



Paul Klee, Joyful Mountain Landscape (1929) (Public Domain)

EMPLOYMENT ARBITRATION AND MEDIATION

PRACTICAL TIPS AND LATEST UPDATES



CALIFORNIA LAWYERS ASSOCIATION | LABOR & EMPLOYMENT LAW SECTION
WEBINAR | MAY 28, 2024
Hon. Ming W. Chin (Ret.) | Phyllis W. Cheng, Esq.

THE SPEAKERS



Hon. Ming W. Chin (Ret.)



Phyllis W. Cheng



OVERVIEW

- I. Recent Case Law
- II. Ballot Initiative
 - A. Update on Latest Trends
 - B. Ballot Initiative
- III. Pending Legislation
- IV. Questions and Answers





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I. RECENT CASE LAW

FAA PREEMPTION OVER PAGA

First a Pro-Employer Decision from the U.S. Supreme Court:

- [Viking River Cruises, Inc. v. Moriana](#), 142 S.Ct. 1906 (2023) held that **the FAA preempts PAGA to the extent state law precludes arbitration agreements from dividing PAGA actions into individual and non-individual claims.**

Then a Pro-Employee Decision from the California Supreme Court:

- In [Adolph v. Uber Technologies, Inc.](#), 14 Cal.5th 1104 (2023) (per curiam), the California Supreme Court departed from the U.S. Supreme Court's decision in *Viking*. *Adolph* followed the roadmap set forth in Justice Sonia Sotomayor's concurring opinion in *Viking* that "California courts will have the last word in an appropriate case." The *Adolph* court held 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."** Accord, [DeMarinis v. Heritage Bank of Commerce](#), 317 Cal.Rptr.3d 1 (2023).

New Petitions for Writ of Certiorari before the U.S. Supreme Court:

- [Uber Technologies, Inc. v. Gregg](#) (US 23-645) and [Lyft, Inc. v. Seifu](#) (US 23-769) on the preemptive effect of FAA over PAGA following *Viking* and *Adolph*.



VALIDITY OF PROPOSITION 22: PENDING BEFORE THE CALIFORNIA SUPREME COURT

[Castellanos v. State of California](#), 89 Cal. App. 5th 131 (2023),
review granted, 309 Cal. Rptr. 3d 725 (Mem) (Jun. 28, 2023);
S279622/A163655M

Petition for review after affirmance in part and reversal in part the judgment in an action for writ of mandate. Is Proposition 22 (the "Protect App-Based Drivers and Services Act") invalid because it conflicts with article XIV, section 4 of the California Constitution? Argued, submission pending.



ARBITRABILITY: WHO DECIDES

[Coinbase, Inc. v. Suski](#) ____ S.Ct. ____, 2024 WL 2333424 (May 23, 2024) (per curiam).

Where parties have agreed to two contracts—one sending arbitrability disputes to arbitration, and the other either explicitly or implicitly sending arbitrability disputes to the courts—a court must decide which contract governs.

PENDING ARBITRATION AND STAY

[Smith v. Spizzirri](#), ___ S.Ct. ___, 2024 WL 2193872 (May 16, 2024)
(per curiam)

When a federal court finds that a dispute is subject to arbitration and a party has requested a stay of the court proceeding pending arbitration, the Federal Arbitration Act compels the court to stay the proceeding.

PENDING ARBITRATION AND STAY DISTINGUISHED?

[Diaz v. Macys West Stores, Inc.](#), ___ F.4th ___, 2024 WL 2098206
(9th Cir. May10, 2024)

District court's order compelling arbitration was final appealable decision, because parties' agreement excluded from arbitration employee's non-individual PAGA claims, and employee's standing to assert non-individual PAGA claims was not affected by enforcement of agreement to submit her individual claim to arbitration.



TRANSPORTATION WORKER EXEMPTION

[Bissonnette v. LePage Bakeries Park St., LLC](#), 601 U.S. 246 (2024)
(per curiam)

A transportation worker need not work for a company in the transportation industry to fall within the FAA's exemption from coverage for any “class of workers engaged in foreign or interstate commerce.”

