An Epic Win for Employers Across the Nation: What Employers Should Do To Avail Themselves of the Benefits of the New U.S. Supreme Court Decision

Description

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In a 5-4 decision this week, the Supreme Court ruled inÂ *Epic Systems v. Lewis*Â that class action waivers in employer/employee arbitration agreements are as lawful and enforceable as any other contract (read the decision here). The Courtâ€™s decision rejects prior positions taken by the National Labor Relations Board and some lower courts that such waivers violated employee rights under the National Labor Relations Act. The decision is a significant victory for employers: It clarifies a subject area of employment law that has been contested for years, and confirms that employers may use employee arbitration agreements as a contractual tool to manage employee disputes and limit liability from potential class action claims.

Background
As discussedÂ last year, theÂ *Epic Systems*Â case stemmed from a dispute over whether there was a conflict between the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA). The FAA requires courts to enforce agreements to arbitrate disputes. Defenses to enforcement exist where (1) a contrary congressional command overrides the FAA or (2) the agreement is void for fraud, duress, unconscionability, illegality, or other defense that is generally applicable to all contracts (as opposed to just arbitration contracts). On the other hand, the NLRA protects the rights of employees to self-organize, bargain collectively, and engage in other â€œconcerted activitiesâ€• for the employeesâ€™ mutual aid and protection. It is an unfair labor practice for any employer to interfere with these rights. Since 2012, the National Labor Relations Board (the Board) has taken the position that arbitration clauses purporting to prevent employees from pursuing their work-related claims on a class basis were illegal. Accordingly, these provisions, at least according to the Board, were not just exempt from enforcement under the FAA, but even asking an employee to accept them was an unfair labor practice under the NLRA. When employers challenged the Boardâ€™s position in federal court, results diverged â€“ some lower courts sided with the Board, while others sustained the employersâ€™ challenges. In response to the Boardâ€™s stance and the split in the courts, many employers updated their forms to drop mandatory individual arbitration provisions.

The Decision
Amidst this conflict between the Board and the lower federal courts, the U.S. Supreme Court reviewed three cases where this issue was in dispute and took the position that class waivers are enforceable under the FAA (the employersâ€™ position), rejecting the Boardâ€™s (and employeesâ€™) position that employer/employee arbitration agreements were illegal or unenforceable under the NLRA.

Summarizing the basic facts before it, the Court noted that the parties â€œcontracted for arbitrationâ€• and â€œproceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective procedures.â€• The Court held that the FAA provision excepting arbitration agreements from enforcement when they are illegal did not apply for two reasons.Â *First*, in the majorityâ€™s view, there was no conflict between the FAA and the NLRA because class waivers were not unlawful under the NLRA. The NLRA, the Court observed, does not expressly approve or disapprove of arbitration, reference class action procedures, or â€œeven hint at a wish to displace theâ€• FAA. Additionally, the NLRAâ€™s protection of the rights of employees to self-organize, join a union, collectively bargain, and engage in other â€œconcerted activitiesâ€• for the employeesâ€™ mutual aid and protection did not extend to class litigation. The Court reasoned that the NLRAâ€™s protection for â€œconcerted activitiesâ€• only

embraced â€œthings employees â€˜just doâ€™ for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, court-room bound activities of class and joint litigation.” As such, there could be no conflict between the NLRA and the FAA and the arbitration agreements must be enforced.

Second, in the majorityâ€™s view, even assuming that class waivers were illegal under the NLRA, the FAAâ€™s exception to enforcement for illegality still would not trigger. The illegality exception, the Court held, â€œdoes not save defenses that target arbitration either by name or by more subtle methods,â€• such as by interfering with fundamental attributes of arbitration. And that was the Courtâ€™s problem with the employeesâ€™ argument: they â€œobject[ed] to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones.â€• By â€œattacking (only) the individualized nature of the arbitration proceedings,â€• the employees improperly sought â€œto interfere with one of arbitrationâ€™s fundamental attributes:â€• the â€œtraditionallyÂ***individualizedÂ*** and informal nature of arbitration.â€• Such efforts, the Court concluded, were not permissible under the FAA. Put another way, the employeesâ€™ defense to enforcement failed because the FAA did not permit them to attack an arbitration agreement â€œjust because it requires bilateral arbitration.â€• The arbitration agreements, therefore, were held by the Court to be enforceable â€“ class waivers and all. The 30-page dissent written by Justice Ginsburg called the majorityâ€™s decision â€œegregiously wrong,â€• referring to â€œthe extreme imbalance once prevalent in our Nationâ€™s workplaces.â€•

What Now?

The immediate impact of the Courtâ€™s decision is significant: employers may now effectively eliminate the possibility of being sued by their employees on a class basis by requiring employees to sign agreements that require individualized arbitration of employment disputes. This an important (and positive) development for employers. The risk of violating many employment laws, which tend to involve small individual damages (e.g., some wage and hour laws), rests with the fact that an infraction is not typically isolated to one employee, but often affects many employees. Plaintiffsâ€™ lawyers search for such conditions because bringing class claims against employers (whether meritorious or not) is far more likely to result in a big payday for plaintiffsâ€™ lawyers than prosecuting an individual employeeâ€™s claim. This is because the higher litigation costs and potential damages associated with class proceedings place significant pressure on employer-defendants to settle. The Courtâ€™s decision upholding class waivers in mandatory individual arbitration clauses gives employers an important tool to mitigate against class claims and make themselves a less attractive target to plaintiffsâ€™ lawyers. At the same time, the decision preserves the principal advantages of individual arbitration: informality, less process, and less cost than class litigation or class arbitration.

Does this mean that all employers should rush to amend their employment agreements to include mandatory arbitration clauses? Not necessarily. Arbitration is not without its own potential drawbacks â€“ such as the difficulty of getting an unfavorable decision overturned, the inclusion of evidence that may be excluded in court, and the ease with which an employee can demand arbitration. Thus, if an employer has limited to no class action exposure, mandatory arbitration may not be an effective tool for that employer. Employers are therefore well-advised to carefully consider the true value of contractual arbitration clauses based on their particular situations.

For those employers who elect to incorporate such waivers into their agreements with their employees, they must be careful not to lose the forest for the trees. WhileÂ *Epic Systems*Â is a huge victory for employers, it is not a license to violate federal and state employment laws. The Courtâ€™s decision does not guarantee that employers that have mandatory arbitration agreements with their employees will avoid major liability for widespread employment practices violations. Government agencies like the Department of Labor and the Equal Employment Opportunity Commission will continue to pursue actions on behalf of employees as they see fit (even if such employees have agreed to mandatory individual arbitration and waived their right to class proceedings). Additionally, claims under laws like Californiaâ€™s Private Attorneys General Act (permitting citizen attorney general actions) may remain immune from arbitration even afterÂ *Epic Systems*. Arbitration agreements, moreover, are still subject to defenses like unconscionability, fraud, and duress and courts may be willing to apply such defenses in the employment context. The same goes for illegality arguments that are premised on more than the fact that the contract is for arbitration. Finally, abruptly and inartfully forcing

employees to sign arbitration agreements may lead to unwanted union organizing efforts and serious disruptions in some workplaces, as well as more subtle negative impacts, like decreased employee morale. Employers, therefore, are strongly advised to consult with an employment attorney as to whether mandatory individual arbitration is right for them and their workforce and, if so, the specific language to include in their arbitration agreements and how to best roll out the agreements to employees.

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