



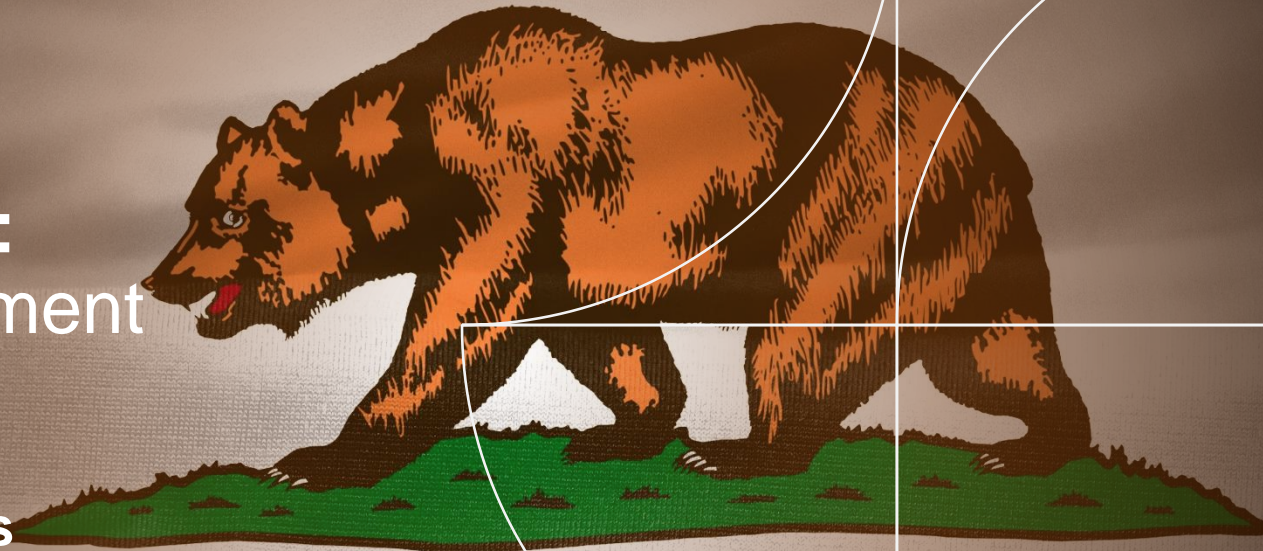
2023 Cal-Peculiarities: How California Employment Law is Different

