

Stand And Deliver: PAGA Plaintiffs May Still Litigate Representative Claims Not Compelled Into Arbitration

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HIGHLIGHTS OF *ADOLPH V. UBER TECH., INC.*

- PAGA representatives retain standing to prosecute non-individual PAGA claims in court, even when their individual PAGA claims are compelled into arbitration.
- Courts may still stay non-individual PAGA claims pending resolution of the individual arbitration actions.
- An arbitrator's finding regarding whether an employee is "aggrieved," and therefore can pursue non-individual PAGA claims following a stay, is binding on the court.

BACKGROUND

Plaintiff Erik Adolph delivered food to customers through the Uber Eats platform as an independent contractor. As a condition of providing services, Adolph agreed to individually arbitrate work-related claims against Uber, including those under the Private Attorneys General Act (PAGA).¹

In October 2019, Adolph filed suit against Uber, alleging that Uber misclassified him and other delivery drivers as independent contractors. Several months later, he asserted a claim under PAGA based on the same theory.

Uber moved to compel Adolph into individual arbitration. The trial court denied Uber's motion. On appeal, the Court of Appeal affirmed the trial court's denial, citing *Iskanian v. CLS Transp.*, 59 Cal. 4th 348 (2014), for the proposition that Uber's arbitration agreement wholly waived PAGA in violation of California public policy. Uber appealed this decision to the California Supreme Court.

THE UNITED STATES SUPREME COURT DECIDES VIKING RIVER CRUISES

In June 2022, while Adolph's appeal was pending, the United States Supreme Court decided *Viking River Cruises v. Moriana*, 596 U.S. ___, [142 S.Ct. 1906] (2022). There, the SCOTUS stated PAGA claims are divisible into *individual* and *non-individual* claims and that the *individual* PAGA claims could be compelled into individual arbitration under a private arbitration agreement between parties. Justice Alito's majority opinion further explained that a PAGA representative compelled into individual arbitration lacked standing to litigate the excised non-individual component. By this reasoning, the majority held non-individual PAGA claims should be dismissed. Applied to Adolph and Uber's dispute, Uber moved, under *Viking River Cruises*, to compel Adolph to arbitrate his individual PAGA claims, and dismiss the non-individual PAGA claims for lack of standing.

However, despite the majority opinion, this secondary issue—what to do with the outstanding non-individual claims that are not arbitrated—remained open to answer from the California Supreme Court. As Justice Sotomayor's concurrence noted, if SCOTUS' "understanding of state law is wrong" on this issue, then "California courts, in an appropriate case, will have the last word."

THE CALIFORNIA SUPREME COURT CHIMES IN

With *Adolph* already on its docket, the California Supreme Court wasted little time accepting Justice Sotomayor's invitation. In its 17 July 2023 opinion, the California Supreme Court analyzed the history of its PAGA standing decisions, the PAGA's text, and legislative intent behind PAGA as a law enforcement action and deterrent against wage violations. The California Supreme Court ultimately determined that a PAGA representative is an "aggrieved employee" with standing to prosecute non-individual PAGA claims, even if their individual PAGA claims must be arbitrated.

More practically, the Court offered a roadmap on how this decision might apply. Here, the Court explained that a representative's non-individual claims could be stayed pending the outcome of arbitration. If the arbitrator found the representative was not an "aggrieved employee," the Court could confirm that judgment and the PAGA representative would no longer have standing to prosecute the stayed non-individual claims. On the other hand, if an arbitrator found that a plaintiff was in fact an "aggrieved employee" under PAGA, that conclusion would also be binding on the court, and the plaintiff would retain standing to pursue non-individual PAGA claims in court.

In the wake of *Viking River Cruises*, many California state trial courts stayed—not dismissed—non-individual PAGA claims pending individual arbitration. While the practical impact of *Adolph* remains to be seen, the *Adolph* decision implicitly agreed with the California trial courts' orders to stay PAGA claims pending individual arbitration, rather than open the floodgates for simultaneous litigation in arbitration and civil court, as some observers feared.

KEY TAKEAWAYS FOR EMPLOYERS

- If not already done, employers should consider updating their arbitration agreements to provide for individual arbitration of PAGA claims.
- Because a PAGA plaintiff need only establish a single Labor Code violation to establish "aggrieved employee" status and in turn, representative PAGA standing, employers should audit their wage and hour practices and policies and utilize tools and strategies to maximize compliance and litigation defenses.

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