"Close the Door!": U.S. Supreme Court Finally Agrees to Reconsider the Rule Against California PAGA Waivers in Arbitration Agreements

Insights
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After repeatedly denying requests to decide the same issue, the U.S. Supreme Court has finally agreed to review the rule prohibiting California Private Attorneys General Act (PAGA) waivers in individual arbitration agreements. The high court announced on December 15 that it granted the writ of certiorari filed in *Viking River Cruises, Inc. v. Moriana* to answer this question: whether the Federal Arbitration Act (FAA) preempts a California Supreme Court ruling that arbitration agreements waiving the right to bring representative actions under PAGA were unenforceable under state law. Employers in California, and other states fashioning legislation similar to PAGA, may be seeing a beacon of light in the dark tunnel of representative litigation of recent years.

Chaos of Conflicting Court Decisions Provides Ladder to Clarify Bi-Lateral Arbitration and PAGA Claims

California lawmakers enacted PAGA in 2004 purportedly to give employees the right to pursue penalties on behalf of similarly aggrieved employees and the state for alleged violations of the labor laws and regulations governing employers. By creating a private right of action for employees to enforce the provisions of the Labor Code where the government was ill-equipped to do so on its own, this procedural statute allows employees who are affected by one Labor Code violation to pursue civil penalties on a representative basis for additional Labor Code violations that affected other employees with the same employer.

For each alleged violation, civil penalties are assessed on a per-period basis for each aggrieved employee affected. Absent a contrary penalty formula in the specific labor code provision alleged to have been violated, the PAGA provides a default penalty formula of $100 per employee per pay period for the initial violation, and $200 per employee per pay period for each subsequent violation. Any recovery of civil penalties is then split with 75% paid to the state and 25% paid to the employees. In addition to the potential of colossal penalties, a primary driver of PAGA actions rests in a prevailing employee's ability to recover an award of reasonable attorney's fees and costs.

Before PAGA, wage and hour class action lawsuits inundated California courts notwithstanding employment arbitration agreements governed by the FAA, whereby employees agreed to waive their right to participate in or bring class actions. In response to California courts declining to enforce the class action waivers in those agreements, the U.S. Supreme Court held in *AT&T Mobility LLC v.*

Concepcion that the FAA requires enforcement of class action waivers and preempts state law rules that interfere with parties' ability to choose bi-lateral arbitration. To avoid *Concepcion*, employees then turned away from filing class actions to filing representative actions under PAGA.

The California Supreme Court provided fodder for this strategy in *Iskanian v. CLS Transportation Los Angeles, LLC* when it held that arbitration agreements containing PAGA representative action waivers were against public policy and unenforceable, and the FAA did not preempt this rule. Resting primarily on the reasoning that PAGA representative actions are a type of "qui tam" action in which employees pursue public relief rather than private and the FAA applies solely to arbitration of claims for private parties, the court effectively created a backdoor for employees to avoid their arbitration agreements by asserting a PAGA claim to proceed on a nearly unobstructed path to court.

In the following years, although there appeared to be a clear conflict between *Iskanian* and *Concepcion*, the U.S. Supreme Court repeatedly denied petitions seeking review of whether the FAA preempts *Iskanian*. However, in 2018, the Court's decision in *Epic Systems v. Lewis* provided hope for *Iskanian* opponents. There, the Court held that employees cannot strategically maneuver around their individual arbitration agreements and the FAA merely by asserting claims on behalf of others. Thus, the Court reaffirmed that the FAA requires courts to rigorously enforce arbitration agreements according to their terms, even including terms for individualized proceedings. Nonetheless, courts continued to compound *Iskanian*'s flawed logic in post-*Epic* decisions by prohibiting PAGA waivers in arbitration agreements.

"Winter is Coming," PAGA

So, why does this matter? The promise of reasonable attorneys' fees and costs for a prevailing employee, coupled with the shift from class and collective actions to PAGA actions following *Concepcion* and *Epic* without any tenable obstacle, has caused an explosion of representational litigation. With 15 PAGA notices lodged every day but with approximately less than 1% of those administered and decided by the agency tasked with doing so, tens of thousands of PAGA lawsuits have flooded the courts. Moreover, because the statutory scheme yields such astronomical potential penalties, the average settlement per PAGA case far exceeds any settlement for compensatory damages in a class or collective action. The possibility of such relief, even if it is only statutory damages on behalf of an entire workforce, is undoubtedly a powerful incentive to bring these cases and litigate. Absent the Court's review of *Iskanian*, employees continually circumvent the FAA thereby clogging courts with PAGA representative actions that are slower, costlier, and a highly attractive means for the plaintiffs' bar to generate fees.

