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California Court Invalidates Arbitration Agreement With PAGA Waiver

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In an unpublished decision, the California Court of Appeal, Third Appellate District denied an employer's motion to compel arbitration of a former employee's Private Attorneys General Act (PAGA) claims. Instead, the court held that the employer's employee arbitration agreement contained an improper PAGA waiver that could not be severed and, as a result, invalidated the entire agreement.

Upon his hire by PennyMac, Richard Smigelski signed an employee agreement to arbitrate. The agreement acknowledges receipt of another document called the Mutual Arbitration Policy (MAP) and states, "I agree that it is my obligation to make use of the MAP and to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with [PennyMac], except as otherwise permitted by the MAP."

The agreement also states that both the employer and employee "agree to forego any right [they] may have had to a jury trial on issues covered by the MAP, and forego any right to bring claims on a representative or class basis." It further provides that "[i]f any provision of the MAP is found unenforceable, that provision may be severed without affecting this agreement to arbitrate." The agreement itself, however, did not contain a severability clause.

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Smigelski filed a lawsuit seeking to recover for violations of PAGA. PennyMac moved to compel arbitration, arguing that (1) "employers and employees may agree to

arbitrate PAGA claims," (2) the agreement reflects such an agreement, (3) "the Federal Arbitration Act (FAA) requires enforcement of the purported agreement to arbitrate PAGA claims, and (4) any unenforceable provisions in the Agreement should be severed, and the remaining provisions enforced." In addition, the employer contended that the question of arbitrability was for the arbitrator, not the trial court, to decide.

In response, Smigelski argued that the arbitration agreement contains unenforceable PAGA waivers within the meaning of a 2014 case, *Iskanian v. CLS Transportation Los Angeles, LLC*. He also contended that the terms of the arbitration agreement precluded severance of the PAGA waivers, thus making the entire agreement unenforceable. In addition, he argued that the arbitration agreement does not "clearly and unmistakably" evidence the parties' intent to delegate questions of arbitrability to the arbitrator, meaning that questions of arbitrability should be decided by the trial court. The trial court denied the employer's the motion to compel arbitration.

On appeal, the California Court of Appeal agreed with the trial court, finding that the arbitration agreement must be construed as waiving both the right to bring class action claims and the right to bring representative PAGA claims. Relying on *Iskanian*, the court determined that because the agreement compels the waiver of representative claims under PAGA, it is unenforceable. The court also found that the agreement "does not authorize severance of unenforceable terms in the employee agreement itself." Because of this, the PAGA waiver

cannot be severed from the employee agreement, rendering the entire agreement unenforceable. Notably, the MAP, which contained a separate PAGA waiver, provided that an arbitrator or court could sever MAP procedures that were not in compliance with the FAA, but the court determined that the PAGA waivers violated state law, not the FAA, and thus the provision did not apply.

Employers may want to review their arbitration agreements to ensure they do not contain an invalid PAGA waiver and to ensure their agreements contain a clear and enforceable severability clause.