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PERSPECTIVE

Viking River PAGA ruling has no clear destination for employers

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In June 2022, the United States Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906. The Court held that claims under the Private Attorneys General Act (PAGA), Cal. Lab. Code § 2698 et seq., may be separated into individual and non-individual claims, and that individual PAGA claims may be compelled to arbitration. The Court further held that since Plaintiff's individual PAGA claims were subject to arbitration, she lacked "statutory standing to continue to maintain her non-individual claims in court" which resulted in dismissal of "her remaining [non-individual PAGA] claims." 142 S. Ct., at 1925.

In a foreshadowed concurring decision, Justice Sonia Sotomayor stated that the California courts might rule otherwise and "in an appropriate case, will have the last word." (*Ibid.*) Just recently, a California Court of Appeal did, in fact, rule otherwise in *Galarsa v. Dolgen Cal.*, 2023 Cal. App., DJDAR 1497.

In *Galarsa*, the California Court of Appeal for the 5th district classified PAGA claims into two "types": "Type A" (a claim for a violation suffered by the plaintiff) and "Type O" (a claim for a violation suffered by an employee other than the plaintiff). The Court of Appeal held that while Type A claims may be compelled to arbitration, it does not necessarily mean that Type O claims must be dismissed. Here's why:

As an initial matter, to justify its deviation from *Viking River*, the Court stated that "a federal court's interpretation of California law is not binding" and that the California Supreme Court has yet to decide this issue in *Adolph v. Uber Technologies, Inc.* (Court to consider whether aggrieved employees maintain statutory standing to pursue Type O claims in court.) *Galarsa* at p. 18.

Second, the Court followed the California Supreme Court's ruling in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, and held that Plaintiff had standing to pursue her Type O claims in court as she satisfied the two standing requirements identified in *Kim* - that is, Plaintiff was employed by Defendant and "was subject to at least one of the Labor Code violations [ ] alleged in her pleading." *Galarsa*, at p. 19. This interpretation, per the Court, aligned with "PAGA's remedial purpose ... by deputizing employees to pursue civil penalties on the state's behalf." (*Ibid.*)

Third, the Court's holding was based on its prediction that the California Supreme Court "will conclude that California law does not prohibit an aggrieved employee from pursuing Type O claims in court once the Type O claims are separated from the Type A claims ordered to arbitration." *Galarsa*, at p. 22. This is for two reasons: First, that decision "best effectuates [PAGA's] purpose." Second, the Type A claims and Type O claims are based on different primary rights and, therefore, there is no one cause of action that is split when Type A claims are sent to arbitration and Type O claims are pursued in court. *Galarsa*, at p. 22-23.

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While the Court of Appeal reasoned that the fate of "Type O claims" is subject to the California Supreme Court's decision, it nonetheless granted the request for publication "to provide guiding precedent for superior courts pending the decision in *Adolph*." *Galarsa* at p. 18 (FT 3). In other words, superior courts in California may no longer dismiss "Type O" (or, as *Viking River* referred to them, "non-individual PAGA claims") when Type A ("individual PAGA claims") are sent to arbitration.

As the *Galarsa* decision reflects, California provides broad PAGA protections to its litigants. PAGA causes frustration for California employers who are faced with significant claims, often due to hyper technical labor code violations. And while *Viking River* offered some relief to employers, other Court decisions following *Viking River* (and before *Galarsa*), suggested its effect was limited.

For example, in *Navas v. Fresh Venture Foods, LLC* (Nov. 2022) 85 Cal.App.5th 626, the Court denied Defendant's motion to compel arbitration as to Plaintiffs' individual claims as the Defendant did not explain "to the Spanish-speaking employee what is an individual PAGA claims" and did not obtain "the employee's consent to waive the right to file an individual PAGA claim in court." 85 Cal. App. 5th at 635.

In *Vaughn v. Tesla, Inc.* (January 2023) 87 Cal.App.5th 208, the Court refused to compel arbitration of claims for the time period plaintiffs were employed via staffing agencies, even though Plaintiffs themselves claimed Tesla was a joint employer during that time period, reasoning that the "joint employment doctrine" was insufficient to justify extension of the arbitration provision to pre-direct-hire claims.

And In *Villareal v. LAD-T, LLC*, (Oct. 2022) 84 Cal. App. 5th 446, the Defendant was unsuccessful in compelling arbitration as the arbitration agreement did not include the correct legal entity, but an unregistered dba.

PAGA's future in California remains to be seen. Several Chambers of Commerce and business groups in California question PAGA's effectiveness in achieving compliance and providing adequate remedies. For this reason, they united to reform PAGA and provide a "better way" for employees "to resolve claims and labor court disputes without lengthy and costly lawsuits" (see cafairpay.com).

The reform initiative, referred to as the Labor Code Fair Pay and Employer Accountability Act, will be on the November 2024 general election ballot. Per its supporters, the goal is to streamline litigation and awareness by permitting employees to file civil penalties claims with the Labor Commissioner (rather than the Court), put money in the hands of aggrieved employees (by awarding 100 percent of the penalties to aggrieved employees), exclude civil penalties claims from arbitration, and create a unit whose goal is to assist and advise employees and employers about California employment laws.