

Cooley

July 30, 2014

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.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our [AI Principles](#), may be considered Attorney Advertising and is subject to our [legal notices](#).

Key Contacts

Wendy Brenner Palo Alto	brennerwj@cooley.com +1 650 843 5371
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.