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# ADR UPDATE

Cases involving late payment of arbitration fees and costs, and those involving the right to arbitrate individual claims while having the right to pursue representative Private Attorneys General Act (PAGA)<sup>1</sup> claims in court, continue to dominate the appellate decisions involving employment arbitration. The most interesting offering in an opinion is actually Justice John Shepard Wiley, Jr.'s dissent in *Hohenshelt v. Superior Court*,<sup>2</sup> in which he criticizes the remedy for late payment set forth by California statute.<sup>3</sup>

## 'DISPUTE' DEFINED UNDER THE EFAA

***Kader v. Southern Cal. Med. Ctr., Inc.*, 99 Cal. App. 5th 214 (2024)**

When the employee signed the arbitration agreement, prior to the effective date of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA),<sup>4</sup> he did not disclose to his employer that he had earlier been subjected to sexual harassment on the job. After the effective date of the EFAA, he filed suit. The defense argued that the dispute arose before the effective date of the EFAA, and the trial court agreed.

The court of appeal reversed. It held that while the date that a dispute has arisen for purposes of the Act depends on the facts of each case, a dispute does not arise merely from the fact of injury. A dispute arises once a party asserts a right, claim or demand. Here, it found there was no dispute at the time the arbitration agreement was signed; the dispute arose when the employee filed suit. Thus, the employee could bring his action under the EFAA in court rather than arbitration.

**NOTE:** This case is also summarized in the discussion of California employment cases, on page 6.

## STRICT CONSTRUCTION OF LATE ARBITRATION FEE PAYMENTS

***Suarez v. Superior Court*, 99 Cal. App. 5th 32 (2024)**

Section 1281.97 of the California Code of Civil Procedure requiring arbitration fees to be paid within 30 days of receiving an invoice from the arbitration provider was strictly applied in this case. The court noted that the statutory provision<sup>5</sup> allowing an extension of two days for electronic service applies only to "an action filed with the court," not to arbitration. Thus, a fee emailed to the arbitration provider 32 days after the invoice was two days late, and the defense therefore waived the right to bring the action in arbitration.

***Hohenshelt v. Superior Court*, 99 Cal. App. 5th 1319 (2024)**

The court of appeal held that if fees or costs are not paid within 30 days of the due date, the drafting party is in material breach of the arbitration agreement and waives its right to compel the employee or consumer to arbitration. It underscored that the employee can elect to withdraw from arbitration.<sup>6</sup> However, the provider cannot extend the due date unless the extension is agreed upon by all parties.

**NOTE:** See Justice Wiley's critique of the statute, noted on page 7 of this issue.

## UNCONSCIONALBILITY INVALIDATED AGREEMENT

***Hasty v. American Automobile Ass'n of Northern Cal., Nev. & Utah*, 98 Cal. App. 5th 1041 (2024)**

The court in this case held that the small dense print and necessity of access to a second screen rendered the arbitration agreement procedurally unconscionable. It held the agreement was substantively unconscionable as it waived the right to

remedies and relief from government and administrative agency proceedings, the links to the provider's rules did not work, the confidentiality provision was one-sided, and the agreement prohibited PAGA, class, and representative claims.

## **NINTH CIRCUIT RECOGNIZES *ADOLPH V. UBER TECHNOLOGIES, INC.***

*Johnson v. Lowe's Home Centers*, 93 F.4th 459 (9th Cir. 2024)

The Ninth Circuit vacated the dismissal of the plaintiff's non-individual PAGA claims and remanded the individual claims to the district court to apply *Adolph v. Uber Technologies, Inc.*,<sup>7</sup> which held that an employee can pursue individual claims in arbitration without losing standing to serve as plaintiff in a representative PAGA action.<sup>8</sup>

In a separate concurring opinion, Circuit Judge Kenneth K. Lee wrote that despite finding no irreconcilable conflict between California law and the Federal Arbitration Act (FAA)<sup>9</sup> in *Johnson*, he saw "a lurking tension" between *Adolph* and the FAA that posed a potential conflict for future cases.

**NOTE:** This case is also summarized in the discussion of California wage and hour cases, on page 11.

## **ENDNOTES**

\* Hon. Michelle R. Rosenblatt (Ret.) has been a mediator and arbitrator on a wide range of civil disputes with ADR Services, Inc. since 2016, when she retired from the bench after 23 years of judicial service. She taught judicial education throughout her career on the bench and is a frequent participant in continuing education programs. She also served for five years as editor of the California Judges Association magazine, *The Bench*.

1. CAL. LAB. CODE §§ 2698-2699.5.
2. *Hohenshelt v. Superior Court*, 99 Cal. App. 5th 1319 (2024).
3. CAL. CODE CIV. PROC. § 1281.98.
4. 9 U.S.C. §§ 401, 402.
5. CAL. CODE CIV. PROC. § 1010.6.
6. CAL. CODE CIV. PROC. § 1281.98.
7. *Adolph v. Uber Tech., Inc.*,<sup>14</sup> Cal. 5th 1104 (2023).
8. See also *DeMarinis v. Heritage Bank of Commerce*, 98 Cal. App. 5th 1041 (2024), holding that a wholesale waiver of PAGA claims is unenforceable.
9. 9 U.S.C. §§ 1-16.