

Articles + Publications | May 10, 2022

A New Horizon for California Employers? Impending SCOTUS Ruling Could Drastically Change the Course of PAGA Litigation

Labor & Employment Workforce Watch

WRITTEN BY

Wesley Gonzales | Jonevin Sabado

On December 15, 2021, the Supreme Court of the United States (SCOTUS) granted a [petition for certiorari](#) in *Viking River Cruises, Inc. v. Moriana*, [Case No. 20-1573](#) to determine whether the Federal Arbitration Act (FAA) “requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims,” including claims under the California Private Attorneys General Act (PAGA). This ruling could have significant implications for PAGA litigation going forward. Given the steady rise of PAGA cases over the past few years, businesses that either employ individuals in California and/or contract with independent contractors in California should pay special attention to this case.

In the eighteen plus years since the California Legislature enacted PAGA, it has become a favored vehicle for plaintiff attorneys to pursue litigation of employment claims. There are distinct advantages for plaintiff attorneys to bring cases under PAGA—most notably, it allows plaintiffs to bring a representative action against their employers (or contracting business entity in the case of independent contractors) without being subject to class-certification requirements. On the other side of this equation, PAGA suits pose a particularly difficult, and oftentimes expensive, headache for employers. Given this, businesses have been endeavoring to mitigate their exposure to PAGA claims by including representative action waivers in their arbitration agreements that would preclude the signatory employee or independent contractor from filing a suit under PAGA. Whether such a provision is enforceable is precisely the issue at hand in *Viking River Cruises*.

Viking River Cruises Challenges the California Supreme Court’s Ruling in *Iskanian*.

Viking River Cruises, Inc. (“VRC”) sells excursions for an ocean and river cruise line. Angie Moriana (“Moriana”) was a sales representative for VRC in California. After VRC terminated Moriana’s employment, she filed a representative suit under PAGA in December 2017, seeking civil penalties for several labor code violations. However, upon her employment with VRC, Moriana signed an arbitration agreement that applied to “any dispute arising out of or relating to [her] employment” and provided that arbitration would take the place of any proceeding by an agency or court for a typical judge or jury trial. Importantly, the agreement included a representative action waiver providing that Moriana was waiving any right to bring suit as part of a class, collective, representative, or private attorney general proceeding (PAGA). Pursuant to this provision, VRC moved to compel Moriana to individual arbitration of her claims. Both the trial court and the California Court of Appeal, applying the California Supreme Court’s ruling in *Iskanian v. CLS Transportation Los Angeles LLC* (2014) 59 Cal.4th 348, denied VRC’s motion, holding that the provision in VRC’s arbitration agreement waiving PAGA claims was unenforceable. The

California Supreme Court denied review, and VRC filed a petition for certiorari in the United States Supreme Court arguing that *Iskanian* runs contrary to the Supreme Court's recent decisions delineating the scope of the federal arbitration act.

On March 30, 2022 the Court heard [oral argument](#) from the parties.

The Current Law Regarding Enforceability of PAGA Waivers

Plaintiff attorneys have used the California Supreme Court's ruling in *Iskanian v. CLS Transportation Los Angeles LLC* (2014) to argue that PAGA claims are not subject to representative action waivers provided in arbitration agreements and thus an arbitration provision containing a PAGA waiver is categorically unenforceable. In reaching its decision, the *Iskanian* court referenced the public policy concerns present in 2004 that prompted the California Legislature to enact PAGA—namely concerns that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with future market growth. PAGA permits employees alleging Labor Code violations to file suit and recover on behalf of themselves, other aggrieved employees, and on behalf of the State of California itself. Thus, the *Iskanian* court emphasized what it saw as a fundamental distinction between the substantive right to bring a PAGA representative action on the one hand and the substantive right to bring a class action on the other and held that agreements purporting to waive an individual's right to bring a claim under PAGA are against public policy.

However, there have been several challenges to *Iskanian*. Parties challenging *Iskanian* argue that its ruling is directly counter to the broad scope of the federal arbitration law delineated by SCOTUS in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, *Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612, and *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407. In *Epic*, SCOTUS considered whether employers and employees could bilaterally bind themselves to resolve all disputes through arbitration on an individual basis—SCOTUS answered in the affirmative. The opinion emphasized the FAA's mandate that "federal courts [are] to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." Citing to both *Epic* and *Concepcion*, parties seeking to enforce PAGA waivers have argued that there is no meaningful distinction between the class action in *Concepcion*, the collective action in *Epic*, and a representative PAGA action. Therefore, PAGA waivers in valid, bilateral arbitration agreements should be enforced.

Considerations Pending the Ruling in *Viking River Cruises*

While there is no concrete date as to when the Supreme Court will issue its ruling in *Viking River Cruises*, the ruling is expected to issue this summer before the Court recesses. In the meantime, employers with a presence in California, as well as companies contracting with independent contractors in California, may want to evaluate alternative paths for their dispute resolution/arbitration programs depending on the Court's ruling.

RELATED INDUSTRIES + PRACTICES

- [Labor + Employment](#)