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PAGA Arbitration: California Courts in the wake of *Viking Cruises*

BY MARC D. ALEXANDER

An open issue in employment cases is arbitrability of non-individual representative claims brought under California's Private Attorneys General Act of 2004 (PAGA). PAGA enables aggrieved employees to bring claims for labor code violations on their own behalf and on behalf of others. The prevailing employee, acting on behalf of the state, stands to collect civil penalties, divided 75% to the state, and 25% to the employee.

In *Viking Cruises v. Moriana* (2022), the United States Supreme Court addressed whether the Federal Arbitration Act (FAA) preempts the rule in *Iskanian v. CLS Transportation Los Angeles* LLC (2014) 59 Cal.4th 348, invalidating contractual waivers of the right to assert representative claims under PAGA.

California cases had invalidated blanket waivers of the employee's right to arbitrate "representative" PAGA claims because the state, as the "represented" party in the private enforcement of labor laws, never agreed to arbitrate the employee's dispute. Furthermore, dividing PAGA claims into arbitrable individual and non-arbitrable non-individual claims would not promote effective enforcement of labor laws. This reasoning led California courts to reject arbitration in PAGA cases.

Justice Samuel Alito wrote: "We hold that the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." The Supreme Court required the employee to arbitrate her individual PAGA claims with her employer. Furthermore, Alito concluded, once her individual claims were sent to arbitration, no aggrieved person remained with standing to represent the non-individual claims in another forum.

Viking does not require California courts to enforce the waiver of PAGA claims. Instead, *Viking* requires claims of an individual employee subject to an arbitration agreement to be arbitrated. Non-individual claims are not "waived," and the employer and employee have not agreed to arbitrate those claims in *Viking*. But Alito reasoned that once the individual claim is ordered to be arbitrated, no aggrieved employee remains with standing to pursue the non-individual claims in court.

After *Viking*, developing case law has been confusing. There are at least four reasons for confusion.

First, the *Viking* opinion is fractured. Justice Alito delivered the opinion in which Justices Stephen Breyer, Sonia Sotomayor, Elena Kagan and Neil Gorsuch joined. Justice John Roberts, Kavanaugh and Barrett joined in parts of Alito's opinion. Sotomayor filed a concurring opinion. Barrett filed a concurring opinion, joined by Kavanaugh, and Roberts joined as to all but a footnote. Justice Clarence Thomas dissented.

Second, as Alito explained, "representative claim" is ambiguous. It can refer to claims the PAGA plaintiff brings as an agent or proxy of the state, or claims the plaintiff brings on behalf of other employees – "non-individual" claims. The clear part of *Viking* is that an arbitration agreement can require individual PAGA claims to be arbitrated, but it's unclear how claims of other employees are to be treated.

Third, while the plaintiff's lack of standing to prosecute non-individual claims is the reason Alito gave for dismissing those claims, it may not be the only reason other justices voted with Alito. Alito's argument that the individual PAGA

claimant lacks standing to bring non-individual claims leads to much the same practical result as enforcement of a waiver of class action arbitration. Yet Alito acknowledges that class actions and PAGA actions are procedurally different. Class actions have multiple plaintiffs and require judicial oversight of numerosity, commonality, typicality, and adequacy of representation. With PAGA, the claimant represents a single entity, the state, against the employer, providing the rationale for arbitrating individual claims. Moreover, this is a characteristic of an individual claim and of non-indi-

vidual claims of other employees: in both examples, there are two parties, with a single private party acting for the state. Unable to rely on the bilateral nature of arbitration to dismiss non-individual claims brought by a single claimant, Alito relied instead on a lack of standing argument.

In *Epic Systems Corp v. Lewis* (2018), the court held arbitration provisions requiring arbitration of individual claims and prohibiting collective action are enforceable. This viewpoint is apparent in Barrett's concurrence joined by Kavanaugh and Roberts: "I agree that reversal is required under our precedent because PAGA's procedure is akin to other aggregation devices [i.e., class actions] that cannot be imposed on a party to an arbitration agreement… I would say nothing more than that." Thus, Barrett's concurrence gathers class actions and PAGA representation of non-individual claims under the umbrella of "aggregation devices" that cannot be imposed on a party to an arbitration agreement absent consent.

