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Ninth Circuit Blesses Iskanian re: Arbitration of PAGA Claims

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On September 28, 2015, the Ninth Circuit Court of Appeals issued a 2-1 decision in the long-awaited case of ***Sakkab v. Luxottica Retail North America, Inc***. (No. 13-55184, D.C. No. 3:12-cv-00436-GPC-KSC) ("*Sakkab*"). The Court held that an arbitration agreement that requires arbitration of PAGA claims arising out of employment is unenforceable under California law.

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Employer's Arbitration Agreement

Luxottica, which operated several eyewear retail stores, distributed a Retail Associate Guide to its employees upon hire. The Retail Associate Guide contained a dispute resolution agreement, which read:

> You and the Company each agree that, no matter in what capacity, neither you nor the Company will (1) file (or join, participate or intervene in) against the other party any lawsuit or court case that related in any way to your employment with the Company or (2) file (or join, participate or intervene in) a class-based lawsuit, court case or arbitration (including any collective or representative arbitration claim).

The plaintiff brought a putative class action in state court against Luxottica for (1) unlawful business practices; (2) failure to pay overtime compensation; (3) failure to provide accurate itemized wage statements; and (4) failure to pay wages when due. After the case was removed to the federal district court, the plaintiff later filed an amended complaint, adding a representative claim for penalties under California's Private Attorney General Act ("PAGA"). Under PAGA, employees may sue their employer for certain workplace violations on behalf of themselves, as well as other current or former employees, in representative suits similar to class actions.

Employer's Motion to Compel

Luxottica sought to compel arbitration of all of the plaintiff's claims pursuant to the agreement. The plaintiff did not contest the arbitrability of his first through fourth claims. The plaintiff, however, argued that an individual's right to bring a representative PAGA claim could not be waived in an arbitration agreement under California law. The portion of the agreement that prohibited him from bringing any claims on behalf of other employees, the plaintiff argued, was therefore unenforceable.

The district court acknowledged a split in California authority, but ultimately ruled that the Federal Arbitration Act ("FAA") preempted any California rule that barred waiver of PAGA claims in arbitration agreements. As such, the court granted Luxottica's motion to compel arbitration.

Employee's Appeal

Following the district court's ruling, but before the appeal, the California Supreme Court announced its decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014) ("*Iskanian*"), which held that employees could **not** waive their right to bring representative claims under PAGA.

On appeal of *Sakkab*, the Ninth Circuit Court of Appeals preliminarily held that the FAA did not preempt the *Iskanian* rule because the rule fell within the purview of the FAA's "saving clause." The FAA provides that

arbitration agreements are generally valid and enforceable. The FAA will preempt any state law that conflicts with the FAA or stands as an obstacle to the purposes and objectives of the FAA. However, an arbitration agreement may still be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Under this "saving clause," arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. The Court acknowledged that the FAA would preempt any state law that singled out arbitration agreements for special treatment. However, the *Iskanian* rule barred **any** waiver of PAGA claims, regardless of whether the waiver appeared in an arbitration agreement or a non-arbitration agreement. As such, the *Iskanian* rule fell within the FAA's saving clause and was not preempted.

The Court further held that the FAA did not preempt the *Iskanian* rule because the *Iskanian* rule did not conflict with the FAA's general purposes. The rule did not evidence judicial hostility toward arbitration and did not prohibit arbitration of PAGA claims; the rule merely provided that representative PAGA claims could not be waived outright.

Finally, citing general preemption principles, the Court noted that PAGA is part of California's legislative scheme for enforcing the Labor Code, which falls within the state's police powers. The Court also endorsed the view that a PAGA claim is a qui tam action, and "the FAA was not intended to preclude states from authorizing qui tam actions to enforce state law."

As such, the Court followed the *Iskanian* decision in holding that an arbitration agreement that requires individual arbitration of all claims arising out of employment is unenforceable as applied to PAGA claims.

The decision in *Sakkab* is significant because it acts as confirmation that the decision in *Iskanian* is binding law. Until now, federal district courts were not bound by *Iskanian*, and several district courts even refused to apply *Iskanian*, instead requiring employees to arbitrate their PAGA claims on an individual basis. The Ninth Circuit decision in *Sakkab*, however, leaves courts little discretion in refusing to follow *Iskanian*. It is incumbent upon California employers to ensure their arbitration agreements are compliant with *Iskanian*, *Sakkab*, and the cases that will undoubtedly follow.