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Arbitration Agreements and Class Action/PAGA Representation Waivers

You may recall a newsletter we sent out last summer highlighting a major win for employers in the battle against the onslaught of PAGA claims ravaging California agriculture. The victory came by way of a pivotal opinion by the United States Supreme Court in *Viking River Cruises, Inc., v. Moriana*. The Court took up the question of whether the Federal Arbitration Act ("FAA") preempts a California Supreme Court decision which says that employers 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 The answer from the US Supreme Court is yes, the California rule of law is preempted and, thus, no longer applicable to the extent that the waiver precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. Our previous newsletter also recommended that employers update their arbitration agreements to include language consistent with the *Viking* ruling. If you have not updated your arbitration agreements, please, let this serve as a reminder that you should take advantage of the *Viking* victory update your agreements and have employees sign them.

As expected, there has been a lot of pushback against the *Viking* decision. Shortly after the *Viking* decision the California Supreme Court decided to review an appellate court decision, *Adolph v. Uber Technologies*. The plaintiff, Adolph, signed an arbitration agreement prior to working as a driver for UberEATS. Plaintiff eventually sued Uber for misclassifying him as an independent contractor, rather than an employee and brought a representative PAGA action alleging multiple violations. The California Supreme Court is set to decide whether an aggrieved employee who arbitrates his individual claims including claims for penalties under PAGA maintains statutory standing to pursue representative PAGA claims arising out of events involving other employees in court. If the court decides the answer is yes, *Viking River* becomes inconsequential.

Prior to the decision in *Viking River Cruises*, the issue of whether the FAA preempted Assembly Bill 51 ("AB 51") was taken up in in the U.S. District Court in *Chamber of Commerce of the United States v. Bonta*. AB 51 is a California law prohibiting employees from requiring employees to enter into arbitration agreements as a condition of employment. The Chamber of Commerce of the United States and other business groups filed suit in US District Court arguing the FAA preempted AB 51 as it relates to mandatory arbitration. The trial court concluded that the FAA did preempt California Assembly Bill 51 and that AB 51's preclusion of mandatory arbitration agreements was unenforceable. Bonta appealed to the Ninth Circuit.

The Ninth Circuit opined that AB 51 was not in conflict with the FAA because AB 51 only applies to behavior before a contract exists and the FAA applies to existing contracts. The decision was divided and the dissenting judge wrote a very spirited dissent admonishing his fellow judges' and the legislatures' attempts to eliminate the 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.")

The Chamber of Commerce filed a motion for reconsideration and the Ninth Circuit granted that motion. However, the court, recognized that the US Supreme Court had had granted the Viking River Cruises' petition for review and 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 withdraw its prior opinion and granted a panel rehearing. The Ninth Circuit stayed the enforcement of AB 51 and its prohibition of mandatory arbitration agreements pending their ruling.

On February 15, 2023, the Ninth Circuit issued a ruling upholding its prior decision that AB 51 is preempted by the FAA and fully blocked its enforcement. Supporters of AB 51 are expected to try to appeal to the US Supreme Court in a last ditch effort to save the law, however, we suspect the ruling will be upheld. Overall, this is great news for employers.

What This Means for Employers:

As we suggested last summer, employers should review their arbitration agreements to ensure they are taking full advantage of the *Viking* decision. Although the future of arbitration agreements in the employment law context may seem uncertain or confusing, arbitration agreements that the employee and employer properly execute and which contain PAGA waivers have been useful in deterring the filing of PAGA representative claims. These updated and properly executed arbitration agreements are also useful in compelling arbitration of individual claims and potential dismissal of the representative claims. In addition to reviewing and revising the content of the arbitration agreement employers should ensure that the agreements themselves are being presented to employees appropriately. Although the law prohibiting mandatory arbitration agreements has been struck down, the agreements are still subject to basic contract principles of unconscionability. In other words, threatening employees to sign an arbitration agreements to avoid their own termination is not a sound approach and may lead to arbitration agreements being invalidated if challenged in court. Please contact Barsamian & Moody at (559) 248-2360 if you have any questions about your arbitration agreements or how they should be presented to new and existing employees.