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What Remains in the Wake of Viking River Cruises?

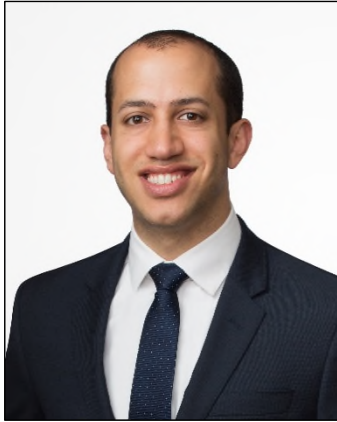
June 23, 2022

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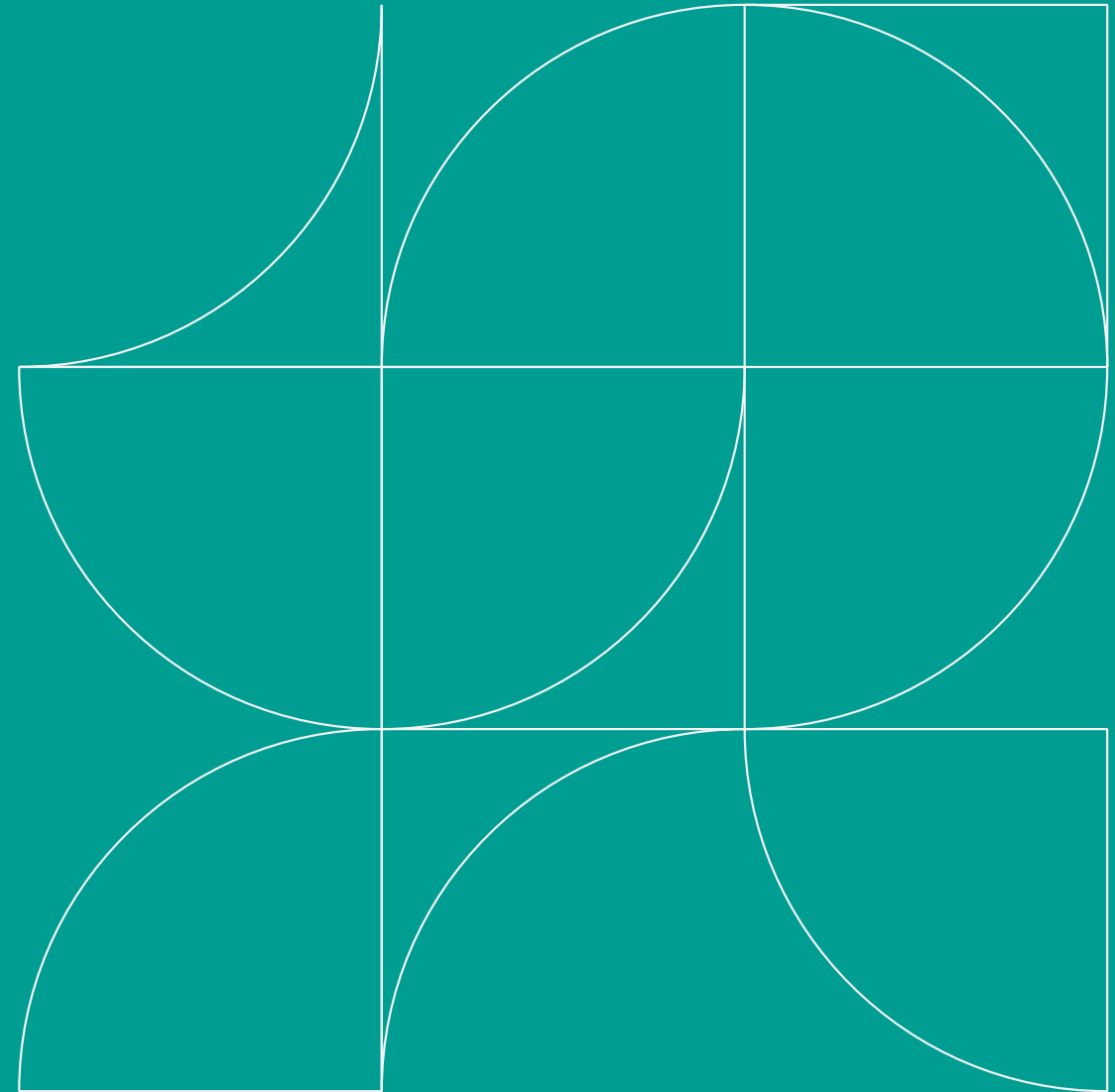
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Today's Agenda

1. Summary of the SCOTUS decision in *Viking River Cruises Inc. v. Moriana*
2. The Importance of the Severability Clause in the Court's Decision
3. Concurring Opinion By Justice Sotomayor Suggesting A Need For Changes To Standing Requirements Under PAGA
4. Application of *Viking River* to Common Variations of Arbitration Agreement Language
5. What Part of *Iskanian* Survives *Viking River*?
6. Whether *Viking River* overrules *Kim v. Reins*
7. What Might Legislative Changes Look Like?

Summary of the SCOTUS decision in *Viking River Cruises Inc. v. Moriana*



Summary of the SCOTUS decision in *Viking River Cruises Inc. v. Moriana*

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- The arbitration agreement between Moriana and Viking River contained a class action waiver providing that there was no right to bring a class, collective, representative or California Private Attorneys General (“PAGA”) action.
- The trial court and Court of Appeals had concluded that Moriana could not be compelled to arbitrate her PAGA claim, under the holding of *Iskanian v. CLS Trans. Los Angeles*, which barred contractual waivers of individual and representative PAGA claims on grounds that individual PAGA claims cannot be split from representative PAGA claims.

