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The California Supreme Court Sets Viking River Cruise Decision Adrift

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As we predicted (here), employees can be compelled to individually arbitrate their Labor Code claims under the Private Attorneys General Act of 2004 ("PAGA"), but an arbitration agreement that prohibits employees from bringing a representative action on behalf of other employees in court violates California public policy. In *Adolph v. Uber Technologies*, *Inc.*, S274671 (July 17, 2023) ("*Adolph*"), the California Supreme Court analyzed whether an employee retained standing to bring a PAGA action on behalf of other aggrieved employees despite the existence of a valid arbitration agreement requiring arbitration of the employee's individual PAGA claims. The Court answered with an unequivocal and unanimous "yes."

Erik Adolph filed a class action and PAGA representative action lawsuit against Uber arising from his work as a delivery food driver for Uber Eats. Previously, Adolph had signed an arbitration agreement that contained a class action waiver and required Adolph to arbitrate any claims against Uber on an individual basis. The agreement also stated that Adolph would not "bring a representative action on behalf of others under [PAGA] in any court or in arbitration." Based on the agreement, Uber moved to compel arbitration of Adolph's individual claims and dismiss the class claims, which the trial court granted. Adolph then sought to pursue only his PAGA claims on behalf of himself and other aggrieved employees. Uber again moved to compel, claiming Adolph had to arbitrate the question of whether he was an aggrieved employee under PAGA. Based on existing California case law that did not permit the splitting of PAGA claims into individual and representative claims, the trial court denied the motion, which the court of appeal affirmed.

One month later, the U.S. Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, 596 U.S. _, 142 S.Ct. 1906 (2022), which permitted arbitration of individual PAGA claims. In the decision, the U.S. Supreme Court also reasoned that an employee litigating individual PAGA claims in arbitration would be deprived of standing to bring a representative action in court and would be placed in a position no different than a member of the general public. Justice Sotomayor, writing in a concurrence, stressed that the issue of standing is a question for the state court to decide.

Not surprisingly, when the question was posed to the California Supreme Court, it rejected the standing analysis by the U.S. Supreme Court. The *Adolph* Court held that even if an employee is required to arbitrate his or her individual PAGA claims, the employee retains statutory standing under Labor Code section 2699(c) to bring claims on behalf of other aggrieved employees as long as the

employee was employed by the “alleged violator,” and had suffered one or more alleged Labor Code violations.

Notably, the Court also rejected the argument that an individual settlement of the employee’s Labor Code claims deprives the employee of standing to represent other aggrieved employees. Rather, the Court found standing required only “the *fact* of a violation” (emphasis added), regardless of whether it had been remedied, and “post-violation events,” such as an individual settlement, added an unacceptable “expiration element” to the statutory standing requirements.

Addressing Uber’s concern that employees might be able to relitigate the issue of whether they are an aggrieved employee after arbitration concluded, *Adolph* holds that the decision of the arbitrator is binding once it is confirmed and entered as a final judgment under Civil Code section 1287.4. Employees cannot relitigate whether they are aggrieved for standing purposes should an arbitrator determine the employee suffered no Labor Code violations, but this may be cold comfort to employers. If the arbitrator finds the employee suffered one Labor Code violation, the employee has standing to litigate a whole host of alleged Labor Code violations on behalf of other employees. And while the Court stated that a trial court may exercise its discretion to stay the non-individual PAGA claims while the arbitration proceeds, it did not require the trial court to do so, again leaving the employer possibly defending individual and non-individual claims in different locations.

Adolph certainly deals a blow to the benefits that employers may have obtained from the *Viking River* decision, and should raise questions with employers as to what they should do with their current arbitration agreements. Employers would be wise to thoroughly examine the issues and review their current arbitration agreements with experienced employment counsel.

Employers also should take note that this is the first of several upcoming PAGA cases to be decided by the Court. Up next are two more: Can a plaintiff in one PAGA representative action intervene and object to a settlement or judgment in another action that tries to extinguish the plaintiff’s case? Does a trial court have inherent authority to strike representative PAGA claims if they are unmanageable and require extensive individualized analysis of each employee’s factual circumstances? Again, stay tuned.

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