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ARBITRATION AGREEMENTS FOR CALIFORNIA AG EMPLOYERS: DO I NEED ONE? HOW DO I GET ONE?

LEGAL DISCLAIMER

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with legal counsel for individual responses to questions or concerns regarding any given situation.

ARBITRATION

Arbitration refers to an alternative dispute resolution method where the parties in a dispute agree to have their case heard by a qualified arbitrator out of court.

WHY IS ARBITRATION SIGNIFICANT PARTICULARLY FOR AGRICULTURAL EMPLOYERS?

- An employer can compel a plaintiff-employee to arbitrate their claims covered by the arbitration agreement.
- The ability to arbitrate gives an employer an opportunity to reach a resolution while still being able to rebut the allegations made against them instead of settling to avoid costly litigation.
- Class action waivers make individual claims less attractive to plaintiffs' attorneys who are interested in the substantial attorney fees often awarded in class actions.
- Reduce the threat of costly litigation which plaintiff attorneys take advantage of to obtain quick settlements.

WHY IS THE RIGHT TO ARBITRATE SIGNIFICANT?

- Parties in a dispute can choose a neutral arbitrator that has familiarity with the respective industry which often leads to fairer outcomes.
- Arbitration is a way to settle a dispute outside of the court which promotes **expeditious and less expensive decisions**.
- Arbitration offers confidentiality that is not available in litigation.

HISTORY OF ARBITRATION IN CALIFORNIA

FEDERAL ARBITRATION ACT

- Enacted in 1925, the Federal Arbitration Act (FAA) is an act of Congress that provides for judicial facilitation of private dispute resolution through arbitration.
- A written provision in any maritime transaction or a contract evidencing a transaction involving commerce.
- An agreement to arbitrate is a contract between parties and should be treated as such.
- Promote arbitration proceedings and encourage their implementation even if such proceeding results in inconsistent decisions arising from duplicate actions.
- Requires courts to stay litigation in favor of arbitration.

ISKANIAN V. CLS TRANSP. LOS ANGELES, LLC

- California Supreme Court held that “pre-dispute agreements to waive the right to bring “representative” PAGA claims are invalid as a matter of public policy.”
- Arbitration provisions banning class-action litigation or collective arbitration of employment-related claims are enforceable.
- Invalidates agreements to separately arbitrate or litigate “individual PAGA claims for Labor Code violations that an employee suffered,” on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA.

ASSEMBLY BILL 51

“AB 51 is the culmination of a many-year effort by the California legislature to prevent employers from requiring an arbitration provision as a condition of employment.” (*Chamber of Commerce of the United States v. Bonta*, (2021) 13 F.4th 766, 782, Ikuta, J., dissenting.)

ASSEMBLY BILL 51

- Assembly Bill 51 added Code § 432.6 to the California Labor Code:

(a) A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act (“FEHA”) (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.

(f) Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.).

- The California State legislature passing of AB 51 was an attempt to circumvent the clear intent of the FAA by regulating behavior before an arbitration was signed rather than after.

ASSEMBLY BILL 51 - CURRENTLY STAYED

- *Chamber of Commerce of the United States v. Bonta*
- United States District Court for the Eastern District of California issued a restraining order staying the enforcement of AB 51 on the grounds that it likely violates the Federal Arbitration Act.
- The 9th Circuit Court of Appeals ruled that AB 51 does not entirely violate the FAA, ruling that AB 51 was partially enforceable as it relates to:
 - AB 51's ban on pre-agreement behavior by employers does not violate the FAA.
- AB 51's imposition of penalties on employers after an arbitration agreement has been signed violates the FAA and is unenforceable.
- **In 2021 the U.S. Chamber of Commerce appealed the panel's ruling, thereby preserving the District Court's injunction (for now).**

UNITED STATE SUPREME COURT
DECISION
VIKING RIVER CRUISES, INC., V. MORIANA

PRIVATE ATTORNEY GENERAL ACT (PAGA)

- The Private Attorney General Act or PAGA, is a California statute that enables workers to file lawsuits as a representative of the State of California against an employer on behalf of all current and former employees for certain labor violations, previously only enforceable by a state agency.
- PAGA claims are different from a normal lawsuit in that it's a law enforcement action for penalties rather than for compensatory damages.
- PAGA claims have ravaged California Agriculture due to the availability of attorneys fees and the lack of standing requirements which incentivize plaintiffs' attorneys to file claims.

WHAT IS THE *VIKING RIVER CRUISES, INC., v. MORIANA* CASE ABOUT?

