HUNTON ANDREWS KURTH

Lawyer Insights

How Justices' Upcoming PAGA Ruling May Affect Employers

By Julia Trankiem and Michael Pearlson
Published in Law360| March 7, 2022

On March 30, the U.S. Supreme Court will hear oral argument on the matter of Viking River Cruises Inc. v. Moriana.[1]

In Viking River, the court will decide whether the Federal Arbitration Act preempts California law barring arbitration of Private Attorneys General Act claims. Viking River may have momentous consequences for the ability of California employers to defend against large civil penalties under PAGA.

Pursuant to PAGA, employees can collect civil penalties on behalf of themselves and other aggrieved employees by asserting in representative actions that their employers have engaged in violations of the California Labor Code. PAGA claims are often predicated on technical violations of the code, such as mistakes on wage statements.

However, civil penalties can quickly accumulate when the employee seeks to represent a large number of other aggrieved employees, potentially costing the employer millions of dollars — 75% of which goes to the state of California.

Since PAGA was enacted in California in 2004, employers have been subject to PAGA claims at a rapid clip, ranging from relatively minor technical violations to more widespread failures to comply with the Labor Code. Yet, the decision in Viking River might provide employers some respite.

Contrary to the current state of California law, the Supreme Court may hold that employment arbitration agreements that include a collective or representative action waiver may be enforced as to PAGA claims. Therefore, Viking River has the potential to provide employers a sturdy layer of protection against PAGA claims through properly drafted arbitration agreements.

If the court reverses the ruling of the lower court, employers would likely be able to stave off highly damaging wage and hour penalties — due to employees seeking to represent a large number of other aggrieved employees — because employers would be able to enforce mandatory arbitration agreements that include representative action waivers immediately upon the hiring of an employee.

Overview

In the Viking River case, the plaintiff, Angie Moriana, alleged claims that the defendant, Viking River Cruises, failed to pay all wages due, pay proper overtime, provide meal and rest breaks, or furnish accurate wage statements — all in violation of the California Labor Code. Viking had entered into an arbitration agreement with Moriana that required the parties to arbitrate any claims on an individualized basis.

This article presents the views of the authors, which do not necessarily reflect those of Hunton Andrews Kurth LLP or its clients. The information presented is for general information and education purposes. No legal advice is intended to be conveyed; readers should consult with legal counsel with respect to any legal advice they require related to the subject matter of the article. Receipt of this article does not constitute an attorney-client relationship. Prior results do not guarantee a similar outcome. Attorney advertising.

Viking moved to compel arbitration, asserting that Moriana could not maintain a representative PAGA action and could only bring her claim individually pursuant to the arbitration agreement.

Viking's position conflicted with the California Supreme Court's 2014 holding in Iskanian v. CLS Transportation Los Angeles LLC,[2] that PAGA claims are not subject to arbitration agreements, and representative action waivers encompassing PAGA claims are not enforceable under California law.[3]

As a result, the Superior Court of Los Angeles County and California Court of Appeal rejected Viking's motion. The California Supreme Court also denied review.

The Supreme Court has repeatedly held that courts must enforce arbitration agreements pursuant to the FAA, including agreements that contain class action waivers. Yet, despite Supreme Court precedent, California has distinguished PAGA claims in light of the goal of the statute to prosecute Labor Code violations on the state's behalf, as was reflected in the Iskanian decision.

Consequently, although California employers have been able to avoid class action litigation through arbitration agreements, those employers cannot currently use arbitration agreements to limit exposure to civil penalties under PAGA.

What to Expect From Oral Arguments

Viking argues in its briefing that Iskanian directly conflicts with the U.S. Supreme Court's decisions in 2011 in AT&T Mobility LLC v. Concepcion[4] and in 2018 in Epic Systems Corp. v. Lewis.[5] Concepcion held that the FAA preempted California state law deeming class action waivers unenforceable, and Epic Systems reasserted that the FAA requires courts to enforce collective action waivers in arbitration agreements.

Viking asserts that there is no meaningful distinction between the class action at issue in Concepcion, the collective action in Epic and the representative PAGA action at issue in Viking River. The only notable legal difference, according to Viking, is that the plaintiff is pursuing a PAGA claim.

Moreover, Viking states:

[I]f anything, representative PAGA actions are even less compatible with traditional bilateral arbitration, and the Iskanian decision is even more obviously incompatible with the FAA. Class actions are at least constrained by requirements like typicality and commonality, while under PAGA an employee who experienced one Labor Code violation may assert other violations that did not impact her at all.

