CLIENT ALERTS & INSIGHTS

Is the end near? Supreme Court set to rule on whether California's PAGA law runs afoul of the Federal Arbitration Act

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Generally, the Federal Arbitration Act ("FAA") has routinely been enforced by the balance of the nation's courts over the years, as it codifies accepted deference to parties' contracts and agreements and has been held to preempt most conflicting state laws. That fact notwithstanding, the enforceability of arbitration agreements is not assumed in all cases. Indeed, just over three years ago, the federal circuits were split on whether arbitration agreements that preclude class and collective actions violate Section 7 of the National Labor Relations Act's protection of, among other rights, workers' right to protected, concerted activity. In *Epic Systems v. Lewis*, the Supreme Court resolved the split by ruling that they do not (see prior alert here). A year later, the Supreme Court decided in *Lamps Plus Inc. v. Varela* that arbitration agreements must explicitly provide for class arbitration in order for that procedural process to be available and finding that courts and parties could not infer consent to class arbitration where an agreement was silent or ambiguous on the issue (see prior analysis here).

Since *Epic Systems*, both sides of the labor-management divide have wondered when, not if, the Supreme Court will decide whether laws like California's Private Attorney General's Act (PAGA), which allow individual employees to bring claims on behalf of the state for various labor law violations, and which prohibit agreements mandating arbitration, could survive a challenge under the FAA. This issue has continued to gain attention, with a number of states proposing their own PAGA laws, some of which provide even greater protections to workers than California's (summary here).

Under PAGA, the California Supreme Court, prior to *Epic Systems*, held in *Iskanian v. CLS Transportation*, that PAGA actions were exempt from class waivers in arbitration agreements despite the otherwise enforceability of such agreements. The California Supreme Court held that PAGA claims are exempt because they are brought on behalf of the government and not owned by the individual employee party to the arbitration agreement. In 2019, with *Epic Systems* now the law of the land, the California Supreme Court upheld *Iskanian* in *Correia v. NB Baker Electric, Inc.*, again finding that PAGA claims are outside the scope of the FAA and class and collective waivers in such agreements (analysis here).

Finally, a resolution to this open question appears at hand.

On December 15th, the Supreme Court agreed to hear *Viking River Cruises Inc. v. Angie Moriana*, which 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. In short, Viking is asking the Supreme Court to enforce the arbitration agreements signed by their employees in full. This would preclude their employees' ability to avail themselves of the procedural

mechanism created by PAGA which allows employees' to do the state's bidding and that, in many wage and hour cases, drastically increases the settlement value of both individual and class/collective claims. A decision in Viking's favor would be a significant victory for California employers who favor the use of arbitration agreements. And, regardless of the outcome, the Supreme Court's decision will certainly instruct other states on the future of PAGA-like laws.

Benesch has long been on the front line reporting developments under California's PAGA, including the cases that have interpreted it, and other states' efforts to pass similar laws. As with prior developments in the law regarding arbitration agreements and PAGA, Benesch's Labor and Employment group will closely monitor *Viking River Cruises* as the case is briefed, argued, and ultimately decided, and will provide updates as the case progresses.

Please reach out to Benesch's Labor & Employment Practice Group for more information.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.

Joseph R. Blalock at **jblalock@beneschlaw.com** or 614.223.9359