

Mandatory Arbitration Agreements for Employees

Employer Use of Class Action Waivers

BY JOHN HUSBAND

.....

In Epic Systems Corp. v. Lewis, the U.S. Supreme Court ruled that mandatory arbitration agreements requiring an employer and an employee to resolve employment-related disputes through one-on-one arbitration do not violate the National Labor Relations Act. This article discusses that opinion and considers when and how employers may want to use agreements containing class action waivers in the employment context.

.....

On May 21, 2018, the U.S. Supreme Court in *Epic Systems Corp. v. Lewis* ruled 5 to 4 that the Federal Arbitration Act (FAA) dictates that arbitration agreements be enforced, and the National Labor Relations Act (NLRA) does not override that policy to permit employees to bring class or collective actions when employees have agreed otherwise.¹

The decision, authored by Justice Gorsuch, resolved a controversial issue that arose from the National Labor Relations Board's (NLRB) 2012 opinion in *D.R. Horton, Inc. v. NLRB* which, for the first time, put the NLRA in conflict with the FAA.² *Epic Systems* is seen by many as a win for employers, offering an effective tool to combat costly and time-consuming employee class actions. This article discusses the decision and its implications.

***Epic Systems* Overview**

In *Epic Systems*, the Court resolved three consolidated cases³ in which employees had alleged wage claims and sought to certify collective actions under the Fair Labor Standards Act (FLSA) as well as class actions under Federal Rule of Civil Procedure 23 for alleged state wage law violations.⁴ In each case, the respective employer sought to dismiss the collective lawsuits, moving

to compel individual arbitration, as provided in arbitration agreements the employees had signed.⁵

Despite having agreed to arbitrate any employment-related claims on an individual basis, the employees (and the NLRB) argued that the class action waivers in their arbitration agreements were unlawful, violating the employees' rights to engage in concerted activities for their mutual aid and protection under § 7 of the NLRA. They also argued that, although the FAA generally requires courts to enforce arbitration agreements as written, the FAA's "saving clause"⁶ eliminates that obligation if an arbitration agreement violates some other federal law.⁷

The employers countered those arguments by focusing on precedent holding that the FAA demands that individual arbitration agreements be enforced.⁸ The employers further asserted that nothing in the NLRA overrides the FAA's enforcement provision.⁹

NLRA does not Protect Class and Collective Actions

The majority phrased the question presented 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?"¹⁰ The Court ruled that the FAA requires courts to enforce arbitration agreements on the terms

“
The majority phrased the question presented 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?’
”



that the parties select, subject to the courts' refusal to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract"¹¹ (e.g., fraud, duress, unconscionability—not arbitration-specific defenses). The Court stated that the NLRA does not override the FAA, and that § 7 focuses on the right of employees to organize unions and bargain collectively, not on the right to pursue class or collective actions.¹² The Court pointed out that the parties in these cases contracted for individual arbitration and specified the rules that would govern their arbitrations, indicating their intention to avoid any class or collective action procedures.¹³ The Court concluded that neither the NLRA nor the FAA's savings clause protected the employees' ability to resolve employment disputes through collective or class action when the employees agreed to arbitrate their disputes with their employers on a one-on-one basis.¹⁴

The Dissent's Focus: Policy and Employee Rights

Given that *Epic Systems* was a 5-to-4 decision, practitioners should take note of key points raised in the dissent, which was highly critical of the majority opinion. Justice Ginsburg wrote the dissent, joined by Justices Breyer, Sotomayor, and Kagan. The dissent began by rephrasing the question in the case to: "Does the Federal Arbitration Act . . . permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act . . . 'to engage in . . . concerted activities' for their 'mutual aid or protection'?"¹⁵ The dissent stated that the answer should be a resounding "No."¹⁶

Justice Ginsburg stated that the majority's decision "is egregiously wrong"¹⁷ because lawsuits to enforce workplace rights fit within the NLRA umbrella of "concerted activities for the purpose of . . . mutual aid or protection."¹⁸ The dissent pointed to over 75 years of NLRB rulings that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment.¹⁹ The dissent further stated: "Forced to face

their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers."²⁰ Contrary to the majority, the dissenting justices asserted that NLRA § 7 rights include the right

“
Epic Systems
 clearly supports
 the use of
 individual
 arbitration
 agreements to
 better control
 employer costs,
 publicity, and
 liability exposure
 related to alleged
 violations of
 employment
 laws.
 ”

to use class or collective litigation to resolve disputes over wages and hours and would hold that class action waivers in arbitration agreements are unlawful.²¹

Using Class Action Waivers as a Tool to Limit Class Action Liability

In *Epic Systems*, the Supreme Court sanctioned

the use of arbitration agreements by employers to help avoid class actions in the employment context. By using arbitration agreements with their employees, employers are able to resolve employment disputes in front of a neutral arbitrator rather than in the more public setting of a state or federal court. And by requiring that disputes be arbitrated on an individual, rather than a class or collective basis, employers avoid lengthy and expensive class action lawsuits that often involve hundreds or more current and/or former employees alleging similar claims against the employer. *Epic Systems* clearly supports the use of individual arbitration agreements to better control employer costs, publicity, and liability exposure related to alleged violations of employment laws.

Practical Considerations

Before implementing the use of arbitration agreements that include class action waivers, employers should analyze the practical ramifications of doing so to make certain this practice is appropriate for their specific organizations.

