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The Latest on Employment Arbitration Agreements

Until last month, a divide existed between California state and federal courts whether an arbitration agreement between employer and employee could waive an employee's right to bring a representative claim under the California Private Attorney General Act ("PAGA") (Cal. Lab. Code § 2698 *et seq.*) – state courts said no, while most California federal courts held the opposite.

PAGA authorizes an employee to bring an action for civil penalties on behalf of the state against his/her employer for Labor Code violations committed against the employee **and fellow employees**, with most of the litigation proceeds going to the state. Thus, a PAGA claim is a type of government enforcement action where the representative employee acts as the state's proxy. If employees bring a representative PAGA action, they can potentially recover penalties under PAGA for themselves and for any of the other employees they represent; whereas, if representative actions were not permitted, they can only seek damages under PAGA for themselves.

Declining to enforce a representative action waiver contained in an arbitration agreement, the San Francisco Ninth Circuit Court of Appeals in *Sakkab v. Luxottica Retail North America, Inc.* decided in September, held that the Federal Arbitration Act ("FAA") does not preempt California's "Iskanian rule," which prohibits waiver of representative claims under PAGA.

The California Supreme Court in *Iskanian* held that class action waivers in arbitration agreements are enforceable under the FAA, but that representative PAGA claims are

unwaivable under California law. Thus, *Sakkab* resolved this split between federal and state courts, in favor of the bar against representative PAGA waivers.

Where does that leave arbitration agreements in the California employment context? An employer's arbitration agreement can waive an employee's right to bring a class action, requiring an employee to arbitrate his/her individual claim only; however, the agreement cannot waive the right to bring a representative action under PAGA, whether in court or in arbitration.

Therefore we should see an increase in PAGA litigation, as well as the government's reaction to this complex statute. On October 2nd, the Governor signed AB 1506, effective immediately, amending PAGA to broaden the areas an employer may cure before an employee may bring a civil action to include a violation of the requirement that an employer provide its employees with the inclusive dates of the pay period and the name and address of the legal entity that is the employer.

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