
# Ep. 60: *Viking River Cruises*: The Future of PAGA Arbitration

**July 20, 2022**

**Jose Garriga:** Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

What do you know about California's Private Attorneys General Act? If you're an employer in California or looking to do business in the Golden State, it should figure prominently in how you would evaluate and manage labor conditions in your workplace.

Today's episode spotlights that important piece of legislation, as it covers last month's Supreme Court decision in *Viking River Cruises, Inc. v. Moriana*. In that decision the Court held that the Federal Arbitration Act preempts California's law, which holds that Private Attorneys General Act, or PAGA, claims cannot be compelled to individual arbitration.

We have on the show today two guests who are very well positioned to bring our listeners up to speed on PAGA and on *Viking River Cruises* and its significance: Akin Gump labor and employment counsel Jonathan Slowik, who is the driving force behind the firm's *PAGA Report* blog, and Supreme Court and appellate senior counsel Aileen McGrath.

Welcome to the podcast.

Jonathan, welcome to the show, and Aileen, welcome back. Great to have you both here for this episode. This is a topic, as I mentioned, very relevant for California employers, particularly in light of the Supreme Court decision, so let's dive right in.

The *Viking River Cruises* decision by the Supreme Court, as I mentioned, concerned California's Private Attorneys General Act. Just to give listeners a little bit of background, those who might be unfamiliar with this, what is PAGA, and what is its significance to companies doing business in California? Jonathan, if I could ask you to lead off.

**Jonathan Slowik:** Thanks, Jose. To understand PAGA, I think it's instructive to start with the two primary ways that California enforces minimum labor standards. First is through private lawsuits.

This could be an individual action for wages and penalties, either before the labor commissioner or, less commonly, in court, or a class action brought by an employee on behalf of other similarly situated employees.

The purpose of a private lawsuit is to compensate employees who've been deprived of wages or other rights under the Labor Code. And, so, the recovery in such a lawsuit is compensatory damages like lost wages and/or statutory penalties, most prominently statutory penalties in the Labor Code for failure to provide an accurate wage statement or failure to provide final pay at termination.

The second way is through government enforcement efforts. The Department of Industrial Relations has an agency called the Labor and Workforce Development Agency, or LWDA, that can cite employers for violating Labor Code provisions. There are several provisions scattered throughout the Labor Code that provide civil penalties that only the state can recover through the LWDA. There's no private right of action to recover these penalties. Generally, the penalties reach a maximum of about $50 to $100 per employee per pay period. But some provisions provide a maximum penalty of up to $1,000 for an employee in a single pay period.

In 2003, the legislature determined that the state didn't have sufficient resources to police all employers in the state. And, so, it enacted PAGA to augment the state's enforcement capabilities by deputizing aggrieved employees to stand in the shoes of the state and bring an enforcement action to collect those civil penalties that previously only the state could recover. What PAGA basically does, it allows any employee who experienced a violation to file a lawsuit and say, "I'm going to act as the state of California and sue you for these penalties that only the state can recover."

After satisfying minimal prerequisites, any aggrieved employee can do this. And 75% of the penalties recovered go to the state, with the remaining 25% being distributed among the aggrieved employees. And, importantly, the statute also provides for attorneys' fees to a prevailing plaintiff. Over time, PAGA has largely supplanted class action litigation as the primary means for lawsuits over alleged wage and hour violations. Last year, for example, there were over 6,000 PAGA filings for that one year alone. For this reason PAGA's really become a lightning rod among pro-business groups who claim that the statute has become rife with abuse and is largely a tool for shakedown lawsuits. And, so, pro-business groups have had this law in their sights for a long time now.

**Jose Garriga:** That's interesting. Thank you. So, then going to the case at hand, what was the question at issue in *Viking River Cruises*, and how did the Court rule?

**Jonathan Slowik:** The question in *Viking River Cruises* was whether a PAGA lawsuit can be compelled to individual arbitration. Employers increasingly over the last decade-plus have adopted mandatory arbitration programs whereby all employees, as a condition of employment, agree to submit any disputes between the employer and employee to binding arbitration.

