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News & Types: Litigation Update

PAGA and the FAA: How California Courts are Vetting the Arbitration Bypass

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The tension between the Federal Arbitration Act (FAA) and California's Private Attorneys General Act (PAGA) continues to be a battleground following the U.S. Supreme Court's 2022 *Viking River Cruises* decision, which held that an employee's individual PAGA claim could be compelled to arbitration. Though the California Supreme Court in 2023 maintained that a plaintiff retains standing for non-individual (representative) claims even if their individual claim is arbitrated, some plaintiffs have adopted a "headless" PAGA strategy. This tactic involves disclaiming their personal PAGA claim to ensure the entire representative action bypasses arbitration and remains in civil court, creating a significant legal controversy over whether PAGA allows a plaintiff to sue solely on behalf of others.

The legality of this "headless" strategy has caused a notable split among California appellate courts, centering on the interpretation of the pre-July 2024 PAGA statute, which stated an aggrieved employee "may bring a civil action on behalf of himself or herself and other current or former employees." This year, the Fifth Appellate Court endorsed the "headless" tactic in two separate cases, reasoning that the language was ambiguous, and the word "and" should be seen as an inclusive disjunctive term (e.g., "A or B, or both"). Conversely, the Second Appellate Court, in *Leeper v. Shipt, Inc.* (2024) 107 Cal.App.5th 1001 firmly rejected this approach, applying a plain language reading that held "and" to be a conjunctive (e.g., "A and B always"), thereby requiring every PAGA action to include both an individual and a non-individual component. This conflict is critical for California employers, as it determines whether plaintiffs can effectively shed their arbitrable individual claims to avoid arbitration entirely.

The California Supreme Court has granted review in *Leeper* to resolve this pressing legal issue and will be determine the future viability of the "headless" PAGA tactic and influencing PAGA litigation and arbitration defense strategies for years to come. Our firm is closely monitoring these developments in the evolving landscape of California employment law.

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