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ALERT

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**Supreme Court Allows Employers to Resolve Legal Claims
in Arbitration Without Class or Collective Actions**

An anxiously anticipated Supreme Court case issued on May 21, 2018 in which the Court ruled that arbitration agreements in employment must be enforced according to their terms, which include those providing for one-on-one arbitration without class or collective actions. *Epic Systems Corp. v. Lewis*, ___ U.S. ___, No. 16-285 (May 21, 2018). The result and reasoning was much as anticipated with the Court splitting 5-4 along traditional conservative-liberal justice lines. Newly appointed Justice Gorsuch wrote the opinion for the Court.

The issue as framed was: "Should employees and employers be allowed to agree that any dispute 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?"

The Court finds that the National Labor Relations Act (NLRA) secures employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. Instead, the Federal Arbitration Act written by Congress has instructed federal courts to enforce arbitration agreements according to their terms, including terms providing for individualized proceedings. The Court states that Congress saw virtue in arbitration, including its speed and simplicity and inexpensiveness, but arbitration was not meant to wind up looking like the litigation it was meant to displace.

The plaintiff in the case had sought to litigate a federal claim on behalf of a nation-wide class under the wage-hour law's collective action provisions. He also sought to pursue a state claim as a class action under Federal Rule of Civil Procedure 23. The effect of the decision is to enforce the motion to direct the legal dispute to one-on-one arbitration without proceeding on a collective or class action basis.

In rejecting the claim Section 7 of the NLRA could override the specified arbitration procedures, the Court stated that the term "other concerted activities" should serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace rather than "the highly regulated, courtroom-bound activities of class and joint litigation." The Court suggests that Section 7 does not speak to class and collective procedures.

The Court concludes by stating: "Congress has instructed that arbitration agreements like those before us must be enforced as written."

Four justices dissent, in an opinion written by Justice Ginsburg. The dissenters say that the ruling "subordinates employee-protective labor legislation to the Arbitration Act." The dissent would find that employer-dictated collective-litigation "stoppers" are unlawful. It suggests that the inevitable result of the decision would be the under enforcement of federal and state statutes designed to advance the well-being of vulnerable workers.

In a footnote, the dissenters point out that the individual arbitration "agreements" were not genuinely bilateral. That is, the employer had emailed its employees an arbitration agreement requiring resolution of wage and hour claims by individual arbitration. The agreement provided that if the employees continued to work, they would be deemed to have accepted the agreement.

Editor's Note: The ability of employers to enter into individual employment contracts with arbitration provisions barring class and collective actions has been an evolving concept. Much of the growth in the concept stems from a Supreme Court ruling in 1991 that individual arbitration agreements could require arbitration of employment discrimination claims. However, in 2012, the NLRB during the Obama Administration ruled that Section 7 of the NLRA guarantees the right to class or collective action procedures which could not be barred by arbitration agreements. Subsequent rulings in the federal appeals courts were divided, and even at the Supreme Court level in the current case the outgoing General Counsel of the NLRB took one position, and the incoming Solicitor of the new administration took a different position.

Some commentators speculate whether the ruling will apply to all legal claims against employers, and all forms of class actions. The rationale of the Court seems to suggest that it would.

A new issue is suggested by the ruling as to whether there could be a waiver of class or collective actions in an individual employment agreement that did not provide for arbitration. The majority suggested that the right to bring a class or collective action is not a protected concerted activity under Section 7 of the NLRA. However, other portions of the majority ruling indicate that the decision was based upon the Federal Arbitration Act, another federal statute, casting doubt on whether such waivers of class and collective actions would be enforceable without the use of arbitration. This issue is important as some employers have used or attempted to use individual employment agreements to require employees to waive jury trials and the like.

One thing that is clear is that the ruling gives a "green light" for more employers to use arbitration agreements waiving class and collective actions. Prior to this decision there was danger in doing so, as any employee denied a job for refusing to enter such an agreement could seek back pay and reinstatement through the NLRB. Prior to 2012, a majority of Fortune 500 companies were using arbitration agreements waiving class or collective actions in some manner. The process slowed because of the uncertain legal outcome since 2012, but now the increased use of individual arbitration agreements can continue.

Many employers feel that individual employment agreements avoid expensive court litigation and "runaway" juries, as well as being quicker and cheaper to conduct than court litigation. Further, many

employees may choose not to pursue small, individual claims. On the other hand, employers must be careful in introducing such agreements as some employees may object. Further, being a simpler and quicker process, there is always a possibility that more employees will actually pursue their legal claims in arbitration who would otherwise not find a lawyer to sue in court.

Employers should be cautious about adopting any "standardized" arbitration agreement without conferring with competent labor law counsel. There are many legal and strategic issues involved in drafting such an agreement, and different employers may desire different approaches. For example, one of the numerous issues to address is which arbitration tribunal to use and the manner of paying for that tribunal.

*Questions? Need more information?
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