Dear Member,

Last month, the Fourth Appellate District decided two cases concerning the enforceability of arbitration agreements. In *Flores*, the Court held that an arbitration provision was unenforceable (1) because the agreement submitted as an exhibit to the motion to compel arbitration was not signed by the employer, (2) because the agreement failed to distinguish between disputes subject to arbitration under AAA rules and disputes subject to a collective bargaining agreement and (3) because the agreement failed to identify which set of AAA rules would apply to the binding arbitration.

In *Hernandez*, the Court held that, because a PAGA claim was a representative action brought on behalf of the state, the employee was not required to first arbitrate her individual dispute to establish that she was a "aggrieved employee" under PAGA.

**Flores V. Nature's Best, Distribution, LLC, 7 Cal.App.5th 1, Fourth District (Orange County), Filed December 2, 2016**

Julie Flores filed the lawsuit against Nature's Best Distribution, LLC; Nature's Best; KeHe Distributors, Inc. and KeHe Distributors, LLC alleging several FEHA claims. In July 2001, Flores began work in defendants' shipping/receiving department. In February or March 2014, Flores injured her back and was placed on medical leave. In August 2014, defendants terminated Flores' employment for failing to return to work from medical leave. Included in Flores' new employee packet was a document titled "Agreement for Alternative Dispute Resolution" that provided, in part, as follows: "In further consideration of the mutual benefits of the employment relationship between employee and company, employee and company agree to submit all legal, equitable and administrative disputes to the American Arbitration Association for mediation and binding arbitration. This applies to all employee disputes, except those actually covered by the grievance and arbitration procedure in the Agreement between Nature's Best and Teamster's Local 692, hereinafter referred to as the 'Collective Bargaining Agreement.' In other words, all disputes actually covered by the Collective Bargaining Agreement shall be determined according to the terms and conditions of said Agreement, exclusively. All disputes not within the scope of the Collective Bargaining Agreement are covered by this agreement. ...Arbitration... shall be in accordance with the rules of the American Arbitration Association..."

Defendant's filed a motion to compel arbitration that was denied by the trial court as unconscionable. On appeal, the Court upheld the trial court's denial on several grounds. First, although the copy of the agreement submitted to the Court was signed by Flores it was not signed by the employer. Accordingly, defendants could not establish that an enforceable agreement existed. Second, Flores was a member of the Teamsters Local and it was uncertain whether her termination was to be determined under the collective bargaining agreement or under arbitration conducted by the American Arbitration Association. Third, Flores argued that the AAA had sixty-nine separate sets of arbitration rules including labor arbitration, employment arbitration rules and mediation procedures, non-binding arbitration rules and employment benefit rules. In an effort to clarify this ambiguity, defendants in their motion to compel stated that the AAA's Labor Arbitration Rules would apply. In their reply to Flores' opposition, defendants stated that the AAA's Employment Arbitration Rules and Mediation Procedures would apply. Defendants apparent confusion concerning which rules would apply did not enhance their chances in getting the trial court's decision reversed. Because the appellate court concluded that the parties had not reached an agreement on which claims would be submitted to arbitration, it need not

analyze whether the failure to designate a particular set of arbitration rules was procedurally and/or substantively unconscionable. It should be noted that the appellate court was critical of the employer's failure to identify the applicable set of rules, to provide a copy of the rules or provide a website link.

**Hernandez v. Ross Stores, Inc., 7 CalApp.4th 171, Fourth Appellate District (Riverside County), Filed December 7, 2016**

In September 2012, Ross Stores hired Martina Hernandez as a nonexempt, hourly-paid warehouse employee. After she was terminated in September 2014, Hernandez filed a single-count representative action under PAGA alleging that Ross had violated numerous labor code laws and sought recovery of PAGA civil penalties for the violations. Ross filed a motion to compel arbitration contending that the employment agreement obligated Hernandez to resolve "any disputes" through binding arbitration on an individual basis. Ross further contended that as a condition precedent to bringing a PAGA action, Hernandez had to establish that she was an "aggrieved employee" party and that such determination was a dispute that must be arbitrated. The trial court, relying on the *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348 (2014), held that the PAGA claim was a representative claim brought on behalf of the state and did not include individual claims. The trial court denied the motion to compel arbitration because there were no individual claims or disputes between Ross and Hernandez that could be separately arbitrated.

On appeal, Ross argued that *Iskanian* allowed for arbitration of private disputes between employers and employees concerning their respective rights and obligation toward each other. The appellate court affirmed the trial court's ruling finding that the dispute between Ross and Hernandez was not a dispute between an employer and employee but was a representative action and Hernandez was acting on behalf of the stated. There were no "disputes" between Ross and Hernandez that required arbitration and that the determination of whether the party bringing back the action was an "aggrieved employee" should not be decided separately by arbitration. The appellate court noted that adoption of Ross' contention requiring an employee to litigate a PAGA claim in multiple forms would thwart the public policy of PAGA to "empower employees to enforce the Labor Code" on behalf of the state.

**NOTE TO MEMBERS:** In the coming weeks, I will send you additional case summaries. The summaries reflect my analysis and have not been reviewed by CDRC's Board. I invite your comments.

For those who have not renewed their membership, please do so either on-line at www.cdrc.net or by mail. Checks should be sent to CDRC's Treasurer Chuck Pereyra, 800 Wilshire Blvd., Suite 1200, Los Angeles, California 90017. Membership levels are Professional $150, Contributing $250, Sustaining $500, and Sponsoring $750. For those who have renewed or encouraged other colleagues to join, my sincere thanks.

Regards,

John Warnlof

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