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US Supreme Court Splits the Baby on Arbitrability of PAGA Claims

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In the latest chapter in the enforceability of employment arbitration agreements in California, the United States Supreme Court in *Viking River Cruises, Inc. v. Moriana* (Viking River) weighed in on whether the Federal Arbitration Act (FAA) preempts California Supreme Court precedent set in *Iskanian v. CLS Transportation* (2014) preventing the enforceability of California Private Attorneys General Act (PAGA) waivers.

In *Iskanian*, the California Supreme Court held, in part, that the FAA does not preempt state law prohibiting waiver of PAGA representative actions in employment agreements. Specifically, the California Supreme Court determined that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy."

Now with the *Viking* decision, rather than treating a PAGA waiver as simply unenforceable in its entirety, the US Supreme Court, relying on a severability clause in the arbitration agreement at issue, decided that the *individual* PAGA claims could be treated differently from the *representative* PAGA claims and that the individual PAGA claims could be compelled to arbitration. Specifically, the US Supreme Court held that the FAA "preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."

The Underlying Dispute in *Viking*

In *Viking*, the employee filed, among other claims, a PAGA action against her former employer alleging various California Labor Code violations. The former employee, Moriana, had signed an employment contract with her employer, Viking, that contained a mandatory arbitration agreement. The arbitration agreement contained a Class Action Waiver providing that the parties could not bring any dispute as a class, collective, or representative action under PAGA. The arbitration agreement also contained a severability clause specifying that if the waiver was found invalid, such a dispute would presumptively be litigated in court and that any portion of the waiver that remained valid would be enforced in arbitration.

When Viking moved to compel arbitration of Moriana's individual PAGA claim and dismiss her remaining PAGA claims (the *representative* PAGA claims), the California trial court denied the motion and the Court of Appeal affirmed the decision based on California's precedent under *Iskanian*.

United States Supreme Court Held the Arbitration Agreement to be Enforceable in Part

The United States Supreme Court reversed the judgment of the California Court of Appeal, instead deciding that Viking was entitled to compel arbitration of Moriana's individual PAGA claim. The Court reasoned that although the arbitration agreement was invalid to the extent it included a "wholesale waiver" of all PAGA claims (consistent with *Iskanian*), the severability clause providing that any "'portion' of the waiver that remained valid" must still be enforced in arbitration. The Court further reasoned that the rule of *Iskanian* that PAGA actions cannot be divided into individual and non-individual PAGA claims is inconsistent with the purpose of the FAA and that forcing parties into a judicial forum is inconsistent with parties ability to agree to arbitrate their own claims.

The United States Supreme Court took the analysis one step further, finding that because 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," Moriana no longer had standing to continue to maintain her non-individual claims in court and her remaining claims should be dismissed.

Takeaways for Employers

It is time once again for employers to review their arbitration agreements and consider whether any changes may be warranted.

We will continue to keep a close eye on this as the US Supreme Court decision is likely not the end of the story. In her concurring opinion, Justice Sotomayor all but provided a roadmap for next steps:

"...if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits."

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