One of the things that supercharged the plaintiffs' bar's shift toward PAGA litigation was a 2014 case that Jose mentioned at the jump called *Iskanian v. CLS Transportation*. Aileen will likely discuss these cases in more detail, but by 2014, the U.S. Supreme Court had issued a series of pro-arbitration decisions, holding, among other things, that parties to an arbitration agreement can agree to waive the right to bring class claims, and that any contrary state law is preempted by the Federal Arbitration Act, or FAA. Many courts, especially federal courts, had applied these same principles to PAGA

actions and concluded that, if parties had agreed in an arbitration agreement to bring claims only on an individual basis, that also precluded a plaintiff from bringing a PAGA action for civil penalties on behalf of other aggrieved employees.

In *Iskanian*, the California Supreme Court upended this trend and held that the waiver of a right to bring a PAGA claim violates California law. And that, furthermore, the FAA doesn't preempt that rule. Employers had been seeking to challenge this *Iskanian* rule for many years, and the U.S. Supreme Court had consistently declined to take up the issue. But that streak was broken late last year when the U.S. Supreme Court agreed to hear *Viking River Cruises*.

In *Viking River Cruises*, the Court issued an interesting ruling that defied a lot of people's expectations. It started by distinguishing between what it called the individual component and the non-individual component of a PAGA claim. So, by “individual component,” it was talking about the portion of the claim that seeks penalties for violations that the named plaintiff actually experienced. And the “non-individual component,” or what many of us used to call the “representative component,” this would concern any violations for which the plaintiff was seeking penalties that happened to other people.

The Court held that the FAA did not preempt California's rule against compelled arbitration of PAGA claims with respect to this non-individual or representative part. But, since the parties in *Viking River Cruises* had agreed to arbitrate claims on an individual basis, the FAA required that that individual component of the PAGA claim did need to be arbitrated. So, having concluded that the individual portion needed to be sent to arbitration, the Court then turned to state law to determine what happens with the rest of the lawsuit. And it concluded that the rest of the lawsuit would need to be dismissed for a lack of standing. That's because PAGA provides standing to an aggrieved employee, which it defines as, quote, "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."

Parsing this language, the Court concluded that this essentially required a personal stake in the court action. And that personal stake was missing once the individual part had been severed and sent to arbitration because the remainder of the lawsuit concerned other employees, and the named plaintiff just didn't have any stake in that.

**Jose Garriga:** Thank you. Aileen, let me turn to you for the next question. And building on what Jonathan has said, how was the Court's decision different from what Court watchers might have expected?

**Aileen McGrath:** I would say that the decision stands out in a couple of ways. And one of them is the way that Jonathan just alluded to, which was that there was a path that the Court could have taken to resolve this case that would have been in line with its trend in arbitration cases over the last decade or so. But the Court took a narrower path that resulted in a slightly less definitive ruling than most Court watchers really expected. And the other is that the Court rested its decision on state law grounds. Usually the Supreme Court tries really hard not to rest its decisions on those grounds. In fact, it typically avoids even hearing cases that raise significant state law questions.

As to the first way that the decision is unusual, one way the Court could have resolved this case would have been to say that PAGA claims are just like class actions. They involve the claims of parties who are not before the Court. In that way, they expand the scope of a proceeding. From there, the Court could very easily have said, as it said in

many other cases, that arbitration is inherently unsuited to resolving those types of claims, that parties to an arbitration agreement can therefore agree to waive the right to pursue those claims in any form, including in arbitration, and, therefore, that the FAA preempts any state law rule, like the *Iskanian* rule and other California predecessors, that prevent parties from entering into agreements to waive the right to bring those kinds of claims.

And that reasoning would have followed directly from the Supreme Court's FAA jurisprudence over the last several years, which has consistently said that this exact reasoning applies to class actions and other similar representative actions in cases like *American Express v. Italian Colors*, *AT&T v. Concepcion*, *Epic Systems v. Lewis*. All of those cases are part of a uniform line of authority that had applied that reasoning in the class action context.

