SPECIAL ALERT: U.S. SUPREME COURT TO CONSIDER WHETHER TO ALLOW WAIVER OF PAGA REPRESENTATIVE CLAIMS IN ARBITRATION AGREEMENTS

The United States Supreme Court agreed on December 15, 2021 to review *Viking River Cruises, Inc. v. Moriana*, a case challenging California's ban on arbitration agreements that waive employees' right to bring representative actions under the Private Attorney General Act (PAGA). A decision is not expected before the summer of 2022, and of course it is not clear how the Court will decide the case. However, the Court's decision *could* have a significant impact on litigation of wage and hour cases in California. If the Court agrees with the employer, it could pave the way for employers and employees to enter into agreements to arbitrate PAGA claims on an *individual* basis and for employees to waive the right to bring *representative* PAGA actions. While we await a decision, employers may wish to consult legal counsel about potential changes to their arbitration agreements. Employers may consider including PAGA claims within the scope of arbitrable disputes and including an employee waiver of the right to bring representative actions in anticipation of a possible ruling from the Supreme Court that could allow enforcement of such agreements.

The California Labor Code allows employees to sue their employers to recover unpaid wages under specified circumstances. Pursuant to PAGA, employees may *also* bring representative actions (similar to class actions) on their own behalf and on behalf of other employees to recover *penalties* associated with Labor Code violations by standing in the shoes of the state and acting as "private attorneys general." In PAGA actions, 75% of any penalty awarded goes to the state and 25% is awarded to the employees.

After PAGA was passed in 2004, some employers attempted to include PAGA claims in their arbitration agreements with employees, pursuant to which employees agreed to arbitrate any PAGA claims on an individual basis and to waive the right to bring representative PAGA Actions. However, in 2014, the California Supreme Court held (in *Iskanian v. CLS Transportation Los Angeles, LLC*) that any prospective waiver of the right to bring a PAGA action – including in an arbitration agreement – was against California public policy and was unenforceable. *Iskanian* has been applied to forbid enforcement of arbitration agreements in which employees agree to waive their right to bring representative PAGA actions.

Around the same time, several U.S. Supreme Court cases clarified that the Federal Arbitration Act (FAA) requires enforcement of otherwise valid arbitration agreements between employees and employers that include waivers of the right to bring class actions. (*AT&T Mobility LLC v. Concepcion* (2011) and *Epic Systems Corp. v. Lewis* (2018).) Consequently, an employer in California might be able to enter into an arbitration agreement with an employee that requires individual arbitration of a claim for a violation of the Labor Code and waives the employee's right to bring a *class action* for violation of the Labor Code but – under *Iskanian* – cannot enter into a similar arbitration agreement regarding individual arbitration of a PAGA action arising from the same alleged Labor Code violation. The employer might still be forced to litigate a PAGA representative action in court. And indeed, so-called "PAGA only" representative actions have multiplied in recent years, likely because of this.

In *Viking River*, the employer argues that the U.S. Supreme Court's rationale in *Concepcion* and *Epic* applies equally to PAGA representative actions and asks the Court to hold that the FAA requires enforcement of arbitration agreements in which employees agree to waive their right to bring PAGA representative actions. The Plaintiff, on the other hand, argues that PAGA representative actions are

procedurally and substantively different from class actions because the employee is standing in the shoes of the state, and posits that the California Supreme Court correctly concluded employees cannot waive PAGA rights, including the right to bring representative actions. Thus, Plaintiff argues, arbitration agreements purporting to waive those rights are not enforceable.

The Supreme Court has agreed to address the specific question of whether the FAA "requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." The Court previously denied petitions to consider similar questions. It is not clear why the Court has altered course now, although recent changes to the composition of the Court could be the answer.

A decision is not expected before the summer of 2022. In the meantime, employers may wish to consult legal counsel about changing (or preparing to change) their approach to arbitration of PAGA cases. Employers whose arbitration agreements do not include PAGA claims or waivers of the right to bring representative actions may wish to revise their agreements; and employers whose arbitration agreements already cover PAGA claims may choose to move to compel arbitration of those claims in anticipation of a possible change in the law.

Employers should remember that there is still a question concerning the enforceability of a California statute that aims to prohibit employers from *requiring* employees or applicants to enter into arbitration agreements related to disputes under the Fair Employment and Housing Act and the California Labor Code – *including* PAGA claims (California Labor Code Section 432.6). If enforceable, that statute would prohibit employers from making arbitration of employment claims a mandatory condition of employment. However, the Federal Ninth Circuit Court of Appeals is still considering this question. (For more information, see our Special Alert on *Chamber of Commerce v. Bonta*.) Thus, even if the Supreme Court concludes arbitration agreements can include waivers of PAGA representative actions, there may still be a question about whether employers can *require* employees to enter into these arbitration agreements.

A final note: California voters may be presented with a choice of whether to repeal PAGA altogether in November 2022. Proponents of the initiative are currently seeking the requisite number of signatures to put the question on the ballot.

In sum, there are numerous possibilities for change to PAGA litigation in the next year. Rest assured that WTK will keep you updated on all of them. In the meantime, feel free to reach out to any member of the WTK team if you have questions about how these issues impact your business and whether any changes are needed in your policies or arbitration agreements.

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