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California Supreme Court Weighs in on U.S. Supreme Court's Landmark Decision in *Viking Cruise Lines* Regarding PAGA Lawsuits

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The *Adolph v. Uber* Ruling Thwarts The U.S. Supreme Court's Landmark *Viking* Decision

In a widely anticipated but unsurprising ruling, the California Supreme Court on July 17, 2023 issued its decision in *Adolph v. Uber Technologies, Inc.*, (S274671) weighing in on the United States Supreme Court's ("SCOTUS") recent landmark decision in *Viking River Cruises, Inc. v. Moriana, (2022) 596 U.S. __, [142 S. Ct 1906]* (*Viking*).

In *Viking*, the SCOTUS had ruled that California employers can compel PAGA wage and hour cases to individual arbitration via an employee arbitration agreement and that employees may thereafter potentially lose their standing to represent other employees in a PAGA action, thus subjecting the entire PAGA case to being dismissed. [1] In so holding, *Viking* partially overruled a prior California Supreme Court decision, *Iskanian v. CLS Transportation Los Angeles. LLC* (2014) 59 Cal.4th 348, 379 (*Iskanian*) which had essentially outlawed these so-called "PAGA waivers."

However, the California Supreme Court in *Adolph* has blunted the *Viking* decision by ruling that the named plaintiff in a PAGA representative action *retains* their standing to represent the PAGA class of similarly aggrieved employees, despite having their own individual wage and hour claim compelled to arbitration.

The Upshot of the Decision

The *Adolph* decision marks another blow to California employers under the state's wage and hour laws. There had been great hope for employers when SCOTUS took the rare occasion to take up a case involving a California statute with no national implications. Many thought that the High Court intended to fully uphold PAGA waivers or even strike down altogether the PAGA statute, a statute which has severely

[1] PAGA stands for Private Attorney General Act of 2004. The PAGA statute authorizes employees to serve as a private attorney general with respect to an employer's alleged wage and hour violations under the Labor Code, authorizing an employee to sue their employer in a civil action "on behalf of himself or herself and other current or former employees" to recover civil penalties for Labor Code violations they have sustained. Labor Code sect. 2699, subd. (a)

plagued California employers during the past decade by exposing them to an avalanche of potentially seven-figure wage and hour claims. [2]

The right of employers to require employees sign an arbitration agreement containing a waiver of the right to bring or participate in *both* wage and hour class actions *and* PAGA representative lawsuits would have been an incredible relief for California businesses and would have greatly curtailed the flood of PAGA lawsuits which continues unabated.

The *Adolph* decision virtually insures that PAGA cases cannot be dismissed despite the SCOTUS' ruling in *Viking* that an employee representative plaintiff's individual claim can be compelled to arbitration. This will be true, unless the employer can prevail initially at individual arbitration of the representative plaintiff's wage claims. The SCOTUS in *Viking* had questioned (but did not determine) whether the representative employee would retain such standing once compelled to individual arbitration under California law. Unfortunately for employers, *Viking* left an opening for California courts to fill on the issue of standing, and *Adolph* has done so. The *Adolph* decision refutes the Supreme Court's suggestion that standing would be eliminated for PAGA plaintiffs once compelled to arbitrate.

Brief Background of Adolph and Viking

Plaintiff Erik Adolph worked as a driver for defendant Uber technologies, Inc. (Uber) delivering food for the company's Uber Eats platform. As a condition of his employment, Adolph was required to sign an arbitration agreement that also waived his right to bring a representative PAGA action on behalf of himself and others under the PAGA in any court or in arbitration. (The PAGA waiver). The agreement required him to arbitrate, on an individual basis only, almost all work-related claims.

As noted, the PAGA waiver in *Adolph* was unenforceable under California law prior to the *Viking* decision in 2022, based upon a prior California Supreme Court decision in *Iskanian. Iskanian* had found that PAGA waivers violated California's public policy, distinguishing them from class action waivers on that basis that the PAGA statute is a law enforcement action on behalf of the state of California, and not solely on behalf of the representative employee.

