

# The Performance Review

## Episode 17

### Destination Arbitration: *Viking River Cruises* and its impact on Private Attorney General Act (PAGA) claims

Philip Person ([00:18](#)):

Welcome back, everybody. We have a new episode today. We're going to be talking about Viking River Cruises, a recent US Supreme Court decision dealing with arbitrations and its impact on PAGA. Our guest today is Chris Ramos, general counsel at Time by Ping, GT alum, GT extended family, friend, and fan of the show. So welcome, Chris. Tell us about Time by Ping, and tell us a little bit about your practice.

Chris Ramos ([00:48](#)):

Yeah, thank you. Thank you very much for that introduction. Longtime listener, first-time caller. But it's great to be here with you, Philip, and with Ryan as well. Yeah, like you mentioned, my name's Chris, I'm the general counsel at Time by Ping. Time by Ping is a venture-backed startup. It's automating timekeeping for professional services people. Been doing this for about three years. Very, very excited to be here with you both today and talk about Viking River Cruises.

Ryan Bykerk ([01:17](#)):

Yeah. Thank you, Chris. It's really, really good to have you. And yeah, just appreciate you taking the time to talk about this decision. Chris, maybe could you tell us why is this such an important decision?

Chris Ramos ([01:26](#)):

I think it's important on a few different levels, but the first is that for so long now, about a decade, California employers have been very restricted in the availability of arbitration and arbitration agreements with their employees. This represents a pretty big shift in the way employers in California can structure their contractual relationships with employees with respect to arbitration.

Philip Person ([01:55](#)):

And we can sit here and talk about arbitrations all day, about the impact of Viking River Cruises, but we should probably start by talking about PAGA in general. What's your thoughts on that? What about the history of PAGA? Let's give an education for our listeners.

Chris Ramos ([02:12](#)):

Yeah. So PAGA is one of those things that I think for in-house lawyers in particular, it's somewhat of a looming issue all of the time. And that's because it is one of the statutes that the plaintiff's bar has really taken an interest in. And bringing claims against California employers. The statute was enacted really to address a deficiency that the state of California perceived in its ability to bring enforcement actions itself, for employers' violation of the labor code. And so what PAGA does is it essentially deputizes

private individuals to stand in the place of the state in bringing enforcement actions for labor code violations against California employers.

Ryan Bykerk ([03:01](#)):

Right. And it sets penalties and it gives them the ability to enforce penalties, right? So default penalties are a hundred dollars for each aggrieved employee per pay period for initial violations, 200 for subsequent violations. And this is one of the things that I noted about even the Viking River opinion, which I know we're not to that yet. We'll get to that in a minute. But the majority opinion there writes that individually, these penalties are modest, but PAGA gives the aggrieved employee this ability to, well, they call it an additive dimension, right? To take all these low-value claims and weld them together into high-value suits. But like I said, I'm getting ahead of myself. So unlike class actions, before Viking River, these claims for PAGA penalties could not be compelled to individual arbitration, right?

Chris Ramos ([03:55](#)):

Yeah, that's right. Under a California Supreme Court precedent, the court held that the state had a strong public policy in allowing individuals to bring PAGA suits in court. And that's because PAGA was intended to have a deterrent effect on California employees. And the state believed that deterrent effect would be in fact diminished if these suits were allowed to proceed in arbitration. And so for that reason amongst others, but for that being one of the primary reasons, California had a rule that did not allow for arbitration of these PAGA claims.

Philip Person ([04:33](#)):

And that's correct. Just speaking about that rule, that California Supreme Court rule, there's two ways to pronounce it. And I've seen courts pronounce it either way. Iskanian or Iskaniian. I've seen so many variations of it. Ryan, what have you heard it as?

Ryan Bykerk ([04:49](#)):

Oh man. So I always say Iskanian with a long A.

Philip Person ([04:52](#)):

See?

