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EMPLOYMENT LAW UPDATE

JUDICIAL

Federal

Supreme Court Rules in *Viking River Cruises, Inc. v. Moriana* that the FAA Preempts California's *Iskanian* Rule Preventing Arbitration Agreements from Waiving the Right to Bring Representative Claims

In a long-anticipated decision, the United States Supreme Court issued its ruling in *Viking River Cruises, Inc. v. Moriana*, offering, at least for the time being, a victory in favor of the enforcement of waiver of California's Private Attorneys General Act of 2004 ("PAGA") in arbitration agreements. Unfortunately, however, that victory may be short-lived.

While California's Labor and Workforce Development Agency ("LWDA") is authorized to pursue enforcement actions and impose civil penalties on employers for California Labor Code violations, it lacks sufficient resources to do so with any great reach. As a result, PAGA legislation was enacted, whereby any "aggrieved employee" may initiate an action against a former employer "on behalf of himself or herself and other current or former employees" to obtain civil penalties that previously could have been recovered only by the state in an LWDA enforcement action.

Respondent Angie Moriana ("Moriana") was hired by ocean and river cruise company Viking River Cruises, Inc. ("Viking") as a sales representative. At the outset of Moriana's employment, she signed an agreement to arbitrate any dispute arising out of her employment. The agreement contained a "class action waiver" that provided that the parties could not bring any dispute as a class, collective, or representative action.

The arbitration agreement also contained a severability clause specifying that, if any portion of the waiver was deemed invalid or unenforceable, the portion of the case that could not be compelled to arbitration would be litigated in court, while any acceptable portion would proceed to arbitration. Viking moved to compel arbitration of Moriana's individual claims (the claims that arose from the violations she claimed to have personally suffered) and to dismiss her remaining PAGA claims. The trial court denied that motion, and the California Court of Appeal affirmed, based on the California Supreme Court's prior decision in *Iskanian v. CLS Transportation Los Angeles, LLC*.

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The United States Supreme Court granted certiorari and reversed the California Appellate Court's decision, noting conflict between PAGA's procedural structure and the Federal Arbitration Act ("FAA"). The Supreme Court held that the prohibition on the contractual division of PAGA actions into constituent claims unduly circumscribed the freedom of parties to determine the issues subject to arbitration, thus violating the fundamental principle that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." (Citing *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 945.) As a result, it reasoned, a state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration, and would coerce the parties into giving up a right they should enjoy under the FAA.

The Supreme Court also held that the FAA preempted *Iskanian* insofar as it precluded division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. As Viking was entitled to compel arbitration of Moriana's individual claims and, pursuant to PAGA's standing requirement, a plaintiff can only maintain a non-individual PAGA claim by virtue of also maintaining an individual claim in that action, Moriana lacked standing to maintain her non-individual claims in court once her individual claims were compelled to arbitration. As a result, the Supreme Court held that the correct course was to dismiss Moriana's PAGA claims for lack of standing.

While certainly a victory, the Viking River Cruises decision may be a pyrrhic one, as its concurring opinion expressly noted the freedom of the California legislature to "modify the scope of statutory standing under PAGA within state and federal constitutional limits." Should the legislature do so (as it likely will) the standing issue will be resolved to permit an individual to pursue PAGA claims in court even absent the existence of individual claims in that same forum. Employers utilizing arbitration agreements, particularly those that include class and PAGA waivers, should continue to monitor the state of applicable law to ensure that their agreements remain in compliance.

Time and Expense of Preemployment Drug Test Deemed Not Compensable by *Johnson v. Winco Foods LLC*

In *Johnson v. WinCo Foods LLC*, the Ninth Circuit Court of Appeals affirmed a federal court's ruling in favor of WinCo Foods, LLC ("WinCo"), holding that the time and expense associated with an applicant taking a drug test prior to employment does not require compensation as an employee.

