

PAGA Claims Are A Gamble As Calif. Justices Mull Uber Case

By **Jonathan Andrews** (November 9, 2022, 4:28 PM EST)

Last year, the U.S. Supreme Court radically altered the arbitration landscape for California's Private Attorneys General Act, or PAGA.[1]

In *Viking River Cruises v. Moriana*,[2] the high court ruled in June that PAGA could not be used to bypass mandatory arbitration in agreements with employees under the Federal Arbitration Act.[3] Individual PAGA claims, the court said, must go to arbitration.

At the same time, a plaintiff who had submitted the "individual" portion of a PAGA claim to arbitration lacked standing under state law to pursue a nonindividual claim on behalf of others and was therefore barred from pursuing nonindividual PAGA claims in court.

In reaching its conclusion, the Supreme Court relied on the California Supreme Court's 2014 decision in *Iskanian v. CLS Transportation*,[4] which found that predispute arbitration agreements that waive the right to bring representative PAGA claims are invalid as a matter of public policy.

The high court agreed with that concept, but it overruled *Iskanian* by holding that a PAGA plaintiff may be compelled to arbitrate the individual component of his or her PAGA claim.

In the wake of the *Viking River Cruises* decision, the scope and continued viability of PAGA have become open questions. Without the main weapons envisioned by California legislators — nonindividual actions of a size that employees have incentive to bring — is there any reason for PAGA to remain on the books?

That question should be answered when the California Supreme Court considers the second part of the *Viking River Cruises* ruling. In *Adolph v. Uber Technologies Inc.*,[5] the state court agreed in April to decide whether an employee who brings an individual claim in arbitration maintains statutory standing to pursue PAGA claims arising out of events involving other employees in court.

California lawmakers enacted PAGA in 2004, because they concluded that the state's Department of Industrial Relations lacked sufficient resources to investigate all employers for compliance with labor laws. Legislators saw enforcement as hit-and-miss, with businesses facing few consequences for shortchanging employees on required pay or meal and rest breaks.



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PAGA provided a different vehicle for prosecuting violators. It deputized employees to bring a type of qui tam^[6] action on behalf of the state^[7] when they saw violations of wage and hour, workplace safety and other laws designed to protect them.

It put companies on notice they faced not only detection, but actual penalties, and because it allowed the employees to pursue claims arising out of their own employment as well as the employment of other employees and receive attorney fees awards for doing so, employees have an incentive to seek the penalties.

Under PAGA, aggrieved employees were empowered to file lawsuits to recover civil penalties that otherwise could only be assessed by the state. These claims would now be asserted on behalf of claimants and other aggrieved employees for the benefit of the state. The state could bring its own action against the employer, but if it chose not to do so the employee was deputized to step into its shoes.

Claimants were obligated to follow strict procedural requirements,^[8] including giving notice to the state and providing a copy of the filing to the employer, before they could proceed with such actions.

The plaintiff in the Adolph case is an Uber Eats driver who charged Uber with misclassification of employment status for himself, as well as for a large group of similarly situated drivers. He has asked the state court to address whether California law vests an aggrieved party forced to arbitrate his own claim with standing to pursue the nonindividual aspect of the PAGA claim — where the lion's share of penalties reside.

When it agreed on July 20 to hear Adolph, the California Supreme Court set the stage for a possible override of the U.S. Supreme Court's holding in Viking River Cruises. The state court could find that aggrieved parties who arbitrate individual claims are not stripped of standing under PAGA to pursue court actions on behalf of a larger group of claimants in court.

It could also agree with the Supreme Court that when an employee is compelled to arbitrate an individual claim, he or she no longer has standing to maintain the remainder of a PAGA action, handing employers the same protective shield in PAGA actions that they now possess in class action cases.

For both employers and employees, PAGA claims are presently a huge gamble, and they will remain so until the California Supreme Court issues its decision in Adolph, which could happen as soon as next year. Parties arbitrating or mediating individual PAGA claims to settlement need to be aware of these risks.

Currently, as PAGA cases come before them, trial courts must decide whether to follow the Supreme Court's Viking River Cruises ruling and dismiss plaintiffs' nonindividual claims or whether to place such actions on hold pending a decision in Adolph.

While a significant number of California state courts have been staying the nonindividual actions while the individual claims proceed to arbitration, some federal courts have taken a harder line.

On Sept. 21, a California federal court granted an employer's motion to compel arbitration of claims as to the plaintiff's individual PAGA claims, but it dismissed the nonindividual PAGA claims as to other allegedly aggrieved employees.

