Employers Earn Critical Post-Viking River Arbitration Victory: Your 7-Step Action Plan to Beat Back PAGA Claims

Insights
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Following the U.S. Supreme Court's June decision in *Viking River Cruises, Inc. v. Moriana*, employers in California have awaited further guidance by federal courts regarding the scope and impact of this key decision that ruled that employers can compel arbitration of individual claims brought under the state's Private Attorneys General Act (PAGA). On September 21, a California federal judge handed employers a critical victory by granting an employer's motion to compel arbitration of claims as to the plaintiff's individual PAGA claims and to dismiss representative PAGA claims as to other allegedly aggrieved employees. In the holding, the judge noted that, absent intervening California authority regarding the Supreme Court's interpretation of standing, the Supreme Court's interpretation would be applied. The *Johnson v. Lowe's Home Centers* decision closely followed the U.S. Supreme Court's holding and rationale, which signals great hope for employers relying on arbitration agreements to swiftly resolve PAGA claims. This Insight summarizes the ruling and provides employers with a helpful seven-step action plan to help earn similar victories.

What Happened in *Viking River*

For those unfamiliar with the 2022 SCOTUS decision in *Viking River*, an employee alleged an individual PAGA claim based on her employer's alleged failure to pay final wages within the time required by the California Labor Code, plus the plaintiff alleged representative PAGA claims based on Labor Code violations sustained by other Viking River employees.

Understandably, the employer filed a motion to compel arbitration of the plaintiff's individual PAGA claim and to dismiss the other PAGA claims. The motion was denied by the trial court based on the rule announced in 2014's *Iskanian v. CLS Trans. L.A., LLC.*, that "categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and nonarbitrable 'representative' claims."

The U.S. Supreme Court reversed that ruling, holding that "the Federal Arbitration Act (FAA) preempted the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." The Court reasoned, among other things, that based on the severability clause, "Viking River was entitled to enforce the agreement insofar as it mandated arbitration of [the employee's] individual PAGA claim." The Supreme Court granted the employer's motion to dismiss the plaintiff's nonindividual PAGA claims for lack of statutory standing.

What Happened in Recent Case

In the *Lowe's Home Centers* case just decided by the Eastern District federal court, the employer's arbitration agreement contained a clause reading as follows:

> To the extent permissible by law, there shall be no right or authority for any dispute to be arbitrated as a representative action or as a private attorney general action, including but not limited to claims brought pursuant to the Private Attorney General Act of 2004, Cal. Lab. Code § 2698, et seq. ("Representative Action Waiver"). THIS MEANS THAT YOU MAY NOT SEEK RELIEF ON BEHALF OF ANY OTHER PARTIES IN ARBITRATION, INCLUDING BUT NOT LIMITED TO SIMILARLY AGGRIEVED EMPLOYEES. THE ARBITRATOR'S AUTHORITY TO RESOLVE ANY DISPUTE AND TO MAKE WRITTEN AWARDS WILL BE LIMITED TO YOUR INDIVIDUAL CLAIMS.

The plaintiff contended, among other things, that the waiver constituted an unenforceable "wholesale waiver" of PAGA claims. The court disagreed, noting that the Viking River decision made clear that PAGA actions are "representative" in two ways:

- "PAGA actions are brought by employees acting as representatives — that is, as agents or proxies — of the State"; and
- "PAGA claims are also predicated on code violations sustained by other employees."

Under the second view of "representative," it was reasonable to distinguish "individual" PAGA claims, which are based on Labor Code violations suffered by the plaintiff, from so-called representative (or maybe quasi-representative) claims involving other aggrieved employees.

Getting to the point, the court followed *Viking River's* rationale and holding that "*Iskanian's* principal rule prohibits waivers of 'representative' PAGA claims in the first sense. That is, it prevents parties from waiving representative standing to bring PAGA claims in a judicial or arbitral forum." Looking to the first view of "representative," the court reasoned that *Iskanian's* principal rule remained intact, i.e., provisions that constitute "wholesale waivers of PAGA claims" are invalid.

In essence, an employee cannot be required to waive the employee's right to act in a representative capacity under PAGA – at the least on the employee's own behalf – in an arbitration proceeding. The court therefore concluded that because the second sentence limited the applicability of the waiver to only parties in arbitration including similar aggrieved employees, it did not prevent the plaintiff from bringing a PAGA action on behalf of the state and therefore was not a wholesale waiver.

