

2023: The state of Arbitration Post-Bonta and Viking River and What Comes Next

Prepared for the Association of Corporate Counsel, San Diego

by:

Signature Resolution Mediators/Neutrals

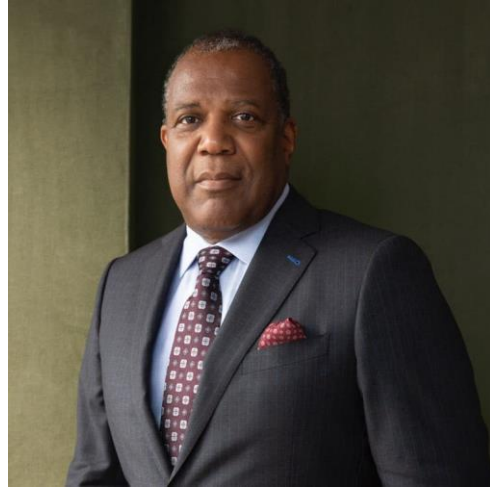
Jonathan Andrews & T. Warren Jackson

May 10, 2023

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PANELISTS



T. Warren Jackson
Mediator



Jonathan Andrews
Mediator

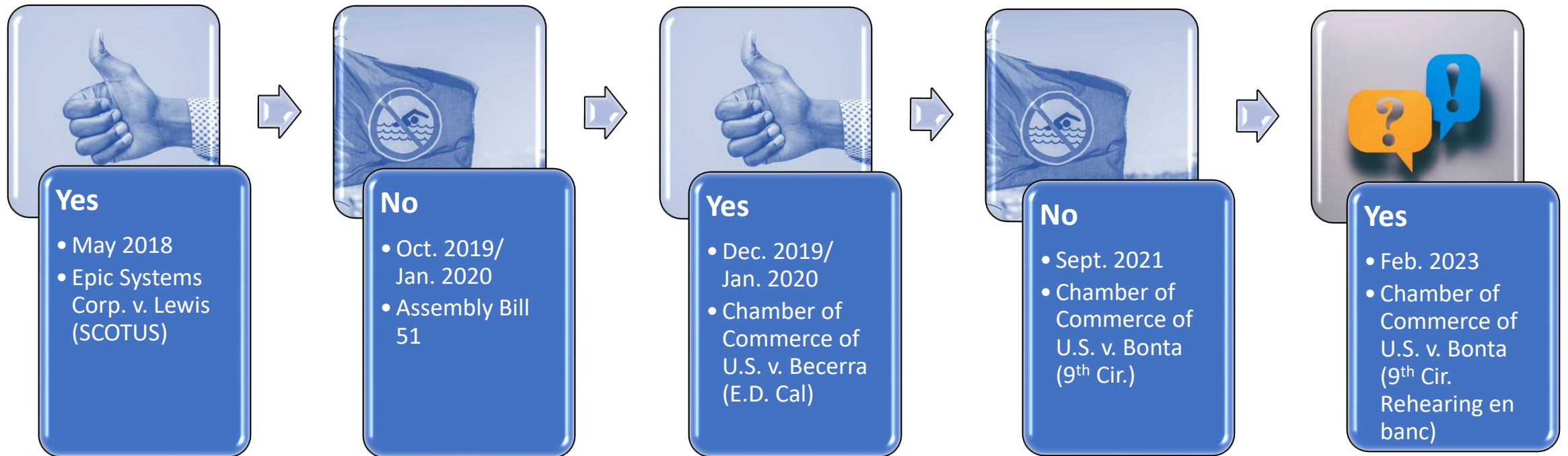
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Mandatory Arbitration – Current State of Law

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Can You Make Your Arbitration Agreement Mandatory?



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Impact of Delay

- *Morgan v. Sundance, Inc.* – SCOTUS (May 23, 2022). Employer waited eight months to move to stay the case and compel arbitration
- FAA policy favoring arbitration is strong, but courts “may not make up a new procedural rule based on the FAA’s policy favoring arbitration”
- Waiver simply based on prejudice will not work
- Remanded to lower court to focus on whether the employer relinquished its right to arbitrate by taking actions inconsistent with arbitration

Sample Class Waiver Language

- Employee agrees Employee is waiving the right to bring, or to participate in a class action, representative action, or collective action, whether filed in a court of law or in arbitration, against Company (“Class Action Waiver”). The Parties agree that any arbitration will proceed on an individual basis only. No other parties or their claims shall be joined, nor shall the arbitrator have authority to do so.
- Severability – PAGA

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Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (HR 4445)

- Applies to sexual assault and sexual harassment claims
- Amends the FAA to allow plaintiffs to pursue claims in court even where there is an arbitration agreement in place
- Applies to past & future agreement, but only to claims that arose on or after March 3, 2022

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PAGA Suit Considerations | *Viking River Cruises*



Who?

