

# The Future of PAGA Claims & Arbitration in California: What's at Stake?

By Scott P. Jang & Mia Farber

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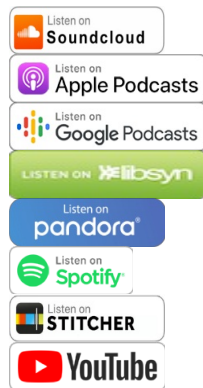
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## Details

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On March 30, 2022, the U.S. Supreme Court heard oral argument in *Viking River Cruises, Inc. v. Moriana* to decide whether the Federal Arbitration Act (FAA) requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including claims under California's Private Attorneys General Act (PAGA).

Jackson Lewis P.C. · The Future of PAGA Claims & Arbitration in California: What's at Stake?



## Transcript

Alitia Faccione (00:06):

Welcome to Jackson Lewis's podcast, We get work. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

On March 30, 2022, the U.S. Supreme Court heard oral argument in *Viking River Cruises versus Moriana* to decide whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including claims under California's Private Attorneys General Act, a decision that could have significant consequences for California employers.

On this episode of We get work, we discuss the potential ramifications for PAGA actions in California if the Supreme Court concludes that the FAA effectively preempts PAGA and the wide-ranging effects not only in California but for pending legislation in other states. Our hosts today are Mia Farber and Scott Jang, principals

respectively in the Los Angeles and San Francisco offices of Jackson Lewis and members of the firm's California Class and PAGA Action Group.

Mia has extensive experience arbitrating employment disputes pursuant to employment arbitration agreements and collective bargaining agreements, as well as defending employers in judicial arbitrations. Scott represents management in all areas of employment law with a particular focus on class actions and complex litigation. His litigation experience covers the full spectrum of employment law. Mia and Scott, the question on everyone's mind today is what will the Supreme Court's decision in Viking River Cruises mean for California employers?

Mia Farber (02:15):

The Viking River Cruises is actually a very interesting case for the U.S. Supreme Court to have taken up on review. The case was originally filed back in 2017 in the Los Angeles Superior Court. And not to anyone's surprise, the Superior Court, which is California's lowest level, denied the motion to compel arbitration based upon California precedent. The decision was then appealed to the court of appeal. The court of appeal affirmed the trial court's denial of the motion to compel arbitration. And then it also ordered the decision to be unpublished, which meant no one could cite it.

So essentially, it was a statement that the court of appeal felt this wasn't a significant opinion. That decision was then appealed to the California Supreme Court. The California Supreme Court denied review. And then finally, it was appealed to the U.S. Supreme Court, which, to the surprise of many, granted review.

Scott Jang (03:17):

Yeah, that's right, Mia. It wasn't too surprising, I don't think, that the Viking River decision was ultimately unpublished by the California Court of Appeal. I mean, the California courts have pretty consistently held that representative action waivers are not enforceable as applied to PAGA, following the lead of California Supreme Court's decision in *Iskanian* back in 2014.

What was really surprising to all of us who follow these types of cases is that the U.S. Supreme Court actually granted review. After all, the court of appeal's decision, again, was unpublished, and the U.S. Supreme Court has previously denied reviewing PAGA cases in the past, which suggested that the court really didn't have too much interest in PAGA. There were very substantive cases involving PAGA and its procedural aspects. But in the past, the U.S. Supreme Court hasn't really seemed to really take a bite or have much interest in those cases.

Mia Farber (04:19):

So for those outside California, and even inside California, PAGA or the Private Attorneys General Act is not necessarily well understood. And for those of you outside the state of California, why you might be interested in Viking River is because several states have proposed similar PAGA-type legislation that is winding its way through the various legislatures.

And so when you understand what PAGA's about, it would make sense that the Supreme Court would want to avoid deciding on the direct PAGA issues as a piece of

legislation that really lacks clarity. It's often referred to as the bounty hunter law. So under PAGA, an aggrieved employee may file a lawsuit to recover civil penalties on behalf of him or herself and all other allegedly aggrieved employees, and on behalf of the state of California. And at the time PAGA was enacted, it was enacted because the state of California was struggling to fully enforce the labor code. So the idea at the time was to deputize private litigants to bring enforcement actions on behalf of the state. PAGA often is compared to a qui tam action under the False Claims Act.

So that the Supreme Court granted review on Viking was a little out of character because, as Scott mentioned, there had been other challenges like this to PAGA that sought review by the high court and they were denied. But the current court seems invested in fleshing out the case law surrounding the Federal Arbitration Act as we've seen in a number of decisions. It heard oral argument for several cases involving the FAA or the Federal Arbitration Act in March of 2022, including a case regarding whether airline ramp workers qualify as transportation workers that are exempt under the FAA. And the U.S. Supreme Court also recently issued an opinion regarding whether federal courts have independent jurisdiction, or an independent jurisdictional basis to confirm or vacate an arbitration award.

