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Supreme Court Holds That Employer Sponsored Arbitration Programs do not Violate National Labor Relations Act

On May 21, 2018, in a 5-4 decision, the United States Supreme Court issued a long-awaited decision in *Epic Systems Corp. v. Lewis*, 584 U.S. _____ (2018), holding that mandatory employer-sponsored arbitration agreements do not offend the National Labor Relations Act ("NLRA"). Justice Gorsuch, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, delivered the opinion.

The Court reiterated that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA") instructs "federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." Relying on that rule, the Court held that employers can require employees to submit all work-related disputes to individual arbitration. The Court thus concluded that nothing in the NLRA trumps the FAA's mandate, particularly because the specific provision of the NLRA on which the employees relied "does not express approval or disapproval of arbitration" and "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand." In reaching its ruling, the Court notably chipped away at *Chevron* deference, rejecting the contention that it must defer to the National Labor Relations Board's ("NLRB") interpretation of the interplay between the NLRA and FAA. In support, the Court made specific reference to the fact that, as recently as 2010, the NLRB had expressed a view contrary to what it was now espousing. But, regardless of the seeming position changes, the Court held no such deference was warranted because the employees could not show any rule or precedent that authorizes the NLRB to interpret, much less oversee, the FAA. Justice Gorsuch's "straight talk" on *Chevron* deference may portend further such rulings on the issue in the future.

The decision is a significant victory for employers. It confirms that arbitration programs with class action waivers are enforceable, even when they are a mandatory condition of employment. It thus rejected and put to rest the prior view of some lower courts which had distinguished between mandatory arbitration programs and optional ones, *i.e.*, where employees could "opt-out" of arbitration. Employers who already use mandatory arbitration agreements that include class action waivers can now take comfort that the NLRA is no longer a potential obstacle to enforcement of such agreements. Employers who have previously held off implementing such an arbitration program should now reconsider in light of this new decision, as such a program will be enforced even as to putative class claims.

Employers who have employed an "optional" arbitration program containing a class action waiver but giving employees the right to "opt-out" may wish to consider removing the opt-out right. Employers may still conclude, for sound cultural reasons or to avoid potential state law pitfalls, not to utilize mandatory arbitration but the Supreme Court's ruling appears to make clear that the validity of the agreement to arbitrate will not depend on the existence of an opt-out right.

Expect the *Epic Systems* decision to change significantly the landscape of employment-related class and collective action litigation. More employers are likely to adopt arbitration programs with class action waivers; so that portends less group litigation. At the same time, however, we do not see this as the end to aggregated claims and proceedings. As plaintiff counsel know and understand, employers may still sometimes conclude that a class or collective resolution, whether in court or arbitration, is still more efficient and cost-effective. Ask any employer that has had to arbitrate 50 or 100 individual employment matters which it could have litigated/tried collectively; and we expect employers will have no trouble finding employees' counsel amenable to broader resolutions. Accordingly, we do not expect employees just to accept the ruling and go away; rather we assume several will continue to pursue claims individually in the hope of reaching a critical mass that effectively compels employers to agree to or even seek aggregation. Finally, be on the watch for statutory reactions at the state and local level. Rulings such as this make those more attractive venues, particularly in states and localities whose employment laws are already more favorable to employees.

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