Epic Systems Corp. v. Lewis: U.S. Supreme Court Ruling

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U.S. Supreme Court Rules That Employers May Require Employees To Waive Class And Collective Actions And Individually Arbitrate Their Employment Claims

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Defending against class actions or collective actions brought by large groups of employees alleging violations of wage and hour, as well as a variety of discrimination claims, with their staggering litigation costs, greatly enhances the ordinary risks employers face in operating their workplaces. Adapting to this risk, employers have sought to require employees to submit such claims to an individual, binding, and confidential arbitration proceeding.

In 2012, however, the National Labor Relations Board (NLRB) found that this attempt by employers to limit their potential exposure violated Section 7 of the National Labor Relations Act (NLRA) which guarantees to employees the right to engage in "other concerted protected activity" for the purpose of collective bargaining or other mutual aid or support.[1] During the next six years, the NLRB invalidated numerous arbitration agreements and employer policies limiting employees' ability to file class and collective actions.[2] Employer appeals from the NLRB's decisions resulted in a split of authority between several federal circuit courts of appeal with two courts agreeing with the NLRB's conclusion and one court upholding the employers' right to enforce class and collective action waivers in employment arbitration agreements.[3]

The U.S. Supreme Court responded to this confusing split of authority by granting certiorari as to all three cases which they then consolidated under the lead case of *Epic Systems Corp. v. Lewis*. On May 21, 2018, the Court handed down its decision bringing clarity to this turbulent area. Writing for a 5-4 majority, newly seated Justice Gorsuch, stated the issues before the Court concisely as:

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?[4]

The Court found that while, as a matter of policy, these questions were "surely debatable," as a matter of law, the answer was clear.[5] Thus, the Court held that class and collective action waivers in employer arbitration agreements were completely enforceable, rejecting the NLRB's three main arguments.

First, the Court rejected the NLRB's technical argument that the Federal Arbitration Act's (FAA) "savings clause," which provides that arbitration agreements are presumptively enforceable "save upon such ground as exist at law or in equity for the revocation of any contract." The Court found that that "savings provision" applied only when general contract defenses,

that applied to all contracts and not solely arbitration agreements, were implicated.[6] The Court then rejected the NLRB's argument that the NLRA, which was passed in 1935 by Congress, ten years subsequent to the FAA, impliedly overruled the FAA as to these types of waivers, noting that it disfavored such "implied repeal" and that it would interpret those statutes "as a harmonious whole rather than at war with one another."[7] Finally, the Court refused the NLRB's request to defer to the NLRB's administrative rulings under the *Chevron* deferral doctrine,[8] finding that Congress did not delegate to the NLRB the power to interpret one statute (the NLRA) in a way that limits the work of a second statute (the FAA) that it did not administer.[9]

Following the issuance of the *Epic Systems* decision, the NLRB issued a statement saying that it "respects the Court's decision, which clearly establishes that arbitration agreements providing for individualized proceedings, and waiving the right to participate in class or collective actions, are lawful and enforceable."[10]

Practice Pointer

In view of the *Epic Systems* ruling, employers and their legal counsel should review their arbitration and employment agreements to ascertain whether they are or should be taking advantage of the protections the Court has afforded to employers. Those agreements also should be reviewed to ensure that they meet with all the typical due process requirements courts have placed upon arbitration agreements to ensure enforceability. Employer that have inserted opt-out provisions in their arbitration agreements as a result of the NLRB's former position, may wish to re-think whether now to make those agreements mandatory. Employers also should be mindful of any arbitration agreements permitting class or collective actions to be brought in arbitration, a forum ill-suited to handling such complex litigation. Finally, employers should review carefully with their counsel the impact of any state #MeToo laws,[11] which seek to invalidate employment, arbitration and settlement agreements attempting to maintain the confidentiality of sexual harassment and similar claims and ascertain whether FAA preemption defenses to such laws are available.

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[1] *See D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012).*

[2] As of May 21, 2018, the NLRB had 55 pending cases with allegations that employers had violated the NLRA by maintaining or enforcing individual arbitration agreements or policies containing class and collective action waivers. *Supreme Court Issues Decision in NLRB v Murphy Oil USA*, NLRB (May 21, 2018), https://www.nlrb.gov/news-outreach/news-story/supreme-court-issues-decision-nlrb-v-murphy-oil-usa.

[3] Compare *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016) and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), which both found class and collective action waivers unenforceable, with *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015), which upheld such waivers in employer arbitration agreements entered into voluntarily by employees.

[4] *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, No. 16-285 (May 21,2018), slip op. at 1.

[5] *Id.* at 2.

[6] *Id.* at 6-7.

[7] *Id.*

[8] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841, 844 (1984), held that a court should defer to an administrative agency's interpretation of a statute it administered.

[9] *Epic Systems, Slip Op. at 19-20.*

[10] *See* n.1, *supra* at 1.

[11] *See e.g., NJ Senate Bill No. 121* (March 5, 2018), passed by the Senate and currently before the Assembly.