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CALIFORNIA EMPLOYEES CAN WAIVE CLASS CLAIMS IN AN ARBITRATION AGREEMENT, BUT NOT PAGA CLAIMS

Resolving an issue that has created uncertainty for California employers, the California Supreme Court recently held in *Iskanian v. CLS Transportation Los Angeles, LLC* that class action waivers in employment arbitration agreements can be upheld under California law, but waivers of representative actions under California's Private Attorneys' General Act ("PAGA") may not be.

Iskanian worked as a driver for CLS between March 2004 and August 2005. In December of 2004, Iskanian signed an arbitration agreement that provided that "any and all claims" arising out of his employment would be subject to binding arbitration, and that Iskanian could not assert any class or representative action claims in arbitration except as required by law. When Iskanian filed a class action lawsuit in 2006 for unpaid overtime and other violations of the wage and hour laws, CLS moved to compel arbitration, which was granted by the trial court.

While Iskanian's subsequent appeal was pending, in 2007 the California Supreme Court decided *Gentry v. Superior Court*, which held that class action waivers are invalid under certain circumstances (link to September 2007 FEB). In response, CLS withdrew its motion to compel arbitration and the parties proceeded to litigate the case. During the pendency of the litigation, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion* in 2011, which held that federal law preempted California's refusal to enforce waivers in consumer arbitration agreements (link to April 28, 2011 Litigation Alert). CLS then renewed its motion to compel arbitration, arguing that the ruling of *Concepcion* overruled *Gentry*. After the trial court and a California Court of Appeal agreed with CLS, the California Supreme Court took up review.

The California Supreme Court held that the decision of the United States Supreme Court in *Concepcion* made clear that *Gentry's* general prohibition against employment class action waivers (unless certain conditions are met) is unenforceable under federal law, because a state cannot require a procedure that interferes with the fundamental attributes of arbitration. The Court further determined that the National Labor Relations Act does not prevent the enforcement of the class action waiver, and that CLS did not waive its right to compel arbitration by withdrawing its motion to compel after issuance of the *Gentry* decision.

However, the Court also held that an action for violation of California's PAGA—which allows an aggrieved employee to bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations—is unwaivable and is not preempted by federal law.

The California Supreme Court's ruling thus meant that plaintiff Iskanian was required to arbitrate his individual damages claims, but that CLS must answer the PAGA action for civil penalties in some forum (either in a lawsuit or through arbitration).

CHANGE TO HANDBOOK ARBITRATION POLICY—ADDING CLASS ACTION WAIVER—WAS VALID AND ENFORCEABLE

On the same day that the California Supreme Court issued *Iskanian*, another important ruling with respect to class action arbitration waivers was issued by the Ninth Circuit Court of Appeals. In *Davis v. Nordstrom*, the court held that an employer's unilateral change to its employee handbook's arbitration policy—which required employees to arbitrate nearly all claims individually and precluded employees from filing most class action lawsuits—was enforceable under California law.

Nordstrom had an arbitration provision in its employee handbook that required the arbitration of certain

disputes with employees, and required Nordstrom to provide 30 days' written notice of substantive changes to the arbitration provision to "allow employees time to consider the changes and decide whether or not to continue employment subject to the changes." In July and August of 2011, Nordstrom revised its arbitration policy to require employees to arbitrate nearly all claims individually, and precluded employees from filing most class action lawsuits. Nordstrom sent letters to employees in June 2011, informing them of the changes.

When Nordstrom employee Faine Davis filed a class action lawsuit shortly thereafter, Nordstrom moved to compel Davis to submit her claims to individual arbitration. After the district court held that Davis and Nordstrom did not enter into a valid arbitration agreement regarding the revisions, Nordstrom appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals determined that the changes to the arbitration agreement were validly made. The court noted that California law permitted Nordstrom to unilaterally change the terms of Davis' at-will employment, and that Davis' continuation of her employment after being given notice of the revised arbitration terms established that she accepted those new terms. The court also determined that Nordstrom satisfied its own 30 day notice requirement by not enforcing the agreement within 30 days of Davis' receipt of the revised agreement, and that Nordstrom was not required to specifically inform Davis that her continued employment constituted acceptance of the revised terms of the arbitration agreement. Finally, the court declined to address whether the terms of the policy were unconscionable under California law, noting that the California Supreme Court's decision in *Iskanian* would address that issue.