Part 3: 2023 PAGA Peculiarities

October 18, 2023

Seyfarth Shaw LLP

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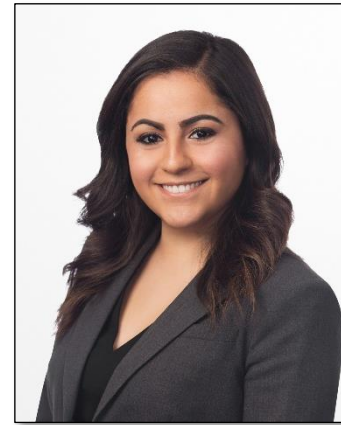
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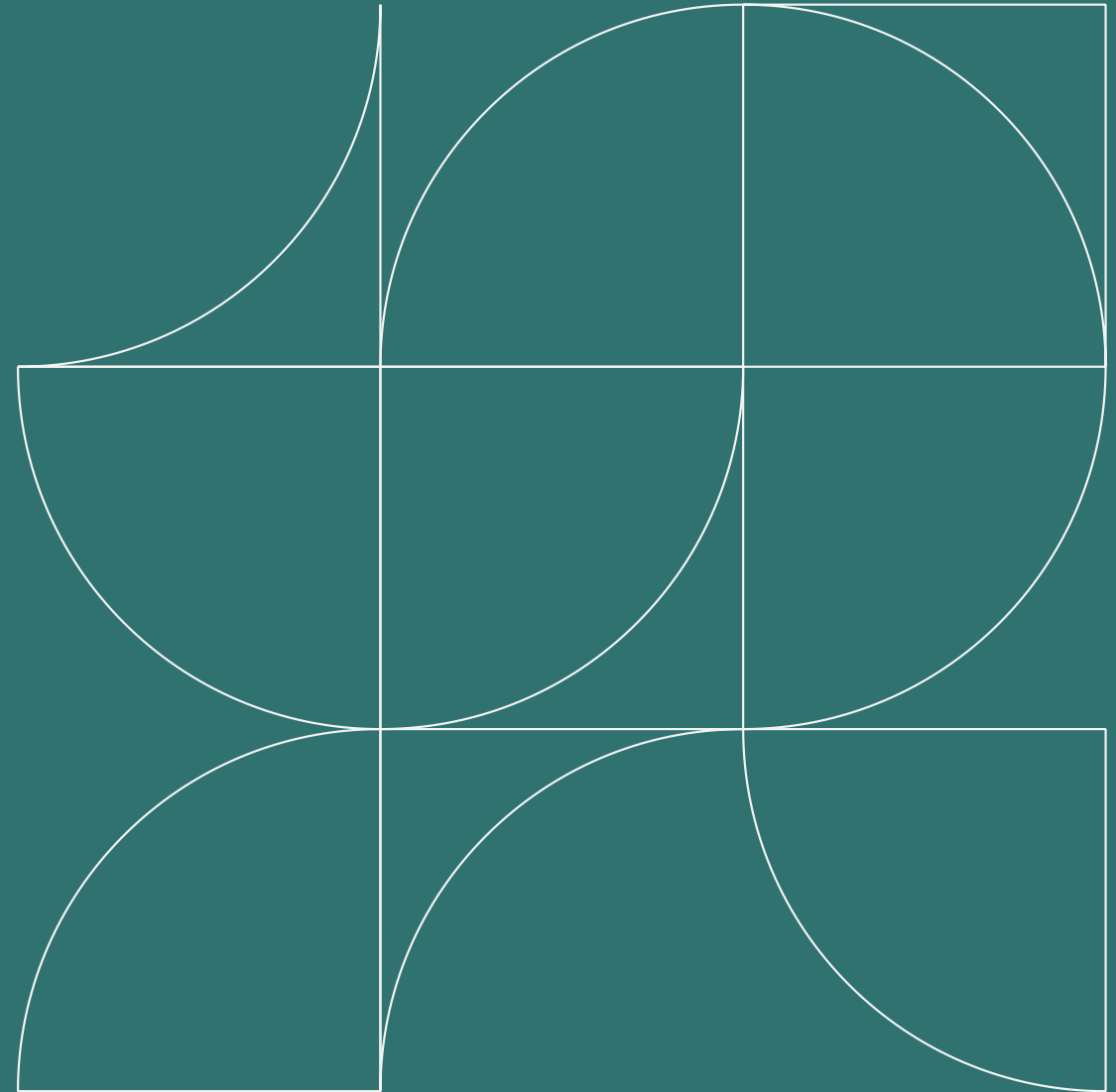