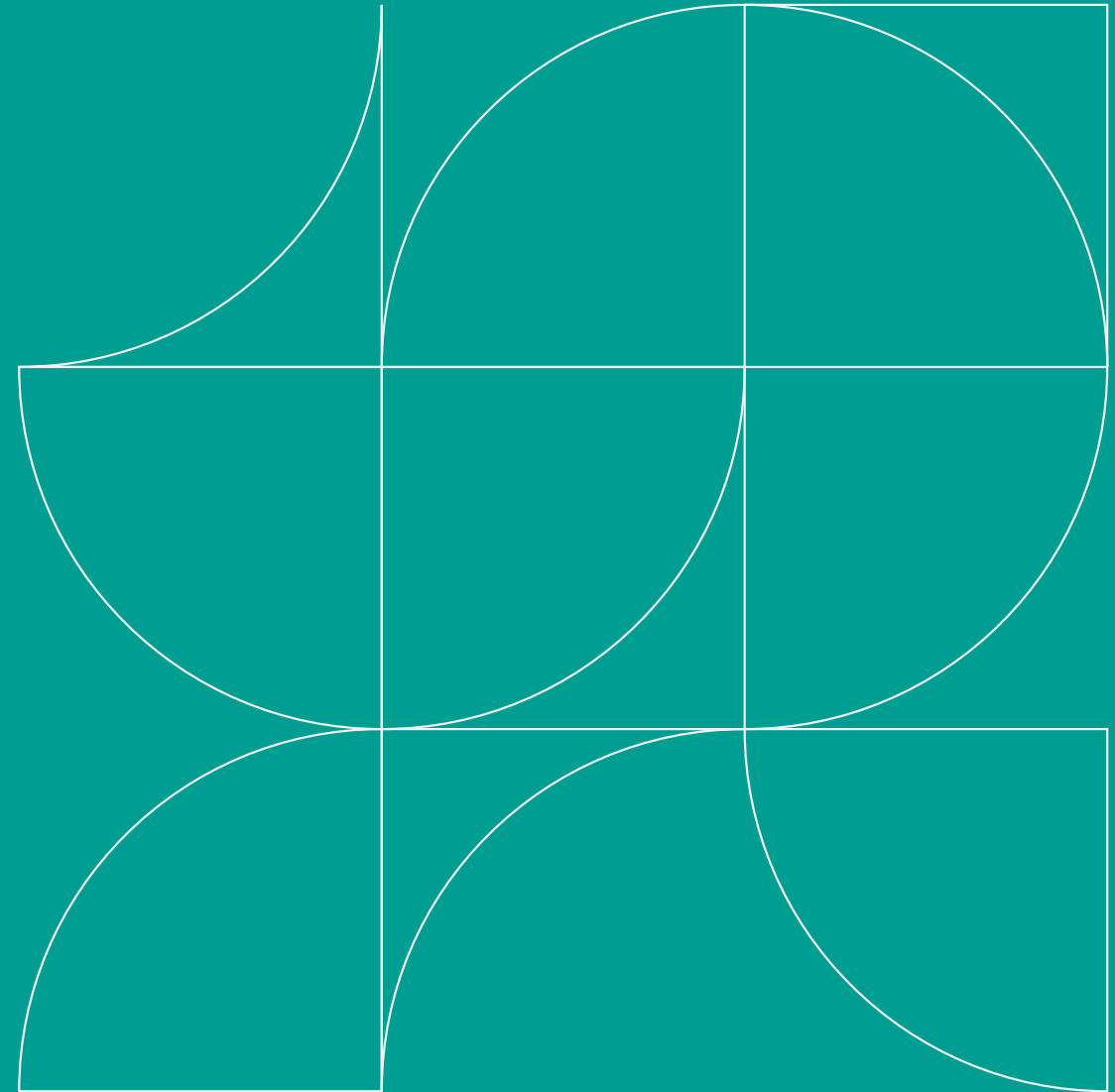
Summary of the SCOTUS decision in *Viking River Cruises Inc. v. Moriana*

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- The Supreme Court reversed the Court of Appeals' decision, and found that the Federal Arbitration Act ("FAA") preempts *Iskanian*'s rule that PAGA claims cannot be divided into individual and non-individual actions through an arbitration agreement.
- The Court held that, under PAGA's standing requirement, plaintiffs can maintain representative PAGA claims "only by virtue of also maintaining an individual claim in that action." Thus, once the individual PAGA claim is compelled to arbitration, the employee lacks standing to maintain a PAGA representative claim.
- The Court found that a waiver of "representative" PAGA claims was still invalid under *Iskanian* if construed as a "wholesale waiver" of such PAGA claims, and that this aspect of *Iskanian* was not preempted by the FAA.

