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Labor & Employment Alert

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Viking River court holds that employers can compel PAGA lawsuits to individual arbitration—if their arbitration agreements have two key components

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The U.S. Supreme Court overturned the California's Supreme Court's rule against compelling PAGA claims to individual arbitration, if the plaintiff's arbitration agreement has a "representative action waiver" and (in some cases) a severability clause.

What's the Impact?

- Employers with well-drafted arbitration agreements (i.e., that contain clear representative action waivers and/or a severability clause) can now compel PAGA plaintiffs to individual arbitration
- Employers should review and, if necessary, revise their arbitration agreements to follow the *Viking River* roadmap so they have the option to compel representative PAGA lawsuits to individual arbitration

In 2004, the California Legislature passed the Private Attorneys General Act, which "deputizes" private citizens to sue employers on behalf of the State of California. The only barrier-to-entry is

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the e-filing of a boilerplate letter to the Labor Workforce Development Agency, which has admitted to reading less than one percent of those letters, which sit in a proverbial stack on a shelf. If the LWDA does not respond or notify the parties that it plans to investigate within 65-days, which happens more than 99% of the time, the plaintiff becomes a "state-proxy," and thus is granted special privileges and immunities.

Over the past decade, PAGA has become the lawsuit *du jour* for the plaintiffs' bar, due in large part to the California Supreme Court decision in *Iskanian v. CLS Transp. Los Angeles, LLC*. In *Iskanian*, the Court held that pre-dispute agreements that waive "representative" PAGA claims are invalid as a matter of public policy; but as the Supreme Court noted in *Viking River Cruises, Inc. v. Moriana*:

> What, precisely, this holding means requires some explanation. PAGA's unique features have prompted the development of an entire vocabulary unique to the statute, but the details, it seems, are still being worked out. An unfortunate feature of this lexicon is that it tends to use the word "representative" in two distinct ways, and each of those uses of the term "representative" is connected with one of *Iskanian's* rules governing contractual waiver of PAGA claims.
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> In the first sense, PAGA actions are "representative" in that they are brought by employees acting as representatives—that is, as agents or proxies—of the State. But PAGA claims are also called "representative" when they are predicated on code violations sustained by other employees. In the first sense, "every PAGA action is . . . representative" and "[t]here is no individual component to a PAGA action[.]"

In *Viking River*, the United States Supreme Court held that arbitration agreements cannot waive "representative actions" in the first sense (i.e., state-proxy). However, arbitration agreements can waive "representative actions" in the secondary sense (i.e., on behalf of other employees) if the arbitration agreement has a severability clause that would allow the court to enforce the non-state-proxy-waiver only—which has the effect of nullifying the plaintiffs' right of "claim joinder" and results in an individual PAGA arbitration.

The facts and procedural history of *Viking River* are unremarkable. Plaintiff Moriana ("Moriana") was terminated. Moriana sued under PAGA. Defendant Viking River moved to compel Moriana to individual arbitration of her claims, pursuant to her arbitration agreement that contained a representative action waiver. Viking River lost and appealed the decision all the way up to the United States Supreme Court.

Viking River argued that Supreme Court precedent "require[d] enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective proceeding." Moriana argued that PAGA is not a class action, but a single substantive cause of action that allows "employee plaintiffs to increase the available penalties that may be awarded in an action by proving additional predicate violations of the Labor Code." And thus to require enforcement of representative action waivers would be tantamount to a waiver of a substantive right.

The Supreme Court disagreed with both arguments, but did explain that there is an irreconcilable conflict between "PAGA's procedural structure and the FAA … and that it derives from the statute's built-in mechanism of claim joinder." More specifically, *Iskanian*'s "prohibition on contractual division of PAGA actions into constituent claims" ("Indivisibility Rule") means that the "parties cannot agree to restrict the scope of an arbitration to disputes arising out of a particular 'transaction' or 'common nucleus of facts.'"

In addition to violating a core precept of the FAA, consent, the Supreme Court also found that the Indivisibility Rule gives rise to "suits featuring a vast number of claims [that] entail the same 'risk of "in terrorem" settlements that class actions entail[,]" which "effectively coerces parties to opt for a judicial forum" so as to preserve their right to judicial review at the cost of the benefits of private dispute resolution for which the parties have contracted.

For these reasons, the Supreme Court held that the FAA preempted *Iskanian's* Indivisibility Rule and found the representative action waiver at issue enforceable because:

> [T]he severability clause in the agreement provides that if the waiver provision is invalid in some respect, any "portion" of the waiver that remains valid must still be "enforced in arbitration." Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim.

While the severability clause seemed necessary to the result in *Viking River*, it may not be essential to compelling all PAGA claims to arbitration. A severability clause may not be necessary where the language of the representative action waiver more clearly targets only claim joinder than the agreement at issue in Viking River.

Key takeaways

What Viking River means for California employers depends on where you are in the life-cycle of a PAGA case:

- For employers in the pre-ligation phase (i.e., received a PAGA Notice but no complaint filed), it means you can immediately demand and/or move to compel the plaintiff to individual arbitration of his or her PAGA claims.
- For employers in early litigation and/or settlement discussions (i.e., complaint filed, minimal discovery conducted), you may still be able to prevail on a motion to compel the plaintiff's PAGA claims to individual arbitration.
- For employers in well-developed litigation (i.e., significant discovery and/or some motion practice), a motion to compel is still worth a shot, but employers should be prepared to deal with the plaintiff's argument that the employer "waived" the right to compel the case to arbitration.
- For employers headed to mediation, mandatory settlement conferences, etc., the exposure in your matters (and corresponding settlement value) has likely been reduced to a fraction of what is was before *Viking River*, as you now can argue that the settlement value of the case

should be based on the "value" of the claims of the PAGA plaintiff alone.

What to do next

Now, more than ever, employers should have their arbitration agreements reviewed and/or revised by well-qualified counsel to ensure that they have the two elements necessary for compelling a PAGA lawsuit to individual arbitration: (1) a representative action waiver and (2) (in some cases) a severability clause.

Nixon Peabody's lawyers have extensive experience in drafting arbitration agreements that fit the *Viking River* mold and with enforcing such arbitration agreements. We also have extensive experience defending against PAGA lawsuits in court. If you have questions about your arbitration agreement, a PAGA lawsuit, or any other employment matter, do not hesitate to contact the authors of this article.

Viking River is a rare and monumental win for employers, and we'd be happy to share additional perspective on the case and what it means for the future of PAGA.

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