How Unions Could Stem Possible Wave Of Calif. PAGA Claims

By **Ron Holland, Ashley Farrell Pickett and Anthony Guzman** (April 27, 2023)

Ron Holland

Ashley Farrell Pickett

Anthony Guzman

The U.S. Supreme Court's 2022 ruling in Viking River Cruises v. Moriana[1] gave California employers a brief reprieve from the onslaught of nonarbitrable Private Attorneys General Act claims.

Before then, PAGA's structure was unique — allowing an aggrieved employee to bring a nonarbitrable suit on behalf of the state to recover penalties for Labor Code violations committed against both themself as an individual and other aggrieved employees as a representative. Viking River changed that and subjected the individual portion of those claims to arbitration.

Once successfully compelled to arbitration, Viking River directed courts to dismiss the PAGA claim's remaining nonindividual, representative portion — a boon to California employers that may soon change following the California Supreme Court's upcoming decision in Adolph v. Uber[2] anticipated later this year.

Many now expect the California Supreme Court to turn back the clock on Viking River by holding that the nonindividual portion of a PAGA claim survives even after the individual's own claim is compelled to arbitration — setting the stage for a post-Adolph wave of PAGA litigation while leaving many employers wondering what, if anything, they can do to help keep the proverbial floodgates closed.

For union employers, the California Court of Appeal, Fifth Appellate District's recent decision in last year's Oswald v. Murray Heating and Plumbing[3] may hold the answer — one that would allow employers and unions to use collective bargaining to address the nonindividual portion of PAGA claims that Viking River left untouched.

So with Adolph now primed to potentially end Viking River's short-lived reprieve, union employers should take care to understand Oswald's unique impact on PAGA litigation in unionized workplaces, how employers and unions might leverage Oswald to stifle any post-Adolph resurgence in nonindividual PAGA claims, and how employer and employee interests may even be aligned in doing so.

The Lead-Up to Adolph

To understand the issue, we start with Iskanian v. CLS Transportation Los Angeles, in which the California Supreme Court in 2014 held that a waiver of a PAGA claim before the actual dispute arose — such as through a preemployment arbitration agreement — violated public policy because such a waiver could not be "knowing and voluntary."[4]

This begged the question — when do PAGA disputes arise? In 2017's Julian v. Glenair,[5] the Fifth Appellate District explained a waiver can only be considered "knowing and voluntary" after an employee submits a PAGA letter to the California Labor Workforce Development Agency and the time for the LWDA to take the case elapses.

Only at that point does the employee have adequate awareness of both the violations at issue and their authority to proceed on the state's behalf. From there, the employee is free to waive the right to bring a representative PAGA action.

Viking River partially overturned Iskanian and recognized a distinction in PAGA's individual and representative components. Employees could now waive their right to a judicial forum for their individual PAGA claims.

Although Viking River upheld Iskanian's holding that the right to pursue a representative PAGA claim could not be waived via a predispute agreement, the Viking River decision held that — as a matter of state law — courts would have to dismiss the remaining representative portion of the PAGA claim once the individual claim is compelled to arbitration because the act did not provide employees with statutory standing to maintain the representative portion alone.

Sotomayor's Prediction of a Potential Post-Adolph Problem

The post-Viking River rule is simple — compel the named plaintiff's individual PAGA claims to individual arbitration, and the rest of the PAGA suit goes away. U.S. Supreme Court Justice Sonia Sotomayor's concurrence in Viking River thought otherwise.

While she joined the majority in full, she recognized that their standing analysis that required dismissal of the leftover representative PAGA component was a matter of state law, and therefore, that the state courts might interpret PAGA differently: "Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."[6]

The month following Sotomayor's concurrence, the California Supreme Court granted review of Adolph — and directly requested the parties to brief whether an employee compelled to individual arbitration under Viking River "maintains statutory standing to pursue PAGA claims arising out of events involving other employees."[7]

If, as many predict, Adolph disagrees with Viking River's interpretation of state law, many employers will be back to square one — with predispute arbitration agreements helpless to preclude representative PAGA suits.

Oswald and Avoiding a Post-Adolph Problem

Notably, however, the recent California decision in Oswald may change the calculus for unionized employers, regardless of the California Supreme Court's ultimate decision in Adolph. In Oswald, the employer and union had a collective bargaining agreement with a mandatory arbitration provision.

When Jerome Oswald later sued under PAGA, his employer argued that the language of the arbitration provision covered his claims and satisfied the requirements of a PAGA exception that applies to certain construction employer CBAs.

After the California Superior Court for Los Angeles County disagreed and refused to compel arbitration, the employer and union executed a memorandum of understanding that retroactively modified the CBA to apply to Oswald's claims and the PAGA exception.

