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Is Viking River the beginning of the end for PAGA?

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By most accounts, the Labor Code Private Attorneys General Act of 2004, or "PAGA," has been a colossal failure. When enacted, PAGA was supposed to provide a mechanism for "aggrieved employees" to act as private attorneys general in enforcing California's wage and hour laws, filling in gaps purportedly left by California's underfunded Labor and Workforce Development Agency ("LWDA").

However, as soon as the law was proposed, skeptical employers predicted that it would touch off a tidal wave of "bounty hunter" litigation and lead to disproportionate penalties and settlements relative to actual injuries suffered. Of course, that is exactly what happened. However noble PAGA's original objectives may have been, and despite multiple attempts to "fix" the law through amendment, the statute has created a cottage industry of PAGA representative actions (over 6,000 last year alone). Even more troublingly, PAGA has not provided the benefits promised.

There is no evidence that PAGA has effected any meaningful change in wage and hour compliance. Nor has it resulted in more money in workers' pockets. A 2021 study by the CABIA Foundation concluded that enforcement by the LWDA delivered more than four times greater average payments to employees than private enforcement actions prosecuted by plaintiffs' lawyers – who gobbled up the lion's share of payments made by the employer (an average of $372,000 per case). Workers not only do better if the LWDA prosecutes the action, employers pay 29% less per award, and the employees receive payment in half the time.

Perhaps most tellingly, unions in the construction and janitorial industries tasked their many friends and admirers in the Legislature to exempt their own sectors of the economy from PAGA, complaining that their industries needed protection from "frivolous lawsuits brought under PAGA." Of course, the Legislature complied by passing AB 1654 in 2018 and SB 646 in 2021, quickly acceding to the unions' requests.

Meanwhile, employers facing mounting litigation costs have tried to fight back by implementing arbitration agreements with class and representative action waivers. While the California Supreme Court eventually accepted that class action waivers are enforceable under the Federal Arbitration Act ("FAA"), it simultaneously carved out an exception for PAGA representative suits in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), holding that PAGA actions are immune from representative action waivers.

For years, employers repeatedly attempted to get the U.S. Supreme Court to review and overturn Iskanian, but the Court rejected multiple cert petitions until this term. On June 15, 2022, in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. __ (2022), an eight-justice majority held that California's judicial carve-out for PAGA claims

was incompatible with the FAA. Uncharacteristically, the majority opinion, authored by Justice Samuel Alito, was joined (in whole or in part) by the "liberals" (Justices Elena Kagan, Stephen Breyer, and Sonia Sotomayor), other "conservatives" (Justices Neil Gorsuch and Amy Coney Barrett), and the "center" (Chief Justice John Roberts and Justice Brett Kavanaugh). Justice Clarence Thomas dissented based on his longheld belief that the FAA does not apply in state court.

Plaintiff Angie Moriana argued that PAGA created a substantive right to pursue representative actions to recover penalties for Labor Code violations suffered by the named plaintiff and other "aggrieved employees." Defendant Viking River Cruises, on the other hand, argued that the Court's prior pro-arbitration jurisprudence required enforcement of waivers of the right to bring representative PAGA actions because the PAGA statute "create[d] a form of class or collective proceeding."

The majority "disagree[d] with both [parties'] characterizations of the statute." It made clear that the "FAA does not require courts to enforce contractual waivers of substantive rights." But, the majority apparently did not view the right to bring a "representative" action – i.e., one involving violations suffered by both the plaintiff and other employees – as a substantive right.

The majority also took issue with Viking River's argument that "Iskanian's prohibition on PAGA waivers is inconsistent with the FAA because PAGA creates an intrinsically representational form of action and Iskanian requires parties either to arbitrate in that format or forgo arbitration altogether." Instead, the majority envisioned a world in which each PAGA plaintiff can pursue a representative claim – i.e., representing California – alleging Labor Code violations suffered by the named plaintiff, on an individual basis.

The majority opinion ultimately dismantled Iskanian's holding by taking issue with what it described as PAGA's "built-in mechanism of claim joinder," by which named plaintiffs "use the Labor Code violations they personally suffered as the basis to join to the action any claims that could have been raised by the State in an enforcement proceeding." The majority found that this portion of Iskanian "unduly circumscribe[d] the freedom of parties to 'determine the issues subject to arbitration' and 'the rules by which they will arbitrate[]' … in a way that violates the fundamental principle that 'arbitration is a matter of consent.'"

Toward the end of the majority opinion, Justice Alito addressed the lingering question of what a court should do with the "non-individual claims" – i.e., the claims stemming from violations suffered by other employees – once a plaintiff's individual claims are compelled to arbitration. The answer? Dismiss the non-individual claims. The majority held that PAGA provides "no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." Therefore, assuming an employer has an appropriate arbitration agreement, employee plaintiffs only can pursue penalties for Labor Code violations they personally suffered, and they must do so in arbitration.

Notwithstanding the overwhelmingly positive outcome for employers, as some in the plaintiffs' bar have noted (in this very publication), Justice Sotomayor's concurrence calls the long-term impact of Viking River into question. Although she voted with the majority, Justice Sotomayor's concurrence essentially outlined for the plaintiffs' bar how it might get around the Court's holding: California courts may interpret existing California law (or the California Legislature can amend PAGA) to allow employees to litigate PAGA representative claims in court even if their own individual claims have been compelled to arbitration. And, while an interpretation of or amendment to PAGA of this nature would upend traditional notions of standing, there is already talk among the plaintiffs' bar of getting the Legislature to do just that. Thus, as much as employers may rejoice in Viking River, the victory lap may be short-lived.