CLIENT ALERTS & INSIGHTS

States Seeking to Expand Availability of Private Attorney General Laws to Combat Arbitration Agreements

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Authors: W. Eric Baisden, Adam Primm

In May 2018, the Supreme Court upheld the validity of arbitration agreements containing class action waivers in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), resolving a circuit split and ending a six-year dispute regarding the issue. In that case, Justice Gorsuch wrote that the Federal Arbitration Act required enforcement of arbitration agreements providing for individualized proceedings (see our analysis of *Epic Systems* here). In April 2019, the Supreme Court further found that waivers of class arbitration must be explicitly stated in arbitration agreements. *Varela v. Lamps Plus*, 139 S. Ct. 1407 (2019) (see our analysis of *Lamps Plus* here and here).

However, despite its strong statement in favor of the enforceability of arbitration agreements and class action waivers, it was widely expected that *Epic Systems* would not alter the California Private Attorney General Act's ("PAGA") independence from such agreements and waivers. In March 2019, a California Appellate Court confirmed this belief in *Correia v. NB Baker Electric, Inc.*, 32 Cal. App. 5th 602 (Cal. Ct. App. 2019), when it found that *Epic Systems* did not alter the California Supreme Court's 2014 decision in *Iskanian v. CLS Transportation*, 59 Cal. 4th 348 (2014), which found that PAGA actions were exempt from class waivers in arbitration agreements, despite the enforceability of such agreements (see our analysis of *Correia* here). PAGA claims are exempted because they are brought on behalf of the government and are not owned by the individual employees bringing them. Instead, PAGA actions are akin to qui tam suits in which the aggrieved employee acts as a proxy or agent of the state to bring the action on behalf of all aggrieved employees.

With that background, it is unsurprising that many states are exploring their own PAGA-based laws. Proposals are pending at various stages of the legislative process in New York, Massachusetts, Vermont, Washington, and Maine, with additional legislation in Connecticut in an early drafting stage. While PAGA in California is largely limited to wage and hour violations brought by individual aggrieved employees on behalf of the state, these other proposals are broader. The proposals in Washington, Maine, and Vermont all apply to anti-discrimination laws, as well. The proposals in New York, Maine, and Vermont also permit unions or workers' advocacy groups to bring actions on behalf of the state.

Despite these expansions, the underlying basis of these PAGA-like proposals follows the same basic premise: they allow individuals to bring actions on behalf of the state. Washington State Representative Drew Hansen, who sponsored Washington's PAGA-like proposal, compared it to the federal False Claims Act, another qui tam statute that allows individuals to bring actions on behalf of the public. This structure provides additional benefits to employees. First, it allows an aggrieved employee to leverage their colleagues and assert representative actions that put additional pressures and burdens on the employer, which opponents claim allows plaintiffs' attorneys to

threaten PAGA litigation to secure settlements. Second, it allows employees and their attorneys to circumvent class waivers in arbitration agreements that otherwise undercut their leverage and bargaining position.

The proposed legislation is not surprising. After *Epic Systems*, many anticipated PAGA copycats in other states to blunt the strength of class waivers in arbitration agreements. While none of the proposals are law (yet), it shows that class waivers will continue to face challenges.

We will continue to monitor progress and provide updates on further developments. If you have any questions, contact a member of Benesch's Labor & Employment Practice Group.

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

Adam Primm at 216.363.4451 or aprimm@beneschlaw.com.