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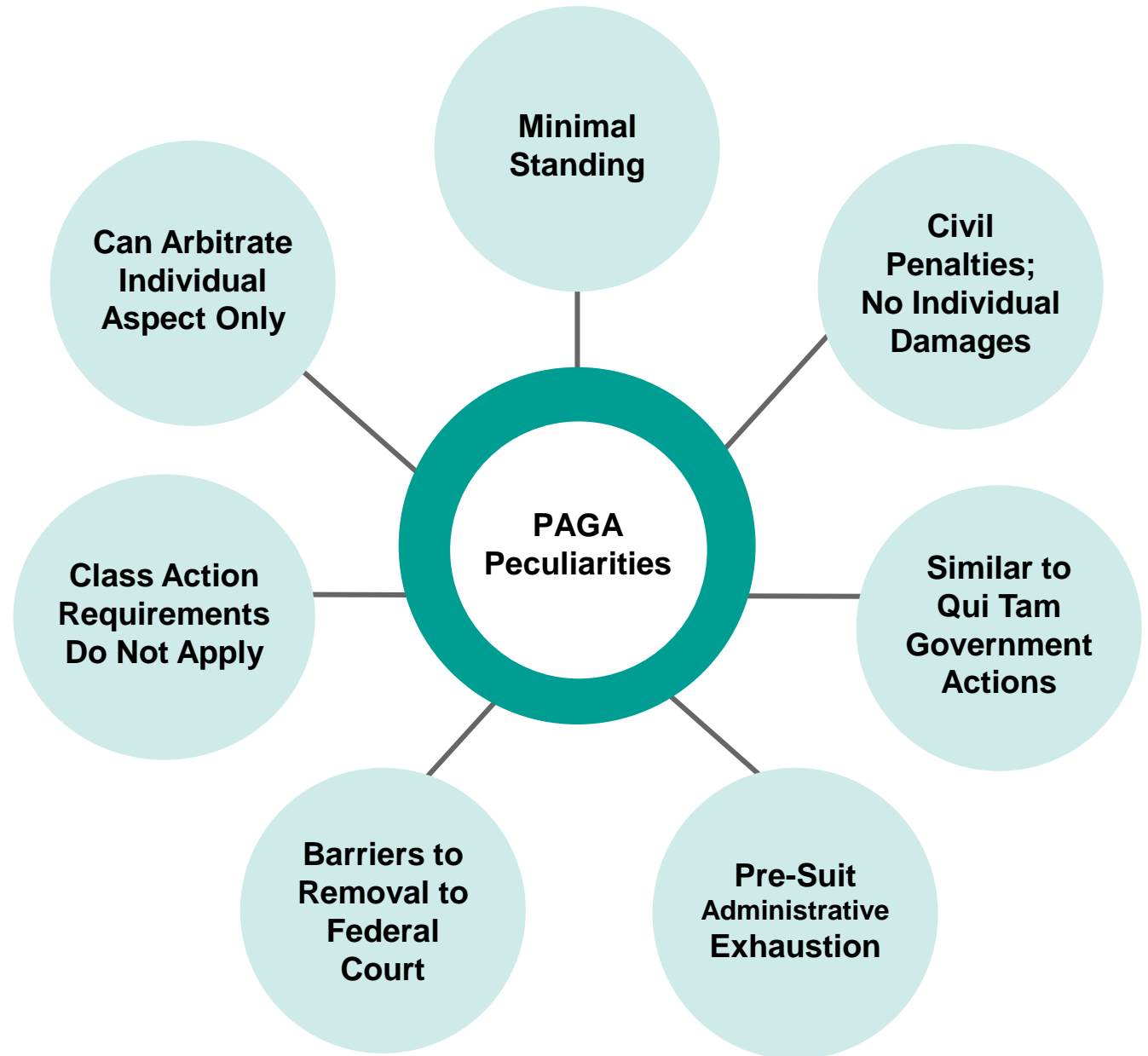
Agenda

- 01** Background
- 02** Arbitration of PAGA claims
- 03** Standing Issues
- 04** Potential Future Developments

