

MONDAY, AUGUST 14, 2023

PERSPECTIVE

## Questions remain after *Adolph v. Uber Technologies, Inc.* decision

By Jonathan D. Andrews  
and Monique Ngo-Bonnici

The California Supreme Court's July 17 ruling in *Adolph v Uber Technologies, Inc.* has been read, discussed and dissected ad nauseum by nearly every employment attorney in the state of California (and outside of the state as well). While the Court provided clarity on certain important issues - i.e., that representative PAGA claims cannot be compelled to arbitration - it also opened the door to new questions that will likely affect the value, strategy and prospects for PAGA actions going forward.

### The Decision

For those who have not been following, the central question considered by the Court was whether an aggrieved employee, who has been compelled to arbitrate his or her individual claims under PAGA, maintains the statutory standing to pursue "PAGA claims arising out of events involving other employees" in court.

A unanimous California Supreme Court held that, as long as certain conditions are satisfied, such an employee is not barred from pursuing the representative action. "Standing under PAGA is not affected by enforcement of an agreement to adjudicate a plaintiff's individual claim in another forum. Arbitrating a PAGA plaintiff's individual claim does not nullify the fact of the violation or extinguish the plaintiff's status as an aggrieved employee," the Court wrote.



Shutterstock

The decision was penned by Justice Liu for the Court and provides a clear interpretation of the requirements for PAGA standing. The Court held that an employee only needs to establish two factors: (1) employment with the violator, and (2) the occurrence of one or more Labor Code violations.

In addition, the decision provides a path forward for PAGA cases where the plaintiff's individual claims are compelled to arbitration. Specifically, Justice Liu explained that once an individual claim is compelled to arbitration, the trial court may, pursuant to Code Civ. Proc. Section 1281.4, exercise its discretion to

"stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." In such cases, the trial court would be bound by the arbitrator's ruling as to whether the plaintiff had suffered one or more labor code violations, and thus whether such plaintiff had standing to pursue claims on behalf of others.

Unfortunately, the *Adolph* decision leaves open several unanswered questions regarding the preclusive effect of the arbitrator's decision and whether any form of settlement or judgment could put an employee's representative PAGA standing to rest. Specifically, it remains unclear

how conflicting arbitration decisions in multi-plaintiff cases against the same employer will be handled. Will other findings by an arbitrator in the case - such as a finding that one or more of the employer's policies is unlawful - have a preclusive effect on the trial court?

### Preclusive effect of arbitration

Although a decision to stay the non-individual PAGA action is entirely within the trial court's discretion, there is a strong likelihood that trial courts will elect to wait out arbitration before proceeding to trial. It makes sense, given that the arbitrator's decision in the indi-

vidual case could, in fact, doom the representative action. On top of that, trial courts already have very full dockets. If there is no basis for bringing a non-individual claim, why move forward with it?

The California Supreme Court explained it this way: “If the arbitrator determines that Adolph is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment (Code Civ. Proc., § 1287.4), would be binding on the court, and Adolph would continue to have standing to litigate his nonindividual claims. If the arbitrator determines that Adolph is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and Adolph could no longer prosecute his non-individual claims due to lack of standing.” (citing *Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65.)

But this is far from the end of the story. Just because an arbitrator finds that a plaintiff in an individual PAGA action may lack standing does not mean that other employees were not harmed by the company’s actions. Under the Adolph ruling, it only requires one successful plaintiff to open the door to the larger action. In other words, when multiple plaintiffs arbitrate the same claim, only one arbitrator must find a labor code violation in order for a PAGA representative case to move forward. This provides a powerful incentive to pursue the individual PAGA claims of multiple employees in arbitration, even if one or more of their clients is shut down in arbitration.

This is where the Adolph Court has opened the door for new questions. How will conflicting arbitration decisions in multi-plaintiff cases against the same employer be handled? Will trial courts also

be bound by an arbitrator’s decision beyond whether the individual has standing to pursue a representative PAGA action? What if the arbitrator determines that the employer’s policies are violative of the law? Will the trial court be bound by that decision as well?

At a minimum, trial courts will now be bound by an arbitrator’s decision as to whether an employee is an aggrieved employee for purposes of PAGA. Therefore, the decisions made by arbitrators that favor claimants will be heavily scrutinized by all parties to fully understand the basis and scope of those decisions.

Undoubtedly, there are some who will argue that those decisions should be applied on a representative basis. However, even if they succeed on an individual PAGA claim in arbitration, this does not guarantee a win for the larger representative group of plaintiffs waiting in the wings. Those workers would still need to establish that trying their claims on a representative basis was manageable, that those claims were based on the same Labor Code violations as those of the named PAGA representative, and that they themselves were injured by the employer’s violation of the same code sections as the named PAGA representative.

In addition, the *Adolph* decision leaves open the question as to whether an employee with a time-barred labor code claim can pursue a representative PAGA claim. In 2021, an appellate court held in *Johnson v. Maxim Healthcare Service, Inc.* (66 Cal.App.5th 924) that an aggrieved employee whose individual claim was time-barred nevertheless had standing to pursue a representative PAGA claim. But the *Adolph* decision now puts that into question, at least for cases where the trial court has stayed the representative PAGA case to await a decision from the arbitrator as to whether claimant is success-

ful on his or her individual PAGA claims. In such a case, the arbitrator’s adverse decision on the claimant’s individual PAGA claim would be binding on the trial court and could result in the claimant not being able to pursue the representative PAGA claims, in direct conflict with the Johnson decision.

### Resolving PAGA Actions

For employers who want to put an entire PAGA matter behind them, including both the individual and representative PAGA claims, mediation may provide the means to achieve this. Of course, it will be in employers’ best interest to settle all related PAGA claims through mediation because an employer who agrees to settle just the individual claim takes a risk that the plaintiff will collect his individual settlement and then proceed to court with a nonindividual action.

From the plaintiffs’ perspective, mediating PAGA claims before an arbitrator makes a determination on the employee’s individual claims makes sense because there is always a risk of an adverse ruling. If the trial court has stayed the representative PAGA case, an adverse ruling in the individual action will doom it, at least for that plaintiff.

In addition, even if another employee was successful in arbitration against the same employer and could step in to pursue the representative case, the risks may dictate otherwise. Any possibility of an adverse outcome in the first individual arbitration could raise manageability and other defenses if or when the matter eventually proceeded as a representative action in state court.

Mediation does not pose the same risk of issue preclusion presented by a bifurcated proceeding. Because it is not one-sided, does not involve outside decision makers, and invites creativity and flexibility, mediation can offer parties a better chance of resolving their differences. And, if successful, it can help the parties reach a mutually satisfactory settlement without the need for costly and time-consuming discovery.

### Conclusion

The *Adolph* decision may put PAGA plaintiffs more firmly in the driver’s seat, but their choices are not clear-cut or straightforward. Given the complexities of PAGA and the shift-ing dynamics of pursuing multi-track cases, both plaintiffs and defendants will need to approach PAGA cases thoughtfully and strategically.

---

**Jonathan Andrews and Monique Ngo-Bonnici** are employment law neutrals with Signature Resolution.

