

Podcast

Viking River Cruises Drops Anchor on PAGA

By Scott P. Jang & Mia Farber

August 9, 2022

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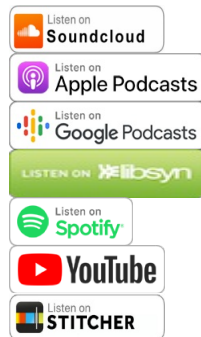
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Details

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The United States Supreme Court held that California's Private Attorneys General Act rule is preempted by the Federal Arbitration Act to the extent California precludes division of PAGA actions into individual arbitrable claims and non-individual, non-arbitrable claims. On this episode of We get work™, we discuss the ramifications for PAGA actions in California now that the Supreme Court's decision has overruled the California's Supreme Court decision.

Jackson Lewis P.C. · Viking River Cruises Drops Anchor on PAGA



Transcript

Alitia Faccone:

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?

Alitia Faccone:

The United States Supreme Court held that California's Private Attorneys General Act rule is preempted by the Federal Arbitration Act, to the extent California precludes division of PAGA actions into individual arbitrable claims and non-individual non-arbitrable claims. On this episode of We Get Work, we discuss the ramifications for PAGA actions in California now that the Supreme Court's decision has overruled the California Supreme Court's decision.

Alitia Faccone:

Our hosts today are Mia Farber and Scott Jang, principles, 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 is a seasoned trial attorney and has arbitrated numerous employment disputes pursuant to employment arbitration agreements and collective bargaining agreements, as well as defending employers in judicial arbitrations. A co-leader of the firm's technology group, Scott represents management in all areas of employment law, with a particular focus on class actions and complex litigation, as well as advising clients with respect to arbitration agreements. Mia and Scott, the question on everyone's mind today is, does the Supreme Court's decision in Viking River Cruises render PAGA claims against California employers moot, and if so, how does that impact my business?

Scott Jang:

Well, Mia, the US Supreme Court issued its much anticipated opinion in Viking River Cruises. The court held that PAGA action waivers in arbitration agreements governed by the Federal Arbitration Act can in certain circumstances be enforced. The effect of this is the narrowing of a PAGA action, which can otherwise encompass alleged labor code violations for hundreds or even thousands of employees, to just to named plaintiff's own PAGA claims, which must proceed in arbitration on an individual basis only. This would reduce an employer's potential exposure in a PAGA action significantly, and so it's unsurprisingly then that many see this decision as a significant victory for employers, at least at first blush.

Mia Farber:

That's right, Scott. To fully understand the impact of the US Supreme Court's decision in Viking River, it's important to break down exactly how the court reached its decision, because it was somewhat of a circuitous route. The court started its opinion by stressing that PAGA actions are representative in two different ways. First, PAGA actions are representative in that the named plaintiff is deputized to represent the State of California's interest and claims in a PAGA action. For ease of reference, we'll refer to this representative as big R Representative.

Mia Farber:

Second, PAGA actions are representative in that the named plaintiff not only seeks to prosecute the Labor Code violations that the plaintiff personally suffered allegedly, but also the alleged violations suffered by other allegedly aggrieved employees. We will refer to this representative as the small R. The distinction between the two ways PAGA actions are representative was critical to the court's reasoning and analysis in Viking River. With respect to Representative with the big R, the court explained that PAGA action waivers cannot completely bar a plaintiff from stepping into the shoes of the California Labor Commissioner and bringing a PAGA action to represent California's interest.

Mia Farber:

There was no complete FAA preemption; therefore PAGA action waivers that purport to preclude a plaintiff from representing the State of California in bringing a PAGA action altogether are not enforceable, and nothing in the FAA says otherwise. This

part of the US Supreme Court's opinion is consistent with the California Supreme Court's 2014 decision in *Iskanian*. The US Supreme Court, however, went further. The US Supreme Court held that to the extent PAGA actions effectively force the aggregation of the named plaintiff's PAGA claims with the PAGA claims of other alleged aggrieved employees, i.e., the representative with a small R, this conflicts with the Federal Arbitration Act. And under the Federal Arbitration Act, or FAA, arbitration is a matter of consent, and the parties are presumed to agree to arbitration on a one-on-one basis, not on an aggregate or multi-plaintiff basis.