***Viking River Cruises, Inc., v. Moriana* (2022) 142 S. Ct. 1906**

Viking River Cruises, Inc., is a company that offers cruises around the world. The Plaintiff in the case, Angie Moriana, was a sales representative for the company. At the time of her hire, Moriana executed an arbitration agreement to arbitrate any disputes arising out of her employment. Specifically, the arbitration agreement contained a **Class Action Waiver waiving Moriana's right to bring class, collective, or representative PAGA actions**. After her employment ended, Moriana filed a PAGA action in California state court alleging that Viking had violated various wage and hour laws. **Viking moved to compel arbitration of her individual claims and to dismiss her PAGA claims. The trial court denied the motion and the Court of Appeal affirmed, holding that the "categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and non-arbitrable 'representative' claims."**

The US Supreme Court took up the question of whether the Federal Arbitration Act ("FAA") preempts a California Supreme Court decision which says that you cannot force employees to arbitrate PAGA claims. The answer from the US Supreme Court is **yes, the California rule of law is preempted, and thus no longer applicable, to the extent that the waiver precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.**

KEY POINT OF *VIKING RIVER CRUISES, INC., V. MORIANA*

- The FAA does not preempt the *Iskanian* rule that prohibits use of an arbitration agreement to waive an employee's entitlement to pursue "representative" claims on behalf of the State for PAGA civil penalties.
- The FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into arbitrable individual claims and non-arbitrable 'representative' claims through an agreement to arbitrate.
 - Meaning an employee may be required to arbitrate their individual PAGA claims and as a result of the resolution of those claims would lack statutory standing to maintain non-individual claims in court.
- Arbitration of an individual's PAGA claims results in the individual being no different than a general member of the public, and they therefore lack standing so the PAGA lawsuit can be dismissed.

PETITION FOR REHEARING

- The losing plaintiff in *Viking River Cruises*, believing that the United States Supreme Court went outside the scope of the briefed issues filed a petition for rehearing asking the Court to narrow their decision.
 - The question presented to the Court by the plaintiff-employee was whether the Court’s opinion should be modified to avoid “unwarranted and incorrect resolution of the unbriefed issues of contract construction and state law **statutory standing**.”
- On August 22, 2022, the Court denied the request for rehearing and issued a final judgment, leaving intact the Court’s analysis of the severability language in *Viking River Cruise*’s arbitration agreement, as well as the Court’s analysis of statutory standing under PAGA.

VIKING RIVER CRUISES IS A WIN FOR
CALIFORNIA EMPLOYERS

BUT.....

- Justice Sotomayor's, concurrence –
 - “the Court reasons, based on available guidance from California courts, that Moriana lacks “statutory standing” under PAGA to litigate her “nonindividual” claims separately in state court. Of course, if this Court’s understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court’s understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits.
- There are current cases under review which address the *Viking River Cruises* decision.
- Potential legislative remedies.

CURRENT CASES BEING REVIEWED

- *Adolph v. Uber Technologies, Inc.*
 - Regarding standing after resolution of a PAGA action.
- *Chamber of Commerce of the United States v. Bonta*
 - Regarding AB 51.

ADOLPH V. UBER TECHNOLOGIES, INC.

- On July 20, 2022, the California Supreme Court decided to take up the review an appellate court decision. The Plaintiff, Adolph, signed an arbitration agreement prior to working as a driver for UberEATS.
- Plaintiff would eventually sue Uber for misclassifying him as an independent contractor, rather than an employee and would bring a representative PAGA action alleging multiple violations.
- Uber moved the court to compel arbitration, but the court denied their motion.
- Uber appealed the decision and lost. The reviewing court opined that “Unless and until the United States Supreme Court or the California Supreme Court directly overrules it, the courts of this state must follow the rule of *Iskanian* which establishes that the trial court did not err by concluding that the initial issue of whether Adolph can pursue a PAGA claim as an aggrieved employee must be decided by the trial court, not an arbitrator.”
- In light of the *Viking* case, Plaintiff specifically requested that the court address whether a plaintiff still has standing to act as a representative in a PAGA action.

CHAMBER OF COMMERCE OF THE UNITED STATES V. BONTA

- Prior to the decision in *Viking River Cruises*, the issue of whether the FAA preempted AB 51 was taken up in *Chamber of Commerce of the United States v. Bonta*.
- Shortly after the passage of AB 51 in October of 2019, Chamber of Commerce of the United States and other business groups filed suit in US District Court arguing AB 51 was preempted by the FAA. The trial court concluded that California Assembly Bill 51 was preempted by the FAA. *Bonta* appealed to the 9th circuit asserting that AB 51 was not preempted.
- The Ninth Circuit opined that AB51 was not in conflict with the FAA because AB51 only applies to behavior before a contract exists and the FAA applies to existing contracts.
- Although the Ninth Circuit reversed, ruling AB51 was not preempted, the decision was divided. The dissenting judge wrote a very spirited dissent admonishing his fellow judges' and the legislatures' attempts to eliminate employer's and employees' right to arbitrate. (Ikuta, J., Dissenting – "AB 51 is the culmination of a many-year effort by the California legislature to prevent employers from requiring an arbitration provision as a condition of employment.")
- Chamber of Commerce filed a motion for reconsideration and the motion was granted. However, the court, recognizing that *Viking River Cruises*' petition for review by the US Supreme Court had been granted, indicated that they would not reconsider until after the *Viking River Cruise* decision.
- On August 22, 2022, instead of granting or denying the petition, the Ninth Circuit made a surprise decision to withdraw its prior opinion and grant a panel rehearing.

ARBITRATION AGREEMENTS

- Employers may continue to enter into voluntary arbitration agreements with employees, but the language of the agreement should reflect that it is entered voluntarily and that there will be no retaliation in the event the employee chooses not to accept the agreement.

THANK YOU!

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