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EMPLOYMENT LAW UPDATE

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JUDICIAL

Federal

Ninth Circuit Gives a Thumbs-Up to the California Supreme Court, Holds the *Iskanian* Decision Is Not Preempted by Federal Law

In *Sakkab v. Luxottica Retail North America, Inc.*, the Ninth Circuit Court of Appeals held that a waiver of the plaintiff's representative Private Attorneys General Act ("PAGA") claim could not be enforced.

Shukri Sakkab ("Sakkab") filed a wage and hour class action lawsuit against his former employer, Luxottica Retail North America, Inc. ("Luxottica"). Sakkab included a PAGA representative claim, which allows employees to step into the shoes of the California Attorney General and bring representative actions for alleged Labor Code violations. The United States District Court for the Southern District of California granted Luxottica's motion to compel arbitration based on two arbitration agreements Sakkab entered into during his employment. The arbitration agreements precluded Sakkab from pursuing class, collective, or representative claims, whether in court or in arbitration. Pursuant to Luxottica's motion, Sakkab's class and representative PAGA claims were dismissed.

Shortly after the district court entered its order on Luxottica's motion, the California Supreme Court issued its ruling in *Iskanian v. CLS Transportation Los Angeles, LLC*, holding that waivers of representative PAGA claims are contrary to California public policy and are thus unenforceable. Sakkab appealed the district court's order, arguing that his PAGA claim could not be waived. On appeal, Luxottica argued that the *Iskanian* rule conflicts with the Federal Arbitration Act's ("FAA") objectives and is therefore preempted. The FAA permits arbitration agreements to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration. If a "generally applicable" state rule interferes with the FAA's objectives, it is preempted by federal law.

The Ninth Circuit ultimately agreed with Sakkab, holding that the *Iskanian* rule is not preempted by the FAA, and that the waiver of Sakkab's PAGA claim was therefore unenforceable. In its ruling, the Ninth Circuit explained that the FAA does not preempt the *Iskanian* rule for two reasons. First, the *Iskanian* rule bars the waiver of PAGA claims in any kind of contract, whether the contract

concerns arbitration or not. Second, the *Iskanian* rule does not conflict with the FAA's purposes. More specifically, because the *Iskanian* rule does not prohibit outright the arbitration of certain claims, but rather prohibits only the waiver of PAGA claims, the rule does not interfere with the FAA's goal of overcoming judicial hostility to arbitration.

Moreover, the *Iskanian* rule does not prevent the parties from selecting the procedures they want applied in arbitration and therefore does not interfere with arbitration. A PAGA action is an action brought on the state's behalf; it is not a mechanism for resolving the claims of other employees. In contrast, a class action is designed to adjudicate the claims of absent class members; therefore, principles of due process mandate that class members' rights be protected by requiring special procedures to resolve those claims. Because PAGA claims do not require any special procedures, prohibiting waiver of such claims does not diminish parties' freedom to select the arbitration procedures that best suit their needs.

What does all of this mean for employers? Employers have long been familiar with California courts' distaste for arbitration. The *Iskanian* decision is merely one in a long line of cases making it increasingly difficult for employers to enforce their contractual agreements to arbitrate. However, in the absence of binding authority from the Ninth Circuit as to the validity of the *Iskanian* rule, numerous federal district courts in California have enforced representative PAGA waivers. Now that the Ninth Circuit has weighed in, employers face yet another unwelcome hurdle to the enforcement of PAGA waivers. Unless and until *Sakkab* (or some other case) makes its way to the U.S. Supreme Court, California employers will be precluded from enforcing PAGA waivers in either state or federal court.

Employer Successfully Challenges PAGA Claim Based on Insufficient Notice Letter

The Ninth Circuit Court of Appeals dismissed an employee's Private Attorneys General Act ("PAGA") claim because the plaintiff failed to comply with the PAGA's notice requirements.

In *Alcantar v. Hobart Service et al.*, the plaintiff filed a class action lawsuit against his employer alleging that he was not compensated for time spent commuting to job sites and was not provided with proper meal and rest breaks. The complaint included a representative PAGA action. The Ninth Circuit permitted the plaintiff to proceed with his class claim for commute time, but not for his meal and rest break class claims. The court's analysis regarding the PAGA claim is of particular interest.

The employer moved for summary judgment on the PAGA claim, arguing that the plaintiff had not complied with PAGA's notice requirements. In order to bring a representative action under PAGA, an employee must first give written notice to the Labor and Workforce Development Agency and the employer of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violation. In *Alcantar*, the plaintiff's PAGA letter contained a series of legal conclusions (e.g., "Plaintiff

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contends that Defendant failed to pay wages for all time worked"). The Ninth Circuit held that the letter lacked factual allegations and theories of liability and therefore did not provide enough information to assess the seriousness of the alleged violations or what policies or practices were being complained of. The court affirmed summary judgment of the PAGA claim.

When defending a PAGA claim, employers should carefully scrutinize the notice letter to determine its sufficiency, and consider a challenge to the claim if the letter is deficient.

California

California Court of Appeal Instructs Trial Court to Re-Examine Its Denial of Class Certification

In *Alberts v. Aurora Behavioral Health Care*, a group of former employees (collectively, "Plaintiffs") of two acute care psychiatric hospitals filed a class action against the operator of the hospitals, Aurora Behavioral Health Care ("Aurora"). Plaintiffs alleged multiple wage and hour claims, focusing on Aurora's purported denial of meal periods, rest periods, and overtime to nursing staff.

Plaintiffs claimed that Aurora regularly and intentionally understaffed its hospitals and forced nurses to remain on duty in lieu of taking meal and rest periods in the manner required by California law. Plaintiffs also alleged that Aurora regularly required nurses to perform tasks off-the-clock and without adequate overtime compensation. Plaintiffs proposed five subclasses for certification: the meal break subclass, the rest break subclass, the overtime subclass, and two derivative subclasses for waiting time penalties and allegedly inaccurate wage statements.

The trial court denied Plaintiffs' motion for class certification, holding that the proposed subclasses lacked "commonality." In reaching its decision, the trial court focused on the policies applicable to the proposed subclasses. In doing so, it deemed Aurora's meal and rest period policies to be legal. Plaintiffs appealed.

The appellate court looked more closely at Aurora's policies. The lower court had deemed acceptable Aurora's policy that employees be provided with "an unpaid thirty-minute break for a meal period *approximately halfway* between the beginning and end of the employee's shift." The appellate court disagreed, as California law requires the provision of a meal break *within five hours* of the beginning of an employee's shift. The difference between Aurora's policy and California law, while minor, was sufficient to discredit the trial court's analysis. Moreover, as evidence had been submitted to demonstrate that Plaintiffs regularly failed to receive their meal periods until far later in their shifts, the appellate court held that the trial court's conclusions regarding the legality and application of Aurora's policies were improper. The appellate court noted similar deficiencies in the trial court's rulings regarding second meal breaks, rest breaks, and overtime.

As the trial court relied on a series of improper criteria, its ruling on class certification was overturned. In its decision, the appellate court further held that, even had the applicable policies been legally sufficient, evidence of widespread violations of those policies would also have been sufficient to warrant consideration of class certification.

The appellate court remanded for further proceedings, directing the trial court to determine whether the handling of individual issues (particularly, damages) may still have an effect on the ultimate manageability of the case as a class action.

California employers must remain vigilant regarding the drafting and implementation of legally compliant employment policies, as improper policies, or poor implementation thereof, may form the basis of a class action lawsuit. Employers are advised to consult with legal counsel to ensure that their policies are sound and minimize the risk of litigation.

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