Drafting Employee Arbitration Agreements After *Epic Systems Corp. v. Lewis*

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The United States Supreme Court recently ruled that mandatory arbitration clauses which simultaneously waive class or collective proceedings do not violate the National Labor Relations Act (NLRA) or the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, (2018). In *Epic Systems*, the SCOTUS considered whether the NLRA prohibits enforcement of employment agreements requiring employees to resolve employment disputes through individual, "bilateral" arbitration under the FAA. Writing for the 5-4 majority, Justice Neil Gorsuch wrote that the NLRA "does not mention class or collective procedures" and thus cannot be read to displace the FAA.

This holding effectively permits employees to waive their right to pursue a class action in court while agreeing to resolve all employment disputes through bilateral arbitration. While this holding appears to be a boon to businesses and employers, there are some precautions that should be taken when drafting arbitration provisions into employment agreements.

This article will summarize the holdings in *Epic Systems* and offer drafting tips to labor counsel seeking to incorporate mandatory arbitration clauses, waiving collective actions, into employment handbooks and/or agreements.

A. The Case

The consolidated condisputes leading to the *Epic Systems* decision involved employment agreements containing mandatory *bilateral* arbitration clauses requiring that the only form of dispute resolution be through *individualized* arbitration. The plaintiff-employees in these consolidated cases sought to litigate Fair Labor Standards Act (FLSA) claims through federal class actions, claiming that an arbitration clause that prohibits class action suits violates the NLRA. The plaintiffs alleged that class and collective actions are "concerted activities" that are protected by §7 of the NLRA. The employees argued that while the FAA requires courts to enforce agreements to arbitrate, if that agreement violates another federal law, then the obligation to follow this agreement is nullified.

Rejecting previous NLRB authority and the plaintiff-employees' claims, *Epic Systems* held that arbitration agreements must be enforced in accordance with the FAA. The Court held that for one Act to displace another, congressional intent must be "clear and manifest." The Court held that while §7 speaks about unions and collective bargaining, it does not mention class or collective actions or express a "clear and manifest" intent to displace the FAA.

B. Pragmatic implications of *Epic Systems*.

Epic Systems held that employees are permitted to waive their right to pursue class actions in court by signing employment contracts containing mandatory arbitration provisions. While this ruling may decrease the likelihood that a plaintiff could maintain a successful class action in *court*, if class arbitrations are not expressly prohibited by the parties' contract, plaintiffs may still be free to pursue *class arbitrations* under the FAA. What are some pragmatic implications to consider?

First, there may be a potential increase in attempts to engage in *class arbitration*. Second, employers and their counsel should be prepared for increased challenges to the enforceability of mandatory bilateral arbitration clauses based on contract defenses other than illegality. Therefore, it is important that drafters of employment agreements containing mandatory arbitration provisions take precaution to carefully draft these clauses.

The first thing a drafter should be aware of is that even when parties agree to arbitrate all disputes, that does not *necessarily* mean that they will be prohibited from pursuing *arbitral* class action. Class arbitration is rare, but courts may nonetheless mandate class arbitration. The Supreme Court has held that under the FAA, a party may not be compelled to arbitrate a class action without "a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623, 200 L. Ed. 2d 889 (2018) ("courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent"). However, to date, the Supreme Court has not specified the parameters for what constitutes *agreement* to class arbitration.

A case currently pending before the Supreme Court, *Lamps Plus, Inc. v. Varela*, may resolve this issue. In *Lamps*, an employee initiated a class action suit against his employer, the employer moved to compel arbitration in accordance with the employment contract, and the District Court compelled class arbitration. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672 (9th Cir. 2017), cert. granted, 138 S. Ct. 1697, 200 L. Ed. 2d 948 (2018). The Ninth Circuit held that where the phrase "arbitration shall

be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment" was included in an employment contract, the term "any and all lawsuits" could reasonably be interpreted to encompass class actions. The Ninth Circuit held that this phrase, though it did not expressly mention class actions, constituted agreement to class arbitration.

The second thing a drafter should be aware of is that because *Epic Systems* arguably closes the court house doors to employment-centric class actions, it is likely that the courts will see an increase in challenges to the formation and enforceability of contracts containing mandatory arbitration provisions. Since *Epic Systems*, at least two federal courts have refused to enforce employer arbitration agreements under state law contract principles. *Huckaba v. Ref-Chem, L.P.*, 892 F.3d 686 (5th Cir. 2018) (holding that the contract indicated that the arbitration clause must be signed by both parties to be enforceable and that Texas law does not favor arbitration); *Weckesser v. Knight Enterprises S.E., LLC*, No. 17-1247, 2018 WL 2972665 (4th Cir. June 12, 2018) (holding that an arbitration agreement entered into by an employee and an employer cannot be enforced by the employer's parent company).

C. Recommendations for Drafters

Ohio law favors arbitration and a party seeking to challenge mandatory arbitration provisions as unconscionable "must prove 'a quantum' of both procedural and substantive unconscionability." *Taylor Bldg. Corp. of Am. v. Benfield*, 2008-Ohio-938, ¶ 53, 117 Ohio St. 3d 352, 364, 884 N.E.2d 12, 24. Although an employee in Ohio must satisfy a heavy burden to be successful on a claim for unconscionability, because a challenge to an arbitration clause can lead to costly litigation, employers drafting employment contracts with mandatory arbitration provisions, should take precautions to avoid unenforceability. Below are some suggestions for doing this:

(1) Employers who want to preclude employees from pursuing class actions should *expressly* state that the parties agree to settle disputes through bilateral arbitration, *and* that they waive the right to pursue class action suits *and* class arbitration.

(2) Employers should consider including an "opt-out provision" to eliminate challenges of duress. Most employees will not opt out of arbitration agreements, but such a clause would prevent a court from questioning the conscionability of the agreement.

(3) Employers should refrain from adding excessive and immaterial limitations into arbitration agreements. This includes provisions requiring that arbitration proceedings be confidential. Such limitations could lead to litigation regarding the enforceability of the clause.

(4) When instituting a new corporate policy mandating arbitration for employment disputes, employers should include express language stating that by continuing their employment, they agree to arbitrate any disputes arising from their employment. *See Cerjanec v. FCA US, LLC*, No. 17-10619, 2017 WL 6407337, at *4 (E.D. Mich. Dec. 15, 2017) (holding that "continued employment, *by itself*" is not "sufficient to manifest assent to an arbitration policy," but that continued employment only manifests assent to an arbitration policy "when the employee *knows* that continued employment manifests assent").

(5) Employers should refrain from restricting the types of claims or relief available to the employee. *See e.g. Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 6 P.3d 669 (2000) (concluding that the limit on damages was unconscionable and contrary to public policy).

(6) Employers should consider whether it is important to limit discovery prior to selection of the arbitrator. Even though parties to an arbitration agreement are permitted to contractually agree to the extent of discovery, if discovery is significantly limited, this may lead to a challenge in court.

D. Conclusion

Epic Systems held that an agreement to settle disputes through bilateral arbitration was neither illegal under the NLRA, nor unenforceable under the FAA. This decision will allow employers to draft employment agreements requiring that disputes be resolved solely through bilateral arbitration, thus, precluding employees from pursuing class actions. Because of the dramatic effect of this ruling, it is likely that the courts will see more challenges to the formation and conscionability of employment agreements containing mandatory arbitration provisions. Additionally, because contracts are governed by state law, states may subject these clauses to greater scrutiny due to the potential harsh results of enforceability. Therefore, employers should carefully consider how expansive they want to draft their arbitration provisions and ensure that employees have unquestionably agreed to be bound by these provisions.

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