



STEVEN H. KRUIS, ESQ.



*Once an employee's individual claim is compelled to arbitration, he or she no longer has standing to bring representative claims under PAGA.*

## SCOTUS Compels Arbitration of PAGA Claims

By Steven H. Kruis

**Introduction.** In *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (June, 15, 2022), the U. S. Supreme Court ruled that the Federal Arbitration Act preempted California's Private Attorney General Act of 2004, and compelled arbitration of Respondent's employment claim. By ruling in favor of Viking, the court held that employers may enforce arbitration agreements in California to the extent they require an employee to arbitrate *individual* claims under PAGA. Once an employee's individual claim is compelled to arbitration, that employee no longer has standing to bring *representative* claims under PAGA on behalf of other aggrieved employees and the remainder of the lawsuit must, therefore, be dismissed.

**Facts.** Respondent Angie Moriana filed a PAGA action against her former employer Viking River Cruises, alleging wage and hour violations on behalf of herself and others. Her employment contract with Viking included a mandatory arbitration agreement that contained both a "Class Action Waiver" -- precluding any class, collective, or representative action under PAGA -- and a severability clause stipulating that if the waiver was found invalid, the dispute would be litigated in court. Any "portion" of the waiver that remained valid would be arbitrated. Viking moved to compel arbitration of Moriana's individual PAGA claim and to dismiss her other PAGA claims. Applying the *Iskanian* rule, the trial court denied the motion ruling that the categorial waivers of PAGA standing are contrary to public policy, and that PAGA claims cannot be split into arbitrable "individual" claims and non-arbitrable "representative" claims. The Second District Court of Appeal affirmed and the California Supreme Court denied Viking's petition for review. The U. S. Supreme Court granted certiorari.

**PAGA.** California's Private Attorneys General Act of 2004 (Cal. Lab. Code § 2698 *et seq.*) authorizes an "aggrieved employee" to commence an action against an employer on behalf of himself or herself and other current or former employees to recover civil penalties that could have been recovered only by the California Labor and Workforce Development Agency. Thus, a PAGA lawsuit is a "representative action" in which the employee plaintiff sues as an "agent or proxy" of the state. Recovery of any penalties from the employer are divided between the LWDA and plaintiff on a 75% - 25% basis, respectively.



**Representative Action Waivers.** In *AT&T Mobility, LLC v. Concepcion*, 563 U. S. 333 (2011), and *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the U. S. Supreme Court held that the FAA preempted state law deeming class action waivers unenforceable and reaffirmed that the FAA requires courts to enforce collective action waivers in arbitration agreements.

**The Iskanian Rule.** However, the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4<sup>th</sup> 348 (2014), that arbitration agreements containing PAGA representative action waivers were against public policy since the state is the real party in interest, and that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA. Therefore, PAGA actions cannot be divided into individual and representative claims, and the FAA did not preempt this rule.

**Holding.** The *Viking River Cruises* opinion has four main holdings. First, *Iskanian's* rule that PAGA actions cannot be divided into individual and non-individual claims is preempted by the FAA. Viking was entitled to compel arbitration of Moriana's individual claim. Second, PAGA provided no mechanism for a court to adjudicate non-individual PAGA claims once an individual claim had been compelled to a separate arbitration proceeding. Third, under PAGA's standing requirement, a plaintiff has standing to maintain non-individual PAGA claims only during the pendency of her individual claim. Once that claim is compelled to arbitration, plaintiff lacks statutory standing to prosecute the non-individual claims in court. Fourth, *Iskanian's* prohibition on wholesale waivers of PAGA claims is *not* preempted by the FAA.

**Practice Pointers.** The *Viking River Cruises* holding will most likely generate a flurry of defense motions in active representative cases with similar arbitration agreements, those that contain representative waivers and severability clauses. However, this decision may not be the last word on PAGA cases. In her concurring opinion, Justice Sotomayor suggested, "the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits."

**Conclusion.** In the long run, Sacramento may very well legislate around the *Viking River Cruises* decision and preserve the private attorney general model of enforcing California labor standards. However, in the short term, we may expect the courts to be inundated with defense motions to compel arbitration and dismiss the remaining PAGA representative claims.

**Steven H. Kruis** has mediated thousands of matters throughout Southern California since 1993, and is with the San Diego Office of ADR Services, Inc. He may be reached at [skruis@adrservices.com](mailto:skruis@adrservices.com).

*However, Iskanian's prohibition on wholesale waivers of PAGA claims is not preempted by the FAA.*

