

U.S. Supreme Court Deals Blow to California's Private Attorneys General Act

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Bilateral arbitration agreements governed by the Federal Arbitration Act (FAA) may require arbitration of California Private Attorneys General Act (PAGA) claims on an individual basis only, the U.S. Supreme Court has held. [*Viking River Cruises, Inc. v. Moriana*](#), No. 20-1573 (June 15, 2022).

The Court's decision overrules the California's Supreme Court decision in [*Iskanian v. CLS Transp. Los Angeles, LLC*](#), 59 Cal. 4th 348 (2014), to the extent *Iskanian* effectively required PAGA claims to be adjudicated in court on a representative basis.

Court's Decision

The question before the Court was whether the FAA preempts a rule of California law articulated in *Iskanian* that invalidated provisions in arbitration agreements that waive the right to assert representative claims, including representative claims under PAGA.

To start, the Court stated that the FAA does not establish a categorical rule mandating enforcement of representative action waivers, including waivers of the right to assert claims on behalf of absent principals, such as California's Labor Workforce Development Agency (LWDA), in any forum. To that extent, the Court concluded that the FAA does not preempt California law and does not require enforcement of wholesale representative action waivers.

The Court held that California's rule is preempted by the FAA to the extent California precludes division of PAGA actions into individual arbitrable claims and non-individual, non-arbitrable claims. The Court held that PAGA's built-in mechanism of claim joinder conflicts with the FAA. It stated that *Iskanian's* prohibition on the contractual division of PAGA actions unduly circumscribes the freedom of parties to determine the issues subject to arbitration. Further, it held the mechanism violates the fundamental principle that arbitration is a matter of consent. In this respect, the Court

concluded that California law is preempted by the FAA.

How these principles came together was dictated by the severability provision in Viking River Cruises Inc.'s arbitration agreement. The severability provision in the agreement provided that, if the representative action waiver was found invalid in some respect, any "portion" of the waiver that was still enforceable would be enforced in arbitration. Relying on this provision, the Court concluded the representative action waiver in Viking's arbitration agreement remained invalid to the extent that, contrary to *Iskanian*, the waiver attempted to prevent the employee, Angie Moriana, from asserting a representative action altogether. The Court explained, the waiver was partially enforceable to the extent it required individual arbitration of Moriana's PAGA claim. Further, the Court held that the non-individual representative aspect of the PAGA claim could not be maintained in court and was subject to dismissal because PAGA provides no mechanism to give an individual standing to proceed in court once the individual claim has been committed to arbitration.

Takeaway

Employers doing business in California should determine if an arbitration agreement pertaining to employment claims is suitable for their workforce. In addition, employers that currently utilize arbitration agreements for their workforce should review any representative action waiver and severability provisions to determine if they are sufficient to assist with compelling arbitration when a PAGA claim is alleged.

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