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

On May 21, 2018, the U.S. Supreme Court ruled, by a 5-4 vote, that class and collective action waivers in workplace arbitration agreements are enforceable. Such waivers require employees to adjudicate their workplace disputes in individualized arbitrations, instead of through class and collective actions.

In *Epic Systems Corp. v. Lewis*, Justice Neil Gorsuch, writing for the majority, resolved a recent circuit split by holding that employees' rights to engage in concerted activity under Section 7 of the National Labor Relations Act ("NLRA") do not override the mandate of the Federal Arbitration Act ("FAA"), which requires federal courts to enforce arbitration agreements according to their terms—"including terms providing for individualized proceedings." Specifically, the Court held that the NLRA "says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum;" and further noted that the Court had "never read a right to class actions into the NLRA." Moreover, the opinion explained that the NLRA "does not express approval or disapproval of arbitration. It does not mention class or collective action procedures." Consequently, the majority ruled that under the FAA, arbitration agreements with class and collective action waivers must be enforced as written.

Justice Ruth Bader Ginsburg, in her dissenting opinion, characterized the majority's opinion as "egregiously wrong," and stated that it will inevitably lead to "the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

Implications of *Epic Systems Corp.*

Under *Epic Systems*, employers may include class and collective action waivers in workplace arbitration agreements that are otherwise lawful (*e.g.*, that are neither procedurally nor substantively unconscionable and are compliant with applicable law). Including such waivers in arbitration agreements may provide a number of benefits for employers. First, the financial cost and exposure to corporations in individualized arbitrations is generally lower than in class and collective actions, and such individualized

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arbitrations may be easier to settle. Second, individualized arbitrations are more likely to be private, as compared to class and collective court cases, where a public trial might bring negative publicity for the employer. Third, in arbitration, both the employer and employee generally agree to mutually select the presiding arbitrator; in a trial, parties have no say in which judge hears their case. Lastly, arbitrations have a more streamlined, and less formalized, process—especially when it comes to discovery—which makes the resolution of individualized workplace disputes much quicker than class and collective actions in federal or state court.

Employers should, however, carefully consider the entire picture before deciding to enter into arbitration agreements in the first instance. Arbitration decisions are subject to limited judicial review and generally can only be overturned where the award was procured by corruption, fraud, or undue means; where there is misconduct or partiality on the part of the arbitrator; or where the arbitrator exceeded his or her power. Plain errors and incorrect outcomes, by contrast, are rarely bases for challenging an arbitrator's award. Additionally, there may be a number of business reasons why an employer might prefer to litigate a claim in a public forum and have access to the more formalized structure of court-monitored discovery when litigating a claim. Finally, arbitration may not be available for all claims. For example, new legislation will require New York employers to include an exception in arbitration agreements for claims relating to sexual harassment. Whether or not these types of state laws remain enforceable after *Epic Systems* is unclear.

The *Epic Systems* decision may also have implications outside the realm of arbitration. Although the Court's decision upheld class action waivers strictly within the context of arbitration agreements, dicta in the decision hints that the right to engage in class action litigation in general may be more readily subject to waiver than has widely been assumed. In recent years, many employers have omitted class action waivers from all agreements (*e.g.*, separation agreements, employment agreements) to avoid concerns about the potential curtailment of Section 7 rights under the NLRA; however, *Epic Systems* may argue for the reassertion of class waivers absent other statutory restrictions. Specifically, the Court questioned throughout the opinion whether the NLRA guarantees employees the right to prosecute claims as part of a class, regardless of the forum. Notably, the decision states that the NLRA lacks "any hint about what rules should govern the adjudication of class or collective actions *in court* or arbitration" (emphasis supplied) and that "[t]he notion that Section 7 [of the NLRA] confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted . . . ." Employers relying on *Epic Systems* to reincorporate class action waivers in other agreements should, however, proceed with caution, as the express holding of the Court's decision was limited to the effect (or lack thereof) of the NLRA on the FAA. Further, employers should be mindful that there remain open questions regarding the enforceability of state legislation prohibiting arbitration in certain contexts.

If you have any questions about the above ruling, or its impact on your arbitration or other agreements, please contact Tonianne Florentino, Tina Grimshaw, or any other attorney at the Firm at (212) 758-7600.