TRANSPORTATION WORKER EXEMPTION DISTINGUISHED?

[Fli-Lo Falcon, LLC v. Amazon.com, Inc.](#) 97 F.4th 1190 (9th Cir. 2024)

1. As a matter of first impression, FAA's transportation worker exemption did not apply to business, and
2. Businesses' purported lack of sophistication did not render delegation provision in parties' agreements unconscionable.



APPLICABILITY OF ARBITRATION AGREEMENT ON REEMPLOYMENT

[Vazquez v. SaniSure](#), 101 Cal.App.5th 139 (2024)

Arbitration agreements employee executed during her first stint of at-will employment did not apply during her second stint of employment.

TIMELINESS IN COMPELLING ARBITRATION

[Semprini et al. v. Wedbush Securities Inc.](#), 101 Cal.App.5th 518 (2024)

1. Employer's nine-month delay in moving to compel arbitration of individual PAGA claims, following change in law due to issuance of decision by United States Supreme Court in [Viking River Cruises, Inc. v. Moriana](#), 596 U.S. 639 142 S.Ct. 1906 (2022), coupled with employer's litigation conduct amounted to waiver of right to arbitrate individual PAGA claims, and
2. Employer's five-month delay in moving to compel arbitration of claims for wage and hour violations asserted by class members, after those class members signed arbitration agreements, coupled with other litigation conduct amounted to waiver of right to arbitrate.

INCORPORATING DISPUTE RESOLUTION PROVIDER RULES

[Mondragon v. Sunrun Inc.](#), 101 Cal.App.5th 592 (2024)

1. Incorporation of dispute resolution provider's rules into the arbitration agreement did not constitute clear and unmistakable evidence that parties intended to arbitrate threshold questions of arbitrability;
2. Inclusion of carve-out provisions prevented finding parties clearly and unmistakably delegated arbitrability question to the arbitrator;
3. Severability provision created ambiguity as to parties' delegation of arbitrability question; and
4. Carve-out provision applied to all PAGA claims, including employee's individual claims.

AUTHENTICITY OF SIGNATURE ON ARBITRATION AGREEMENT

[Garcia v. Stoneledge Furniture LLC](#), ___ Cal.Rptr.3d ___, 2024 WL 2234833
(May 17, 2024)

A proponent seeking to authenticate an electronic signature on an arbitration agreement must show the electronic signature was the act of the person, which could be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

LATE PAYMENT OF ARBITRATION FEES

[Reynosa v. Superior Court](#), ___ Cal.Rptr.3d ___, 2024 WL 1984884 (May 6, 2024)

1. Review by mandamus was proper for denial of arbitration stay;
2. Employer materially breached arbitration agreement and waived the right to compel employee to proceed with arbitration by twice failing to timely pay arbitration fees and costs; and
3. Employee's continued involvement did not evince that employee deliberately chose the remedy of continuing the arbitration proceeding.



LATE PAYMENT OF ARBITRATION FEES

[Hohenshelt v. Super. Ct.](#), 99 Cal.App.5th 1319 (2024)

1. Employee was entitled to withdraw his dispute with employer from arbitration and proceed in court under statute governing costs of arbitration initiation;
2. Arbitration service's extension of time for employer to pay arbitration fee did not act to make employer's payment timely;
3. FAA did not preempt state statute prescribing procedures for payment of fees to initiate arbitration.



