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Supreme Court Hears Oral Argument in Advance of Major Ruling on the Arbitrability of PAGA Claims

California Employment Law Update Blog on **April 5, 2022**

Last week, the United States Supreme Court heard oral argument in *Viking River Cruises, Inc. v. Moriana*, Case No. 20-1573,_ U.S. _ (2022). The case addresses whether the Federal Arbitration Act ("FAA") requires the enforcement of bilateral arbitration agreements that preclude an employee from bringing claims under the Private Attorneys General Act ("PAGA") on a representative basis. The plaintiff, Moriana, sued Viking, alleging a number of claims, including failure to pay wages. The parties' arbitration agreement precludes class and collective claims but Moriana proceeded under PAGA, which allows workers to sue their employers on the State's behalf for alleged violations of California labor law. In 2014, the California Supreme Court held that because PAGA actions are brought on behalf of the state, employees cannot individually waive their right to bring these claims. Often, this means limited and even minor Labor Code violations become grounds for costly litigation that encompasses all of an employer's non-exempt California workforce.

At oral argument, the questions focused on state sovereignty, preemption, the compatibility of large PAGA-like claims in the intentionally streamlined context of arbitration, claim preclusion, and whether PAGA provides substantive versus merely procedural rights. Justices Kagan and Sotomayor focused their questioning on areas that would keep PAGA claims in court. For example, Justice Sotomayor questioned the notion that PAGA is an "intentional evasion" of the holdings in prior Supreme Court cases that approved class action waivers in the consumer and employment contexts. Justice Kagan challenged whether it is appropriate to override a state's decision to enforce its labor laws when "that's the way the state has decided best serves its sovereign interests."

Some of the more conservative Justices' questions, on the other hand, appeared focused on reconciling PAGA with the Court's prior pro-arbitration rulings. For example, Justice Barrett questioned whether California could create other legislative bypasses to the FAA by characterizing rights as substantive, as opposed to procedural. Similarly, Justice Alito questioned whether it would be appropriate to view a PAGA claim as "a set of claims integrated into a single action by an implicit rule of claim joinder," drawing a comparison to class claims.

Viking River Cruises' counsel repeatedly emphasized the important point that an arbitrator easily could deal with an individual's claims for lost wages, but when the issue becomes resolving several different violations on behalf of the entire salesforce and employer-wide discovery, then arbitration as an efficient dispute resolution mechanism would be gutted in practice. He noted, as California employers are well aware, that dozens of PAGA claims are being filed each day and they look just like class actions (*e.g.*, the ones the parties agreed would be brought on an individual basis in arbitration).

The Supreme Court likely will issue an opinion in *Viking River Cruises* in June or July of this year. We will provide any updates as soon as they become available.

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