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The Arbitrability of Claims Arising Under PAGA

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If an employee asserts representative[1] claims seeking civil penalties from his employer under California's Labor Code Private Attorneys General Act of 2004,[2] colloquially known as PAGA, are such claims arbitrable by agreement of the parties?

This question — left open by the California Supreme Court's decision in *Iskanian* and the Ninth Circuit's in *Sakkab* — has since eluded a uniform answer from the courts.[3] The Ninth Circuit, in several unpublished decisions, has held that parties may agree to arbitrate, but not completely waive the right to bring, a representative PAGA claim.[4] But at least one unpublished Ninth Circuit decision and several from the California courts of appeal have taken a broader view of *Iskanian*, concluding that certain PAGA claims are not subject to arbitration.[5]

Courts should adopt a unified approach to this open question and allow representative PAGA claims to be arbitrated, so long as such claims are not outright waived. This view is the most faithful to *Iskanian*, *Sakkab* and the Federal Arbitration Act.[6]

The History and Purpose of the FAA

The FAA "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements."[7] Its "primary purpose" is to ensure "that private agreements to arbitrate are enforced according to their terms."[8] The FAA replaced "judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"[9] This equal-treatment principle is at the heart of 9 U.S.C. § 2 — which makes arbitration agreements "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] Under Section 2's savings clause, a "court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'"[11]

PAGA Overview: History, Purpose and Enforcement Scheme

Before PAGA was enacted, several state statutes provided civil penalties for Labor Code violations, and the labor commissioner could sue to obtain such penalties, with the money going into the general fund or a fund created by the Labor and Workforce Development Agency for educating employers.[12]

The California Legislature enacted PAGA in 2003 to address two related problems: (1) many Labor Code provisions were not being enforced because they authorized only criminal sanctions and state prosecutors tended to target other enforcement priorities; and (2) understaffed state enforcement agencies often lacked resources to pursue available civil sanctions on their own accord.[13] To address the first problem, the Legislature provided for the imposition of costly civil penalties aimed at deterring Labor Code violations.[14] The Legislature dealt with the second problem by authorizing aggrieved employees, acting as private attorneys general, to detect Labor Code violations and recover civil penalties for Labor Code violations.[15]

The Legislature amended PAGA in 2004 due to a perceived onslaught of PAGA actions seeking exorbitant penalties for relatively minor Labor Code violations.[16] The 2004 amendment added a new section to PAGA, Section 2699.3, which requires exhaustion of administrative remedies before a civil action can be filed.[17]

Accordingly, PAGA requires aggrieved employees, before commencing a PAGA action, to provide specific notice to the Workforce Development Agency to allow the agency the opportunity to exercise its "initial right to prosecute and collect civil penalties" under the Labor Code.[18] Once an employee has satisfied PAGA's statutory exhaustion requirements, "an employee authorized to assert a PAGA action is not subject to [the agency's] supervision."[19] If an employee ultimately prevails in a PAGA action, 75 percent of the civil penalties recovered go to the agency and, similar to other qui tam actions, the remaining 25 percent bounty is divided among the "aggrieved employees."[20]

Iskanian and _Sakkab_ Concern the Enforceability of PAGA Waivers — Not the Arbitrability of PAGA Claims

In *Iskanian*, the California Supreme Court addressed the enforceability of a contractual provision waiving the plaintiff's right to bring a representative PAGA claim.[21] The *Iskanian* court held that arbitration agreements cannot waive representative claims under PAGA, reasoning that when "an employment agreement compels the waiver of representative claims under PAGA, it is contrary to public policy and unenforceable as a matter of state law."[22] In *Sakkab*, the Ninth Circuit concluded that the *Iskanian* rule prohibiting waiver of representative claims under PAGA is not preempted by the Federal Arbitration Act.[23]

Critically, *Iskanian* and *Sakkab* do not hold that PAGA claims cannot be arbitrated. Quite the opposite: In both *Iskanian* and *Sakkab*, the courts remanded for consideration of whether the representative PAGA claims should be resolved in arbitration or litigation.[24] Accordingly, in light of the precise questions answered by *Iskanian* and *Sakkab*, the arbitrability of a representative PAGA claim in the absence of a complete contractual wavier of the right to bring representative claims remains an open question.

California Court of Appeal Decisions Addressing the Arbitrability of Representative PAGA Claims

Since *Iskanian*, the California courts of appeal have grappled with whether PAGA claims are arbitrable. The state's appellate courts have taken three different approaches to the issue.

