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Recent developments in employment arbitration law from 2021 and 2022

A LOOK AT *VIKING RIVER CRUISES* AND OTHER RECENT AND IMPORTANT EMPLOYMENT ARBITRATION DECISIONS

Viking River Cruises and the Private Attorneys General Act ("PAGA")

In *Viking River Cruises v. Moriana* (2022) 142 S.Ct. 1906, Justice Alito's majority opinion (joined by Justices Breyer, Sotomayor, Kagan, and Gorsuch) addressed the impact of the Federal Arbitration Act ("FAA") on two rules of the California Labor Code Private Attorneys General Act of 2004 ("PAGA").

First, the majority found the FAA does *not* preempt the rule of *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 that prohibits a "wholesale waiver" of PAGA claims in arbitration agreements. Second, the majority held the FAA *does* preempt the rule derived from *Iskanian* that PAGA claims cannot be divided into an "individual component," i.e., the portion of the PAGA action based on violations allegedly committed against the plaintiff, and a "representative" component, i.e., the portion of the PAGA action based on violations allegedly committed against other employees.

The plaintiff employee in *Viking River Cruises* filed a PAGA action against the defendant based on the alleged failure to timely pay her final wages following resignation and also based on a "wide array" of other California Labor Code violations allegedly committed against the defendant's other employees. PAGA only authorizes an employee who is "aggrieved" by at least one Labor Code violation to bring a PAGA action on behalf of themselves and other current and former employees who have suffered Labor Code violations. Where an arbitration agreement exists, the defendant often moves to compel arbitration of the Labor Code violations allegedly committed against the plaintiff personally, hoping to establish that the plaintiff is not "aggrieved" within the meaning of PAGA and thereby eliminating the plaintiff's standing to pursue PAGA claims based on violations against other employees.

In *Viking River Cruises*, the trial court (affirmed by the California Court of Appeal) denied the defendant's motion to compel based on a long line of California cases holding that a PAGA plaintiff cannot be compelled to first arbitrate his or her "individual PAGA claims" to establish "aggrieved employee" status before proceeding to litigate PAGA claims on behalf of all allegedly aggrieved employees in court.

The U.S. Supreme Court reversed, holding that the rule against dividing PAGA claims into individual and representative claims is effectively a mandatory-joinder rule that requires individual and representative claims to be tried together and forces employers to choose between agreeing to expand the scope of arbitration to include claims of violations against other employees or forgo arbitration of PAGA claims altogether. This rule thus violates U.S. Supreme Court caselaw holding that under the FAA, parties are free to choose the issues subject to arbitration and cannot be forced to arbitrate claims they do not agree to arbitrate. Because the defendant had a right under the FAA to agree to arbitrate just the individual claims, and because, according to the majority, California law does not permit a court to adjudicate representative PAGA claims if the individual claims are in a separate proceeding, dismissal of the plaintiff's case was required.

Justice Sotomayor's concurring opinion addresses where the law may well go next. First, California courts may hold that California law in fact does permit a plaintiff to proceed with PAGA claims in civil court without first establishing in an arbitration of his or her individual claims that he or she is an aggrieved employee. Second, the California Legislature might amend PAGA to provide standing for a plaintiff to bring PAGA claims based on violations against other employees either prior to or without establishing "aggrieved employee" status.

Based on the majority opinion, it appears likely that four justices in the majority in *Viking River Cruises* (Justice Breyer has retired), plus Justice Thomas, who dissented from the decision to reverse based on his longstanding position that the FAA does not apply in state courts, would approve of a reinterpreted or amended PAGA that prohibits PAGA waivers. New Justice Jackson might be a sixth vote. Justice Barrett's opinion concurring in the judgment, but not the parts of the majority opinion approving *Iskanian's* prohibition against wholesale PAGA waivers, indicates that she, along with Chief Justice Roberts and Justice Kavanaugh, might not approve.

