

# 2 Ways Calif. Justices' PAGA Ruling May Play Out

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Under California's Private Attorneys General Act, does an aggrieved employee — who has been compelled to arbitrate their individual claims under PAGA and the California Labor Code — maintain statutory standing to pursue PAGA claims arising out of events involving other employees?

That is the threshold issue of first impression taken up by the California Supreme Court in the highly anticipated case of *Adolph v. Uber Technologies Inc.*, after the court [heard oral arguments](#) on May 9.

The court's pending decision is surely keeping California employers awake at night and could have far-reaching implications on the fate of PAGA, the future vitality of arbitration agreements, and the eternal tug of war between state and federal law.

Depending on how the court rules, employers could either potentially face PAGA battles in multiple forums, or in the alternative, rest easier knowing that PAGA representative claims could be extinguished by virtue of a valid arbitration agreement.

## Procedural Background and Viking River

Plaintiff Erik Adolph initially filed suit against Uber in 2019, alleging it misclassified its drivers as independent contractors rather than employees and thus failed to reimburse drivers for work-related expenses.

Adolph later amended his complaint to add claims under PAGA. Uber then compelled arbitration pursuant to an arbitration agreement Adolph had signed upon hire, but the Orange County Superior Court denied Uber's right to arbitrate Adolph's claims under PAGA.

Uber appealed the trial court's decision, but in April 2022 the California Court of Appeal [confirmed the trial court's findings](#) in an unpublished opinion. Uber then petitioned the California Supreme Court for review.

However, while Uber's petition was pending, in June 2022 the U.S. Supreme Court decided *Viking River Cruises Inc. v. Moriana*, which involved related issues. In *Viking River*, the Supreme Court [ordered the class plaintiff](#), who had signed an arbitration agreement with a class waiver, to arbitrate her individual PAGA claims but then dismissed her representative PAGA claims for lack of standing.

However, Justice Sonia Sotomayor, in a concurring opinion, invited California courts to "have the last word" on these issues. In July 2022, the California Supreme Court [granted review](#) of the *Adolph* case and requested additional supplemental briefing from the parties to address *Viking River*.

## Significant Developments Since *Viking River*

Despite the conceivable win *Viking River* delivered for employers, since that time several California appellate courts have rejected *Viking River*'s conclusion that a plaintiff loses standing to bring a representative claim under PAGA simply because the plaintiff's individual PAGA claim has been compelled to arbitration.

In fact, California courts have been less than inclined to follow the U.S. Supreme Court's guidance on handling PAGA claims when an arbitration agreement is involved.

For example, in February 2023 in *Galarsa v. Dolgen California LLC*, the California Court of Appeal's Fifth Appellate District [disagreed with](#) the U.S. Supreme Court's conclusion that California law requires dismissal of a PAGA plaintiff's representative claims when arbitration of their individual claims is ordered, noting that a federal court's interpretation of California law is not binding and the California Supreme Court has yet to decide the question.

Ultimately, the *Galarsa* court refused to dismiss the plaintiff's representative claims, concluding that "a plaintiff's PAGA standing does not evaporate when an employer chooses to enforce an arbitration agreement." The *Galarsa* court went so far as to predict that the California Supreme Court would agree with its analysis and rule similarly in *Adolph*.

Since *Galarsa*, multiple notable decisions have come down from the California appellate courts on this issue, all of which have refused to dismiss the PAGA plaintiff's representative claims under *Viking River*. Instead, these courts have stayed the representative claims, pending the resolution of arbitration on the PAGA plaintiff's individual claims.

In the most recent decision, *Piplack v. In-N-Out Burgers*, the California Court of Appeal's Fourth Appellate District [stated in March](#):

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.

The Piplack court went on to conclude that "paring away the plaintiff's individual claims [through arbitration] does not deprive the plaintiff of standing to pursue representative claims under PAGA, so long as the plaintiff was employed by the defendant and suffered one or more of the alleged violations."

Accordingly, while the path forward is yet to be decided, these decisions may offer insight and foreshadowing on how the California Supreme Court will rule if it refuses to follow Viking River.

