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EMPLOYER ARBITRATION AGREEMENTS: RECENT DEVELOPMENTS

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How Did We Get Here – Background of *Viking River Cruises*

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Private Attorneys General Act (PAGA)

- PAGA (California Labor Code Section 2698 et seq.) authorizes an "aggrieved employee" to act as a private attorney general and sue employers "on behalf of himself or herself and other current or former employees" to obtain civil penalties for violations of the California Labor Code.
- Civil suits brought under PAGA are "representative" actions where an employee sues as an "agent or proxy" of the state. As explained by the Supreme Court in *Viking River Cruises*, PAGA allows "[a]n employee who alleges he or she suffered a single violation . . . to use that violation as a gateway to assert a potentially limitless number of other violations as predicates for liability."
- Under PAGA, enacted in 2004, the State of California and any aggrieved employees split the recovered civil penalties, with the employees who suffered violations entitled to 25% of the relevant penalties and California receiving the remaining 75%. Because PAGA does not have class action requirements, and allows prevailing plaintiffs to recover attorney fees, and because under the "Iskanian rule" PAGA waivers in arbitration agreements could not be enforced, an ever increasing number of PAGA actions have been filed over the years.

Viking River Cruises, Inc. v. Angie Moriana – Background

- Angie Moriana, a former sales representative for Viking River Cruises, Inc., accepted an agreement to arbitrate any dispute arising out of her employment. The arbitration agreement contained a waiver of the "right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding" The agreement included a severability clause that if a court "finds all or part of the [waiver] unenforceable, the class, collective, representative and/or private attorney general action must be litigated in [court], but the portion of the [waiver] that is enforceable shall be enforced in arbitration."

Viking River Cruises, Inc. v. Angie Moriana – Background

- Despite the agreement, Moriana sued Viking under PAGA on behalf of herself and other employees for alleged wage and hour violations of the California Labor Code, including those she did not personally suffer.
- Viking moved to compel Moriana's "individual" PAGA claim, i.e., the claim she allegedly suffered, to arbitration and sought to dismiss the PAGA claims on behalf of others. The trial court denied the motion based on the Iskanian rule announced by the California Supreme Court in *Iskanian v. CLS Transportation*, 59 Cal 4th 348 (2014), which prohibited waivers of representative PAGA claims in arbitration agreements. The California Court of Appeal affirmed the trial court. The California Supreme Court denied review. The US Supreme Court granted certiorari late last year.

The Supreme Court Took Up the Following Question:

- Whether the Federal Arbitration Act (FAA) requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.
  - In other words: Does the FAA preempt CA law prohibiting PAGA waivers?

The Decision

The *Viking River Cruises* Decision

- The Supreme Court reversed the California Court of Appeal, finding that although the "wholesale waiver of PAGA claims" was invalid under California law, "Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim."

The *Viking River Cruises* Decision

- First, the Supreme Court noted that courts have used the word "representative" with reference to PAGA in two distinct ways.
  - A PAGA action is "representative" because it is brought by an allegedly aggrieved employee acting as the agent or proxy of the state.
  - However, PAGA claims have also been called "representative" when "they are predicated on code violations sustained by other employees."
- As to the latter use of representative, the Court found that "it makes sense to distinguish 'individual' PAGA claims, which are premised on Labor Code violations actually sustained by the plaintiff, from 'representative' (or perhaps quasi-representative) PAGA claims arising out of events involving other employees."

The *Viking River Cruises* Decision

- Within this framework, the Court first noted that "we have never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract."
- The Court rejected a "categorical rule" mandating the enforcement of waivers of "representative capacity."
- The Court noted its long-standing view that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." The Court confirmed that the principle that the FAA does not mandate the enforcement of provisions waiving substantive rights is not limited to federal statutes, but also applies to state statutes.
- The Court explained that certain nonclass representative actions "are part of the basic architecture of much of substantive law," and the FAA does not require such representative actions to be waivable by contract. It listed certain examples including as shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants, whose procedures are not inconsistent with the norms of bilateral arbitration.