The Importance of Severability Clause In the Court's Decision

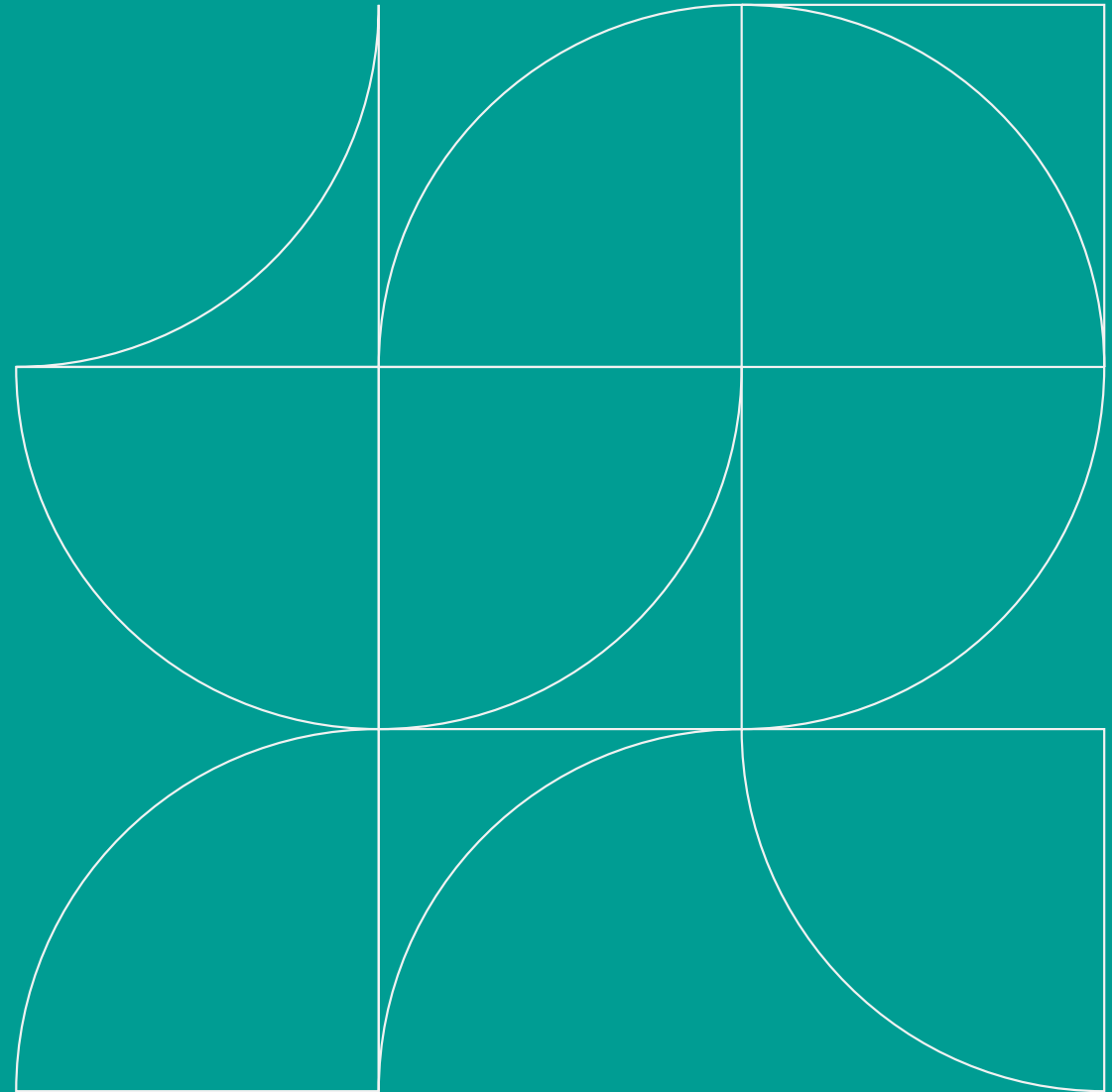


Importance of Severability Clause In Court's Decision

The severability clause in Moriana's arbitration agreement was key to the court's decision. As the Court held,

- “In this case, *Iskanian*'s principal prohibition required the lower courts to treat the representative-action waiver in the agreement between Moriana and Viking as invalid insofar as it was construed as a wholesale waiver of PAGA standing. The agreement's severability clause, however, allowed enforcement of any 'portion' of the waiver that remained valid, so the agreement still would have permitted arbitration of Moriana's individual PAGA claim even if wholesale enforcement was impossible.”

Concurring Opinion By Justice Sotomayor Suggesting A Need For Changes To Standing Requirements Under PAGA



Concurring Opinion By Justice Sotomayor Suggesting A Need For Changes To Standing Requirements Under PAGA

- In a concurring opinion, Justice Sotomayor noted that once a plaintiff's individual PAGA claim has been compelled to arbitration, the plaintiff could not maintain a representative PAGA claim at all because of statutory standing requirements.
- Justice Sotomayor warned that the Court's "understanding of state law" may be wrong, and that "California courts, in an appropriate case, will have the last word." Alternatively, Justice Sotomayor suggested that the legislature "is free to modify the scope of statutory standing under PAGA."

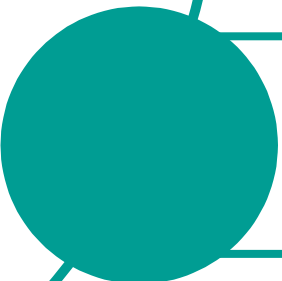
What Viking River Means Going Forward



Arbitration agreements which provide for waivers of representative PAGA claims are enforceable.

