

Alert | Labor & Employment



December 2021

Supreme Court to Consider Whether the FAA Mandates Arbitration of PAGA Actions

On Dec. 15, 2021, the United States Supreme Court granted certiorari in *Viking River Cruises, Inc. v. Moriana*, and likely will decide by summer 2022 whether the Federal Arbitration Act (FAA) preempts California public policy and requires enforcement of arbitration agreements that purport to waive an employee's ability to pursue representative actions under the California Private Attorneys General Act (PAGA). Employers have been waiting for the Supreme Court to take up this issue and are watching the case with interest.

Currently, per the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, arbitration agreements that waive an employee's right to pursue PAGA representative actions are considered void and unenforceable. In *Iskanian*, the California Supreme Court held the FAA does not preempt California state law prohibiting prospective PAGA waivers because PAGA actions are between the employer and *the state*, not the *employee*. Thus, the state of California is the real party in interest, not the employee bringing suit, and although the employee may have executed a binding arbitration agreement, the state of California did not. Thus, arbitration agreements that purport to waive the right, expressly or otherwise, to bring a PAGA representative action are not enforceable.

In *Viking River*, the employee filed a PAGA representative action seeking civil penalties for various alleged violations of the California Labor Code, despite signing an arbitration agreement with her employer agreeing to resolve all future employment-related disputes with the employer via individual arbitration. Relying on the agreement, the employer moved to compel the action to arbitration. The trial

court denied the motion, and the Court of Appeal affirmed the denial citing California state law as articulated in *Iskanian*. The California Supreme Court subsequently denied the employer’s petition for review.

Viking River then petitioned the U.S. Supreme Court for certiorari, relying on the Supreme Court’s decisions in *AT&T Mobility LLC v. Concepcion* and *Epic Systems Corp. v. Lewis*. These decisions held that courts may not disregard bilateral arbitration agreements or reshape traditional individualized arbitration by mandating class-wide arbitration procedures without all parties’ consent. Viking River argued the Supreme Court needed to review the case to reaffirm the FAA and national policy in favor of arbitration. Viking River further argued review was necessary to ensure that *Concepcion* and *Epic* promote bilateral arbitration, rather than simply result in “representational litigation” under PAGA by those who agreed to arbitrate individually. In granting review, the Supreme Court will decide “[w]hether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.”

This will be a closely watched decision for both sides of the bar and will likely have a groundbreaking effect on California employment litigation. Should the Supreme Court decide in Viking River’s favor, PAGA-only actions, which have become the preference of California plaintiffs’ attorneys in the face of arbitration agreements containing class action waiver provisions, will largely become a thing of the past for those employers who mandate individual arbitration for employees. Although it is by no means certain how the Supreme Court will decide this issue, employers should certainly be ready to revisit any arbitration agreements with California employees and consider what if any changes the ultimate ruling may warrant.

Authors

This GT Alert was prepared by:

- [Ashley M. Farrell Pickett](#) | +1 310.586.7708 | farrellpicketta@gtlaw.com
- [Radha D.S. Kulkarni](#) | +1 310.586.7724 | kulkarnir@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¶Greenberg Traurig’s Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojijimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig’s Warsaw office is operated by GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAURIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*