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EMPLOYMENT LAW UPDATE

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JUDICIAL

Federal

Ninth Circuit Court of Appeals Blocks California's Ban on Mandatory Arbitration Agreements

In *Chamber of Commerce v. Bonta*, the Ninth Circuit Court of Appeals affirmed the district court's grant of a preliminary injunction barring enforcement of California's Assembly Bill 51 ("AB 51") with respect to arbitration agreements governed by the Federal Arbitration Act ("FAA"). AB 51 would have made it unlawful for California employers to require applicants and employees to sign arbitration agreements as a condition of employment beginning January 1, 2020. Violations of the law could not only lead to civil and criminal penalties but would also be considered an "unlawful employment practice." In *Chamber of Commerce v. Bonta*, a majority of the Ninth Circuit panel concluded the FAA preempts AB 51.

As AB 51 took effect in early 2020, a California federal district court granted the U.S. Chamber of Commerce's request for a preliminary injunction, enjoining enforcement of AB 51 with respect to arbitration agreements governed by the FAA. California appealed the preliminary injunction to the Ninth Circuit. In 2021, a divided Ninth Circuit panel held the FAA does not completely preempt AB 51. Thereafter, the U.S. Chamber of Commerce filed a petition for rehearing en banc, which the Ninth Circuit deferred pending the U.S. Supreme Court's decision in *Viking River Cruises v. Moriana*. The U.S. Supreme Court issued its *Viking River Cruises* opinion on June 15, 2022. On August 22, 2022, instead of granting or denying the petition for rehearing in *Chamber of Commerce v. Bonta*, the Ninth Circuit decided to withdraw its prior opinion and have a rehearing.

In affirming the district court's grant of a preliminary injunction, a majority of the Ninth Circuit panel stressed long-standing U.S. Supreme Court precedent that state rules that burden the formation of arbitration agreements are an obstacle to the legislative intent of, and thus preempted by, the FAA. The Ninth Circuit panel majority also rejected arguments from California that it should sever clauses that were deemed preempted by the FAA and leave the remainder of the law intact. The Ninth Circuit explained that AB 51 could not be dissected and salvaged because the statute's provisions all work together to burden the formation of arbitration agreements and there was no authority in the legislation to sever the penalty portions of the law.

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The preliminary injunction barring enforcement of AB 51 with respect to arbitration agreements governed by the FAA will remain in effect for the time being. California could request a rehearing by the Ninth Circuit en banc or appeal to the U.S. Supreme Court. If either a rehearing is granted or a petition to the U.S. Supreme Court is granted, the injunction would remain in effect until a decision in the matter. If California does not pursue a further appeal, the matter will return to the district court to proceed for a final determination on the legality of AB 51.

Ninth Circuit Court of Appeals Applies Supreme Court Precedent to Evaluate Potential Arbitration Waiver in *Armstrong v. Michaels Stores, Inc.*

In *Armstrong v. Michaels Stores, Inc.*, Teresa Armstrong ("Armstrong") filed a putative class action against Michaels Stores, Inc. ("Michaels") alleging various wage and hour violations. More than one year after the case's commencement, Michaels moved to compel arbitration. While the trial court granted the motion, Armstrong appealed, arguing that Michaels had unnecessarily and unacceptably delayed in seeking to compel arbitration. The Ninth Circuit Court of Appeals was unmoved, ruling that, although a year had passed, Michaels' acts remained consistent with a desire to exercise the right to arbitrate.

Armstrong executed an agreement to arbitrate disputes regarding the terms and conditions of her employment with Michaels. In October of 2017, Armstrong filed her complaint. Michaels answered and asserted its right to arbitration as an affirmative defense before removing the case to federal court. Armstrong then amended her complaint, adding a claim under the Private Attorneys General Act ("PAGA"). Michaels's answer to the amended complaint once again asserted its right to arbitration as an affirmative defense.

Over the course of the ensuing year, at each case management conference, Michaels continued to assert its desire to arbitrate. There were no discovery motions and the only discovery exchanged related to Armstrong's non-arbitrable PAGA claim. Only after issuance of the anticipated ruling in *Epic Systems Corp. v. Lewis*, which impacted whether the matter would proceed as an individual claim, rather than class action, did Michaels ultimately file its motion to compel arbitration.

After Michaels' initial motion was successful, the appellate court considered the impact of *Epic Systems* and *Morgan v. Sundance, Inc.*, electing to apply the test articulated by *Morgan*, which considers: (1) whether it is established that there was an existing right to compel arbitration; and (2) whether there were intentional acts inconsistent with that existing right.

The parties agreed that there was an existing right to compel arbitration, and the court noted that Michaels was consistently vocal about its desire to arbitrate. Michaels repeatedly confirmed this desire, both in its responsive pleadings and during various case management conferences. Moreover, Michaels did not avail itself of the trial court for purposes of seeking rulings, and only exchanged discovery limited to the non-arbitrable PAGA claim. None of these actions were inconsistent with Michaels' arbitration right. Further excusing Michaels' delay, the court noted that Michaels' strategy was motivated by its

desire to await the *Epic Systems* ruling.