When Adolph filed a PAGA claim in his second amended complaint against Uber, pre-*Viking*, Uber moved to compel the matter to arbitration under the agreement signed by Adolph. Uber's motion to compel arbitration was denied by the trial court based upon the *Iskanian rule*, and Uber also lost its appeal to the Court of Appeal, which found that the trial court had properly relied on *Iskanian* to find that Uber's PAGA waiver violates public policy. In May 2022, Uber filed its petition to have the United States Supreme Court review the case, and before Adolph could file an answer, the Supreme Court decided *Viking*.

The *Viking* decision partially overruled *Iskanian's* holding that PAGA arbitration waivers are unenforceable under California law, finding that invalidating PAGA waivers violated federal law favoring arbitration of disputes, specifically the Federal Arbitration Act (FAA). Viking held that the FAA preempts California's

[2] The PAGA statute is facing legislative push-back in the proposed "California Fair Play and Employer Accountability Act of 2024" which will be on the ballot and would eliminate PAGA and replace it with increased DLSE enforcement.

PAGA statute to the extent state law precludes arbitration agreements from dividing PAGA actions into individual and non-individual claims.

The California Supreme Court then granted review of the Adolph case "to provide guidance on statutory standing under PAGA." As noted, the decision by the California Supreme Court in *Adolph* is not a surprising one, because *Viking* left somewhat open the question of employees' *standing* to serve as the PAGA representative, once their individual case for alleged wage and hour violations was compelled to arbitration by an employer. Justice Alito in *Viking* did weigh into the standing issue, suggesting that once an employer compelled an employee's PAGA claim to individual arbitration, the employee would lack standing to serve as a representative to the "class" of similarly aggrieved employee and might thereafter be subject to dismissal. Nevertheless, Justice Alito conceded that standing was ultimately an issue of California law.

Lower California Courts of Appeal were quick to chime in after *Viking*, almost uniformly holding, (contrary to Justice Alito's suggestion), that a PAGA representative plaintiff retained standing under California law, even after their individual case had been compelled to arbitration, to serve as a representative plaintiff. Although some U.S. District Courts relied on *Viking* to dismiss PAGA lawsuits altogether in federal court, the writing was clearly on the wall once the California Supreme Court announced it was taking up the standing issue in *Adolph v. Uber*, which only tangentially involved standing, to weigh in on the standing issue.

There are Two Silver Linings to the Decision for Employers

Although the decision is another blow to California employers, there are at least a couple of silver linings that can be gleaned from the *Adolph* ruling, albeit they are less significant than the overall ruling itself. First, the California Supreme Court in *Adolph* confirmed that during individual arbitration, the PAGA case brought on behalf of other employees could be stayed at the trial court's discretion under California's arbitration procedures, (Cal. Code of Civ. P., sect. 1281.4). This was already the law in California regarding arbitration, but confirmation in *Adolph* is important.

Secondly, *Adolph* confirmed that although individual arbitration does not eliminate the plaintiff's standing to represent other employees, such standing would be lost if the plaintiff were to lose his case in arbitration, because such a plaintiff is no longer "an aggrieved employee" under the PAGA statute. (Losing would mean an arbitrator's finding that an employer committed no Labor Code violations as to the individual plaintiff). Although this finding would appear to be self-evident, there were recent California decisions that conflicted on this issue.

Taking these two silver linings together, it means that employers will normally have a chance to defeat a PAGA case at the stage of individual arbitration, theoretically before providing employee contact information and wage and hour data.

What Should Employers Do Now?

Despite the *Adolph* decision, and its modification/clarification of *Viking*, employers should still use employee arbitration agreements that contain *both* class action and PAGA waivers. This is true for several

reasons. First, as noted above, because *Viking* provided the right to compel a plaintiff to arbitrate his individual wage claims, and this part of the ruling could not be affected by *Adolph*, employers have a chance to defeat the entire PAGA action by winning at the individual arbitration stage. Granted, this is not always going to be possible or easy, but even the leverage created by the possibility of losing can create the chance to settle PAGA cases earlier and more reasonably. Individual arbitration itself may take a year to complete.

Secondly, employee PAGA waivers may prove to be invaluable because there is still an undecided aspect of PAGA law, which is interpreting the effect of a case in which most or all employees of a given employer have signed an arbitration agreement containing a waiver of their right to bring or participate in a PAGA action. There is an undecided issue, in this writer's opinion, as to whether they can still be included as similarly aggrieved employees in the so-called PAGA class.

These and many other issues still remain to be decided regarding the PAGA statute.

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