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Mitigating Exposure for California Employers Through Mandatory Arbitration Agreements

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Mitigating Exposure for California Employers Through Mandatory Arbitration Agreements

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Program Description

This program will address how the Federal Arbitration Act ("FAA"), California's Private Attorneys General Act ("PAGA"), Assembly Bill 51 ("AB 51"), and the *Viking River Cruises* U.S. Supreme Court decision intersected to create a conundrum in the state of mandatory arbitration in California until *Chamber of Commerce v. Bonta*.

OVERVIEW

A BRIEF HISTORY OF ARBITRATION AGREEMENTS

PROS & CONS OF ARBITRATION FOR EMPLOYMENT-RELATED CASES

WAGE/HOUR CLASS ACTIONS AND PAGA LITIGATION

WHERE ARE WE NOW? MANDATORY ARBITRATION AGREEMENTS AND PAGA

HOW TO DRAFT ENFORCEABLE ARBITRATION AGREEMENTS

BEST PRACTICES TO MITIGATE EXPOSURE

A Brief History of Arbitration Agreements

- Nearly 100 years ago, Congress passed the Federal Arbitration Act of 1925 ("FAA"). This law made "valid, irrevocable and enforceable" arbitration agreements with few exceptions.
- When the FAA went into effect, the act's operative section read that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce" to settle deal-related disputes in arbitration should be enforced in court "save upon such grounds as exist at law or in equity for the revocation of any contract."

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A Brief History of Arbitration Agreements

- The Act defined "commerce" as that crossing lines between the United States, territories, and foreign countries.
- It exempted the employment contracts of "seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."
- Proponents of the FAA sought to empower businesses to have an alternative option to court and made their agreements to do so enforceable.

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U.S. Supreme Court Adopts FAA as National Policy

- For approximately the next 60 years, federal courts read the FAA to apply only to contractual or transactional disputes brought in federal court. This changed in the mid-1980's with the United States Supreme Court recognized the FAA as adopting a national policy favoring arbitration.
- The *Keating* case was a landmark ruling which placed the FAA above conflicting state laws and extended its reach into state courts. *Southland Corp. v. Keating* (1984) 465 U.S. 1.
- *Keating* laid the groundwork for an explosion of employment-related arbitration agreements.
  - In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, the Supreme Court determined the FAA applied to statutory claims.

U.S. Supreme Court Adopts FAA as National Policy

- The U.S. Supreme Court eventually applied the *Mitsubishi* standard in employment law matters.
  - In 1991, the Court decided *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, which held that employees can agree to arbitrate Age Discrimination in Employment Act claims.
  - In 2001, the Court considered whether the FAA's exemption for "seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce" covered workers generally and held that it did not, reasoning that ruling otherwise would make Congress' explicit exclusion superfluous. *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105.

The Rise of Arbitration in Employment Lawsuits

- In 2000, the California Supreme Court decided *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) *24 Ca1.4th 83*, which held claims asserted under California's Fair Employment and Housing Act ("FEHA") may be subject to binding arbitration.
  - The California Supreme Court held that an arbitration agreement may be revoked if it does not include basic procedural and remedial protections so that a claimant may effectively pursue his or her statutory rights, or otherwise it is unconscionable.

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The Rise of Arbitration in Employment Lawsuits

- In *AT&T Mobility LLC v. Conception* (2011) *563 U.S. 333*, and *Epic Systems Corp v. Lewis* (2018) 183 S.Ct 1612, the Supreme Court of the United States held that when parties enter into agreements to resolve disputes by individualized arbitration, rather than collection action or individual actions in court, those agreements are fully enforceable under the FAA.
- California employers and courts follow *Armendariz, Concepcion* and *Epic,* and many employment related actions have been compelled to or stipulated to arbitration.
  - In 1992, only 2% of workers were covered by mandatory arbitration agreements.
  - By 2017, more than 50% of workers were covered by mandatory arbitration agreements which preclude them from filing class actions.

