Clark Hill

California Seminar

Clarity & Practical Compliance Strategies Around Arbitration Agreements

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Session 1 Road Map

1. Recent California Legislation Passed: AB 51
2. Employers' Waiver of Right to Enforce Arbitration Agreement
3. Recent Case Law Regarding Non-Signatories' Enforcement of Arbitration Agreements

California AB 51's Progress

- In 2018, the U.S. Supreme Court issued the seminal decision in *Epic Systems Corp. v. Lewis,* acknowledging the Federal Arbitration Act ("FAA") permits the use of arbitration agreements with class action waivers.

- In 2019, the U.S. Supreme Court went further in *Lamps Plus v. Varela* and held that, under the FAA, an arbitration agreement must expressly authorize class/representative arbitration. Otherwise, arbitration must proceed on an individualized bases.

California AB 51's Progress

- Partly in response, in 2019 California passed AB 51, which prohibits imposing "as a condition of employment, continued employment, or the receipt of any employment-related benefit" the requirement that an individual "waive any right, forum, or procedure" available under the California Fair Employment and Housing Act ("FEHA") and Labor Code, as well as imposed criminal penalties on employers for requiring arbitration.
- Shortly before AB 51 was scheduled to go into effect, the U.S. District Court granted a temporary restraining order and preliminary injunction barring enforcement of the statute, concluding that AB 51 was likely preempted by the Federal Arbitration Act. (*Chamber of Commerce v. Bonta*)

Fast Forward to 2021

- In September 2021, a 9th Circuit panel reversed the District Court's ruling.

- In October 2021, the US Chamber of Commerce petitioned the 9th Circuit to rehear the case "en banc."

- Petition for hearing remains pending and the US District Court's stay on AB 51's actual enforcement remains in effect pending the petition for rehearing.

Fast Forward to 2021

- Practical Impact if the 9th Circuit panel's decision actually goes into effect?
  - AB 51's enforcement mechanisms– civil and criminal penalties—would be preempted by the FAA because they punish employers for entering into an agreement to arbitrate.
  - Arbitration agreements entered into that are governed by the FAA would still be valid even though entered into in violation of AB 51. A contrary holding would have violated the FAA.
  - Only applicants or employees who refuse to sign an arbitration agreement and are either denied employment or are terminated as a result will have any concrete remedy under AB 51.

Fast Forward to 2021

- Practical Impact if the 9th Circuit panel's decision actually goes into effect?
  - If a business is not covered by the FAA, then federal courts in the 9th Circuit will be required to invalidate arbitrate agreements entered into after AB 51's effective date.
  - California courts are not bound by the 9th Circuit panel's decision.
  - Possible that a 9th Circuit "en banc" panel could uphold the trial court's ruling.
  - Possible that US Supreme Court could review and reverse.

Waiving of Right to Enforce Arbitration Agreement

- In *Garcia v. Haralambos Beverage Co.*, the California Court of Appeal rejected Defendant's contention that it was reasonable to wait until it located the executed arbitration agreements before filing its motion, particularly because the employer was aware of its policy requiring arbitration and possessed checklists that demonstrated the plaintiffs received copies of the arbitration agreements.

Waiving of Right to Enforce Arbitration Agreement

- **Waiver Standard**
  - Were the employer's actions inconsistent with the right to arbitrate;
  - Whether `the litigation machinery has been substantially invoked' and the parties `were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate;
  - Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

Waiving of Right to Enforce Arbitration Agreement

- **Waiver Standard**
  - Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
  - Whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and (6) whether the delay `affected, misled, or prejudiced' the opposing party.'" [Citation.]" (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.)

The Length of Defendant's Delay

- The Court held there was substantial evidence to support a finding the length of Defendant's delay prior to filing its Motion to Compel Arbitration because:
  - (1) Twenty-four months elapsed from the time defendant was served with Plaintiff's original complaint to when it filed its motion to compel arbitration;
  - (2) Twenty months elapsed from the time it asserted arbitration as an affirmative defense in its Answer to when it filed its motion (Even excluding the nine-month period during which the action was stayed pending mediation).

