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GOOD NEWS FOR CALIFORNIA EMPLOYERS!!!!
ARBITRATION AGREEMENTS CAN LIMIT PAGA ACTIONS

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On June 15, 2022, the Supreme Court of the United States (SCOTUS) issued the greatly anticipated decision in Viking River Cruises, Inc. v. Moriana, holding that California employers require their employees who entered into a valid arbitration agreement containing appropriate waiver language to bring their individual Private Attorneys General Act (PAGA) claims in arbitration.

This is a ***big win*** for California employers in their ability to limit their exposure to PAGA representative claims through use of arbitration agreements.

What is PAGA

PAGA, found in the Labor Code, enables "aggrieved employees" to bring an action against their employer and seek significant penalties for alleged violations of the labor code which the "aggrieved" employee-Plaintiff claims to have suffered. In addition, the Plaintiff can bring claims for violations that other "aggrieved employees" allegedly suffered, even if the Plaintiff did not personally suffer from all of the claimed violations.

The Plaintiff acts as a "private attorneys general" for the State of California, acting as the State's agent. The penalties that can be awarded in PAGA actions are substantial – starting at $100 and can increase to $200 and go up to $1,000 per violation, per employee, per pay period, covering a one year period of time.

In a typical PAGA action, the Plaintiff claims anywhere between 5 to 10 various labor code violations. When the PAGA action is concluded 75% of the collected penalties distributed to the California Labor and Workforce Development Agency (LWDA), and the remaining 25% is distributed among the aggrieved employees. The Plaintiff also recovers their attorneys' fees and costs which are usually substantial.

Waivers in Arbitration

Previously the California Supreme Court held that arbitration agreements which included a waiver of PAGA representative actions was against public policy and unenforceable – so an employee could not be compelled to arbitrate their PAGA claims. (Iskanian v. CLR Transp. Los Angeles, LLC, 59 Cal.4th 348 (2014).

Case History

Angie Moriana [Plaintiff] signed an arbitration agreement when she was hired by Viking River Cruises. The agreement provided that any dispute arising out of her employment would be submitted to arbitration. The agreement contained a "Class Action Waiver" providing that in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action. The arbitration agreement also contained a provision that stated if the class action waiver were found invalid, any class, collective, representative, or PAGA action presumptively would be litigated in court (severability clause). But, under that severability clause, if any "portion" of the waiver remained valid, it would be "enforced in arbitration."

After her employment ended, Plaintiff filed a PAGA action alleging individual PAGA claims, as well as "representative" PAGA claims on behalf of other aggrieved employees. Viking River Cruise sought to compel the Plaintiff's individual claims into arbitration and to dismiss her representative claims, based on the arbitration agreement.

The trial court denied Viking River Cruises' motion to compel arbitration, holding that waivers of PAGA are contrary to public policy and that PAGA claims cannot be split into arbitrable individual claims and non-arbitrable representative claims. This decision was based on the California Supreme Court's decision in the Iskanian v. CLS Transp. Los Angeles case. The Court of Appeal affirmed the trial court's decision denying the motion to compel, and Viking River Cruise petitioned the United States Supreme Court.

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Issue Before SCOTUS

The issue in Viking River Cruises was whether an arbitration agreement between a California employer and its employees can include a provision where the employee is required to bring their individual PAGA claim in an arbitration proceeding (similar to the class action waiver).

The SCOTUS decision noted that California law recognized PAGA actions as a "representative action" in two distinct ways. A PAGA action is "representative" because one employee files suit on behalf of the State of California – acting as its "agent"; the action is also "representative" in that the Plaintiff is a "representative" for the other employees alleged to be aggrieved by the claimed labor code violations.

The Court also discussed when an employee would have "standing" to bring a PAGA action -as an individual and as a representative —meaning does the employee have the right to bring the claim on behalf of other employees, not just themselves – e.g. "standing" to sue.
The Decision

The SCOTUS HELD that Viking River Cruise was entitled to enforce the agreement insofar as it mandated arbitration of the Plaintiff's individual PAGA claim.

As to the non-individual claims, SCOTUS stated that because of PAGA's standing requirement—that a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action—once the Plaintiff's "individual" claims are compelled to arbitration "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims…." Thus, the remaining "representative" claims were dismissed.

What Does this Mean & What's Next

Employers with properly drafted arbitration agreements entered into with their employees will likely be able to compel arbitration of plaintiffs' individual PAGA claims and seek dismissal of any non-individual PAGA claims; however, it is anticipated that Plaintiffs will continue to oppose arbitration in a variety of ways:

1. If there is a current case pending before the court which has been actively litigated and not arbitrated, the Plaintiff may assert that the employer has waived its right to compel arbitration by not seeking to do so sooner;

2. In a pre-litigation matter, if a current arbitration agreement has an express or implied contractual carve-out relating to PAGA, then it could be argued that any PAGA claims are outside the scope of the agreement's "covered claims;"

Also, it should be noted that California's AB 51 provides that an employer may not require applicants or employees to enter into mandatory arbitration agreements as a condition of employment, continued employment, or the receipt of any employment-related benefit under FEHA or the Labor Code. This bill was to take effect on January 1, 2020, but after litigation challenging AB 51 was filed, the case has been deferred pending the Viking River Cruise decision. We will have to wait and see what is next with AB 51.

It is also anticipated that the California Legislature will seek to revise the PAGA statute to alter the PAGA standing requirement to allow the non-individual PAGA claims to be litigated once an individual PAGA claim has been compelled to arbitration.

What Should I Do Now?

- Employers should review their current arbitration agreements to ensure they require arbitration of employees individual PAGA claims consistent with Viking River Cruise, and that the agreement does not contain any language that could be construed as excluding PAGA claims or requiring litigation of individual PAGA claims in the event a complete "representative waiver" is found invalid.

- Employers without arbitration agreements should consider implementing arbitration agreements as part of their employment practices.

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