Updates
May 24, 2018
Supreme Court Delivers a Win for Employers, Upholds Employment Agreements Requiring Arbitration

In *Epic Systems Corp. v. Lewis*, __ U.S. __ (2018), the United States Supreme Court upheld an employment contract provision that requires employees to individually arbitrate any disputes with the employer. In a 5-4 opinion authored by Justice Neil Gorsuch, the Court held that neither the Federal Arbitration Act's savings clause nor the National Labor Relations Act provided a basis to challenge mandatory arbitration agreements that require employees to waive their right to class or collective actions. Justice Clarence Thomas filed a concurring opinion. Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan, filed a dissenting opinion.

Background

The decision arose from three consolidated cases that were substantively identical. The Court focused its discussion on a case arising from the U.S. Court of Appeals for the Ninth Circuit, in which the plaintiff filed a class action wage-and-hour claim against his former employer. The employer moved to compel arbitration under the terms of its employment agreement, which required that disputes be resolved through individual arbitrations.

The district court granted the motion, but the Ninth Circuit reversed, holding that the Federal Arbitration Act, which generally requires courts to enforce arbitration agreements, did not control because the arbitration clause conflicted with the National Labor Relations Act (NLRA). Specifically, the Ninth Circuit ruled that pursuing claims as a class or collective action is a "concerted activity" protected by Section 7 the NLRA.

Supreme Court Enforces Arbitration Agreement

The Supreme Court reversed the Ninth Circuit.

The heart of the dispute between the majority and dissenting opinions centered on the scope of the rights protected under the NLRA. The majority viewed the NLRA narrowly as protecting only rights to organize unions and to bargain collectively, but saying nothing about class or collective action procedures—or about the validity of arbitration agreements. The court looked to the language of Section 7, which defines "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 does not define a right for class or collective actions on its face. And the court ruled that the "other concerted activities" catchall should be read narrowly in light of its surrounding language to protect only things employees "just do" for themselves when exercising their right to free association in the workplace. This does not include the "highly regulated, courtroom-bound activities of class and joint litigation."

The court bolstered its conclusion by looking to other statutory sections that define regulatory regimes for union organization and bargaining. Congress created no equivalent provisions for the adjudication of class or collective actions. The Court found it "hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about . . . class and collective action procedures" if Congress intended Section 7 to create rights to pursue class and collective actions.

Similarly, Congress could not have intended to "have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by" the Federal Arbitration Act and other laws specifically governing dispute resolution procedures. As a result, the Court concluded that the NLRA did not limit the Federal Arbitration Act's command that courts enforce arbitration agreements according to their terms—in this case, by

requiring individual arbitration and prohibiting class or collective actions.

"The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written," Gorsuch wrote.

Remaining Issues

The *Epic Systems* decision is a clear win for employers facing class or collective action who wish to enforce agreements mandating individualized arbitration. But it does not mean arbitration agreements are always enforceable. They remain subject to traditional and generally applicable contract defenses, such as fraud, duress or unconscionability.

In addition, the dissent in *Epic Systems* emphasized that the majority opinion did not jeopardize discrimination complaints asserting disparate-impact or pattern-or-practice claims that call for proof on a group-wide basis. It remains to be seen whether such claims can be brought on behalf of a class where an employment contract would otherwise compel individual arbitration.



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