PROS & CONS OF Employment Arbitration

PROS	CONS
No Risk Of Runaway Jury	Expensive
Limits Class Action Exposure	Limited Circumstances for Appeal
Confidentiality	
Streamlined Litigation	
Objective Factfinder	
Limited Circumstances For Appeal	

Wage and Hour Class Action Lawsuits Are On The Rise With No Signs of Slowing Down

- The number of employment class actions, representative actions, and Fair Labor Standards Act (FLSA) collective actions has exploded over the last fifteen years and shows no sign of abating.
  - In particular, the number of lawsuits related to the FLSA, which establishes the country's minimum wage and overtime pay rate criteria have risen sharply.
  - A review of compiled statistics revealed that there were more than 8,800 wage and hour lawsuits filed in 2015, which represents a 358% increase over the same type of filings that occurred in 2000.

Wage and Hour Lawsuits Are On The Rise With No Signs of Slowing Down

- While a handful of Supreme Court cases have made modest inroads for employers, many lower courts remain supportive of employment class action litigants and may view the process as necessary to constrain employer conduct.
- At the same time, the Plaintiffs' bar is continuing to develop strategies designed to increase employer costs and to provide itself with settlement leverage.

Class Action Costs Are On The Rise

- Settlements for wage and hour lawsuits have soared over the past few years. In 2011, the amount paid to settle class action lawsuits filed over disputes in the way companies paid their employees totaled just over $200 million.
- However, in 2016, that amount increased to more than $600 million.
- In 2021, a new record was set for workplace class action settlements: $3.62 billion.
  - That's compared to $1.58 billion in 2020 and $1.34 billion the year before that.

Private Attorneys General Act ("PAGA")

- PAGA was enacted in 2004 to help the Labor & Workforce Development Agency ("LWDA") enforce California's labor laws.
- It allows employees to sue for any Labor Code violation as if they were the state.
- Because it deputizes private attorneys to file lawsuits on behalf of aggrieved employees, many argue it has been abused.

PAGA Claims Are Similarly Rampant In California

- Attorneys have leveraged PAGA's penalty structure to secure large settlements even if the claims have little to no merit.
- The employer often ends up paying a hefty sum with much of the money going to the attorneys and very little going to workers or the state.
- The representative employee bringing a PAGA claim only receives a small portion of the damages or judgment.
  - 75 percent of the penalties recovered in a PAGA claim go to the State of California.
  - The aggrieved employees share 25 percent of the penalties.

PAGA Diverges from U.S. Supreme Court Standard

- Though California courts follow *Concepcion* and *Epic,* the California Supreme Court in *Iskanian* held that pre-dispute agreements waiving the right to bring "representative" PAGA claims were invalid as a matter of public policy. *See Iskanian v. CLS Transp. Los Angeles, LLC* (Cal. 2014) 327 P.3d 129.
  - The "*Iskanian* rule" mandates the availability of representative PAGA claims even when an otherwise enforceable arbitration agreement to resolve disputes through individualized arbitration exists.

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PAGA Diverges from U.S. Supreme Court Standard

- In *Sakkab v. Luxottica Retail N. Am., Inc*., 803 F.3d. (9th Cir. 2015), a divided panel of the Ninth Circuit concluded that "the FAA does not preempt the *Iskanian* rule" and that representative PAGA actions are less incompatible with traditional arbitration than the class arbitrations addressed in *Concepcion.*

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AB 51 Threatens Mandatory Arbitration Agreements

- The California legislature has repeatedly attempted to ban mandatory arbitration agreements as a condition of employment and limit claims subject to arbitration.
- AB51 was signed into law by Governor Gavin Newsom, which was meant to take effect on January 1, 2020. As drafted, AB 51:
  - Prohibited employers from requiring employees to sign arbitration agreements under FEHA as a condition of employment, continued employment, or the receipt of any employment-related benefit.
  - Allowed for criminal penalties for violations of the Labor Code and imposed civil liability against any employer that retaliated, discriminated, terminated, or threatened any such action, against employees who refused to accept mandatory arbitration.

Ninth Circuit in Flux Regarding Legality of Mandatory Arbitration Agreements

- On the eve of AB 51 taking effect, a California federal district court judge entered an injunction blocking enforcement, holding that AB 51 violated the FAA by unfairly requiring greater consent on arbitration agreements and potential civil and criminal penalties that is absent from other contracts.
- On September 15, 2021, a divided Ninth Circuit panel reversed the district court's injunction. In October 2021, the Ninth Circuit upheld the statute prohibiting forced arbitration in employment. *See Chamber of Commerce v. Bonta* (9th Cir. 2021)13 F.4th 766.
  - The court held that the FAA does not completely preempt AB 51 to the extent that AB 51 seeks to regulate an employer's conduct *prior to* executing an arbitration agreement (i.e., as a condition of employment).