Mia Farber:

The ultimate effect of this is that the FAA can operate to divide PAGA actions into two parts, first, the named plaintiff's own individual PAGA claims, and second, other alleged aggrieved employees' PAGA claims. The named plaintiff's own individual PAGA claims must be submitted to arbitration on an individual basis. The PAGA claims of the other allegedly aggrieved employees, on the other hand, are left behind in court and should be dismissed. The US Supreme Court explained that the PAGA claims of the other allegedly aggrieved employees should be dismissed, because PAGA does not provide the named plaintiff standing to move forward with those claims while the named plaintiff pursues his or her own individual claims in arbitration. This part of the US Supreme Court's opinion overruled a contrary conclusion in *Iskanian*, where the California Supreme Court held that PAGA actions can only be pursued on an aggregated basis.

Scott Jang:

Now, I don't want to brag, Mia, but I just wanted to point out for the record that this was a scenario that we teased out in our prior podcast. We noted that Justice Alito's questioning during oral arguments suggested that PAGA claims might be arbitrable after all, notwithstanding some language in *Iskanian*, and that a decision finding PAGA claims arbitrable on an individual basis might be the direction the court takes to resolve the case, which appears to be exactly what the court did here. That said, I'm sure humble pie will be served swiftly, and I'll be completely way off on my next Supreme Court prediction, so I won't hold onto that victory for too long.

Scott Jang:

But going back to the merits of the case, I think an interesting and probably quite crucial part of the decision is the US Supreme Court's reliance on the severability language that was attached to Viking River Cruises's class action waiver provision. The class action waiver provision in the agreement stated in part, "There will be no right or authority for any dispute to be brought, heard, or arbitrated on a class, collective, representative, or private attorney general action, or as a member in any purported class, collective, representative, or private attorney general proceeding." The US Supreme Court reasoned that this language sounded like, to use a terminology that Mia referenced earlier, a big R Representative action that is a waiver of the employee's right to represent the State of California and bring a PAGA claim altogether.

Scott Jang:

The court held that this provision could not be enforced as is, but then the court went

further. The court went onto zero in on severability language that followed the class action waiver. The severability language stated that if a court found the class action waiver unenforceable, either entirely or in part, then, "The portion of the class action waiver that is enforceable shall be enforced in arbitration." The court relied on this language to conclude that while the class action waiver cannot be enforced to preclude the plaintiff from bringing PAGA claims altogether, it can act as a little R representative action waiver and preclude her from pursuing PAGA claims on an aggregated basis. In other words, Ms. Moriana could not pursue the PAGA claims of other alleged aggrieved employees.

Mia Farber:

Another interesting aspect of the decision was how the justices voted. While the decision was technically eight to one, a closer look at the vote breakdown reveals a much more complicated picture. First, Justice Thomas was the sole dissenter. He maintained his long-held position that the Federal Arbitration Act does not apply to state court proceedings at all, and therefore it had no impact on Ms. Moriana's PAGA claims. Next, Chief Justice Roberts and Justice Kavanaugh and Barrett joined part of the court's majority opinion, as well as the majority opinion's ultimate conclusion. They would've taken a firmer stance and simply concluded that PAGA is preempted by the FAA and left it at that. That was probably the home run decision that employers were hoping for. And in the majority, we interestingly had conservative Justices Alito and Gorsuch join forces with liberal Justices Kagan, Breyer, and Sotomayor. Justice Sotomayor wrote a concurring opinion, which has garnered a lot of attention.

Scott Jang:

It sure has. Many of our friends on the other side of the bar see Justice Sotomayor's concurring opinion as a sort of future roadmap for perhaps working around the court's decision in Viking River Cruises. Justice Sotomayor said that the court's reasoning for dismissing the representative PAGA claims of the other allegedly aggrieved employees rested on the US Supreme Court's view that PAGA does not provide the named plaintiff standing to move forward with those claims while the name plaintiff pursued his or her own individual PAGA claims in arbitration.

Scott Jang:

Justice Sotomayor suggests that if the US Supreme Court's view of PAGA standing is wrong, then dismissal of the representative claims might actually not be required. Alternatively, Justice Sotomayor pointed out that the California legislature could also try to amend PAGA to give the named plaintiff standing to move forward with those claims, and I think all this to say that Justice Sotomayor suggested that this might not be the final word on this matter.

Mia Farber:

Scott, that's right, unfortunately. PAGA is not dead. Both sides of this issue hoped that the decision in Viking River Cruises would provide a clear-cut path for proceeding with PAGA actions or not, and unfortunately for California employers, Viking River Cruises does not appear to have brought the complete demise of PAGA. Even setting aside Justice Sotomayor's potential escape hatch that's outlined in her concurring

opinion, Viking River Cruises is not a complete shield to representative PAGA claims. For example, employers who do not have arbitration agreements are of course not shielded by Viking River Cruises. In addition, Viking River Cruises only applies to arbitration agreements governed by the FAA, and certain transportation workers engaged in interstate commerce are exempt from the scope of the FAA.