Ryan Bykerk ([04:53](#)):

Am I doing this wrong? That's a third way. Okay. I don't-

Philip Person ([04:56](#)):

I've been in courts, and I've heard it so many different variations of it. And I just say the PAGA arbitration rule, but let's go with Iskanian. So in Iskanian, that's what previously was a seminal case. And where they brought the class action lawsuit on behalf of that employee and other aggrieved employees, just like any other PAGA action or representative action, they try to compel arbitration there. And the court emphasized that the FAA's goal of promoting arbitration as a means of private dispute resolution didn't preclude the California legislature from deputizing employees to prosecute California labor code violations on the state's behalf.

And therefore it did not apply the FAA preemption to that in that PAGA case. So going along with that line of authority there, the Supreme Court declined a petition for [inaudible 00:06:04] of

Iskanian in January, 2015. And later in that same year, the 9th Circuit also ruled that Iskanian was not preempted by the FAA. So that was the history of it in the past eight, 10 years or so of it until we had Viking River Cruises. And that changed everything, turned it on its head. So now let's talk about Viking River Cruises. I know, Ryan, we're so eager to talk about it, but I'm going to defer to our guest first. So Chris, tell us a little bit about Viking River Cruises.

Chris Ramos ([06:42](#)):

Sure, sure. I'm the least impressive of the three of us, but I appreciate you guys giving me the air time.

Ryan Bykerk ([06:47](#)):

Oh, please.

Chris Ramos ([06:49](#)):

Viking River Cruises involved a sales representative at Viking River Cruises cruise line, who brought an array of claims against her employer. Her individual claim was related to a failure to pay a final wages, I believe within 72 hours. But in asserting her PAGA claim, she also asserted a number of other violations on behalf of other employees. A wide range of things from overtime claims, to meal and rest period claims and the gamut of claims that you generally see in these PAGA suits. Her employment agreement contained a severability clause that would essentially allow for to the extent that any waiver of class of representative action was found to be unenforceable, that the part of the claim that was allowed to proceed would have to proceed in arbitration.

And that I think Viking River, the holding in Viking River Cruises is perhaps a little bit more nuanced than certainly the parties argued in the case. And I think anybody really expected it to turn out. Certainly more nuanced than most of the Supreme Court's arbitration jurisprudence. And I think that a lot of that is animated by the way that this arbitration clause in particular was structured. But anyway, so the plaintiff brought those claims in court, and Viking River Cruises moved to compel arbitration for individual claim and dismiss her non-individual claims. The company argued that since she had signed an arbitration agreement when she was hired, she was required to arbitrate those individual claims. And demanded that arbitration agreement also included, like we mentioned a second ago, class and representative action waiver. And so she could not bring any class or representative action in that arbitration. And they argued that included the PAGA claim, because that is a representative action in more than one sense as the court ends up holding.

Philip Person ([08:53](#)):

And you mentioned the nuance of that case, Viking River Cruises. Our listeners, they come to The Performance Review for nuance. I mean, why else do you click, listen to The Performance Review to listen? Not just to listen to Ryan and I spatter on, but let's spend some time talking about that nuance. Because in there, the employee's PAGA complaint seem to have been split. And I think that's something we should probably spend a little time on. Can you talk about that split?

Chris Ramos ([09:25](#)):

Yeah, absolutely. And on this point of nuance, I mean, in the opinion, the court, I think even throws a little bit of shade at some of the California courts about how they talk about PAGA claims. But the holding really turns on the fact, like I mentioned a moment ago, that PAGA claims are, quote, "Representative actions" in more than one sense, right? And so the court says, "Well, a PAGA claim is representative in the sense that the plaintiff brings the case or brings the claim standing in the shoes

and on behalf of the state of California." Right? So in the first instance, the plaintiff is representing the state. The claims are also, quote, unquote "representative" in the sense that given some of PAGA's claim joinder rules, which we can get to in a moment, a plaintiff in a PAGA case can assert a claim for violations that he or her suffered themselves, but also violations that other employees may have suffered, but that employee didn't necessarily suffer. So those are the two senses in which PAGA actions can be representative.

