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California Appellate Court Invalidates Class-Arbitration Waiver in Employment Agreement

Areas of Interest

- **Consumer Litigation & Class Actions**
- **Employment**
- **Supreme Court & Appellate**
- **United States**

On March 10, 2009, a California appellate court held that an employee's agreement to arbitrate on an individual basis was unenforceable with respect to a plaintiff-employee who had filed a putative class-action lawsuit alleging the denial of meal and rest periods. *Franco v. Athens Disposal Co., Inc.*, case no. B203317. *Franco* is the latest in a string of decisions in which California state courts have declined to enforce class-arbitration waivers in the employment context. The decision is of interest to employers that use arbitration agreements with their California employees and, more broadly, to all businesses operating in California that use arbitration agreements.

In *Franco*, the Second District Court of Appeal relied heavily on *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), in which the California Supreme Court held that class-arbitration waivers are unenforceable as a matter of California public policy when they would "undermine the vindication of unwaivable statutory rights"—there, the right to overtime pay under the Labor Code. *Franco* expanded *Gentry*'s reasoning in two ways.

First, the *Franco* court concluded that the right to meal and rest periods, governed by the California Labor Code and administrative Wage Orders issued under the Code, "cannot be waived." The court held that the class waiver in Franco's arbitration agreement was unenforceable under the factors identified in *Gentry* for determining whether "class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration." For example, the court found that the total potential damages for meal and rest period violations were likely to be too small for the case to be pursued as an individual claim. In addition, as in *Gentry*, the court found that the employees' possible fear of retaliation could deter them from suing their employer—even though the employer had instituted a non-retaliation policy. Also, the court concluded that, because some individuals might be unaware of their legal rights, class-wide notice would be more likely to inform former and current employees of their allegedly violated rights.

Second, while in *Gentry* the California Supreme Court had been careful to separate its "unwaivable statutory rights"/public policy analysis from its discussion of unconscionability, *Franco* appears to treat those issues as one and the same.

In addition to holding that the class arbitration waiver was invalid, the *Franco* court also held that the entire arbitration agreement was unenforceable because it prohibited an employee from acting as a private attorney general under the Labor Code Private Attorneys General Act of 2004—and thus from seeking civil penalties on behalf of other current and former employees. That restriction, the court held, "imped[ed] *Gentry*'s goal of" comprehensive enforcement of the statute.

Franco makes clear that state courts in California are continuing to refuse to enforce class arbitration

waivers in employment arbitration agreements. Moreover, *Franco* is not alone. On March 17, the Second District again refused to enforce an employment arbitration agreement that required individual rather than class arbitration. *Sanchez v. Western Pizza Enters., Inc.*, case no. B203961. Thus, employers that wish to use arbitration agreements in California should carefully consider both their litigation strategy in light of *Franco* (and *Gentry*) and examine both the substance and presentation of the arbitration clauses in their contracts.

For more information about the topics raised in this Client Alert, please contact Donald M. Falk, Daphne Hsu, Jerome M.J.F. Jauffret, John Nadolenco, Archis Parasharami and Bronwyn F. Pollock.

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