Actions Inconsistent With the Right to Arbitrate

- (1) Representation to the Court of the absence of the intent to arbitrate;

- (2) Defendant argued that class wide arbitration was unavailable under the arbitration agreements;

Actions Inconsistent With the Right to Arbitrate

- (3) During two years that elapsed between service of Complaint and Motion to Compel Arbitration, Defendant:
  - Agreed to a protective order to facilitate the production of class wide information;
  - Responded to Plaintiff's discovery requests;
  - Met and conferred with Plaintiffs on discovery disputes;
  - Participated in in the class wide *Belaire-West* notice process; and
  - Participated in an informal discovery conference regarding documents relevant to the *Belaire-West* notice process.

Prejudice to Plaintiffs

- Prejudice typically is found only where:
  - the petitioning party has unreasonably delayed seeking arbitration or
  - substantially impaired an opponent's ability to use the benefits and efficiencies of arbitration.
- Prejudice is not found where the party opposing arbitration shows only that it incurred court costs and legal expenses in responding to an opponent's pleadings and motions." (*Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1205.)

Prejudice to Plaintiff

- In *Garcia*, the Court found substantial evidence supported a finding that Defendant's delay impaired Plaintiff's ability:
  - (1) Defendant agreed to participate in class wide mediation, which resulted in plaintiffs incurring additional expenses to retain experts to assess defendant's ability to pay a class wide settlement;
  - (2) Plaintiffs also expended time and resources propounding and pursuing class wide discovery, which was useful for their class claims, but not for their individual claims;
  - (3) Plaintiffs incurred expenses in completing the *Belaire-West* notice process, which was unnecessary for plaintiffs' individual claims; and
  - (4) Plaintiffs expended resources in filing a motion to compel further discovery responses and for attorney fees.

Waiving of Right to Enforce Arbitration Agreement

- **Bottom line:**
  - Defendants should promptly move to compel arbitration;
  - If Plaintiff asks for a delay in motion filing, document the request in writing.
  - Arbitration should be listed as an affirmative defense in a defendant's answer;
  - Defendants should not engage in discovery or other motion practice before moving to compel arbitration.

- *Garcia v. Expert Staffing West*
  - Issue: Whether the arbitration agreement between a job applicant and prospective employer applies to disputes arising between the job applicant and her former employer?
  - The arbitration agreement stated: "In the event there is any dispute between Employee and the Company relating to or arising out of employment or the termination of Employee ... regardless of the kind or type of dispute, Employee and the Company agree to submit all such claims or disputes to be resolved by final and binding arbitration ...." The agreement defined "the Company" as "Expert Staffing West *and all related entities*, including entities where employees are sent to work." (Italics added.) The agreement also included a class action waiver, stating: "neither Employee nor the Company will assert any class action ... claims against each other in arbitration, in any court, or otherwise," and that it was "governed by the FAA.

Recent Case Law Regarding Non-Signatories Enforcement of Arbitration Agreements

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Recent Case Law Regarding Non-Signatories Enforcement of Arbitration Agreements

- Under the principle of equitable estoppel, "a non-signatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the non-signatory are "intimately founded in and intertwined" with the underlying contract obligations." (*Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 786.)
- Effect of Agency Allegations: Allegations in the Complaint that Defendants are agents/alter-egos of one another does not constitute judicial admissions to allow all defendants to enforce each other's arbitration agreements.

Recent Case Law Regarding Non-Signatories Enforcement of Arbitration Agreements

- Ruling: Mere existence of a business relationship between a former employer and prospective employer was an insufficient basis to compel arbitration with parties that did not bargain for or execute an arbitration agreement between a job applicant and another entity.

Conclusion

- Whether California Employers will be barred from requiring applicants and employees in California to enter into mandatory arbitration agreements remains an open issue.
- Arbitration can be waived due to delay.
- Mere existence of a business relationship between a former employer and prospective employer was an insufficient basis to compel arbitration.

