



issue paper

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277 South Washington Street, Suite 200 • Alexandria, VA 22314-3675 • 703.253.2020 • 703.253.2053 fax • americanstaffing.net

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By Sarah Kroll-Rosenbaum
Partner, Akerman LLP
601 West Fifth Street, Suite 300
Los Angeles, CA 90071
sarah.kroll-rosenbaum@akerman.com
213-533-5903

ASA Contacts:
Stephen C. Dwyer, Esq.
Senior Vice President, Chief
Legal and Operating Officer
703-253-2037
sdwyer@americanstaffing.net

Brittany Sakata, Esq.
General Counsel
703-253-2038
bsakata@americanstaffing.net

Edward A. Lenz, Esq.
Senior Counsel
703-253-2035
elenz@americanstaffing.net

Impact of *Viking River* on California PAGA Claims

I. Introduction

The recent U.S. Supreme Court ruling in *Viking River Cruises Inc. v. Moriana*¹ has significant implications for staffing companies operating in California. The decision addresses whether employer arbitration agreements that cover employee claims under California's Private Attorneys General Act are arbitrable under the Federal Arbitration Act.²

PAGA allows individual employees to file lawsuits against their employers on behalf of themselves and other "aggrieved employees." In bringing such suits, employees act as agents of the state to recover civil penalties for alleged violations of certain sections of the labor code.

In *Viking River*, the Supreme Court ruled that under the FAA³ employers may compel employees to submit their *individual* PAGA claims to arbitration, rejecting California case law interpreting PAGA to require joinder of the claims of individuals and other aggrieved employees.⁴

II. Factual and Legal Background

The plaintiff in *Viking River*, Angie Moriana—a former Viking employee—filed a PAGA lawsuit against Viking seeking penalties for various alleged wage and hour violations. Moriana's employment was subject to an arbitration agreement that included a waiver barring her from bringing any type of representative action, including under PAGA. It also included a "severability clause" specifying that if any portion of the waiver was held invalid, the remaining valid portion would be subject to arbitration.

Viking asked the California court to require Moriana to arbitrate her individual PAGA claim and to dismiss the representative claims. The motion was denied on two grounds: that waivers of PAGA claims are barred under California law, and that under California law, there is no such thing as an individual PAGA claim; there are only representative claims filed by employees on behalf of themselves and other aggrieved employees. The California Court of Appeal affirmed the denial of the motion. Viking then appealed to the Supreme Court.

In the appeal, the Supreme Court addressed whether California's prohibition on PAGA waivers in arbitration agreements violated the FAA. After discussing prior FAA cases addressing waivers of class and collective actions, the Court determined that California

¹ 142 S.Ct. 1906 (2022)

² Cal. Lab. Code §§ 2698 *et seq.*

³ 9 U.S.C. § 1 *et seq.*

⁴ See *Iskanian v. CLS Transp. Los Angeles LLC*, 59 Cal. 4th 348 (2014)

PAGA actions are distinct from class actions.⁵ The Court also determined, after an extended technical discussion of California law, that the state's prohibition on "wholesale waivers" of PAGA claims in arbitration agreements did not violate the FAA.

However, the Court went on to say that the state cannot prohibit the splitting of PAGA actions into individual and nonindividual claims. The court said that the California Supreme Court's interpretation of PAGA's mandatory joinder of claims as prohibiting the splitting of individual claims is a procedural bar that conflicts with the FAA and unduly restricts employers' and employees' freedom to determine the issues and rules for arbitration. Accordingly, employees may agree to arbitrate their individual PAGA claims, and such agreements are enforceable under the FAA.⁶

III. Effect of Ruling on Nonindividual Claims

Having decided that PAGA claims may be split into individual and nonindividual claims, the Court addressed the technical question of whether employees, like Moriana, who are subject to arbitration of their individual PAGA claims have legal standing to maintain nonindividual claims on behalf of other employees. The court said no, because, under PAGA, a plaintiff has standing to maintain nonindividual claims in a PAGA action "only by virtue of also maintaining an individual claim in that action." Because Moriana's individual claim had been committed to arbitration, she lacked standing to maintain her nonindividual claims in court, requiring those claims to be dismissed.

IV. Implications of Decision—Potential Legislation to Undo It

As a result of the Supreme Court's ruling, employers may enforce employee agreements to arbitrate their individual PAGA claims. However, in a concurring opinion, Justice Sotomayor noted that the court's ruling denying Moriana standing to maintain her *nonindividual* PAGA claims rests on the majority's interpretation that PAGA "provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding." If the court is right in that interpretation, she said, the California legislature is "free to modify the scope of statutory standing under PAGA." It is unclear how the legislature will address the standing issue, but there would appear to be no way in light of *Viking River* that it could compel individual PAGA claims subject to arbitration to be litigated in court.

V. What Staffing Agencies Should Do

To reduce their exposure to nonindividual representative PAGA claims, staffing agencies operating in California should consider modifying their arbitration agreements to encompass the arbitration of individual PAGA claims and should consult with expert counsel as to how such agreements should be written in light of *Viking River*. Agencies also should discuss with counsel the use of arbitration generally as a tool to reduce

⁵ The Supreme Court has ruled that, under the FAA, employers can require employees, as a condition of employment, to sign mandatory arbitration agreements waiving their right to file class actions. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). However, because the court in *Viking River* did not view PAGA representative actions as class actions in the usual sense, it held that employers could not mandate arbitration of such actions.

⁶ Whether employers can *require* employees to agree to arbitrate their individual PAGA claims as a condition of employment under California law is under review by the courts.

litigation costs. Arbitration itself can be costly and, depending on the circumstances, litigating a single action involving common factual and legal issues could be more cost-effective than arbitrating multiple individual claims.

Sarah Kroll-Rosenbaum is co-leader of the Akerman LLP litigation practice in Los Angeles, focusing on complex litigation. In the past several years, she has defended staffing agencies in class, collective, and representative actions. She was a featured speaker on arbitration, class actions, and other issues at the 2022 ASA Staffing Law Conference in Washington, DC.

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