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Viking Victory: Supreme Court Holds PAGA Cannot Circumvent Arbitration Agreement

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In the latest chapter regarding arbitration agreement enforcement, the U.S. Supreme Court has rejected California's rule precluding arbitration of California Labor Code Private Attorneys General Act[1] ("PAGA") claims.

In *Viking River Cruises, Inc. v. Moriana*,[2] the Court held that the Federal Arbitration Act[3] ("FAA") preempts the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*[4] in part. Specifically, the Court held that PAGA actions are severable into individual and non-individual claims, and that an employee with an arbitration agreement must pursue his or her individual PAGA claim in arbitration rather than in court. The Court further held that arbitration agreements cannot foreclose the non-individual claims, but those claims nevertheless should be dismissed for lack of standing once the individual claims are sent to arbitration. The decision, written by Justice Alito, reversed the lower court ruling denying the employer's motion to compel arbitration. Chief Justice Roberts and Justices Kavanaugh and Barrett joined in part and concurred in the judgment. Justice Sotomayor, although joining the majority opinion, filed a separate concurrence. Justice Thomas dissented, stating his view that the FAA does not apply to proceedings in state courts.

As a result of this decision, employers should adopt or update their arbitration agreements to conform to *Viking River Cruises*, and prepare for the next steps likely to be taken by the Plaintiffs' bar.

Background

Numerous U.S. Supreme Court decisions have addressed challenges to the enforceability of arbitration agreements and the application of the FAA. These cases largely have supported the enforceability of arbitration agreements under the FAA, requiring courts to "rigorously enforce arbitration agreements according to their terms[.]"[5] For instance, the Court has held that the FAA preempts state laws prohibiting class action waivers;[6] that arbitration agreements requiring waiver of class and collective actions are enforceable under the FAA and are not precluded by the National Labor Relations Act;[7] and that arbitration on a class basis cannot be compelled absent unambiguous consent.[8]

But the federal policy favoring arbitration has faced significant challenges in California, particularly with regard to the arbitration of PAGA claims. PAGA authorizes employees to file lawsuits and recover civil penalties – which are otherwise recoverable only by the state – from an employer, "on behalf of himself or herself and other current or former employees," for underlying violations of the California Labor Code.[9]

California state courts have held that a PAGA claim avoids an arbitration agreement entirely. In *Iskanian*, the California Supreme Court declined to enforce the employee's arbitration agreement containing a waiver of representative PAGA claims as against public policy. The court explained that PAGA claims—unlike class actions—belong to the state and not the individual plaintiff employee who is pursuing the action (and who signed the arbitration agreement). Accordingly, the court held that the FAA did not preempt California's prohibition of PAGA waivers.[10]

Lower Court Proceedings

Moriana was a sales representative for Viking River Cruises, Inc. Before starting her employment, she signed an agreement with Viking River in which she agreed to submit any future employment-related disputes with Viking River to binding arbitration on an individual basis. Notably, the agreement required Moriana to waive any right to bring a class, collective, representative, or PAGA action. Nonetheless, after the end of her employment, Moriana sued Viking River. She alleged a single cause of action for civil penalties under PAGA, on behalf of herself and "other similarly situated aggrieved employees," alleging that Viking River committed various California Labor Code violations. In response, Viking River sought to enforce the arbitration agreement. The trial court denied Viking River's motion to compel arbitration, which Viking River appealed.

The Court of Appeal affirmed, concluding that the *Iskanian* rule prohibiting PAGA waivers was not preempted by the FAA. The court also held that an *individual* PAGA claim could not be compelled to arbitration because PAGA claims are representative—not individual—by their nature. Viking River petitioned the United States Supreme Court for *certiorari*.

The U.S. Supreme Court's Decision

The U.S. Supreme Court held that the FAA preempts *Iskanian* to the extent it precludes division of a PAGA action into individual PAGA claims and non-individual PAGA claims.

The Court held that Viking River was entitled to compel Moriana's individual PAGA claim to arbitration. The Court also explained that PAGA fails to provide a mechanism by which non-individual PAGA claims may be adjudicated once the individual claim is compelled to arbitration. Thus, the Court dismissed Moriana's non-individual (representative) claims, finding that she lacked standing under PAGA to maintain them in court.

In her concurrence, Justice Sotomayor qualified the Court's opinion as dependent on the accuracy of its understanding of California law as it applies to standing under PAGA, and noted that the state legislature may modify PAGA's standing requirements in response.

What *Viking River Cruises* Means For Employers

As a result of this decision, individual plaintiffs who have signed an enforceable arbitration agreement will be unable to bring PAGA representative actions in court. Employers, therefore, should consider several potential next steps:

- Employers who have not yet adopted arbitration agreements now have another reason to adopt them: to avoid not only class actions, but also representative PAGA actions.
- Employers who have arbitration agreements should review them with counsel to ensure that they provide the best protection possible in light of the *Viking River Cruises* decision.

- Employers may want to consider adding a "bellwether claims" provision to their arbitration agreements, as a proactive response to what many plaintiffs' counsel have promised to do in anticipation of this decision: file hundreds or thousands of individual arbitrations to drive up employer costs. With a bellwether provision, individual arbitrations proceed in small numbers, and no arbitration costs or fees are payable until a particular case is ready for adjudication.

- Employers who have pending PAGA cases brought by a named plaintiff who signed an enforceable arbitration agreement should consider contacting opposing counsel to request that they dismiss the representative PAGA claim and submit the individual PAGA claim to arbitration. Absent agreement from counsel, employers should move to compel the named plaintiff's individual PAGA claims to arbitration and move to dismiss the representative PAGA claims, whether such a motion previously was made or not. The intervening change in the law provides a renewed basis for doing so.

In short, the *Viking River Cruises* decision presents an opportunity for employers to redouble their efforts to adopt and enforce arbitration agreements.

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[1] Cal. Labor Code § 2698, *et seq.*

[2] Case No. 20-1573.

[3] 9 U.S.C. § 1, *et seq.*

[4] 59 Cal. 4th 348 (2014).

[5] *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 133 S. Ct. 2304, 2309 (2013) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1758 (1985).

[6] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352, 131 S.Ct. 1740, 1753 (2011).

[7] *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1619 (2018).

[8] *Lamps Plus, Inc. v. Varela*, 587 U.S. ___, 139 S. Ct. 1407, 1419 (2019).

[9] Cal. Labor Code § 2699.

[10] *Iskanian*, 59 Cal. 4th at 360. *See also Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 430–31 (9th Cir. 2015) (holding that the FAA did not preempt the California rule announced in *Iskanian* that PAGA pre-dispute waivers are unenforceable under California law).

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