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

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Finally, some good news for employers. The U.S. Supreme Court has upheld the enforceability of class action waivers set forth in arbitration agreements between employers and employees.

The 5-4 decision in *Epic Systems Corp. v. Lewis*, handed down on May 21, 2018, holds that employees who are subject to arbitration agreements – whether as stand-alone agreements or provisions contained in employment agreements – can be required to arbitrate their claims on an individual basis.

Background

Many employers require their employees to sign arbitration agreements in which the parties (*i.e.*, the employer and the employee) agree to submit most claims to binding arbitration. These agreements have many benefits compared to traditional litigation, including confidentiality, expediency, simplicity and decreased costs. At times, these arbitration agreements also contain class action waivers, which require that any arbitration between the parties be conducted on an individualized basis rather than on a class, collective, or multi-employee basis.

Under the Federal Arbitration Act (FAA) and following Supreme Court precedent, courts have enforced such arbitration agreements (including those containing class action waivers) unless the arbitration agreement itself was unenforceable under “generally applicable contract defenses, such as fraud, duress, or unconscionability.”

In 2012, the National Labor Relations Board (NLRB) determined that arbitration agreements containing

class action waivers violated the National Labor Relations Act (the Act). Specifically, the NLRB held that Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations, to bargain collectively ..., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. Section 157.

The NLRB also noted that employees joining together in litigation against their employer was a form of protected, concerted activity under Section 7 of the Act. Accordingly, the NLRB held that class action waivers in arbitration agreements, which required employees to arbitrate their claims on an individual basis, violated Section 7 and therefore it rendered such agreements invalid, unenforceable and a violation of the Act.

Since the Board’s 2012 decision, the federal appellate courts have split on the issue, with some circuit courts agreeing with the NLRB, and others finding such class action waivers to be enforceable and not in violation of the Act.

The Supreme Court’s Decision

In *Epic Systems*, the Supreme Court was asked to resolve the circuit split. The case actually consisted of three consolidated cases all with similar fact-patterns. In each case, the employee and the employer had entered into an arbitration agreement requiring the parties to arbitrate their claims on an individual basis. The employee filed a putative collective action complaint in federal court claiming that the employer violated the Fair Labor Standards Act and seeking to represent a collective of similarly situated individuals. The employer moved to dismiss

the complaint under the FAA because there was a valid arbitration agreement between the parties. The employee opposed the motion and filed a complaint with the NLRB arguing that the requirement to arbitrate claims individually violated the Act.

In its decision, the Supreme Court held that class action waivers found in arbitration agreements, as well as other clauses that required employees to arbitrate their claims individually, are enforceable and do not violate the Act.

Writing for the majority, Justice Neil Gorsuch said the Court reached its decision on three primary grounds. First, the Court noted that the FAA requires courts to enforce arbitration agreements as written, including with whom the parties choose to arbitrate their disputes (*e.g.*, the employer and the aggrieved employee) and the rules governing the dispute (*e.g.*, individualized proceedings, rather than class or collective proceedings). Contrary to the employees' arguments, the Court found that the FAA's savings clause – which allows courts to invalidate arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,” 9 U.S.C. Section 2, such as fraud, duress, or unconscionability – does not invalidate the class action waivers at issue because the savings clause does not include defenses that interfere with the “fundamental attributes of arbitration,” in this case, the parties' agreement to proceed with individual arbitration instead of class or collective proceedings.

Second, the Court rejected the employees' argument that the Act overrides the FAA's mandate to treat arbitration agreements as “valid, irrevocable, and enforceable.” 9 U.S.C. Section 2. The Court noted that when faced with two statutes allegedly touching on the same topic, the Court must endeavor to give effect to both, and a party suggesting that one statute displaces the other bears the burden of showing a “clear and manifest” intention that Congress intended such a result because there is a presumption that disfavors repeal of congressional acts by implication. Here, the Court noted, such “clear and manifest” intention by Congress was absent. Section 7 of the Act protects employees' right to concerted activity, but focuses on the right to organize unions and bargain collectively – it does

not mention class or collective action procedures or even allude to a desire to displace the FAA.

Finally, the Court concluded that the NLRB's decision was not entitled to deference under administrative law. Specifically, the Court found that, although the NLRB sought to interpret a statute which it administers (the Act), it sought to do so in a way that limited a second statute that it does not administer (the FAA). The Court also determined that administrative deference was not warranted where, as here, a traditional canon of statutory construction – not reading conflicts into statutes – answered the question posed to the Supreme Court.

In dissent, Justice Ruth Bader Ginsberg argued that the right of employees to engage in their Section 7 rights was paramount and trumped the FAA. The dissent focused on the history of the Act and that it was enacted as a result of the “extreme imbalance once prevalent in our Nation's workplaces” and to “place employers and employees on more equal footing.” Justice Ginsberg believes that the arbitration agreements containing class action waivers at issue in *Epic Systems* were the result of the unequal bargaining power between employers and employees. Further, she contended that class and collective actions are concerted activity and arbitration agreements that forbid employees from joining together are inherently unfair to employees and prevent them from engaging in their Section 7 rights, which will result in employers not being held accountable for violations of employment law. In short, the dissent challenged the long history of the Supreme Court upholding and enforcing arbitration agreement between employers and employees due to the unequal bargaining power between such parties.

The Impact on Employers

Epic Systems is certainly good news for employers. It conclusively establishes the legality of what has been a standard practice for many employers – including an arbitration provision in employment agreements requiring all employment disputes to proceed through individualized arbitration. Now, when faced with a threatened class or collective action in federal court, employers may rely on the *Epic Systems* decision to enforce the terms of any arbitration

agreement and move the proceeding to private arbitration.

However, employers should still be aware that the *Epic Systems* decision does not preclude lawsuits challenging arbitration agreements on general contract grounds, such as fraud, duress, or unconscionability. Indeed, employers must ensure that any arbitration agreement that they are contemplating must be enforceable under general contract law. This means that the arbitration agreement must:

- Allow employees to recover in arbitration what they can recover in court, such as attorneys' fees, civil fines, and penalties;
- Not revise the statute of limitations period applicable to employee claims; and
- Limit the amount that the employee must contribute towards the arbitration costs at an amount equal to federal or state court filing fees.

Further, in some states, employees may circumvent arbitration agreements through the use of private attorney general suits – lawsuits that allow an employee to sue his or her employer in a representative capacity (*i.e.*, the employee steps into the shoes of the state) and to recover penalties and attorneys' fees for technical violations of various labor laws suffered by that one employee and all other employees. In addition, while it is unlikely, Congress could take steps to roll back the *Epic Systems* decision by amending the FAA.

While the *Epic Systems* decision provides a measure of relief for employers whose arbitration agreements contain class waivers, employers should still consult with legal counsel to review their arbitration agreements to ensure they cannot be challenged on other grounds, such as a failure to provide employees all rights they would have in court or requiring employees to pay for more for arbitration than it would cost to file a complaint.

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