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U.S. Supreme Court Rules That Class Action Waivers Are Enforceable

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Employers may require employees to enter into arbitration agreements that waive such employees' ability to participate in a class or collective action lawsuit, the U.S. Supreme Court ruled this week. In a long-awaited decision that represents a significant victory for employers, the Court in *Epic Systems Corp. v. Lewis* held that such agreements do not violate the National Labor Relations Act and are enforceable.

Background

In 2012, the National Labor Relations Board issued a decision in *D.R. Horton, Inc.* rejecting workplace class action waivers, *i.e.*, agreements preventing employees from pursuing legal claims – either in court or in arbitration – on a class or collective action basis. The Board took the position that class waivers prevented employees from engaging in 'concerted activity' in contravention of Section 7 of the National Labor Relations Act (NLRA). This was a new position of the Board, as it had never previously claimed that class or collective actions fell under Section 7 protection as concerted activity. In the years that followed, the federal circuit courts split on the issue: some courts refused to enforce the Board's view, while others endorsed it. Ultimately, the Supreme Court granted *certiorari* in a trio of consolidated cases: *NLRB v. Murphy Oil USA* (from the U.S. Court of Appeals for the Fifth Circuit), *Epic*

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Systems Corp. v. Lewis (Seventh Circuit), and *Ernst & Young v. Morris* (Ninth Circuit), to squarely address the enforceability of a class action waiver.

Summary of the Court's Opinion

At the outset, Justice Neil Gorsuch, writing for the Court's majority in a 5-4 decision, rejected the employees' contention that under the "saving clause" of the Federal Arbitration Act (FAA), the NLRA renders class and collective action waivers illegal. In doing so, the Court reasoned that the "saving clause" recognizes only defenses that apply to "any" contract, such as, for example, fraud, duress, or unconscionability. Relying on its previous decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), in which the Court upheld class waivers in consumer contracts, the Court succinctly stated: "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class wide arbitration procedures without the parties' consent." In reaching this holding, the Court emphasized the FAA's mandate that courts generally enforce, not override, the terms of arbitration agreements.

The Court likewise rejected the employees' position that the NLRA creates a protected right to pursue a class or collective action. The majority wrote that Section 7 of the NLRA, by its terms, focuses on the right to organize unions and bargain collectively, but it does not express approval or disapproval of arbitration, nor does the NLRA anywhere mention class or collective action procedures. The Court further opined that the "catch-all" provision of Section 7 – permitting employees to engage in "other concerted activities for the purpose of . . . other mutual aid and protection" – does not include the right to participate in a class action because it encompasses only those activities similar to those expressly listed in Section 7, *i.e.* "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace." Justice Gorsuch remarked that it was highly doubtful that Congress "would have tucked into the

mousehole of Section 7's catchall term an elephant that tramples the work done" by other laws. Moreover, Justice Gorsuch noted that class and collective actions were "hardly known" as of the time the NLRA was passed in 1935, and therefore, it was exceedingly unlikely the drafters of the NLRA intended it to cover such procedural litigation vehicles.

Even more, the Court explained, the Fair Labor Standards Act (FLSA) – the statute giving rise to the employees' causes of action in all three cases – was similar to other employment related statutes that also allow employees to proceed collectively that the Court previously held did not prohibit mandatory individual arbitration.

The dissenting opinion, however, authored by Justice Ruth Bader Ginsburg, took direct aim at the majority's holding, calling the majority's decision "egregiously wrong." In the dissent's view, Section 7 of the NLRA includes the right of employees to pursue class and collective litigation, as 'concerted activities,' and consequently, class action waivers should be unlawful. The dissent also expressed concern that the Court's holding will cause nominal claims employees might have, namely for minimum wage and overtime violations to go unpursued, thereby emboldening employers to ignore their legal obligations. Directly addressing the dissenting opinion, Justice Gorsuch stated, "like most apocalyptic warnings, this one provides a false alarm," adding that the majority's holding "merely declines to read into the NLRA a novel right to class action procedures...."

Impact of the Decision and Thinking Ahead

The Supreme Court's decision in *Epic Systems* confirms that, at least under federal law, employers can require their employees to agree to arbitration, in which they waive the ability to bring a class or collective action. Although Congress could elect to amend the FAA to preclude the enforceability of class waivers, such legislation would not likely pass

Congress, let alone be signed into law by the current Administration.

Nevertheless, it is imperative that employers seeking to utilize class action waivers in arbitration agreements ensure that such agreements conspicuously and explicitly state that the employee is agreeing to waive his or her right to participate in a class or collective proceeding. In fact, just a few weeks ago, the Supreme Court granted *certiorari* in a case that should further clarify the circumstances in which class arbitration can be required. In *Lamps Plus, Inc. v. Varela*, the Supreme Court will address the question of whether the FAA forecloses a state-law interpretation of an arbitration agreement that would allow class arbitration where the agreement does not expressly authorize or prohibit class proceedings. In *Lamps Plus*, the U.S. Court of Appeals for the Ninth Circuit, inferred that the parties agreed to class arbitration based upon the language in their contract that "arbitration shall be in lieu of any and all lawsuits or other civil proceedings." Although the Supreme Court will not decide the *Lamps Plus* case until its next term, it highlights the importance of ensuring the clarity of the language used in arbitration agreements, particularly as it concerns an employee waiving his or her right to participate in a class or collection action – either in court or arbitration.

Employers should also remain mindful that while the Supreme Court's decision upholds the enforceability of class action waivers, the plaintiffs' bar has already started bringing dozens of single-claimant arbitrations against single employers, rather than as class or collective actions. In many cases, defending multiple single employee arbitrations can cost an employer more than it would cost to defend a class or collective action. Although arbitration continues to have considerable benefits, such as confidentiality and streamlining of disputes, employers should consult with legal counsel to discuss the benefits and shortcomings of arbitration.

Moreover, while the majority's decision in *Epics Systems* strongly suggests that Section 7 of the NLRA does not protect employees' rights to pursue class or collective action claims under any circumstances, the Supreme Court did not specifically address the issue of whether class or collective action waivers that are not part of an arbitration agreement may be enforceable.

As a final point, some state laws may prohibit arbitration and/or class waivers in certain circumstances. For instance, the 2018-19 New York State Budget, recently signed into law by Governor Andrew Cuomo (Senate Bill S7507C), precludes pre-dispute agreements that require employees to arbitrate sexual harassment claims. However, this provision also provides that it is effective only to the extent it is not "inconsistent with federal law." It is likely that disputes over the validity of such state laws will make their way into the courts over the coming year.

In sum, the Supreme Court's decision is certainly a victory for employers that require their employees to agree to arbitrate their claims and waive their right to pursue a class or collective action. Nonetheless, employers should continue to remain diligent in ensuring their employee arbitration agreements are well-drafted and that they consult with legal counsel to ensure that such agreements do not otherwise run afoul of the law.