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On March 10, 2009, the California Court of Appeal in *Franco v. Athens Disposal Company*, addressed the enforceability of a class action and “private attorney general” waiver clause in a written arbitration agreement signed by the plaintiff. The plaintiff filed his complaint as a potential class action under the California Private Attorneys General Act, alleging, among other claims, denied meal and rest breaks in violation of the California Labor Code. The court of appeal refused to enforce the arbitration agreement and remanded the case to the trial court for further proceedings.

## California Court of Appeal Finds Arbitration Agreement With PAGA Waiver Unenforceable

By Henry D. Lederman

On March 10, 2009, the California Second District Court of Appeal in *Franco v. Athens Disposal Company, Inc.*, B203317 (Mar. 10, (2009) addressed the enforceability of an arbitration agreement with a class action and “private attorney general” waiver clause in a case brought by a former employee as a class action against his employer for violations of the California Labor Code.

### Background Facts

The plaintiff, Edizon Franco, was a former garbage truck driver for Athens Disposal Company. During his employment, the plaintiff signed an arbitration agreement (written in Spanish) that included a waiver of “any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of class or in a private attorney general capacity.” Following the termination of his employment, the plaintiff filed a class action complaint against Athens alleging that he had been denied meal and rest periods, overtime and that the company engaged in illegal payroll practices in violation of the California Labor Code and Business and Professions Code. In his complaint, the plaintiff sought civil penalties as provided for by the Private Attorneys General Act (PAGA). The PAGA authorizes an aggrieved employee to recover civil penalties “on behalf of himself ... and other current or former employees.”<sup>1</sup> Following the filing of the lawsuit, Athens filed a motion to dismiss the case and compel arbitration per the terms of the arbitration agreement signed by the plaintiff. The trial court granted the company’s motion to compel arbitration of the plaintiff’s claims because the arbitration agreement precluded the plaintiff from proceeding either as a class representative or as a private attorney general.

### The Court of Appeal’s Decision

The California Court of Appeal reversed, refusing to enforce the arbitration agreement and remanding the case to the trial court. In concluding that the arbitral class waiver clause was unenforceable, the court applied the factors described in the California

Supreme Court's decision *Gentry v. Superior Court*.<sup>2</sup> Applying the *Gentry* factors, the appellate court found that without the class action mechanism individuals would have difficulty obtaining counsel because their potential damages would be modest, there was a potential for retaliation against employees if they proceeded individually, employees might be unaware of their legal rights under California's Labor Code, and a class action would serve to enforce important statutory policies and prevent employers from continuing to violate the Labor Code. Thus, while accepting *Gentry's* holding that class waivers are not *per se* unenforceable, the court of appeal ruled that in the context of the case before it the clause contained in the Athens Disposal agreement would not be enforced.

Even though the plaintiff in *Franco* sought to maintain his entire case as a class action, the court separately addressed the arbitration agreement's clause prohibiting him from proceeding as a "private attorney general." Principally at issue was California's PAGA, which authorizes an aggrieved employee to recover civil penalties not only for himself but other similarly situated employees. The court interpreted this provision to mean that while the plaintiff could recover civil penalties for the violation of his personal rights, he also could recover those penalties for the violation of the rights of other current and former employees.

The court reasoned that the PAGA is in the nature of an enforcement action with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. The statute, in effect, deputizes private individuals to perform an important public law enforcement function, one that private individuals are empowered to perform to remedy understaffing of California's labor law enforcement agencies. The court held that because the plaintiff in *Franco* was precluded by the arbitration agreement from acting in this private attorney general capacity, he was being prevented from performing the private attorney general's "core function." This in turn impeded enforcement of California's labor laws, thus making the prohibition of private attorney general actions in arbitration unconscionable.

It is not clear whether the court would have addressed the private attorney general waiver the same way if it had ruled that the class waiver clause was enforceable, applying the *Gentry* factors. In any event, because the appellate court addressed the private attorney general section of the agreement separately from the class waiver section and did not apply the *Gentry* factors to its analysis of the PAGA waiver, the decision could be interpreted to mean that private attorney general waivers are never to be enforced because they conflict with California's statutory scheme permitting individuals to perform a state law enforcement function. It is to be noted that, at least based on the published opinion, no argument was raised that the Federal Arbitration Act<sup>3</sup> preempted the PAGA, at least to the extent the PAGA would prohibit enforcement of the parties' agreement barring private attorney general claims.

Companies with arbitration agreements should inspect those agreements to determine whether a private attorney general waiver is included, and if so and particularly if they are doing business in California, should consult with their attorneys regarding whether modifications to the arbitration agreement are warranted.

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<sup>1</sup> Cal. Lab. Code §2699(a).

<sup>2</sup> 42 Cal. 4th 443 (2007).

<sup>3</sup> 9 U.S.C. §§ 1 et seq.