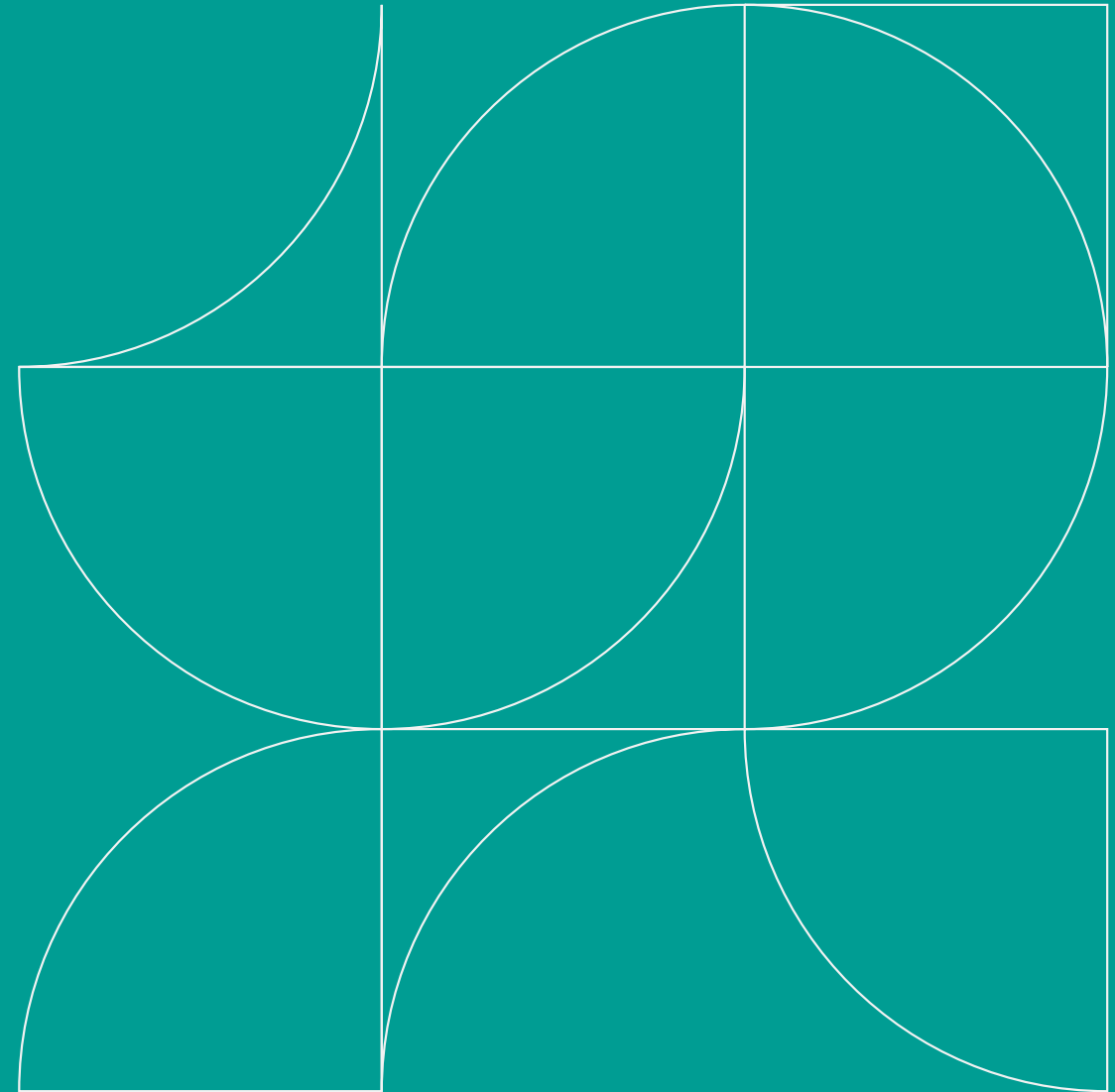


Arbitration agreements which provide for waivers of individual PAGA claims are not enforceable.



Arbitration agreements should contain severability clauses to avoid wholesale rejection of the agreement in the event a court finds that it contains unenforceable provisions.

Application of *Viking River* to Common Variations of Arbitration Agreement Language



Application of *Viking River* to Common Variations of Arbitration Agreement Language

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- Arbitration agreement contains a full PAGA waiver AND a severability clause.
 - *Viking River* scenario – “individual” PAGA claim goes to arbitration and non-individual component of PAGA should be dismissed for lack of standing.
- Arbitration agreement states that all disputes shall be resolved on an individual basis, including all PAGA claims; the employee agrees that any PAGA claim shall be based only on alleged Labor Code violations supposedly suffered by the employee and not any other employee; the employee agrees not to file any PAGA claim based on alleged Labor Code violations affecting other employees.
 - Enforceable under *Viking River* – plaintiff may only proceed in arbitration as to PAGA claims arising out of his/her own alleged Labor Code violations.
 - No need to rely on a severability clause.

Application of *Viking River* to Common Variations of Arbitration Agreement Language

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- Arbitration agreement expressly excludes PAGA from the scope of covered claims.
 - *Viking River* does not apply; full scope PAGA claims proceed in court.
- Arbitration agreement excludes PAGA claims from the scope of covered claims “to the extent required by law”.
 - Arguably excludes “representative” PAGA claims but allows “individual” PAGA claim to be sent to arbitration and then “representative” PAGA claims should be dismissed for lack of standing.
- Arbitration agreement does not contain a representative action / PAGA waiver clause.
 - Per *Stolt-Nielsen / Lamps Plus*, the “individual” PAGA claims should be compelled to arbitration and the “representative” PAGA claims should be dismissed for lack of standing.