And the expected result here was that the Court would simply take one more step and say that PAGA is just like those kinds of cases. And that result would've both reinforced the holdings in those previous cases and also expanded them slightly to include not only PAGA claims but also, potentially, other actions that might seek to raise claims on behalf of absent parties. But the Court not only declined to go that far, and it distinguished PAGA, but it also arguably confines *Concepcion*, *Italian Colors* and that line of cases to true class actions. In *Viking River*, the Court methodically compared PAGA cases to class actions. That way left open and arguably could allow in the future state rules that prohibit parties from waiving the right to pursue other kinds of representative actions in court.

And, so, I think that's the chief way ... That was exactly how the parties to the case briefed this case, and that's the main way that the case turned out, differently from what people were expecting, but the other way is that the Court ... As Jonathan mentioned, a significant part of the Court's holding was grounded in its understanding of California law, specifically California state law rules about standing in PAGA actions. It's hard to overstate how unusual it is for the Court to have rested its decision on those grounds. Usually, the Court tries to stay very far away from resolving state law questions because the Court, the Supreme Court, only has jurisdiction to resolve questions of federal law.

And usually, as I mentioned before, the fact that a case could involve an undecided or unsettled issue of state law is a reason that the Court often decides not to take up a case in the first instance. And, so, the fact that, here, the Court waded into state law leaves open the possibility that the Court could have misunderstood what state law actually requires. I think Jonathan will talk a little bit more about this later on in the podcast. And it's especially unusual because no party really suggested that the Court could resolve the case in this way.

And, so, the state law basis for the Court's decision is, at least in the context of this particular case, relatively untested. And it's hard to know exactly why the Court went in that direction, given that no one suggested that this was how the case should come out. I would guess that it means that Justice Alito was trying to pull together a fractured coalition. We see from this case that it's an unusual lineup with lots of different views about FAA preemption and about arbitration in general. And, so, that might have been what led us to this somewhat unusual result, but it is a very interesting, pretty unusual, almost unprecedented, I would say, feature of the case.

**Jose Garriga:** Thank you. A reminder, listeners, we're here today with Akin Gump Supreme Court and appellate senior counsel Aileen McGrath and labor and employment council Jonathan Slowik discussing the Supreme Court's decision in *Viking River Cruises* and its impact on California's Private Attorneys General Act.

Let me stay with you, Aileen, then, to discuss this. And you previewed some of your answer, I think, in the last question, but looking more broadly, then, what does *Viking River Cruises* suggest about the Supreme Court's approach to arbitration cases in the future?

**Aileen McGrath:** I think it suggests that the Court might not be as predictable a forum as it once was for arbitration cases. And we can see that actually, not only from *Viking River*, but also from several of the other arbitration-related cases that the Court considered this Term.

To back up a little bit, as you've seen from the list of cases I described that methodically chipped away at state rules that attempted to confine arbitration or keep certain types of claims out of the arbitral forum, one of the hallmarks of the Roberts Court for a long time has been its expansion of FAA preemption, and its willingness over and over again to strike down state law rules that kept claims out of arbitration and in court.

And in fact, a little-known fact is that Justice Roberts himself, when he was a private lawyer, before he joined the Court, so, decades ago, championed these efforts. He was actually an architect, one of the architects, of a strategy seeking to get courts to uphold arbitration agreements that prohibited class actions. And once he joined the Court, that perspective quickly took root. And he and Justice Scalia, as well as Justice Kennedy and some of the other conservative members of the Court, often voted together in the sweeping decisions that I mentioned; *Concepcion* and *Italian Colors* are some good examples.

And, so, what *Viking River* suggests is that that approach might look somewhat different now. That, even though *Viking River* did reach an employer-friendly result, it did reach a conservative, more business-friendly result, the reasoning suggests that certain of the Chief's conservative brethren might be somewhat less inclined to endorse broad arbitration decisions, at least to the same extent that Justice Kennedy and Justice Scalia might have been.

And there are other indications that might be happening, aside from *Viking River*. As I mentioned, there were a number of other arbitration cases up at the Court this year. And in two of those, the Court reached employee-friendly rulings that, much like in *Viking River*, Court watchers didn't necessarily expect. One of those cases is *Morgan v. Sundance*, where the Court said that the waiver of the right to compel arbitration can't be conditioned on a showing of prejudice to the non-moving party, who's usually the plaintiff. And, so, hard to say how that will be applied by the lower courts, but I think the assumption is that it will be applied in a way that makes it slightly more difficult for defendants to compel arbitration when they've already litigated a case.