The *Viking River Cruises* Decision

- However, the Court found that there was a conflict between the FAA and PAGA's "built-in mechanism of claim joinder" by which claims of others must be included in the proceeding.
- The Court held that "[r]equiring arbitration procedures to include a joinder rule of that kind compels parties to either go along with an arbitration in which the range of issues under consideration is determined by coercion rather than consent, or else forgo arbitration altogether."
- Either way, the parties are coerced into giving up a right they enjoy under the FAA. As such, the effect of the Iskanian rule "is to coerce parties into withholding PAGA claims from arbitration."

The *Viking River Cruises* Decision

- Based on this analysis, the Court found the Iskanian rule to be partly preempted by the FAA, "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."
- The Court ruled that the FAA does not broadly preempt California law precluding waivers of standing to bring PAGA claims, and so Viking's waiver of PAGA claims in the arbitration agreement could not be enforced to waive outright all PAGA "representative" claims.
- Although Viking's agreement did not have an express provision requiring arbitration of individual PAGA claims, it had a severability clause that required enforcement in arbitration of any portion of the waiver that remained valid. Because the rule that PAGA actions cannot be divided into individual and nonindividual claims was preempted, Viking was "entitled to compel arbitration of Moriana's individual claim."

The *Viking River Cruises* Decision

- Finally, the Court addressed what the lower courts should do with Moriana's "non-individual" PAGA claims once her individual PAGA claim was compelled to arbitration.
- The Court held that because PAGA civil actions must be "brought by an aggrieved employee on behalf of himself or herself and other current or former employees," meaning "a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action," PAGA provides "no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding."
- As such, once an employee's own dispute "is pared away from a PAGA action," such as when it is compelled to arbitration, "PAGA does not allow such persons to maintain suit."
- Therefore, the Court found that "Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims."

Application of *Viking River Cruises* to Pending Litigation

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Application of *Viking River Cruises* to Pending Litigation

- For pending PAGA litigation, where the plaintiff is subject to an arbitration agreement, the key considerations will be:
  - Can the agreement be interpreted to require arbitration of the plaintiff's individual PAGA claim, either based on the definition of covered claims, or other language in the agreement, such as was found in Viking River's waiver and severability provisions?
  - The waiver provision may also need to be reviewed if it speaks to what happens when the waiver is found to be invalid.
- If employers are successful in compelling arbitration of the plaintiff's individual PAGA claim, they will also be able to seek dismissal of the non-PAGA claims based on *Viking River Cruises*
- However, the plaintiff's bar will and already is challenging that aspect of *Viking River Cruises*
  - In this regard, Justice Sotomayor's concurring opinion noted that as to the Court's ruling on the plaintiff's lack of PAGA standing, "[o]f course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."
  - Mariana recently filed a petition for rehearing with the Supreme Court seeking, among other things, that the court rehear its standing ruling based on the argument that state courts, not the Supreme Court, "have ultimate authority to issue definitive state-law rulings."
  - The petition also argues that the court's view of PAGA standing is incorrect, and that Mariana still had standing even if her individual PAGA claim was compelled to arbitration and that, at most, her court PAGA claim should be stayed pending arbitration, not dismissed.
- After the Supreme Court agreed to hear *Viking River Cruises*, numerous PAGA actions were stayed pending the outcome.
- Therefore, we can expect numerous rulings in the near future from trial courts applying *Viking River Cruises* to a variety of arbitration agreements to determine if those agreements require the same result as *Viking River Cruises*, or not.
  - We can expect that however trial courts rule, many rulings will be appealed to higher courts.

Other Developments in Arbitration

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HR 4445 – The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

- At the election of the plaintiff, HR 4445 prohibits enforcement of predispute arbitration agreements or joint-action waivers in cases filed under federal, tribal, or state law that relate to sexual assault or sexual harassment.
- Defines "predispute arbitration" and "joint-action waivers" as:
  - any agreement to arbitrate a dispute that had not yet arisen at the time of making the agreement; and
  - any agreement that prohibits or waives the right of one of the parties to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum.
- The person alleging conduct constituting a sexual harassment dispute or sexual assault dispute can elect to arbitrate his or her claims.