Application of *Viking River* to Common Variations of Arbitration Agreement Language

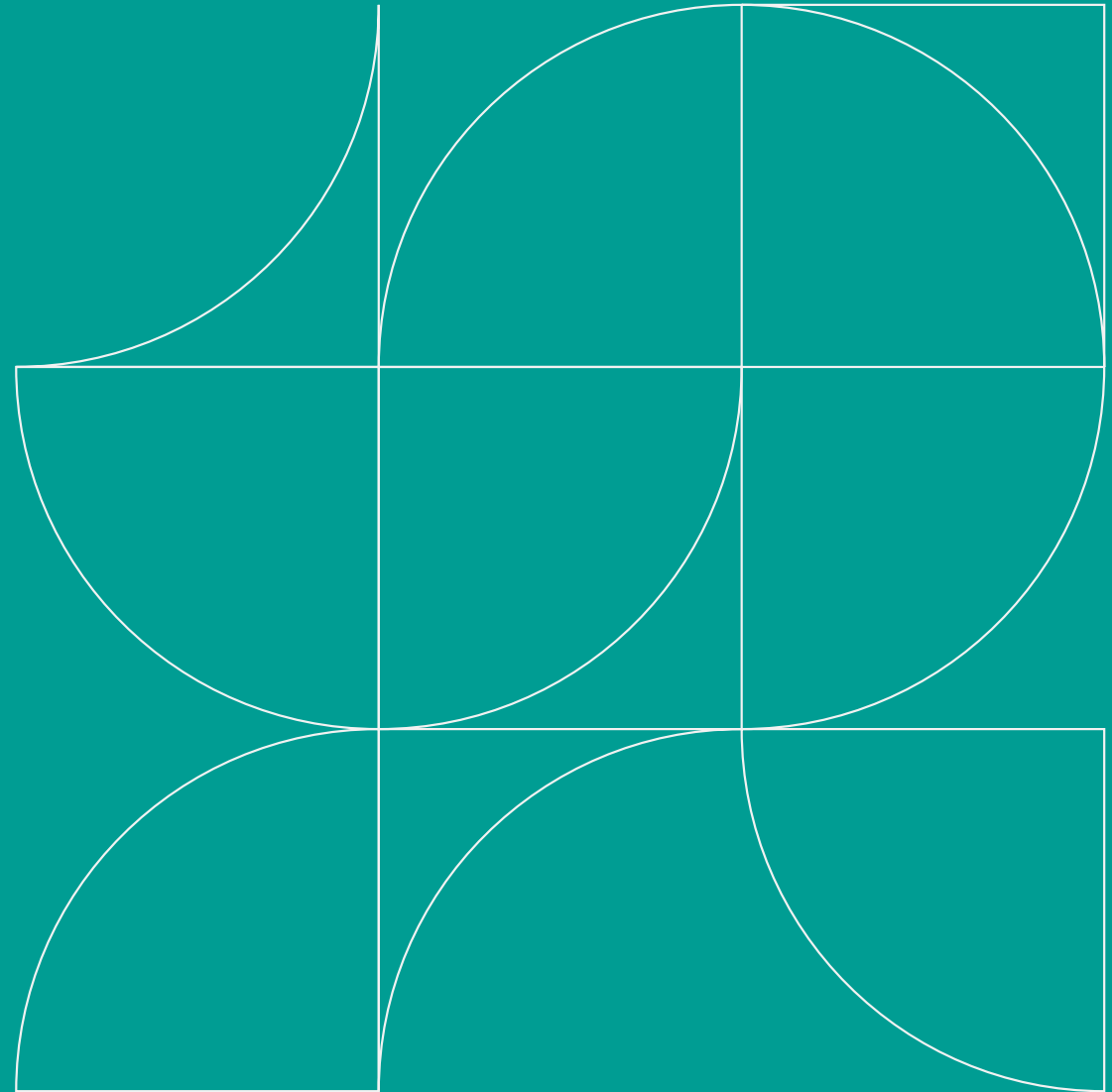
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- Arbitration agreement contains a blanket representative action / PAGA waiver with no severability clause:
 - Outcome is unclear but potentially unenforceable.
 - Blanket waiver of all PAGA claims is invalid, but
 - Does the court “blue pencil” out the PAGA waiver and send the “individual” PAGA claim to arbitration under *Stolt-Nielsen* and dismiss the representative component of the PAGA claim?
 - Does the court rule that the blanket PAGA waiver renders the entire agreement unconscionable and invalidates the entire arbitration agreement?
 - Or does the court rule that the non-PAGA individual claims go to arbitration, and the full scope PAGA claims must be litigated in court?