Scott Jang (06:27):

So maybe just take a step back and kind of think about, well, what is the Viking River decision all about? And the issue that's presented before the U.S. Supreme Court in Viking River is whether the FAA requires enforcement of representative action waivers in bilateral arbitration agreements, including representative action waivers that affect PAGA claims in California. And while this was likely taken up because of its connection to the Federal Arbitration Act, there is a lot of focus here in California as what this could mean for PAGA and PAGA actions, which as many employers know have proliferated throughout the state.

Mia Farber (07:10):

And in listening to the questions before the Supreme Court, it was clear that some of the justices were concerned about how a decision by the U.S. Supreme Court would affect PAGA and how it would affect the FAA. Justice Kagan in particular seemed concerned that PAGA was how California had decided to enforce its labor code and therefore really should not be within the ambit.

Scott Jang (07:39):

Yeah, Mia, I think that's right. I think when I was listening to oral arguments, one of the things that really struck me was how Justices Kagan and Sotomayor really came out very strongly in their questioning of Paul Clement, who was Viking River's attorney before the U.S. Supreme Court. And their questions really focused on what impact this decision would have on PAGA where California has specifically enacted PAGA because it thought that its labor code was otherwise not being sufficiently enforced.

And so Justices Kagan and Sotomayor really stressed that California has made this policy and legislative decision to create PAGA to enforce the labor code. And Justices Kagan and Sotomayor really seemed troubled by the potential ability of the

FAA to override California's enforcement decision. And so Paul Clement's response was that may be true, but in cases such as AT&T versus Concepcion and Epic, that the U.S. Supreme Court didn't have similar concerns with respective class actions, and that class actions were very similar to PAGA actions, and therefore the FAA at the end of the day must override PAGA if that is the tension between the two.

And as Mia said, as you said earlier, there is a lot of tension by other states with respect to how this plays out, specifically states such as Illinois, Massachusetts, New Jersey, New York, and I believe Washington have PAGA-like statutes that are not necessarily fully pending but are being contemplated. And so we can expect that other states are closely following this case to see what they do with respect to PAGA or PAGA-like legislation in their states.

Mia Farber (09:48):

What's also interesting about PAGA is that when it was enacted originally it was in part due to the fact that the labor commissioner was undersourced and unable to fully enforce the labor code provisions against employers perceived to be violating the labor code to the extent the legislature wanted. But since the enactment of PAGA, it was reported in 2020 that the state of California received over \$100 million in penalties from PAGA actions. And before that, in 2019, they received well into the tens and millions of dollars in PAGA actions. And for those not familiar with the penalties under PAGA, 75% go to the state, 25% go to the aggrieved employees. And so since the state has recovered well over \$100 million in PAGA penalty, we had actually increased their staff to enforce PAGA actions. We haven't seen any sort of curtailing of PAGA enforcement by private individuals.

The other thing about PAGA that's interesting is that even though it's been reported the state's received all these monies and penalties, very few PAGA actions have actually been prosecuted by the state. Really, essentially beyond having a website where people can enter their PAGA letters and information about settlements, there's very little action required by the state agency enforcing PAGA. But if the decision in Viking River Cruises goes in favor of employers, even if some employees opted out of the arbitration agreements, it would still greatly reduce the potential impact of a PAGA claim because those employees that signed arbitration agreements would not be included in those PAGA settlements.

Scott Jang (11:48):

And Mia, I don't know if you had a chance to hear Justice Alito's comments during oral argument. But there was an interesting colloquy between the parties about the extent to which PAGA claims are arbitrable, whether on an individual basis or as a representative action basis. And I think for most of us litigators in California, we have generally come to the consensus that courts will hold that PAGA claims are not arbitral whether individually or as a representative action based on language in Iskanian.

But as Justice Alito and some of the parties during oral argument pointed out, there's a suggestion that this line of reasoning is actually dicta and that maybe there is an open door for PAGA claims to be arbitrated on an individual or representative action basis. And actually, Viking River when they first petitioned to and moved to

compel arbitration, one of the positions they took was that if the PAGA action waiver cannot be enforced completely with respect to representative action, that the PAGA claim should be arbitrated individually. And that was denied by the California trial court and the court of appeal. But it's curious to see if this is a potential opening in middle ground that the court, the U.S. Supreme Court might take up.

Mia Farber (13:25):

I agree, Scott. That was a very interesting part because it does seem possible that the U.S. Supreme Court could take that exchange and say, fine, you can't completely waive your right to bring a PAGA action since it's qui tam type action that you're bringing on behalf of the state, but you also can't say it only can be brought in court. You have to let employers use arbitration because we believe arbitration is more efficient for everyone and the FAA and other laws want to encourage arbitration. Even today, the public policy of the state of California is to favor arbitration.