Prior to *Viking River Cruises*, at least six decisions of the California Court of Appeal in 2021 and 2022 had reaffirmed multiple prior decisions of federal and California courts that *Iskanian* is not preempted by the FAA: *Wing v. Chico Healthcare and Wellness Centre, LP* (2022) 78 Cal.App.5th 22; *Williams v. RGIS, LLC* (2021) 70 Cal.App.5th 445, *Herrera v. Doctors Medical Center of Modesto, Inc*. (2021) 67 Cal.App.5th 538 [also holding PAGA not preempted by section 301 of the Labor-Management Relations Act of 1947 ("LMRA")); *Winns v. Postmates Inc.* (2021) 66 Cal.App.5th 803; *Rosales v. Uber Technologies, Inc*. (2021) 63 Cal.App.5th 937; *Contreras v. Superior Court* (2021) 61 Cal.App.5th 461. These opinions are abrogated to the extent they conflict with *Viking River Cruises*, but reflect good law in other respects.

It should also be noted that *Viking River Cruises* addresses FAA preemption. As to any arbitration agreement not governed by the FAA, *Iskanian* is still good law.

Transportation exemption

Not all arbitration agreements are covered by the FAA. A prominent exemption is found in Section 1 of the FAA, which exempts transportation workers engaged in foreign or interstate commerce.

The U.S. Supreme Court, in *Southwest Airlines Co. v. Saxon* (2022) 42 S.Ct. 1783, held that airplane cargo loaders are "intimately involved" with the interstate transportation of cargo and, therefore,

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subject to the transportation exemption, but the Court refused to define the class of workers subject to the exemption more broadly to include all employees who carry out the customary work of the airline.

The Ninth Circuit, in *Carmona v. Domino's Pizza, LLC* (9th Cir. 2021) 21 F.4th 627, and *Romero v. Watkins & Shepard Trucking, Inc*. (2021) 9 F.4th 1097, and the California Court of Appeal in *Betancourt v. Transportation Brokerage Specialists, Inc*. (2021) 62 Cal.App.5th 552, found that delivery drivers who may not themselves have crossed state lines in the performance of their duties still fell under the FAA transportation exemption as "last-mile" delivery drivers of goods in interstate commerce.

The implications of this FAA exemption can be significant. In the cases cited in the preceding paragraph, class-action waivers had to be analyzed under other standards – in *Betancourt*, the class action waiver was held unenforceable under the rule of *Gentry v. Superior Court* (2007) 42 Cal.4th 443; in *Romero*, in an unpublished opinion, the class action waiver was held enforceable under Nevada law. After *Viking River Cruises*, FAA exemption triggers the application of *Iskanian* in PAGA cases.

On the other hand, in *Capriole v. Uber Technologies, Inc*. (9th Cir. 2021) 7 F.4th 854, the Ninth Circuit found that Uber drivers are not engaged in interstate commerce and not exempt from the FAA.

Formation issues

To compel enforcement of an arbitration agreement, the moving party must first establish the formation of a valid arbitration agreement.

A common issue arises when a plaintiff claims he or she did not sign the arbitration agreement. In *Bannister v. Marinidence Opco, LLC* (2021) 64 Cal.App.5th 541, the defendant employer alleged the plaintiff had placed her electronic signature on the arbitration agreement during her onboarding process, but the plaintiff alleged she had not touched a computer or reviewed or signed an arbitration agreement during onboarding. Based on the plaintiff's evidence that a large number of employees were onboarded the same day and that the employer's representative completed forms for other employees without their participation, and based on credibility determinations, the trial court found the plaintiff had not signed the agreement, and the court of appeal upheld that finding as a reasonable conclusion from conflicting evidence.

In *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, the defendant employer submitted a handwritten arbitration agreement that contained a signature the defendant claimed belonged to the plaintiff. The plaintiff, however, declared that she did not remember the arbitration agreement, that she had not been told about an arbitration agreement, and that had she known she was being asked to sign an arbitration agreement, she would not have signed it. The court held the plaintiff's declaration was in effect a denial that the signature was hers and that the defendant's failure to present contrary evidence that the signature was in fact the plaintiff's meant the trial court correctly ruled the plaintiff had not entered into an agreement to arbitrate.