For the Court of Appeal, this was enough. The fact that Oswald was no longer an employee, that the suit was already pending and that Oswald was not even a signatory to the

memorandum of understanding were all irrelevant because the court recognized that "[a] contracting party may agree to an arbitration clause that applies retroactively to a pending lawsuit," and that "[t]he same reasoning applie[d] [t]here, where the contracting party (Oswald's union) agreed to retroactivity modify and clarify an existing arbitration clause."[8]

Oswald's union membership was key to this decision. The court reasoned that "[a]s a union member, Oswald enjoy[ed] the benefit of the union's bargaining power but he [was] also subject to the burdens imposed by the CBA."[9]

Although Oswald deals with a limited exception to the general rule against arbitrating PAGA claims, Oswald's reasoning has several broader key takeaways for union employers hoping to stem a potential resurgence of PAGA litigation should Adolph undermine Viking:

- First, Oswald confirms a union's ability to retroactively waive certain statutory member rights that can include an employee's right to bring a PAGA claim in court, as opposed to arbitration, even after a PAGA suit is filed;

- Second, once a PAGA suit is filed, Oswald suggests a union could even waive a member's right to serve as a PAGA representative altogether, because at that point the dispute has already arisen such that a union's waiver on behalf of its member would be sufficiently "knowing and voluntary."[10]; and

- Third, Oswald's reasoning about being bound by the respective burdens and benefits of collective bargaining places it in line with strong federal precedent that may preempt judicial or legislative attempts to circumvent or limit these types of PAGA-related concessions by unions during the bargaining process.[11]

Taken together, Oswald suggests employers and unions can use collective bargaining to agree to a framework for handling these types of PAGA waivers in cases like Oswald in which an employee files a PAGA suit in violation of a CBA's grievance and arbitration procedure.

The reason for such a framework is simple: Reducing an employer's unnecessary litigation spend frees up monetary resources that might otherwise be used at the bargaining table — potentially promising a framework in which both employers and employees can benefit from an overall reduction in PAGA litigation.

In execution, the structure of these frameworks can vary.

Much like a wage reopener, CBAs could include language that makes the filing of a PAGA suit, or any representative suit, trigger a limited obligation to bargain over how those representative claims should be resolved, whether by waiving that particular employee's right to bring a representative PAGA suit in court instead of CBA arbitration, as suggested by Oswald; by waiving the employee's right to serve as a PAGA representative altogether, as suggested by Iskanian; or through some other mutually accepted resolution reached at the bargaining table, as suggested by the U.S. Supreme Court's 2009 ruling in 14 Penn Plaza v. Pyett.

As an added precaution, CBAs can also include language by which the union and employer agree to meet and confer over any needed modifications should a court ultimately find the chosen resolution framework insufficient.

Even with retroactivity aside, Oswald may implicate a more significant preemption question that goes to the heart of both the National Labor Relations Act and PAGA respectively: Should the union or the state have the ultimate authority for determining who gets to represent the interests of the bargaining unit member with respect to claims involving their wages, hours and working conditions?

If at the outset, a CBA expressly affirms the intent of bargaining unit members to designate the union as their sole and exclusive representative with respect to all representative claims based on their wage and hour rights, can the state — through PAGA — nonetheless displace the right of those members to collectively choose their own representative?

Although both Oswald and entrenched federal precedent under Penn Plaza suggest that bargaining unit members alone should have this right, detractors may point out that the NLRA's two preemption doctrines — the Garmon and Machinist preemptions[12] — do not prohibit states from implementing minimum state employment standards of general applicability, e.g., minimum wage, required breaks, etc.[13]

Under that case line, however, PAGA's unique nature would again take center stage because, at bottom, PAGA is not a statute that sets forth California's minimum wage and hour standards — PAGA is an enforcement mechanism that empowers a representative to enforce those wage and hour standards contained elsewhere in California's Labor Code.

A preemption challenge under Oswald would therefore target PAGA's attempted displacement of a union's right to represent bargaining unit members in collectively bargained decisions about how best to address purported violations of those members' wage and hour rights — not the underlying state law that provides those rights.

Nonetheless, it still remains to be seen whether and/or how California will tolerate these types of CBA frameworks and preemption arguments in a post-Oswald, post-Adolph environment. Until then, unionized employers may be well served by keeping an eye on potential and upcoming litigation surrounding these issues.

Ron Holland and Ashley Farrell Pickett are shareholders, and Anthony Guzman is an associate, at Greenberg Traurig LLP.

[1] Viking River Cruises Inc. v. Moriana, 142 S.Ct. 1906 (2022) ("Viking River").

[2] Adolph v. Uber Technologies, Case No. S274671 (C.A. Sup. Ct. Review Granted Jul. 20, 2022) ("Adolph").

[3] Oswald v. Murray Plumbing and Heating Corporation, 82 Cal. App. 5th 938 (2022).

[4] Iskanian v. CLS Transportation Los Angeles LLC, 59 Cal. 4th 348 (2014) ("Iskanian").

[5] Julian v. Glenair Inc., 17 Cal. App. 5th 853 (2017).

[6] Viking River, 142 S.Ct. at 1925.

[7] Adolph v. Uber Technologies, Case No. S274671, Order Limiting Issues for Briefing (Aug. 1, 2022).

[8] Oswald, 82 Cal. App. 5th at 944.

[9] Id. at 944 ("As a union member, Oswald enjoy[ed] the benefit of the union's bargaining power but he [was] also subject to the burdens imposed by the CBA, which limit his remedy for Labor Code violations to an arbitral forum.").

[10] Iskanian, 59 Cal. 4th at 383 ("Of course, employees are free to choose whether or not to bring PAGA actions when they are aware of Labor Code violations," just not "before any dispute arise.").

[11] E.g., 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Judicial nullification of contractual concessions…is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relation Act ["NLRA"]—freedom of contract.").

[12] Two types of preemption exist under the NLRA. Garmon preemption prevents state interference in the specific activities already protected or prohibited by the NLRA, while Machinist preemption prevents state interference in areas Congress intended to be left unregulated and controlled by the free play of economic forces. For a more detailed discussion of Garmon preemption and Machinist preemption, refer to Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

[13] See., e.g., Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).