What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

Connie Elder Carrigan is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

Supreme Court Weighs in on Arbitration of Employment Disputes

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In March 2022, we reported on landmark legislation that paved a clearer path for individuals to pursue workplace sexual harassment and sexual assault claims in court. The *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,* enacted with bipartisan Congressional support in early February, added a new chapter to the Federal Arbitration Act to permit persons alleging conduct constituting sexual harassment or sexual assault under state or federal law to elect to invalidate pre-dispute arbitration agreements or joint-action waivers in class or collective actions with respect to cases that relate to such sexual harassment or assault disputes.

However, the ongoing dispute over the enforcement of arbitration clauses in employment agreements continues. On June 15, 2022, the United States Supreme Court ruled in the case of *Viking River Cruises, Inc. v. Moriana* that the Federal Arbitration Act preempts California's Private Attorneys General Act (PAGA), thereby permitting companies to compel arbitration of an employee's individual claim for labor law violations. Five justices joined in support of the majority opinion penned by Justice Samuel Alito, and three other justices concurred in part. Only Justice Clarence Thomas issued a dissenting opinion.

The state of California passed PAGA in 2003, permitting employees to sue under the California Labor Code for civil penalties that had previously been recoverable only by the state. The plaintiff in *Moriana* had signed a mandatory arbitration agreement providing that she could not bring a class action against her employer. After the employee sued for labor code violations on behalf of herself and others, the trial court and California appellate court denied the employer's motion to compel arbitration of the employee's PAGA claims.

The case raised the question of whether individual claims can be separated from representative claims. As a result of the Supreme Court's decision, the case was remanded back to the trial court with instructions that the PAGA claim be dismissed based on a lack of standing. It is worthy of note that while Viking may enforce the mandatory arbitration clause contained in its employment agreements, the Supreme Court decision did not specifically invalidate an employee's right to sue in a

representative capacity in a class or collective action. Notwithstanding that fact, the Supreme Court explained that PAGA claims may be divided into "individual" and "non-individual" claims and that because the plaintiff agreed to arbitrate her claims against her employer, it could compel her to arbitrate her PAGA claims, thereby resulting in dismissal of her "non-individual" PAGA claims because she no longer has standing to bring a PAGA action on behalf of other employees. In light of that outcome, it is anticipated that the California legislature will modify the scope of the statutory standing under PAGA in order to permit an individual who does not have an individual claim to bring a PAGA representative action.

EMPLOYER TAKEAWAYS

While the opinion addresses employment claims prosecuted in California, the decision demonstrates the Supreme Court's commitment to the enforcement of arbitration agreements, including contractual waivers by employees and other potential claimants in class or collective actions.

In light of the interplay between the March legislation and this new Supreme Court ruling, mandatory arbitration provisions for individual employment claims, other than claims involving sexual harassment or sexual assault, continue to be sustainable approaches for employers to minimize litigation. The ruling follows the Supreme Court's trend of enforcing arbitration agreements, although it is more nuanced than some advocates had hoped, as the court's reasoning could leave room for legislative revision of standing requirements for representative claims.

Employers are encouraged to review their policies and contractual documentation in order to evaluate the viability of including mandatory arbitration provisions and class action waivers, with the proviso that such provisions need to have a carve-out for claims involving sexual harassment or sexual assault. Employers should certainly remain vigilant as the scope and enforceability of arbitration provisions and representative class waivers in the context of employment remain in flux.

If you have questions regarding this new ruling or other legal issues pertaining to the employment relationship, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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