One group of California Court of Appeal decisions suggests that representative PAGA claims are categorically inarbitrable. For instance, in *Kim v. Reins International California Inc.*, the Court of Appeal interpreted *Iskanian* to stand for the broad proposition that "an employer defendant may not compel a plaintiff employee to arbitrate PAGA claims."[25]

A second line of authority focuses on the timing of an aggrieved employee's agreement to arbitrate a representative PAGA claim.[26] At least three Court of Appeal decisions have held that employees may agree to arbitrate PAGA claims "[o]nly after [they] have satisfied the statutory requirements for commencing a PAGA action."[27] The core reasoning undergirding these cases centers on the "representative" nature of a PAGA claim — positing that "an arbitration agreement executed prior to the satisfaction of [the statutory exhaustion] requirements cannot encompass the employee's PAGA claim, as the employee is not then the state's agent."[28]

Third, some California Court of Appeal decisions focus on whether the PAGA claim at issue concerns "civil penalties" or "statutory damages," holding that plaintiff-specific PAGA claims for statutory damages that "could

have been obtained by individual employees suing in their individual capacities" — unlike representative PAGA claims for civil penalties that "are paid largely into the state treasury" — are akin to private disputes subject to arbitration.[29] Under the reasoning of these cases, "[c]ivil penalties are distinguishable from [plaintiff-specific claims for statutory damages] because [civil penalties] cannot be collected in an individual capacity and because of their unique payout structure defined by PAGA, in which most of the penalties are paid into the state treasury rather than exclusively to the aggrieved employee."[30]

Ninth Circuit Decisions Concerning the Arbitrability of Representative PAGA Claims

In contrast, three unpublished Ninth Circuit decisions have held that representative PAGA claims are eligible for compelled arbitration, so long as the PAGA claims fall within the scope of the parties' arbitration agreement.[31] In *Valdez v. Terminix International Co.*, the Ninth Circuit reasoned that "*Iskanian* and *Sakkab* clearly contemplate that an individual employee can pursue a PAGA claim in arbitration."[32] The *Valdez* court reasoned that although the real party in interest in a PAGA action is the state, "[e]mployees can bind government agencies because they 'represent[ ] the same legal right and interest' as the government in PAGA proceedings."[33] This sound view has not been uniformly adopted even within the Ninth Circuit, since at least one unpublished Ninth Circuit decision, like some of the California Court of Appeal decisions, has focused on whether the PAGA claim at issue concerns a representative claim for "civil penalties" or plaintiff-specific "statutory damages."[34]

PAGA Claims Should Be Deemed Arbitrable

The three Ninth Circuit decisions concluding that representative PAGA claims are arbitrable, so long as they have not been completely waived, get it right for two central reasons. First, these decisions correctly apprehend the scope of the holdings in *Iskanian* and *Sakkab*, neither of which concluded that representative PAGA claims are inarbitrable. Second, these three decisions are most faithful to the Federal Arbitration Act, as they abide by the national policy favoring arbitration and, unlike the three lines of authority from the California Court of Appeal, do not create "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'"[35]

In contrast, the three lines of authority from the California Court of Appeal (one of which was also adopted by an unpublished Ninth Circuit decision) either read *Iskanian* too broadly or construe *Iskanian* in a manner that contravenes the core purpose of the FAA. To begin, *Kim* interprets *Iskanian* much too broadly in concluding that "an employer defendant may not compel a plaintiff employee to arbitrate PAGA claims."[36] Indeed, *Sakkab* specifically noted that the *Iskanian* rule does not prohibit the arbitration of any claim,[37] and the *Iskanian* court remanded the case to determine whether the employer would defend the representative PAGA claim in arbitration or litigation.[38]

More fundamentally, this state rule jettisons the FAA's national policy in favor of arbitration. The U.S. Supreme Court has time and again made clear that the FAA "preempts any state rule discriminating on its face against arbitration — for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'"[39] Yet, recent state and federal cases finding representative PAGA claims categorically "not subject to arbitration" emphatically do just that.[40]

The second line of authority from the California Court of Appeal, which posits that an employee may agree to arbitrate a representative PAGA claim only after the Workforce Development Agency gives him the green light to start a PAGA action,[41] does not prohibit "outright the arbitration of a particular type of claim,"[42] but ultimately it, too, conflicts with the FAA.[43] As the U.S. Supreme Court has explained, the FAA "not only"

displaces state rules that facially discriminate against arbitration — the FAA "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."[44]

