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Arbitration Agreements and the Supreme Court's Recent Decision: An Epic Change for Employers?

By Brendan G. Dolan and Joseph K. Mulherin

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The Supreme Court's Decision

On May 21, 2018, a divided Supreme Court confirmed in *Epic Systems Corp. v. Lewis*, No. 16-285, 584 U.S. ___ (2018), that class action waivers in mandatory employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA). The practical import of the Court's decision is that employers may lawfully require employees, as a condition of employment, to enter into mandatory arbitration agreements that preemptively bar them from pursuing class action claims in court or in arbitration. Employees who enter into arbitration agreements with class waivers may only litigate claims against their employers in individual arbitration. As discussed below (and at our upcoming webinar on June 19, 2018), while class action waivers can be a powerful tool for limiting significant potential employer liabilities, mandatory individual arbitration is not necessarily a panacea for avoiding complex and expensive litigation and may not be appropriate for every employer.

Justice Gorsuch, who we suggested in our March 2017 article *Class Is in Session: Supreme Court to Decide Future of Class Waiver Arbitration Clauses* might play a role in the future of class waivers, wrote the opinion for the five to four majority. Justice Ginsburg penned the strongly worded dissent. And, while these competing justices tackled a multitude of legal (and social) issues in the decision, the primary legal issue in *Epic Systems* was whether class action waivers in arbitration agreements violate the National Labor Relations Act (NLRA) and are thus unenforceable.

The employee in *Epic Systems* had entered into an arbitration agreement with a class action waiver, but nevertheless brought a class action wage claim in court under the Fair Labor Standards Act (FLSA). He argued that wage and hour class action litigation was "protected concerted activity" under the NLRA and that the class waiver in his arbitration agreement could not be enforced because it violated the NLRA's prohibition on employer interference with concerted activity. That argument had been considered by a number of federal appellate courts around the country in recent years with differing results, which led the Supreme Court to take up *Epic Systems* and two similar cases on review.

Writing for the Court, Justice Gorsuch concluded that it was inappropriate to read the federal statutes implicated in the case, the FAA and NLRA, as conflicting with each other. He reasoned that the strong FAA mandate to enforce arbitration agreements could not be construed to conflict with the NLRA's protection of concerted activity, which did not include a right to bring a class or collective action.

What It All Means, and What Employers Should Do

While the Supreme Court's decision in *Epic Systems* puts to rest facial challenges to the enforcement of class action waivers in arbitration agreements on the grounds that they conflict with the NLRA, employees may still challenge such agreements under generally available contract defenses such as "fraud, duress or unconscionability." To be sure, the plaintiffs' bar and employee advocacy groups will, as they have done for years, attempt to expand these and other arguments to get around arbitration agreements and class action waivers.

The continued attack on arbitration agreements places an increased premium on employers' careful drafting, implementation and maintenance of agreements and class action waivers. Employers should make conscious, considered judgments about implementing or maintaining arbitration agreements and class action waivers. While arbitration was for years seen as a low cost alternative to court litigation, that is not necessarily so any longer. Arbitration can be expensive, and one reaction to class action waivers that has already been observed is the filing by plaintiffs' lawyers of dozens of individual arbitrations at a time, for which employers are required to foot the bill for arbitrator fees in many jurisdictions.

Employers should also anticipate, especially if Congress turns over in the fall, that legislators will look to exempt some claims, such as those for sexual harassment or discrimination, from mandatory arbitration. In addition, although there are legal impediments to enforcement of state laws and judicial decisions that affect the enforceability of employee arbitration agreements, state legislation and state court rulings are likely to further muddy the waters.

The *Epic Systems* decision resolves one of the long-standing issues regarding arbitration and class action waivers but there remain myriad other questions that employers must confront in connection with determining whether to implement or maintain an arbitration agreement and a class action waiver.

Dive Deeper at Vedder Price's Upcoming Webinar

We will address these issues in detail in our June 19th webinar, *What Employers Need to Know about Class Action Waivers in Employee Arbitration Agreements*. To learn more about this complimentary program for HR professionals and in-house counsel, and to register, please visit www.vedderprice.com/events.

If you have any questions regarding the topics discussed in this article, contact **Brendan G. Dolan** +1 (415) 749-9530, **Amy L. Bess** +1 (202) 312-3361, **Joseph K. Mulherin** +1 (312) 609-7725, **Heather M. Sager** +1 (415) 749-9510 or any Vedder Price attorney with whom you have worked.