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II. BALLOT INITIATIVE

A. UPDATE ON LATEST TRENDS: POLL

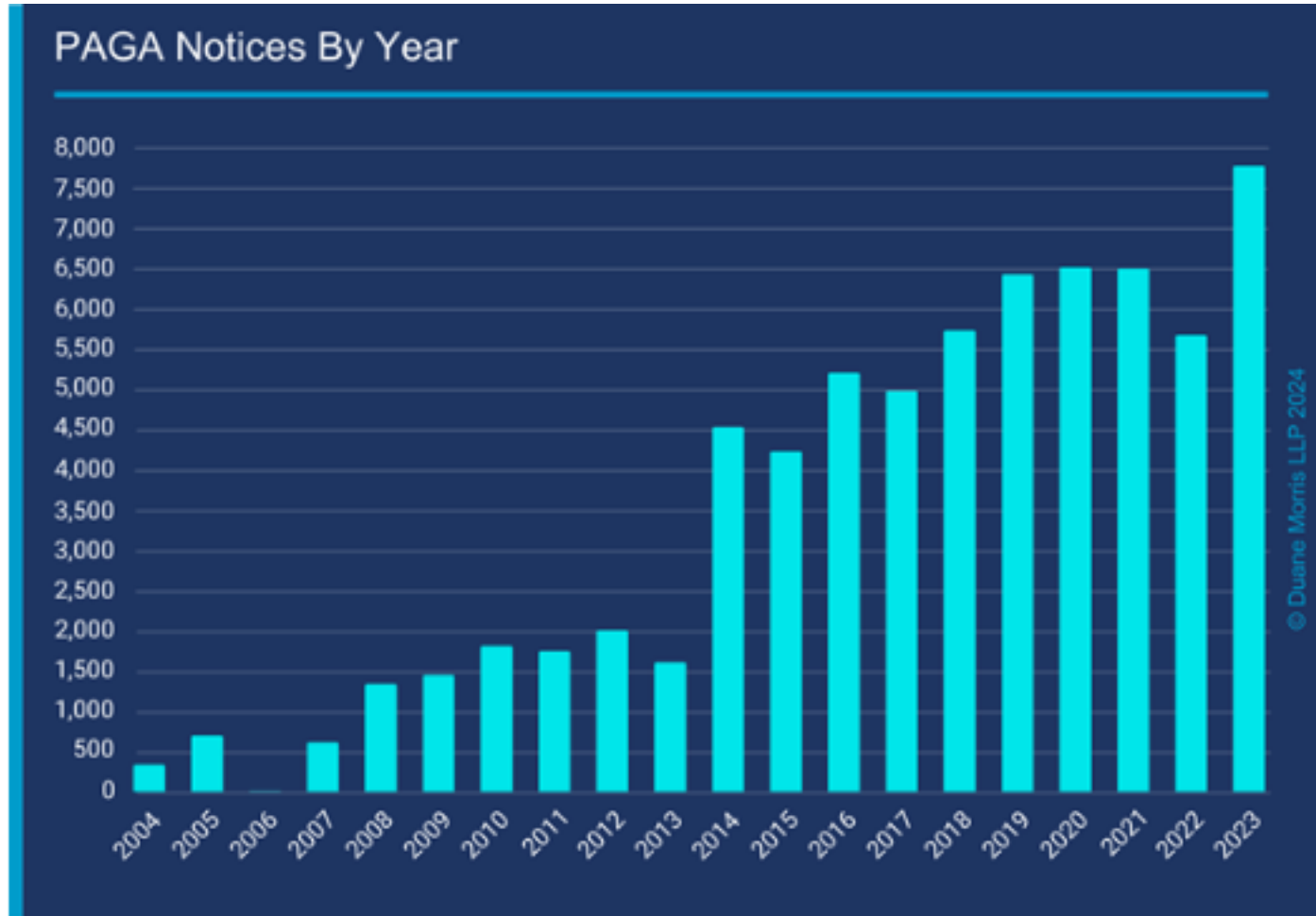
How much have Private Attorney General's Act (PAGA) (Lab. Code, §§ 2698 - 2699.5) cases grown since the law's inception in 2004?

1. More than 10 times.
2. More than 50 times.
3. More than 100 times.
4. More than 500 times.
5. More than 1,000 times.

Answer: More than 1,000 times.