Consequently, Viking takes the position that the FAA preempts PAGA actions to the extent that those claims preclude valid arbitration agreements providing for waivers of representative actions.

Additionally, Viking finds the Supreme Court's 2002 ruling in U.S. Equal Employment Opportunity Commission v. Waffle House Inc.,[6] cited by the Iskanian court in support of its holding, to be readily distinguishable.

© 2022 Hunton Andrews Kurth LLP

In Waffle House, the Supreme Court held that the EEOC could not be compelled to arbitrate a civil enforcement action brought by the EEOC itself in connection with alleged violations against a specific employee, even though that employee had entered into an arbitration agreement with the employer.[7]

Viking distinguishes Waffle House on the basis that

[n]o California official initiated this litigation; Moriana did … [m]oreover, there is simply no getting around the fact that here, in contrast to Waffle House, the person who initiated this litigation, i.e., Moriana, also signed the arbitration agreement.

For her part, Moriana argues in her opposition to Viking's petition for writ of certiorari that Viking's agreement is unenforceable under Iskanian because its prohibition of "'private attorney general claims' forecloses any assertion of a PAGA claim, in any manner, in any forum."

More specifically, Moriana argues that because the state is the real party in interest in PAGA actions, enforcing a waiver of PAGA claims in an employment agreement would essentially impose that waiver on the state, which is not a party to the agreement, preventing the state from asserting its labor policies through deputized representatives.

As such, according to Moriana, an employee must be permitted to bring a PAGA representative claim in some forum because the state is not bound to a waiver to which it is not a party.

Further, Moriana asserts that previous cases decided by the court, including Concepcion and Epic Systems, are not inconsistent with Iskanian. In so doing, Moriana argues that the "court has never held that the FAA requires enforcement of agreements waiving individuals' rights to assert particular claims."

Moreover, she asserts that allowing defendants to excuse themselves from liability for specific kinds of claims or particular remedies is not the FAA's objective.

Moriana also attempts to distinguish class actions from PAGA actions by stating that, unlike class actions, PAGA proceedings would essentially remain bilateral matters between individual plaintiffs, acting as representatives of the state, and defendants if parties agreed to arbitrate PAGA representative claims for penalties on behalf of the state.

Conclusion

After oral argument on March 30, the court must hand down a decision by June 30, when the current term expires. Thus, in the second half of this year, employers may be able to compel arbitration in PAGA, assuming a proper arbitration agreement is in place.

Employers should review their arbitration agreements to reevaluate the representative action waivers included in such agreements after the decision is handed down, while employers that do not have such agreements should consider adopting them.

Given Supreme Court precedent, arbitration agreements have been increasingly less difficult to enforce in the employment context over the last decade. Especially in light of Viking River, arbitration agreements

© 2022 Hunton Andrews Kurth LLP

are an incredibly powerful tool for employers in avoiding massive costs in penalties and fees from the outset of litigation.

Employers should consistently ensure that their arbitration agreements comply with applicable law and that employees are given sufficient notice and time to review and evaluate such agreements.

If the court does not overturn Iskanian, California's carve out for PAGA claims would remain and employers may face a steep escalation in lawsuits given that representative action waivers would be unenforceable as to PAGA claims.

After the Iskanian decision itself, PAGA claims rose at a rapid clip and employers should expect the frequency of PAGA claims to maintain or increase if Viking River is decided in favor of Moriana. In such case, employers doing business in California should frequently audit their employment practices to ensure strict compliance with the California Labor Code.

© 2022 Hunton Andrews Kurth LLP

Notes

1. Viking River Cruises, Inc. v. Moriana, Case No. 20-1573.

2. Iskanian v. CLS Transportation Los Angeles LLC, 59 Cal.4th 348 (2014).

3. Id. at 383-84.

4. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

5. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

6. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

7. Id. at 297-98.

© 2022 Hunton Andrews Kurth LLP

How Justices' Upcoming PAGA Ruling May Affect Employers
By Julia Trankiem and Michael Pearlson
Published in Law360| March 7, 2022

Julia Y. Trankiem *is a partner in the firm's Labor & Employment group in the firm's Los Angeles office. Julia extensively collaborates and partners with companies to solve complex employment issues. She can be reached at +1(213) 532-2119 or jtrankiem@HuntonAK.com.*

Michael Pearlson *is an Associate in the firm's Labor & Employment group in the firm's Los Angeles office. Michael's experience includes wage and hour class actions; California Private Attorneys General Act (PAGA) suits; and workplace discrimination, harassment, and retaliation matters. He can be reached at +1(213) 532-2012 or mpearlson@HuntonAK.com.*

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.