



Arbitration and PAGA rights, post *Adolph v. Uber*

Arbitrating individual Labor Code violations after *Adolph*

By Hon. Tricia Bigelow (Ret.)

Twenty years ago, California lawmakers enacted one of the state's most impactful pieces of legislation. The Private Attorneys General Act – Labor Code sections 2698 thru 2699.5 – affectionately known as PAGA, which changed the way businesses are policed and prosecuted for Labor Code violations. It provided a vehicle for workers to seek redress for workplace grievances while establishing a critical support system for overburdened state regulators.

Over the past two years, however, PAGA has been challenged, analyzed and reformulated in ways the California legislature could never have envisioned back in 2004. As discussed below, California has recently enacted Labor Code amendments benefiting employers.

PAGA 101

When PAGA was adopted in 2004, it was intended to address a troubling reality: Employers regularly violated the Labor Code with few or no consequences. The state's Department of Industrial Relations (DIR) lacked the resources needed to investigate all California employers for compliance with labor laws, so enforcement of those laws was hit-and-miss. Because businesses knew they faced little chance of being penalized, more than a few subjected their workers to unsafe conditions, shortchanged them on required pay, and denied them meal and rest breaks.

PAGA provided a unique vehicle for prosecuting Labor Code violators. It deputized individual employees to bring a type of qui tam action on behalf of the state whenever they saw violations of wage-hour, workplace safety, and other

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laws designed to protect them. It also put companies on notice that they now faced not only detection, but actual penalties for such violations.

Significantly, PAGA allowed employees to pursue not just claims arising out of their own employment, but also claims related to the employment of other affected workers, and it awarded them attorney fees for doing so. Under PAGA, aggrieved employees were empowered to file lawsuits to recover civil penalties that otherwise could only be assessed by the state. These claims would now be asserted on behalf of claimants and other aggrieved employees for the benefit of the state. The state could bring its own action against the employer, but if it chose not to do so, the employee was deputized to step into its shoes. Claimants were obligated to follow strict procedural requirements including giving notice to the state and providing a copy of the filing to the employer before they could proceed with such actions.

Because PAGA claims were brought on behalf of the state, they were distinguishable from class-action lawsuits and were exempted from any mandatory arbitration provisions included in employment agreements. Even when the state chose not to pursue a claim, it would still recover the lion's share of any award, with injured employees receiving the remainder after attorney fees were deducted.

Viking River Cruises and arbitration agreements

All of this changed two years ago. In July 2022, the U.S. Supreme Court ruled that arbitration agreements could not be cast aside just because employees asserted claims under PAGA. In *Viking River Cruises v. Moriana* (2022) 596 U.S. 639, the Court held that PAGA could not be used to override mandatory arbitration agreements between employers and employees and that the Federal Arbitration Act (FAA) required individual PAGA claims to proceed to arbitration.

In reaching its conclusion, the Court relied on the California Supreme Court's decision in *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, in which the state court invalidated as a matter of public policy pre-dispute arbitration agreements that waived the right to bring "representative" PAGA claims. Employers, according to the California Supreme Court, could not enforce pre-dispute arbitration agreements if they foreclosed plaintiffs' ability to pursue PAGA penalties on behalf of other allegedly aggrieved employees. Even though employees could waive their right to participate in a representative action by agreeing to individual arbitration, waivers of the right to bring a PAGA action on behalf of the state were unenforceable.

Although it agreed with *Iskanian* in concept, the Supreme Court in *Viking River* overruled it, holding that a PAGA plaintiff may be compelled to arbitrate the individual component of his or her PAGA claim. It even suggested that a plaintiff who submitted the individual portion of a PAGA claim to arbitration might lack standing under state law to pursue a non-individual claim on behalf of others in court. Without deciding the issue, however, it deferred to California courts for a determination of that question under applicable state law. "California courts, in an appropriate case, will have the last word," wrote Justice Sotomayor in her concurring opinion.

The *Adolph v. Uber* decision, arbitration agreements, and PAGA

The question was answered in July of 2023 when the California Supreme Court decided *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104. The plaintiff in *Adolph* was an UberEats driver who claimed that Uber had misclassified his employment status, as well as the status of a large group of similarly situated drivers. He asked the state court to address whether California law vested an aggrieved party forced by the *Viking River* decision to arbitrate his own claim with standing in the trial court to pursue the non-individual aspect of the PAGA claim – where the lion's share of penalties reside.

The state's highest court ruled that "an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA." Thus, as long as certain conditions were satisfied, an employee forced to arbitrate an individual PAGA claim was not barred from pursuing a representative PAGA action in court. The employee only needed to establish his or her employment with the alleged violator and the occurrence of one or more Labor Code violations.

The *Adolph* court cited an earlier decision, *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, in which it had held that a plaintiff retained standing to maintain a PAGA claim arising out of the employment of other employees even after his or her personal claim for damages had settled. To have PAGA standing, according to *Kim*, a plaintiff must be an "aggrieved employee" – that is, (1) "someone 'who was employed by the alleged violator'" and (2) "'against whom one or more of the alleged violations was committed.'" (*Kim*, *supra*, at pp. 83-84.)

While establishing the right of individuals to pursue representative PAGA actions in court, the *Adolph* decision failed to provide clarity regarding the preclusive effect of an arbitrator's decision in an individual PAGA action. Might other findings by an arbitrator, such as a finding that one or more of the employer's policies were unlawful, have a preclusive effect on the trial court? *Adolph* also did not address whether any form of settlement or judgment could shut down an employee's representative PAGA standing.

