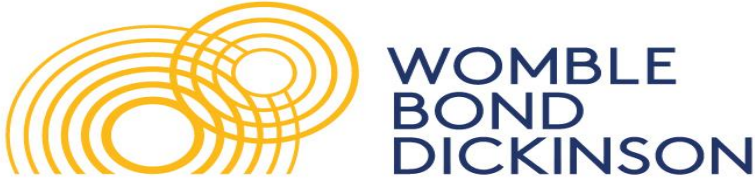


womblebonddickinson.com



THE EVOLVING WORLD OF CALIFORNIA EMPLOYMENT ARBITRATION:

Changes for Employers and Employees

September 21, 2022



Meet Our In Person Panel



Kristin Walker-Probst
Partner
Business Litigation, Irvine



David Berkley
Of Counsel
Business Litigation, Irvine



Courtney Wenrick
Associate
Business Litigation, Irvine



Nikku Khalifian
Associate
Business Litigation, Irvine

Meet Our Virtual Panel



Christopher J. Mead

Partner

Business Litigation, San Francisco



Edward L. Seidel

Partner

Business Litigation, San Francisco



Scott M. McLeod

Counsel

Business Litigation, San Francisco



PROGRAM OVERVIEW

Viking River

Pro-employer

PAGA Cases

Encouraging enforcement of arbitration agreements

A.B. 51 & H.R. 4445

Pro-employee

Employment and Sexual Harassment/Assault Cases

Limiting enforcement of arbitration agreements



What is PAGA?

- Private Attorneys General Act (Cal. Lab. Code §§ 2698 – 2699.5):

Authorizes *aggrieved employees* to file lawsuits to recover civil penalties on behalf of (1) themselves, (2) other employees, and (3) the State of California for *Labor Code violations*.

- Stepping in the shoes of Attorney General
- *Monetary penalty* for every violation employer commits
- Recent “explosion” in filings

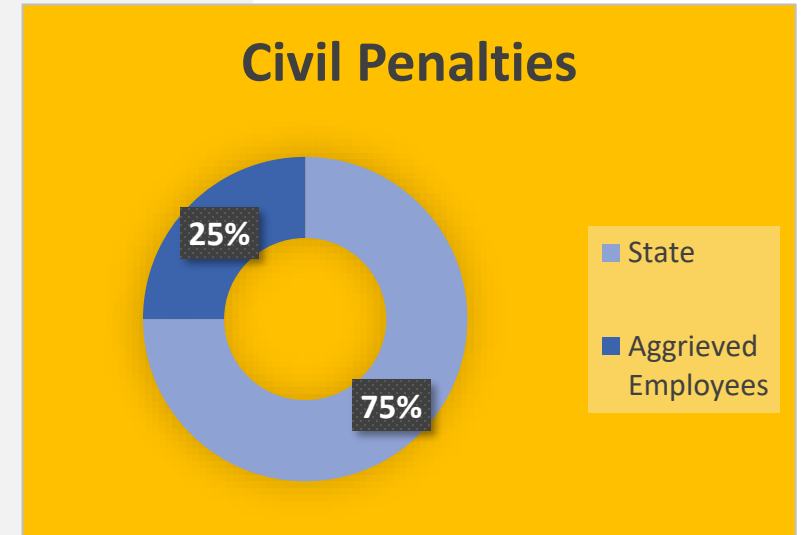


PAGA V. CLASS ACTIONS

PAGA ACTIONS	CLASS ACTIONS
✓ One employee can bring action on behalf of other aggrieved employees	✓ Same
✓ Class certification not required ✓ Administrative remedies must be exhausted	✓ Class certification required
✓ Plaintiff must only suffer one of the alleged violations	✓ Typical and common violation
✓ Civil Penalties	✓ Damages
✓ SOL – 1 year	✓ SOL – usually 4 years

PENALTIES UNDER PAGA

- Default Penalty v. Enumerated Penalty
- Initial Violation v. “Subsequent” Violation
- Attorneys’ fees and costs are allowed
- 75% to the State and 25% to aggrieved employees
- Civil Penalties v. Statutory Damages



LEGAL HISTORY OF PAGA AND ARBITRATION AGREEMENTS



AT&T Mobility LLC v. Concepcion (2011)
and *Epic Systems Corp. v. Lewis* (2018)

