CARLTON FIELDS

California Law on Arbitration Changes... Again

June 23, 2014

The Latest The California Supreme Court today confirmed the validity of an employee's waiver of the right to bring a class action contained in an arbitration agreement. That's the good news. However, the court also held that these arbitration agreements may **not** include a waiver of an employee's right to bring representative claims under the Private Attorney General Act (PAGA), found at Section 2698-99 of the California Labor Code. Those can still be litigated in the courts, leaving employers exposed to two potential tracks of litigation over the same alleged workplace violation. **What is PAGA?** Under PAGA, an employee steps into the shoes of the state labor law enforcement agencies to recover penalties on behalf of the employee and his/her co-workers for state law wage and hour violations. The employee must send 75 percent of the penalties recovered to the state, and gets to keep the other 25 percent. In traditional class actions, the entire recovery goes to the employees. In both types of cases, the employee's attorney can recover "reasonable" fees. **Why does the California Supreme Court ruling treat PAGA claims differently than class action claims - aren't they the same thing?** No, they are not. To proceed as a class action in state or federal court, the named plaintiffs must surmount several hurdles. Among other things, before a class action will be certified, the plaintiffs must show "commonality," meaning that there are common questions as to all of the class members that will generate common answers that allow all or portions of the case to be resolved in one stroke. The plaintiffs also must generally show that these common questions that give rise to common answers "predominate" in the case. Additionally, the named plaintiffs and their counsel must show that they are appropriate representatives for the class. In a PAGA case, by contrast, the plaintiff need not meet any of the class certification hurdles. Nor must other co-workers be brought into the case. One employee can litigate as a representative for all of affected employees, and the named plaintiff need not share his 25 percent of the penalty award with anyone else. **What should you do with your arbitration agreements now?** Unclear. Today's decision is likely to go to the U.S. Supreme Court, which has the final say under the Federal Arbitration Act. For now, however, waiver of PAGA claims will most likely not be enforced in California. If such language is present, there is a risk a California court could invalidate the entire arbitration agreement, which the California Supreme Court did not do in today's decision. **If your agreements don't include a PAGA or representative action waiver, are they enforceable?** Not necessarily. California courts will still closely scrutinize arbitration agreements. Many have been invalidated because the court found

them “unconscionable” as a result of either their unfair language or circumstances. For example, courts have said provisions that impose more fees and costs on an employee in arbitration than he would have paid to litigate in court are unconscionable, as are provisions that require an employee to submit all claims against the employer to arbitration, while allowing the employer to choose to go to court on claims it may have against the employee. Courts also have turned thumbs-down where the employer has the discretion to use the same arbitrator repeatedly, presumably affecting the arbitrator’s neutrality. Recently, a California court of appeal refused to enforce an arbitration agreement that was written in English where the employees were Spanish speakers.

Click here to read the California Supreme Court opinion in *Iskanian v. CLS Transportation Los Angeles LLC*.

In short, arbitration agreements in California can be important tools that allow employers to resolve wage and hour disputes cost-effectively. But they can present pitfalls, so it is wise to review them regularly with counsel.

Authored By

Mark A. Neubauer

Meredith M. Moss

Related Practices

Labor & Employment