In *Western Bagel Co, Inc. v. Superior Court* (2021) 66 Cal.App.5th 649, a meal and rest period class action case, the Spanish version of the arbitration agreement signed by the Spanish-only-speaking plaintiff employee referred to binding arbitration in one provision, but non-binding arbitration in another. The English version referred to binding arbitration in both provisions. The trial court applied California's rule construing ambiguity against the drafter to find no agreement for binding arbitration. The court of appeal reversed, applying the rule of *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407, that the FAA preempts state law rules of *contra proferentem* to ascertain whether an agreement authorizes classwide arbitration, and requires instead application of the FAA rule that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration.

In *Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, the court held the issue of formation is always for a court to decide, regardless of whether the agreement purports to delegate that authority to an arbitrator. The defendant employer sought to enforce an arbitration provision in its employee handbook, but after a broad review of California cases regarding enforcement of handbook arbitration policies, the court found the defendant's arbitration policy did not create an agreement to arbitrate because the employer's welcome letter stated that the handbook was intended to be informational, could be changed by the employer at any time, and did not create a contract of employment, and because the handbook acknowledgement form did not reference the arbitration policy.

Delegation clauses

Once a court finds a valid arbitration agreement that covers the plaintiff's claims, the court will decide whether any contract defenses preclude enforcement, unless the arbitration agreement contains a clear and unmistakable "delegation" provision that an arbitrator is to determine arbitrability. The plaintiff may make a court challenge to the delegation provision itself as unconscionable.

In *Wilson-Davis v. SSP America, Inc*. (2021) 62 Cal.App.5th 1080, the court held that standard provisions in a CBA requiring arbitration of issues concerning interpretation of the CBA did not constitute clear and unmistakable intent to delegate arbitrability issues to an arbitrator. The court of appeal affirmed denial of the motion to compel arbitration because the CBA did not require employees to arbitrate statutory wage and hour claims and because resolution of those claims did not require interpretation of the CBA.

In *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, the court examined two versions of the defendant employer's arbitration agreement, both containing delegation clauses stating, "[e]xcept as

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expressly provided for above with respect to group, collective, or representative actions, the arbitrator shall have the exclusive power to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this agreement." Version One also included a provision that "if the arbitrator or any judge of competent jurisdiction determines that any provision of the JAMS Rules or this agreement is illegal, invalid, or unenforceable, such provisions shall be severed or modified so that the remainder of the agreement shall apply to the fullest extent permitted by law." This clause indicating that a judge might rule on these issues meant delegation was not clear and unmistakable, so the delegation clause in Version One was unenforceable and arbitrability was for a court to determine. Version Two did not contain a similar clause, so the delegation clause in Version Two was clear and unmistakable and arbitrability was for an arbitrator to determine.

In *Lim v. TForce Logistics, LLC* (9th Cir. 2021) 8 F.4th 992, the district court found the delegation clause in the arbitration agreement was procedurally unconscionable because it was a take-it-or-leave-it offer by the employer and because it was in the middle of 31 paragraphs in more than nine pages of single-spaced 10-point font, nothing in the text called attention to the delegation clause, and the plaintiff was not required to sign or initial the delegation clause. The delegation clause was substantively unconscionable because it required the employee to split arbitration fees with the employer, authorized the arbitrator to award attorneys' fees to whichever party prevailed on claims where only a prevailing employee is statutorily authorized to recover attorneys' fees, and provided that arbitration would be venued in Texas. These multiple unconscionable provisions could not be severed. The Ninth Circuit affirmed the district court's finding that the delegation clause was unenforceable and that, for the same reasons, the entire arbitration agreement was unenforceable.

Unconscionability

The most common area of litigation in employment arbitration where there is no CBA is the state law contract defense of unconscionability.

In *Nunez v. Cycad Management LLC* (2022) 77 Cal.App.5th 276, the court found procedural unconscionability where the plaintiff employee was a native Spanish speaker with limited English skills who declared he had no opportunity to review the arbitration agreement that was forced on him in a rush while he was working, that he was misled as to the nature of the agreement, and that he was instructed to sign or be fired. The court found the agreement substantively unconscionable because it allowed the arbitrator to impose attorneys' fees plus filing, administrative, and arbitrator's fees on the plaintiff, and it included unfair discovery limitations. Because the agreement was "rife with unconscionability" the court refused severance and affirmed denial of the motion to compel arbitration.

