California's Rule Against Employer-Imposed Waivers of Representative Private-Attorney General Claims is Here to Stay

By Gordon W. Renneisen

California is in the midst of a long-running battle over the enforceability of representative-action waivers in employment contracts. While this battle has not been fully resolved, recent case law indicates that representative private-attorney-general actions will not soon be eliminated by waivers in employer-imposed arbitration agreements. Practitioners may assume that California will continue to rely on representative actions brought by employees pursuant to the Labor Code Private Attorneys General Act (PAGA)[i] to ensure compliance with the state's labor laws and to "supplement enforcement actions by public agencies."[ii]

In *Iskanian* The California Supreme Court Distinguished Between Waivers of Class Claims and Waivers of PAGA Claims

The California Supreme Court most recently addressed the allowable scope and enforceability of representative-action waivers in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014). The Supreme Court essentially crafted a compromise. *Iskanian* holds that no-class-action provisions in arbitration agreements are enforceable.[iii] But *Iskanian* also holds that a contractual term, including a term in an arbitration agreement, "requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy" and thus is not enforceable.[iv]

Since *Iskanian* was decided, the Federal Circuit Courts have split over whether the National Labor Relations Act (NLRA) vests employees with a substantive, non-waivable right to pursue class actions, or whether the Federal Arbitration Act (FAA) requires that no-class-action provisions in arbitration agreements be enforced.[v] This Circuit split, turning on federal questions that ultimately will have to be resolved by the U.S. Supreme Court, casts doubt on the long-term viability of the first prong of the *Iskanian* compromise.

In contrast, the second prong of the *Iskanian* compromise, addressing state-law PAGA claims, is now well-established.

The Courts have Rejected Employers' Contention that the FAA Requires Enforcement of PAGA Waivers Imposed through Arbitration Agreements

Iskanian holds that any employment agreement compelling "the waiver of representative claims under the PAGA … is contrary to public policy and unenforceable as a matter of state law"; and that the FAA does not preempt this state-law rule – even if the waiver at issue is incorporated into an arbitration agreement.[vi]

In its preemption analysis, the California Supreme Court explained that that the plaintiff in a representative PAGA action acts as an agent for the state, which is "the real party in interest," and seeks only to "recover civil penalties, 75 percent of which will go to the state's coffers."[vii] It concluded, "A PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship"; rather, "it is a dispute between an employer and the *state*, which alleges directly or through its agents … the employer has violated the Labor Code."[viii]

Employers immediately challenged this conclusion; arguing that the FAA, and U.S. Supreme Court precedent applying it, preempted any state-law rule or decision interfering with the enforcement of waiver provisions in arbitration agreements. Some federal district courts initially agreed with this position.[ix] Last year in *Sakkab*, however, the Ninth Circuit rejected employers' preemption arguments.[x]

Sakkab expressly holds, "the FAA does not preempt the *Iskanian* rule" barring PAGA waivers.[xi] The Ninth Circuit based its holding in part on the FAA's "saving clause, [which] "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'"[xii] The Ninth Circuit determined that the *Iskanian* rule fell within the saving clause because the "rule bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement."[xiii]

In light of *Sakkab*, employers can no longer ask federal district courts in California to disregard *Iskanian*. Similarly, state trial and appellate courts "are bound to follow *Iskanian*'s holdings that representative action waivers are unenforceable under state law and that this rule is not preempted by the FAA."[xiv] California's lower appellate courts have consistently applied *Iskanian*;[xv] and there is no reason to believe that they will stop doing so.

