

# California Employers May Wish to Update Their Arbitration Agreements in Light of New California Court of Appeals Decision Involving PAGA

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The debate over the right to waive California Private Attorneys General Act (PAGA) claims continues.

The most recent rule, as stated by the California Court of Appeal for the Fourth District this week, is:

“Arbitration agreements between employers and employees that require arbitration of the individual portion of a PAGA claim are enforceable, but arbitration agreements that require arbitration (or waiver) of the representative portion of a PAGA claim are **not enforceable.**”

This holding comes on the heels of several recent landmark decisions involving PAGA, including the U.S. Supreme Court case of *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, where the class plaintiff, who had signed an arbitration agreement with a class waiver, was ordered to arbitrate her “individual” PAGA claims, but her “representative” PAGA claims were dismissed for lack of standing.

However, since *Viking River*, California courts have been less than inclined to follow the U.S. Supreme Court’s guidance on how to handle PAGA claims when an arbitration agreement is involved.

This week’s decision against In-N-Out Burgers is no different.

“Despite the deep deference we afford the United States Supreme Court, even on purely state law questions where the United States Supreme Court’s opinions are only persuasive, not binding, we

conclude we must follow [*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73] and hold that plaintiffs *retain standing* to pursue representative PAGA claims in court even if their individual PAGA claims are compelled to arbitration,” stated the court.

While these issues have rapidly evolved over the past several years — and are far from settled — many California employers and courts await guidance from the highly anticipated ruling of *Adolph v. Uber Technologies, Inc.* by the California Supreme Court, which involves many of these issues, and is set to be decided later this year.

In the meantime, in light of this decision and most recent rule, employers may wish to update the language in their arbitration agreements with respect to PAGA to increase the likelihood of their enforceability.

The case is [\*Piplack et al. v. In-N-Out Burgers\* G061098](#) (March 7, 2023)

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