Often, the degree of procedural unconscionability is found to be low, but the court denies the motion to compel arbitration because of a high degree of substantive unconscionability. In *DeLeon v. Pinnacle Property Management Services, LLC* (2021) 72 Cal.App.5th 476, there was a low degree of procedural unconscionability because the defendant employer presented the arbitration agreement to the plaintiff on a take-it-or-leave-it basis, but there was a high degree of substantive unconscionability.

The *DeLeon* arbitration agreement included a substantively unconscionable provision that all claims were subject to a shortened one-year statute of limitations. The court also found unfair discovery limitations that the arbitrator could lift only upon a finding of "substantial need," as opposed to the "good cause" standard approved in prior cases. The court noted the plaintiff did not simply say the discovery limits were too restrictive, but submitted a declaration of counsel showing how and why discovery limits were too restrictive. The court found that the multiple unconscionable provisions rendered the agreement permeated by unconscionability and unenforceable.

Ramirez v. Charter Communications, Inc. (2022) 75 Cal.App.5th 365 is another case where there was a low degree of procedural unconscionability because the defendant employer presented the arbitration agreement to the plaintiff on a take-it-or-leave-it basis, but there was a high degree of substantive unconscionability. The court held multiple provisions of the agreement substantively unconscionable, including shortening of the limitations period for FEHA claims, a provision granting an award of attorneys' fees to the prevailing party on a motion to compel arbitration of claims where there is only statutory authority to award attorneys' fees to a prevailing employee, and excessive discovery limitations (the plaintiff provided evidence as to why permitted discovery would be inadequate).

The *Ramirez* agreement also lacked mutuality because it required the employee to arbitrate claims an employee would likely bring, while excluding from arbitration claims the employer would likely bring, including claims for injunctive or other equitable relief related to unfair competition, trade secrets, severance or noncompete agreements, theft or embezzlement or other criminal conduct, and intellectual property rights. Given the multiple defects, the court of appeal found the agreement permeated by significant unconscionable terms and affirmed the trial court's ruling that severance was inappropriate, and that the agreement was unenforceable.

On the other hand, in *Alvarez v. Altamed Health Services Corp.* (2021) 60 Cal.App.5th 572, the Court of Appeal reversed the trial court's findings of procedural and substantive unconscionability. While there was a low degree of procedural unconscionability because the defendant employer imposed the agreement on the plaintiff, the court of appeal found no higher degree of

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procedural unconscionability based on the fact that the agreement was not presented to the employee in Spanish (because the Spanish-speaking plaintiff stated during her interview that she was "comfortable" speaking and reading English) or the fact that the plaintiff was not provided a copy of the applicable rules of the American Arbitration Association ("AAA") (because she made no claim that any provision of the AAA rules was unconscionable).

There was only one substantively unconscionable provision in *Alvarez*, a right of appeal to a second arbitrator. The court found that provision to benefit the employer more than the employee, so that provision could be severed and the agreement enforced.

Duress

Another state-law contract defense applicable to arbitration agreements is economic duress, which if found, permits a party to rescind an agreement. *Martinez-Gonzalez v. Elkhorn Packing Co., LLC* (9th Cir. 2021) 25 F.4th 613, illustrates the very high bar that must be overcome to establish economic duress. The defendant employer hired the plaintiff, a Mexican citizen, helped him obtain an H-2A temporary agricultural visa, and transported him to the United States. A few days after work started, the defendant had about 150 workers stand in line in a parking lot at the end of a workday to sign employment packages, including the arbitration agreement. When each employee reached the front of the line the employee was asked by an employer representative who was flipping through the pages to hurry and sign the documents so everyone could sign.

The district court denied the defendant's motion to compel arbitration on grounds of economic duress and undue influence. The Ninth Circuit reversed, finding that "while the circumstances surrounding the signing of the agreements were not ideal," they did not rise to the level of economic duress because the defendant did not commit a "wrongful act" under California law and because the plaintiff had reasonable alternatives, such as refusing to sign or later revoking the agreement within ten days as permitted under the agreement. There was no undue influence because the plaintiff could not show "undue susceptibility in the servient person" and "excessive pressure by the dominating person."