Ryan Bykerk ([10:33](#)):

Yeah, I thought that was one of the more interesting observations in the opinion itself. And Chris, you mentioned maybe throwing some shade, which made me want to, I got that sense as well. And it made me happy, but then I also realized I've been practicing and dealing with PAGA for a long time now. And if you had really stopped me and asked, "Well, is it representative in two separate ways?" I'm not sure I would've articulated it that way. So it's just really interesting to see someone who's a PAGA outsider, certainly Justice Alito doesn't practice on PAGA all the time, look at the statute with fresh eyes and make that observation. So it's just one of those observations that now, of course, seems quite obvious, but yeah, I'm just not sure I would've described it that way before reading the opinion. In any case, the court recognized this dual representative nature of the claim. So I guess let's take this in two parts. First, what did it decide would happen with her individual PAGA claim?

Chris Ramos ([11:31](#)):

So the court holds essentially that her individual PAGA claim can and should proceed in arbitration. And the court holds that by virtue of the arbitration agreement, the representative claim, the claim she's asserted for violation suffered by other employees cannot proceed in arbitration. And really, that turns on the concept of consent, right? That arbitration is born of consent between parties to submit certain claims to arbitration, in that that consent framework is broken when a statute like PAGA allows a plaintiff to bring or to join claims that he or she did not suffer. And aren't contemplated by the arbitration agreement by the scope of the consent to arbitrate claims. So the court holds that the plaintiff's individual claim can proceed in arbitration. It holds that the representative claim, the claim on behalf of other employees, cannot. That would have to proceed in court if it were to proceed at all. But that by virtue of PAGA's standing requirement, once you sever her individual claim from the representative claims, that those representative claims cannot survive on their own in court.

Philip Person ([12:48](#)):

And the three of us, we could probably nerd out on this all day, talking about the standing issue, the individual versus representative claims as Ryan pointed out, "Hey, there's actually two ways to look at this as a representative action." But let's keep it simple for the listeners. What does Viking River Cruises mean practically? How does this impact current and future PAGA claims?

Chris Ramos ([13:12](#)):

I think it has a few impacts, right? I think at bottom, it means that California employers can now agree with their employees to arbitrate individual PAGA claims. Right? Whereas before, none of those arbitration agreements would've been enforceable. So I think that's the biggest upshot here. It also allows employers to mitigate some of the risk that I think, like we pointed out at the top of the show, the outsize risk that PAGA claims present is really by nature of the claim joinder rules, right? The fact that a plaintiff can tack on all of these violations or alleged violations that an employer may have committed, whether or not he or she had personally suffered those violations. And by the way, that is a

virtue of PAGA, that's different from something like a class action, right? Because in the class action, the plaintiff him or herself has to have experienced the violations of the class.

They have to be typical and common. And so there are all these other, their typicality and commonality rules and all these other rules to ensure that the violations that the plaintiff allegedly suffered are aligned and of the same kind, that the violations of the class suffered. That's different in the PAGA framework, right? The plaintiff doesn't have to have suffered any of the other violations that they bring on behalf of other individuals. And so that is the reason that PAGA claims are very high risk, because they can tack on all the additional violations. And so the holding in Viking River Cruises gives employers the opportunity to mitigate some of that risk by agreeing with their employees to submit individual PAGA claims to arbitration. And the results of that, as the court points out, is that the representative claims, the claims for violations that the plaintiff did not him or herself suffer, can't proceed in court by virtue of the standing rule.

Ryan Bykerk ([15:19](#)):

Yeah, for sure. And it's interesting to look a little bit into the near future here, Chris, and I'm interested to hear your opinion on this. Employers have been high-fiving each other over this, and it's good news for employers. But I guess the question is, do you think California is going to push back on this decision and maybe how?