PAGA Peculiarities: An Overview

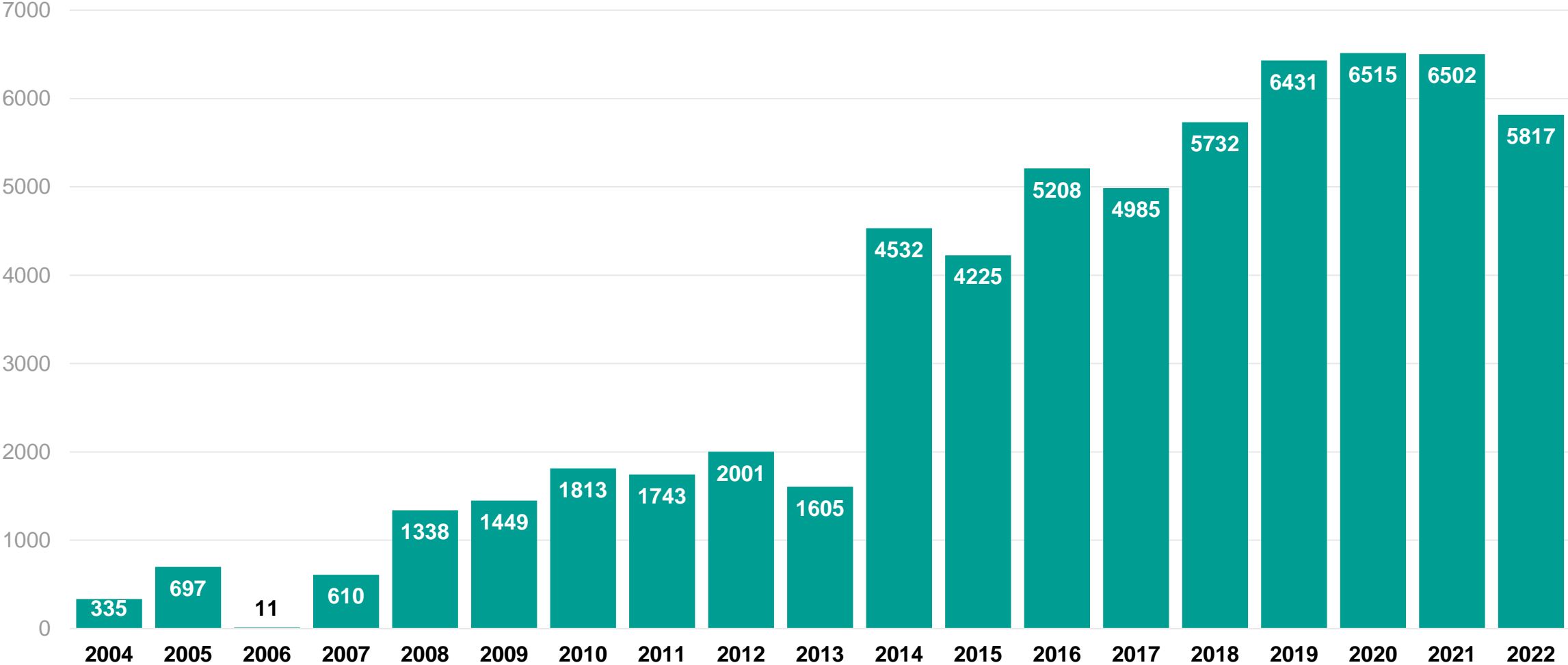


PAGA Peculiarities

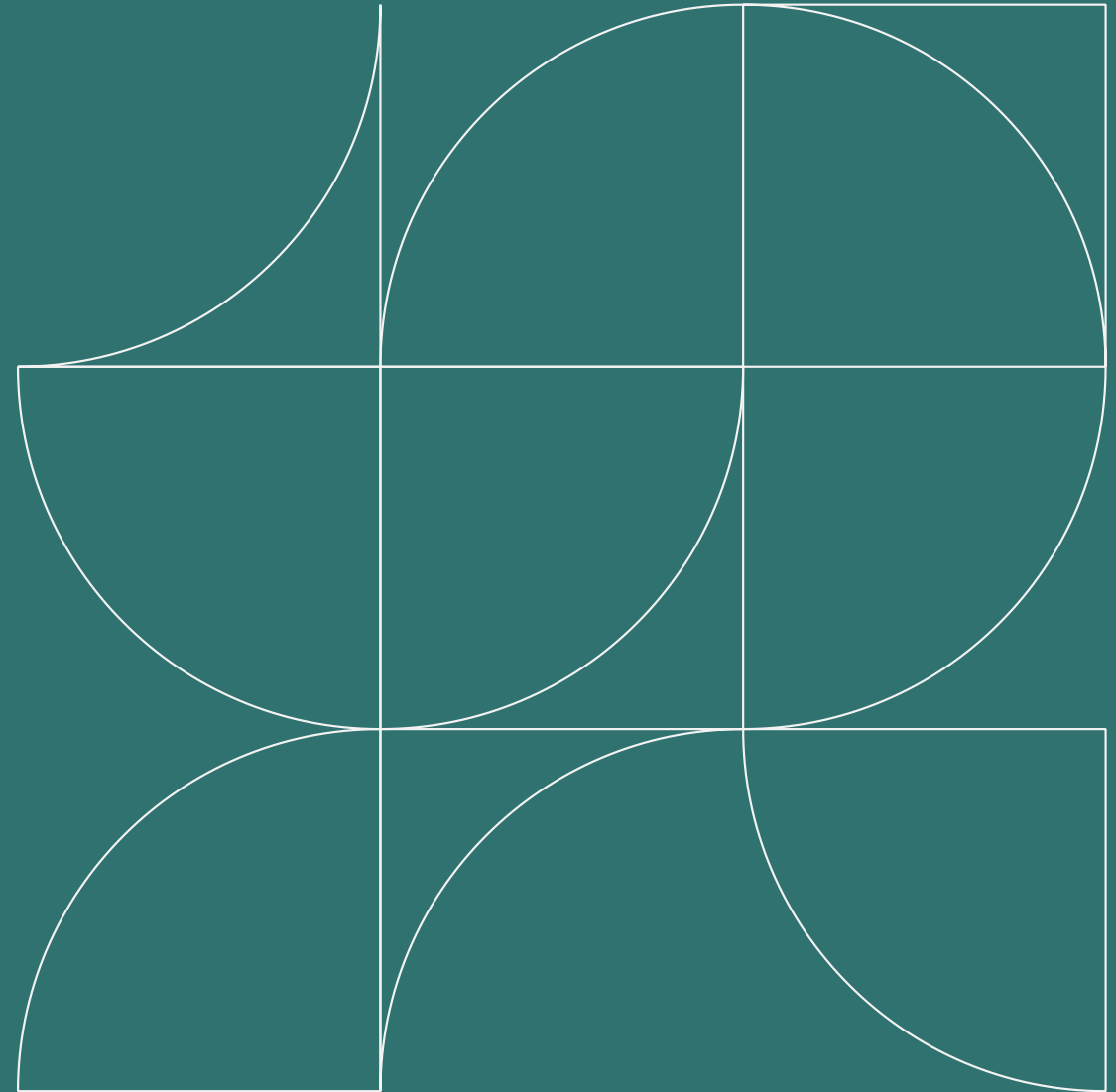


Steep Increase in PAGA Notices Since Enactment

Number of PAGA Notices



Arbitration of PAGA Claims



Viking River and Adolph v. Uber



- June 2022: Viking River held individual PAGA claim subject to arbitration and plaintiff loses standing to pursue representative claim once submitted to arbitration
- Throughout 2023: California Courts of Appeal hold that compelling individual PAGA claims to arbitration does not eliminate standing
- July 2023: Adolph held that compelling individual PAGA claims to arbitration does not result in PAGA plaintiffs losing standing to pursue the representative PAGA claim under state law.

- *Duran v. EmployBridge Holding Co. (2023)*
 - Affirmed the trial court’s decision to deny the motion to compel because the arbitration agreement included language that “claims under PAGA ... are not arbitrable under this agreement.”
 - The Court of Appeal dismissed the employer’s argument that this agreement was entered into pre-Viking River and should be interpreted to mean only representative PAGA claims are not arbitrable.
- *Westmoreland v. KinderCare Education, LLC (2023)*
 - Poison pill language rendering agreement invalid if class action waiver found unenforceable in a pre-Viking River arbitration agreement precluded individual PAGA claims from being compelled to arbitration

