

THE **RECORDER**

## PAGA Claims Must Now Be ‘Headed’

By JJ Johnston

January 31, 2025

**O**n the cusp of the new year, Private Attorneys General Act plaintiffs were dealt a significant setback. On Dec. 30, a California appeals court ruled that such plaintiffs could not pursue so-called “headless” PAGA claims. As long as an employee has standing to bring a representative action on behalf of fellow employees, he or she must first arbitrate any individual PAGA claim based on those same violations.

In its unanimous decision in the case of *Leeper v. Shipt* (B339670, Cal.App.2nd, Division One), the Court of Appeals for the Second Appellate Division said that every PAGA action necessarily includes an “individual PAGA claim.” That individual claim cannot be set aside or disregarded while the larger representative claim is pursued in court. Therefore, PAGA plaintiffs may not bypass arbitration simply by asserting only a representative PAGA claim on behalf of their fellow employees—i.e., “headless” claims.

The *Leeper* decision undoubtedly comes as a surprise to many PAGA plaintiffs and their attorneys, who reasonably assumed that they could bypass arbitration by pursuing “headless” PAGA actions. In fact, a different appeals court in the same division appeared implicitly to recognize a PAGA plaintiff’s right to move directly to a representative action.

### The ‘Balderas’ Decision

In *Balderas v. Fresh Start Harvesting* (101 Cal. App.5th 533 (2024) 320 Cal. Rptr. 3d 326), the court said the statutory goal behind PAGA “is furthered by extending broad standing to aggrieved employees that does not depend on the viability or strength of a plaintiff’s individual PAGA claim.”

Relying on *Adolph v. Uber Technologies* (14 Cal.5th 1104 (2023) 310 Cal.Rptr.3d 668, 532

P.3d 682), the *Balderas* court said, “California courts have consistently held that ‘[p]aring away the plaintiff’s individual claims’ for one reason or another, ‘does not deprive the plaintiff of standing to pursue representative claims under PAGA.’” (*Adolph*, supra, at p. 1122.)

The *Balderas* court noted that, in *Adolph*, the California Supreme Court had expressly rejected the U.S. Supreme Court’s ruling in *Viking River Cruises v. Moriana* ((2022) \_ U.S. \_ 9213 L.Ed.2d 179, 200-2010) that a PAGA plaintiff could only have standing to bring a representative action if he or she also maintained an individual claim in that action. The only two requirements for PAGA standing, it said, are that the plaintiff is “someone ‘who was employed by the alleged violator’” and “someone ‘against whom one or more of the alleged violations was committed.’” (*Adolph*, supra, 14 Cal.5th at p. 1120.)

### ‘Leeper’ Distinguished

The plaintiff in *Leeper* alleged that she and her fellow workers were misclassified as independent contractors by Shipt, and this violated multiple provisions of the Labor Code. Relying on *Balderas* and other prior decisions, she sought to bring only a representative PAGA claim on behalf of all injured workers.

In the case of *Kim v. Reins International California* (9 Cal.5th 73 (Cal. 2020) 259 Cal. Rptr. 3d 769, 459 P.3d 1123), the California Supreme Court ruled that the PAGA statute “expressly authorizes PAGA suits brought ‘separately’ from individual claims for relief”



JJ Johnston

Courtesy photo

(*Kim*, supra, 9 Cal.5th at p. 88), and that the Legislature did not “intend[ ] to make PAGA standing dependent on ... the maintenance of a separate, unresolved claim” (id. at pp. 90–91). This language, according to the *Leeper* court, refers only to non-PAGA individual claims, not to individual PAGA claims, such as the one Christina Leeper would have been entitled to file.

“The plaintiff in *Kim* had settled ‘his own Labor Code claims against’ the defendant seeking statutory penalties not recoverable under PAGA, and the question presented to the high court was whether that settlement of individual non-PAGA claims deprived him of standing to bring a PAGA action seeking civil penalties. (*Kim*, supra, 9 Cal.5th at p. 82.) Standing to bring a PAGA claim was the only issue addressed by *Kim*, the court wrote.

Similarly, the court found that *Balderas* was also exclusively focused on the question of PAGA standing under Labor Code Section 2699(c)(1), which provides the definition of “aggrieved employee.” That case, the court said, did not consider what actually constitutes a PAGA claim. “*Balderas* did not have occasion to discuss, did not discuss, and its holding does not address, whether a plaintiff may carve out an individual PAGA claim from a PAGA action.”

Standing to bring a PAGA action was not the issue for the plaintiff in *Leeper*, according to the appellate court. She allegedly qualified as an “aggrieved employee” under PAGA, because she was “employed by Shipt during the applicable statutory period and suffered the Labor Code violations alleged [in the complaint].”

### What Constitutes a PAGA Claim?

After reviewing the prior cases, the *Leeper* court concluded that “neither *Kim*, *Adolph*, nor *Balderas* suggests we should—let alone requires that we must—reach the interpretation of section 2699, subdivision (a) proposed by *Leeper*.” The only question raised by *Leeper*’s assertion of a representative PAGA action divorced from an individual PAGA claim was one of definition: Does a PAGA claim necessarily encompass both individual and representative claims? “Because this presents a question of statutory interpretation, our review is de novo.”

Labor Code Section 2699(a) reads as follows: “Notwithstanding any other provision of law, any

provision of this code that provides for a civil penalty to be assessed and collected by the [LWDA] or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of the employee and other current or former employees against whom a violation of the same provision was committed pursuant to the [notice and fee] procedures specified in Section 2699.3.”

The court said that the “unambiguous and ordinary meaning of the word ‘and’” in the statute “means that the action described has both an individual claim component (plaintiff’s action on behalf of the plaintiff himself or herself) and a representative component (plaintiff’s action on behalf of other aggrieved employees).” Every representative PAGA claim also includes an individual claim, which must be separately arbitrated.

### Resolving PAGA Cases: Going Forward

This latest decision changes the PAGA landscape in such a way that mediation may now provide the best avenue for resolving both individual and representative PAGA claims. Without the ability to pursue a “headless” claim—as *Balderas* seemed to promise—PAGA plaintiffs who are subject to an enforceable arbitration agreement are once more expected to prosecute two separate actions, with defendants responding to the two actions in different forums.

For both sides, a single mediation session may afford the best opportunity to satisfactorily resolve all of the claims. A skillful and knowledgeable mediator can guide both parties through the process, explaining what must be proven and what statutory penalties may be assessed for specific Labor Code violations.

**JJ Johnston** is a nationally recognized employment and class action mediator. He has been mediating employment and class action matters for more than two decades and has more than three decades’ experience as an employment attorney representing both plaintiffs and defendants in a wide range of cases, including wage and hour class actions, PAGA claims, wrongful terminations, discrimination and retaliation cases, sexual harassment cases, prevailing wage claims, fair pay act claims, and defamation claims.