- Employee sued Viking River Cruises for PAGA violations
- SCOTUS agreed to review a challenge to the *Iskanian* rule



What?

- Issue: Whether individual PAGA claims can be compelled to arbitration where there is a representative action waiver



Where?

- From a ruling by the California Supreme Court
- On Appeal to the United States Supreme Court



When?

- Oral Argument March 30, 2022
- Decided on June 15, 2022.
- Under FAA, arbitration agreements can require EEs to bring individual PAGA claims to arbitration

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Will the *Viking* Decision Forever Put PAGA Actions To Bed?

- *Adolph v. Uber Technologies, Inc.* (Review granted July 20, 2022; Hearing May 9, 2023)
 - Threshold Issue currently being evaluated by California Supreme Court:
 - Whether California law allows an aggrieved party who is forced into arbitration to maintain standing to pursue the nonindividual—and most lucrative—aspect of the employee’s PAGA claim.
- Post-Viking River Orders Analysis
 - California courts have rejected Supreme Court’s standing ruling (*Dolgen California LLC v. Galarsa; Uber Technologies Inc. v. Gregg; Lyft Inc. v. Seifu; Piplack v. In-N-Out Burgers.*)
 - As of 3/21/23. 97 Orders have been reviewed (15 federal; 82 state). 21 denied motion to compel outright for a variety of reasons; of the remaining 76, 62 sent individual PAGA case to arbitration with no dismissal of non-individual PAGA claims; 13 dismissed the non-individual PAGA claims after sending individual case to arbitration (7 federal court and 6 state court).

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Response & Impact of *Viking* – Litigate Individual Claim

- Litigate the individual PAGA case in arbitration (fees are still obtainable)
- Employer must pay all of the arbitration fees
- Disproportionate amount of defense fees relative to claim may secure favorable settlements

Response & Impact of *Viking* – Mass Actions

- Similar to response to class waivers
- Example: > 10,000 former and current Postmates drivers filed individual arbitrations simultaneously triggering \$4.6 Million in filing fees due within 30 days
- Court denied Postmates' TRO

Review *Viking River* Arbitration Agreement

- The agreement in Viking: “covers any disputes arising out of or relating to your employment with [the Company]”
- The individual PAGA claim must fall within the scope of what is covered by the agreement
- Must have a class/representative waiver
- Look for any PAGA carve out

Viking Waiver

- The agreement in Viking River : ***“There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action, or as a member in any purported class, collective, representative or private attorney general proceeding, including, without limitation, uncertified class actions (“Class Action Waiver”)”***
- This is what evidences the intent that any arbitration be individual only
- Prevents the arbitration from proceeding as a multi-employee arbitration
- Without it, an employer could end up with all of the primary disadvantages of arbitration and none of the primary advantages

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Fees & Costs (CCP §§ 1281.97-1281.99)

The Drafting Party Pays

Failure to pay fees & costs to initiate or continue arbitration within 30 days of the due date is a material breach of the arbitration agreement

Consequences include waiver of the right to arbitrate; payment of the employee's attorney's fees & costs; and possible monetary, evidentiary, discovery, or terminating sanctions

Fees & Costs (CCP §§ 1281.97-1281.99) –Cont'd

Arbitrator's Fees & Costs Are Due In Advance

Unless otherwise expressly stated in the arbitration agreement, payment is due upon receipt

Recent case law indicates all fees & costs must be invoiced at the beginning of the arbitration



MEDIATION CONSIDERATIONS

Issues Under PAGA

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Pre-Mediation Issues

- What information is necessary for an effective mediation?
- Exchanging briefs/information
- Timing of mediation
- Declarations
- Attendees
- Insurance

Issues in Mediation

- Three things defense counsel wants to see from plaintiff's counsel
- Three things plaintiff's counsel wants to see from defense counsel
- Threatened insolvency/inability to pay
- Expanding the scope of resolution (class conversions, etc.)
- Scope of PAGA letter

Settlement/Court Approval

- Scope of release -1542 waivers
- Court scrutiny of agreement
- Individual enhancements
- Interveners

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The background features a repeating pattern of light blue speech bubbles, each containing a dark blue question mark. The bubbles are arranged in a staggered, overlapping grid. The overall color palette is various shades of blue.

Questions?

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