

AUGUST 29, 2016 | TRADITIONAL LABOR RELATIONS

# Ninth Circuit Rules that Agreements Precluding Employees from Bringing Class Action Claims Violate Federal Labor Law

In a sweeping ruling with far-reaching implications for California employers, the Ninth Circuit Court of Appeals – the federal appellate court for the Western United States – has concluded in [Morris v. Ernst & Young, LLP](#) that an employer violates the National Labor Relations Act (NLRA) by requiring employees to sign agreements precluding them from bringing class action or other collective actions regarding their wages, hours, or other terms and conditions of employment.

This decision presents a significant departure from existing, ever evolving law that employers have been navigating in considering class action waivers. In 2014, the California Supreme Court in [Iskanian v. CLS Transportation Los Angeles, LLC](#) held that class action waivers in arbitration agreements are enforceable under the Federal Arbitration Act (FAA) but that representative claims under the Labor Code Private Attorneys General Act of 2004 (PAGA) are unwaivable under California law. The PAGA has been an egregious enforcement mechanism permitting employees to bring collective actions seeking penalties and attorneys' fees for wage and hour violations, no matter how minor. The Ninth Circuit in [Sakkab v. Luxottica Retail North America, Inc.](#) subsequently ruled that the FAA does not preempt California's *Iskanian* rule prohibiting the waiver of representative claims under PAGA.

The path forward following *Iskanian* and *Sakkab* for California employers seeking to ensure legal compliance has been to require the waiver of traditional class actions, and not PAGA actions, to avoid running afoul of the law. There has been some security in this position and, indeed, last month the California Supreme Court in [Sandquist v. Lebo Automotive, Inc.](#) implicitly recognized the continuing enforceability of class action waivers in deciding a procedural question over whether the arbitrator or judge has authority to determine whether a particular agreement permits or prohibits class action arbitration.

Following *Ernst & Young*, however, employers located in the Ninth Circuit may now find themselves facing an unfair labor practice charge before the National Labor Relations Board, by seeking to enforce class action waivers or merely inserting such prohibition into arbitration agreements. The Ninth Circuit has reasoned that an employer's arbitration agreement prohibiting class actions interferes with the right to engage in concerted activity under the NLRA for the purpose of collective bargaining or "other mutual aid or protection." The Ninth Circuit found that the FAA, which recognizes the enforceability of arbitration agreements, must yield to federal

substantive rights such as the right to engage in concerted activities under the NLRA.

It is important to note that the federal appellate courts are divided on this issue, with the Second, Fifth and Eighth Circuits concluding that the NLRA does not invalidate collective action waivers in arbitration agreements and the Seventh Circuit agreeing with the Ninth Circuit's position. In all likelihood this issue will make it to the U.S. Supreme Court as the final arbiter but until then employers should tread lightly in drafting and seeking to enforce employee arbitration agreements barring collective actions.