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KD Alert: U.S. Supreme Court Issues Ruling that Employers Can Require Employees to Arbitrate their PAGA Claims, authors Marcus Dong, Esq., Katherine Catlos, Esq., June 23, 2022

On June 15, 2022, the U.S. Supreme Court issued its ruling in Viking River Cruises, Inc. v. Moriana ("Viking River") which had drawn the attention of employers due to its impact on the enforceability of arbitration agreements with respect to claims under California's Private Attorneys General Act of 2004 ("PAGA"). Since PAGA's inception, employers have faced costly representative action lawsuits exposing them to potentially hundreds of thousands of dollars of penalties for technical and substantive violations of the Labor Code, ranging from inaccurate pay stubs to missed meal and rest breaks.

In Viking River, the employee, Angie Moriana, signed an arbitration agreement agreeing to arbitrate "any dispute arising out of or relating to [her] employment." The agreement included a waiver of class action and representative action claims, the latter of which covered PAGA claims. Moriana's agreement also had a "severance clause," stating if any portion of the waiver was not enforceable, "the portion of the [waiver] that is enforceable shall be enforced in arbitration."

Viking River moved to compel arbitration of Moriana's individual claim and dismissal of her representative PAGA claim. But under California Supreme Court precedent in Iskanian v. CLS Transp. Los Angeles, (2014) 59 Cal. 4th 348, the trial court denied the motion for two reasons: (1) wholesale waivers of PAGA claims in arbitration agreements are not enforceable; and (2) PAGA claims could not be split into arbitrable individual claims and non-arbitrable "representative" claims," meaning PAGA claims were essentially not subject to arbitration. On Viking River's petition, the U.S. Supreme Court was tasked with determining if the Federal Arbitration Act ("FAA") preempted Iskanian.

The U.S. Supreme Court held waivers of PAGA claims in arbitration agreements are still unenforceable. But the Court also reversed the California courts and held the FAA preempted Iskanian's rule that PAGA claims could not be arbitrated. Individually, Moriana agreed to arbitrate all claims, including PAGA claims. With respect to her non-individual PAGA claims (on behalf of other "aggrieved employees"), because her individual claim was already committed to arbitration, the Court held Moriana lacked standing to pursue her representative action in court, and thus the trial court should have dismissed her representative PAGA claim.

The Court's decision is a significant shift, because previously, California courts held that PAGA claims by their nature were representative claims on behalf of the State of California and were disputes between an employer and the State and therefore not subject to arbitration since the State was not a party to any arbitration agreement. Iskanian, 59 Cal. 4th at 387. The Supreme Court explained that Iskanian interfered with the parties' freedom to determine which issues they would arbitrate and by what rules.

Practically, for employers, there are two key takeaways from Viking River. First, wholesale waivers of PAGA claims, or representative actions, in arbitration agreements are not enforceable. Therefore, arbitration agreements should not include representative action waivers.

Second, employers can now force their employees to at least arbitrate their individual PAGA claims. Even if employers have arbitration agreements which contain representative action waivers, although those waivers are still unenforceable under Iskanian, if the waiver can be severed from the remainder of the arbitration agreement, an individual's PAGA claim would have to go to arbitration. Previously, Iskanian and its progeny would have forced Viking River to potentially arbitrate Moriana's non-PAGA claims and resolve her PAGA claims in court.

The Supreme Court's decision now raises questions of efficiently resolving PAGA claims. Because waivers of PAGA claims are unenforceable, employers will still face PAGA actions – the question is in what forum. For employers with enforceable arbitration agreements, an employee may have to arbitrate her individual PAGA claim, but under Viking River, the employee would have no standing to pursue her non-individual PAGA claims on behalf of other "aggrieved employees" in court, which seemingly defeats the purpose of PAGA for those employees who signed effective arbitration agreements.

In her concurrence, Justice Sotomayor invited the legislature to resolve this potential discrepancy. And in its amicus brief, the State of California defended PAGA and wrote, "PAGA has served an important function in the adequate and fair enforcement of the State's labor laws, supporting and supplementing direct government enforcement." Given the State's position, the legislature is likely to address the loophole created by Viking River sooner rather than later.

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