But that is precisely what the second line of authority does, as it is difficult to fathom many situations — if any — in which an employee could have a cognizable representative PAGA claim based on a Labor Code violation that predates a pre-employment agreement to arbitrate representative claims.[45] Virtually every pre-employment arbitration agreement would succumb to this rule. Such a result reveals a thinly veiled state rule designed to displace and override arbitration agreements. Under Concepcion, the FAA preempts such state rules.[46]

The third line of authority from the California courts of appeal, which focuses on whether the PAGA claim in question provides for "civil penalties" or "statutory damages," is based on the idea that a representative PAGA claim for civil penalties is inherently a dispute between the state and the employer rather than a dispute between private parties.[47] Not so. PAGA "is simply a procedural statute" creating a scheme for the collection of civil penalties.[48] Under this statutory enforcement scheme, either (1) the Workforce Development Agency cites or initiates its own action or proceeding against the employer, or (2) an aggrieved employee commences and controls a representative PAGA action.[49]

To maintain the agency's primacy over civil-penalty-collection efforts, PAGA requires that an employee notify the employer and the agency of the specific Labor Code provisions alleged to have been violated before commencing a PAGA action.[50] If the agency cites the employer or initiates its own proceeding or action against the employer,[51] the employee's representative PAGA action is foreclosed.[52]

In contrast, if the agency declines to investigate or cite the employer, the plaintiff-employee "represents the same legal interests as" the agency,[53] "pursues the PAGA action in his own name, exercises complete control over the lawsuit, and is not restrained by any provision of the PAGA statute from settling or disposing of the claim as he sees fit."[54] The plaintiff-employee — and not the agency — is therefore very much the "master" of a representative PAGA action.[55]

These defining characteristics make representative PAGA actions analogous to disputes between private parties in which the state holds only a peripheral beneficial interest.[56] Indeed, because the plaintiff-employee represents the same legal interests as the government in a PAGA action, "the judgment in a PAGA representative action is binding not only on the named employee plaintiff but also on government agencies and any aggrieved employee not a party to the proceeding."[57]

Moreover, the "private attorney general" character of a representative PAGA action is of no consequence in determining its arbitrability. The U.S. Supreme Court "has enforced agreements to arbitrate claims brought under RICO and under federal antitrust laws, both of which create 'private attorneys general' enforcement schemes,'"[58] and therefore, in the absence of a contrary command from Congress, a state statute creating such an enforcement scheme falls within the ambit of the FAA as well.[59]

Nor is the arbitrability of a representative PAGA action undermined merely because it is a "form of qui tam action"[60] — as qui tam actions, like those arising under the federal False Claims Act,[61] are not categorically immune from the FAA either.[62] Indeed, recent federal cases have compelled arbitration of qui tam claims, such as FCA claims and representative PAGA actions, despite the fact that the government is deemed the real party in interest in qui tam actions.[63] Therefore, as three unpublished Ninth Circuit decisions have recently held, when an employee's arbitration agreement encompasses representative actions, courts should compel arbitration of any representative PAGA claims.

Conclusion

Consistent with the mandates of the FAA and PAGA's history, purpose and enforcement scheme, because the plaintiff-employee is the master of his or her own representative PAGA action, and that employee has assented to bringing such claims in arbitration, courts should compel arbitration of those PAGA claims.

Disclosure: Sungaila served as appellate counsel before the Ninth Circuit in *Ridgeway v. Nabors Completion & Production Services Co.*, referenced in this article.

[1] "[E]very PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee — the plaintiff bringing the action — or as to other employees as well, is a representative action on behalf of the state." *Iskanian v. CLS Transp. L.A. LLC,* 59 Cal. 4th 348, 387 (2014).

[2] Cal. Lab. Code §§ 2698–2699.5, Stats. 2003, ch. 906, § 2, eff. Jan. 1, 2004; *Sakkab v. Luxottica Retail N. Am. Inc.*, 803 F.3d 425, 436 (9th Cir. 2015); *Iskanian*, 59 Cal. 4th at 378.

[3] See *Sakkab*, 803 F.3d at 430; *Iskanian*, 59 Cal. 4th at 391.

[4] *Ridgeway v. Nabors Completion & Production Services Co.*, No. 15-56673, 2018 WL 832864, at *1 (9th Cir. Feb. 13, 2018); *Valdez v. Terminix Int'l Co. Ltd. P'ship,* 681 F. App'x 592, 594 (9th Cir. 2017); *Wulfe v. Valero Ref. Co.-Cal.*, 641 F. App'x 758, 760 (9th Cir. 2016).

