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It May Be Time To Update Those Arbitration Agreements Again!

California Employment Law Update on **June 5, 2023**

Back in the "good old days," arbitration agreements barred just about any type of civil litigation that was filed in court. Then, as we reported in 2014, the California Supreme Court determined that Private Attorneys General Act ("PAGA") claims are immune from arbitration in *Iskanian v. CLS Transp. Los Angeles, LLC* – which, unsurprisingly, led to an avalanche of PAGA claims being filed as plaintiffs' lawyers scrambled to make their cases arbitration-proof (at least as to those pesky PAGA claims).

In response to *Iskanian*, some employers immediately and dutifully revised their arbitration agreements to exclude PAGA claims. For the record, we remained skeptical of the durability of *Iskanian* and generally did not advise employers to surrender on this issue – at least not until the United States Supreme Court had weighed in.

Lo and behold, in June 2022, the United States Supreme Court proved us right and in *Viking River Cruises v. Moriana* held that the Federal Arbitration Act preempts *Iskanian*'s holding that PAGA actions could not be divided into individual and representative claims brought on behalf of other allegedly "aggrieved employees." Thus, according to *Viking River*, arbitration agreements *are* enforceable to the extent they require arbitration of individual PAGA claims.

Now, proving that no good deed goes unpunished, an appellate court has decided that a law-abiding employer that relied to its detriment upon *Iskanian* and included a broad PAGA carve out in its arbitration agreement *could not* compel to arbitration an employee's individual PAGA claim – even though that claim would have otherwise been arbitrable but for the *Iskanian*-inspired carve out. *Duran v. EmployBridge Holding Co.*, 2023 Cal. App. LEXIS 426 (Cal. App. 5th Dist., Apr. 27, 2023).

Even agreements that do not include broad PAGA carve outs may face additional scrutiny—especially to the extent courts seek to avoid the *Viking River* rule and keep PAGA cases out of arbitration. In a case decided the same week as *Duran*, the Court reviewed an arbitration agreement that included a waiver of representative actions (unenforceable as to the representative PAGA claims under *Iskanian* and *Viking River*) but also had a savings clause which provided that if the waiver was unenforceable, "then this agreement is invalid and any claim brought on a class, collective, or representative action must be filed in a court of competent jurisdiction[.]" *Westmoreland v. Kindercare Educ. LLC*, 90 Cal. App. 5th (2023). Although the savings clause was no doubt inspired by *Iskanian*, the Court found that it was actually a "poison pill," because instead of expressly allowing the individual PAGA claim to be severed and sent to arbitration (as *Viking River* would dictate), it simply "invalidates the agreement." *Id.* at 982. Ironically, had the employer "included a waiver of representative claims" with *no* savings clause, "the result . . . could have been substantially similar to that in *Viking River*." *Id*.

We will continue to monitor these decisions and provide any relevant updates. In the meantime, employers should carefully review and update their post-*Iskanian* arbitration agreements. Employers would be well-advised to consider excising language broadly excluding PAGA claims from arbitration, and also to scrutinize their agreements for unintended "poison pills" that could invalidate them altogether.

Unfortunately, recent case law in this area has made determining exactly what is and is not arbitrable under PAGA almost as complicated as "splitting the atom"!

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