



...or Not to Arbitrate?" by Kartikey Pradhan, Esq. 23

The California Supreme Court's much anticipated and "unsurprising" decision in

Adolph v. Uber Technologies, Inc. ostensibly deals a significant blow to employers by holding that an employee compelled to arbitrate claims under the Private Attorney General Act ("PAGA") maintains standing to bring PAGA action on behalf of aggrieved employees in court. The decision addresses the United States Court's holding in *Viking River Cruises, Inc. v. Moriana*, that overturned the *Iskanian* rule, which did not permit PAGA claims to be compelled to arbitration. The SCOTUS' decision provided much-needed relief, albeit temporary, from the havoc created by Plaintiff's attorneys filing PAGA Actions to obtain leverage by bringing class actions without the need to obtain class certification.

Refresher on *Viking River Cruises, Inc. v. Moriana*

As a refresher, on June 15, 2022, the U.S. Supreme Court issued its decision in *Viking River*, overruling *Iskanian*, in part, holding that PAGA actions may be split into individual and representative claims, leaving individual claims able to be compelled into arbitration. However, the Court noted that these claims could not simultaneously exist in arbitration and state court. A plaintiff could only maintain standing in the representative action if they similarly maintained their individual claims. Should the plaintiff's individual claims be compelled to arbitration, they would lose standing to pursue the representative claim, subjecting it to automatic dismissal.

This was, for all intents and purposes, a victory for California employers who have been subjected to countless PAGA lawsuits since its inception. Nevertheless, the victory was short-lived, as questions remained regarding the issue of standing. Now, those questions have been answered by the California Supreme Court thanks to the ruling in *Adolph*.

Unpacking the Court's Ruling in *Adolph*

First, the *Adolph* Court held that a plaintiff, who is an aggrieved employee, maintains standing to pursue representative claims in court, even if their individual claims have been compelled to arbitration. In reaching this conclusion, the Court noted that PAGA imposes two requirements for standing: (1) the plaintiff must allege they were employed by the defendant-employer; and (2) that they were subject to one or more Labor Code violations. Indeed, the Court noted that "[s]tanding under PAGA is unaffected by enforcement of an agreement to adjudicate a plaintiff's individual claim in another forum."

Despite its initial sting, the Adolph ruling does come with a silver lining. Indeed, the Court stated that an arbitrator's decision regarding plaintiff's status as an "aggrieved employee" would be binding on the trial court. Therefore, an arbitrator's finding that plaintiff is not an "aggrieved employee" would necessarily destroy plaintiff's standing to pursue their representative claims in court. Moreover, the Court ruled that a plaintiff's individual claims are not severed from the representative claims, and therefore, the trial court maintains discretion pursuant to Cal. Code Civ. Proc. § 1281.4 to stay proceedings pending the outcome of the arbitration. Accordingly, it can be surmised that, because standing is ultimately predicated on the arbitrator's decision, the better approach is to move for a stay of the representative action until the individual PAGA claims are decided. Indeed, when drafting arbitration agreements, employers should include such a clause. Also, of note, because the California Supreme Court in Adolph held that Plaintiff's status as an aggrieved employee, instead of the redressability of an injury determines PAGA standing, the likelihood of an arbitrator stripping Plaintiff of PAGA standing is unlikely.

What's Next for Employers

Although possible changes by the legislature may come in November 2024, now more than ever, employers should review their wage and hour practices and arbitration agreements to ensure their compliance with the Labor Code and *Viking River/Adolph*. If employers can make a showing that an employee is not "aggrieved" as to their individual claims, the employee will lose standing to pursue their representative claims in state court, saving employers on costly litigation fees. Additionally, employers should look to revise their arbitration agreements to specifically include an agreement to stay any representative claims in state court pending the outcome of arbitration of the individual claims. Employers should also ensure that arbitration agreements are carefully drafted and are airtight with a severability clause, to avoid the court striking language compelling employees to arbitrate PAGA claims and/or stay representative claims.

Conclusion

The attorneys at Kaufman Dolowich & Voluck have extensive experience in drafting and enforcing arbitration agreements, along with litigating PAGA actions in both state court and arbitration. They also provide expert and proactive counsel regarding the myriad obligations shouldered on California employers to help curb these claims from the outset.

If you have any questions regarding the Adolph ruling, revising or drafting an arbitration agreement, or litigating a PAGA action, please feel free to reach out to the authors of this article, Partner Kartikey Pradhan and Associate Regan Heslop for more information.