

Multiple Private Attorneys General Act (PAGA) Representative Claims Crumble As Federal Courts Continue To Reject *Iskanian* and Enforce Arbitration Agreements Containing PAGA Waivers



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When the California Supreme Court decided *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014), this June, some legal commentators assumed that employees could not waive pre-litigation claims under the **Private Attorneys General Act** (PAGA). Those assumptions may have been premature. As we noted [here](#), at least one federal court refused to apply *Iskanian* forcing an employee's individual PAGA claims to arbitration. The list seems to be growing. The Courts in *Ortiz v. Hobby Lobby Stores, Inc.* Case No. 13-CV 1619 (E.D. Cal. Oct. 1, 2014); *Chico v. Hilton Worldwide, Inc.*, Case No. 14-CV-5750 (JFW) (C.D. Cal. Oct. 7, 2014); *Langston v. 20/20 Companies, Inc.* Case No. 14-CV-1360 JGB (C.D. Cal.); *Mill v. Kmart Corp.*, Case No. 14-CV-02749 (KA) (N.D. Cal. Nov. 26, 2014); and, *Lucero v. Sears Holdings Mgmt. Corp.*, Case No. 14-1620 (AJB) (S.D. Cal.) have all similarly rejected this holding in *Iskanian* and, as discussed more fully below, all but one

court has forced the each plaintiff's individual PAGA claims to arbitration.

In all five cases, the plaintiffs brought putative class actions and PAGA representative actions against their respective employers even though each Plaintiff had signed a valid arbitration agreement containing a waiver of class and representative claims. Despite this knowing waiver, the Plaintiffs argued that the California Supreme Court's decision in *Iskanian* rendered the arbitration agreements unenforceable. Each court rejected the Plaintiffs' argument, citing the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2010), which held that "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: the conflicting rule is displaced by the FAA." See *e.g. Mill*, at 10 and *Lucero*, at 5.

Notably, all of the courts recognized that they were not bound by the California Supreme Court's interpretation of federal pre-emption law under the FAA. And, given the absence of any fraud or coercion in the formation of the arbitration agreements, the Courts found that the employees were bound by their contracts. The courts noted that the FAA reflects a liberal federal policy favoring arbitration and it is a "fundamental principle that arbitration is matter of contract." See, *e.g., Chico v. Hilton*, at *5. More specifically, the Courts in *Langston* and *Lucero* found a significant flaw with the California Supreme Court's reasoning in *Iskanian* barring PAGA waivers in arbitration agreements. As the Court in *Langston* put it:

[A]lthough the court asserts that the basis for holding representative PAGA claim waivers unconscionable is that an employee cannot waive a right that properly belongs to the government, the court nevertheless acknowledges that an employee may actually sometimes waive the government's right to bring a PAGA claim. That inconsistency illuminates the fact that, it is not an individual's ability to waive the government's right that drives the court's rule but rather the court's disfavor for pre-existing agreements to arbitrate such claims individually.

Langson at 8-9.

Interestingly, while four of the Courts (implicitly and/or explicitly) required each plaintiff to arbitrate the PAGA claim on an individual basis, the Court in *Ortiz* did not compel the plaintiff's individual PAGA claims to arbitration but instead, struck the PAGA claims entirely. The *Ortiz* court recognized that there was a split of federal authority as to whether a plaintiff who had waived his right to bring a representative action under PAGA could be compelled to arbitrate a purportedly individual PAGA claim. Siding with the view that PAGA can only be litigated on a representative basis, the court held that by waiving his right to bring any representative claims, Ortiz had waived his right to litigate any PAGA claim whatsoever irrespective of the forum. *Ortiz* at 21.

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