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Epic Systems Allows Employers to Bar At Least Some Employment Class Actions: What Can This Mean for You?

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Overview:

Employment-based class actions can create large, even catastrophic exposures for companies. However, in *Epic Systems Corp. v. Lewis*, 2018 WL 2292444 (U.S. May 21, 2018), the U.S. Supreme Court approved arbitration as a means to mitigate these exposures. In this case the Supreme Court resolved unsettled law to rule that class action waivers in arbitration agreements can be enforced against employees, subject generally only to state law defenses (such as fraud, duress or unconscionability) applicable to all contracts.

Although there are procedural requirements that must be met to create enforceable arbitration agreements, in many instances it may be worth the effort. We are available to discuss whether and when arbitration programs make sense for your workforce, and to work with you to implement any arbitration program you decide to pursue.

The Case

In *Epic Systems* the Supreme Court reviewed whether an employer can require its employees to submit to individual arbitration wage-and-hour claims as a condition of employment without an option to go to court, as well as without an option to pursue class claims in that arbitration. The National Labor Relations Board had ruled that such agreements were unlawful restrictions on employees' rights to engage in "concerted activities for the purpose of . . . other mutual aid and protection" under Section 7 of the National Labor Relations Act (NLRA). The U.S. Circuit Courts of Appeal had split on this issue, leading to the Supreme Court taking this case to give a definitive answer.

In a 5-4 decision, the majority of the Supreme Court held the NLRA did not conflict with the Federal Arbitration Act's (FAA) requirement that arbitration agreements be enforced as written (including any bars to class actions or class arbitrations) because, in the majority's view, the FAA was not subject to laws that target agreements because they require individual arbitrations. Rather, under the FAA, agreements to arbitrate are subject only to contract defenses applicable to all contracts, such as fraud, duress or unconscionability, and that do not target arbitration "either by name or more subtle methods," such as by prohibiting agreements that bar class actions. The majority also noted that certain federal statutes clearly overrode aspects of the FAA by referring to how charges or claims must be processed, but that the NLRA did not have this specificity through its general reference to the protection of "concerted activities."

The dissent questioned whether these agreements were truly bilateral, since the employers simply e-mailed them to the employees with the caveat that continuing to work constituted acceptance of these agreements. The dissent also argued that this case did not allow arbitration agreements to bar certain group actions to enforce anti-discrimination complaints, such as those pursuing pattern-or-practice or disparate impact claims, since these claims depend on proofs on a group-wide basis.

General Contractual Requirements

Agreements to arbitrate are contracts, which require proof that the employee agreed to it. An employer can acquire signed arbitration agreements as part of a new employee's initiation and "onboarding" process. As *Epic Systems* indicates, an employer also can create enforceable agreements by providing existing employees with the agreement (in that case via email) coupled with notice that continued employment constitutes acceptance of this agreement.

The substance of the agreement can vary greatly, depending on the goals of the employer, including its desired workplace culture. For example, a properly drafted class waiver can require at least some employment disputes (see discussion below) with employees to be resolved in arbitration on an individual basis. For these claims, the employer can avoid the risk of class or collective actions and class arbitration. The arbitration also can typically be treated as confidential. Another option in such agreements is to allow for private non-binding mediation prior to requiring binding arbitration. Arbitration can be an expensive avenue of dispute resolution, whereas disputes often may be resolved in mediation at a lower administrative cost.

An example of a portion of an arbitration clause in an employment agreement is as follows:

> As a condition of your employment at ABC, you agree that any controversy or claim arising out of or relating to your employment relationship with ABC Company or the termination of that relationship, [except for . . . (indicate exceptions, if any)] must be submitted for non-binding mediation before a third-party neutral and (if necessary) for final and binding resolution by a private and impartial arbitrator, to be jointly selected by you and ABC Company.
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> If efforts at informal resolution through mediation fail, disputes arising under this Agreement must then be submitted to binding resolution by arbitration before a neutral third party. The arbitration shall be conducted and administered by [the American Arbitration Association (AAA) . . .

Implementing a successful and enforceable program will require consideration and resolution of numerous other issues, such as the extent to which any costs can be shared with the employee.

Application to Various Employment Claims

Although *Epic Systems* has now made clear that there is no wholesale bar to enforcing individual arbitration of employment disputes, there is still substantial uncertainty how this will apply to certain employment disputes, and whether forcing certain disputes into individual arbitration is a preferred approach for an employer. We sketch out a few of the issues below, with the caveat that implementing a successful arbitration program requires detailed discussion and follow up with counsel.

