

EMPLOYMENT LAW COMMENTARY

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WHAT THE SUPREME COURT'S “EPIC” DECISION MEANS FOR EMPLOYERS

By Andrew R. Turnbull

On May 21, 2018, the United States Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, holding that waivers of class and collective actions in arbitration agreements are enforceable under the Federal Arbitration Act (FAA). The Supreme Court’s decision resolves a circuit split that has been brewing for several years on whether such waivers contained in predispute employment arbitration agreements violate the National Labor Relations Act (NLRA) by preventing employees from acting in concert to pursue claims against their employers. Writing for the majority in a 5-4 decision, Justice Neil Gorsuch found that arbitration agreements requiring employees to arbitrate their claims individually are enforceable under the FAA and the NLRA.

This decision marks a significant win for employers who have arbitration agreements with these waivers, as it reduces their risk of having to litigate employment claims on a class and collective basis. Although these waivers are now enforceable, employers must still review their arbitration agreements and programs to ensure they are carefully crafted to avoid contractual challenges,

such as finding the agreements are unconscionable, and be mindful that not all class claims will be covered. Employers who do not currently use predispute arbitration agreements should consider whether it makes sense for them to adopt such agreements in light of this ruling.

BACKGROUND

Many companies require their employees, as a condition of employment, to enter into arbitration agreements that require them to arbitrate any future claims against the company, rather than litigate those claims in court. As part of these arbitration agreements, companies also commonly require employees to arbitrate their employment claims individually and prohibit arbitration on a class or collective basis. Such waivers have long been enforced pursuant to the FAA.

In 2012, however, the National Labor Relations Board (the “Board”) ruled in *D.R. Horton Inc.*, 357 NLRB No. 184 (2012), that employers violate the NLRA when they require employees to enter predispute arbitration agreements containing class or collective action waivers. The Board essentially reasoned that such waivers contravened employees’ rights under Section 7 of the NLRA to engage in “concerted activities” in pursuit of “mutual aid or protection.” In 2013, the Fifth Circuit Court of Appeals rejected the Board’s position in *D.R. Horton*, and later confirmed that same ruling in *Murphy Oil USA, Inc. v. NLRB*. In 2016, the Seventh Circuit Court of Appeals in *Lewis v. Epic Systems Corp.* and the Ninth Circuit Court of Appeals in *Morris v. Ernst & Young* held that class action waivers in mandatory, predispute arbitration agreements between employers and employees violate the NLRA by restraining employees’ right to engage in concerted activity. Those courts found that the FAA’s savings clause — which provides arbitration agreements are unenforceable if grounds exist at law or in equity for their revocation — rendered the agreements unlawful because they violate the NLRA.

To resolve this circuit split, the Supreme Court granted certiorari and consolidated *Epic*, *Murphy Oil*, and *Ernst & Young* to determine whether an employment arbitration agreement containing a class and collective action waiver violates the NLRA or is permitted by virtue of the FAA.

THE SUPREME COURT’S DECISION

The Supreme Court majority held that class action waivers are enforceable. The Court found that the FAA has a strong policy in favor of arbitration that requires enforcement of arbitration agreements, including enforcing the terms selected by the parties. Although the FAA’s savings clause allows courts to refuse to enforce

arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,” the Court reasoned that the savings clause only recognizes “generally applicable contract defenses, such as fraud, duress, or unconscionability.” The Court rejected the employees’ position because they were challenging the agreements on procedural terms in the agreements requiring that their claims be heard on an individual basis, rather than attacking the agreements on contractual grounds, such as asserting the agreements are unconscionable.

The Court also held that the NLRA did not preempt the FAA to render class and collective action waivers unlawful. While recognizing the NLRA provides employees with the right to engage in “concerted activities,” the Court found that that right did not include a right to engage in class or collective action procedures. The Court reasoned that Congress could not have intended the NLRA to address class and collective waivers, as the NLRA was enacted well before class action procedures had been adopted in the Federal Rules of Civil Procedure and even several years before the Fair Labor Standards Act codified its collective action provision. As Justice Gorsuch noted, “[i]t’s more than a little doubtful that Congress would have tucked into the mousehole of Section 7’s catchall term an elephant that tramples the work done by these other laws . . .”

The Court also found that it did not need to defer to the Board’s position on class and collective waivers. The Board had to interpret not only the NLRA, but also the FAA to find that such waivers were unlawful. Because the NLRB has no power to interpret or administer the FAA, it was due no deference. Deference was also particularly unwarranted, in the Court’s view, because the Board and the U.S. Department of Justice took opposing views on the issue.

Writing for the dissent, Justice Ginsberg contended that class and collective waivers were protected by the NLRA. Noting that Congress enacted the NLRA to protect employees’ right to engage in concerted activity, she found that class and collective action waivers illegally subvert that right by barring employees from banding together to seek mutual aid and protection. Accordingly, the dissent found the waivers to be unenforceable under the FAA’s savings clause.

PRACTICAL TAKEAWAYS

In light of this decision, employers should review their arbitration agreements and consider modifying them to include class action waivers if they are not already included. Companies operating in multiple jurisdictions that have created different versions of their arbitration agreements to address the uncertainty caused by the

circuit split should now consider standardizing the waiver language in their arbitration agreements.

Despite this significant victory, arbitration agreements are still subject to challenge. For example, as the Supreme Court found, traditional contract defenses, such as unconscionability, can make a class or collective waiver unenforceable. Consequently, it is critical to ensure that arbitration agreements and programs are carefully crafted to avoid enforceability issues on these grounds.

In addition, some states have laws expressly precluding class waivers. For example, class action waivers are not allowed under California's Private Attorneys General Act (PAGA). Courts have found that PAGA is not preempted by the FAA and is procedurally distinct from many other class claims, as it is a representative action where an employee acts as the state's proxy. In addition, some federal laws prohibit certain types of claims from being arbitrated, such as retaliation claims under the Sarbanes-Oxley Act of 2002, and certain contractors of the Department of Defense cannot have predispute arbitration agreements covering sexual harassment or assault claims. Given recent attempts by state legislatures to attack arbitration agreements covering sexual harassment and assault claims in light of the MeToo movement, some states may seek to revise their laws to circumvent the Supreme Court's decision. Although these state laws would be susceptible to FAA preemption challenges, employers should pay close attention to these developments and might consider preemptively limiting their arbitration programs to cover only certain types of claims, such as wage and hour claims.

Employers without predispute arbitration agreements may be encouraged by the Supreme Court's decision to adopt an arbitration program or mandate that certain employees sign arbitration agreements as a condition of employment. Although arbitration has a number of benefits, it is not right for all companies. The benefits of arbitration generally include that it can be a less costly forum than litigating in court, leads to faster resolutions than do court actions, and provides a confidential forum out of the public purview. Despite these benefits, arbitration has several

drawbacks that companies should consider before implementing mandatory arbitration agreements or programs. In some instances, arbitration can be more expensive. Most arbitration agreements require the employer to pay both the employer's and the employee's share of the arbitrator's expenses and fees, including the initial filing fees and hourly billing rates of the arbitrator, to avoid the risk of a court invalidating the arbitration agreement on unconscionability grounds for imposing a cost or fee-splitting requirement. Employers can also face increased costs and fees associated with having to move in court to compel arbitration or defend challenges to the enforceability of the arbitration agreement. Another possible drawback is that some arbitrators are less likely than courts to grant dispositive motions. The right to file dispositive motions is not guaranteed in arbitration as it is in court. And, unlike court judges who have an interest in eliminating from their docket cases that lack merit, arbitrators are paid by the hour and may be more disinclined to grant dispositive motions.

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