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Ninth Circuit in Flux Regarding Legality of Mandatory Arbitration Agreements

- The Chamber of Commerce subsequently filed a petition for rehearing *en banc*, positing that AB 51 should be preempted in its entirety.
  - The Ninth Circuit deferred rehearing pending the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___ [142 S.Ct. 1906, 213 L.Ed.2d 179].

Pendulum Begins To Swing In Favor of Employers

- On March 30, 2022, the U.S. Supreme Court heard oral arguments in *Viking River Cruises, Inc. v. Moriana*. *Viking River Cruises* was a highly anticipated case, particularly for California employers, related to the scope of the FAA as it applies to the FAA's ability to preclude PAGA actions based on an otherwise enforceable arbitration agreement between the parties.
- The U.S. Supreme Court issued its decision on June 15, 2022, holding that claims brought under PAGA can be split into individual PAGA claims and non-individual PAGA claims, and that individual claims may be compelled to arbitration.

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Pendulum Begins To Swing In Favor of Employers

- The Court further held that because of PAGA's standing requirements, once an employee's individual PAGA claims are compelled to arbitration, the non-individual PAGA claims cannot be maintained and must be dismissed.
- The Court concluded that the FAA broadly preempts rules that interfere with parties' freedom to determine the issues subject to arbitration.

PROS & CONS OF Employment Arbitration Post *Viking River Cruises Inc.*

PROS	CONS
No Risk Of Runaway Jury	Expensive
Limited Class Action Exposure	Limited Circumstances for Appeal
Confidentiality	
Streamlined Litigation	
Objective Factfinder	
Limited Circumstances For Appeal	
PAGA Waiver (at least for individual PAGA claims)	

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AB 51 Is Preempted: Mandatory Arbitration Agreements Are Back In Play

- Following the *Viking River Cruises* ruling, the Ninth Circuit panel in *Chamber of Commerce v. Bonta* withdrew the panel decision in August 2022 and granted rehearing.
- At issue was whether the FAA preempts California's AB 51.
- On February 15, 2023, the Ninth Circuit affirmed the district court's prior ruling that the FAA preempts AB 51, which made it a criminal offense for an employer to require an applicant or employee to agree to arbitration as a condition of hire or continued employment.
- The Court reasoned that AB 51's imposition of criminal and civil penalties on employers entering into arbitration agreements as a condition of employment or continued employment is an "obstacle" to the FAA's purpose.

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AB 51 Is Preempted: Mandatory Arbitration Agreements Are Back In Play

- The Court explained that AB 51 discriminates against arbitration by:
  - (1) Discouraging or prohibiting the formation of an arbitration agreement, even if the agreement is ultimately enforceable, and
  - (2) Burdens the defining features of arbitration agreements.
- The Ninth Circuit ultimately held that "Yes, the FAA preempts AB 51."

Key Takeaways From The *Chamber of Commerce v. Bonta* Case

- AB 51 Is Preempted In Its Entirety
- FAA Continues To Preempt State Challenges
- Ninth Circuit Joins Sister Circuits
- California May, But Likely Won't, Appeal The Decision

Are Mandatory Arbitration Agreements Bulletproof?

- At the moment...No.

- *Viking*'s modification to the rules set forth by the California Supreme Court in *Iskanian* created the present rule: arbitration agreements between employers and employees that require arbitration of the individual portion of a PAGA claim are enforceable, but arbitration agreements that require arbitration (or waiver) of the representative portion of a PAGA claim are not enforceable. *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281, 1288.

Are Mandatory Arbitration Agreements Bulletproof?

- "The plain language of [Labor Code] section 2699(c) has only two requirements for PAGA standing. The plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" *Kim v. Reins International California Inc.* (2020) 9 Cal.5th 73, 83–84.

- Nevertheless, as a matter of stare decisis, we are bound to follow *Viking* on FAA preemption and *Kim* on PAGA standing. *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281, 1293.

Why Is Standing Related To PAGA Relevant?

- Now that it has been clarified that PAGA provides individual and non-individual representative claims, the issue of standing in California is more contentious following the *Viking River Cruises* ruling.

- Though the U.S. Supreme Court held that an employee who must arbitrate their individual PAGA claims loses standing to proceed against an employer on the representative claims, California Supreme Court precedent states otherwise.

