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California Supreme Court "Green Lights" Class Action Waivers in Arbitration Agreements

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Yesterday, the California Supreme Court in *Iskanian v. CLS Transportation*, a case involving state wage and hour claims, recognized that the U.S. Supreme Court's 2011 *Concepcion* decision effectively invalidated the California high court's prohibition on class and collective action waivers. As a result, in most contexts, California courts can no longer restrict the use of the waivers.[1]

This ruling recognizing, the enforceability of waivers, is meaningful for employers across the country. For all practical purposes, the most valuable tool available to employers for avoiding class and collective action lawsuits by employees is arbitration agreements that include class and collective action waivers. The net result of an enforceable waiver is that the employee's only avenue for bringing a claim, whether it be an FLSA overtime claim or other employment-related cause of action, is through an individual claim in arbitration. Because class action attorneys have little interest in bringing claims on behalf of a single employee, the waivers can be extraordinarily valuable to employers.

Nowhere in the country have courts been more hostile toward these waivers than in California. In 2007, the California Supreme Court in *Gentry v. Superior Court* held that class action waivers were, under many circumstances, unenforceable based on the "doctrine of unconscionability."

Then, in 2011, the U.S. Supreme Court, in *AT&T Mobility v. Concepcion*, a consumer contract case, held that state laws and court rulings that limited the parties' rights to include class or collective action waivers in arbitration agreements violated the Federal Arbitration Act (FAA) and were invalid.

In yesterday's *Iskanian* decision, California's high court acknowledged its ban on waivers was no longer valid in light of *Concepcion*. Significantly, the California court not only recognized that the FAA preempted state law restrictions on waivers, but the court also rejected an argument by the plaintiffs that these waivers in the employment context violated the National Labor Relations Act (NLRA).

In doing so, the California Supreme Court expressly rejected the National Labor Relations Board's (NLRB) conclusion in its 2012 *D.R. Horton* decision that the NLRA generally prohibits contracts under which employees waive their rights to participate in collective action

proceedings to resolve wage claims.

Earlier this year, the federal Fifth Circuit Court of Appeals (with jurisdiction over Texas, Louisiana and Mississippi), in an appeal of the *D.R. Horton* decision, similarly rejected the NLRB's conclusion that the waivers violated the NLRA and were unenforceable.

The key takeaway from the *Iskanian* decision for employers is that the California court's recognition of the legitimacy of class and collective action waivers, together with the Fifth Circuit's *D.R. Horton* ruling rejecting the NLRB's opposition to the waivers, effectively confirms that class and collective action waivers are here to stay.

Given these developments, employers would be well advised to seriously consider adopting arbitration agreements with their employees that include class and collective action waivers. By utilizing waivers, employers can make themselves a far less attractive target for class action plaintiffs' lawyers.

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[1] The California court recognized one instance in which class action waivers are still prohibited—suits brought under the State Labor Code's Private Attorneys General Act of 2004 (PAGA). The court in *Iskanian* explained waivers were inappropriate in PAGA cases because the claim is ultimately brought on the state's behalf and not simply on the individual's behalf.