Another case that the Court heard this term was *Southwest Airlines v. Saxon*. And in that case, the Court rejected a narrow definition of what it means for workers to be engaged in foreign or interstate commerce, which is an exception to the FAA that carves out those workers from the FAA's coverage. And, so, the effect of the Court's ruling is to prevent employers from entering into arbitration agreements with that set of employees.

And the takeaway from these decisions, I don't think it's fair to say that these decisions suggest that this Court is suddenly going to be less friendly to business interests in general. I think that's going too far. But I do think that the results in these cases, including *Viking River*, suggests that the Court is less predictable than it used to be in these cases. And that the Chief's perspective on these issues might be somewhat less dominant that it used to be, where he could be counted on to write a sweeping and commanding decision and achieve a majority on that issue. The cases that came up this Term suggest that those days, we might be passed that time on the Roberts Court.

**Jose Garriga:** Thank you, Aileen. And listeners will have an opportunity to hear more of Aileen's thoughts on this Court and its Term as we will be going into our SCOTUS review and preview episode shortly. So keep your eyes on our feed for that.

Jonathan, to wrap up, what should our business listeners, then, understand about this decision and its import?

**Jonathan Slowik:** As Aileen mentioned, perhaps the most pro-employee part of the decision in *Viking River Cruises* rested on the Supreme Court's interpretation of state law. And it's important to understand the implications of that, because the Supreme Court is not the final word on state law. There's good reason to think that the Supreme Court's interpretation of state law was correct: that once the employee's individual portion of the PAGA claim is severed and sent to arbitration that the employee doesn't have standing to represent the interests of other employees when the employee doesn't have a personal stake in that court action.

It's perhaps notable that all five Supreme Court Justices that reached that issue agreed that that's what state law means. And that interpretation, I think, is also faithful to the text of the law. The PAGA statute uses the term “aggrieved employee” not only for standing, but for many other things throughout the statute. And interpreting that term in any other way than the U.S. Supreme Court did could lead to some bizarre results elsewhere in the statute.

So, I think they're parsing the text correctly, but Justice Sotomayor, in her concurring opinion, observed that state courts very well could disagree with the Supreme Court. And if they do, state courts are the final word on what state law means, not the U.S. Supreme Court. Even if they don't, however, the California legislature is free to change the law if it doesn't like the result that the U.S. Supreme Court reached. If the legislature wants to ensure that employees with arbitration agreements still have standing to prosecute a PAGA action on behalf of other employees, it's free to do that. There's no cases or controversies requirement for standing under state law. And, so, the legislature could amend PAGA to say that an employee doesn't need to have a stake in the court action in order to have standing. And, in fact, at least one state legislator is already on record saying that he's working on legislation to do exactly that.

For both of these reasons, I think an underrated takeaway of this case is that PAGA litigation in the medium to long term could continue in more or less its current form. I think this case has really been touted as a major victory for employers. And I think, for the moment, it is, but it remains to be seen whether that victory holds up over time, and California employers should be prepared for the possibility that it doesn't.

As for employers in other states, I think the Supreme Court has demonstrated a path forward if other states want to enact their own legislation that's similar to PAGA, that

allows a plaintiff to bring a representative action on behalf of other employees notwithstanding an arbitration agreement. And several other states have considered similar legislation. In fact, Massachusetts is considering a bill right now that's very much modeled after PAGA. And, so, I think employers in other states also need to be prepared for the possibility that they may need to defend similar lawsuits to PAGA lawsuits, even if they don't have significant operations in California.

**Jose Garriga:** Thank you, Jonathan. Listeners, you've been listening to Akin Gump Supreme Court and appellate senior counsel Aileen McGrath and labor and employment counsel Jonathan Slowik. Thank you both for making the time to come on the show today. It's a fascinating topic for our listeners doing business in and with California.

And thank you, listeners, as always for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* with your favorite podcast provider to ensure you do not miss an episode, including our upcoming SCOTUS episode. We're on, among others, iTunes, YouTube, and Spotify.

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Until next time.