The Aftermath of Viking River and Adolph v. Uber

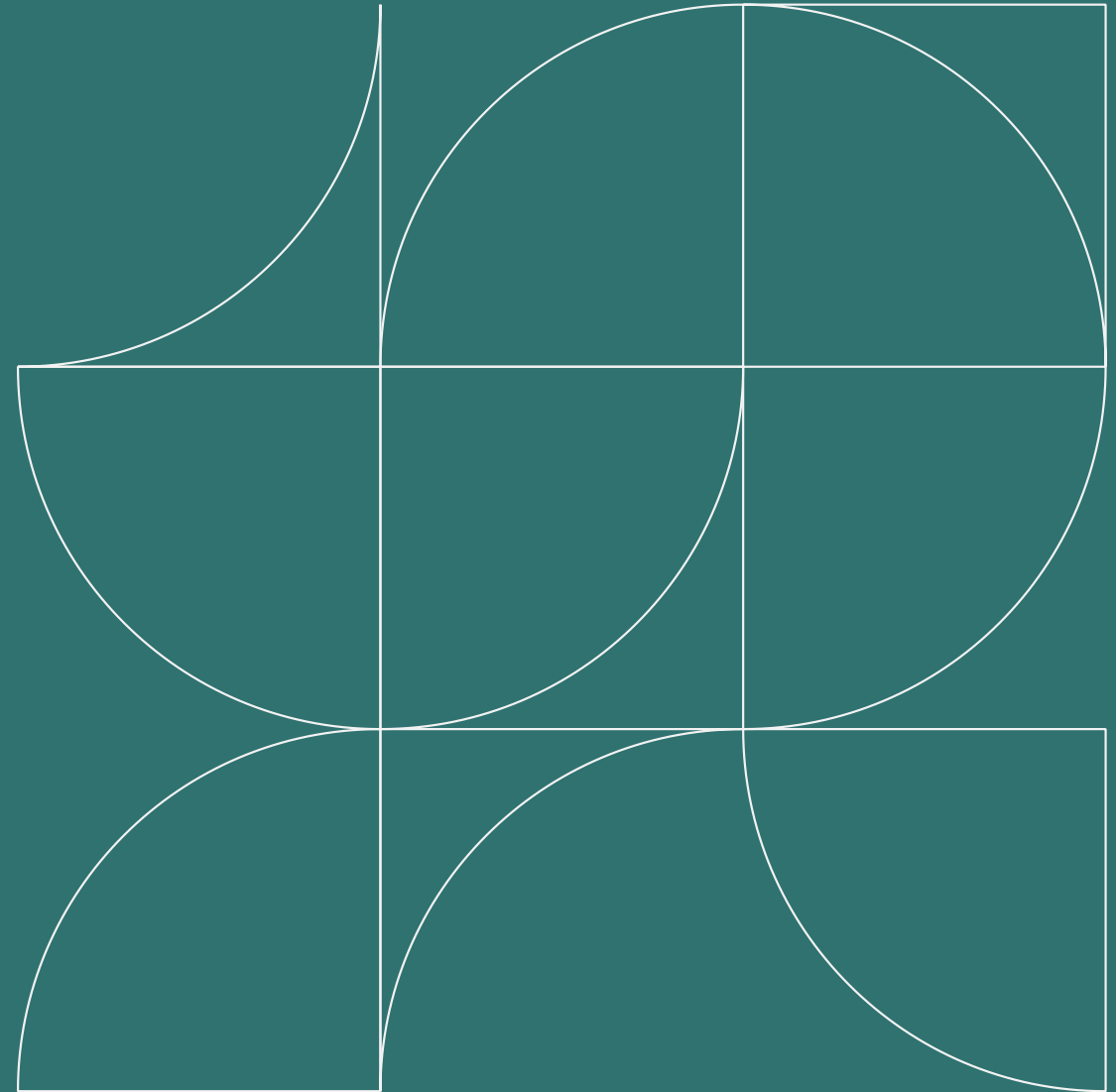


The Aftermath of Viking River and Adolph v. Uber



- Employers should consider adapting the language of their arbitration agreements
 - Explicitly state that “individual” PAGA claims are within the scope of the agreement.
 - Carve out “individual” PAGA claims from class and representative action waivers.
- What is the benefit of individual arbitration given that the plaintiff only has to establish one violation to establish standing?
 - Stay of the representative action
 - Potential impact on plaintiff’s counsel’s investment in the case
 - Less at stake
- However, there are other factors to consider, including:
 - Costs of arbitration
