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Supreme Court Upholds Enforceability of Employee Class Action Waivers

Written by Monique A. Hannam – May 2018

After years of uncertainty surrounding the legality of employee class action waivers, corporate executives and in-house counsel can breathe a collective sigh of relief. On May 21, the U.S. Supreme Court issued an opinion in Epic Systems Corporation v. Lewis, holding that class action waivers in employee arbitration agreements are enforceable under the Federal Arbitration Act (FAA). The 5-4 decision consolidated appeals from the Fifth, Seventh and Ninth Circuits and brought finality to a hotly debated issue.

Writing for the majority, Justice Gorsuch framed the issue as whether employers and employees should be allowed to agree to resolve any disputes between them through arbitration on an individualized basis. The employees contended that they should be permitted to bring disputes regarding payment and overtime issues in class or collective actions, despite agreements they had with their employers prohibiting such proceedings.

While class action waivers in arbitration agreements have been maligned by some for their adhesive nature, the Supreme Court noted that the parties had "contracted for arbitration." The Court reasoned that the FAA protected arbitration agreements from judicial interference, and that the National Labor Relations Act (NLRA) did not command a different result.

First, the Supreme Court reaffirmed its familiar dogma that the FAA establishes "a liberal policy favoring arbitration agreements." It then

rejected the employees' argument that employment arbitration clauses fell within the scope of the FAA's savings clause, which allows courts to refuse to enforce arbitration agreements upon "such grounds as exist at law or in equity for the revocation of any contract." According to the Court, the savings clause establishes a sort of "equal treatment rule for arbitration contracts" and does not save defenses that interfere with the fundamental attributes of arbitration. Since the employees' arguments attacked a fundamental attribute of arbitration proceedings – its individualized nature – the savings clause provided no refuge. The Supreme Court also refused the invitation to distinguish between defenses that rely on state laws, such as unconscionability and defenses derived from federal statutes.

Second, the Supreme Court found that the NLRA does not command a contrary result. In guaranteeing workers "the right … to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," Section 7 of the NLRA does not approve or disapprove arbitration. The Court interpreted this "catch-all term" as limited to "things employees 'just do' for themselves in exercising their right to free association in the workplace." It contrasted this with the "highly regulated, courtroom-bound activities of class and joint litigation." So, according to the ruling, Section 7 may permit unions to bargain to prohibit arbitration, but it does not make employee arbitration provisions illegal.

Applying various canons of statutory interpretation, the Court held that the NLRA provisions at issue did not alter or repeal the FAA's regulatory scheme since, among other things, Congress 2 would not hide "elephants in mouse holes." The Court also declined to give Chevron deference to the National Labor Relations Board's (NLRB's) interpretation of the issue, finding that the NLRB overstepped its bounds in interpreting a statute over which it had no delegated authority.

Justice Ginsburg drafted a dissenting opinion emphasizing the importance of class and collective employee actions in enforcing labor laws. The dissent expressed skepticism on whether the employees had truly entered into "agreements" that were "genuinely bilateral." The dissenting justices also contended that collective and class suits fit comfortably within Section 7's catchall protection of the right to "engage in other concerted activities for the purpose of mutual aid or protection." The dissent believes that waivers, which Justice Ginsburg colorfully described as "employer dictated collective-litigation stoppers," are unlawful under the NLRA and thus unenforceable under the FAA's savings clause.

History will tell whether Congress accepts Justice Ginsburg's invitation to explicitly override the FAA. But, for now, employers can count on courts to enforce agreements in which their employees agree not to pursue collective or class actions, whether by arbitration or litigation.

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