California Court of Appeal Holds Arbitration Agreements Waiving Right To Pursue California Labor Code Private Attorneys General Act Claims Are Unenforceable

Labor & Employment Law Blog
By Christopher Andre and Scott Dauscher on 07.13.2011

Today, the California Court of Appeal held in Brown v. Ralph's Grocery Company that the decision of the trial court denying enforcement of a class action waiver contained in an arbitration agreement between Ralph's Grocery Company and its employees was not supported by substantial evidence but held, also, that a provision of that arbitration agreement barring employees from pursuing claims under the California Labor Code Private Attorneys General Act of 2004 (“PAGA”) is unenforceable because, according to that court, the recent decision of Supreme Court of the United States in AT&T Mobility v. Concepcion, previously discussed here, does not apply to representative actions brought under PAGA. Further, the Court of Appeal remanded the case back to the trial court for a determination of whether the arbitration agreement is enforceable except for the PAGA waiver or is unenforceable in its entirety because of the PAGA waiver.

Notably, one member of the three justice panel that decided the case dissented from that part of the decision holding that that waiver of the right to file a representative action under PAGA is unenforceable and expressed the view that “[t]he preemptive effect of the Federal Arbitration Act (FAA) requires enforcement of the PAGA waiver in the employment arbitration agreement [at issue in the case] under the holding of AT&T v. Concepcion.” That dissenting opinion suggests reasons why a higher court might later disagree with the Court of Appeal and hold that PAGA waivers are enforceable under the FAA despite contrary state law.

Today’s decision if left undisturbed by higher courts is a significant setback for California employers. Plaintiffs bringing class action wage and hour lawsuits now routinely include allegations that their claims fall under PAGA, which provides for awards of very sizable penalties for violations of many provisions of the California Labor Code when aggregated to account for hundreds or even thousands of class members. PAGA provides for penalties of $100 per employee per pay period for each initial violation and of $200 per employee per pay period for each subsequent violation. Further, as we previously reported here and here, California courts hold that PAGA penalties apply, also, to violations of Industrial Welfare Commission Wage
Orders.

Given the significance of the issues involved in today’s decision, we anticipate further developments, regarding those issues, which we will report on here.

In the meantime, in light of today’s decision, we think employers that have in place or are considering implementing arbitration agreements containing PAGA waivers should promptly consult competent employment law counsel.