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Trends in PAGA claims and what it means for California employers

As long as the *Iskanian* decision remains the law in California, the prospect of unfettered PAGA claims remains a threat

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For years, California has lagged behind other state and federal courts in enforcing mandatory arbitration agreements that included waivers of the employee's right to bring putative class actions against an employer. Although the California Supreme Court's decision in *Iskanian v. CLS Transportation* finally aligned California with the rest of the country, it did so with one major exception.

Under *Iskanian*, waivers of the right to bring a representative action under California's Private Attorney General Act (PAGA) are unenforceable. PAGA allows individual employees to bring suit for civil penalties for violations of California's Labor Code on behalf of the state's Labor and Workforce Development Agency. The employee is then permitted to seek civil penalties for violations that he or she suffered, and violations suffered by other current and former employees. PAGA claims were singled out for special treatment by the California Supreme Court because with PAGA, the employee assumes the role of a public agency enforcing the law. In the aftermath of the *Iskanian* ruling, and the U.S. Supreme Court's refusal to review the decision, employers in California can expect an uptick in PAGA claims as plaintiffs adjust strategies to reflect this new reality.

The immediate impact of the *Iskanian* decision has been an increase in PAGA representative actions, especially stand-alone PAGA claims in which a single plaintiff seeks to bring an action on behalf of other "aggrieved employees" in California courts. This is a particularly attractive vehicle for plaintiffs' attorneys to bring claims against employers that instituted mandatory arbitration agreements in the wake of the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* to avoid litigation in California state courts.

Beyond an increase in the number of PAGA case filings in state courts (either as stand-alone actions or tacked onto other wage and hour putative class actions), *Iskanian* also changed the way that courts treat existing cases that include PAGA claims. There are reports that California courts are creating a two-track system, sending non-PAGA claims to arbitration while maintaining PAGA action on the docket for concurrent litigation. While there are no clear rules requiring courts to stay PAGA proceedings pending the result of arbitration, it appears that some courts have contemplated stays pending the arbitration. There is no guidance, however, about what would happen if these bifurcated cases are not stayed, and the arbitrator finds the employer not liable under the non-PAGA claims after a court has already found the employer liable under the PAGA claims.

In contrast, federal courts appear reluctant to follow *Iskanian*. Since the California Supreme Court issued the decision, several district courts have granted motions to compel arbitration of all employee claims, including PAGA. Courts disagreeing with the *Iskanian* decision have done so after finding that the Federal Arbitration Act and/or *AT&T Mobility LLC v. Concepcion* preempt *Iskanian*'s holding that bars waivers of representative PAGA claims.

The impact for California employers is two-fold. First, the increase in new litigation, and lack of precedent for how courts will treat existing litigation, is contributing to the already uncertain legal climate for California employers. Second, employers are now faced with revisiting how to design employee arbitration agreements to take advantage of the ability to impose mandatory arbitration for employees, while taking into account that an employee cannot be required to arbitrate his or her PAGA claims in California state court.

Defensive strategies for PAGA actions

While there is little an employer can do to prevent an enterprising plaintiff from bringing allegations for Labor Code violations under PAGA, there are some strategies for addressing these cases:

1. *Remove to federal court:* Removal can take place if the case raises questions of original federal jurisdiction, or falls under either traditional diversity jurisdiction or the Class Action Fairness Act. Removal requires careful analysis of the parties to see if any can be classified as residents of another state. It also requires a showing of an amount in controversy of at least \$75,000 for traditional diversity jurisdiction and \$5 million for removal under the Class Action Fairness Act.

2. *Mount an aggressive defense:* While PAGA cases are technically representative actions, employers should consider arguments successfully used to defeat class actions. For example, under the principles endorsed by the U.S. Supreme Court decision in *Dukes v. Wal-Mart* and the California Supreme Court in *Duran v. U.S. Bank*, plaintiffs in a representative action must still demonstrate that they will be able to manageably try their case. In practical terms, this means aggressively challenging the

plaintiffs to show how they can prove the alleged violations for each employee. As PAGA claims often involve a host of different labor law violations, this becomes increasingly complicated and unmanageable.

3. *Craft an effective employment arbitration agreement:* Through *Iskanian*, the California Supreme Court blessed the use of class action waivers in mandatory arbitration agreements. When crafting these agreements, employers should be careful describing the nature of the claims included and excluded. Where removal to federal court is possible—for example, where the employer is headquartered outside of California—it is advisable to include representative PAGA claim waivers. Nevertheless, because removal to federal court is not guaranteed, it is important to carefully craft the agreement so PAGA claims are severable from remaining claims. There is a risk that if the PAGA waiver is found unenforceable, the court might find the entire arbitration agreement unenforceable if the two claims cannot be severed.

Big picture: Strategies for addressing the surge in PAGA actions

Although individual employers will benefit from the strategies listed above, there remains a pressing need for a broader response that protects employers from the uncertain threat of PAGA lawsuits. The best approach may be a legislative one. In fact, California has history dealing with similar problems using its often maligned initiative process. In 2004, the voters passed Proposition 64, which curtailed the ability of plaintiffs to bring representative actions under the Unfair Competition Law (UCL). UCL previously allowed plaintiffs to bring representative actions for unfair business practices without proof they had actually been injured by such practices and where prior case authority did not require UCL actions to meet class certification requirements (like PAGA claims today). Proposition 64 expressly required UCL claims pursued by a representative plaintiff on behalf of unnamed persons must meet class certification standards. Since that time, the number of stand-alone UCL cases has decreased significantly. A similar effort aimed at PAGA could impose stricter requirements for bringing PAGA actions, such as requiring the plaintiffs to meet the standards for class certification.

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