Chris Ramos ([15:39](#)):

It's hard to read the tea leaves on whether or not there will be pushback on the decision. I think it certainly is possible. It's certain that the plaintiff's bar will push for some change. Justice Sotomayor, in her concurrence, I'd go so far as to say invites the legislature to reconsider some of the standing rules. Well, she says a couple things, right? She says, "Well, first, this is just our interpretation and maybe we're not interpreting it correctly. Right. And you might clarify that this is what the statute actually says." Or "Of course you are free to change the statute and change the standing rules, and do whatever you see fit to bring about the policy change that the statute was designed to manifest." So the table's certainly been set for change to occur. Anybody's guess whether some change actually happens. But curious what you guys think.

Philip Person ([16:37](#)):

I think that the interesting pieces, what you talked about Justice Sotomayor's concurrence, which stated that there was no mechanism that the state has to be able for a court to adjudicate non-individual pilot claims once the individual's claim has been committed to a separate proceeding. Obviously, that's not the majority opinion in Viking River Cruises, but who knows who will latch onto that language and how they'll try to use that in future PAGA arguments to try to avoid arbitration? I don't know, but that's just some language from the opinion that was interesting.

Ryan Bykerk ([17:21](#)):

Yeah. I mean, you use the word invites, Chris. And I read it that way too. When I got to that page, I was like, "Oh, okay, this makes sense. This is what I expect to see." Yeah. What is California exactly going to do? I don't know. I mean, we've already heard statements from the attorney general talking about PAGA. We've heard statements from members of the California state legislature talking about maybe creating a new pathway to legal standing. I think there are a lot of options for the state of California to do something here. And I wonder if the fact that PAGA's profile has been pulled up significantly by this

case, going to the Supreme Court, puts some added pressure on the California legislature to step up and accept the invitation from Justice Sotomayor to do something about it.

I don't know what path they'll take. Certainly you could get the LWDA more involved. I think that gives some opportunity to use some of the funds that maybe PAGA has collected over the years with the express purpose of increasing enforcement to maybe get them involved on a broader basis. I don't know. It'll be really interesting to see, but I don't think PAGA is going anywhere. At least not anytime soon. I think it'll continue to be a part of the legal landscape here in California. But I guess that begs the question. So you're general counsel for an employer in California. How are you, or maybe how are some of your colleagues approaching the decision?

Chris Ramos ([18:48](#)):

That's a good question. I think it should prompt, it certainly prompted me, and I know that it's prompted a lot of my in-house colleagues to rethink whether or not they want to enter into arbitration agreements with their employees. And I think whenever an in-house lawyer thinks about how to do that, there's of course this legal component, right. But there's also a cultural component that I think particularly in California, you have to consider, because there's a certain sentiment that California employees have toward arbitration.

And so there are always the legal considerations, right? But then there are the cultural considerations and thinking through how it impacts your ability to recruit talent, retain talent. I was just thinking about this. I don't know if you guys remember, but during the height of the MeToo movement, you can remember, if you guys remember, there was a huge push, and this even happened in a big way in the law firm space. There was a big push to get arbitration clauses out of employment agreements, because they were being used to essentially silence victims of sexual harassment, things like that.

And so obviously, arbitration of labor code violations is maybe not as it, perhaps doesn't invoke the same passions that arbitration of a sexual harassment claim might. But I think that set the tone amongst a lot of employees and employers and how they thought about entering into arbitration agreements with their employees. On the other side of the coin, though, like we've been talking about, right. PAGA really does represent a big risk to employers and for, I think, sometimes pretty technical violations of the labor code, right? Things like information appearing on a wage statement representing the legal name of the employing entity correctly with the address, things like that. And so I think it's certainly something to consider. I think the mere fact that it's just now available, obviously, it's on the menu now. It really gives all employers something to consider. And then depending on what the culture of a particular organization is, I think being able to enter into these arbitration agreements with employees.