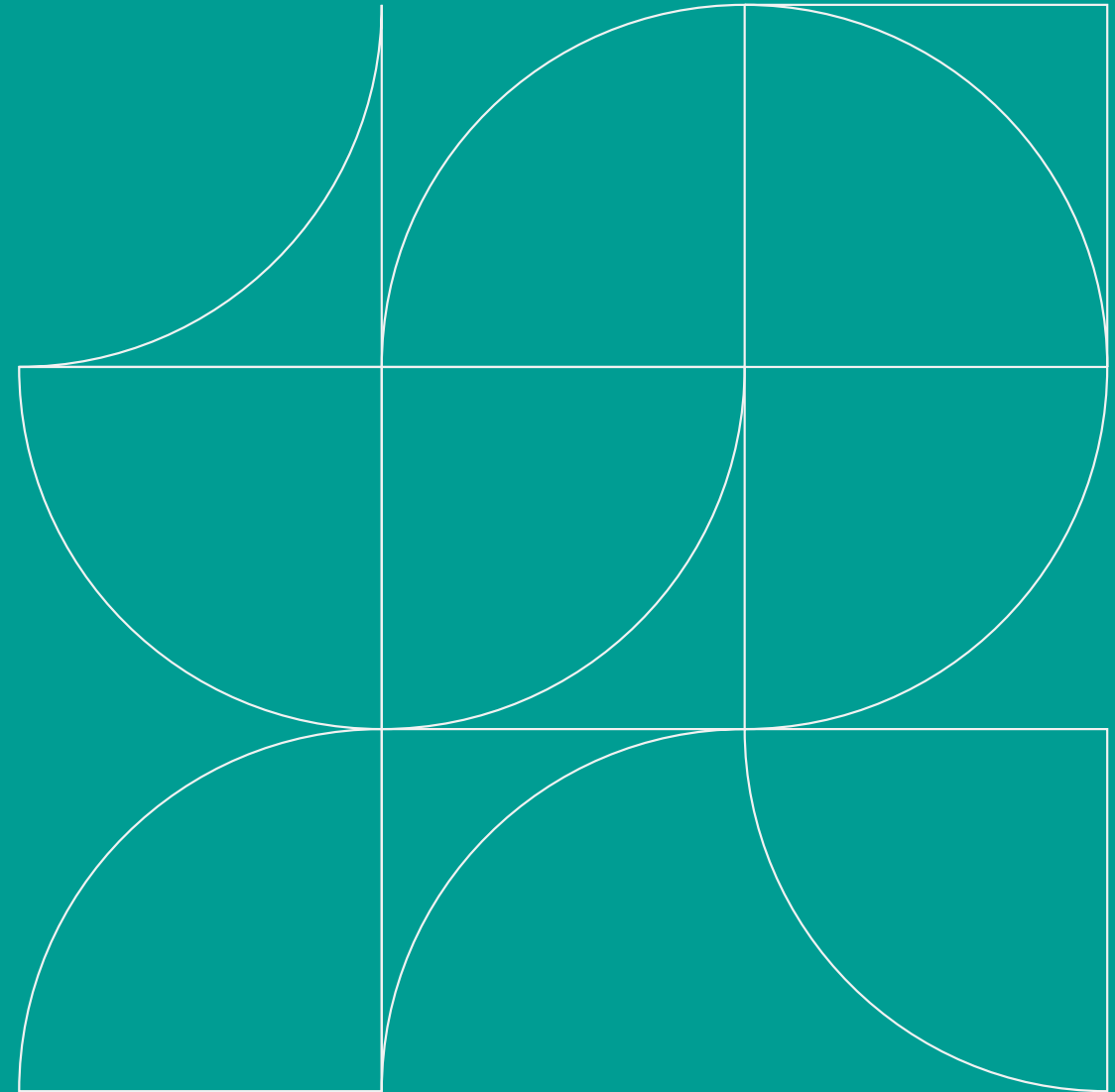
What Part of *Iskanian* Survives *Viking* *River*?



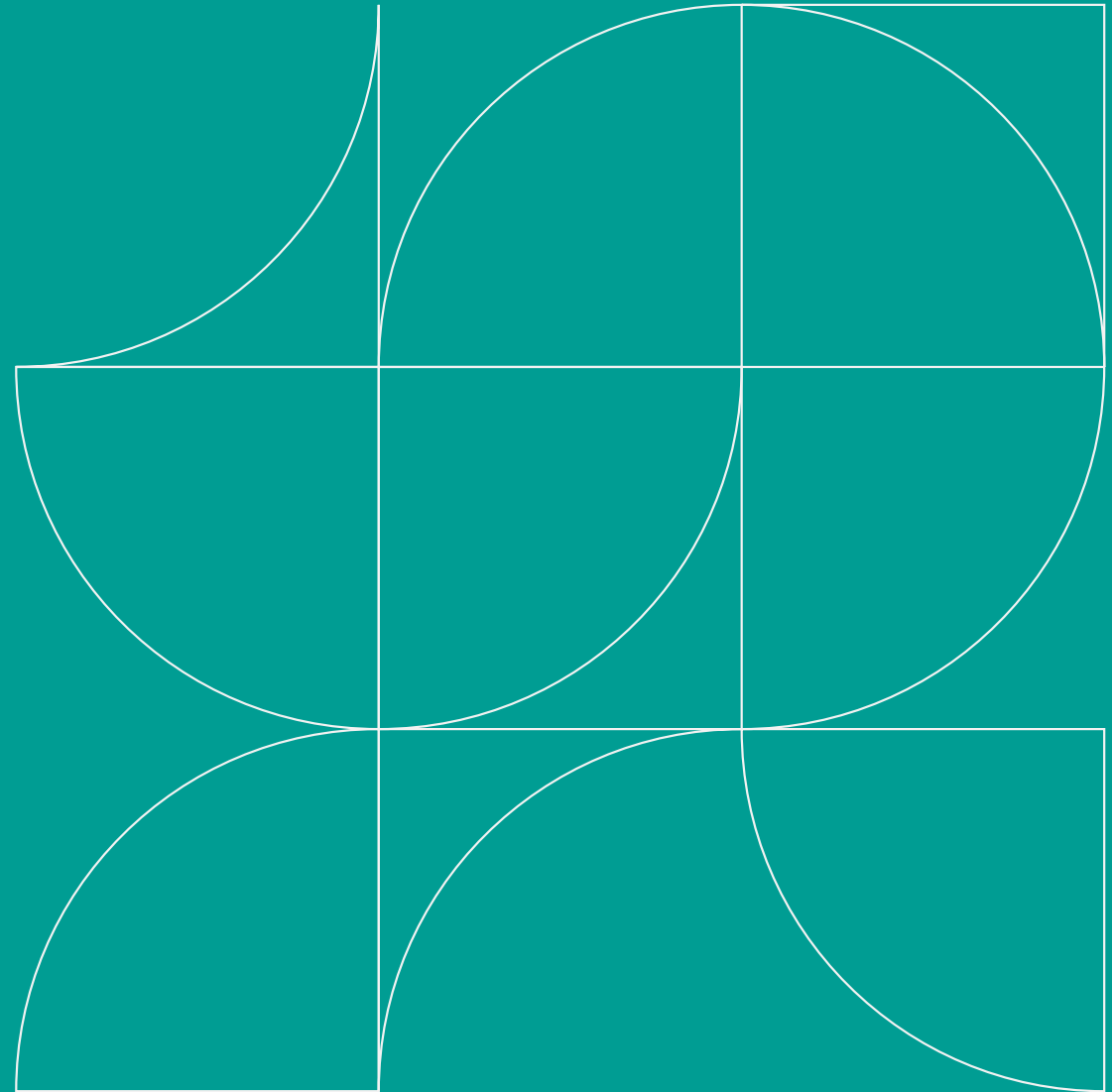
What Part of *Iskanian* Survives *Viking* *River*?