Southwest Airlines Co. v. Saxon

- FAA Section 1 exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."
- Saxon was a ramp supervisor at Southwest Airlines who frequently loaded and unloaded baggage, airmail, and commercial cargo on and off airplanes that travel across the country.
- The Supreme Court determined the "class of workers" to which Saxon belonged by looking at "the actual work that the members of the class, as a whole, typically carry out," and concluded she belonged to a "class of workers who physically load and unload cargo on and off airplanes on a frequent basis."
- The Supreme Court determined that this class of workers is "engaged in foreign or interstate commerce."
  - "[A]ny such worker must at least play a direct and 'necessary role in the free flow of goods' across borders."
  - "Put another way, transportation workers must be actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce."

New York – CPLR Section 7515 – Attempted Ban of Arbitration of Discrimination Claims

- The 2018-2019 State Budget was signed into law by New York Governor Andrew Cuomo adding Section 7515 to the New York Civil Practice Law and Rules (CPLR).
  - This provision stated that no written contract shall contain "any clause or provision . . . [requiring] that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment," and that any "mandatory arbitration clause" with respect to such claims is null and void "except where inconsistent with federal law."
- CPLR 7515 applied only to predispute arbitration agreements; parties remained free to agree to arbitration claims after a dispute arises. Collective bargaining agreements could continue to require arbitration of sexual harassment claims.
- In 2019, New York expanded the prohibition on predispute arbitration agreements to all claims of discrimination.

New York – CPLR Section 7515 – Attempted Ban of Arbitration of Discrimination Claims

- Courts have found that CPLR 7515 is inconsistent with federal law:
  - *Latif v. Morgan Stanley & Co. LLC, et al.*, 18-cv-11528 (S.D.N.Y. June 26, 2019) (compelling arbitration and explaining that CPLR 7515 was preempted because it was inconsistent with federal law).
  - *Whyte v. WeWork Cos., Inc.*, No. 20-cv-1800-CM (S.D.N.Y. June 11, 2020) (compelling arbitration of gender discrimination and retaliation claims).
  - *Fuller v. Uber Tech. Inc.*, No. 150289/2020, 2020 NY slip op. 33188(U) (N.Y. Sup. Ct. Sept. 25, 2020) (adopting reasoning in *Latif* and granting motion to compel arbitration of sexual harassment claim because FAA preempted CPLR 7515).
  - *Gilbert v. Indeed*, No. 20-3826, 2021 WL 169111 (S.D.N.Y. Jan. 19, 2021) (FAA preempted CPLR 7515 prohibiting mandatory arbitration clauses for sexual harassment claims).

New Jersey – SB 121 – Attempted Broad Ban on Employment Arbitration

- New Jersey passed a law (Senate Bill 121, signed March 18, 2019) making New Jersey the first state to enact broad-brush legislation that significantly restricted employers from, among other things, enforcing certain mandatory arbitration (and nondisclosure provisions) in employment contracts and settlement agreements:
  - "A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable."
  - "No right or remedy under the 'Law Against Discrimination,' 12 P.L.1945, c.169 (C.10:5-1 et seq.) or any other statute or case law shall be prospectively waived."
- Applied to "all contracts and agreements entered into, renewed, modified, or amended on or after the effective date."

New Jersey – SB 121 – Attempted Broad Ban on Employment Arbitration

- Courts have found that SB 121 is preempted by the FAA:
  - *Janco v. Bay Ridge Auto. Mgmt. Corp., et al.*, MON-L-1967-20 (N.J. Super. Ct. Jan. 22, 2021) (granting motion to compel arbitration of an NJ LAD claim despite SB 121).
  - *N.J. Civil Inst. and Chamber of Com. of the U.S. v. Gurbir Grewal*, 19-cv-17518 (D.N.J. Mar. 25, 2021) (granting permanent injunction enjoining NJ AG from enforcing SB 121 with respect to employer arbitration agreements because it was preempted by the FAA).
  - *Antonucci v. Curvature Newco, Inc.*, No. A-1983-20, 2022 WL 453465, at *1 (N.J. Super. Ct. App. Div. Feb. 15, 2022) (finding that FAA preempted 2019 amendment to NJ's LAD).

