

# ***Leeper v. Shipt*: Will California Hamper Arbitration in PAGA Employment Lawsuits?**

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In *Leeper v. Shipt*, the California Supreme Court will revisit the ongoing question of whether, and to what extent, employees can pursue litigation in court for violation of the California Private Attorneys General Act (PAGA), Labor Code § 2698, et seq. despite signing valid and binding arbitration agreements.

## **Background of PAGA Actions and Arbitration**

PAGA permits an employee who experienced a Labor Code violation to sue an employer for civil penalties on behalf of themselves individually, other “aggrieved” employees, and the state of California.

In *Viking River Cruises, Inc. v. Moriana*, the U.S. Supreme Court ruled that employers are “entitled to enforce [arbitration] agreement[s] insofar as [they] mandate[] arbitration of [the employee’s] individual PAGA claim.” In doing so, the Supreme Court reversed California’s precedent prohibiting courts from compelling arbitration of the employee’s individual claims in PAGA lawsuits, as discussed in greater detail in Troutman Pepper Locke’s [prior article](#) on the matter.

In a 2023 decision, and in a direct response to *Viking River Cruises* — the California Supreme Court determined that an employee could still pursue claims in court on behalf of other employees under PAGA, even when that employee’s individual PAGA claim is subject to arbitration. In other words, the Court permitted the representative portion of PAGA claims to continue in court, even if the employee’s individual PAGA claim was arbitrable.

Based on this framework, trial courts tend to compel employees subject to binding arbitration agreements to arbitrate their individual PAGA claims, while staying the remainder of the case constituting the representative PAGA claims until the arbitration has concluded.

## **Employees Attempt to Avoid Arbitration by Asserting “Representative-Only” PAGA Actions, With Mixed Results**

Some employees have attempted to avoid arbitration by bringing “representative only” PAGA claims. They argue they are only bringing the lawsuit on behalf of the state and other aggrieved employees, not themselves, thereby circumventing mandatory arbitration.

As explained by the Court of Appeal in *CRST Expedited, Inc. v. Superior Court*, employees seek to avoid arbitration in PAGA cases for at least two reasons: (1) to avoid trial courts staying the representative portion of the

claim while the arbitration proceeds, which can significantly delay the litigation; and (2) to avoid adverse decisions by an arbitrator that would jeopardize their standing to pursue the remaining representative PAGA claims in court.

### **Courts Are Split on Whether Employees Can Allege Representative-Only PAGA Claims**

Some courts have held that individual PAGA claims are “necessarily” included in every PAGA lawsuit. In [Leeper v. Shipt](#) and [Williams v. Alacrity Solutions Group, LLC](#), the Court of Appeal of California concluded that individual PAGA claims are inherently part of every PAGA action.

Under these cases, employees cannot avoid arbitration of their individual PAGA claims by ostensibly “waiving them” to pursue a representative-only action.

Other courts disagree. In [Balderas v. Fresh Start Harvesting, Inc.](#), [Rodriguez v. Packers Sanitation Services Ltd., LLC](#), and [CRST Expedited, Inc.](#), the Court of Appeal of California concluded employees can bring representative-only PAGA lawsuits without seeking penalties for themselves.

### **California Supreme Court Will Determine Whether Employees Can Avoid Arbitration by Pleading “Representative-Only” PAGA Actions**

To resolve this conflict, the California Supreme Court has agreed to review the *Leeper* and *Williams* decisions. The court is expected to decide whether PAGA actions necessarily have both an individual component and a representative component, and whether employees can file a representative-only PAGA lawsuit, which could allow them to avoid arbitration.

The California Supreme Court’s decision may significantly affect PAGA litigation. If employees can bring “representative-only” PAGA lawsuits, employers may be unable to enforce arbitration agreements in most PAGA cases because many employees will waive their individual PAGA claim to avoid arbitration. This could effectively neutralize *Viking River Cruises* by creating an avenue for employees to avoid arbitration in PAGA lawsuits.

If, by contrast, employees must pursue their individual claims, employees may be compelled to arbitrate their individual PAGA claim before litigating the representative PAGA claims in court. If the employee is unsuccessful in arbitration, meaning they cannot prove to the arbitrator that they experienced a Labor Code violation, they will be unable to proceed with the representative PAGA claim. Employers may therefore avoid costly and time-consuming representative PAGA litigation, including discovery about other employees, until after the employee prevails in arbitration.

Employers should continue to evaluate whether arbitration agreements are appropriate for their business, particularly as they pertain to non-PAGA lawsuits.

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