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Epic Systems Corp. v. Lewis: What a long strange trip it's been[1] (to uphold arbitration clauses and class action waivers in employment contracts).

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For years, Nixon Peabody's Arbitration team, Class Action team, and Labor and Employment team have closely followed the struggle between the Supreme Court's unwavering commitment to enforcing arbitration agreements under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and various efforts—including that of the National Labor Relations Board—to chip away at the breadth of the Court's pro-arbitration pronouncements.[2] On Monday, the Supreme Court yet again quashed such efforts in *Epic Systems Corp. v. Lewis*, Nos. 16-285, 16-300, 16-307, 2018 WL 2292444, (U.S. May 21, 2018). The Court held that employers can fully enforce arbitration clauses containing class action waivers, rejecting arguments that such waivers were prohibited by the National Labor Relations Act ("NLRA"). As Justice Gorsuch, writing for a 5–4 majority, stated: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us"—requiring employees to arbitrate individually—"must be enforced as written." The practical effect of this decision, and the important considerations now facing employers, are discussed below.

The path to the Court's ruling was anything but straightforward. In 2012, 77 years after the NLRA's adoption, the NLRB held in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (Jan. 3, 2012), that Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, trumps the FAA when it comes to mandatory pre-dispute arbitration provisions and class action waivers in employment contracts, rendering such provisions unenforceable. The Department of Justice also signaled its agreement

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[1] Apologies to Jerry Garcia, Bob Weir, Phil Lesh and Robert Hunter.

[2] *See, e.g.*, U.S. Supreme Court to provide guidance on the legality of employee class action waivers in arbitration agreements (Jan. 27, 2017), *available* here; California Supreme Court allows class action waivers — but with exception for PAGA (Jan. 25, 2014), *available* here; Court slams board's anti-arbitration ruling (Jan. 20, 2014), *available* here; U.S. Supreme Court will hear landmark class action waiver case: *American Express Co. v. Italian Colors Restaurant* (Nov. 19, 2012), *available* here; Labor board goes against employers – again (Feb. 6, 2012), *available* here; Critical developments in labor and employment law (Jan. 9, 2012), *available* here.

with this view. But after the 2016 election, the Department of Justice "disavowed" that position, *Epic Systems*, 2018 WL 2292444, at *5, resulting in the unusual circumstance of two departments within the same Executive Branch filing opposing briefs on the same issue. In the interim, the Circuit Courts of Appeals had split on the issue, a split reflected in the three separate cases before the Supreme Court, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), and *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016).

In the Fifth Circuit, the Court of Appeals had rejected the *D.R. Horton* rule. In the Seventh and Ninth Circuits, the Courts of Appeals had accepted it and refused to enforce class action waivers in the employment context. The Supreme Court's *Epic Systems* decision resolved the split reflected in those decisions, and will likely affect approximately 150 other pending cases, according to the NLRB general counsel's office.[3] The decision will also likely affect millions of employees and thousands of companies.

The lengthy majority opinion from Justice Gorsuch (joined by Chief Justice John Roberts and Justices Kennedy, Thomas, and Alito) provided four basic rationales for preferring the FAA's protection of arbitration over the NLRA's protection of "concerted activity" in the labor relations sphere. First, Justice Gorsuch argued that, for decades, no one saw any conflict between the FAA and the NLRA. *See* 2018 WL 2292444, at *3-*4. This casts doubt on the supposed conflict now.

Second, extending slightly a line of argument followed previously by the Court in many of its other arbitration decisions, *see, e.g., Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1426-27 (2017); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339, 344 (2011), the Court focused on the language of the FAA's "savings clause," 9 U.S.C. § 2. That clause provides that a court may refuse to enforce an agreement to arbitrate if it does so "upon such grounds as exist . . . for the revocation of any contract." *Id.* But those grounds must be with respect to contracts generally; they may not be aimed at agreements to arbitrate only, because that would "impermissibly disfavor[] arbitration." *Epic Sys. Corp.*, 2018 WL 2292444, at *8. Thus, the Court held that applying the NLRA to preclude arbitration agreements would violate this rule.

