Cooley

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In a prior *Alert* dated June 11, 2012, we reported on a **California appellate court decision** in *Iskanian v. CLS Transportation Los Angeles, LLC* ("*Iskanian*"), which upheld the use of class and representative action waivers in employment arbitration agreements. In *Iskanian*, an employee had signed an arbitration agreement at the beginning of his employment that waived his ability to assert class or representative action claims against his employer. After his employment ended, he filed a class action complaint alleging various wage and hour claims under the California Labor Code. He also sought civil penalties under California's Private Attorney General Act ("PAGA"). The employer prevailed in the Court of Appeal, but Iskanian appealed to the California Supreme Court.

Recently, the California Supreme Court ruled, issuing a wide-ranging decision that approved of the use of class action waivers but disapproved of the use of PAGA representative action waivers in employment agreements. The Court found that:

- The U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion* (which we reported on **in an *Alert* dated June 22, 2011**) invalidated state procedures that were "incompatible with arbitration." As a result, the California Supreme Court's prior holding in *Gentry v. Superior Court*, which rendered class waivers unenforceable in certain situations, was pre-empted by federal law.
- The National Labor Relations Board's decision in *D.R. Horton & Cuda*, which found that class waivers violate section 7 of the National Labor Relations Act (which we reported on **in an *Alert* dated January 13, 2012**), was not controlling. In making this determination, the Court agreed with the Second, Fifth, and Eighth Circuit Courts of Appeal, as well as several federal district courts, including the Northern District of California.
- PAGA was initially passed as a means of "deputizing" individual employees to enforce provisions of the Labor Code; therefore, PAGA claims were intended to be brought by individual employees as enforcement actions on behalf of the state of California. Thus, PAGA claims are not waivable under the holding in *Concepcion* because the Federal Arbitration Act, upon which the *Concepcion* decision was based, was designed only to regulate private disputes, not disputes between employers and state agencies.

In short, the Court ruled that employees can waive their rights to pursue class action claims in court, but that PAGA claims cannot be similarly waived.

Employers who have (or are considering) mandatory arbitration agreements with California employees should carefully consider the effect of the *Iskanian* decision.

Our attorneys have deep counseling and litigation experience on these issues. To discuss these issues further or pose questions about this *Alert,* please contact one of the attorneys listed above.

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