Supreme Court sides with employers on arbitration class action waivers

In May, the U.S. Supreme Court ruled 5-4 that employers may include language in arbitration agreements that bars employees from filing class-action lawsuits to resolve employment disputes. It's a huge win for employers.

THE LAW The Federal Arbitration Act, passed in 1925, favors arbitration as an alternative to litigation to resolve employment disputes and requires courts to enforce arbitration agreements as long as they are fair to all parties.

The National Labor Relations Act, passed in 1935, protects workers' rights to "concerted activity" including "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

WHAT'S NEW In several recent cases, employees have argued that arbitration agreements that prohibit employees from bringing class actions violated the right to concerted activity under the NLRA. The 5th Circuit overruled a National Labor Relations Board decision that class action waivers violated the NLRA. The 2nd and 8th Circuits had previously ruled similarly.

However, the 7th and 9th Circuits deferred to two NLRB's rulings, agreeing that the NLRA barred class action waivers in arbitration agreements.

To decide the issue, the Supreme Court consolidated all three cases as *Epic Systems Corp. v. Lewis*. On May 21, it ruled that the NLRA's protection of "concerted action" does not affect arbitration agreements at all. Arbitration agreements can have waivers prohibiting class actions without violating either the NLRA or the FAA.

In a strongly worded dissent, Justice Ruth Bader Ginsburg argued that the FAA was never intended to apply to statutory issues such as class actions, or Fair Labor Standards Act issues. While history may be on her side, judicial precedent is not. Since the 1980s, courts have consistently given employers great leeway in applying arbitration agreements to employees for any number of statutory reasons. Given the precedents, change must come from Congress.

A contemporary context

The #MeToo movement has engendered some anger toward arbitration in the halls of Congress and in the workplace. Several legislative proposals would bar arbitration of sexual harassment complaints; none have passed.

Plaintiffs can be expected to attack the secrecy surrounding arbitration. The confidential sexual harassment settlements paid out in Congress and in large corporate settings provided fodder to the anti-arbitration movement.

Because arbiters are not required to rely on precedent (unlike courts), many settlements are confidential. Employers must weigh the risk of bad publicity against the legal viability of their arbitration system. In short, the

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battle is not over and employers should not be too cocky about what they can do with their arbitration agreements.

HOW TO COMPLY Resist the temptation to run right out and draft the most draconian arbitration agreement possible. As noted in the *Epic Systems Corp. v. Lewis* decision, arbitration agreements can still be ruled unenforceable for being fraudulent, made under duress or unconscionable.

The opt-out clause

To take the sting out of arbitration agreements, some attorneys recommend adding an opt-out clause that lets employees reject the opportunity to arbitrate claims.

Most opt-out clauses require the employee to make a decision within the first 30 days of employment or after the modified agreement is offered. Employees who opt out retain the right to sue in court and may not use the employer-offered arbitration process. Employers may not retaliate against employee for opting out of the arbitration process.

An opt-out clause makes it harder to argue that an arbitration agreement was signed under duress or that the employee was coerced into signing it.

Changing existing agreements

Employers should take advantage of the *Epic Systems Corp. v. Lewis* opinion to have their attorney review any existing arbitration agreement—or any that might be under consideration.

Any changes planned, such as inserting a class-action ban, confidentiality provisions or an opt-out clause, should be approved and drafted by an attorney who specializes in this area of the law.

The process of rolling out new arbitration agreements should be planned ahead of time as well. It should start by evaluating all existing arbitration agreements. After all, not every employee may have the same agreement. The goal is to move employees who have agreements to the agreements you want them to have.

Any impediments to offering the revised agreements to existing employees and new hires should be worked out before moving ahead.

Your attorney can also advise you on gaining a legally sound agreement to arbitrate. One point of attack for arbitration enemies will be to argue employees did not really know what they were signing. They will argue “no meeting of the minds” means no viable contract.

That and other potential complications drive home a key caution: Neither revising nor creating an arbitration agreement is a do-it-yourself project. Leave those tasks to your attorney.

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