California AB 51 (LABOR CODE SECTION 432.6)

- On October 10, 2019, AB 51 (Labor Code Section 432.5) signed by Governor Gavin Newsom and effective January 1, 2020, prohibits California employers — not subject to the FAA — from requiring employees to sign an arbitration agreement as a condition of employment.
- Section 432.6 applies to contracts entered into, modified, or extended on or after that date. It prohibits employers from requiring arbitration of claims for violation of FEHA or the Labor Code as a condition of employment or continued employment, even if the employee can opt out of the agreement or receives a benefit by accepting the agreement. Cal. Lab. Code § 432.6(a).
- In addition, it prohibits an employer from threatening, retaliating against, discriminating against, or terminating an applicant or employee because of a refusal to agree to arbitration. It also provides for civil and criminal penalties against employers who include a compulsory arbitration clause as a condition of employment. Labor Code Section 433 made violation of Section 432.6 a misdemeanor. However, the law also states that it is not intended to invalidate a written arbitration agreement that is enforceable under the FAA.

Chamber of Commerce v. Bonta, 13 F.4th 766 (9th Cir. 2021)

- The Chamber of Commerce challenged the law in federal court, and the district court temporarily enjoined enforcement of the law on December 30, 2019, before it went into effect.
- On February 7, 2020, the district court issued a preliminary injunction finding it likely that the Chamber of Commerce would prevail in its argument that the FAA preempts Section 432.6.
- The State of California appealed, and on September 15, 2021, the Ninth Circuit vacated the preliminary injunction and ordered the district court to issue a narrower preliminary injunction that enjoins only the enforcement of civil and criminal sanctions for violation of Section 432.6.

Chamber of Commerce v. Bonta, 13 F.4th 766 (9th Cir. 2021)

- Holding: California's prohibition of mandatory arbitration of FEHA and Labor Code claims as a condition of employment—even if including an opt-out provision—is not preempted by the FAA. But the civil and criminal penalties prescribed by Sections 433 and 12953 are preempted by the FAA because they punish employers for the act of executing arbitration agreements.
- Reasoning: Labor Code Section 432.6 merely regulates preagreement employer behavior and does not invalidate or render unenforceable executed arbitration agreements governed by the FAA.
- Dissent: Majority's decision is inconsistent with California contract law, US Supreme Court precedent, and the precedent of other circuits.
- Status: On October 20, 2021, the Chamber of Commerce petitioned for rehearing en banc. The Ninth Circuit stayed en banc proceedings pending the result in *Viking River Cruises*. Although *Viking River Cruises* has now been decided, as of today no further action has been taken by the Ninth Circuit. As the Ninth Circuit has yet to issue a formal mandate, the district court's injunction remains in effect.

SB 762 Speeds Up Arbitration Cases

- Requires consent from all parties before the adjustment of deadlines for the payment of fees and costs due to the arbitrator during the pendency of the arbitration.
- Requires an arbitration provider to issue an invoice for any fees and costs to all parties and specify the final due date of the initiation fees as soon as a worker or consumer completes the filing requirements.
- Seeks to prevent companies from slowing down arbitration cases by withholding payment of arbitration fees.
- The law requires that employers who are obligated to pay fees and costs before arbitration can proceed, or, during the pendency of an arbitration, if the employer does not pay the arbitration fees within 30 days of the date they are due, the employer is in breach of the agreement, in default of arbitration, and waives its right to compel arbitration. Other sanctions can also apply.

Practical Considerations

Practical Considerations

- *Viking River Cruises* gives California employers with arbitration agreements the opportunity (subject to the terms of those agreements) to compel employees to arbitrate their individual PAGA claims and prevent the nonindividual PAGA claims from being maintained.
- In addition to assessing whether employers can now move to compel pending PAGA actions to individual arbitration, all employers with arbitration agreements should review with legal counsel what changes to agreements are required or prudent in light of *Viking River Cruises*. In particular, employers should review the current wording of arbitration agreements as to covered claims, excluded claims, representative action waivers, and severability provisions.
- For employers that have not implemented arbitration agreements or programs, *Viking River Cruises* creates another potential benefit to arbitration that such employers should consider.