Fourth, Sotomayor joined Alito's opinion with a proviso: "the Court reasons, based on available guidance from California courts, that Moriana lacks 'statutory standing' under PAGA to litigate her 'non-individual' claims separately in state court… Of course, if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word." Sotomayor added if the Supreme Court is right about the individual's lack of standing to pursue non-individual claims in a different forum, then the California legislature was free to expand statutory standing under PAGA "within state and federal constitutional limits." Thus, Sotomayor opened the door for state courts interpreting California law to reach a different conclusion than the Supreme Court about standing to bring non-individual claims. Some California courts have walked through that door.

In *Lewis v. Simplified Labor Staffing* (review denied and ordered not to be published), previously published at: 85 Cal. App. 5th 983, the court, following *Viking*, overturned the trial court's ruling that had relied on *Iskanian*. Judge Albert Harutunian explained California's "state-must-consent" rule could not survive *Viking*. While "state-must-consent" is not a phrase in *Viking*, it refers to the PAGA plaintiff's representative role as an agent or proxy of the state. The "state-must-consent" rule cannot survive *Viking* because the Supreme Court required Moriana to arbitrate her individual claims without state consent. As to the non-individual claims, the court punted in *Lewis*. Because AAA rules delegated the issue to the arbitrator, the arbitrator would have to decide the scope of the arbitration agreement, specifically, whether non-individual PAGA claims are arbitrable in the same way that individual PAGA claims are arbitrable.

In *Galarsa v. Dolgen California, LLC* (2023) 88 Cal.App.5th 639, the court predicted that after *Viking*, the California Supreme Court will conclude that California law does not prohibit an aggrieved employee from pursuing non-individual claims of other employees in court once those claims are separated from individual claims ordered to arbitration. "The reason for this prediction is simple – it is the interpretation of PAGA that best effectuates the statute's purpose, which is 'to ensure effective code enforcement.'" The court held the arbitration provision stating Galarsa couldn't assert her representative action claims was invalid, the individual and non-individual claims could be split, and Galarsa could be required to arbitrate her individual PAGA claims.

Following Sotomayor's lead, the court in *Piplack v. In-N-Out Burgers*, G061098 (4/3 3/7/23) held that the PAGA plaintiff, compelled to arbitrate his individual claims, had standing to pursue non-individual claims. Because SCOTUS does not decide state law, the *Piplack* court followed *Kim v. Reins International California, Inc.*, 9 Cal.5th 73 (*Kim*) (2020) on the issue of state law standing. "The plain language of [Labor Code] section 2699(c) has only two requirements for PAGA standing. The plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (quoting *Kim*). (Query whether the *Kim* standing requirement referring to "al leged violations" means that the violations must actually be sustained, an issue currently pending before the California Supreme Court in *Adolph v. Uber Technologies*, S274671). The *Piplack* court held that one of the plaintiffs satisfied both requirements for standing to bring individual and non-individual claims. The court explained that *Viking* had modified the rules set forth in *Iskanian* to create the present rule: "arbitration agreements between employers and employees that require arbitration of the individual portion of a PAGA claim are enforceable, but arbitration agreements that require arbitration (or waiver) of the representative portion of a PAGA claim are not enforceable."

So does the PAGA claimant have statutory standing under California law to pursue PAGA claims arising out of events involving other employees in court or in any other forum the parties agree to? The answer may turn on whether the California Supreme Court agrees with Alito's or Sotomayor's interpretation of California law. In this fast-developing area of law, new cases may appear between the writing and publication of this article.

On July 20, 2022, the California Supreme Court granted petition for review in *Adolph v. Uber Technologies* to brief and argue, "Whether an aggrieved employee who has been compelled to arbitrate claims under … PAGA … that are 'premised on Labor Code violations actually sustained by' the aggrieved employee … (a)) maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees' … in court or in any other forum the parties agree is suitable." Tempting as it is to speculate on the outcome, we will wait for our Supreme Court to offer guidance.

Marc D. Alexander
is a California attorney and a mediator affiliated with Alternative Resolution Centers (ARC). He can be reached at alexanderdisputeresolution@gmail.com