



PAGA and arbitration: from *Viking River Cruises v. Moriana* to *Adolph v. Uber*. Who's left standing?

THE CALIFORNIA SUPREME COURT WEIGHS-IN, FAVORING AN EMPLOYEE'S RIGHT TO INDIVIDUAL ARBITRATION AND REPRESENTATIVE PAGA STANDING

On June 15, 2022, the United States Supreme Court issued its opinion in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, addressing the issue of whether courts can compel PAGA claims to arbitration. Because of their ability to avoid arbitration, PAGA actions have become increasingly popular in recent years and today represent one of California's most common forms of litigation.

The *Viking River* decision, which sent waves through the legal community, was the culmination of years of litigation, and many anticipated it to be the final word in the long-standing dispute over PAGA arbitrability. While the *Viking River* decision overturned California labor law, it also raised numerous unresolved questions.

Less than two months after *Viking River*, the California Supreme Court granted review in *Adolph v. Uber Technologies, Inc.* [2023 WL 4553702]. On July 17, 2023, the California Supreme Court issued its decision in *Adolph*. In this article we discuss the current state of PAGA and arbitration, post-*Viking River* and *Adolph*, and some of the issues facing litigants.

PAGA basics

The California Legislature enacted the Private Attorneys General Act of 2004 (PAGA) to enhance compliance with state labor laws. Under PAGA, a private individual who meets the statute's notice requirements can act as a "private attorney general" and pursue civil penalties for Labor Code violations on behalf of the State of California and other aggrieved employees. PAGA plaintiffs act as representatives of the state and their lawsuits serve as substitutes for actions initiated by the government itself. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.)

PAGA actions are unique in that they permit the enforcement of state labor laws for groups of employees without requiring the same procedural hurdles as traditional class actions. Notably, 75% of all penalties recovered under PAGA are directed to the California Labor and Workforce Development Agency (LWDA), while the remaining 25% is distributed to aggrieved employees.

PAGA actions have become a substantial component of wage-and-hour litigation in California. Although enacted in 2004, PAGA cases increased in popularity following the United States Supreme Court's decision in *ATT v. Concepcion*, which overruled California's prohibition on class-action waivers. (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.)

Since its inception, the LWDA has collected over \$696 million in PAGA recoveries. (Bloomberg, *Uber Bid to Narrow California's PAGA Scope Likely to Be Rebuffed*, (May 9, 2023, 1:46 PM), (<https://news.bloomberglaw.com/litigation/uber-bid-to-narrow-californias-paga-scope-likely-to-be-rebuffed>).



Viking River and *Adolph*: Key turning points

The arbitrability of PAGA actions was called into question by *Viking River*. In *Viking River*, the United States Supreme Court clarified that employees who sign enforceable arbitration agreements and subsequently pursue PAGA actions can be compelled to arbitrate PAGA penalties predicated on their individual Labor Code violations. However, the issue remained cloudy regarding representative PAGA penalties sought on behalf of other employees.

The ambiguity arose from the Court's interpretation of standing under PAGA. Justice Alito reasoned that an order compelling a plaintiff's individual claim to arbitration would strip him of standing to pursue penalties on behalf of other employees. In her concurring opinion, Justice Sotomayor noted that "if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word. Alternatively, if this Court's understanding is right, the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits." (*Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906.)

On August 1, 2022, just 47 days after the *Viking River* decision, the California Supreme Court granted review in another PAGA case, *Adolph v. Uber*, to provide clarity on the issue addressed in *Viking River*. While awaiting *Adolph's* ruling, several appellate courts weighed in on the matter. (*Mills v.*

Facility Solutions Group, Inc. (2022) 84 Cal.App.5th 1035; *Galarsa v. Dolgen California, LLC* (2023) 88 Cal.App.5th 639; *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281; *Gregg v. Uber Techs., Inc.* (2023) 89 Cal.App.5th 786; *Seifu v. Lyft, Inc.* (2023) 89 Cal.App.5th 1129; *Nickson v. Shemran, Inc.* (2023) 90 Cal.App.5th 121.)

Building on the appellate courts' interpretations, the California Supreme Court rendered its ultimate opinion in *Adolph* on July 17, 2023. In departing from *Viking River*, the *Adolph* court noted that it was "not bound by the high court's interpretation of California law." (*Adolph v. Uber Techs., Inc.* (July 17, 2023, S274671) [2023 WL 4553702].) Specifically, where *Viking River* reasoned that an employee lost standing to seek PAGA penalties on behalf of other employees after their individual penalties were compelled to arbitration, the Court in *Adolph* held that such a ruling would in fact "not strip the employee" of standing to continue pursuing the representative PAGA penalties in court. (*Ibid.*)

Justice Liu, writing for the California Supreme Court, reasoned that the language of PAGA section 2699(c) "has only two requirements for PAGA standing. The Plaintiff must allege that he or she is (1) someone who was employed by the alleged violator and (2) someone against whom one or more of the alleged violations was committed." (*Adolph*, at *5.) Citing the Court's prior reasoning in *Kim v. Reins Int'l California, Inc.* (2020) 9 Cal.5th 73, the Court explained that "standing under PAGA is not affected by enforcement of an agreement to arbitrate a plaintiff's claim in another forum." (*Id.* at *6.)