Although the instant ruling was in Michaels' favor, California employers should be careful not to unnecessarily delay in moving to compel arbitration. While the court was moved by a series of factors that justified Michaels' decision to abstain from moving to compel for over a year, the factual circumstances were particularly nuanced. Where arbitration is the appropriate forum, employers should seek to compel as quickly as reasonably practicable.

California

California Court of Appeal Strengthens Arbitration Agreements While Also Preserving Employees' Ability to Bring Severed Representative PAGA Claims in Court in *Galarsa v. Dolgen California, LLC*

In *Galarsa v. Dolgen California, LLC*, the California Court of Appeal for the Fifth Appellate District issued a detailed ruling regarding the enforcement of arbitration agreements. It held that: 1) *Viking River Cruises, Inc. v. Moriana* and the Federal Arbitration Act ("FAA") do not invalidate the California rule that arbitration agreements purporting to waive employees' rights to pursue representative actions are not enforceable as to representative PAGA claims; 2) severability clauses in arbitration agreements allow unenforceable waiver provisions to be stricken from the agreement; 3) surviving agreements require arbitration of PAGA claims for violations suffered by the plaintiff only; and 4) representative PAGA claims, on the other hand, for violations suffered by employees other than the plaintiff, may still be pursued in court.

In February 2018, Plaintiff Tricia Galarsa ("Galarsa") filed a complaint against Dolgen California, LLC dba Dollar General ("Dollar General") seeking civil penalties under PAGA. Dollar General filed a motion to compel arbitration of individual claims and stay the proceeding, pursuant to the terms of the arbitration agreement executed by Galarsa prior to commencing her employment.

The trial court denied Dollar General's motion, holding that Galarsa's right to bring representative claims could not be waived, the rule against waiver was not preempted by federal law, and that a PAGA claim could not be split into arbitrable individual claims and non-arbitrable representative claims. The court of appeal affirmed the trial court's ruling and the California Supreme Court denied petition for review. The United States Supreme Court then vacated the appellate court's ruling and remanded the case for further consideration in light of the keystone decision in *Viking River*.

On review, the court first sought to dispel the confusion caused by the terms "representative" and "individual." It noted that all PAGA claims are, by their very nature, representative, as a plaintiff acts on the state's behalf. In continuing its analysis, the court divided PAGA claims into "Type A" and "Type O" designations. "Type A" is used when seeking a civil penalty in response to a violation suffered by the plaintiff, while "Type O" is used when seeking a civil penalty in response to a violation suffered by an employee other than the plaintiff.

In its analysis, the court considered the impact of *Viking River* and

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Iskanian v. CLS Transportation Los Angeles. In doing so, it noted that an invalid waiver of representative claims may be severed from the remainder of an arbitration agreement. This hybrid rule was used by the court to strike the invalid section of the subject arbitration agreement, which stated that that Galarsa could not assert any representative action claims in arbitration or in any other forum. PAGA claims are therefore not excluded from the arbitration agreement, as the waiver of representative actions has been stricken, and the court has recognized that even "individual" PAGA claims as representative. The arbitration agreement therefore required arbitration of disputes arising out of the employee's employment. The court interpreted this to mean that Type A claims were permitted despite being "representative" in nature because the alleged violations were suffered by Galarsa, but Type O claims would not be implicated because those claims arise out of other employees' employment with Dollar General.

Because arbitration is a matter of consent and other employees did not consent to have their claims arbitrated by Galarsa, the court held that Dollar General's attempt to compel arbitration for Type O claims was denied. In determining how to treat Type O claims, the court explained that the two requirements for PAGA standing are that the plaintiff must be an aggrieved employee and a subject of at least one of the alleged violations. Galarsa met the requirements.

Diverging with *Viking River*, however, the court predicted that the California Supreme Court will conclude that an aggrieved employee will be permitted to pursue Type O claims in court after separation from Type A claims. This promotes the purpose of PAGA "to ensure effective code enforcement." The court also predicted that the California Supreme Court will come to this conclusion because splitting Type A and Type O claims does not violate the rule against splitting a "primary right," as Type A and Type O claims implicate different primary rights because they indicate different harms.

The court held that, while the order denying the motion to compel arbitration was affirmed as to Type O claims, it was reversed for Galarsa's Type A claims and Galarsa could pursue Type O claims in court. While the result was mixed, California employers can take some comfort in protection against overreach in arbitration agreements, as inapplicable sections may be stricken and Type A PAGA claims may still be compelled to arbitration. Employees, on the other hand, will still have the ability to hold employers accountable in court for Type O PAGA violations in accordance with the general PAGA enforcement goal.

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, Christine Dixon, Jessica O'Malley, Nicole Allen, Haley Murphy, Noah Diamant, Celeste Leung, or Michelle Perez-Yanez at (858) 755-8500; or Grant Waterkotte, Tristan Mullis, Rachel Albert, or Enoch Cheung at (310) 649-5772.