Questions?

Thank You

Legal Disclaimer
This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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PAGA Compliance and Strategy

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PAGA COMPLIANCE AND STRATGIES

OUTLINE

- What is PAGA?
- Why is PAGA Important?
- PAGA updates
  - SB 646
  - *Viking River Cruises, Inc. v. Moriana*
  - *Turrieta v. Lyft, Inc.*
  - *Wesson v. Staples the Office Superstore, LLC*
  - Fair Pay and Employer Accountability Act of 2020

PAGA COMPLIANCE AND STRATEGIES

What is PAGA?

- The California Labor Code's Private Attorneys General Act of 2004 ("PAGA")

- Contained in Labor Code sections 2698-2699.5

- Authorizes "aggrieved employees" to file lawsuits to recover civil penalties on their own behalf and for other employees.

PAGA COMPLIANCE AND STRATEGIES

What is PAGA?

- Employee steps into the shoes of the State of California
- Prior to PAGA, civil penalties only collectable the by State of California
  - 75% of civil penalties go to State of California
  - 25% of Civil Penalties to allegedly aggrieved employees.
- If statute at issue does not impose its own civil penalty, PAGA imposes civil penalties as follows:
    - $100 per worker per pay period for initial violation;
    - $200 per worker per pay period for subsequent violations

PAGA COMPLIANCE AND STRATEGIES

Why is PAGA Important?

- Allows a Plaintiff to representative other employees without need for class certification
- Under current law, PAGA is exempt from binding arbitration agreements (*Iskanian v. CLS Transportation*)
- Very lucrative for the Plaintiff's bar:
  - Average PAGA Settlement was $1,118,777 (2016-2020)
  - In 2020 there were **6,900+** PAGA cases filed
  - Roughly 26 *per day*
  - Increased every year since 2015

PAGA COMPLIANCE AND STRATEGIES

Recent Updates

- SB 646
- Viking River Cruises, Inc. v. Moriana
- Turrieta v. Lyft, Inc.
- Wesson v. Staples the Office Superstore, LLC
- Fair Pay and Employer Accountability Act of 2020

PAGA COMPLIANCE AND STRATEGIES

Senate Bill 646

- Signed into law by Governor Newsom on September 27, 2021
- Effective January 1, 2022
- Adds Section 2699.8 to the Labor Code
- Creates an exception from PAGA for certain janitorial employees performing work under a collective bargaining agreement
  - Expires July 1, 2028
  - Exception is not retroactive.
- This is the second exception to PAGA – in 2019 there was an exception created for construction employees

PAGA COMPLIANCE AND STRATEGIES

Senate Bill 646

- Requirements
  - Covered by a collective bargaining agreement that "provides for the wages, hours of work, and working conditions of employees, provides premium wage rates for all overtime hours worked,"
  - CBA must provide a grievance and binding arbitration procedure to redress Labor Code violations and allowing the labor organization to pursue a grievance on behalf of affected employees.
  - Must be a "Janitorial Employee" which is defined as "an employee whose primary duties are to clean and keep in an orderly condition commercial working areas and washrooms, or the premises of an office, multiunit residential facility, industrial facility, health care facility, amusement park, convention center, stadium, racetrack, arena, or retail establishment."

PAGA COMPLIANCE AND STRATEGIES

Viking Rivers Cruises- Factual Background

- Plaintiff worked as a sales representative for Viking River Cruises
- As part of her employment, she signed an arbitration provision covering any class action claims and any PAGA claims
- Plaintiff filed suit bringing a PAGA claim as a result of various alleged Labor Code violations
- Viking moved to compel Plaintiff's PAGA claims to arbitration
- The Trial Court denied the motion based on *Iskanian v. CLS Transportation*
- The California Court of Appeal affirmed the denial
- On December 15, 2021 the United States Supreme Court agreed to hear the case

