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CASE UPDATES

Decades of strategic case development and trial experience.

ARBITRABILITY OF PAGA CASES BEFORE US SUPREME COURT

1.7.22

n an important development, the United States Supreme Court agreed to review the California Court of Appeal opinion in *Viking River Cruises v. Moriana*, B297327 (Cal. App. Sep. 18, 2020), involving a motion to compel arbitration and California's Labor Code Private Attorneys' General Act ("PAGA") statute. The issue before the court is whether a pre-dispute arbitration agreement under the Federal Arbitration Act ("FAA") purporting to require arbitration of any such claim is valid. A favorable employer decision would invalidate longstanding California law precluding arbitration of any PAGA claim, and have massive positive repercussions in favor of employers.

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WHAT IS PAGA?

PAGA is a statute that allows a single employee to act as a deputized proxy for the State of California, to pursue recovery of civil penalties on behalf of allegedly "aggrieved employees" for purported violations of the California Labor Code. Although a PAGA case is filed, prosecuted, and concluded by a private party (the employee) and their private attorney without State involvement, the State recoups 75% of the recovered penalties, with the remaining 25% issuing to the alleged aggrieved employee group. In theory, the State is the real party in interest. However, the State has little, if any, involvement, in the overwhelmingly vast majority of cases. In PAGA cases, although scores of employees are implicated, class certification is not required. Nor are such cases meaningfully screened by the State pre-filing. The PAGA process allows a single employee to bring claims on behalf of others while avoiding the class action procedure.

In recent years PAGA litigation has exploded, and plaintiff's attorneys are taking full advantage. For instance, in 2005, 700 PAGA cases were filed. Yet, by 2020, it was up to 6,000 cases per year statewide. This has caused deep concern for employers and other defendants, who fear the provisions of PAGA are not being validly used for their intended purpose, but as an avenue to overreach and extract undue sums from legally compliant employers.

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BACKGROUND AND THE *ISKANIAN* RULE

A major force behind this PAGA avalanche resulted from a 2014 California Supreme Court decision. In the *Iskanian* case, the court held that "[u]nder California law, a pre-dispute agreement in which an employee agrees to arbitrate all claims individually and to forgo her right to pursue a representative PAGA action is unenforceable as against public policy." *Iskanian v. CLS Transportation Los Angeles, L.L.C.*, 59 Cal.4th 348 (2014). This decision was issued despite the United States Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 33 (2011), and *Epic Systems Corp. v. Lewis*, 138 S.Ct. 612 (2018) which, in collective effect, held that bilateral arbitration agreements must be enforced as written under the FAA, including those containing class action waivers. This authority casts a long shadow for the FAA's broad preemptive power over any state law that interferes with the enforceability of valid arbitration agreements between parties.

Nonetheless, the California Supreme Court held in *Iskanian* that arbitration agreements are unenforceable as a matter of public policy as to representative PAGA cases. The Court reasoned that a PAGA claim is not a private dispute, but a public dispute between the State of California and an employer, and, because the State (the real party in interest) was not a signatory to the agreement, it could not be enforced, despite Epic and Concepcion's mandates.

Since that time, arbitration of any PAGA representative action – including enforcement of any PAGA waiver – has been near uniformly rejected in California. This has left California employers susceptible to a sea of expensive, protracted – and many would argue, predatory – PAGA-only litigation. Employees and plaintiff's attorneys have eschewed class action litigation in favor of PAGA litigation, which lacks the customary hurdle of class certification and the ability for the employer defendant to challenge the same. Until recently, it was also difficult, if not impossible, to argue PAGA claims were unmanageable due to highly expansive, individualized issues not amenable to efficient group litigation (as was customarily argued in class cases). Thanks to *Iskanian*, PAGA also avoided any class or representative waivers contained in employee arbitration agreements, the prevalence of which has dramatically increased following Epic and Concepcion. Meanwhile, PAGA cases still allow for large-scale exposure, expense, and the proposition of massive attorneys' fees to counsel.

WHY THIS CASE IS IMPORTANT

If the United States Supreme Court overrules *Iskanian*, as many hope and expect, this would have sweeping benefits for employers. Arbitration agreements could validly preclude litigation of representative PAGA claims, and limit it to arbitration of individual claims alone. This could dramatically stem the tide of PAGA litigation that is rapidly sweeping across the state. It is anticipated that a decision will arrive before the current Supreme Court term ends in June 2022. Although we cannot predict the outcome, the court's current composition, coupled with its generally pro-arbitration opinions of the past few years, is cause for hope amongst employers. Even federal cases upholding *Iskanian* to date have noted the apparent tension between that case, the FAA, and applicable federal jurisprudence.

Employers should take careful note, even now. If an employer has pending PAGA litigation with an employee who signed an arbitration agreement under the FAA, it should consider moving to stay the action pending a decision, and/or moving to compel arbitration in anticipation of a favorable opinion in Viking River. Employers may also consider modifying their arbitration agreements now to invoke the FAA, and also to expressly preclude pursuit of PAGA claims on any group or representative basis.

MOVING FORWARD

The attorneys at WSHB will continue to monitor the progress of this case as it weaves its way through the U.S. Supreme Court. If the Court follows its own precedent in *Epic* and *Concepcion*, arbitration agreements will become a pivotal defense to deterring and combatting predatory PAGA litigation. Should you have any questions or concerns in this regard please do not hesitate to

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reach out to a member of our employment practice team.