***Wage-and-Hour Claims*.** Wage-and-hour claims have become a scourge for employers. We track federal employment class actions filed and, each day, plaintiffs typically file between five to ten wage-and-hour class and collective action against employers. To put this in perspective, these wage-and-hour cases constitute around 90% to 95% of the employment class actions filed in federal court.

Fortunately for employers, *Epic Systems* indicates that they can enforce arbitration agreements barring class litigation or arbitration of these claims.

Anti-Discrimination and Anti-Harassment Claims. As the *Epic Systems* dissent indicated, there likely will be contested issues in seeking to enforce arbitral class bars against certain of these claims. Arbitration agreements also generally cannot stop agency enforcement of these claims, such as by the EEOC. Many state and local governments also have or are (in light of the "me too" movement) seeking to prohibit mandatory arbitration of claims alleging sexual harassment, sexual abuse, and sexual discrimination. There are good arguments that the FAA overrides these state law prohibitions against arbitration, but to enforce arbitration agreements in this context an employer may still have to litigate these issues.

Although there can be caveats and potential limitations to whether arbitration agreements can bar class actions (or class-type exposures) for certain of these claims, these agreements may be able to bar class pursuit of many types of discrimination claims, and should be considered to see if they fit with the employer's business goals and workforce culture.

ERISA Claims. ERISA raises complex issues regarding whether and to what extent agreements to arbitrate will be enforced, and whether an employer would even want an arbitral forum for certain ERISA disputes. There are three common types of ERISA claims, and each raises distinct issues with differing potential benefits or detriments regarding arbitration.

Claim for benefits. This is the most common type of ERISA claim, in which litigation often has several procedural benefits for employers. One is that with proper plan language, the employer/fiduciary typically gets some deference in how it interprets and applies its plan. Another is that benefit claims are typically limited to the administrative record, which can greatly streamline and lower the cost of litigation. ERISA also generally requires fiduciaries to interpret the plan consistently for all similarly-situated employers, which can mean that resolution of an individual benefit claim can have plan-wide impact, regardless of whether the plaintiff pursued it as a class action. Finally, in its claims regulation, the U.S. Department of Labor prohibits mandatory arbitration of health and disability claims. In sum, arbitration of certain benefit claims

may be barred; and, even if permitted, arbitration of these claims often may have limited or even negative value for employers.

Claims on behalf of the plan under ERISA § 502(a)(2). ERISA has unique procedural and remedial provisions that allow an employee plan participant to sue "on behalf of the plan" for fiduciary breaches causing losses to the plan, or to disgorge to the plan any ill-gotten gains from such a breach. An employee participant cannot sue under this provision, however, just to remedy her individual injuries distinct from plan injuries. Rather, these claims are commonly brought when the breach affects the value of assets held by a pension plan, such as a 401(k) plan.

It is not clear whether and how an employee's agreement to arbitrate affects the plan's claim under ERISA § 502(a)(2), and these issues are currently being litigated in the courts. Another issue is whether an individual arbitration of a § 502(a)(2) claim would result in the same plan-wide remedy from the employer, since the claim is brought on behalf of the plan to remedy the loss to the plan (or disgorge ill-gotten profits) from the same alleged fiduciary breach. Finally, courts conduct only very limited review of an arbitrator's decision, and thus will not reverse when the arbitrator errs on the law; rather, courts will reverse only if the arbitrator "disregarded" the law. Thus, in what is often an extraordinarily complex area of the law, an employer could be stuck with an arbitrator's legally erroneous (and large exposure) ruling with no meaningful chance for reversal. The employer will thus carefully need to weigh the benefits and risks of adopting mandatory arbitration for these claims.

Individual claims for equitable relief under ERISA § 502(a)(3). ERISA has a "catchall" remedial provisions that allows employee participants to sue for individual losses for a fiduciary breach. Prior to the U.S. Supreme Court's ruling in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), courts limited the type of monetary relief available for these claims. *Amara,* however, effectively held that monetary relief for fiduciary breaches (called "surcharge") is available for these claims. Since *Amara,* employee participants have used class actions to recover judgments for tens and even hundreds of millions of dollars under this provision.

An employer may want to take a hard look whether to implement mandatory arbitration agreements for these types of claims. The large exposures here typically come from the aggregation of individual claims into a class action, which are the types of exposures that may be mitigated by requiring these claims to be arbitrated individually.

Concluding Thoughts

Implementing an enforceable and successful arbitration program often can offer benefits for employers by lowering litigation costs and exposure from workplace disputes. If this is something you may be interested in, we offer our clients an initial no-cost consultation to discuss whether and how to pursue this.
