CARLTON FIELDS

California Employment Law and Arbitration: The Battle Intensifies

September 30, 2015

Yesterday, by a two-to-one vote, the Ninth Circuit joined the California Supreme Court in holding that Private Attorneys General Act (PAGA) claims are an exception to the Federal Arbitration Act. In *Sakkab v. Luxottica Retail North America, Inc.*, Ninth Circuit Case No. 13-55184, a three-judge panel of the Ninth Circuit held that PAGA claims could not be waived or sent to mandatory individual arbitration, which is consistent with the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Yesterday's decision eliminates the division between federal and California state courts under which some federal courts were enforcing PAGA waivers while state courts had to abide by *Iskanian* and hold those PAGA waivers unenforceable. The swing vote yesterday was by a senior judge from Chicago sitting by designation. As a result of the narrow split, it is possible that the entire Ninth Circuit *en banc* will consider the case. More importantly, the U.S. Supreme Court may ultimately intervene. The U.S. Supreme Court came close to accepting *Iskanian* for review, having previously rejected California's state decisions against arbitration of employment disputes in a series of cases, the most recent being *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Making the issue even murkier is California's Assembly Bill AB 465, which would invalidate arbitration agreements completely with respect to wage and hour and other employment claims such as discrimination. That bill has passed both houses of the California Legislature and is currently on Governor Brown's desk. Even if Governor Brown signs it, however, new litigation will arise as to

whether the Federal Arbitration Act preempts AB 465. In short, employment arbitration agreements and collective action waivers remain a hot topic in California. **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 do the courts 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. **What should you do with your arbitration agreements now?** The answer is so far unclear. AB 465 could invalidate the arbitration agreements entirely if it becomes law. Second, the enforceability of arbitration agreements is likely to go to the U.S. Supreme Court, which has the final say under the Federal Arbitration Act. For now, however, PAGA claim waivers will not be enforced in California. If such language is present, there is a risk a court could invalidate the entire arbitration agreement. **If your agreements don't include a PAGA or representative action waiver, are they enforceable?** Not if AB 465 becomes law. Even if it doesn't, 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.

View opinion: *Sakkab v. Luxottica Retail North America, Inc.*, Case No. 13-55184. 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. You should continue to monitor the enforceability of the new California legislation if it becomes law, as employees might claim that having such an agreement in the face of AB 465 constitutes an unfair employment practice. The whole issue of employment arbitration agreements, class action and PAGA waivers will continue to be a fluid one in California. Stay tuned.

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