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The Supreme Court Has Held that Individual PAGA Claims Can Be Severed and Compelled to Arbitration: But What Happens to the Non-Individual Portion of the Claim?

Series 3, 10 in 10: Issue 4

In its much-anticipated decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), the U.S. Supreme Court held that the Federal Arbitration Act (“FAA”) preempts California law to the extent that it precludes the division of individual and non-individual Private Attorneys General Act (“PAGA”) claims through an agreement to arbitrate. The decision abrogates the California Supreme Court’s opinion in *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) insofar as it prohibits the severing of individual PAGA claims from non-individual claims. The decision, however, did not go further to hold that the FAA is a categorical, per se bar to state laws that generally recognize “standing to assert claims on behalf of absent principals.”¹

Post-*Viking River*, employers may enforce arbitration agreements with PAGA waivers and properly constructed severance clauses by severing a plaintiff’s individual PAGA claim from his or her non-individual/non-representative PAGA claims and compelling just the individual component to arbitration. But the fate of severed non-individual PAGA claims after a plaintiff’s individual claims have been compelled to arbitration is less clear.

Applying California law to the case before it, the Supreme Court in *Viking River* held that “PAGA provides no mechanism to enable the court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.”² As a result, the Court held that the plaintiff lacked standing to maintain her non-individual claims and that they must accordingly be dismissed. While this is the final word in *Viking River*, it does not necessarily resolve this issue under California law. And



if the Supreme Court applied the PAGA standing requirement correctly, the California Legislature could modify the standing requirement. Consequently, the scope of the PAGA standing requirement in the context of severed non-individual claims is likely to be the subject of litigation in the coming months.

CURRENT GUIDANCE ON PAGA STANDING

The *Viking River* majority aptly points that “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.”³ PAGA’s standing requirement is one such feature that has been slowly evolving and still is not fully developed.

By its terms, PAGA limits statutory standing to “aggrieved employees,” which in turn, is defined to include “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.”⁴ The Legislature added the “aggrieved employee” standing requirement to PAGA to distinguish it from the California Unfair Competition Law, which previously authorized any member of the general public to sue for relief. But California courts have applied the PAGA standing requirement inconsistently. On the one hand, courts have held that a PAGA plaintiff lacks standing to seek penalties for violations pre-dating his or her employment.⁵ But on the other hand, the California Supreme Court has held that a plaintiff who settled all of his individual Labor Code claims at arbitration retained his PAGA standing as an aggrieved employee because the Legislature “defined PAGA standing in terms of violations, not injury” and “the Legislature did not intend to link PAGA standing to the maintenance of individual claims when such claims have been alleged.”⁶

Given the state of California case law on this point, *Viking River* is unlikely to be the last word on whether non-individual PAGA claims will survive once individual PAGA claims are severed and compelled to arbitration.

Employers should continue to monitor California cases on this point as they develop. In the meantime, they should also review their arbitration agreements to ensure enforceability under the *Viking River* framework.

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¹ *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), *Id.* at 1922.

² *Viking River*, 142 S. Ct. 1906, 1925 (2022).

³ *Viking River*, 142 S. Ct. at 1916.

⁴ Cal. Lab. Code § 2699(c).

⁵ See, e.g., *Hargrove v. Legacy Healthcare, Inc.*, 80 Cal. App. 5th 782, 791 (2022), review filed (Aug. 2, 2022).

⁶ *Kim v. Reins Int'l California, Inc.*, 9 Cal. 5th 73, 85 (2020).