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Uber Can’t Compel Arbitration of PAGA Claim According to California Court

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On April 21, 2021, the Second Appellate District of the Court of Appeal of the State of California filed an unpublished opinion rejecting Uber’s attempt to enforce an arbitration provision that waived an employee’s right to bring a claim under the California Private Attorneys General Act (PAGA). This statute authorizes “aggrieved employees” to file lawsuits to recover civil penalties from employers for violations of the California labor code.

The plaintiff, Jonathan Gregg, filed a lawsuit against Uber in August 2018, alleging that the ride-share company “willfully misclassified him as an independent contractor rather than an employee,” which led to violations of California Wage Order 9-2001 and several other Labor Code provisions that triggered his rights under PAGA. In response to the suit, Uber filed a motion to compel arbitration under the Arbitration Provision of the “Technology Services Agreement,” which the plaintiff was required to sign before becoming a driver. The Los Angeles Superior Court denied Uber’s motion in December 2019, which led to the present appeal.

Uber contended that the question of whether the plaintiff was mischaracterized as an independent contractor was a “threshold issue” separate and distinct from the PAGA claim, and therefore subject to arbitration. The appellate court rejected this argument, stating that threshold issues involving whether a plaintiff is an aggrieved employee under PAGA cannot be split into individual arbitrable and representative nonarbitrable components. The court reasoned that “‘a PAGA-only representative action is not an individual action at all, but instead is one that is indivisible and belongs solely to the state.’” Therefore, in the court’s view, a plaintiff cannot be required by contract to submit any part of a representative PAGA action to arbitration.

In two previous cases, *Provost v. YourMechanic Inc.* and *Contreras v. Superior Court*, California courts have rejected nearly identical attempts to distinguish the plaintiffs' classification under PAGA as a threshold issue of arbitrability. Uber contended that the court should not follow *Provost* and *Contreras*, which sought to arbitrate whether the plaintiffs in those cases were "aggrieved." Here, Uber argued, it sought to arbitrate whether the plaintiff was an "employee." The court rejected this argument as seeking to create a "distinction without a difference."

Uber's second argument – that the trial court should have enforced the arbitration provision's PAGA waiver by dismissing the representative PAGA claim and compelling arbitration of the plaintiff's PAGA claim on an individual basis – was equally unpersuasive to the court.

In the 2014 case *Iskanian v. CLS Transportation Los Angeles LLC*, the California Supreme Court held that an employee's right to bring a PAGA action is unwaivable, and an employment agreement that seeks to compel the waiver of representative PAGA claims is therefore contrary to public policy and unenforceable. Uber argued that *Iskanian* has since been abrogated by the 2017 U.S. Supreme Court case *Epic Sys. Corp. v. Lewis*, which held that an employment arbitration provision was enforceable despite the right of employees to engage in concerted activities for the purpose of collective bargaining and mutual aid or protection. The panel rejected this contention, noting that *Epic* addressed a different issue, which pertained to the enforceability of an arbitration provision against challenges that it violated the National Labor Relations Act.

With this ruling, the appellate court continued the ongoing trend among California courts of holding PAGA waivers unenforceable. The decision also signaled the court's unwillingness to deem the question of employee classification as separate and distinct from the PAGA claim. Companies should take note of this decision, as well as those preceding it, and consider their potential impact on the permissible scope of arbitration provisions.

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- **Shiva Pedram**
  Associate