Falling in line with other post-*Epic* decisions, the California Court of Appeal held in *Moriana v. Viking River Cruises* that representative action waivers in arbitration agreements remain unenforceable despite *Epic*. When the California Supreme Court denied Viking River Cruises's petition for review, Viking petitioned the U.S. Supreme Court in 2020. With the backing of briefs filed by multiple amicus curiae, including the Restaurant Law Center and the United States Chamber of Commerce, the Court

eventually relented. Last week's order means that the SCOTUS is no longer ignoring that state court decisions running afoul of Supreme Court precedent have resulted in the abuse of PAGA and federal policy favoring bi-lateral arbitration.

Angelo Amador, Executive Director of amici Restaurant Law Center, provided the following quote aptly addressing the gravity of the Court's grant of Viking's petition for review:

> We are delighted with the U.S. Supreme Court decision to take this appeal. This issue is of utmost importance to restaurants and other foodservice employers in California. Eating and drinking places in the state employ more than 1.4 million workers. These employers are seeing an explosion of PAGA representative claims specifically because the California Supreme Court opened a back door to skirt federal law as well as U.S. Supreme Court precedent and evade agreements to arbitrate. U.S. Supreme Court review of this case is necessary to ensure that the back door is closed for good and that federal law retains its position in favor of arbitration.

The One Who Passes the Sentence Should Swing the Sword

The Supreme Court's continued refusal to address the conflict between *Iskanian* and post-*Epic* case law with its decisions in *Concepcion* and *Epic* has allowed the unwritten exception to the FAA — that PAGA waivers in arbitration agreements are unenforceable despite the Supreme Court's command to enforce arbitration agreements according to their terms — to survive. However, Viking River Cruises, along with the amici who filed briefs in support of its petition, provided the Court with a proper vehicle to address PAGA's farce head-on. Indeed, if the Court decides to overrule *Iskanian*, PAGA may face a fate comparable to the Red Wedding.

Now that the Court granted review, the parties will prepare additional briefing and cases are ordinarily ready for oral argument in about three months. Accordingly, we can expect the Court to make its final ruling by June 2022.

More Trouble in Store for PAGA?

Regardless of how the Supreme Court ultimately rules in this case, PAGA may face an even bigger existential threat in the near future. A ballot measure has been cleared for signature gathering that would repeal PAGA in its entirety and replace it with enhanced administrative enforcement. Proponents of the measure have until June 6, 2022 to gather 623,212 signatures in order to qualify the measure for the November 2022 ballot.

The business groups supporting the measure appear dedicated to getting the measure qualified and supporting a full-fledged campaign to get it to pass—setting up a high-stakes (and likely costly) ballot fight between the business community and plaintiffs' attorneys. While the outcome of a ballot measure is far from certain at this point, storm clouds are on the horizon for PAGA — and it could very well be in its death throes.

We will continue to monitor developments in this case and the proposed ballot measure, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions about PAGA litigation and arbitration agreements, please contact your Fisher Phillips attorney, the authors of this alert, or any attorney in our California offices.

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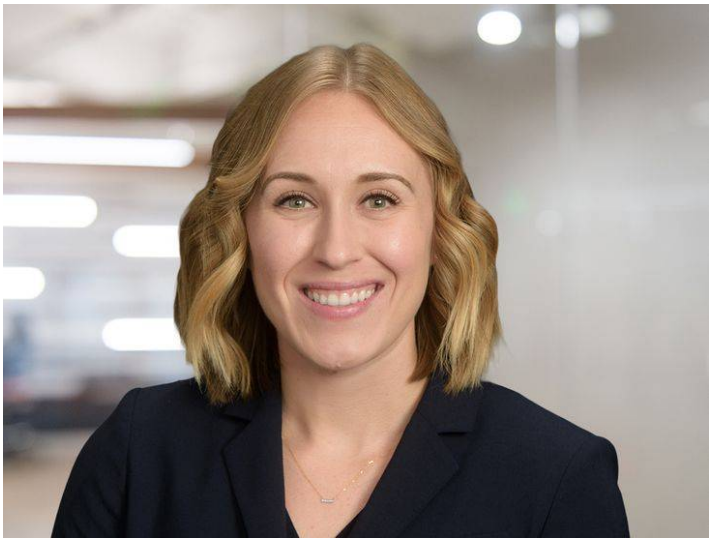

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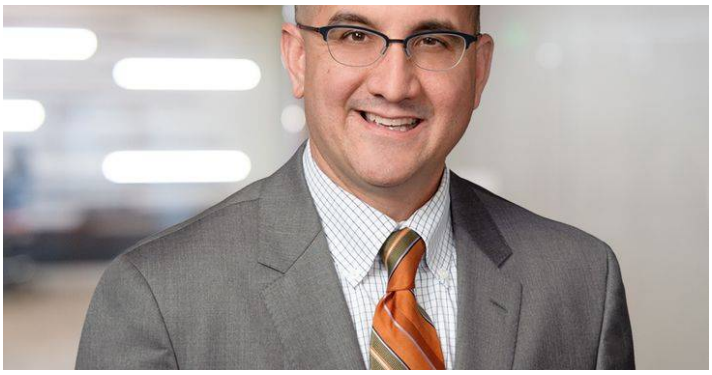

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