In *Johnson v. Lowe's Home Centers LLC*,^[9] the U.S. District Court for the Western District of Virginia found that Johnson's waiver was not an invalid "wholesale waiver" because it did not deny Johnson the right to "bring a PAGA action on behalf of the State for violations she suffered as an individual."

Johnson's waiver, according to the judge, was an enforceable waiver that provided that "the employee may not seek relief on behalf of any other parties in arbitration, including but not limited to similar aggrieved employees."

Those state courts that have refused to dismiss the nonindividual action pending arbitration of the individual claim continue to rely on U.S. Justice Sonia Sotomayor's concurring opinion in *Viking River Cruises* that "California courts, in an appropriate case, will have the last word."

There is also continued reliance on the California Supreme Court's decision in *Kim v. Rains International California Inc.*,^[10] in which the court found in 2020 that a plaintiff retained standing to maintain a PAGA claim arising out of the employment of other employees even after the plaintiff's personal claim for damages settled.

The logic of the *Kim* decision is that only an aggrieved employee has standing to sue under PAGA.^[11] An aggrieved employee is defined as someone "who was employed by the alleged violator" and "against whom one or more of the alleged violations was committed."^[12] The statute does not require an employee to continue to suffer injury in order to have standing.

As the court in *Kim* explains, "The remedy for a Labor Code violation, through settlement or other means, is distinct from the fact of the violation itself ... Settlement [would] not nullify these violations."

Because the Legislature defined PAGA standing in terms of violations, not injury, the court said, the plaintiff had PAGA standing when at least one Labor Code violation was committed against her. Even if she had not personally experienced each and every alleged violation, she would still have standing to serve as a PAGA representative.

By similar logic, arbitration of individual PAGA claims would not necessarily nullify those violations. Therefore, an individual in arbitration may still ultimately retain standing to assert a nonindividual PAGA claim.

If this is how the California Supreme Court comes down in *Adolph*, employers will be forced to question whether there is any benefit to arbitrating individual PAGA claims. They could find themselves fighting on two fronts, with little upside to doing so.

To be sure, the California Supreme Court's decision will have significant repercussions for both employers and employees, and it is sure to raise new questions for both sides. If the state court agrees with the *Viking River Cruises* holding, fewer PAGA claims are likely to be filed and those that do will be compelled to arbitration, to the extent possible.

All nonindividual PAGA actions on behalf of additional employees will likely be dismissed. If, however, the court finds that there is standing for individual employees in arbitration to represent nonindividual claims under PAGA in state court, employers may have to defend both individual wage and hour PAGA claims in arbitration and nonindividual PAGA actions in court.

Depending on the procedural posture of the case, mediating these cases poses a number of interesting challenges. Plaintiff's attorneys must be mindful of the pros and cons of resolving an individual claim that may also dispose of the larger nonindividual action.

Should the trial court end up staying nonindividual PAGA actions pending resolution of Adolph, an individual claimant may have unintentionally closed the door on further, broader action against the employer.

Defense counsel must also be mindful of the impact of litigating and settling the individual claim through arbitration, as there is no guarantee that adjudicating that claim will necessarily forestall the individual from reviving the broader nonindividual PAGA action.

Whether it is carving out certain claims from settlement, resolving the individual claims with appropriate standing language, venue reselection or class conversions, the unknowns of the pending Adolph decision will continue to serve as motivation for all parties to be innovative in mediation.

Jonathan Andrews is a mediator at Signature Resolution.

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[1] <https://www.labor.ca.gov/resources/paga/>.

[2] https://www.supremecourt.gov/opinions/21pdf/20-1573_8p6h.pdf.

[3] <https://uscode.house.gov/view.xhtml?path=/prelim@title9/chapter1&edition=prelim>.

[4] <https://caselaw.findlaw.com/ca-supreme-court/1670626.html>.

[5] <https://casetext.com/case/adolph-v-uber-techs>.

[6] <https://www.shouselaw.com/ca/labor/wrongful-termination/false-claims-act/>.

[7] <https://oag.ca.gov/>.

[8] http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=2.&title=&part=13.&chapter=&article=.

[9] <https://dockets.justia.com/docket/virginia/vawdce/1:2021cv00040/123400>.

[10] *Kim v. Rains International California, Inc.* (2020) 9 Cal.5th. 73, 80).

[11] California Labor Code, § 2699, subd. (a).

[12] *Id.*, subd.(c).