Scott Jang:

So it sounds like we have this window in which PAGA actions in arbitration agreements governed by the FAA are now enforceable post-Viking River Cruises. I think the million dollar question that everyone has in their mind at this point, Mia, is what exactly does this all mean for employers?

Mia Farber:

From a litigation standpoint, Scott, employers who currently have a pending PAGA action and have arbitration agreements with PAGA action waivers should immediately move to enforce their arbitration agreement. These employers should move to compel arbitration of the named plaintiff's individual PAGA claims under the little R of the representative action, and consistent with Viking River Cruises, ask the court to dismiss the PAGA claims of the other alleged aggrieved employees.

Mia Farber:

Employers should certainly not expect that their motions will go uncontested. As we discussed in our last podcast, employers may have to grapple with challenges to the enforceability of their arbitration agreements, consistent with the agreements they see in connection with other motions to compel arbitration dealing with other employment contexts. Following Viking River Cruises, we expect the plaintiff's bar to increase their attacks on the general enforceability of the arbitration agreement, so that they do not even need to get to the issue of whether the PAGA action waiver is enforceable or not. This would likely take the form of a plaintiff attacking the authenticity of their signature on the arbitration agreement or the plaintiff arguing that the agreement is so one-sided that the agreement should be invalidated on the ground that it is unconscionable. And of course, we'll have to see how the California courts address the potential standing issue that Justice Sotomayor tried to make hay of in her concurring opinion.

Scott Jang:

And outside of litigation, employers who do not currently have an arbitration agreement in place should evaluate whether to adopt one now that Viking River Cruises potentially provides a tool for employers to significantly reduce their exposure to PAGA actions. In doing so, employers should consider the various pros and cons of arbitration agreements. The pros of arbitration agreements include the ability to avoid runaway jury verdicts, a degree of confidentiality in terms of the arbitration proceedings, and the ability to implement class, collective, and now representative action waivers to potentially mitigate against those types of claims.

Scott Jang:

The cons of arbitration, on the other hand, include the fact that, at least in California,

the employer generally must pay the unique cost of arbitration, so we're talking about the arbitrator's fees. Other cons include the limited appeal rights in arbitration, the perception that an arbitrator might try to split the baby in arbitration and not give an employer complete victory, and some potential negative public perception of arbitration agreements generally, mostly in the wake of the #MeToo movement. Another consideration that employers should also be thinking about is the fact that the federal and state legislatures are very active in reducing the scope of arbitrable claims, as demonstrated by the recent federal legislation to carve out claims related to sexual assault or sexual harassment from arbitration, which was signed by President Biden in March of 2022.

Scott Jang:

As for the employers who already have arbitration agreements, they'll want to have counsel review their agreements to ensure that their agreement includes language that would allow enforcement of a PAGA action waiver similarly to what was done in Viking River Cruises. And these employers will also want to discuss with counsel whether to update their arbitration agreements for current or new employees in light of the various pros and cons of doing so. This also dovetails into California Assembly Bill 51, which, as Mia discussed in our last podcast, AB 51 was passed by the California legislature in 2019 and essentially prohibits employers from requiring an applicant or employee as a condition of employment to sign an arbitration agreement that affects claims under the California Labor Code or California Fair Employment and Housing Act.

Scott Jang:

This law was immediately challenged by the US Chamber of Commerce, which took the position that the FAA preempts and invalidates California's law. Then a three judge panel of the Ninth Circuit held that the FAA did not preempt AB 51 entirely, and that AB 51's penalties might attach in certain circumstances where the individual does not sign the arbitration agreement. But the decision will likely be subject to further review. The US Chamber of Commerce filed a request for a full panel of judges in the Ninth Circuit to take another look. And now that the US Supreme Court has issued its opinion in Viking River Cruises, we can expect the Ninth Circuit to decide whether a full panel of judges will agree to review this matter further.

Scott Jang:

Even if the Ninth Circuit declines further review, we expect the US Chamber of Commerce to appeal all the way up to the US Supreme Court. While it's difficult to predict how and whether that case will be taken up, based on the recent term, in which the US Supreme Court took a whole host of FAA-related cases, it seems like there might be a good chance that the US Supreme Court might take this case as well.