 - Additional attorneys’ fees
 - Impact that the passage of time will have on the number of pay periods at issue

Standing Issues





PAGA Standing: A Low Hurdle

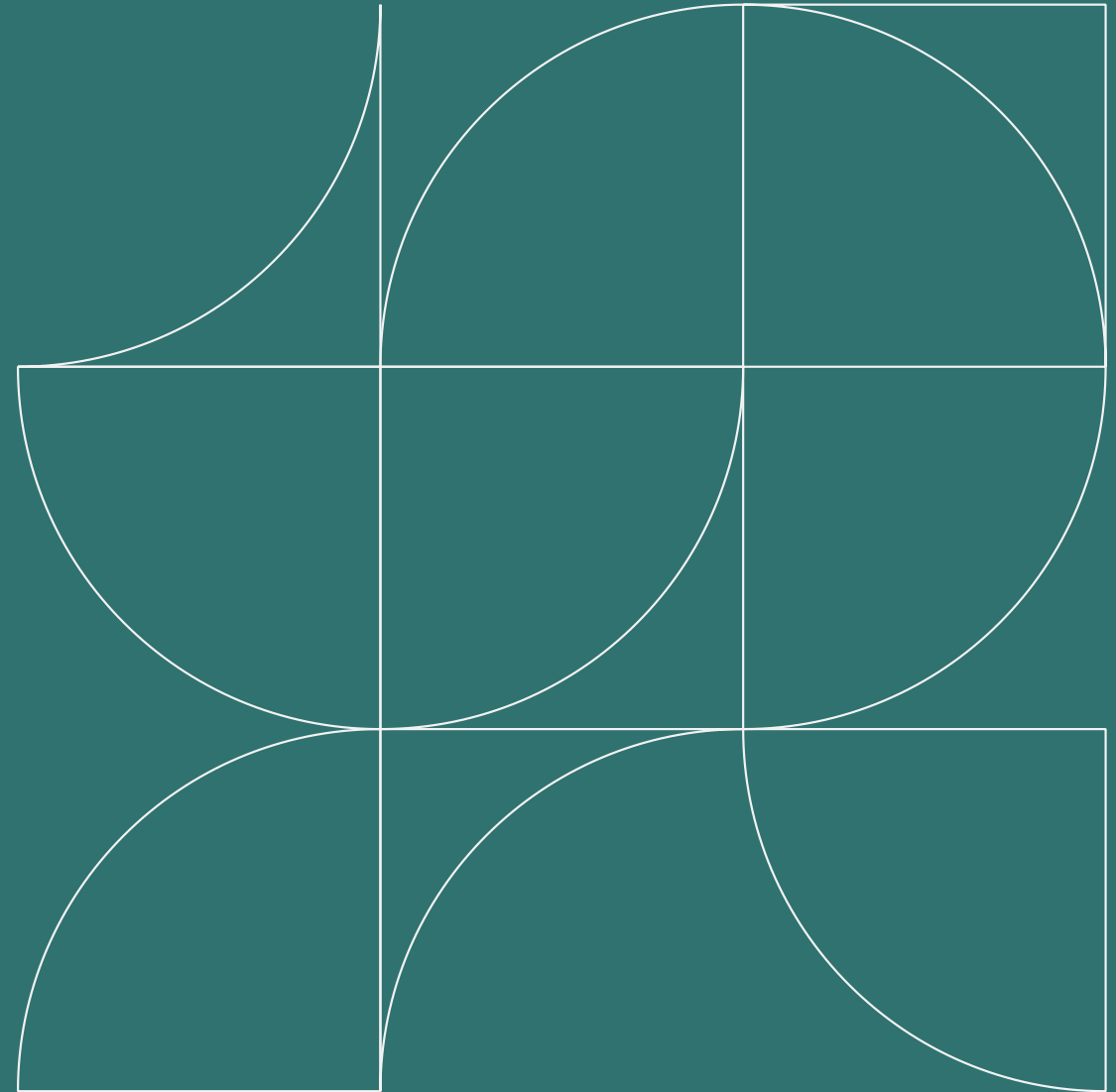
- No personal injury or economic loss needed
- A PAGA plaintiff need only:
 - Be currently or previously employed by the alleged violator of the Labor Code; and
 - Have suffered one or more Labor Code violations, e.g., one late meal period. (Huff v. Securitas Security Serv.; Cal. Ct. App. 2018)
- PAGA plaintiffs are not required to have experienced the same Labor Code violations as other “Aggrieved Employees.”
- PAGA plaintiffs retain standing even if they settle their own individual Labor Code claims or their own claim is time-barred