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After *Adolph*

Early this year, the Ninth Circuit decided *Johnson v Lowes Home Centers, LLC* (9th 2024) 93 F.4th 459 (*Johnson*), mirroring the reasoning of the *Adolph* decision. In *Johnson*, the Ninth Circuit overturned a district court ruling from September 2022 that compelled arbitration of the individual PAGA claims and dismissed the non-individual claims. When *Johnson* had first been considered, the then-current state of PAGA law was *Viking River*, which deferred the question of plaintiffs' status to bring representative actions.

Once *Adolph* was decided, however, the plaintiff in *Johnson* appealed the earlier ruling, and the Ninth Circuit granted review. The three-judge panel found that *Adolph* required the district court's ruling to be overturned to correspond with the corrected *Viking River* interpretation of PAGA.

The *Johnson* panel affirmed the *Adolph* holding that representative PAGA actions could be brought in court even when the individual PAGA claim was subject to arbitration. Its decision kept open the door for representative PAGA actions to proceed even when an individual plaintiff had signed an arbitration agreement.

In a separate concurring opinion in *Johnson*, Circuit Judge Kenneth K. Lee noted what he saw as "a lurking tension" between *Adolph* and the FAA, which could pose a potential conflict for future cases. The procedure set forth in *Adolph*, under which a plaintiff's individual PAGA claim goes to arbitration while the non-individual PAGA claims are stayed and remain in court, "might blunt the efficiency and informality of arbitration in some cases."

In a different context, a California appellate court ruled in December 2023 that a PAGA plaintiff could completely bypass arbitration for both the individual and representative components of her claim. In *Demarinis v. Heritage Bank of Commerce* (2023) 98 Cal.App.5th 776, the court ruled that an employee whose arbitration agreement included a "poison pill" provision could not be compelled to arbitrate even the individual component of her claim. The arbitration agreement – drafted by the defendant – contained a waiver provision stating that employment disputes could not be "brought, heard, or arbitrated on a class, collective, or representative basis and the Arbitrator may not consolidate or join the claims of other persons or Parties who may be similarly situated." Combined with a non-severability clause, the agreement included this language: "If this specific provision is found to be unenforceable, then the entirety of this Agreement shall be null and void."

The appellate court found the waiver provision in the defendant's arbitration agreement to be "an unenforceable wholesale waiver of plaintiffs' rights to bring 'representative' PAGA actions." When coupled with the non-severability and poison-pill clauses, "the unenforceability of the waiver provision renders the entire arbitration agreement null and void." A costly lesson for that defendant, and a caution for California employers to carefully craft their arbitration agreements so as to preserve the alternative forum at least for individual PAGA claims.

Other PAGA challenges

In *Estrada v. Royalty Carpet Mills* (2024) 15 Cal.5th 582, decided January 18, 2024, the California Supreme Court overturned a lower court's decision to strike PAGA claims due to manageability issues, ruling that "while trial courts may use a vast variety of tools to efficiently manage PAGA claims, given the structure and purpose of PAGA, striking such claims due to manageability concerns – even if those claims are complex or time-intensive – is not among the tools trial courts possess." But note, amended Labor Code section 2699, subdivisions (p) and (q), effective July 1, 2024, provide courts with management powers over PAGA litigation.

In *Balderas v. Fresh Start Harvesting* (2024) 101 Cal.App.5th 533, decided in March, a California Court of Appeal rejected a trial court ruling that the plaintiff could not bring a representative PAGA action if she had not filed an individual claim. Citing *Adolph, supra,* 14 Cal.5th at p. 1120, the court said, "There are only two requirements for PAGA standing. Plaintiff must allege that he or she is (1) 'someone "who was employed by the alleged violator'" and (2) someone "'against whom one or more of the alleged violations was committed.'"

In *Hasty v. American Automobile Assn.* (2024) 98 Cal.App.5th 1041, an allegation that *Viking River* allowed a waiver of PAGA rights in an agreement to arbitrate an employee's allegations was held unconscionable and invalid.

On June 17 of this year, the U.S. Supreme Court dismissed an attempt to reverse the *Adolph* holding. It rejected certiorari in *Uber Technologies Inc. v. Gregg*, No. 23-645, preserving mass claims under PAGA *after* employees arbitrate their individual claims. The Court also denied certiorari in *Lyft Inc. v. Seifu*, 23-769, No. 23-769, which raised a similar challenge.

New PAGA law

On July 1, the governor signed two bills that amend Labor Code sections 2699, 2699.3 and 2699.5. The amended codes substantially reform the PAGA process and remove from the November ballot an initiative that would have effectively terminated PAGA. The new laws, which took effect July 1, 2024, should not alter the arbitration landscape for PAGA's individual claims and will not apply to civil actions filed before June 19, 2024. (Ed. Note: For emergency purposes, the amended codes took effect July 1, 2024. However, the true date for the amendments to take effect is October 1, 2024.)

Conclusion

Arbitration of PAGA claims is now a matter of settled law. The ramifications

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of such arbitrations remain in flux, as courts review and consider the impact of arbitrators' findings and conclusions. Further legislation or judicial guidance on the preclusive effect of arbitrators' decisions may yet be forthcoming.

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