PAGA COMPLIANCE AND STRATEGIES

Viking Rivers Cruises- Legal Background

- *Iskanian v. CLS Transportation Los Angeles, LLC* - 2014
  - California Supreme Court held that arbitration agreements cannot be used to require plaintiffs to arbitrate PAGA claims and that the Federal Arbitration Act (FAA) does not require otherwise.
- *Epic Systems Corp. v. Lewis* – 2018
  - United States Supreme Court held that the FAA requires that arbitration agreements providing for individualized proceedings must be enforced
- *Lamps Plus v. Varela* - 2019
  - United Sates Supreme Court held that, under the FAA, an arbitration agreement must expressly authorize class/representative arbitration. Otherwise, arbitration must proceed on an individualized basis.

PAGA COMPLIANCE AND STRATEGIES

Viking Rivers Cruises- Issue and Potential Impact

- Viking River Cruises
  - Question Presented: Whether the FAA requires enforcement of an arbitration agreement that require arbitration of PAGA claims.
  - Put differently, does the FAA "preempt" the California Supreme Court's holding in *Iskanian*.
- Potential Impact
  - Since 2014 PAGA cases have avoided arbitration and number of cases has skyrocketed: 1,500 to 6,900
  - Many if not vast majority of these cases could be funneled into individual arbitration.

PAGA COMPLIANCE AND STRATEGIES

Viking Rivers Cruises- Scope

- If *Viking River Cruises* Overrules *Iskanian*
  - Decision will only apply to employers/workers covered by FAA
    - Businesses must be involved in interstate commerce
    - Workers cannot be exempt "transportation workers"—e.g., interstate truck drivers.
  - Businesses covered by the FAA will need to establish this coverage before taking advantage of Viking River Cruises

PAGA COMPLIANCE AND STRATEGIES

Turrieta v. Lyft, Inc.

- Three Lyft drivers filed separate PAGA suits alleging that they should have been treated as employees instead of as independent contractors.

- One driver, Turrieta, reached a settlement and sought court approval of the settlement

- The two other drivers sought to intervene and object alleging Lyft engaged in a “reverse auction” and that Turrieta settled for an unreasonably low amount.

PAGA COMPLIANCE AND STRATEGIES

Turrieta v. Lyft, Inc.

- The trial court found the other drivers lacked standing to object and approved the settlement.

- The Court of Appeals affirmed and found that being a PAGA plaintiff in a separate suit did not confer standing to object to a PAGA settlement in an a different lawsuit.

- The California Supreme Court granted review decide whether a plaintiff in a PAGA action has the right to intervene, or object to, or move to vacate, a judgment in a related action that purports to settle the claims that plaintiff has brought on behalf of the state

PAGA COMPLIANCE AND STRATEGIES

Wesson v. Staples The Office Superstore, LLC

- The trial court dismissed plaintiff's PAGA claims because it found them to be unmanageable.

- The Court of Appeals affirmed and held, for the first time, that trial courts have the inherent authority to ensure that PAGA claims are "manageable" at trial and may dismiss the claims if they cannot be managed.

- The California Supreme Court recently denied review.

- This case may be of major benefit to PAGA defendants.

PAGA COMPLIANCE AND STRATEGIES

Fair Pay and Employer Accountability Act of 2022 ("FPEEA")

- 2022 Proposed Ballot Initiative
- Stated Goal: Shift enforcement away from Plaintiffs' bar back towards state enforcement
- How it is accomplished:
  - Redirects $100 million of resources to the Labor Commissioner's office to investigate and resolve alleged labor law violations claims
  - Eliminate the right to recover attorney fees in PAGA suits
- Other proposed changes:
  - Doubles the civil penalties available for willful violations
  - 100% of penalties go to workers

PAGA COMPLIANCE AND STRATEGIES

PAGA Strategies

- Individual Settlement with PAGA Plaintiff (Pros/Cons)
- Challenging PAGA Manageability (*Wesson v. Staples The Officer Superstore, LLC)*
- Early Mediation (Pros/Cons)
- Early Deposition of PAGA Plaintiffs (Pros/Cons)

Questions?

Thank You

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