CLIENT ALERTS & INSIGHTS

Arbitration May Prevail Over California's PAGA: Supreme Court Hears Oral Arguments in Viking River Cruises

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On March 30, 2022, the Supreme Court heard oral arguments in Viking River Cruises v. Moriana, in which the Court is poised to decide whether the Federal Arbitration Act compels enforceability of an individualized arbitration agreement in the face of a claim under California's Private Attorney General's Act ("PAGA"). PAGA allows individual employees to bring claims on behalf of the state for various labor code violations as to themselves and similarly situated "aggrieved employees, serving to exempt PAGA claims from arbitration agreements and class waivers."

The case centers on Viking's efforts to enforce an arbitration agreement in which Moriana agreed to arbitrate "any dispute" arising from her Viking employment and further agreed that the arbitration would be bilateral, i.e. with no "class, collective, representative or private attorney general action" asserted (see prior analysis here). This precise issue was previously addressed by the California Supreme Court in 2014 in *Iskanian v. CLS Transportation*, which was likewise decided in favor of the employee. *Iskanian*, however, was decided by the California Supreme Court before the U.S. Supreme Court demonstrated its consistently broad deference to the Federal Arbitration Act's ("FAA") recognition of the enforceability of arbitration agreements. In 2018, the U.S. Supreme Court held in *Epic Systems v. Lewis* that arbitration agreements that preclude class and collective actions do not violate employees' rights under Section 7 of the National Labor Relations Act (see alert here). The Supreme Court's conservative composition and targeted questioning during oral arguments demonstrate that the Court may extend its analysis in *Epic Systems* to claims under PAGA.

At oral argument, the Court's liberal justices appeared inclined to affirm the California Court of Appeal's holding in favor of the employee and precluding mandatory arbitration of PAGA claims, with Justice Sotomayor asserting that forcing arbitration of PAGA claims is akin to "precluding the state from having an effective enforcement mechanism" and pointedly accusing Viking River of "banking on destroying the state's mechanism for enforcing … labor law violations." Likewise, Justice Kagan posited that forced arbitration of PAGA claims rejects California's decision that PAGA claims are the best mechanism to enforce the state's rights "even though that's the way that the state has decided best serves its sovereign interests." Paul Clement, advocating for Viking, stated that such state policy does not have free reign in the face of limits in the FAA and Supreme Court precedent.

The Court's conservative wing did not appear to share similar skepticism regarding Viking's arguments. Chief Justice Roberts observed that, contrary to Moriana's claim that mandating arbitration effectively waives a PAGA claim, a PAGA plaintiff does "have a right to pursue the

substantive claim" - albeit through a different mechanism. And Justice Alito appeared to suggest that finding arbitration agreements enforceable in the face of PAGA claims was supported by the Court's holding in *Epic Systems*. Given that the Court's ideological balance has only grown more conservative since *Epic Systems* was decided, the Court appears likely to find arbitration agreements enforceable with respect to PAGA claims.

If the Court does uphold Viking's arbitration agreement, California employers will have the option of using arbitration agreements to foreclose large, representative PAGA actions. However, employees will still be able to pursue their individual PAGA claims at arbitration, and the state itself may continue to enforce the California Labor Code violations. Other states have taken steps to implement PAGA-like laws which, in many wage and hour cases, drastically increase the settlement value of both individual and class/collective claims, but - to date - none of them have been implemented (see prior update here). That impact will likely be mitigated, should the Court in *Viking River Cruises* find that PAGA claims are properly subject to and limited by arbitration agreements. Benesch's Labor and Employment group will closely monitor *Viking River Cruises*, and will provide updates as the case is ultimately decided.

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