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U.S. Supreme Court Upholds Class Action Waivers in Arbitration Agreements

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On May 21, 2018, the U.S. Supreme Court held by a 5-4 majority in *Epic Systems Corp. v. Lewis* that an employer can lawfully require an employee to waive the right to bring a class or collective action, as part of an agreement to arbitrate employment disputes on an individual basis. As a result, these arbitration agreements – which are increasingly common – are now clearly enforceable, and provide employers a significant tool in mitigating the risk of class and collective litigation. A full copy of the Supreme Court's opinion is available here.

Background on the Case, and the Supreme Court's Decision

The employees in *Epic Systems* sought to litigate Fair Labor Standards Act and related state law claims through class and/or collective actions in federal court, even though they had entered into contracts to resolve employment disputes solely through individual arbitration proceedings.

At issue were two long-standing and apparently competing bodies of federal law. On one side was the Federal Arbitration Act ("FAA") which renders arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[1] On the other side was the National Labor Relations Act ("NLRA"), which, among other things, protects a worker's right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2]

The employers in *Epic Systems* (and the other cases consolidated with it) argued that the FAA requires courts to enforce private arbitration agreements, other than in very narrow circumstances not even alleged by the employees. The employees argued that the class-action waivers in the arbitration clauses were unenforceable because they interfered with the workers' right under the NLRA to engage in "concerted activities," including class and collective action lawsuits.

The Supreme Court sided with the employers, finding that the FAA mandates that arbitration agreements should be enforced as written, and that the NLRA does not require a contrary result. The Court held that under the FAA, arbitration agreements may be invalidated only by contract defenses applicable to any type of contract, such as fraud or duress. This exception does not apply to the defense the employees raised, which sought to invalidate the agreements solely because they required individual arbitration. The Court further rejected the claim that the NLRA, which focuses primarily on workers' rights to organize unions and bargain collectively, protects an employee's right to bring class or collective action claims in litigation.

[1] 9 U.S.C. § 2.
[2] 29 U.S.C. § 157.

Impact of Decision on Employers With Class Action Waivers in Arbitration Agreements

This decision is the most recent in a long line of Supreme Court decisions upholding the enforceability of arbitration provisions.[3] Over the years, employers have increasingly come to view mandatory arbitration agreements for employees as a valuable alternative to court litigation. As Justice Ginsburg noted in dissent in *Epic Systems*, roughly 54 percent of non-unionized employers currently require employees to enter into arbitration agreements, up from just two percent in 1992.[4] Today, nearly a quarter of all non-union employees are subject to class-action waivers in mandatory arbitration agreements.[5]

Prior to a 2012 decision of the National Labor Relations Board invalidating a class action arbitration waiver[6] the consensus view had long been that such waivers were enforceable under the FAA. Since 2012, the issue has been unsettled and frequently litigated. The *Epic Systems*decision has now resolved the matter, stating in no uncertain terms that class action waivers in arbitration agreements are enforceable. Employers that are currently parties to employment class actions filed in contravention of class action waivers in arbitration agreements should consider filing a motion to compel individual arbitrations.

Should Employers Implement Arbitration Agreements with Class Action Waivers if They Do Not Already Have Them?

The now-settled enforceability of class action waivers, and the corresponding protection from potentially costly class-based litigation, is a reason for employers to re-assess whether to require employees to agree to arbitrate their claims and to do so on an individual basis. Actions by individual employees present far lower exposure than aggregated class-based claims.

Employers considering requiring, for the first time, arbitration of employment claims should consult with counsel before moving forward. Arbitration agreements have both advantages and disadvantages.

Potential advantages to mandatory arbitration of employment disputes include:

- **Confidentiality**: Arbitration proceedings and awards can be confidential, unlike court trials and verdicts, which are public.
- **No Juries**: Matters in arbitration are decided by arbitrators, not juries. Arbitrators are often more predictable and reasonable in their findings on liability and damages.
- **Limited Discovery**: Discovery is usually more limited in arbitration than in court actions, which can reduce costs and expedite resolutions.
- **Greater Role in Selecting Decision-Maker**: Arbitration agreements often allow the parties to select an arbitrator of their choosing.
- **Potential for Streamlined and Collaborative Proceedings**: Particularly for disputes involving current employees with whom an employer desires good ongoing relationships, arbitration may somewhat reduce hostility between the parties and provide greater opportunity for collaborative solutions.

[3] *See, e.g.*, *Kindred Nursing Centers L.P. v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).
[4] *See Epic Systems Corp. v. Lewis*, 2018 WL 2292444, at *27 (U.S., 2018) (slip op.)
[5] *Id.*
[6] *See In re D. R. Horton, Inc.*, 357 NLRB 2277 (2012).

Potential disadvantages to mandatory arbitration include:

- **Fewer Opportunities for Early Wins**: Employers typically have fewer opportunities in arbitration to file dispositive motions that may quickly resolve a case, meaning that a higher percentage of cases will actually go to a full evidentiary hearing in arbitration than would be true in court litigation. Arbitrators are also more likely than judges and juries to make a "middle way" or "split the baby" award, instead of ruling definitively for either party.
- **Fees Paid by the Employer**: Some states require employers to front the costs of arbitration.
- **Lower Costs to Employees May Encourage Claims**: Employees may perceive arbitration to be less costly than courtroom litigation, which may encourage more employees to bring claims.
- **The Downsides of Limited Discovery**: There may be fewer opportunities prior to hearing to gather information about the employee's case and strategy.
- **No Precedent**: An arbitration decision, unlike a court case, cannot create a precedent.
- **Limited Right of Appeal**: Arbitration awards are subject to only a limited right of appeal. This promotes finality, but may leave an employer with little recourse against an award with which it disagrees.
- **Negative Publicity**: Apparently because of negative publicity associated with the "MeToo" movement, some companies, including Microsoft, Uber, and several law firms, have recently decided to limit the use of arbitration clauses in employment agreements.
- **State Law Uncertainty**: New York has recently passed legislation that purports to void agreements requiring arbitration of sexual harassment claims.[7] Similar bills have been proposed in California,[8] New Jersey[9] and other states. The Supreme Court's interpretation of the FAA in *Epic Systems* and other cases may, however, mean that state laws invalidating agreements to arbitrate particular employment claims will not be enforced by the courts. As an alternative, states may seek to get around the FAA by enacting legislation like California's Private Attorneys General Act which authorizes employees to bring representative actions for the benefit of other employees in a manner that some courts have held cannot be waived in an arbitration agreement.[10]

For advice or assistance in dealing with this important clarification of the law, please contact any member of the Ropes & Gray labor & employment group.

[7] *See* S-7848A, Part KK, Subpart B. Assemb. Reg. Sess. 2017-2018 (N.Y. 2018).
[8] *See* A.B. 3080. 2018 Leg. Reg. Sess. (Cal. 2018).
[9] *See* S-3581. Assemb. Reg. Sess. 2016-2017 (N.J. 2017).
[10] *See* California Labor Code Section 2698 et seq.; *e.g.*, *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014); *Sakkab v. Luxottica Retail North America, Inc.*, 803 F. 3d 425, 431 (9th Cir. 2015).