[5] See *Mandviwala v. Five Star Quality Care Inc.*, No. 16-55084, 2018 WL 671138, at *2 (9th Cir. Feb. 2, 2018) (noting conflict among California Court of Appeal decisions as to which PAGA claims are subject to compelled arbitration); *Lawson v. ZB N.A.*, 18 Cal. App. 5th 705, 722, 227 (Cal. Ct. App. 2017), pet. review filed; *Julian v. Glenair Inc.*, 17 Cal. App. 5th 853, 870 (Cal. Ct. App. 2017), pet. review denied; *Esparza v. KS Indus. L.P.*, 13 Cal. App. 5th 1228, 1246 (Cal. Ct. App. 2017), pet. review denied.

[6] 9 U.S.C. § 2 et seq.

[7] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

[8] *Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

[9] *Hall St. Assocs. LLC v. Mattel Inc.*, 552 U.S. 576, 581 (2008) (quoting *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

[10] *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

[11] Id. (quoting *Concepcion*, 563 U.S. at 339).

[12] *Iskanian*, 59 Cal. 4th at 378.

[13] *Lopez v. Friant & Assocs. LLC*, 15 Cal. App. 5th 773, 777–78 (Cal. Ct. App. 2017), review denied.

[14] See *Esparza*, 13 Cal. App. 5th at 1240.

[15] See *Iskanian*, 59 Cal. 4th at 390; *Esparza*, 13 Cal. App. 5th at 1240.

[16] *Dunlap v. Superior Ct.*, 142 Cal. App. 4th 330, 338 (Cal. Ct. App. 2006); see also Leonora M. Schloss & Cari A. Cohorn, Assessing the Amended Labor Code Private Attorneys General Act, L.A. Lawyer 12, 13 (February 2006).

[17] *Dunlap*, 142 Cal. App. 4th at 338.

[18] *Caliber Bodyworks Inc. v. Superior Ct.*, 134 Cal. App. 4th 365, 376 (Cal. Ct. App. 2005).

[19] *Julian*, 17 Cal. App. 5th at 866.

[20] Cal. Lab. Code § 2699(i).

[21] See *Iskanian*, 59 Cal. 4th at 383.

[22] Id. at 382–84.

[23] *Sakkab*, 803 F.3d at 427.

[24] *Iskanian*, 59 Cal. 4th at 391 (concluding that representative PAGA claims had to be resolved in "some forum" and remanding to determine whether claims should be litigated or arbitrated); see also *Sakkab*, 803 F.3d at 440 (same).

[25] *Kim v. Reins Int'l California Inc.*, 18 Cal. App. 5th 1052, 1059 (Cal. Ct. App. 2017), review filed.

[26] *Julian*, 17 Cal. App. 5th at 870 (collecting cases).

[27] See id. at 870.

[28] See id. at 873.

[29] *Esparza*, 13 Cal. App. 5th at 1242–44.

[30] See *Mandviwala*, 2018 WL 671138, at *2 (discussing distinction between representative claims for civil penalties and plaintiff-specific claims for statutory damages explained in *Esparza*).

[31] See *Ridgeway*, 2018 WL 832864, at *1; *Valdez*, 681 F. App'x at 594; *Wulfe*, 641 F. App'x at 760.

[32] *Valdez*, 681 F. App'x at 594.

[33] See id. (quoting *Iskanian*, 59 Cal. 4th at 382).

[34] See *Mandviwala*, 2018 WL 671138, at *2 (noting conflict between two California Court of Appeal decisions as to whether PAGA claims for violation of California Labor Code § 558 are arbitrable).

[35] *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339).

[36] See *Kim*, 18 Cal. App. 5th at 1059.

[37] *Sakkab*, 803 F.3d at 434.

[38] *Iskanian*, 59 Cal. 4th at 391–92.

[39] *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 431).

[40] See, e.g., *Mandviwala*, 2018 WL 671138, at *2 ("claims for PAGA civil penalties are not subject to arbitration"); *Esparza*, 13 Cal. App. 5th at 1241 ("PAGA representative claims for civil penalties are not subject to arbitration").

[41] As a threshold matter, this rule flows from a premise that is suspect, given PAGA's statutory enforcement scheme. PAGA deputizes employees to "detect" Labor Code violations that may one day undergird a representative PAGA claim as much as it allows employees to eventually "prosecute" a representative PAGA claim. See *Iskanian*, 59 Cal. 4th at 390. For this reason, a would-be-PAGA-plaintiff has been deputized as the state's agent even before complying with the exhaustion requirements of Labor Code Section 2699.3. At any rate, this state rule suffers from more fundamental problems, as it conflicts with the FAA.