PAGA Standing In the Arbitration Context

After Adolph, compelling arbitration of individual PAGA claim does not eliminate standing of individual to bring representative PAGA claim unless individual is found not to have suffered any violation.

Adolph cited to Johnson v. Maxim Healthcare Services, Inc., 66 Cal. App. 5th 924 (2021), suggesting that an employee may only need to have suffered a violation at any time – and not within the statute of limitations – to establish standing.

Potential Future Developments



Do Representative PAGA Claims Need To Be “Manageable”?

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- Estrada v. Royalty Carpet Mills, Inc.
 - At the end of 2021, we saw the Court of Appeal in Wesson v. Staples the Office Superstore, LLC issue an opinion affirming dismissal of PAGA claims on the basis of unmanageability – a rare good PAGA appellate decision for employers
 - However, 2022 started with a different Court of Appeal in Estrada reaching the opposite conclusion and finding that there is no manageability requirement for PAGA claims.
 - Estrada held that trial court may instead limit the evidence that may be admitted at trial in order to ensure a manageable trial, and that a PAGA plaintiff seeking to try an unmanageable claim “risk[s] being awarded a paltry sum of penalties, if any,” due to problems of proof.
 - The Estrada Court also encouraged plaintiffs to work with trial courts to “define a workable group or groups of aggrieved employees,” including by “narrowing alleged violations to employees at a single location or department.”
 - The California Supreme Court granted review of Estrada to resolve this split of authority and a decision is expected before the end of 2023.
- Hamilton v. Wal-Mart Stores, Inc.
 - The 9th Circuit agreed with Estrada and held that there is no manageability requirement for PAGA claims

Can PAGA plaintiffs object to settlements in other PAGA cases?

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- In *Peck v. Swift Transportation*, the Ninth Circuit dismissed an objector’s appeal of the district court’s approval of a PAGA settlement.
- *Peck* held that objectors to a PAGA settlement are not “parties” to a PAGA suit in the same sense that absent class members are “parties” to a class action.
- The California Supreme Court will visit this issue in *Turrieta v. Lyft, Inc.*

Will PAGA Be Repealed and Replaced?

