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PAGA: What's gone, what's left, and what's next

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Approximately twenty years ago, the California Legislature enacted the labor law known as the Labor Code Private Attorneys' General Act of 2004 (PAGA). Since its inception, it has resulted in the recovery of millions of dollars in penalties arising from wage theft.

Still, on Dec. 14, 2021, the PAGA world was plush with questions. There were, however, a few central tenets known to all. These central tenets were that an action under PAGA is an action that can only be brought by an employee as a *proxy of the State of California* by and through its agency, the Labor and Workforce Development Agency (LWDA). In order to have standing, that employee only had to: (1) be employed by the employer; and (2) be aggrieved by one Labor Code violation. According to the California Supreme Court, because the employee bringing the action is a mere proxy of the State, an arbitration agreement could not affect a PAGA claim as an employee could not bind the State to waive or arbitrate a PAGA Action. And, according to the California Supreme Court, all actions under PAGA were representative in nature: they had to seek redress not just for the employee who brought the Action for the State, but for other employees aggrieved by the same practices or policies.

A day later, the Supreme Court of the United States granted *certiorari* to review a group of decisions in which arbitration agreements were found not to have been formed between the PAGA-employee and the employer. The grant-ing of cert to review PAGA which had then been repeatedly undisturbed by SCOTUS was seen by many as a result of a political agenda undertaken by a new 6-to-3 conservative majority on the Court.

Then, on Dec. 15, 2022, it issued its head-scratching opinion in *Viking River Cruises, Inc. v. Moriana*. Pandemonium ensued with over a decade's long jurisprudence building on and clarifying PAGA's framework flipped on its head. Indeed, the U.S. Supreme Court engaged in academic gymnastics, creating for the first time two components of the PAGA claim: an "individual" component and a "representative" component. By doing so, the U.S. Supreme Court gave possession of the individual component to an employee, at least insofar as it came to being able to agree to arbitrate that component. Then, in *dicta*, it opined that such an agreement also appeared to strip that employee of proceeding with the "representative" component. In other words, in the Supreme Court's view, signing an arbitration agreement effectively barred bringing a representative PAGA claim for recovery of penalties on behalf of other employees. Although, once again, the portion of the opinion regarding standing was *dicta*, after *Viking*, it was no

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longer clear to litigants or trial courts how PAGA standing could be achieved and lost; when and how a PAGA representative can bind the State; and other basic tenets necessary to be understood to litigate and/or rule on PAGA litigation.

Understanding the vacuum left by the U.S. Supreme Court's ruling, a little over a year later, the California Supreme Court handed down *Adolph v. Uber Technologies, Inc.*, which aimed to tackle the first and most basic issue created by the U.S. Supreme Court: does one lose standing to bring a representative action for other employees on behalf of the LWDA merely because of the signing of an arbitration agreement? Although SCOTUS suggested that was the case, the California Supreme Court clarified that it was, in fact, decidedly not the case. It held that, while an employee may sign away their right to adjudicate the "individual" PAGA component of the PAGA action, they do not lose the right to also continue with the "representative" PAGA component in Court.

Thus, a year and-a-half after the Supreme Court of the United States sent shockwaves with its Viking River Opinion, we do know a few things: (1) PAGA is not dead, completely preempted or constitutional; and (2) even employees who sign arbitration agreements can continue to bring PAGA representative actions. But beyond that, much remains unclear. And in the months since, we have seen Courts go in different directions on what to do when faced with a Motion to Compel Arbitration of a PAGA claim. It appears that a majority of courts are opting to stay the representative action pending arbitration of the individual PAGA claim. However, it is well documented that some Courts have declined to stay the representative action, and have permitted the individual PAGA arbitration to run concurrently with the representative PAGA action in Court. Moreover, some Judges have openly opined that the text of *Adolph* supports a finding that a PAGA plaintiff may dismiss the individual component of the PAGA Action, forego arbitration, and continue with the representative PAGA proceeding without losing standing.

In addition, it is entirely unclear what, if any, preclusive effect the arbitrator's ruling may have in the instances Courts have stayed the "representative" component of the PAGA action to await a ruling on the "individual" component. Many believe that an arbitrator's finding that no Labor Code violations would strip that employee of standing to continue with the "representative" component, few believe that this finding could have preclusive effect in another PAGA proceeding. On the other hand, there is also the possibility that a finding in *favor* of an employee in an individual PAGA arbitration may have preclusive effect against the employer in some capacity. Indeed, while many courts have stayed the "representative" PAGA component pending the results of the arbitration of the "individual" component, it seems that it is being done less with a plan and more so to kick the can down the road until they have further guidance from the California Supreme Court.

However, the Courts are not the only place that corporate interests have sought to diminish PAGA protections. Indeed, corporate lobbies have fought against PAGA's worker protections in the Legislature since its inception, and after a reinvigorated effort in recent years, have qualified a ballot initiative that would repeal PAGA and replace it with the "Fair Pay and Employer Accountability Act." Beyond urging voters to scale back employee rights under PAGA, recent political mailers suggest those same interests are also urging California Legislators to make changes that would remove the law's teeth that incentivize attorneys and employees to combat corporate wage theft. As detailed in the 2020 "UCLA Study California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions from Lawbreaking Corporations," before PAGA, enforcement actions were rare. These actions by corporate interests reflect a renewed effort to go back to those days.

In sum, a few years ago, it seemed that PAGA was being solidified and its framework crystalized. Years later, litigants and trial courts are on the frontier again, awaiting further guidance from the California Supreme Court against a backdrop of a looming potential that PAGA will be completely eradicated or otherwise reformed beyond recognition. While it appears that in all likelihood PAGA Actions are here to stay, the lesson of the past few years is that in the world of PAGA, nothing is certain.

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