WinCo requires its job applicants to pass drug screens prior to commencing their employment. Plaintiff Alfred Johnson ("Plaintiff") filed a class action complaint, claiming that, because screenings were administered under the "control" of the WinCo, the members of the putative class must be considered employees and should therefore be entitled to compensation for the time and expense associated with each screening. The prayer for recovery was supported by an alternate argument, in which Plaintiff asserted that putative class members should be treated as employees under a "contract theory" and, as a result, screenings should be regarded as conditions subsequent to hiring. The district court and the Ninth Circuit panel disagreed with each of Plaintiff's contentions.

In its opinion, the Ninth Circuit panel explained that, at the time the drug tests were administered, the individuals were not employees under California's "control" test, as control over a pre-employment drug screening as a component of a job application process is not akin to control over the performance of the job. Affected individuals were not performing work for WinCo at the time of the tests as, the court reasoned, they were still applicants, not yet employees.

The Ninth Circuit panel also explained that the putative class members were not employees under the "contract theory" because the individuals were not officially hired until *after* they established requisite qualifications – in this instance, ability to pass a drug screen. As the drug test was a condition *precedent* to employment, and individuals did not become employees of WinCo until after its satisfaction, Plaintiff's argument faltered.

In light of the *Winco* ruling, California employers that utilize pre-employment drug screening can take comfort in the analysis that, at least under the present state of the law, their practices are acceptable and time spent drug screening before employment is not compensable. Those employers should, however, remain cognizant of potential changes to the treatment of drug testing and drug policies in the workplace, as the California legislature continues to push for changes in that arena.

Bowerman Title

In *Bowerman v. Field Asset Servs., Inc.*, the Ninth Circuit held that the North District Court for the North District of California erred in certifying a class due to the lack of questions common to the class, as well as a failure to demonstrate that the entire class suffered damages stemming from the same alleged harmful conduct by Defendant. The court also reversed the district court's partial summary judgment finding that the Plaintiffs had been misclassified.

Defendant Field Asset Services, Inc. ("FAS") operates in the residential mortgage industry and contracts with vendors to perform pre-foreclosure property preservation services for its clients. These vendors are diverse, ranging from sole proprietorships to corporations, and employ different numbers of employees. Some vendors worked solely for FAS while others contract with several different companies, including FAS' clients and competitors. FAS classified the vendors with which it does business as independent contractors.

Plaintiff Fred Bowerman ("Bowerman") performed work for FAS as a vendor, and filed suit on behalf of himself and other FAS vendors claiming that each had been misclassified as an independent contractor, and was therefore owed overtime and reimbursement of business expenses. The trial court granted Plaintiff's motion for class certification, while also granting partial summary judgment in finding that the vendors were misclassified as a matter of law. FAS appealed.

In its analysis, the Ninth Circuit first found that, even assuming FAS' alleged misclassification could be proved through common evidence, the issue of *whether* FAS was liable to any class member "would implicate highly individualized inquiries on whether that particular class member *ever* worked

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overtime or *ever* incurred any 'necessary' business expenses." Class certification should therefore have failed, as the claims by their nature require individualized inquiries to assess the threshold question of liability – not simply the calculation of damages.

Class certification was also improper because the class members could not demonstrate that "the whole class suffered damages traceable to the same injurious course of conduct underlying [P]laintiff's legal theory." This failure, in turn, meant that the class members also could not show that their damages could be measured on a class-wide basis. The trial court preliminarily sought to ascertain damages for eleven class members through an eight-day jury trial, finding that the only effective method of doing so was by obtaining individualized testimony from each class member. As such, the court held that the class members failed to show that damages could be determined without excessive difficulty. These issues each provided independent bases upon which to reverse class certification.

The court also discussed the applicable legal tests for each of Plaintiffs' wage and hour claims. The court held that, because the overtime claim was rooted in a California wage order, it was governed by the three-pronged *Dynamex* test, while the business expenses claim was based on a California statute and therefore governed by the multi-factor *Borello* test. The trial court's partial summary judgment finding that the vendors had been misclassified was therefore reversed, as the court found that *Borello*'s fact-intensive inquiry created a genuine dispute of material fact. Moreover, while it was undisputed that the class members performed work within the same course of business as FAS, the business-to-business exception to *Dynamex* could apply, leaving open the possibility of a finding in FAS' favor.