### **Potential Outcomes of Adolph v. Uber and Impact on Employers**

On May 9, during oral arguments before the California Supreme Court, the parties in Adolph primarily discussed the hurdles presented by the court's 2020 decision in *Kim v. Reins International California Inc.*, in which the court [allowed litigation](#) of representative claims under PAGA even after the plaintiff settled his individual claims.

Uber argued that the facts of *Kim* are easily distinguishable given that the court in *Kim* only had to address what to do once a PAGA plaintiff's labor code claim was settled in individual arbitration and dealt with an agreement that expressly excluded the plaintiff's claims under PAGA.

In response, Adolph argued that he maintains standing under *Kim*, and the fact that he is covered by an arbitration agreement does not strip him of standing to seek the representative penalties on behalf of others. The parties also disagreed about what a PAGA plaintiff must maintain to have "skin in the game" such that the plaintiff can represent others under PAGA.

The court took the matter under consideration and is expected to make a ruling by Aug. 7.

So, what are the potential outcomes now that the court has heard the parties' arguments and taken the matter under review?

#### *Court Rejects Viking River*

The first potential outcome, and arguably the most likely, will be that the court largely follows the direction of *Galarsa* and the other opinions from the California courts of appeal, rejects *Viking River*, and holds that employees who have their individual PAGA claims compelled to arbitration maintain standing to pursue a representative PAGA action in civil court.

If the court goes that route, which is supported by legislative history and prior case law, such as *Kim v. Reins*, employers could find themselves facing similar battles in multiple forums.

For example, pursuant to a valid arbitration agreement, employers could first find themselves defending against a PAGA plaintiff's individual claims in arbitration. Then, depending on the result of the individual arbitration and whether the plaintiff is found to be an aggrieved employee under PAGA, that same employer could find itself defending against a representative PAGA action in court.

Likewise, because employers must cover the cost of arbitration, such a scenario could result in substantially increased costs in defending PAGA actions. Plaintiffs may be prompted to force an employer's hand in both forums, which will drive up associated fees, costs and prospective settlement value. This result could cause employers to be more selective in enforcing an arbitration agreement signed by a plaintiff.

Another impact that a rejection of *Viking River* could create is a chilling effect on the settlement of individual PAGA claims.

First, employers may feel less inclined to settle PAGA claims on an individual basis if there is still a looming prospect that they could face a representative action despite the individual settlement. Likewise, PAGA plaintiffs may feel less inclined to settle early, given the ability to choose their forum and route forward.

### *Court Upholds Viking River*

On the other hand, the court could potentially uphold *Viking River* and find that representative standing is extinguished when a PAGA plaintiff's claims are compelled to arbitration — meaning, if a PAGA plaintiff is forced to arbitrate his or her individual PAGA claims, a decision or settlement of those individual PAGA claims precludes that plaintiff's ability to represent others in the representative action.

Such an outcome would create a roundabout path to waiving representative PAGA claims, a situation that has been largely unenforceable since 2014.

Nonetheless, suppose the court indeed follows *Viking River*. In that case, employers will secure a massive victory as the viability and validity of a well-crafted arbitration agreement could prevent these costly representative claims.

Likewise, such a finding would discourage PAGA plaintiffs and their attorneys from threatening representative PAGA actions against employers. This result would also encourage quick

settlements, as PAGA plaintiffs could no longer use the threat of a representative action as leverage in negotiating bigger payouts.

However, choosing to follow Viking River presents potential pitfalls for California employers. While employers with valid arbitration agreements containing class and representative waivers may no longer face representative actions under PAGA, they could be subjected to hundreds or thousands of separate costly arbitrations, all for the same wage and hour violations.

## The Path Forward and Fate of PAGA

No matter how the court rules in Adolph, there is already a sizable legislative overhaul to PAGA on the ballot in 2024. California's Fair Pay and Employer Accountability Act will seek to reform PAGA by placing increased enforcement mechanisms solely in the hands of the Labor and Workforce Development Agency so that workers recover wages faster and employers are no longer targeted by private litigation where, often, the primary beneficiaries are the plaintiff's lawyers.

However, in the meantime, employers, their counsel and courts are left to wrestle with a split of authority and hope that the court offers some much-needed clarity on issues that have routinely plagued California courts for more than a decade.

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