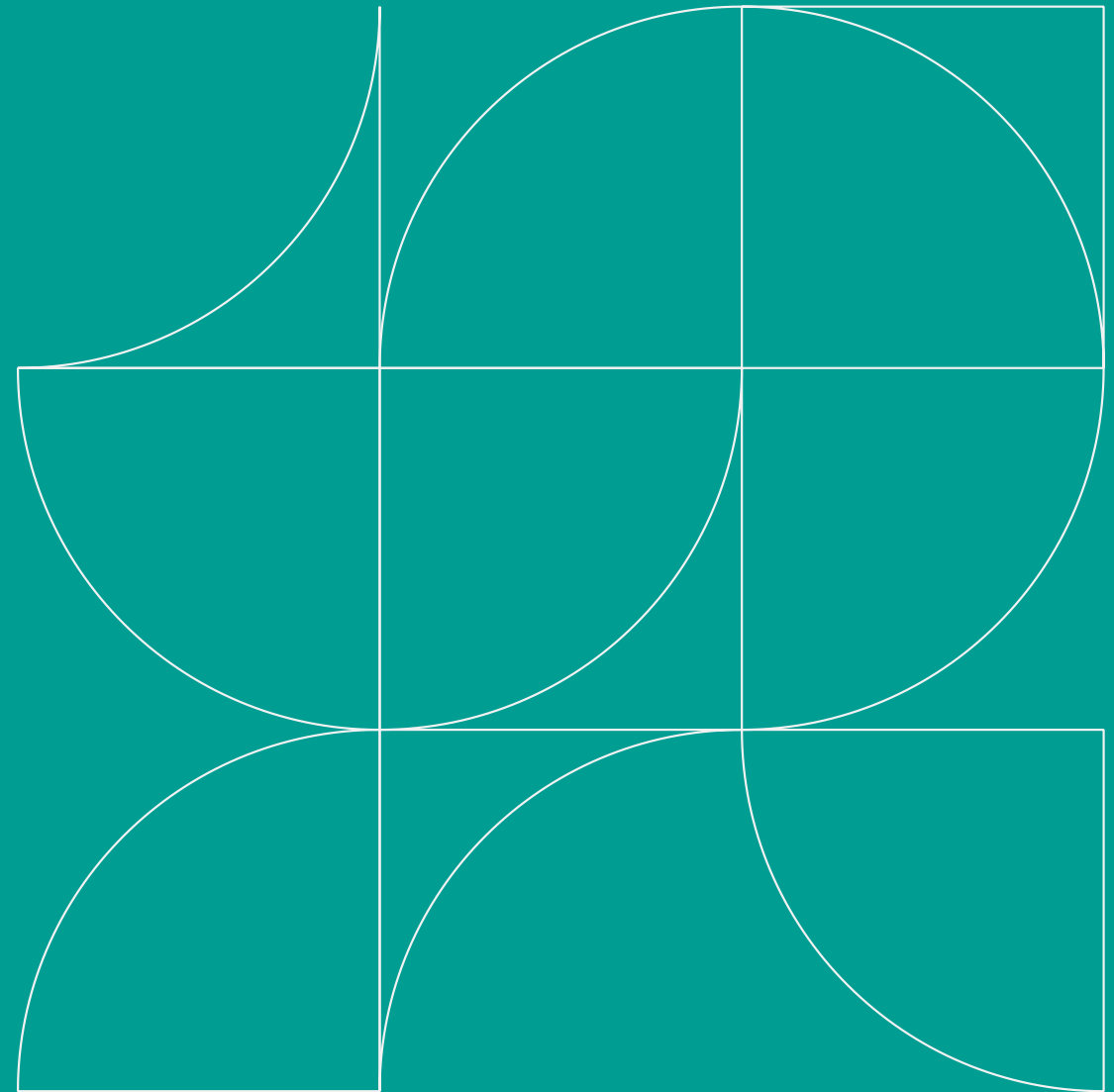
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- The **California Employee Civil Action Law Initiative** will seek to **repeal PAGA** and replace with the Labor Code Fair Pay and Employer Accountability Act. Under this Act:
 - Employees would submit a complaint with the Labor Commissioner
 - The DLSE would have to be a party to all labor complaints
 - All civil penalties would have to be awarded by Labor Commissioner
 - There would be double penalties for willful violations
 - There would be no attorneys' fees available
 - All penalties would be awarded to employees and not to the State
- The Initiative will be on the November 5, 2024 ballot

CLE



Questions?



thank
you

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