Why Is Standing Related To PAGA Relevant?

- In light of this, the California Court of Appeal has been deferring to the California Supreme Court on the issue of standing most recently in *Nickson v. Shemran, Inc.* (Apr. 7, 2023, No. D080914) ___Cal.App.5th___ [2023 Cal. App. LEXIS 265]), where the Court held the plaintiff has standing to litigate non-individual PAGA claims in the superior court notwithstanding his agreement to arbitrate individual PAGA claims. The Court deferred to the Superior Court on how to manage the PAGA non-individual litigation.

All Eyes Are On *Adolph v. Uber Technologies Inc.*

•As management of PAGA litigation in state court remains in the hands of the trial courts and up in the air, some judges have decided to stay litigation pending completion of the arbitration <u>and</u> pending the California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.*, Case No. S274671.
Denicore v. Lending, 2023 Cal. Super. LEXIS 6670, *3.

•In light of the growing tension between U.S. Supreme Court authority and California Supreme Cout precedent, the California Supreme Court agreed to decide the very issue of whether a plaintiff lacks standing to bring non-individual PAGA claims in *Adolph v. Uber Technologies, Inc.*, Case No. S274671. Oral argument is expected to be scheduled soon.

California Fair Pay and Employer Accountability Act: 2024 Ballot

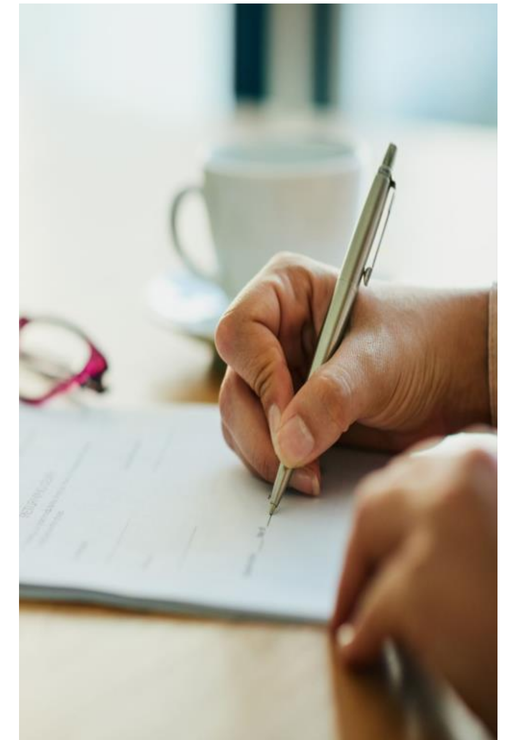
- As PAGA remains a looming threat to California employers, businesses have banned together to reform the state's wage and hour enforcement law and qualify the California Fair Pay and Employer Accountability Act for the 2024 ballot.
- The goals of the initiative are:
  - Resolve workers' claims faster under the Labor Commissioner
  - Eliminate shakedown lawsuits
  - Avoid prolonged and costly court cases
  - Provide penalty payments to workers, not lawyers or the state

How To Draft Enforceable Arbitration Agreements

- Remember The Basics: The *Armendariz* Factors:
  - (1) provide for a neutral arbitrator;
  - (2) provide for more than minimal discovery;
  - (3) require a written award;
  - (4) provide for all of the types of relief that would otherwise be available in court; and
  - (5) not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum.
- What Is Your Consideration?
- Is It Unconscionable? Substantive? Procedural?
- How Are Arbitration Agreements Distributed, Executed, and Documented?
- Are Class Action and individual-PAGA claim waivers included?

Best Practices To Mitigate Exposure

- Now that employers can impose mandatory arbitration as a condition of employment, crafting the agreement requires careful consideration, ideally at the advice of counsel.
- Specific considerations include the following:
    - Whether the arbitration agreement will include a class and collective action waiver and address how non-individual PAGA claims are litigated.
    - Whether to only require arbitration agreements for certain level employees.
    - How to carve out sexual harassment and sexual assault claims, pursuant to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.
    - How to incorporate *Viking River Cruises*, which permits employers to require employees to arbitrate individual PAGA claims.
- Ultimately, employers must be vigilant and keep their arbitration agreements up to date and continue to monitor legislative developments concerning arbitration.



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QUESTIONS?

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