Supplement to the Los Angeles and San Francisco
Daily Journal
JULY 10, 2019

TOP LABOR & EMPLOYMENT LAWYERS

James L. Morris

FIRM:
Rutan & Tucker

CITY:
Costa Mesa

While new California statutes prohibiting confidentiality provisions in settlements of harassment claims may have been intended to benefit plaintiffs by exposing alleged abusers, in practice they have had a "paradoxically inhibiting effect on settlements," said Morris.

"If you're a defendant and you think the allegations lack merit, and you can't enter into a settlement that would keep the allegations confidential, you will be more inclined to say, 'Let's let it all hang out at trial and see who wins there,'" Morris said. "It runs counter to the policy that exists in most other areas of the law in which parties are encouraged to settle their differences."

In a recent settlement negotiation in which plaintiff and defendant each claimed the other had texted sexually explicit photographs, Morris said a de facto confidentiality expectation arose, born out of the concept of "mutually assured destruction."

"In this case, because the allegations run in both directions, I think even though there is no confidentiality clause, both sides will probably keep quiet about it," Morris said. "If one side goes public, the other one will, too."

If a confidentiality clause is not available, Morris said defense attorneys simply have no incentive to place a high valuation on the sexual harassment allegations in settlement.

Morris has successfully handled virtually every type of labor and employment claim employers encounter under California and federal law.

In a case before the California Supreme Court relating to the preemptive scope of the Federal Arbitration Act, Morris is defending the enforceability of his client's arbitration agreement. As described by Morris, the case should address and resolve the "Iskanian exception" regarding whether the preemptive scope of the Federal Arbitration Act requires individual claims for "victim-specific" relief to be arbitrated in a Private Attorneys General Act action purportedly seeking only civil penalties. *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348 (2014).

ZB NA California Bank & Trust appealed the lower court's refusal to enforce the parties' arbitration agreement according to its terms. Specifically, as summarized by Morris, the plaintiff alleges her wages should be recoverable under state Labor Code Section 558, making the argument that unpaid wages are part of the civil penalties structure under PAGA, in addition to the $50 and $100 penalties per incident set in Section 558 of the labor code. *ZB,NA and Zions Bancorporation v. Superior Court*, S246711.

"We've said Section 558 cannot be read that way," Morris said. "Furthermore, if it is read that way, the statutory structure of PAGA would run afoul of the federal law command under the Federal Arbitration Act that state laws can't effectively negate the enforcement of arbitration agreements."

"Assuming the state Supreme Court says it's OK to do it the way the plaintiff wants, is that going to be viewed as a state law or rule that runs afoul of the Federal Arbitration Act and make PAGA invalid altogether when arrayed against an arbitration agreement?" Morris noted.

The Supreme Court has requested additional supplemental briefing.

— Blaise Scemama