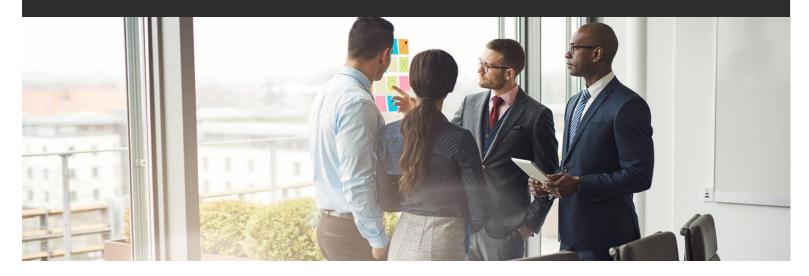


Alert | Labor & Employment



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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.

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