Scott Jang (14:07):

So I think there's actually three possibilities or three outcomes that we might see coming from Viking River Cruises. The first is maybe the status quo then where things don't really change much from they are today and PAGA actions cannot be waived, in which case we probably will see other states push forward with their PAGA legislation. And on the flip side, you might actually see California make or try to make legislative fixes to PAGA. I think that there's a proposed proposition in the works for maybe November 2022 seeking to repeal PAGA. So those efforts might gain steam.

The second possibility may be that PAGA cannot be waived but can be arbitrated to some extent either individually or as a representative action. Or the third possibility, which I think most employers are looking to see if it comes to fruition, is that PAGA can be waived and that employers can enforce bilateral arbitration agreements to defeat PAGA claims, in which case we'll probably see employers moving to revise their arbitration agreements if they haven't done so already to ensure that PAGA claims are covered by their arbitration agreements. And also, we'll probably see more aggressive litigation by litigators in California and elsewhere as to the enforceability of those arbitration agreements.

Mia Farber (15:44):

Right. I agree with that last point in particular, Scott, that even if the U.S. Supreme Court was to find that PAGA claims are arbitrable and subject to representative waivers, similarly to California's Business and Professions Code 17200, I don't think it would be the death of PAGA. I think that we would continue to see challenges to the arbitration agreement in the first instance so that the court would never get to the issue of whether or not the waiver precluded bringing the PAGA action on a representative basis.

Scott Jang (16:22):

That's probably right. We already see quite a bit of litigation with respect to the enforceability of arbitration agreements, whether it is under the rubric of unconscionability or authentication of the arbitration agreement in the first instance. But employers should also be aware that there's other looming obstacles with respect

to arbitration agreements in California. And as some employers may already be aware, AB 51 is California's law with respect to barring mandatory arbitration agreements with respect to California Labor Code claims as well as California Fair Employment and Housing claims. And so there's still that issue that employers will need to grapple with in the first instance before you even get to the enforceability of the PAGA action waiver in the arbitration agreement to begin with.

Mia Farber (17:15):

That's a very interesting point, Scott, regarding AB 51. AB 51's enforceability is actually paused right now awaiting a decision in Viking River. The trial court had found that AB 51 was in fact preempted by the FAA. A three-judge panel of the Ninth Circuit largely reversed the trial court and found that most aspects of AB 51 were not preempted by the FAA. The Chamber of Commerce then sought rehearing with the Ninth Circuit sitting en banc, and the Ninth Circuit recently deferred a decision of whether or not they would hear the Bonta case, which is the one challenging AB 51 as being preempted by the FAA until after the Viking River case was decided by the U.S. Supreme Court.

So while we wait for a decision in Viking River, it is a good time for employers who aren't using arbitration agreements to analyze again the pros and cons of employment arbitration agreements for California employees so that they are not in a position where they might still be subject to PAGA as a representative action. If the decision goes in favor of Viking River's, that will certainly be a significant pro to implementing an arbitration agreement with your workforce.

But there are also other considerations in California. As we, Scott and I noted earlier it is becoming increasingly more difficult to enforce arbitration agreements because the challenge is that the plaintiffs are bringing in challenging the enforceability and whether or not there's even actually a agreement to arbitrate. Additionally, California law requires that employers bear the expense of the arbitration fees and costs that they wouldn't normally incur in connection with a court case. So there's always concerns about mass arbitrations and things of that nature.

Scott Jang (19:31):

Now, Mia, I'm going to ask you the million-dollar question that is on everyone's mind but is a completely unfair question, and that is how do you think the Supreme Court is going to rule on the Viking River case?

Mia Farber (19:45):

You know, I'm not as optimistic as some of our colleagues on this side of the table. Obviously, we expected Kagan and Sotomayor to be critical, but Chief Justice Roberts also seems skeptical of whether or not the PAGA action was preempted by the FAA. And we really didn't hear anything from the other justices other than Justice Alito, Alito, excuse me, as you already pointed out. So I think it's going to be a very close call. And what about you, Scott? What is your view?

Scott Jang (20:26):

I think I share your sentiments. I think that everyone thought that this would be a

very firm ruling in favor of FAA preemption. One, because the U.S. Supreme Court has been so firm on FAA preemption in its prior cases, including AT&T and Epic, and also the kind of unusual circumstances in which the court took the case as well. I would imagine that the U.S. Supreme Court didn't have any intention of picking up an unpublished California Court of Appeal case unless it meant to make some substantive law here.

So I think I shared everyone's sentiment in thinking that the justices were going to really come out swinging with respect to FAA preemption, but I was less optimistic after the oral arguments just because of the relative quietness of some of the more conservative justices who have previously been such forceful advocates at the FAA. But I guess we'll have to see. We'll receive a decision probably before early July when the U.S. Supreme Court takes its recess. So until then, I guess employers should keep updated and we will let you know how the decision goes.

Mia Farber (21:47):

Thank you for listening.

Alitia Faccone (21:51):

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