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The Continuing Saga of PAGA

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California's Private Attorneys General Act has been a lightning rod among employment attorneys from the time of its enactment in 2004. Since the California Supreme Court decided *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), there have been even more heated debates about PAGA, particularly related to its impact on arbitration agreements.

PAGA, codified at Labor Code Sections 2698-2699.5, authorizes "aggrieved employees" to file lawsuits to recover civil penalties for Labor Code violations on behalf of themselves and other aggrieved employees, as well as the state of California. In *Iskanian*, an employee sought to bring a representative action under PAGA against his employer for wage and hour violations. However, he had previously entered into an arbitration agreement by which he waived his right to bring representative PAGA actions. The California Supreme Court held that an agreement requiring an employee, as a condition of employment, to give up the right to bring a PAGA representative claim on behalf of the state is contrary to public policy and is, thus, unenforceable. This became known as the *Iskanian* rule.

Far from settling the waters, however, *Iskanian* stirred up new questions regarding the arbitrability of PAGA claims. Post-*Iskanian* litigation falls into two lines of authority: *Iskanian* and its progeny in the California state courts, and *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), and its progeny in the 9th Circuit. The current battlefront involves cases that feature both representative and individual claims. To date, the U.S. Supreme Court has declined to consider the issue of arbitrability in these new cases.

In post-*Iskanian* California cases, courts have upheld the *Iskanian* rule and reconfirmed that an employer cannot restrict an employee's right to bring a PAGA claim in court because the employee is bringing the claim on behalf of the state. *See, e.g., Tanguilig v. Bloomingdale's, Inc.*, 5 Cal. App. 5th 665 (2016) (holding that (1) a PAGA representative claim is nonwaivable by the plaintiff-employee via an arbitration agreement, and (2) a PAGA claim, whether individual or representative, cannot be ordered to arbitration without the state's consent); *Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439 (2017) (holding that an employer cannot rely on an arbitration agreement with a private party, i.e., an employee, to compel arbitration of a PAGA claim, as it is brought on the state's behalf); *Kim v. Reins International California, Inc.*, 18 Cal. App. 5th 1052 (2017) (holding that, when an employee has brought both individual and PAGA claims in a single lawsuit, and then settles and dismisses the individual employment claims with prejudice, the employee is no longer an "aggrieved employee" entitled to pursue a representative claim under PAGA).

Like California courts, the 9th U.S. Circuit Court of Appeals has adopted the *Iskanian* rule while attempting to define the boundaries of the arbitrability of PAGA claims. *Sakkab*, for example, holds that the Federal Arbitration Act does not preempt the *Iskanian* rule because the rule does not conflict with the FAA's purposes. Consequently, *Sakkab*'s (the plaintiff-employee) waiver of his right to bring a representative PAGA action was unenforceable. The next case in this line of authority, *Valdez v. Terminix International Co. Limited Partnership,* 681 F. App'x 592, 594 (9th Cir. 2017), holds that, while the *Iskanian* rule prohibits a complete waiver of the right to bring a PAGA claim, both "*Iskanian* and *Sakkab* clearly contemplate that an individual employee can pursue a PAGA claim in arbitration, and thus that individual employees can bind the state to an arbitral forum." Finally, *Aviles v. Quik Pick Express, LLC*, 703 F. App'x 631 (9th Cir. 2017), holds that an arbitration agreement with a representative-action waiver should be enforced except as to PAGA.

Although the *Iskanian* and *Sakkab* lines of cases deal with different issues, they build upon and reinforce one another, answering some questions prior cases have raised, while leaving the *Iskanian* rule intact. Taking both lines of cases together, one can see where the general boundaries — and battlegrounds — lie with respect to the arbitrability of PAGA actions:

- An arbitration agreement providing that the parties agree to resolve PAGA claims in arbitration might be enforceable. *Valdez*, 681 F. App'x at 594. But *see Julian v. Glenair, Inc.*, 17 Cal. App. 5th 853, 860 (2017) (holding that an agreement to arbitrate a PAGA claim, entered into before an employee is statutorily authorized to bring such a claim on behalf of the state, is an unenforceable pre-dispute waiver).
- An arbitration agreement requiring an employee to waive his/ her right to bring representative PAGA claims is not enforceable. *Iskanian*, 59 Cal. 4th at 384.
- The FAA does not preempt the *Iskanian* rule. *Sakkab*, 803 F.3d at 427.
- California law prohibits an employer from compelling an employee to split the litigation of a PAGA claim between multiple forums. *Perez v. U-Haul Co. of California*, 3 Cal. App. 5th 408, 412 (2016).
- With respect to an arbitration agreement with a representative-action waiver, it is currently unsettled whether the employee's *individual*, non-PAGA representative claims are arbitrable. Compare *Esparza v. KS Industries, L.P.*, 13 Cal. App. 5th 1228 (2017) (holding that the matter, which involved a representative PAGA claim, was a private dispute subject to arbitration under the terms of the parties' arbitration agreement, but remanding the case to allow employee to clarify the nature of the relief sought) with *Lawson v. ZB, N.A.*, 18 Cal. App. 5th (2017) (directing the trial court to vacate its order bifurcating and ordering arbitration of the underpaid wages portion of PAGA claim); see also *Mandviwala v. Five Star Quality Care, Inc.*, 2018 U.S. App. LEXIS 2770 (9th Cir. Feb. 2, 2018) (following *Esparza*, reversing the district court's order and remanding the case to the district court to order arbitration of the victim-specific relief sought by plaintiff).

One conclusion is certain: The PAGA saga is far from over. Each new California or 9th Circuit case introduces another question about the interplay between arbitration agreements and PAGA claims. In the absence of a U.S. Supreme Court ruling, or the California Supreme Court's resolution of the split between *Esparza* and *Lawson*, it is a safe bet that disputes over the enforceability of arbitration agreements related to various PAGA claims will persist. However, this much appears to be settled (for now): While employees might be able to contract to bring representative PAGA claims in an arbitral forum, they may *not* waive altogether their right to bring representative PAGA claims in any forum.

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