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PERSPECTIVE

## Courts reject attempts to partition PAGA claims

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Last month, the California Court of Appeal affirmed the trial court's ruling in *Hernandez v. Ross Stores, Inc.*, 2017 DJDAR 75 (Cal. Ct. App. Dec. 7, 2016), denying Ross's motion to compel arbitration. "Ross insisted that Hernandez must first arbitrate her individual disputes showing she was an 'aggrieved party' under PAGA" before she could proceed with her California's Private Attorneys General Act (PAGA) claim in court. The act authorizes aggrieved employees suing for Labor Code violations to recover civil penalties on behalf of themselves, other employees and the state of California. This is the second time the Court of Appeal has rejected a litigant's attempt to limit the scope of *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348 (2014), by seeking to compel arbitration of the controversy or dispute underlying a PAGA claim where no separate "claim" has been made. See *Williams v. Superior Court*, 237 Cal. App. 4th 642 (2015).

In *Hernandez*, the plaintiff alleged several Labor Code violations. Hernandez filed the action as a representative PAGA claim on behalf of all "aggrieved employees," defined as all current and former nonexempt hourly employees who worked at a Ross warehouse and had their time tracked by the company's electronic time management system. The trial court rejected Ross' attempt to compel arbitration to determine whether Hernandez qualified as an "aggrieved employee" as contemplated under PAGA.

On appeal, Ross focused on the language of Hernandez's arbitration clause, which applied to "any disputes [rather than

claims] arising out of or relating to the employment relationship." Ross argued that whether Hernandez constituted an aggrieved employee was a separate dispute that must be arbitrated before the PAGA claim could proceed. Ross argued that *Iskanian* did not foreclose arbitrating disputes regarding the underlying Labor Code violations so long as the PAGA claim itself was to be litigated in court.

As the Court of Appeal noted, Ross was not the first litigant to attempt to split a PAGA claim into an arbitrable underlying individual claim and a nonarbitrable representative claim. *Williams* raised nearly identical issues. In *Williams*, the plaintiff brought a single representative PAGA claim against his employer for alleged Labor Code violations, and the defendant sought to compel arbitration as to whether the plaintiff constituted an "aggrieved employee" under PAGA. The *Williams* court rejected the notion that a PAGA claim could be split. The court reasoned that, by its nature, a petitioner "does not bring [a] PAGA claim as an individual claim, but as the proxy or agent of the state's labor law enforcement agencies .... [and thus] cannot be compelled to submit any portion of its representative PAGA claim to arbitration, including whether he was an 'aggrieved employee.'"

Ross attempted to distinguish *Williams* by arguing that the arbitration provision in *Hernandez* was broader in applying to all "disputes" as compared to the provision in *Williams*, which applied only to "claims." The Court of Appeal rejected this argument as "really a distinction without difference." As in *Williams*, the dispositive fact was that "this case involves a dispute, claim, or action brought on behalf of the state by

Hernandez [and] Hernandez did not allege any *individual* claims or disputes." The *Hernandez* court reasoned that "requiring an employee to litigate a PAGA claim in multiple forums would thwart the public policy of PAGA to empower employees to enforce the Labor Code on behalf of the state." Indeed, the court was unable to find any authority to support Ross' argument that an employer may legally compel an employee to arbitrate individual aspects of his PAGA claim while maintaining the representative claim in court.

While courts no doubt will continue to refine the contours of *Iskanian* for years to come, multiple California appellate court decisions have now rejected the notion that plaintiffs can be compelled to arbitrate particular aspects of a PAGA claim.

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