Third, using tools of general statutory interpretation, the Court held that it must strive "to give effect to both" the FAA and the NLRA. *Id.* (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). This, Justice Gorsuch added, is because "[a]llowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*." *Id.* The NLRB had argued that the last clause in Section 7 guarantees employees' rights to "other concerted activities for the purpose of other . . . mutual aid or protection," and therefore guaranteed their right to pursue class-wide relief, notwithstanding any arbitration clause that would otherwise require an individual arbitration. *See* 2018 WL 2292444, at *9-*10. But the Court focused on the *specific* actions protected by that clause, including "self-organization," forming or helping "labor organizations," and collective bargaining, to conclude that the later catch-all phrase "other concerted activities" should be limited to activities similar to those in the specific list—and not extend to lawsuits. *Id.* After applying several other interpretive rules, the Court concluded that it has never (with one exception it later overturned) found a conflict between another federal

[3] *See* NLRB Office of the General Counsel, Memorandum GC 18-03 (March 14, 2018).

statute and the FAA (largely because none of them even mention arbitration)—and was not about to do so now. *See id*., at *10-*11.

Fourth, the Court held that it was not required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), to defer to the NLRB's interpretation of the NLRA. Most basically, the NLRB's job is not to administer the FAA, so its interpretation of the NLRA to the detriment of the FAA is not entitled to deference. 2018 WL 2292444, at *13. Furthermore, the Executive Branch's own shifting views on the NLRB's interpretation (including prior contrary pronouncements) made the interpretation of little value, because "surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable." *Id*.

The majority and the dissent clashed sharply. Themajority rejected the dissent's "apocalyptic warnings" as "false alarms," 2018 WL 2292444, at *15, while the dissent aattacked the majority's "egregiously wrong" decision, *id*. at 18 (Ginsburg, J., dissenting), of being "ahistorical" *id*. at 25 (Ginsburg, J., dissenting), and returning the country to the days of "yellow dog" contracts, *id*. at 19 (Ginsburg, J., dissenting).

Whatever side of the policy debate you might favor, the resolution of the uncertainty around the *D.R. Horton* issue was long overdue. It is hard to call the Supreme Court's decision surprising, particularly given the Court's other recent arbitration decisions. The next steps, however, matter. In light of this decision, employers should consider adopting mandatory arbitration provisions with class action waivers as part of the arbitration clause. This means a review of standard form offer letters, employment agreements, employee handbooks, and even applications for employment. Keeping employees out of court and away from juries, and taking away the class action vehicle, can be important protections for many employers. For employers using or considering arbitration, all of these documents should provide for mandatory arbitration of all disputes between the employer and its employees on an individual, and not a class or aggregate, basis, using language that is consistent throughout and calculated to pass legal scrutiny.

That is not to say that arbitration and class action waivers are a universal panacea for employers faced with employment disputes. State law on unconscionability remains in play, so that arbitration clauses with class action waivers must be crafted, and presented to employees, in a way to minimize any unconscionability defense to enforcement of the provision. Employers who face statutory claims (alleging discrimination, for example), will also still have to defend themselves before state agencies charged with enforcing the anti-discrimination statutes. Traditionally, the agencies have taken the position that contract provisions cannot divest them of their statutory authority. There remains a powerful incentive for lawyers to take these cases, as awards of attorney's fees and multiple damages are available under these statutes. And, in some industries, pre-dispute arbitration agreements are not permitted at all.

Arbitration has its downsides for employers as well. Arbitrators are often loathe to grant summary judgment to employers in arbitrated matters, meaning more of these cases may go to trial as opposed to being disposed of earlier on motion. Arbitration awards are also subject to a very limited scope of review. Because arbitration is often quicker than litigation, and discovery is more limited, the speed with which these matters can be resolved may serve as an incentive for employees and their attorneys to bring and prosecute their cases. But these downsides of arbitration for employers are likely outweighed by the advantages provided to them by the elimination of juries and the availability of class action waivers. The really large recoveries that employers fear are most often won in class actions.

Employers should consult with counsel to determine the path that is the most appropriate for their businesses and to help in the careful drafting of arbitration provisions if the decision is made to adopt this form of dispute resolution. The attorneys at Nixon Peabody are available to discuss the practical application of these cases to your business, and to assist you in making the decision which best suits your organization.

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