Mia Farber:

And we have to see what the state and district courts will do with PAGA in light of Viking River Cruises. There were several PAGA arbitration cases pending before the US Supreme Court, where the petition for review was denied and revoked and the cases were sent back to the lower court to be decided in light of the ruling in Viking

River Cruises. So hopefully we will soon see how the lower courts apply this very complicated decision.

Mia Farber:

And PAGA is itself still a work in progress more than a decade later. We are still seeing how certain issues are working their way through the California system. Recently, the California Supreme Court accepted review of a case regarding whether trial courts have discretion to dismiss PAGA actions based on manageability, due to a split amongst two of the courts of appeal. We also haven't seen the end of challenges to PAGA itself. Last week, the California Court of Appeal ruled on a case brought by a trade association, claiming that PAGA violated the California Constitution. And while the California Court of Appeal ruled that PAGA did not violate California's separation of powers doctrine and affirmed the trial court on that issue, it surely won't be the last attempt to take PAGA down.

Scott Jang:

Well, Mia, it sounds like what I'm hearing you saying is that the story is not over, in that there are many areas in which the story will continue with respect to not only Viking River Cruises, but with respect to the development of PAGA more generally.

Mia Farber:

I agree, Scott, and I think we're going to see those evolutions come from not only the courts, but perhaps also the California legislature and the people through initiative. As some of you all may recall, there was a drive for signatures to get an initiative on the ballot to overhaul PAGA, which stopped when the Supreme Court decided to hear Viking River Cruises. When those developments happen, we'll be sure to bring them to everybody.

Mia Farber:

Never to have it be a boring life cycle for the case of Moriana versus Viking on July 6th, 2022, Moriana filed a petition for rehearing before the United States Supreme Court and petitions for rehearing are pretty rare, pretty unusual, especially in the civil context and whether or not it'll be granted will turn on whether majority of the justices agree. In her petition, plaintiff states that she's not seeking or asking the court to revisit its decisions with respect to the FAA not preempting the Iskanian rule that prohibits the use of an arbitration agreement to waive an employee's entitlement to pursue quote, unquote, "Representative claims on behalf of the state," or that the FAA does preempt Iskanian to the extent incorporates a rule of claim joinder, precluding enforcement and arbitration agreement that separates a plaintiff or an employee's individual PAGA representative claim from her or his non-individual PAGA representative claim.

Mia Farber:

Instead, in her petition for rehearing, Moriana argues, the court's opinion went beyond the federal question presented in the petition for cert and involved the unbriefed issue of state law contract interpretation and statutory construction that Moriana claims exceeded the US Supreme Court's authority. Additionally, she argues

that the opinion was contrary to the contract language and applicable California law and contends that the opinion actually conflicts with rulings by the California Supreme court pertaining to standing for PAGA actions. In essence, she is seeking to have the opinion of the US Supreme court revised to avoid it dictating how California courts may handle PAGA claims.

Scott Jang:

That's right. Mia. That is an interesting development. And while we don't know when exactly the US Supreme court will decide that issue, things are moving quickly already, the California Supreme Court has decided to accept for the review of an unpublished court of appeal case wherein the issue of PAGA standing is one that may be decided by the Calif Supreme Court. Specifically, the issue in this case is whether an employer with an arbitration agreement with a PAGA waiver could enforce its arbitration agreement with respect to PAGA claims in a misclassification case. The court of appeal found in that case that the arbitration agrees waiver of PAGA claims was unenforceable, based on *Iskanian*. The same case in which the California court of appeal relied on in deciding *Moriana* in denying the petition to compel arbitration in that case.

Scott Jang:

And interestingly enough, this appears to be the first California Supreme Court decision in which the issue of PAGA standing is teed up for the court. And as everyone knows, that is a big issue that has potentially been left open with respect to the US Supreme Court's decision in *Viking River Cruises*. And so, all eyes will be on that decision as California Supreme Court appears to be prepared to answer additional questions with respect to when a plaintiff has standing under PAGA, especially when arbitration is in play.

Mia Farber:

And as we all know, Scott, the California Supreme Court is not known for the swiftness with which it reaches issues. So, on the legislative front, the secretary of state announced the other day that the California Fair Pay and Employer Accountability Act, which is the initiative aimed at substantially reforming PAGA, and really making it more of an administrative process did appear to have sufficient signatures. So, we may see legislation coming down well before the California Supreme Court acts.

Alitia Faccone:

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