WHEN MAY A COURT COMPEL AN INDIVIDUAL (OR REPRESENTATIVE) PAGA CLAIM TO ARBITRATION?

Written by Deborah Crandall Saxe*

In *Viking River Cruises Inc. v. Moriana* (2022) 142 S.Ct. 1906, 1922-1924, the Supreme Court of the United States held that the parties to an arbitration agreement may agree to arbitrate individual and/or representative Private Attorneys General Act (PAGA) claims. It also confirmed the validity of the rule set out in *Iskanian v. CLS Transportation Los Angeles*, *LLC* (2014) 59 Cal.4th 348, 383, that an employee cannot lawfully be compelled to waive the right to bring a representative PAGA action anywhere.

The *Viking River* decision has resulted in a flood of petitions to compel individual PAGA claims to arbitration in existing cases. After all, the *Viking River* court made compelling arbitration of the individual PAGA claim seem like a "magic bullet." According to the court, if an individual PAGA claim is compelled to arbitration, the plaintiff loses standing to maintain the representative PAGA claim, which therefore must be dismissed. I leave it to others to discuss whether the court was correct that compelling arbitration of the individual arbitration claim requires dismissal of the representative PAGA claim. This article is about something else. As an arbitrator, I am concerned that courts (with or without authority to do so) will compel individual PAGA claims to arbitration that the arbitrator has no jurisdiction to consider.

I know from experience that lawyers sometimes fail to read the arbitration agreement before making a motion to compel arbitration. A court recently compelled arbitration in a wage and hour class action and the parties then selected me as the arbitrator. The defendant assumed that I would arbitrate only the plaintiff's individual wage and hour claim. However, as I had to point out, the arbitration agreement expressly provided that class claims were arbitrable, and the court's decision to compel arbitration therefore put the entire class action before me. The agreement said: "Excluded from this Agreement are claims for workers' compensation benefits, claims for unemployment compensation benefits, claims under the National Labor Relations Act or a union contract, and any claim that is nonarbitrable under applicable state or federal law. This Agreement otherwise includes all common law and statutory claims, including but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, and infliction of emotional distress, and any and all claims brought or attempted to be brought by me as a class action, collective action or representative action."

Apparently, counsel for the employer did not bother to read the arbitration agreement until after I pointed out what it said. They simply assumed that it prohibited the arbitration of class actions.

A court may also fail to read the arbitration agreement before granting a motion to compel arbitration of an individual PAGA claim. I already have seen an order compelling arbitration of an individual PAGA claim in which the court, without reference to the arbitration agreement, ordered the arbitrator to take jurisdiction of the individual PAGA claim. It does not work that way. An arbitrator's jurisdiction is created by the arbitration agreement. It is a matter of contract. The parties must have consented to arbitrate a claim before the arbitrator may decide it.

A petition to compel arbitration of an individual PAGA claim presents two questions for a court: (1) did the parties agree to arbitrate an individual PAGA claim, and (2) does the court have the authority to decide if they did? The answers to both questions are found in the arbitration agreement.

IS THE INDIVIDUAL PAGA CLAIM ARBITRABLE?

In the future, employers undoubtedly will draft arbitration agreements that specifically require the arbitration of individual PAGA claims. However, very few of the arbitration agreements in existence before *Viking River* expressly provide that individual PAGA claims are arbitrable.

Some, like the one quoted above, specifically require the employee or applicant to submit *representative* PAGA claims to arbitration. Here is an example from another arbitration agreement: "Employee is required to submit to arbitration any and all controversies, claims, or disputes with anyone, whether brought on an individual, group, or class basis, arising out of, relating to, or resulting from Employee's employment or the termination of that employment."

An employer that asks a court to compel arbitration of an individual PAGA claim pursuant to an arbitration agreement like this may face an all or nothing proposition because the plaintiff may argue that the entire PAGA claim (including the representative part) must be submitted to arbitration.

Other arbitration agreements say they do not apply to PAGA claims at all. Consider the following agreement: "All claims, disputes, or causes of action must be brought solely in an individual capacity and will not be brought as a plaintiff (or claimant) or class member in any purported class or representative proceeding, nor joined or consolidated with the claims of any other person or entity. The Arbitrator may not consolidate the claims of more than one person or entity and may not preside over any form of representative or class proceeding."

