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Cruising to Arbitration – Viking River Cruises, No. 20-1573, 596 U.S. ___ (2022)

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Employers received some good news regarding Private Attorneys' General Act (PAGA) cases as the U.S. Supreme Court held that individual PAGA claims can be arbitrated pursuant to a valid arbitration agreement. In *Viking River Cruises v. Moriana*, No. 20-15735, 596 U.S. __ (2022), eight of the nine justices rejected the California Supreme Court-created rule in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), that prohibited arbitration of an employee's individual PAGA claims and only permitted PAGA claims to be litigated in court on behalf of other aggrieved employees ("representative actions").

Facts of Viking River Cruises

In *Viking River Cruises*, plaintiff Angie Moriana signed an arbitration agreement when she was hired as a sales representative for Viking River Cruises. She agreed to arbitrate any claims arising out of her employment that she may have against the company and agreed to a "class action waiver" that she would not bring any claims on a class, collective or representative basis in any arbitral proceeding. The arbitration agreement contained a severability clause specifying that if any portion of the class action waiver was found to be invalid, the claims would be litigated in court. If any portion of the waiver remained valid, it would be litigated in arbitration.

After her termination, Moriana filed a representative PAGA action on behalf of herself and other aggrieved employees in a California court. Viking River Cruises moved to compel arbitration of Moriana's individual PAGA claims and sought to dismiss the remaining PAGA claims brought on behalf of other aggrieved employees. The trial court denied the motion based on *Iskanian*, and the Court of Appeal affirmed.

The U.S. Supreme Court reversed, holding that the Federal Arbitration Act (FAA) preempted *Iskanian* to the extent that *Iskanian* prohibited parties from arbitrating the plaintiff's individual PAGA claims. The Court reasoned that prohibiting the division of PAGA claims into individual and non-individual (or representative) claims allowed a party to an arbitration agreement to expand the scope of issues beyond the parties' original agreement. Such forced procedural expansion of the arbitration agreement by the state "unduly circumscribes the freedom of parties to determine the 'issues subject to arbitration' and 'the rules by which they will arbitrate,'" thus violating the "fundamental principle that 'arbitration is a matter of consent.'"

So What Happens to the Claims Brought on Behalf of Other Aggrieved Employees?

The Court went a step further to discuss the status of the remaining claims brought on behalf of other aggrieved employees. The Court noted that, under its reading of the PAGA statute, Moriana would no longer have standing to pursue the non-individual PAGA claims, because PAGA provided no mechanism to enable a court to adjudicate non-individual PAGA claims when the individual PAGA claims were in arbitration. Because her individual PAGA claims were pared away from the judicial PAGA action, Moriana was no different than a member of the general public, and PAGA did not allow such persons to maintain suit. Given this standing issue, the Court noted that the correct course would be to dismiss the non-individual claims.

What Happens Now?

As a result of *Viking River Cruises*, employers with valid arbitration agreements waiving representative claims and permitting individual arbitration of PAGA claims may now enjoy a reprieve from representative PAGA claims, but this is unlikely to be the end of the story. As Justice Sotomayor succinctly discussed in her concurrence, a state court may interpret PAGA's standing requirements differently or the California legislature may draft a legislative "fix" for the standing problem created by the individual arbitration of a plaintiff's claims.

- We recommend that employers review their existing arbitration agreements to determine what claims are covered or excluded from arbitration. As the U.S. Supreme Court found, a complete ban on bringing a representative or individual PAGA claim would still be invalid under *Iskanian*.
- Employers should identify potential modifications that may be warranted but keep in mind that the Ninth Circuit's *Chamber of Commerce v. Bonta* decision may create barriers for rolling out mandatory arbitration agreements as a condition of employment.
- Employers also should keep a close eye on legislative or California appellate court activity concerning PAGA standing. Judicial or legislative action may make this victory for California employers a fleeting one. The California legislature or judiciary is free to modify standing under PAGA.
- Finally, employers facing representative PAGA actions in court should evaluate whether the plaintiff's individual claims might be subject to arbitration and move to compel individual arbitration and dismiss the representative action.

If you have any questions, please reach out to **Charlie Y. Wang** at cwang@vedderprice.com, **Peter D. Walrod** at pwalrod@vedderprice.com, **Sheryl Skibbe** at sskibbe@vedderprice.com or the Vedder Price lawyer(s) you normally work with.