In light of both *Davis v. Nordstrom* and *Iskanian v. CLS,* employers should review their arbitration agreements and consider whether to include broad class action waivers in conformance with both decisions. An effectively drafted and implemented class action waiver in an arbitration agreement is generally enforceable and may preclude class action claims — such as class-wide claims for unpaid overtime, meal and rest breaks, etc. — against employers for individual employee damages, although it would not preclude a representative action under PAGA for civil penalties.

IRCA DOES NOT PREEMPT FEHA, BUT LIMITS AVAILABLE REMEDIES

In *Salas v. Sierra Chemical Co.*, the California Supreme Court addressed the issue of whether the federal Immigration Reform and Control Act ("IRCA") preempts the application of the antidiscrimination provisions of California's Fair Employment and Housing Act ("FEHA") — which protect California workers "regardless of immigration status." The Court concluded that IRCA does not preempt FEHA, but does preclude an award of lost pay damages for any period of time *after* the employer discovers the employee's ineligibility to work in the United States.

In April of 2003, Vicente Salas used a false Social Security Number to obtain employment with Sierra Chemical, a manufacturer and distributor of chemicals for treating water in swimming pools. On two separate occasions, in March and August of 2006, Salas injured his back while stacking crates, and performed modified duties until a seasonal lay off in December of 2006. In May of 2007, Salas' supervisor informed Salas that he could return to work when he is "released to return to full duty."

Salas sued Sierra Chemical for failing to reasonably accommodate his disability and for wrongfully denying him employment in retaliation for his filing of a workers' compensation claim. During trial preparation, Salas stated that he would testify at trial but would assert his privilege against self-incrimination if asked about his immigration status. This disclosure led Sierra Chemical to investigate Salas' immigration status, and following the investigation, Sierra Chemical moved to dismiss the lawsuit based on Salas' fraudulent use of another person's Social Security Number to obtain employment with Sierra Chemical. After initially being denied relief by the trial court, Sierra Chemical appealed to a California Court of Appeal, which determined that Salas' lawsuit was barred by the legal doctrines of "after-acquired evidence" and "unclean hands" because Salas was not eligible to work in the United States and misrepresented his ability to do so.

On appeal, the California Supreme Court first determined that IRCA — which requires employers to immediately terminate an employee when it discovers the employee is legally unauthorized to work — does not override the remedies in California's antidiscrimination law, which is "available to all individuals regardless of immigration status." The Court reasoned that FEHA was intended to protect unauthorized aliens who, in violation of federal immigration law, have used false documents to secure employment. The Court also stated that by denying unauthorized workers the ability to obtain state remedies under the antidiscrimination laws would effectively immunize employers who discriminate against workers on impermissible grounds.

The Court further held that the legal doctrines of "after-acquired evidence" and "unclean hands" did not bar recovery. The Court found that after-acquired evidence — which refers to an employer's discovery of information after termination that would have justified termination or a refusal to hire — only bars recovery for loss that occurs after the employer acquired information of the employee's wrongdoing or ineligibility for employment. The Court also determined that the doctrine of unclean hands — which applies when a plaintiff has acted unconscionably, in bad faith or inequitably in the matter in which he or she seeks relief — similarly may not be used to wholly preclude a claim, but can be used by a trial court as a guide for fashioning relief.

NEWS BITES:

Commission Allocation Across Pay Periods Not Permitted To Meet Commissioned Employee Exemption Compensation Requirement

California's wage orders exempt from overtime requirements "any employee whose earnings exceed one and one-half (1 1/2) times the minimum wage if more than half the employee's compensation represents commissions." The California Supreme Court in *Peabody v. Time Warner Cable, Inc.* clarified that employers may not allocate commissions paid in one pay period to other pay periods (in which the commission were earned) to satisfy the exemption's compensation requirements.

Time Warner paid the plaintiff on a biweekly basis, but because it paid commissions at the end of each month, many of the plaintiff's checks represented pay at less than one and one-half times the minimum wage ($12/hour at the time). Time Warner argued that for purposes of the commissioned sales exemption, commission wages should be attributed not to the pay periods in which they were *paid*, but instead to the pay periods in which they were *earned*.