THE ARBITRATION AGREEMENT DOES NOT APPLY TO ANY CLAIM OR CAUSE OF ACTION BROUGHT IN COURT PURSUANT TO PAGA.

An employer asking a court to compel arbitration of an individual PAGA claim pursuant to this arbitration agreement might find that the court denies the petition because, by its terms, the arbitration agreement does not apply to PAGA claims (individual or otherwise).

Still other arbitration agreements say that the employee may not bring a representative PAGA claim anywhere. They say the employee must bring all employment-related claims in arbitration (not in court) and/or on an individual basis and cannot bring a representative PAGA claim in arbitration. An employer asking a court to compel arbitration of an individual PAGA claim pursuant to such a provision in a mandatory predispute arbitration agreement may face a ruling that the entire agreement is unenforceable (at least as to PAGA claims) because of the *Iskanian* rule an employee may not be compelled to waive the right to bring a representative PAGA action.

WHO DECIDES? THE ARBITRATOR OR COURT?

The court may have no authority to decide if the parties agreed to arbitrate an individual PAGA claim. There is a strong presumption that threshold (or "gateway") issues of what, if anything, the parties agreed to arbitrate are for a court to decide. (See *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944; *Dennison v. Rosland Capital LLC* (2020) 47 Cal.App.5th 204, 209.) However, the presumption is rebuttable and disappears entirely if the parties *clearly and unmistakably* agreed that those issues will be decided by an arbitrator. (See *Henry Schein, Inc. v. Archer and White Sales, Inc.* (2019) 586 U.S. ___ [139 S.Ct. 524, 527] (the FAA allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions); *First Options, supra*, 514 U.S. at p. 939; *Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130.)

Absent other clauses that muddy the waters, an arbitration agreement containing the following delegation

clause clearly and unmistakably provides that questions of arbitrability are for the arbitrator, not a court: "The Arbitrator, and not any federal, state, or local court or agency shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including . . . any claim that all or any part of this Agreement is void or voidable."

Unless the arbitration agreement contains other provisions that make the delegation clause less than clear, a court presented with a petition to compel arbitration of an individual PAGA claim pursuant to an arbitration agreement containing this clause most likely would not have the authority to rule on the petition. The provision clearly and unmistakably evidences the parties' intent that an arbitrator, not a court, will decide if any particular claim is arbitrable.

An arbitration agreement providing that the JAMS or American Arbitration Association (AAA) arbitration rules apply also may be found to clearly and unmistakably evidence such an intent. (See *Simply Wireless, Inc. v. T-Mobile U.S., Inc.* (4th Cir. 2017) 877 F.3d 522, abrogated on other grounds in *Henry Schein, supra*, 139 S.Ct. 524; *Opus Bank, supra*, 796 F.3d at pp. 1130-1131.) However, incorporation of the JAMS or AAA rules into a mandatory predispute arbitration agreement in the employment context most likely is not enough if one of the parties was unsophisticated. (See *Nelson v. Dual Diagnosis* (2022) 77 Cal.App.5th 643, 657; *MacClelland v. Cellco P'ship* (N.D.Cal. July 1, 2022) 2022 WL 2390997.)

CONCLUSION

Before shooting what it considers to be a "magic bullet" by filing a petition to compel arbitration of an individual PAGA claim, an employer should carefully consider the language of the arbitration agreement to determine (1) if the individual PAGA claim at least arguably is arbitrable, and (2) if the court (rather than an arbitrator) has the authority to decide that it is or is not arbitrable. *Viking River* has changed the legal landscape for PAGA claims by holding that there is such a thing as an individual PAGA claim and that the parties to an arbitration agreement may agree that individual arbitration claims are arbitrable. However, this does not mean that a court may or will compel every individual PAGA claim to arbitration.

This content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.

** Deborah Saxe, Esq., is an arbitrator and mediator affiliated with JAMS, based in Southern California. She arbitrates and mediates employment disputes, including PAGA matters and wage and hour class actions.*