Iskanian v. CLS Transportation Los Angeles, LLC (2014)

Kim v. Reins International California, Inc. (2020)

Viking River Cruises v. Moriana (2022)



VIKING RIVER CRUISES, INC. V. MORIANA

1 U.S. Supreme Court – June 15, 2022

2 FAA preempts *Iskanian*

3 Splitting PAGA claims

4 Dismissing non-individual PAGA claims



IMPACT OF VIKING RIVER CRUISES



APPLICATION OF *VIKING RIVER* HOLDING



C.A. State Court's Application

C.A. Federal Court's Application

U.S. Supreme Court's Application

HOLMAN V. BATH & BODY WORKS, LLC ET. AL.

PAGA action brought by Plaintiff in Alameda Superior Court.

Plaintiff executed arbitration agreement that included representative action waiver.

Defendant filed Motion to Compel Plaintiff's individual PAGA claim to arbitration and dismiss remaining non-individual PAGA claims.

Court granted in part and denied in part Defendants' Motion.

Granted as to Plaintiff's individual claims (*Viking*); Denied as to dismissal of representative claims (*Kim & Iskanian*)

WHAT IS AB 51?

Cal. Lab. Code § 432.6/Gov. Code § 12953

Enforcement of AB 51 is currently stayed pending panel rehearing in *Chamber of Commerce v. Bonta*

Only applies to agreements entered into, modified or extended on or after January 1, 2020

Prohibits employers from requiring employees to sign an arbitration agreement as a condition of employment (regulates conduct prior to execution)

Employees may still voluntarily choose to enter into arbitration agreements

Employers may be subject to penalties

Potential Impacts of AB 51

Uncertainty regarding the use of mandatory employment arbitration agreements

Litigation concerning whether employees voluntarily entered into arbitration agreements

Panel may decide FAA preempts AB 51 in its entirety



ENDING FORCED ARBITRATION OF SEXUAL ASSAULT & SEXUAL HARASSMENT CLAIMS ACT

H.R. 4445/9 U.S.C. §§ 401 *et seq.*

Only applies to claims that arise or accrue after March 3, 2022

Limits use of pre-dispute arbitration agreements and class action waivers covering sexual assault/harassment claims

Amends FAA to give employees option of bringing these claims in arbitration or in court

Court, not an arbitrator, has the power to determine the validity and enforceability of agreement and whether the Act applies

Parties may agree to arbitration after dispute occurs



APPLICATION OF THE ACT

What constitutes:

Sexual Assault

Sexual Harassment

Will the act apply to:

Only sexual assault/harassment claims

OR

All claims at issue in a case



“...no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.”





Questions?



CONTACT US - IRIVINE



Kristin Walker-Probst
Business Litigation, Partner
(657) 266-1065
Kristin.Walker-Probst@wbd-us.com



Nikku Khalifian
Business Litigation, Associate
(657) 266-1039
Nikku.Khalifian@wbd-us.com



Courtney Wenrick
Business Litigation, Associate
(657) 266-1051
Courtney.Wenrick@wbd-us.com



David Berkley
Business Litigation, Of Counsel
(657) 266-1024
David.Berkley@wbd-us.com



CONTACT US – SAN FRANCISCO



Christopher J. Mead
Business Litigation, Partner
(415) 765-6232
Chris.Mead@wbd-us.com



Edward L. Seidel
Business Litigation, Partner
(415) 765-6259
Ed.Seidel@wbd-us.com



Scott M. McLeod
Business Litigation, Counsel
(415) 765-6299
Scott.McLeod@wbd-us.com



WOMBLE
BOND
DICKINSON

“Womble Bond Dickinson,” the “law firm” or the “firm” refers to the network of member firms of Womble Bond Dickinson (International) Limited, consisting of Womble Bond Dickinson (UK) LLP and Womble Bond Dickinson (US) LLP. Each of Womble Bond Dickinson (UK) LLP and Womble Bond Dickinson (US) LLP is a separate legal entity operating as an independent law firm. Womble Bond Dickinson (International) Limited does not practice law. Please see www.womblebonddickinson.com/us/legal-notices for further details.

Information contained in this document is intended to provide general information about significant legal developments and should not be construed as legal advice on any specific facts and circumstances, nor should they be construed as advertisements for legal services.