The court further reasoned in the alternative that, even if the language of the arbitration agreement were construed as a wholesale waiver of PAGA claims, the arbitration agreement contained a severability provision that mirrored the provision in *Viking River*. It read as follows:

> If a court of competent jurisdiction finds the . . . Representative Action Waiver unenforceable for any reason, then the unenforceable waiver provision shall be severable from this Agreement, and any claims covered by any deemed unenforceable waiver provision may only be litigated in a court of competent jurisdiction, *but the remainder of the agreement shall be binding and enforceable.* (emphasis added)

In *Viking River*, the severability clause provided that, "if the waiver was found invalid, such a dispute would presumptively be litigated in court" and "any 'portion' of the waiver that remained valid would be 'enforced in arbitration.'" The court found that, based on these similar provisions in the instant case, the employer was "entitled to enforce the agreements to the extent they mandate arbitration of Plaintiff's individual PAGA claim." In reaching this conclusion, the court noted that since the severability clause ended by stating "the remainder of the agreement shall be binding and enforceable," the severability clause clearly applied to require arbitration of Plaintiff's individual PAGA claim.

With regard to the remaining non-individual PAGA claims, the plaintiff contended that the Supreme Court should not have dismissed the non-individual PAGA claims for lack of standing in *Viking River* because the Supreme Court's ruling in that regard was based on a mistaken view of California law. Specifically, plaintiff argued that California law is clear that standing for PAGA claims is established by virtue of "having Labor Code violations committed against [the employee]" and did not require the employee to actually be injured. This nuance may have had some employers questioning the viability and scope of the Supreme Court's ruling.

Nonetheless, rejecting this argument, the court granted the defendant's motion to dismiss on similar grounds, relying in part on *Viking River*. This result is consistent with the Supreme Court's holding that employees subject to the FAA could legally execute arbitration agreements in which they effectively bargain away their standing to bring non-individual PAGA claims against their employer. This effectively eliminates any leverage an employee had previously under *Iskanian* to threaten an employer with multiple, non-individual PAGA claims that, until *Viking River*, an employee could bring in court exclusively.

7 Takeaways for Employers

Although it's debatable, it remains to be seen the extent to which other federal courts may attempt to limit *Viking River* to its particular facts, possibly resulting in a narrower holding. In the meantime, the playing field has changed for PAGA litigation.

The court's ruling sends a clear message that federal courts may apply the holding of the *Viking River* decision when faced with similar, but not necessarily identical, facts. The decision upholds the rule of law declared by the U.S. Supreme Court that parties subject to the FAA should be free to contractually agree to terms in an arbitration agreement that limit an employee's right to pursue representative PAGA claims on an individual basis only, thereby facilitating a prompt and efficient resolution of disputes in arbitration.

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Moreover, the *Johnson* decision stands for the proposition that California courts have not yet weighed in on the issue of standing in relation to PAGA representative claims. However, this window is quickly closing as the California Supreme Court is likely to soon weigh in on the question of standing, as it granted review in *Adolph v. Uber Technologies, Inc.* after a plaintiff requested the Court address the U.S. Supreme Court's interpretation of state law. Finally, the *Johnson* decision is a lesson to employers regarding taking prompt action to enforce arbitration agreements in the post-*Viking River* era.

Employers should consider taking the following seven steps to address the current state of the law and put your organization in the best possible position:

1. Check the wording of arbitration agreements with assistance of legal counsel.
2. Determine whether existing arbitration agreements should be replaced with updated arbitration agreements consistent with the elements and employer safeguards set forth by *Viking River*.
3. Determine whether the language in employee handbooks needs to be updated consistent with *Viking River*.
4. Among other things, make sure that distinctions are made between PAGA "representative" claims made on behalf of other employees (which can be waived in arbitration) and PAGA "representative" claims which relate only to an employee's individual claims (which cannot be waived in arbitration).
5. Determine whether the arbitration agreements should have a severability provision that effectively permits a court to sever only terms found to be illegal while enforcing the other provisions.
6. Determine whether you should move to compel to arbitration if you have a pending PAGA case.
7. Consult with legal counsel before seeking to enforce arbitration agreements that purport to require waiver or arbitration of PAGA claims. If adequately supported, the best path may be to demand promptly that PAGA claims of an employee, if any, proceed to arbitration individually without a filed court action on the strength of these excellent legal developments. Upon an employee's (legal counsel's) refusal to stipulate to this path, employers may promptly file motions to compel and to dismiss non-individual claims, if appropriate, as done by the employer in this recent case.

Conclusion

We will continue to monitor developments in this area, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. If you have questions regarding the drafting or interpretation of an arbitration agreement currently in place, please contact your Fisher Phillips attorney, the authors of this alert, or any attorney in our California offices.

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