Philip Person ([21:21](#)):

Adding to that, that there really was a good point in that there was some pushback during the MeToo, even recent legislation. The ending forced arbitration of sexual assault and sexual harassment that was signed into law. The federal one that carves out those types of claims from mandatory arbitration agreements, that there's always a carve-out. But you brought up a good point that you have to consider the workforce and the culture and what's going on there, and get calls all the time. But general counsel such as yourself need to coordinate with your outside counsel, such as GT, discussing how an arbitration agreement would impact the workforce. Recruiting, hiring, weighing that against the impact it could have on these types of claims. Such as PAGA, especially with the Viking River Cruises opinion out. So it's something that's open for discussion. And that happens all the time. And it's really on a case-by-case

basis, just to draft the arbitration agreement as that's best suited for the company and the employees there.

Chris Ramos ([22:31](#)):

Your point about the carve-out is such an important one, particularly because if you look at Viking River and the way that these cases are coming out, and it makes sense, but the courts are really digging into the nuance of what's included in the arbitration provisions versus excluded. Again, those severability clauses. And I think when drafting arbitration agreements, I know in-house lawyers can be guilty of this, right? But sometimes there's an impulse to find the first boiler plate arbitration clause you can find and dump it into agreement. And you've really got to fight that impulse. Right? Because what we're seeing is that the details and these arbitration clauses are turning out to be really, really important.

Ryan Bykerk ([23:19](#)):

Yep. No, well put. We've covered a lot of ground. I feel like we're going to have to have you back in a year when this is all shaken out. Maybe we can talk more about that. I don't know. So, but this has been fantastic, Chris. Thank you for coming on and talking us through Viking River. But as you know, since you are a longtime listener, first-time caller, we always end with a crazy employment story and I'm certain you have one for us. So we would just love to end that way. What crazy employment story have you come across as general counsel, or in any other capacity?

Chris Ramos ([23:53](#)):

I knew this was coming, and I thought long and hard about this. And you really don't get that many opportunities to feel genuine gratitude for the position that you're in, in your job. But I couldn't think of anything that would be high entertainment value to our listeners, unfortunately. But I figured this would be a good opportunity for one of you two to share one.

Philip Person ([24:28](#)):

Okay, Chris. Put us on the spot, then, why don't you? Let me think of one. Ah, I have one. It's not one from obviously any of our clients. It's something that I read in the past, another case. And it was pretty interesting. Just goes to show that not all workers' compensation cases are run-of-the-mill. This one involved an assistant manager who called his coworker to discuss a work-related matter. The coworker's husband thought that the assistant manager was having an affair with his wife. The suspicion grew to the point where the husband began threatening and harassing that assistant manager. And then get this, the husband even contacted a professional hitman to kill the husband. Fortunately, the plan to hire this paid hitman didn't work out. And the next step for the husband logically would be to reach out to the assistant manager's supervisor about the alleged affair. That eventually resulted in an internal investigation.

And the assistant manager requested a transfer to a different location. The assistant manager filed a workers' compensation claim against the employer, claiming that his preexisting post-traumatic stress disorder was triggered by the threats and harassment by that employee's husband. The employer argued that the injury was not related to the assistant manager's employment. However, the workers' compensation board found there was a sufficient nexus between the injury and the employee's work-related duties. So fast-forward, it goes on appeal. The court agreed with the board, finding that the record did not reveal a connection between the assistant manager and the coworker's husband outside of these work-related duties. Therefore the court just concluded that the workers' compensation board

properly found that the required nexus between the threatening conduct and the exasperated assistant manager's preexisting employment injuries were justified there.

And that was the end of that case. But like I said, it is a pretty interesting case about calling about your work duties. And then you have somebody alleging an affair, but that's an interesting one and a fun one. Fun workers' compensation case. Thanks again for joining us. We had lots of fun, and putting us on the spot to share the crazy employment stories. I know our listeners going to love that. But for anybody else who has a crazy employment story or a topic they want us to discover, or just any other feedback, feel free to email us at [performancereview@gtlaw.com](mailto:performancereview@gtlaw.com). Other than that, we'll catch you at the next episode.