Evaluate the Forum

Although individual arbitration of employment disputes may be a wise option for larger organizations, smaller companies may not see a significant benefit in litigating each employee's dispute in a separate proceeding. For example, if a company has only a handful of employees who are similarly situated (e.g., classified as exempt, paid under specific policies, etc.), the potential for class or collective actions would be relatively small. In addition, while private arbitration may resolve an issue with one employee, it does not bind or even influence the resolution of that same issue with other employees. Accordingly, it may be preferable for some employers to have a court rule on the lawfulness of a particular policy or practice so it has more certainty for future enforcement.

Employers should also consider the relative merits of dispute resolution through arbitration as opposed to the courts. Evidentiary and procedural rules differ in these forums. For example, arbitrators often have broad discretion on whether (or how much) discovery is permitted, whether certain evidence is admissible,

and other critical issues. Arbitrators may also be less likely to grant motions to dismiss or summary judgment motions, or may attempt to “split the baby” rather than making tough decisions in favor of one party or the other. And because arbitrators are often less bound by precedent than courts, some cases that might easily get dismissed in court may continue to an arbitration proceeding. In addition, the grounds for overturning an arbitrator’s finding are very limited.

New versus Existing Employees

Another practical consideration involves how to implement mandatory arbitration agreements containing class action waivers with new hires versus existing employees. In Colorado, arbitration is a matter of contract, and unless there are grounds to find an arbitration agreement unenforceable under ordinary contract principles, employers may require newly hired employees to sign a mandatory arbitration agreement as a condition of employment.²² When asking existing employees to sign an arbitration agreement and class action waiver, continued employment should be sufficient to create an enforceable contract under Colorado law.²³ But practitioners must be careful to not abrogate the at-will employment relationship when contracting with at-will employees. In addition, it is foreseeable that in a tight labor market key employees may refuse to sign these mandatory agreements, resulting in the loss of good talent and skilled, experienced workers.

Employee Handbooks

Employers should be advised against including a mandatory arbitration agreement and class action waiver in their employee handbooks because for the agreement to be enforceable, it should be signed by both the employee and employer to demonstrate mutual consent and agreement of all terms. Further, to maintain an at-will employment relationship, an employee handbook and its acknowledgment form typically state that the handbook does not create a contract of employment. Therefore, employers should not insert mandatory “agreement” language into the handbook, which could contradict handbook statements that the employment is

at-will and open the door to challenging the enforceability of the agreement.

Consider Substantive Claims


Practitioners should also advise their employer-clients that not all employment-related claims are subject to arbitration. Non-waivable claims under workers’ compensation and unemployment compensation laws may not be arbitrated. In addition, an arbitration agreement may not prohibit an employee from filing an administrative charge with most government agencies, such as the Equal Employment Opportunity Commission (EEOC) and the NLRB. The agreement may require the employee to resolve his or her own case through arbitration rather than the courts, but it may not prevent the employee from filing a charge and the subsequent investigation and potential enforcement by the applicable agency. Thus, the mandatory arbitration agreement terms must be drafted carefully.

Finally, although *Epic Systems* affirms the enforceability of mandatory arbitration agreements and class action waivers in the employment context, employees still may attack such agreements on other grounds, such as fraud, duress, or unconscionability, resulting in litigation over such issues. If the terms of the agreement are onerous or unfair to the employee, a court may find it unconscionable. That could occur, for example, if the contractual terms attempt to shorten the statute of limitations on employment claims, limit the statutory remedies that an arbitrator may award, or shift too many costs to the employee.

Further, employers who use electronic signatures on employment-related documents should note that employees could challenge arbitration agreements by claiming they never signed them. The first months of such a dispute would likely involve the time and expense of obtaining computer experts and the electronic signature company to testify that the employee signed the agreement electronically.

Conclusion

In the wake of *Epic Systems*, mandatory arbitration agreements with class action waivers may be an effective employer mechanism to

control and limit exposure and liability for most employment-related claims. Although they may not be right for all employers and all situations, organizations should weigh the practical considerations and when appropriate, take advantage of this liability-limiting tool. 



John Husband is a partner in Holland & Hart, LLP’s Labor and Employment practice group. He is a Fellow of the College of Labor and Employment Lawyers and has a nationally recognized labor and employment practice—jhusband@hollandhart.com.

Coordinating Editor: John Husband, jhusband@hollandhart.com

NOTES

1. *Epic Systems Corp. v. Lewis*, No. 16-285, 584 U.S. ____ (2018).
2. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).
3. The other cases are *Ernst & Young LLP v. Morris*, No. 16-300, and *NLRB v. Murphy Oil USA, Inc.*, No. 16-307.
4. *Epic Systems Corp.*, slip op. at 2-3.
5. *Id.*
6. See 9 USC § 2.
7. *Epic Systems Corp.*, slip op. at 6.
8. *Id.* at 4.
9. *Id.*
10. *Id.* at 1.
11. *Id.* at 6.
12. *Id.* at 11.
13. *Id.*
14. *Id.* at 25.
15. *Id.* dissent at 2.
16. *Id.*
17. *Id.*
18. *Id.* at 9.
19. *Id.* at 10.
20. *Id.* at 15.
21. *Id.* at 17.
22. See *Austin v. US West, Inc.*, 926 P.2d 181 (Colo.App. 1996).
23. See *Lucht’s Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058 (Colo. 2011).