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The U.S. Supreme Court Says PAGA Representative Action Waivers Are Enforceable After All

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On June 15, 2022, in *Viking River Cruises, Inc. v. Moriana*, Case No. 20-1573,_ U.S. _ (2022), by an 8-1 majority, the U.S. States Supreme Court held that the Federal Arbitration Act ("FAA") preempts the California Supreme Court's central holding in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), that actions brought under the California Labor Code Private Attorneys General Act of 2004 ("PAGA") could not be divided into individual and representative claims through an agreement to arbitrate. This landmark opinion means that, at least for now, arbitration agreements with waivers of the right to bring representative PAGA claims for violations suffered by other alleged "aggrieved employees" will be enforced—just like class action waivers.

As discussed here, in *Iskanian*, the California Supreme Court held that an arbitration agreement could not waive an employee's right to bring a "representative" action under PAGA asserting claims based on violations of the Labor Code suffered by other employees because these actions are brought in the State's shoes as a sort of *qui tam* action. Employers repeatedly had attempted to obtain U.S. Supreme Court review of *Iskanian*, but the Court rejected multiple *cert* petitions until this term.

Justice Alito's majority opinion echoed the familiar view that "[t]he FAA was enacted in response to judicial hostility to arbitration." The majority rejected plaintiff Angie Moriana's argument that PAGA provides a *substantive* right to pursue representative PAGA actions to recover penalties for Labor Code violations suffered by the named plaintiff *and other "aggrieved employees."* However, the majority likewise rejected Viking River's argument that the FAA and arbitration, in general, require totally bilateral proceedings between only one employee and the employer. Instead, the Court took the view that arbitration is compatible with a form of "representative" proceeding in which **one employee** pursues PAGA claims in the shoes of the State (*i.e.*, as its representative) for violations of the Labor Code suffered by that **one employee** plaintiff.

Significantly, the majority ultimately struck down *Iskanian*'s arbitration carve-out for PAGA claims by taking issue with what it described as PAGA's "built-in mechanism of claim joinder," by which named plaintiffs "use the Labor Code violations they personally suffered as the basis to join to the action any claims that could have been raised by the State in an enforcement proceeding." The majority held that this portion of *Iskanian* "unduly circumscribe[d] the freedom of parties to 'determine the issues subject to arbitration' and 'the rules by which they will arbitrate[]' … in a way that violates the fundamental principle that 'arbitration is a matter of consent.'"

The majority held that PAGA provides "no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding" – *i.e.*, arbitration. Therefore, once an employee's claim has been compelled to arbitration on an individual basis, any claims asserting violations of the Labor Code suffered by other employees can be dismissed.

Though employers have good reason to rejoice in this outcome, critics of the decision have already noted that Justice Sotomayor's concurrence casts doubt on *Viking River*'s long-term impact. Although she voted with the majority, her concurrence provided what ultimately amounts to a "How-To" guide for plaintiffs' attorneys and lawmakers to circumvent the Court's decision. For example—although such a modification would turn the common conception of standing on its head—Justice Sotomayor suggested that California courts could interpret California law or, alternately, the Legislature could amend PAGA, to permit an employee to litigate representative PAGA claims on behalf of other employees, even after the employee lost individual standing once the employee plaintiff's claims were compelled to arbitration.

Therefore, at least for now, California employers can rest easier knowing PAGA claims are no longer immune to arbitration and waiver agreements. Moreover, employers should reexamine their arbitration agreements to ensure that the language is sufficiently broad to maximize on this development.

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