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Client Alert

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Arbitration and PAGA Representative Actions: Supreme Court to Weigh In

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The Supreme Court repeatedly has enforced arbitration agreements according to their terms. The Court also has repeatedly found preempted state laws that attempt to limit the Federal Arbitration Act's ("FAA") objectives.

In California, however, state courts have declined to compel individual arbitration of representative actions under California's Private Attorney General Act ("PAGA"). Defense practitioners have long argued that this carve-out is difficult to reconcile with longstanding FAA jurisprudence, but the Supreme Court has not previously heard this issue on the merits.

That may soon change. In important news for employers in California, the Supreme Court recently granted Viking River Cruises, Inc.'s petition for a writ of certiorari, which asks the Court to resolve the issue of whether the FAA preempts this state court carve-out of PAGA representative actions from the otherwise broad federal policy favoring individual arbitration.

PAGA Background

PAGA is a California procedural statute authorizing private parties, under certain circumstances, to recover civil penalties for some California Labor Code violations. PAGA claims are brought on a representative basis, such that an "aggrieved employee" attempts to stand in the place of the State and seek penalties on behalf of all other allegedly "aggrieved" employees, including with respect to Labor Code violations that did not personally impact the employee.

The *Iskanian* Decision and its Aftermath

To reconcile PAGA and the Supreme Court's longstanding arbitration jurisprudence, the California Supreme Court decided in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) that PAGA claims are "outside the FAA's coverage." The *Iskanian* decision reasoned that while the FAA

governs private disputes, an employee's suit under PAGA is a claim which properly belongs to the *state*, rather than the *employee*. By analogizing the PAGA scenario to the U.S. Supreme Court's decision in *EEOC v. Waffle House* (2002)– which concluded that the EEOC was not bound by an individual employee's arbitration agreement—the California Supreme Court held that PAGA claims similarly do not fall within the FAA's purview. The California Supreme Court thus declined to compel arbitration in *Iskanian*.

Since the *Iskanian* decision's FAA carve-out for PAGA claims, the PAGA floodgates have opened in California. More than 6,000 PAGA notices were filed with the LWDA in 2020—averaging 15 per day. In some instances, PAGA representative claims are included alongside workplace class and collective actions pertaining to the same alleged violations of the California Labor Code, and some PAGA representative claims are tacked on in later amendments. More recently, some plaintiffs' counsel have also shifted their efforts away from bringing class and collective actions, to focus instead on stand-alone PAGA representative actions. This change in tactic likely assumes that California courts following the *Iskanian* decision will often permit employees to circumvent agreements to individually arbitrate, and to proceed on PAGA representative claims where class or collective actions have been waived by a workplace arbitration agreement.

As Viking's petition argued, citing the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011), the deluge of PAGA representative claims post-*Iskanian* brings with it the "small chance of a devastating loss" in each case, potentially resulting in "in terrorem" settlements by employers.

Where Do We Go From Here?

In deciding to take up the question presented, the U.S. Supreme Court may soon bridge the gap between *Iskanian* and the FAA. If the U.S. Supreme Court closes the loophole for PAGA representative actions and holds that the FAA applies to PAGA representative claims (just as it does to class and collective actions), the results could be significant for employers in California. Obviously, such a decision would impact existing stand-alone PAGA representative suits, as well as ongoing litigation where tagalong PAGA representative claims have been stayed pending arbitration of individual claims. But additional ripple effects might also flow from such a decision. For example:

- If the U.S. Supreme Court overturns *Iskanian* under the FAA, it may magnify the importance of the contours of the current battle over the FAA's Section 1 exemption for certain "class[es] of workers engaged in foreign or interstate commerce," another issue being considered by the Supreme Court.
- If the U.S. Supreme Court's decision turns on whether the LWDA is a party to PAGA representative actions, such a decision might inspire different funding allocations and staffing priorities for the LWDA, or encourage the LWDA to take up substantially more PAGA representative actions.
- California has already enacted legislation attempting to blunt the impact of workplace arbitration agreements, including AB51's attempted prohibition on mandatory arbitration agreements. AB51 has been challenged and if it is overturned, and/or if the U.S. Supreme Court overturns *Iskanian*, California might take additional creative legislative action regarding arbitration.

On the other hand, a decision by the U.S. Supreme Court upholding *Iskanian* could have ramifications beyond California. If the U.S. Supreme Court agrees with *Iskanian* that PAGA representative claims are beyond the purview of the FAA, other states may follow California's blueprint and enact statutory schemes similar to PAGA.

Briefing before the U.S. Supreme Court should be complete in the first half of 2022. Employers in California and across the country should monitor how the U.S. Supreme Court decides this issue to understand the potential widespread ramifications.

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