LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, JULY 21, 2023

PERSPECTIVE

Attorney reviews of *Adolph v. Uber Techs Inc.* decision

Shutterstock

Compelling employees to arbitration suddenly has less of an upside

By Chandra S. Andrade and Kevin L. Jones

On July 17, the California Supreme Court issued its much-anticipated decision in *Adolph v. Uber Techs Inc.*, as to whether employees still have standing to sue for "non-individual" PAGA claims when they have been compelled to arbitrate their individual Labor Code claims. The Court in a 7-0 vote answered yes: aggrieved employees still have standing – foreclosing employers' ability to extinguish PAGA claims by compelling underlying Labor Code claims to individual arbitrations.

Background

To have standing to bring a PAGA claim, a plaintiff must be an "'aggrieved employee'[:] any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." In other words, a PAGA plaintiff must be a current or former employee who was subjected to a Labor Code violation (e.g., missed meal break, unpaid overtime wages). Though PAGA is a representative action enabling recovery of penalties on behalf of other employees, class action prerequisites such as commonality and typicality do not apply.

In traditional notions of standing, particularly Article III standing to sue in federal court, a plaintiff must show (1) they have suffered an "injury-in-fact"; (2) such injury is traceable to the unlawful actions of the defendant(s); and (3) a remedy can redress the situation. See U.S. Const. art. 3, § 2, cl. 1. The California Constitution does not contain a parallel cases and controversies requirement. *See Grosset v. Wenaas*, 42 Cal. 4th 1100, 1117 n.13 (2008). Instead, California has a patchwork of statutes and case law that sets standing requirements for particular causes of action, which often do not follow the rigid requirements of federal court.

Because it was unclear whether Plaintiffs still had standing to pursue PAGA claims if their underlying Labor Code claims were resolved, many employers began to require employees to enter arbitration agreements to curb potential PAGA exposure. In particular, many employers began requiring employees to sign agreements where alleged individual Labor Code violations would be compelled to arbitration and the employee would waive their right to pursue class or representative (i.e., "non-individual") claims. However, in 2014, the California Supreme Court in *Iskanian v. CLS Trans. Los Angeles, LLC*, 59 Cal. 4th 348, invalidated such waivers of the right to bring representative PAGA claims in court or arbitration.

The ruling in *Iskanian* led employers to redraft arbitration agree-

ments whereby the PAGA waiver was omitted but employees were still required to arbitrate individual claims. Such agreements would "split" PAGA actions such that the individual claims were arbitrated and the nonindividual claims litigated in court. In lawsuits where the arbitration agreement prescribed "splitting," trial courts commonly stayed the PAGA non-individual claims until an arbitrator ruled on the underlying individual claims. Meanwhile, following *Iskanian*, multiple lower state appellate courts interpreted *Iskanian* to hold that arbitration agreements requiring such splitting were void.

However, last summer, the United States Supreme Court in *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022), abrogated *Iskanian*, holding that the Federal Arbitration Act (FAA) preempts any California state law prohibition on splitting individual and non-individual PAGA claims. The Court reasoned that such an anti-splitting rule runs afoul of the FAA because parties are then forced to arbitrate issues they did not agree to arbitrate, or else forgo arbitration altogether. Consequently, *Viking River* required enforcement of agreements to arbitrate a PAGA plaintiff's individual claims.

The U.S. Supreme Court further opined that "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding." Thus, per the Court's reading of PAGA, an employer could effectively extinguish PAGA exposure by forcing all underlying individual Labor Code violation claims to arbitration. However, Justice Sotomayor noted in her concurrence that because interpretation of PAGA standing is a question of state law, "if this Court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."

One year later, the California Supreme Court in *Adolph* accepted Justice Sotomayor's invitation.

Adolph v. Uber Techs

In 2019, Uber Eats driver Erik Adolph sued Uber claiming he was misclassified as an independent contractor and sought reimbursement for employee business expenses. However, when hired, Adolph did not opt out of a technology services agreement that included an arbitration provision and PAGA waiver.

After Uber won a motion to compel arbitration of Adolph's individual Labor Code claims, he amended his complaint to eliminate the individual claims and retain only the PAGA claim. Uber filed a second motion to compel arbitration, which was denied and affirmed by the Court of Appeal. In May 2022, Uber filed a petition for review, but before Adolph could file an answer, the U.S. Supreme Court issued its *Viking River* ruling. The California Supreme Court granted review "to provide guidance on statutory standing under PAGA."

The California Supreme Court held that to have PAGA standing, a Plaintiff need only (1) be (or have been) employed by the alleged violator and (2) have suffered at least one Labor Code violation on which the PAGA claim is based. The Court further opined that "[s]tanding under PAGA is not affected by enforcement of an agreement to adjudicate a plaintiff's individual claim in another forum [and a]rbitrating a PAGA plaintiff's individual claim does not nullify the fact of the violation or extinguish the plaintiff's status as an aggrieved employee. …" Under this framework, Adolph's allegations that he experienced Labor Code violations while employed as a driver for Uber sufficed to confer standing for his PAGA action.

Implications

At bottom, employers will not be able to escape PAGA liability simply by resolving individual Labor Code violations in arbitration. Thus, compelling employees to arbitration (when often the employer must pay for the arbitrator's fees to avoid a court finding the agreement unconscionable) may be more costly for the business with less of an upside.

Further, compelling arbitration may result in employers having to litigate the same underlying Labor Code violations in two forums. To this point, the California Supreme Court did opine (without affirmatively requiring) that the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration. The Court further noted that "[i]f the arbitrator determines that Adolph is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, … Adolph could no longer prosecute his non-individual claims due to lack of standing." This should prevent plaintiffs from being able to relitigate issues in court that have already been rejected by the arbitrator – and provides a roadmap for employers to seek a stay in the trial court pending the outcome of the PAGA individual claim in arbitration.

Chandra S. Andrade *is a partner and Kevin L. Jones is an associate in Farella Braun + Martel's Employment Group.*

Reprinted with permission from the *Daily Journal*. ©2023 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.