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GUEST COLUMN

Legal implications of the Supreme Court's ruling in *Adolph v. Uber*

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On July 17 the California Supreme Court issued its long-anticipated ruling in *Adolph v. Uber Technologies, Inc.*

Based on questions asked during oral argument and its own prior decision in *Kim v. Reins International California, Inc.*, 9 Cal. 5th 73, the Adolph decision did not come as a surprise. The Court held that an aggrieved employee maintains standing to pursue representative Private Attorneys General Act (PAGA) claims on behalf of other employees, despite being compelled to privately arbitrate the employee's own individual PAGA claims. This directly contradicts the United State Supreme Court's ruling in *Viking River Cruises, Inc. v. Moriana* (142 S.Ct. 1906).

Several months after the Viking River ruling, a California Court of Appeal declined to follow Viking River, reasoning that SCOTUS' interpretation of California law was not binding on California courts. *Galarsa v. Dolgen California, LLC*, 88 Cal. App. 5th 639, 652. Several other California appellate courts followed.

Galarsa's refusal to follow *Viking River* was, in part, based on its prediction that the California Supreme Court would rule the way it did – and conclude that an aggrieved employee is not barred from pursuing representative PAGA claims in court even after signing an arbitration agreement. *Galarsa*, 88 Cal. App. 5th at 654.

As it turned out, the 5th Circuit's prediction in *Galarsa* was correct. The California Supreme Court unanimously agreed it was not "bound by the high court's interpretation of California law." *Adolph v. Uber*, at 11.

Further, the Court cited its own previous holding in *Kim v. Reins International California, Inc.*, 9 Cal. 5th 73, and stated that standing is conferred upon an employee who sustained (alleged) Labor Code violations. It opined that arbitrating individual PAGA claims "does not nullify the fact of the violation or extinguish the plaintiff's status as an aggrieved employee." *Adolph v. Uber*, at 14. This, per the Supreme Court, is aligned with PAGA's stated purpose "to deputize employees to pursue sanctions on the state's behalf." It found that any other interpretation "would undermine PAGA's purpose of augmenting enforcement of the Labor Code." *Id.* at 15.

State revenues were also at issue. The California Supreme Court opined that narrowing PAGA standing (i.e., dismissing a PAGA representative claim once PAGA individual claims are compelled to arbitration), "would likely reduce state revenues and increase state costs of enforcement." *Id* at 17.

The Court acknowledged the defense arguments that it should narrow PAGA standing to curb abuse of the act. However, it deferred that action to the Legislature "which may amend the statute to limit PAGA enforcement if it chooses."

At least for now, in view of California's departure from *Viking River*, a private arbitration of an individual's PAGA claims will not result in a trial court's dismissal of representative PAGA claims. Uber attorneys recently told the Los Angeles Times that the company is reviewing whether to appeal the decision to the United States Supreme Court.

Employers should review and consider modifying their arbitration agreements to conform to the *Adolph* decision. They should also consider whether they want to litigate in two forums – arbitration first on the employee's individual claims, and then later in the trial court for the representative PAGA claims.

Limiting arbitration in California has been a focus of the Legislature in recent years. For example, in 2021 the Legislature enacted Cal. Code Civ. Proc. Section 1281.97, which states the employer will lose the right to arbitrate if the employer does not timely pay arbitration fees. *See also Cvejic v. Skyview Capital, LLC*, 2023 Cal. App. LEXIS 486 (court applied Section 1281.97 and held that a plaintiff was entitled to withdraw from arbitration after defendant was tardy in paying its arbitration fees).

The question remains – what will happen with PAGA? In the two decades since its enactment, many California employers strongly oppose PAGA and seriously question whether the act fulfills its intended purpose.

Though the law likely yielded some revenues to the state, there remain significant questions about whether it truly benefits employees and the public. *See, e.g., Iskanian v. CLS Transportation Los Angeles*, LLC, 59 Cal. 4th 348, 383 ("The PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations"), and *Adolph v. Uber* at 7 ("PAGA is designed primarily to benefit the general public. . . Penalties recovered are dedicated largely to public use . . .") (Citing Kim, 9 Cal. 5th at 81).

The Labor and Workforce Development Agency receives between 5,000-6,000 notices per year. That number is growing. Critics of PAGA argue that it does not effectively deter violations and financially penalizes employers, with no real financial benefit to the employees who allegedly were aggrieved. Most of the money recovered goes to the plaintiffs' attorneys and the state.

Those who agree that PAGA is being abused should look at the Fair Pay and Employer Accountability Act, which will be on the 2024 general election ballot, and which is intended to substantially revise PAGA to address these issues.

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