CLIENT ALERTS & INSIGHTS

California Court Distinguishes U.S. Supreme Court Ruling Reaffirms PAGA Claims Are Not Subject To Mandatory Arbitration/N.J. Amendment Invalidates Mandatory Arbitration

MARCH 28, 2019

Authors: W. Eric Baisden, Adam Primm

Last month, a California Court of Appeal reaffirmed that California's Private Attorney General Act ("PAGA") is outside the scope of the Federal Arbitration Act ("FAA") and the Supreme Court's 2018 opinion in Epic Systems v. Lewis (click to see our summary of Epic Systems), confirming what many practitioners already believed.

In 2014, the California Supreme Court in *Iskanian v. CLS Transportation*, while upholding the general enforceability of class waivers in mandatory employment arbitration agreements, exempted PAGA actions from the actions subject to such arbitration agreements. The U.S. Supreme Court's decision in *Epic Systems*stated that class and collective waiver provisions in arbitration agreements that employees must sign as a condition of employment do not violate the National Labor Relations Act.

Despite this seeming contradiction, many anticipated that PAGA actions would remain separate from the application of *Epic Systems* due to its unique nature as a government, qui tam-like action (click to see our post-*Epic Systems* guidance). Under PAGA, the individual is merely a deputized agent of the government; the government actually possesses the claims. Thus, the individual cannot waive the state's procedural rights to a group action under PAGA.

In *Correia v. NB Baker Electric, Inc.*, the California Appellate Court confirmed this analysis by finding that *Epic Systems* did not address the conclusion of *Iskanian* that claims for civil penalties brought on behalf of the government under PAGA were not waived by an employee's arbitration agreement. Relying on the qui tam aspect of PAGA rendering the aggrieved employee a "proxy or agent" of the state, the court cemented PAGA's status as separate and exempt from arbitration agreement waivers. Because the state did not consent to a waiver, the PAGA claims were not subject to a motion to compel arbitration.

New Jersey Tries Too

On the other coast, New Jersey recently enacted an amendment to its Law Against Discrimination, seeking two significant restrictions on written agreements between employers and employees.

The first is a provision rendering unenforceable any "provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment" and further prohibits any prospective waiver of any "right or remedy" under the law. While the terms are vague and undefined, this provision is clearly aimed at restricting the application

of mandatory arbitration to claims of discrimination, retaliation, or harassment. The provision is expected to be challenged as preempted by the FAA, likely under the Supreme Court's precedent in *Epic Systems*.

The other provision is unrelated to arbitration, but is further evidence of the impact of the "Me Too" movement and is worth discussing here. This portion of the amendment renders unenforceable against an employee any nondisclosure provision in an employment contract or settlement agreement that has the "purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." Essentially, the amendment renders any agreement to maintain the confidentiality (through a confidentiality or non-disparagement restriction) of the underlying details of a claim unenforceable by an employer in New Jersey.

If the parties nonetheless agree to confidentiality, the employee has discretion to decide whether or not to abide by the restriction. The employee may also decide whether to enforce the provision against an employer so long as the employee has not already revealed details of the claim rendering the employer reasonably identifiable.

The impact of this amendment could be widespread. Plaintiffs' attorneys have expressed concern that the amendment will reduce the likelihood of early settlements to avoid publicity of a claim and expose alleged victims to reliving claimed misconduct through litigation. Similarly, employers are discouraged from settling defensible cases for the purpose of maintaining confidentiality and avoiding either disruption or negative publicity that accompanies litigation.

For more information, please contact a member of Benesch's Labor & Employment Practice Group:

W. Eric Baisden at 216.363.4676 or ebaisden@beneschlaw.com;

Adam Primm at 216.363.4451 or aprimm@beneschlaw.com.