[42] See *Concepcion*, 563 U.S. at 431.

[43] See *Julian*, 17 Cal. App. 5th at 870 (collecting cases).

[44] See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426.

[45] See *Iskanian*, 59 Cal. 4th at 390; see also Cal. Lab. Code § 2699.3.

[46] See *Concepcion*, 563 U.S. at 341–42.

[47] See *Mandviwala*, 2018 WL 671138, at *2 (discussing distinction between statutory damages and civil penalties articulated in *Esparza*).

[48] See *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Ct.*, 46 Cal. 4th 993, 1003 (2009).

[49] See Cal. Lab. Code §§ 2699(a), (h); id. § 2699.3(b)(2)(A)(i), (ii); id. § 2699.3(c).

[50] Cal. Lab. Code § 2699.3(a)(1)(A); *Urbino v. Orkin Servs. of Cal. Inc.*, 726 F.3d 1118, 1121 (9th Cir. 2013).

[51] Such an action or proceeding would not itself be a PAGA action, because (1) authority to bring such actions or proceedings lies outside the PAGA statute, and (2) only an "aggrieved employee" can bring a PAGA claim. See Cal. Lab. Code § 2699(a); *Caliber Bodyworks*, 134 Cal. App. 4th at 370 & 370 n.1.

[52] Cal. Lab. Code § 2699(h).

[53] See *Iskanian*, 59 Cal. 4th at 380.

[54] See *Porter v. Nabors Drilling USA L.P.*, 854 F.3d 1057, 1060 (9th Cir. 2017). Since July 2016, PAGA requires aggrieved employees to provide the Workforce Development Agency with copies of their filed complaints, proposed settlement agreements and court orders denying an award of civil penalties. See id. at 1060 n.1; Cal. Lab. Code §§ 2699(l)(1)–(4). Even under these new requirements, however, a plaintiff-employee

need not obtain the agency's approval before settling or disposing of a representative PAGA claim as he sees fit. See Cal. Lab. Code §§ 2699(l)(1)–(4).

[55] See *Nanavati v. Adecco USA Inc.*, 99 F. Supp. 3d 1072, 1083 (N.D. Cal. 2015).

[56] See id.

[57] See *Iskanian*, 59 Cal. 4th at 380; *Valdez*, 681 F. App'x at 594.

[58] *Bowen v. First Family Fin. Servs. Inc.*, 233 F.3d 1331, 1338 (11th Cir. 2000) (citing *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (RICO); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth Inc.*, 473 U.S. 614 (1985) (antitrust statutes)).

[59] See *Gay v. CreditInform*, 511 F.3d 369, 385 (3d Cir. 2007) (observing that in the context of whether a claim must be submitted to arbitration, "the question of what [a state] Legislature intended to do is separate from what it has the power to do").

[60] See *Sakkab*, 803 F.3d at 439.

[61] 31 U.S.C. §§ 3729–3733.

[62] See *United States v. Bankers Ins. Co.*, 245 F.3d 315, 325 (4th Cir. 2001) (concluding that "the government ha[d] demonstrated no valid basis for placing the FCA claim in a different category" outside the scope of the FAA, reasoning that "[i]n deciding whether the arbitration agreement applies, [the court] 'must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim'").

[63] See *Valdez*, 681 F. App'x at 594 (quoting *Iskanian*, 59 Cal. 4th at 380); *United States ex rel. Hicks v. Evercare Hosp.*, No. 1:12-CV-887, 2015 WL 4498744, at *3 (S.D. Ohio July 23, 2015) (rejecting qui tam plaintiffs' contention that "courts simply do not send qui tam claims to arbitration"); *Cunningham v. Leslie's Poolmart Inc.*, No. CV 13-2122 CAS CWX, 2013 WL 3233211, at *11 (C.D. Cal. June 25, 2013) ("Since plaintiff's representative PAGA claim is a ... claim seeking individual relief in the form of a 25 percent share of penalties otherwise recoverable by the state of California, plaintiff's PAGA claim is nothing more than 'a claim that [plaintiff] may have against the company.'"); *Deck v. Miami Jacobs Bus. Coll. Co.*, No. 3:12-CV-63, 2013 WL 394875, at *7 (S.D. Ohio Jan. 31, 2013) ("While the FCA action was necessarily 'brought in the name of the government' ... it still represents a claim belonging to the plaintiffs themselves"); see also Mathew Andrews, Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act, 15 Pepp. Disp. Resol. L.J. 203, 206 (2015) (analyzing recent cases indicating a "shift toward qui tam arbitration").