Practical Considerations

- Under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, employers should:
  - Consider whether to exclude from arbitration claims for sexual harassment or assault, or to build the election to proceed in court on such claims into the agreement;
  - Require the individual to sever such claims into a separate case from arbitrable claims.
- Employers should also consider potential revisions to arbitration agreements to counter potential mass arbitration filings by the plaintiff's bar in response to the enforcement of class waivers or requirements to individually arbitrate PAGA claims.
- Employers should also anticipate attempted legislative changes to PAGA that the plaintiff's bar will likely seek. In this regard, Justice Sotomayor's concurring opinion noted that, if the Supreme Court's understanding of PAGA standing "is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits."

Our Global Reach

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Asia Pacific
Europe
Latin America
Middle East
North America

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Dallas
Dubai
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Hartford
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Miami
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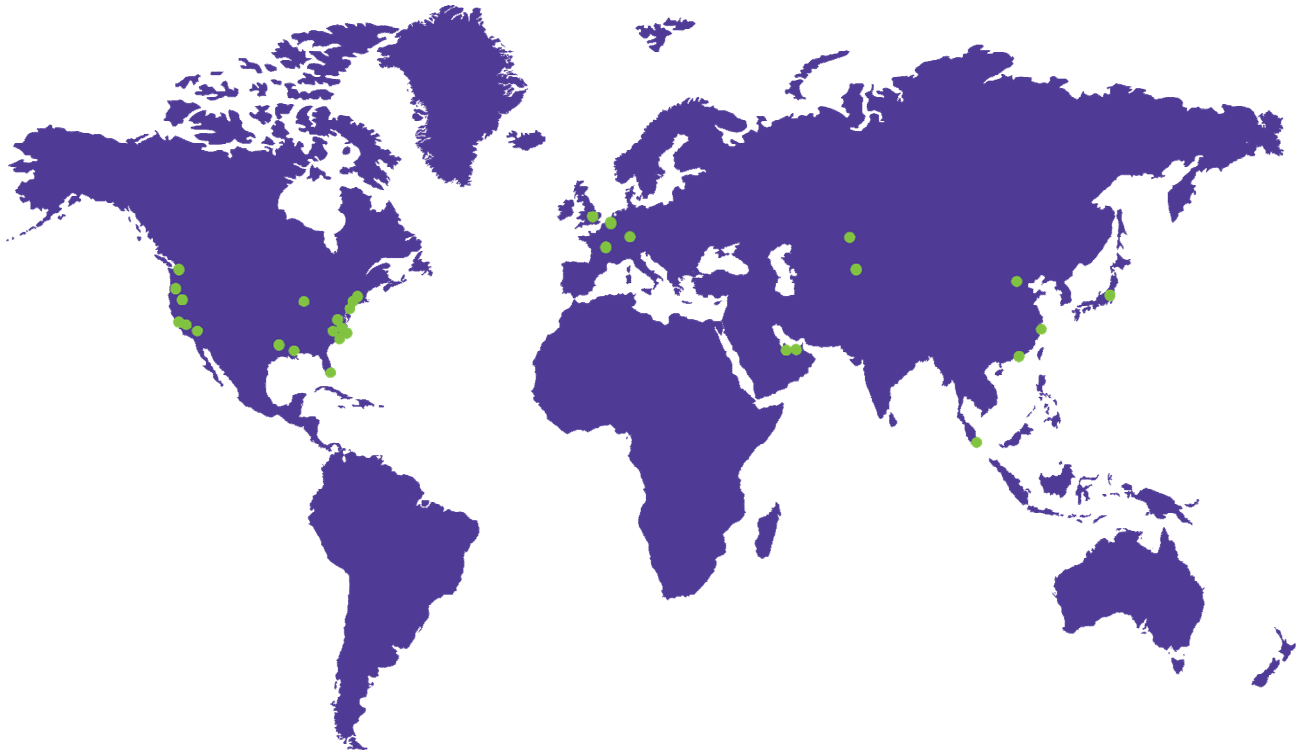

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THANK YOU