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CALIFORNIA COURTS EMBRACE CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS IN THREE NEW CASES

This week the Ninth Circuit Court of Appeals and the California Supreme Court issued opinions giving employers cause for hope. All three cases arose under California law and all three cases held arbitration agreements between employers and employees may contain enforceable provisions prohibiting employees from participating in or bringing claims as class actions. However, as is often the case, the California Supreme Court's ruling raises more questions than it answers regarding the litigation risks California employers may face moving forward.

We will focus on the easy ones first: the pro-arbitration, pro-class waiver Ninth Circuit opinions. In *Johnmohammadi v. Bloomingdales, Inc.*, the Ninth Circuit considered Bloomingdale's alternative dispute resolution program. The program binds employees to an arbitration agreement containing a class action waiver if the employee does not affirmatively opt out of the arbitration agreement within 30 days. Johnmohammadi did not opt out of the arbitration agreement and subsequently filed a class action lawsuit alleging Bloomingdales violated California wage and hour laws. Johnmohammadi argued that the class action waiver violated federal laws, specifically the National Labor Relations Act and the Norris-LaGuardia Act, which prevent employers from interfering with employees' abilities to engage in concerted activities, *i.e.,* class action lawsuits. In enforcing the arbitration agreement, the Ninth Circuit found dispositive the fact that Johnmohammadi could have opted out of the agreement and her failure to do so was purposeful and voluntary.

In *Davis v. Nordstrom, Inc.*, Nordstrom amended its arbitration policy to include a class action waiver after the U.S. Supreme Court's 2011 pro-arbitration decision in *AT&T Mobility LLC v. Concepcion*. Nordstrom's arbitration policy is embedded within its employee handbook and is not a separate and distinct agreement. At the time it was amended, Nordstrom notified Davis of the policy change but did not explicitly inform her that continued employment would be deemed acceptance of the new arbitration policy. On these facts, the Ninth Circuit reversed the district court's ruling that no contract to arbitrate existed between the parties. Rather, the Ninth Circuit held that, while not a "model of clarity," Nordstrom's actions were enough to find the parties had an agreement to arbitrate which included the class waiver provision. That the Ninth Circuit found an enforceable arbitration agreement, let alone class waiver, on the facts of *Davis* suggests the tide has truly turned on the Court's historic hostility toward arbitration.

The California Supreme Court decision in *Iskanian v. CLS Transportation Los Angeles, LLC* is more of a mixed bag for employers. The good news is that the

Supreme Court recognized that *Concepcion* overruled its prior precedent that class action waivers in employment agreements were generally challengeable as unconscionable or against public policy. This ruling clears the way for employers to add class action waivers to their arbitration agreements and be comforted that such waivers, in the absence of other unconscionable terms, will be enforced.

The bad news is *Iskanian's* holding that arbitration agreements which waive an employee's right to bring a representative action under California's Private Attorneys General Act (PAGA) are unenforceable as against public policy. PAGA, also known as California's "sue your employer" law, deputizes employees to sue on behalf of the state for numerous Labor Code violations, with 75 percent of any civil penalties assessed going to the State and 25 percent to the employee bringing the PAGA claim. PAGA also specifically authorizes suits to be brought as representative actions on behalf of the employee and her fellow employees and further incentivizes litigation by providing for attorneys' fees. It is unclear whether CLS Transportation will attempt to obtain U.S. Supreme Court review of this portion of the decision.

There are several takeaways for California employers in light of this trifecta of class action waiver cases:

- Consideration should be given to adopting an arbitration agreement (or amending current arbitration agreements) which include class action waivers;
- Notwithstanding the remarkable result in *Davis*, employers who choose to have arbitration agreements should make them stand-alone agreements, separate and apart from employee handbooks;
- Arbitration agreements, even though enforceable with class action waivers, must still be fair overall and able to withstand attacks based on unconscionability;
- Employers should expect to see more representative PAGA claims being pled alongside wage and hour claims;
- As a result of the Court's ruling, employers may have increased litigation costs due to bifurcated proceedings with individual claims in arbitration and representative PAGA claims in court;
- Employers may also experience a significantly longer dispute horizon, as courts may use California civil procedure rules to stay arbitrable claims while PAGA claims are litigated; and
- As PAGA claims will now be the last, best hope of employees (and their attorneys) to avoid arbitration and stay in court, employers should review their policies and practices to ensure compliance with the myriad obligations imposed by California's Labor Code.