The Courts have Rejected Employers' Attempts to Circumscribe or Evade the *Iskanian* Rule against PAGA Waivers

PAGA allows any "aggrieved employee" to bring a claim for civil penalties for Labor Code Violations on "behalf of himself or herself and other current or former employees,"[xvi] and thus creates a streamlined, non-class mechanism for resolving disputes over alleged Labor Code violations affecting multiple employees.[xvii] Accordingly, employees who have signed arbitration agreements containing waiver provisions – but who seek to have their representative claims expeditiously resolved in court – have begun filing complaints asserting only PAGA claims.[xviii]

In response, some employers have argued that, even if *Iskanian* precludes any waver of representative PAGA claims, such claims should not be heard by a judge until after an arbitrator has heard the employee's "individual" PAGA claims. The courts have consistently rejected these arguments. A survey of recent case law establishes that there are at least three, inter-related grounds on which any attempt to carve an arbitrable "individual claim" out of a representative PAGA claim fails.

First, a "'PAGA claim is not an individual claim.'"[xix] As the First appellate District held in *Reyes*, "A plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action and include 'other current or former employees.'"[xx]

While *Iskanian* stops short of fully endorsing the holding of *Reyes*, it nevertheless holds that "*every* PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state."[xxi] Appellate courts applying *Iskanian* thus have determined that, since "a PAGA action is by definition a form of representative claim," a contractual provision barring an arbitrator from hearing any representative claim must be deemed to "categorically exclude" from arbitration all PAGA claims – including any purported "individual" claim.[xxii]

Courts have also rejected employers' attempts to compel arbitration of questions relating to whether a plaintiff qualifies as an "aggrieved employee."[xxiii] For example, the appellate court in *Williams* reversed a trial court order compelling a plaintiff asserting "only a single representative cause of action under PAGA" to arbitrate "whether he is an 'aggrieved employee' under the Labor Code with standing to bring a representative PAGA claim."[xxiv] The appellate courts have uniformly concluded that "no legal authority" supports the proposition "that a single representative action may be split in such a manner."[xxv]

Finally, even if there were a legally authorized mechanism for dividing a single PAGA cause of action into "individual" and representative components, employers would face additional hurdles in attempting to compel arbitration of "individual" issues. In its November 2016 *Tanguilig* opinion, the First Appellate District concluded that it did not need to decide if "an 'individual PAGA claim' … is cognizable"; because, assuming it could be pled as a stand-alone claim, "a PAGA plaintiff's request for civil penalties on behalf of himself or herself is not subject to arbitration under a private arbitration agreement between the plaintiff and his or her employer."[xxvi]

Pursuant to *Iskanian*, in any PAGA action, "the state is the real party in interest."[xxvii] The *Tanguilig* court thus concluded, "Because a PAGA plaintiff, whether suing solely on behalf of himself or herself or also on behalf of other employees, acts as a proxy for the state … the PAGA claim cannot be ordered to arbitration without the *state's* consent.[xxviii] In other words, "'if the claim belongs primarily to the state, it should be the state and not the individual defendant that agrees to waive the judicial forum.'"[xxix]

Tanguilig and other cases holding that no PAGA claim can be sent to arbitration without the state's consent have been decided in the context of employers' attempts to enforce agreements that did not allow for the arbitration of representative actions.[xxx] An employer might be in a different situation if its contract allowed for a proceeding in which representative PAGA claims would be resolved in their entirety in an arbitral forum.[xxxi] But further attempts by employers to compel arbitration of only the "individual" portions of representative PAGA claims are unlikely to succeed in light of the conclusive rejection of such attempts in *Tanguilig*, *Williams*, and *Perez*.

Conclusion

The *Iskanian* rule against PAGA waivers is now the accepted and controlling law in both state courts and the Ninth Circuit. Only a decision by the U.S. Supreme Court to consider the enforceability of such waivers could call that rule into question. But, to date, the Supreme Court has shown no interest in taking up questions relating to private-attorney-general claims brought against employers pursuant to the statutory law of California.[xxxii]

Likewise, California appellate decisions rejecting employers' attempts to compel arbitration of the "individual claims" of plaintiffs bringing representative PAGA actions suggest that lower courts have little appetite for arguments that, no matter

how creative, would allow employers to invoke representative-action waivers to delay or derail the resolution of PAGA claims.