- Viking River only applies to arbitration agreements covered by the FAA.
 - Certain transportation industry workers are excluded from the FAA – e.g. recent Supreme Court decision in *Southwest v. Saxon*.
- If employee did not sign an arbitration agreement, can still pursue full scope PAGA claims even if employee does not have alleged Labor Code violations within the statute of limitations.
 - Does not matter if other employees have signed arbitration agreements.
- Potential threat of mass “individual” PAGA arbitrations.
 - Enforceability of mass arbitration poison pill language?
- Should you revise your arbitration agreements or roll out a mandatory arbitration agreement?
 - En banc review of 9th Circuit’s *Bonta* decision is still pending.

CLE



Does *Viking River* Overrule *Kim v.* *Reins*?



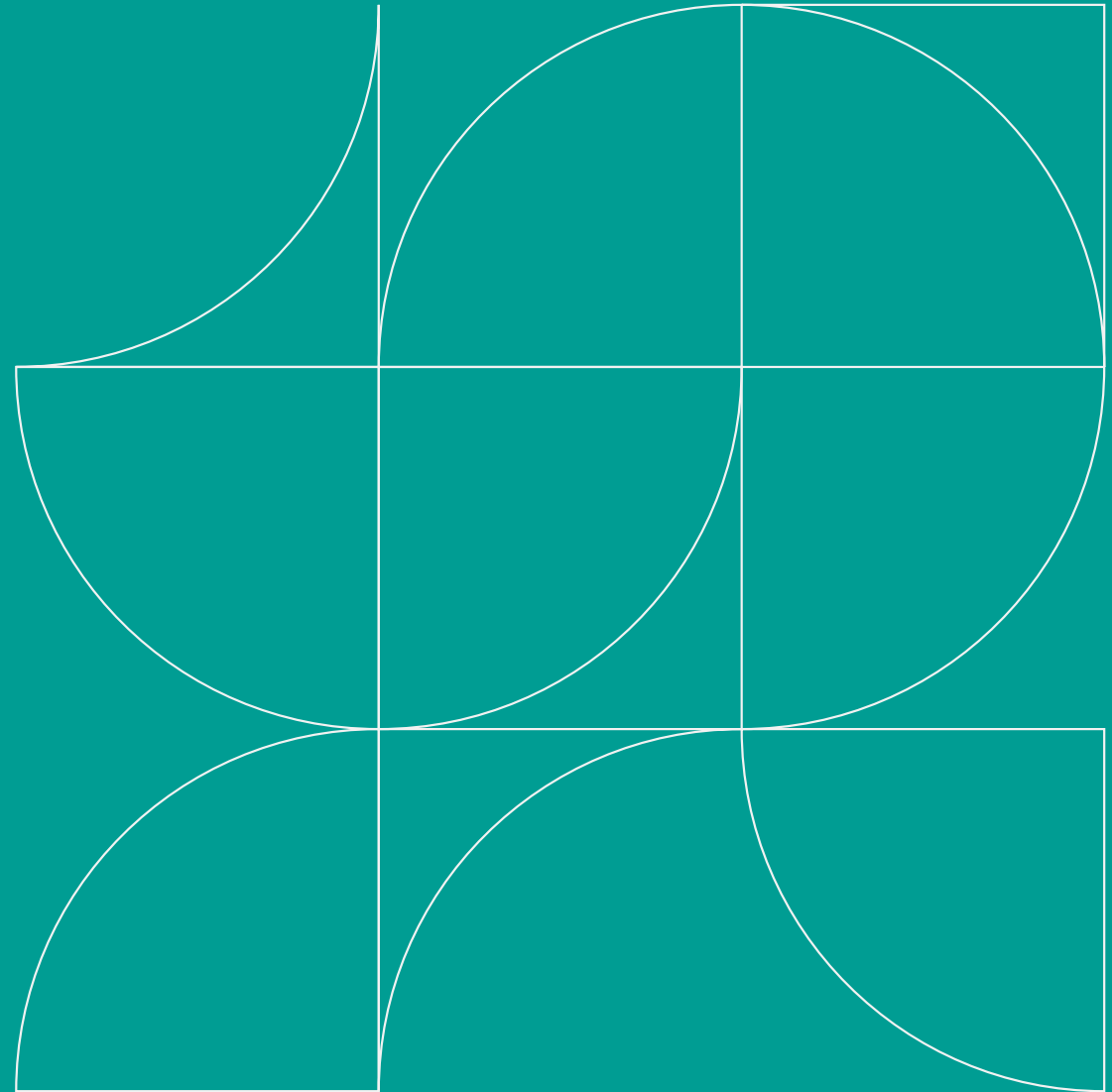
Does *Viking River* Overrule *Kim v. Reins*?

