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Employee Class Action Waivers Held Enforceable

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On May 21st, the United States Supreme Court held that the National Labor Relations Act ("NLRA") does not prohibit employers from requiring workers to agree, as a term and condition of their employment, that they waive the right to bring class or collective actions, and will individually arbitrate employment-related legal claims. *Epic Sys. Corp. v. Lewis*, U.S., Case No. 16-285 (Slip Opinion, May 21, 2018). This decision resolves a high profile conflict, in which the National Labor Relations Board and some federal courts had found that the NLRA prohibits enforcement of arbitration agreements containing class action waivers. The Court's decision makes clear that the NLRA does *not* prevent the enforcement of an arbitration agreement that is otherwise valid under the Federal Arbitration Act ("FAA").

THE BASIC FACT PATTERN

The Supreme Court consolidated a trio of cases that had slightly differing facts but ultimately presented the same substantive legal issue. (*Epic Sys. Corp. v. Lewis* (7th Cir.); *Ernst & Young v. Morris* (9th Circuit); *NLRB v. Murphy Oil USA, Inc.*, (5th Cir.)). The overarching fact pattern can be described as follows:

- An employee accepts employment and, as a term and condition of accepting employment, agrees to individually arbitrate any and all claims he may subsequently have against the company.
- The employee subsequently asserts that the company has violated the Fair Labor Standards Act (the "FLSA").
- The employee files a "collective action" under the FLSA, and argues that he is allowed to proceed as a member of the collective action because the arbitration agreement he entered into is unlawful under the NLRA.
- Employer moves to compel arbitration and argues that the arbitration agreement is lawful and enforceable under the FAA.
- The employees argued that collective/class action litigation constituted "other concerted activities . . . for other mutual aid or protection" under the NLRA, and that, therefore, employers could not demand individual arbitration.

SUPREME COURT REJECTS PLAINTIFFS' ARGUMENT

The Court rejected the arguments made by the plaintiff-employees. Specifically, the Court held that the FAA's "savings clause" may not be used to assert defenses that attempt to subtly single out arbitration agreements as unlawful. Moreover, as the Court colorfully stated, the NLRA and the FAA are not in conflict, noting that it is "more than a little doubtful" that Congress intended to "[tuck] into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; [and] flattens the parties' contracted-for dispute resolution procedures;"

KEY TAKEAWAYS

1. Employment-related arbitration agreements containing class or collective action waivers are not unenforceable on the grounds that they violate the NLRA.
2. Employment-related arbitration agreements may still be held unenforceable on other grounds, including general contract grounds such as lack of consideration, duress, fraud, or unconscionability. Some state laws may also limit the use of arbitration agreements in the employment context.
3. Employers should carefully evaluate whether it is worth implementing (or re-implementing) agreements that incorporate arbitration provisions with class action waivers. Because arbitration agreements in the employment context may still be held unenforceable on a number of grounds, employers should consult with employment counsel in evaluating whether to utilize arbitration provisions.

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