The time for testing or questioning *Iskanian* is over. Unless and until something dramatic changes, attorneys in California should assume that a PAGA claim cannot be waived and cannot be forced into piecemeal arbitration. Even if the employee-plaintiff is bound by an otherwise enforceable arbitration agreement containing a representative-action waiver, a complaint alleging only representative PAGA claims does not raise any arbitrable issues. Such actions have to be resolved entirely through judicial proceedings.

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[i] Cal. Labor Code §2698 et seq.

[ii] *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009).

[iii] *Iskanian*, 59 Cal. 4th at 359-360.

[iv] *Id.* at 360.

[v] *Compare Lewis v. Epic Systems Corporation*, 823 F.3d 1147, 1160-1161 (7th Cir. 2016) (holding that the NLRA guarantees a substantive right to pursue class or collective actions) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016) (same) *with D.R. Horton Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (holding, "arbitration agreements containing class waivers enforceable").

[vi] *Iskanian*, 59 Cal. 4th at 384.

[vii] *Id.* at 387.

[viii] *Id*. at 386-387.

[ix] *See Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 4782618 at *3-*4 (C.D. Cal. Aug. 11, 2014)

[x] *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir 2015).

[xi] *Id.* at 429.

[xii] *Id.* at 432 (quoting *AT & T Mobility v. Concepcion* (2011) 563 U.S. 333, 339)

[xiii] *Id.*

[xiv] *Tanguilig v. Bloomingdale's, Inc.*, --- Cal.Rptr.3d ----, 2016 WL 6778788 (Cal. Ct. App. Nov. 16, 2016).

[xv] *Id.* (citing cases).

[xvi] Cal. Labor Code §2699(a). *See also Id*. at §2699(c) (defining "aggrieved employee" to mean "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.")

[xvii] *Arias*, 46 Cal.4th 969, 975.

[xviii] The alternative is to file a complaint asserting the employee's own, individual claims; class claims; and representative PAGA claims. But a state court applying both prongs of *Iskanian* to such an omnibus complaint is likely to compel the individual claims to arbitration; dismiss the class claims pursuant to the contractual waiver; and stay proceedings on the PAGA claims pending resolution of the individual arbitration. *See e.g. Young v. Remx, Inc*., 2 Cal.App.5th 630, 633-634 (2016)

[xix] *Williams v. Superior Court*, 237 Cal.App.4th 642, 649 (2015) (quoting *Reyes v. Macy's, Inc.,* 202 Cal.App.4th 1119, 1124 (2011)).

[xx] *Reyes*, 202 Cal.App.4th at 1123 (quoting *Machado v. M.A.T. & Sons Landscape, Inc.* (E.D.Cal. 2009) 2009 WL 2230788 at *2).

[xxi] *Iskanian*, 59 Cal. 4th at 387.

[xxii] *Perez v. U–Haul Co. of California*, 3 Cal.App.5th 408, 420 (2016)

[xxiii] *See Williams*, 237 Cal.App.4th at 649.

[xxiv] *Id*.

[xxv] *Id. See also Perez*, 3 Cal.App.5th 408, 421.

[xxvi] *Tanguilig*, 2016 WL 6778788 at *5.

[xxvii] *Iskanian*, 59 Cal. 4th at 387.

[xxviii] *Tanguilig*, 2016 WL 6778788 at *6.

[xxix] *Id*. (quoting *Valdez v. Terminix Int'l Co. Ltd. P'ship*, 2015 WL 4342867 at * 9 (C.D. Cal. July 14, 2015).

[xxx] *See Tanguilig*, 2016 WL 6778788 at *3; *Valdez*, 2015 WL 4342867 at *7-* 9; and *Cobarruviaz v. Maplebear, Inc*., 143 F. Supp. 3d 930, 946-947 (N.D. Cal. 2015).

[xxxi] *See Iskanian*, 59 Cal. 4th at 391(employer "must answer the representative PAGA claims in some forum.")

[xxxii] *See Williams*, 237 Cal.App.4th at 647 n.3; *Securitas Sec. Servs. USA, Inc.v. Superior Court*, 234 Cal.App.4th 1109, 1120 (2015).

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