A. UPDATE ON LATEST TRENDS: PAGA

Growth of PAGA cases 2004-2024



Source: California Department of Industrial Relations



B. BALLOT INITIATIVE

[The California Employee Civil Action Law Initiative](#) (#21-0027) has qualified for the ballot in California as an initiated state statute on November 5, 2024. The initiative is sponsored by [Californians for Fair Pay and Accountability](#).

A "yes" vote supports this ballot initiative to repeal the Private Attorneys General Act (PAGA) and replace it with a new law, the Fair Pay and Employer Accountability Act, that would:

- double statutory and civil penalties for willful violators;
- require that 100% of monetary penalties be awarded to harmed employees;
- provide resources to employers to ensure labor compliance; and
- require the Division of Labor Standards Enforcement (DLSE) to be a party to all labor complaints.

A "no" vote opposes this ballot initiative to repeal the Private Attorneys General Act (PAGA), which allows employees to sue employers and collect a share of monetary penalties for state labor law violations.





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III. PENDING LEGISLATION

AB 2288 (ASSEMBLYMEMBER KALRA)

[AB 2288](#) (Assemblymember Kalra) — Labor Code enforcement: private civil actions

Existing law, the Labor Code Private Attorneys General Act of 2004, authorizes an aggrieved employee, on behalf of themselves and other current or former employees, to bring a civil action pursuant to specified procedures for a violation of a provision of the Labor Code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency. Existing law establishes a civil penalty for provisions of the Labor Code for which a civil penalty is not specifically provided, and, with specified exceptions, similarly authorizes an aggrieved employee to recover that civil penalty in a civil action. Existing law, for its purposes, authorizes a court, whenever the agency has discretion to assess a civil penalty, to exercise the same discretion, as prescribed.

The bill would additionally authorize the award of injunctive relief.

Status: Referred to Senate Rules and Public Employment Committees.



SB 940 (SENATOR UMBERG)

[SB 940](#) (Senator Umberg) — Civil Disputes

This bill would give consumers the option to have a dispute adjudicated pursuant to the Small Claims Act if a consumer contract requires a dispute under the contract to be adjudicated by a specific alternative dispute resolution entity and the dispute may be adjudicated pursuant to the Small Claims Act .

This bill would, from the time of appointment until the conclusion of the arbitration, prohibit the arbitrator from entertaining or accepting any offers of employment as a dispute resolution neutral in another case from a party or lawyer for a party, as defined, in the pending arbitration. In a consumer arbitration case, require the disclosure of any solicitation, as defined, made after January 1, 2025, and within the last 2 years by, or at the direction of, a private arbitration company to a party or lawyer for a party. Prohibit the solicitation of a party or lawyer for a party during the pendency of the arbitration.

This bill would authorize the State Bar to create a program to certify alternative dispute resolution firms. If the State Bar creates that program, the bill would require the State Bar to establish procedures for a firm to become a certified alternative dispute resolution firm that include specified requirements, and would authorize the State Bar to charge a fee to cover the reasonable costs of administering the program.

Status: Senate Judiciary Committee third reading.



SB 1141 (SENATOR NIELLO)

[SB 1141](#) (Senator Niello) — Mediation: Amount in Controversy

Existing law prohibits a court from ordering a case into mediation where the amount in controversy exceeds \$50,000.

This bill would prescribe the following requirements that must be met before an LA County Superior Court may order a case to mediation: (1) the amount in controversy must not exceed \$150,000, (2) the case has been set for trial, (3) at least one party has notified the court of its interest in mediation, (4) counsel attending the mediation must have full authority to settle the case, and (5) the parties have been notified of their option to stipulate to a mutually agreeable mediator. The bill would provide that if the parties do not stipulate to a mutually agreeable mediator, as specified, then the court must select a mediator at no cost to the parties. The bill would require the mediation to conclude no later than 120 days before the trial date. The bill would provide that determination and any stipulation of the amount in controversy shall be without prejudice as to any finding on the value of the case by a mediator or in a subsequent trial.

Status: Senate Judiciary Committee third reading.





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IV. QUESTIONS AND ANSWERS



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THANK YOU

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