ARBITRATION

Class action?! Despair not: Arbitration agreement will improve our lot

by Garrett Jensen

One of your employees signed an arbitration agreement, agreeing to arbitrate claims against the company and waiving the right to file a class action, but she now seeks to sue the company in a class action. Will the arbitration agreement pass muster, or will the company be forced to litigate a class action? Stay tuned to find out.

What is the view on arbitrating wage claims?

In the last several years, there has been an increase in litigation arising out of arbitration agreements between employers and employees. When an arbitration agreement is executed, California and federal case law recognize a strong public policy in favor of arbitrating matters rather than litigating them. Doubts about whether an arbitration clause applies to a particular dispute are usually resolved in favor of sending the parties to arbitration.

Until recently, however, the prevailing rule in California according to *Discover Bank v. Superior Court* and *Franco v. Athens Disposal Company* was that arbitration agreements that waived an employee's right to file a class action and a representative action under the California Labor Code's Private Attorneys General Act (PAGA) were unenforceable. The landscape shifted in 2011 with the U.S. Supreme Court's *AT&T Mobility v. Concepcion* decision, in which the Court ruled the inclusion of a waiver of the right to file a class action in an arbitration agreement didn't render the agreement unenforceable. The issuance of the *Concepcion* decision brought a renewed wave of requests by employers to enforce arbitration agreements containing class action waivers.

It's time to sue my boss

One such request was made by Marukai Corporation in a lawsuit initiated by Josefina Gomez. Gomez alleged that her employer committed California Labor Code violations related to wages, overtime pay, and meal and rest breaks, and she filed the suit on behalf of herself and other employees as a class and representative action (representative actions are filed under the PAGA, which has been termed the "Sue Your Boss Law").

But Marukai said not so fast. Gomez had signed an arbitration agreement in 2007 in which she expressly agreed to waive her right to file her claims as a class and/or representative action. The company argued the court should dismiss the class claims and order the parties to arbitration to resolve her individual claims.

Undeterred, Gomez countered that Marukai had waived its right to seek arbitration of her individual claims because it waited almost a year and a half after the lawsuit was filed to seek arbitration. Even after *Concepcion* was decided, Gomez argued that Marukai had continued to engage in discovery (the pretrial exchange of evidence) and conduct other procedural steps related to her going forward with her claims on a class basis. The trial court agreed that the company had waived its right to arbitrate, and Marukai appealed the decision.

You signed on the dotted line—off to arbitration!

On appeal, Marukai argued that until the *Concepcion* decision and a later case, *Brown v. Ralphs Grocery Company,* it would have been futile to seek arbitration given the state of California law. It was a full year into Gomez's matter when the U.S. Supreme Court ruled in *Concepcion* that including a waiver of the right to file a class action didn't render an arbitration agreement unenforceable. Had Marukai sought arbitration before the *Concepcion* ruling, the trial court would have likely denied the request.

Further, *Concepcion* didn't address whether arbitration agreements that contained a PAGA waiver were unenforceable. Three months after *Concepcion,* the *Brown* decision determined that while the *Franco* ruling that a PAGA waiver isn't enforceable was still good law, the trial court had discretion to sever that waiver from the arbitration agreement and send the remaining individual claims to arbitration.

Marukai argued that it didn't delay in seeking arbitration. Rather, it quickly requested arbitration once those two decisions changed the law. The appellate court found the company's argument convincing and ruled that it hadn't waived its right to seek arbitration. Gomez's individual claims, aside from her PAGA claim, were then ordered to arbitration.

Under the *Brown* decision, however, the court removed the language in the arbitration agreement in which Gomez agreed to waive her right to file a PAGA claim on behalf of other employees. While her class claims were dismissed, the PAGA claim would be decided in court after her individual claims had been arbitrated. *Gomez v. Marukai Corporation* (California's Second Appellate District, 2/11/13, unpublished).

Bottom line

Marukai obtained a very favorable ruling in that the class claims were dismissed and Gomez's individual claims were sent to arbitration. It went from defending a class action in court to defending a single employee's claims in arbitration.

You can take several things from this decision and the current landscape regarding arbitration agreements in California. First, the use of a well-written arbitration

agreement that is compliant with California law is a great tool for sending an individual's claims to arbitration and dismissing class claims. Second, if you want to reap the benefits of an arbitration agreement, you should avoid delaying your request to arbitrate the case once litigation has commenced.

Finally, the state of California law regarding whether an employee can waive the right to file claims on a representative basis under the PAGA is still unsettled. The *Brown* decision in 2011 reaffirmed that an employee can't waive the right to file a representative action. However, we will be carefully monitoring this issue since the California Supreme Court recently agreed to hear a case *(Iskanian v. CLS Transportation)* in which a waiver of a representative action in an arbitration agreement was deemed enforceable.

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