This case represents a victory for California employers facing class actions that necessitate highly individualized factual inquiries. As always, however, employers should do their best to maintain appropriately crafted and implemented policies, such that class litigation can be avoided altogether, to the extent possible.

California

California Appellate Court Makes Wide Range of Rulings in *Meza v. Pacific Bell Telephone Company*

In *Meza v. Pacific Bell Telephone Company*, a California appellate court ruled on four appealed orders in the same class and PAGA action. In doing so, it found that the trial court abused its discretion in refusing to certify meal and rest period classes, because whether uniform written guidelines violate wage and hour law, even if diversly applied, is not an individualized inquiry. It also concluded that Labor Code section 226 does not require the rates and hours related to a lump sum overtime payment to be reported on wage statements. Finally, it found that claim preclusion bars a PAGA claim where the primary right involved is the same primary right as a previously settled PAGA lawsuit.

Plaintiff Dave Meza ("Plaintiff") was hired by Defendant Pacific Bell Telephone Company ("Pacific Bell") in January 2014 as a premises technician. After his employment ended in October 2015, he filed a class action complaint

against his former employer alleging various violations of the California Labor Code, including failure to provide meal and rest periods and failure to provide accurate itemized wage statements.

Plaintiff moved to certify six classes of premises technicians, five pertaining to meal and rest period claims and the other to a wage statement claim. He cited Pacific Bell's "Premises Technician Guidelines" which provided that, during meal and rest periods, technicians could not abandon their vehicles, travel "out of route," congregate with other company vehicles, or sleep in their vehicles. It also required that employees protect company property and project a positive image of the company. Plaintiff claimed that these guidelines placed too many restrictions on the premises technicians and substantially limited their activities during meal and rest periods, while also arguing that common issues predominated because the guidelines uniformly applied to all premises technicians.

Pacific Bell argued that the guidelines on which Plaintiff relied were not in effect during his employment and that those that were in effect did not specifically limit how premise technicians could spend their meal and rest breaks. It also argued that common issues did not predominate because the premise technicians' understanding and the managers' enforcement of the guidelines differed. It also argued that Plaintiff was an inadequate class representative because he repeatedly lied in his deposition and the circumstances of his discharge were unusual (Plaintiff ended a disciplinary meeting, claiming an alleged medical emergency, but while on disability leave, obtained a job with a competitor).

The trial court denied Plaintiff's class certification motion based on its conclusion that common issues did not predominate. Plaintiff and Pacific Bell then filed cross-motions for summary adjudication of the remaining wage statement class claim, and the trial court granted summary adjudication in favor of Pacific Bell.

After Plaintiff filed his third amended complaint, which added a claim alleging that Pacific Bell's wage statements failed to accurately show the inclusive dates of each pay period, Pacific Bell filed a motion to strike for failure to state a claim, which the trial court granted without leave to amend. Finally, Pacific Bell moved for summary adjudication of Plaintiff's PAGA claim, arguing that a final, approved settlement in a prior action barred Plaintiff from pursuing his claim under the doctrine of res judicata, which the trial court granted.

Plaintiff appealed all four trial court orders (class certification order, wage statement order, order to strike, and PAGA order). The appellate court first considered whether each order was appealable. As each order was an interlocutory order, each was appealable under the "one final judgment" rule. It further found that the class certification, wage statement, and PAGA orders were appealable under the "death knell doctrine," an exception to the one final judgment rule, which provides that an order that disposes of all class claims is appealable, allowing a denial of a representative claim to be immediately appealed.