The road ahead

So, where does PAGA stand in a post-*Adolph* world? The legal implications of the court's ruling are still unfolding, but one thing is certain: PAGA jurisprudence will continue to be a dynamic field. Moving forward, there are several issues that practitioners can anticipate arising in *Adolph's* wake:

Litigation stays

When the individual and representative portions of a PAGA case proceed in separate forums (i.e., in both court and arbitration), the question of timing becomes crucial. Will trial courts choose to stay representative PAGA claims pending arbitration of individual claims, or will they proceed simultaneously?

Justice Liu addressed Uber's argument about duplicative litigation, stating that "trial court[s] may exercise... discretion to stay [] non-individual claims pending the outcome" of arbitration. (*Id.* at *8.) Previously, state trial courts largely chose to exercise this discretion, but it remains to be seen whether the *Adolph* decision will bring any changes to this approach.

Res judicata and collateral estoppel

The impact of legal determinations made in arbitration on related PAGA litigation is uncertain. Principles of res judicata and collateral estoppel will likely be central to legal disputes in the coming years.

PAGA standing

Adolph is unlikely to be the final word on the issue of PAGA standing. Questions remain about whether and how parties can fashion releases that limit an employee's ability to pursue PAGA penalties on behalf of other employees.

PAGA manageability

PAGA litigation often involves adjudicating Labor Code claims on behalf of hundreds or thousands of employees. The extent of a trial court's discretion to manage these claims, either through dismissal or other means, is hotly disputed between litigants. Appellate courts have differed in their approaches to this issue. (See *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685 (disagreeing with *Wesson v. Staples The Office Superstore, LLC* (2021) 68 Cal.App.5th 746.)

On June 22, 2022, the California Supreme Court granted review in *Estrada v. Royalty Carpet Mills* (Cal. 2022) 511 P.3d 191 to add clarity. While trial courts wait for a decision in *Estrada*, practitioners can expect continued uncertainty.

Arbitration discovery

With an expected rise in the number of arbitrations involving individual PAGA claims, increased arbitration discovery disputes are likely to follow. The scope of arbitration discovery, especially regarding third-party employees whose claims remain outside the individual arbitration, is still unclear. Decisions on discovery matters will depend on each case's specific facts and the terms of the applicable arbitration agreement.

PAGA repeal and judicial review

Efforts to repeal PAGA are already underway, with a measure known as the California Fair Pay and Employer Accountability Act (FPEAA) securing a place on the November 2024 California ballot. Moreover, the California Supreme Court's departure from the high court's interpretation of PAGA standing could lead to further attempts by litigants to appeal to the United States Supreme Court.

Resolution: incentives and the ticking clock of litigation

The aftermath of *Adolph* brings a host of unresolved issues and ongoing developments in PAGA jurisprudence. Practitioners should be prepared for continued evolution and adaptability in navigating the complexities of this legal landscape. In this uncertain terrain, practitioners are grappling with a critical question: How should they proceed? The stakes are high for both sides, making early and timely resolution an enticing prospect.

Defendants: From the defense standpoint, many small employers cannot afford to weather the lengthy litigation process. Thus, securing an early resolution becomes a paramount goal for these litigants. It's worth noting that PAGA penalties are calculated per pay period, adding a layer of complexity to settlement negotiations. Litigants must closely monitor the number of pay periods involved, as what starts as a one-year statutory period can quickly balloon as litigation progresses and pay periods continue to accrue.

The recent rulings in *Viking River* and *Adolph* might further amplify this effect. In practice, numerous trial courts have already opted to stay the adjudication of representative PAGA claims until arbitration of the individual litigant's PAGA claim is completed. As a result, employers may find themselves incurring the costs of arbitration, only to encounter a similar predicament regarding the representative PAGA claims months or even years later, now confronting heightened exposure due to the extended pay periods and corresponding potential penalties.

Plaintiffs: Counsel for plaintiffs also have strong incentives to seek resolution. The arbitration process can be a grueling and protracted ordeal, filled with significant risks. A negative outcome could have lasting repercussions, preventing a litigant from pursuing representative claims on behalf of other aggrieved employees. Moreover, arbitrating individual claims before delving into representative litigation only

prolongs the recovery process, which is exacerbated by what can be a lengthy court-approval period, spanning months or even years.

Although the Los Angeles Superior Court recognized this issue and introduced model settlement agreements to streamline the approval of PAGA settlements, statewide adoption of these agreements has not occurred. Delayed litigation will only compound what can already be a challenging process of locating witnesses and gathering evidence years after the alleged events occurred. Moreover, litigants continue to face the risk of unfavorable changes to the law either through legislation or judicial review.

Final thoughts

The intricate PAGA dynamics at play demand a strategic and adaptive approach from practitioners. As the legal community continues to process *Viking River*, *Adolph*, and their downstream implications, practitioners should prepare

to confront a landscape filled with risks and continued uncertainty. Issues of res judicata, collateral estoppel, manageability, and arbitration discovery will likely work their way up and down the appellate system for years to come. In this environment, both plaintiffs and defendants would be wise to consider the benefits of timely resolution.

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