Waiver

Even where a valid agreement to arbitrate is found, a party may be denied enforcement if that party is found to have waived the right to arbitrate. For example, in *Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, the U.S. Supreme Court held that a party asserting waiver of the right to arbitrate does not have to show prejudice caused by the moving party's actions.

Under California law, prejudice is one of several factors considered in determining whether a party has waived the right to arbitrate. The California waiver analysis is very fact intensive, as illustrated by two recent decisions that reached opposite conclusions.

In *Quach v. California Commerce Club, Inc.* (2022) 78 Cal.App.5th 470, the defendant employer in a FEHA case filed an answer, propounded and responded to multiple sets of discovery, took the plaintiff's deposition, engaged in extensive meet and confer regarding discovery, and did not move to compel arbitration until 13 months after the complaint was filed. The court of appeal found the defendant's conduct was merely participation in litigation that was largely limited to party-directed discovery, with no trial court involvement or determinations on the merits, and that the plaintiff had not shown any prejudice apart from the expenditure of time and money on litigation. The court of appeal therefore reversed the trial court's finding of waiver and directed the trial court to grant the motion to compel arbitration.

In *Garcia v. Haralambos Beverage Co.* (2021) 59 Cal.App.5th 534, the defendant employer asserted an affirmative defense in its answer to the plaintiffs' class action complaint that the claims were subject to arbitration agreements. Thereafter, the defendant participated in classwide mediation, agreed to a protective order to facilitate production of classwide information, responded to discovery requests with objections that did not assert the right to arbitrate, and engaged in meet and confer on discovery disputes and the *Belaire-West* notice process. Over 19 months after lawsuit was filed, the defendant notified the plaintiffs that it had found arbitration agreements signed by the plaintiffs and intended to move to compel arbitration, and two years after the filing of the lawsuit the defendant filed its motion to compel. The trial court denied the motion to compel. The court of appeal affirmed the trial court, finding that the defendant acted inconsistently with the right to arbitrate and that the plaintiffs had been prejudiced because their ability to realize the benefits and efficiencies of arbitration had been impaired.

No award of attorneys' fees to prevailing employer on motion to compel arbitration of FEHA claims, unless the employee's opposition to arbitration is frivolous, unreasonable, or groundless

In *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473, the defendant employer successfully compelled arbitration in response to the plaintiff's complaint alleging FEHA claims. The trial court awarded attorneys' fees to the defendant under a provision in the arbitration agreement that a party unsuccessfully resisting arbitration shall pay the prevailing party's fees in obtaining an order compelling arbitration. The court of appeal held that attorneys' fees may only be awarded to a prevailing employer if the heightened standard for awarding attorneys' fees against employees in FEHA cases is met. Therefore, the case was reversed and remanded with instructions to the trial court to only award attorneys' fees if the court found the plaintiff's opposition to the motion to compel was frivolous, unreasonable, or groundless.

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In *Ramirez, supra,* the court reached a different conclusion. It held that a fee-shifting provision in an arbitration agreement providing for an attorneys' fees award to a prevailing employer on a motion to compel arbitration is unconscionable and unenforceable. Thus, it cannot be saved by interpreting it to incorporate the heightened standard for awarding attorneys' fees against an employee.

Federal court jurisdiction over motions to affirm or vacate arbitration awards

In *Badgerow v. Walters* (2022) 142 S.Ct. 1310, the U.S. Supreme Court held that in determining federal court jurisdiction to entertain a petition to confirm or vacate an arbitration award under section 9 or 10 of the FAA, the district court may only consider whether the petition to confirm or vacate itself satisfies the requirements for federal court jurisdiction and may not "look through" the petition to the underlying dispute to find a source of federal jurisdiction. The express look-through authorization in section 4 of the FAA for petitions to compel arbitration does not apply to petitions to confirm or vacate arbitration awards. The Court noted that because most petitions to confirm or vacate are based on state contract law principles, and because the parties may not be diverse or the amount of the arbitration award may be less than $75,000, there often will be no federal court jurisdiction over a petition to confirm or vacate. As a practical matter, this means petitions to confirm or vacate often will not be able to be brought in federal court, not even in front of the federal district court judge who compelled the case to arbitration in the first instance.

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