Plaintiff's earlier class certification appeal was denied, the court concluding that the death knell doctrine only permits an interlocutory appeal after

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any PAGA claims have also been dismissed (although the appellate court noted that this may be subject to debate). The court found that the class certification order was appealable, because as soon as the trial court granted summary adjudication of the wage statement order, no class claims remained. This same reasoning applied to the PAGA order, because as soon as the trial court granted summary adjudication in favor of Pacific Bell, no class claims remained.

The analysis for the wage statement order was more complex due to the doctrine's requirement that the orders subject to appeal dispose of all class claims but leave individual claims intact because the trial court's order only referred to the certified class claim, and it was unclear that it intended to summarily adjudicate anything other than the class claim. Nevertheless, the appellate court found the wage statement order was appealable. Finally, the court found that Plaintiff's appeal of the order to strike was not proper, as Plaintiff did not include it in his notice of appeal.

In reviewing the orders, the appellate court concluded that the lower court erred in refusing to certify the five meal and rest period classes, as it agreed with Plaintiff that the legality of Pacific Bell's guidelines is a common issue to the class. In evaluating whether individualized inquiries predominate because the guidelines were applied in diverse ways in practice, the court found that they do not. While *Brinker Restaurant Corp. v. Superior Court* (which concluded that class certification was appropriate because the plaintiff presented evidence of a uniform rest break policy) informed the court's decision, it did not answer the specific question at issue because there was no assertion in that case that the company applied the policy in diverse ways.

The court concluded that the lower court did not apply the proper legal framework when it denied class certification, in which it was concluded that the disparate manner in which employees experienced the policy through different managers rendered the claims unsuitable for class treatment. However, an employer's liability arises by adopting a uniform policy that violates wage and hour laws. The fact that an individual inquiry may be necessary to determine whether individual employees were able to take breaks despite policy is not a proper basis for denying certification. Thus, the issue to be resolved—whether the guidelines violate wage and hour law—is not an individualized inquiry. As a result, the court remanded and ordered the lower court to consider whether Plaintiff is an adequate class representative, an issue not previously addressed.

Next, the appellate court affirmed the wage statement order because it found that Pacific Bell's wage statements did not violate the Labor Code's statutory requirements. Plaintiff argued that Pacific Bell's wage statements violated Labor Code section 226 by failing to include the "rate" and "hours" attributable to overtime true-up payments, only including a lump sum amount. This overtime true-up was calculated using a complex formula that could only be determined after the close of the month and was reflected in the next month's first wage statement. Because the statute explicitly requires that a wage statement list the "hourly rates in effect *during the pay period*," Pacific Bell was not required to list hours and rates from earlier periods. The court concluded that it "cannot read into the statute a requirement that an employer include hours and rates from prior pay periods when the legislature omitted such a requirement."

Finally, the appellate court affirmed the PAGA order because it was barred by claim preclusion in light of the settlement and dismissal of a previous PAGA lawsuit. The established rule is that a judgment in a prior PAGA action operates as a claim preclusion bar to later lawsuits against the same employer. While Plaintiff argued that the claims did not involve the same cause of action as the previous PAGA lawsuit, the court found that Plaintiff's claims concerned the same primary right as those at issue in the previous PAGA lawsuit. Two cases have the same cause of action if they are based on the same primary right, and if the matter *could* have been raised in the prior action, the judgment is conclusive despite the fact that it was not *actually* raised in the prior suit. Plaintiff brought all the same claims as the previous lawsuit, except for a claim for failure to pay for upkeep of uniforms. However, as hers was also a claim for payment of wages, it could have been brought in the prior PAGA action. Additionally, the settlement broadly released "any and all known and unknown wage and hour related claims." Thus, claim preclusion was appropriate, and the trial court properly granted summary adjudication of Plaintiff's PAGA claim.

This is Pettit Kohn Ingrassia Lutz & Dolin PC's employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Ryan Nell, Shannon Finley, Rio Schwarting, Brian Jun, Christine Dixon, Jessica O'Malley, Rayne Brown, Nicole Allen, or Haley Murphy at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Andrew Chung, Rachel Albert, or Enoch Cheung at (310) 649-5772.

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