Updates
June 17, 2022
US Supreme Court Cracks the Door Slightly Open for Arbitration of PAGA Claims

California's Private Attorneys General Act (PAGA) is a statute that authorizes employees to bring an action for civil penalties on behalf of the state against an employer for Labor Code violations committed against the employee and fellow current and former employees. PAGA claims proceed on a representative basis, a quasi-class mechanism without all the certification requirements of a class or collective action. There is a long history of litigation and debate regarding whether, and how, employees and employers can enter into prospective agreements waiving the right to bring or participate in a PAGA representative action. The standing authority, set by the California Supreme Court in *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014), was a resounding "no." Thus, employers using arbitration agreements in California regularly include verbiage expressly exempting PAGA claims from the reach of the agreement.

However, on June 15, 2022, in *Viking River Cruises, Inc. v. Angie Moriana*, U.S., No. 20-1573 (2022), the U.S. Supreme Court held the Federal Arbitration Act (FAA) preempts the rule that precludes the use of an agreement to divide PAGA claims into individual and representative claims, effectively nullifying the portion of *Iskanian* that prohibited the application of arbitration agreements to PAGA matters. This may be the first tentative step towards allowing employers and employees to voluntarily agree to refrain from participating in collective proceedings of any kind.

The Permissible Scope of Arbitration Agreements Under *Iskanian*

In *Iskanian*, an employee entered into an arbitration agreement that included a waiver of the right to bring representative actions. The employee sought to bring a representative action under PAGA.

The California Supreme Court held that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions was contrary to public policy. Further, the California Supreme Court held that the FAA does not preempt a state law that prohibits a waiver of PAGA representative actions.

Viking River Cruises

The named plaintiff in *Viking River* signed an arbitration agreement applying to any disputes arising out of her employment as a sales representative. The agreement contained a class action waiver providing that in an arbitration proceeding, the parties could not bring class, collective, or representative PAGA actions. It also contained a severability clause stating that if the waiver was invalid, the action would be litigated in court. However, the severability clause also provided that any portion of the waiver that remained valid must still be enforced in arbitration. The employee brought a claim under PAGA.

Viking attempted to compel arbitration of the employee's "individual" PAGA claim and dismiss her representative PAGA claims, relying on the waiver language in the agreement. Because of the holding in *Iskanian*, the trial court and the California Court of Appeal both held that Viking could not split the PAGA claim into arbitrable individual claims and nonarbitrable representative claims. The U.S. Supreme Court reversed the judgment of the California Court of Appeal, holding that companies can compel arbitration of an individual's PAGA claim.

Notably, the U.S. Supreme Court remanded the case to the California Court of Appeal to determine how to handle the employee's representative claims. The Court noted her representative claims could not be dismissed simply because they are "representative." However, the Court also acknowledged a plaintiff loses standing to bring representative claims in court once the plaintiff no longer has individual PAGA claims and "the correct course is to dismiss [the plaintiff's] remaining claims."

Should We Remove Our PAGA Carve-Outs Now?

Most employers who operate in California have PAGA carve-outs in their arbitration agreements, so the question is whether it is now time to remove those carve-outs and reissue agreements. It may not quite be that time, but we are getting close. *Viking River* is likely not the last shoe to drop regarding arbitrations in California. At least one case on review to the U.S. Court of Appeals for the Ninth Circuit has been stayed pending the outcome of *Viking River Cruises*, and there are others pending in the lower courts in California. The dicta in the *Viking River Cruises* case may provide the Ninth Circuit additional ammunition to decide that California cannot prohibit knowing and voluntary arbitration agreements that include waivers of all types of representative proceedings.

For now, when a plaintiff files both PAGA and class claims in a California state court and has signed an agreement including a waiver of representative proceedings, employers should assess whether the Court's decision affects the desirability of removing the case to federal court, if the option is available, so as to have the *Viking River* precedent to rely upon. Based on Justice Sonia Sotomayor's concurrence in *Viking River*, employers should be prepared for the possibility that California courts may deviate from the Court's opinion and/or the legislature will quickly weigh in to address the standing issues the Court raised.

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