

## labor and employment lawflash

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## California Court Enforces Waivers of Class and PAGA Representative Claims

*Recent court decision represents significant development for parties seeking to enforce arbitration agreements containing class and representative waivers.*

On June 4, a unanimous panel of the California Court of Appeal for the Second District upheld a lower court's ruling compelling individual arbitration of a plaintiff's wage and hour claims and dismissing both class and representative claims under the California Labor Code Private Attorneys General Act (PAGA). *Iskanian v. CLS Trans. Los Angeles, LLC*, — Cal. Rptr. 3d —, No. B235158, 2012 WL 1979266 (Cal. Ct. App. 2d Dist. June 4, 2012). In so ruling, the court (i) held that the U.S. Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (*Concepcion*), preempted any California law prohibiting arbitration of certain claims; (ii) rejected a recent decision from the National Labor Relations Board (NLRB); and (iii) held that employees may validly waive their right to bring PAGA claims on behalf of others as part of an arbitration agreement.

### Background

As a driver for defendant CLS Transportation, LLC (CLS), plaintiff Arshavir Iskanian signed a "Proprietary Information and Arbitration Policy/Agreement" providing that any and all employment-related disputes would be submitted to binding arbitration. The arbitration agreement contained a waiver of the right to bring claims on behalf of a class or as a representative of others.

Notwithstanding this arbitration agreement, Iskanian filed a putative class action complaint against CLS, alleging that the company failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner. CLS moved to compel arbitration, which the trial court initially granted. Shortly after the trial court issued its order, the California Supreme Court issued its opinion in *Gentry v. Superior Court (Circuit City Stores)*, 42 Cal. 4th 443 (2007), holding that class action waivers in employment arbitration agreements were unenforceable as contrary to public policy. On appeal, CLS's initial motion to compel arbitration was reversed, and the case proceeded to litigation in Superior Court.

Soon after the U.S. Supreme Court issued its opinion in *Concepcion*, which overruled California law in regards to class action waivers in commercial contracts, CLS renewed its motion to compel arbitration. The trial court granted the motion, and a second appeal followed.

### Gentry Overruled

On appeal, the court affirmed, holding that *Concepcion* overruled *Gentry* and rejecting the plaintiff's "vindication of statutory rights" argument. Finding that a purported intent to vindicate statutory rights "is irrelevant in the wake of *Concepcion*," the court held that "[t]he sound policy reasons identified in *Gentry* for invalidating certain class waivers are insufficient to trump the far-reaching effect of the [Federal Arbitration Act (FAA)]." *Iskanian*, 2012 WL 1979266 at \*5. Thus, the court held that any California statute or policy prohibiting arbitration of certain claims is invalid, and that under the FAA, class and representative waivers should be enforced according to their terms "so as to facilitate streamlined proceedings." *Id.*

## Rejection of *D.R. Horton*

The court also rejected the plaintiff's argument that a recent decision by two members of the NLRB in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), barred enforcement of class and representative waivers in employment arbitration agreements as a violation of Section 7 of the National Labor Relations Act (NLRA).

Finding several faults with the *D.R. Horton* decision, the *Iskanian* court declined to give any deference to the NLRB, noting that "the FAA is not a statute the NLRB is charged with interpreting." *Iskanian*, 2012 WL 1979266, at \*6. The court instead followed the Supreme Court's binding authority in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), that, unless the FAA is "overridden by a contrary congressional command," then "agreements to arbitrate must be enforced according to their terms." *Iskanian*, 2012 WL 1979266, at \*7. Finding no such "congressional command" in the NLRA, the court rejected *D.R. Horton*. *Id.*

## PAGA Waivers Enforceable

Departing from two prior decisions issued by other California Courts of Appeal, the *Iskanian* court held that the representative action waiver of PAGA claims in the parties' arbitration agreement was enforceable under *Concepcion*. The court compelled individual arbitration of the plaintiff's PAGA claim, holding that "any state rule prohibiting the arbitration of a PAGA claim is displaced by the FAA." *Id.* at \*9. The court further held that California's "Broughton-Cruz rule"—which bars arbitration of public injunctive relief actions—has been overruled by *Concepcion*. Accordingly, "the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement. The FAA preempts any attempt by a court or state legislature to insulate a particular claim from arbitration." *Id.* The court concluded that the plaintiff could not pursue representative claims against CLS.

## Implications

The *Iskanian* decision, when coupled with another recent California opinion, *Kinecta Alternative Financial Solutions, Inc. v. Superior Court (Malone)*, 205 Cal. App. 4th 506 (2012), which held that class allegations may be dismissed when a court compels individual arbitration, represents a significant development for parties seeking to enforce arbitration agreements containing class and representative waivers.

The *Iskanian* decision, however, creates a clear split in authority among California Courts of Appeal regarding the enforceability of PAGA representative action waivers. See, e.g., *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2d Dist. 2011) (holding that PAGA waivers were not enforceable); *Reyes v. Macy's, Inc.*, 202 Cal. App. 4th 1119 (1st Dist. 2011) (following *Brown* and refusing to compel individual arbitration of PAGA claims). This split may lead to California Supreme Court review, which means that the issue may not be resolved anytime soon.

While awaiting a final outcome, employers should carefully consider enforcement of arbitration agreements and the scope of waivers contained in such agreements.

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