The California Supreme Court disagreed, and held that employers must pay the required minimum wages *in each pay period* — regardless of when the commissions were actually earned — to satisfy the commissioned employee exemption compensation requirements.

Home Delivery Drivers Working In California Misclassified As Contractors

In *Ruiz v. Affinity Logistics Corp.*, the Ninth Circuit Court of Appeals determined that California delivery drivers were improperly classified as independent contractors under California law because the evidence established that Affinity had the right to control the drivers' work and secondary factors supported employee status.

Affinity is a company providing home delivery services for home furnishing retailers like Sears. When Ruiz applied to become a driver for Affinity, Affinity told him that he needed to become an independent contractor, create a business name, get a business license and establish a commercial checking account. Affinity also assisted by completing the necessary forms for Ruiz, such that all he needed to do was to sign the documents. Affinity required that Ruiz paint his delivery truck white, put a Sears logo on his truck and required him to stock his truck with certain supplies. Affinity also supplied mobile phones to its drivers, required each driver to have a helper, wear a uniform and comply with grooming requirements, provided drivers with a daily route manifest of deliveries (which directed drivers on, among other things, the order of deliveries) and required drivers to attend a daily morning briefing.

Ruiz, on behalf of himself and a class of similarly situated drivers, claimed that he was wrongly classified, and as a result, was not provided sick leave, vacation, holiday and severance wages, and was improperly charged for the cost of workers'

compensation insurance coverage. The Ninth Circuit Court of Appeals agreed, and held that the facts overwhelmingly indicated that Affinity had the right to control all aspects of the drivers' work, including the "color of their socks" and "the style of their hair." The court also noted that secondary factors — including that the work did not require substantial skill, the trucks were provided by Affinity and the work performed was the core business of Affinity — weighed in favor of employee status.

Professor Allowed To Prove That Her Release Of Claims Was Procured By Fraud

Diane Schmidt — who suffered from fibromyalgia — was a political science professor at California State University in Chico who sued the university for, among other things, disability discrimination, harassment and retaliation. After filing seven grievances with the university and complaints of discrimination with government agencies, she entered into a settlement and release agreement with the university in February of 2010.

Schmidt filed a lawsuit two months later, and in response, the university asserted that Schmidt's release of claims barred her lawsuit. Schmidt claimed that the settlement was void because she understood that the release agreement withdrew only two of her pending grievances in exchange for removal of certain discipline from her personnel file, but did not preclude her from filing a lawsuit. The trial court granted the university's motion to dismiss the claims, finding that the settlement agreement was unambiguous and that evidence outside of the agreement itself could not be used to interpret the document.

A California Court of Appeal agreed with the trial court that outside evidence could not be used to interpret the unambiguous agreement. However, the court also determined that Schmidt's claim that the university made false representations during negotiations of the release to induce her to sign it raised an issue of fraudulent inducement that should be resolved by a jury. The court found that there were enough disputed facts concerning the issue of whether the university misled Schmidt concerning the scope and effect of the release language, including the facts that the university knew Schmidt was under a time pressure due to upcoming hearings on her grievances and deadline for her discrimination complaint, that the university represented the release would only include the resolution of three grievances (rather than a broader, "global" release) and that Schmidt did not have an attorney available to review the final release.

Obama NLRB Appointments Declared Unconstitutional

Affirming a decision of the D.C Circuit Court of Appeals, the United States Supreme Court held in *NLRB v. Noel Canning* that President Obama's January 2012 recess appointments to the National Labor Relations Board ("NLRB") were unconstitutional and thus the Board had no power to act.

Noel Canning challenged an order of the NLRB that required it to execute a collective bargaining agreement, claiming that the NLRB lacked a quorum because three of the five members were invalidly appointed through recess appointments when the Senate was not actually in recess. The Supreme Court agreed that the recess appointments — which were made by President Obama on January 4, 2012, in between January 3 and January 6 *pro forma* Senate sessions — were not properly within the scope of the Recess Appointments Clause (which gives the President the power to make appointments during a recess of the Senate).

While the NLRB is now properly constituted and Senate-confirmed, the hundreds of decisions previously issued by the improperly-constituted Board — including key decisions on employer social media policies and practices — have been invalidated by the *Noel Canning* decision.

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