- The California Supreme Court’s decision in 2020 held that, under PAGA, an employee does not lose the ability to pursue representative claims as an “aggrieved employee” by virtue of settling and dismissing individual claims.
- However, the majority decision in *Viking River* implicitly – if not explicitly – overrules *Reins* on this point:
 - “But as we see it, PAGA provides no mechanism to enable a court to adjudicate nonindividual PAGA claims once an individual claim has been committed to a separate proceeding. Under PAGA’s standing requirement, a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. ... **When an employee’s own dispute is pared away from a PAGA action**, the employee is no different from a member of the general public, and **PAGA does not allow such persons to maintain suit**. ... As a result, Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims.”

Does *Viking River* Overrule *Kim v. Reins*?

- *Viking River* must trump *Reins* on standing – if you no longer have standing to pursue individual claims, then you should no longer have standing to pursue representative PAGA claims in court, whether by an arbitration agreement or individual settlement.
- At least until California says otherwise...
- But what about other California case law?
 - *Johnson v. Maxim Healthcare* – *Viking River* did not expressly touch the issue of someone with lack of standing based on the statute of limitations. What if you have someone from years ago, beyond SOL, who never signed an arbitration agreement?

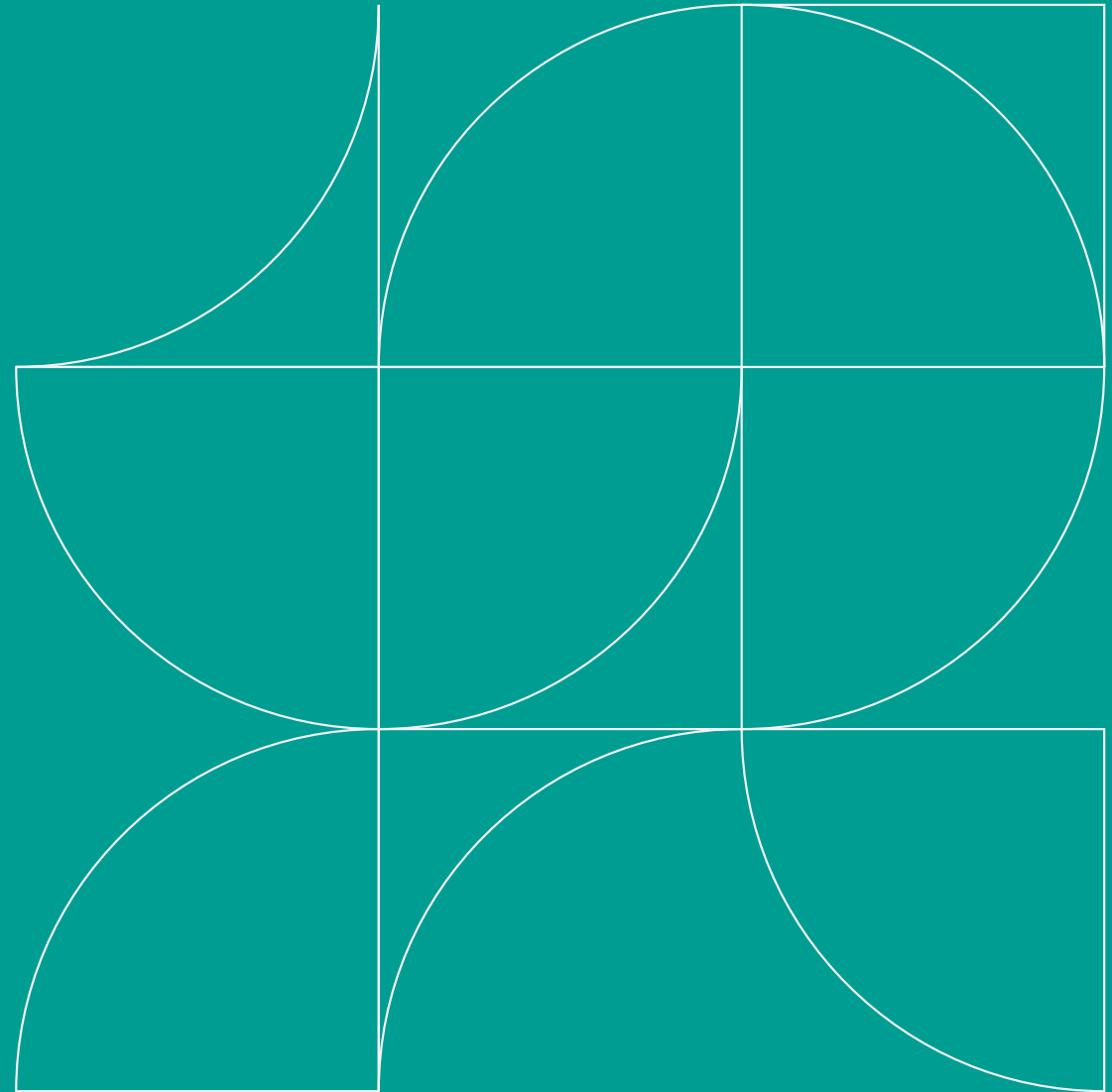
What Might Legislative Changes Look Like?



What Might Legislative Changes Look Like?

- Justice Sotomayor warned that the Court’s “understanding of state law” on this issue may be wrong, and that “**California courts**, in an appropriate case, will have the last word.”
Alternatively, Justice Sotomayor hinted that if the lack of standing was correct, then the “**California Legislature is free to modify the scope of statutory standing** under PAGA within state and federal constitutional limits.”
- When is the next session of Legislature?
 - State Sen. Dave Cortese (D-San Jose) indicated recently to *Daily Journal* that he “plans to pursue legislation that follows the guideline in Sotomayor’s concurrence”.
 - Likely no danger of a new PAGA law coming into play for at least six months.
- What about a California appellate court first?
- What reaction are we seeing from the plaintiffs’ bar?

Questions?



thank you

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