Considerations for Use of Arbitration Agreements to Curtail Class Claims

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May 21, 2019, marks the one-year anniversary of the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*, which upheld the use of class action waivers in employee arbitration agreements.

In a 5-4 vote, the Supreme Court determined that the law is "clear" that class action waivers are enforceable under the Federal Arbitration Act (FAA) and that individual arbitration agreements do not conflict with the National Labor Relations Act's collective action guarantees. In upholding the "liberal federal policy favoring arbitration agreements," the Court held that Congress, through the FAA, has instructed federal courts to enforce arbitration agreements as written, and employers are free to compel employees, as a condition of employment, to require that arbitration proceed on an individual basis.

The decision was heralded as a much-needed reprieve for employers facing a mounting number of costly wage and hour and other collective employment practices litigation, so it is fitting to reflect on the decision's impact in the past year.

Epic's Impact During the Past Year

While it is too soon to determine *Epic*'s impact on the number of class and collective action filings since the decision, several courts of appeal have already weighed in on *Epic*:

First Circuit

Bekele v. Lyft, Inc. (in light of *Epic*, plaintiff unable to prevail on argument that agreement requiring individual arbitration violates the NLRA).

Fifth Circuit

In re JPMorgan Chase & Co. (reversing district court decision allowing class notice to be sent to putative class members who signed arbitration agreements with class waivers).

Sixth Circuit

Gaffers v. Kelly Servs., Inc. (holding that, like the NLRA, nothing in the Fair Labor Standards Act displaces the FAA or bars individual arbitration agreements); *McGrew v. VCG Holdings Corp.* (concluding that neither the NLRA nor the FLSA preclude individual arbitration agreements, and such agreements are enforceable against both employees and independent contractors).

Seventh Circuit

Herrington v. Waterstone Mortg. Corp. (reversing district court opinion that compelled arbitration but struck as unlawful the waiver clause forbidding class or collective arbitration, which resulted in a $10 million arbitration award against the employer).

Ninth Circuit

O'Connor v. Uber Tech. (reversing district court order denying Uber's motion to compel arbitration; *Miner v. Ecolab, Inc.* (vacating district court order denying employer's motion to compel arbitration and remanding for further proceedings).

Eleventh Circuit

Cowabunga, Inc. v. NLRB (reversing NLRB panel ruling holding that employer violated the NLRA by maintaining and enforcing employment agreements requiring that employment disputes be resolved through individualized arbitration); *Franks v. NLRB* (reversing NLRB ruling holding that arbitration agreements barring collective or class claims violated the NLRA).

What *Epic* Likely Will Not Cover

Arbitration agreements with class waivers do not (and cannot) prevent individuals from filing a charge with the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC has the power to investigate workplace claims and to enforce workplace discrimination and harassment claims on behalf of one or more employees. And, as Justice Ginsburg noted in her dissent in *Epic*, she does not view the majority opinion "to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis."

Challenges to Arbitrability: What Lies Ahead for Employers

Challenges to the enforceability of arbitration agreements under contract law analysis. Like all contracts, arbitration agreements must be supported by adequate consideration, meeting of the minds, mutuality of obligation, etc. In *Epic*, the Supreme Court made clear that arbitration agreements are still susceptible to defenses arising from the **formation of the agreement**, for things such as fraud, unconscionability, duress, and illegality.

So while the *Epic* decision may deter some employment litigation, employers can expect to see increased litigation challenging the validity of arbitration agreements, and whether such "take it or leave it" agreements are enforceable.

Employers with a multistate workforce must be particularly mindful of the nuances among the various state law requirements governing the enforceability of arbitration agreements and whether, for example, arbitration imposed on existing employees is supported by adequate consideration.

Mass (and costly) arbitration filings. A creative plaintiffs' bar has already waged mass arbitration filings against several companies such as Chipotle, Uber, Lyft, and Buffalo Wild Wings. More than 12,000 individual arbitration claims were reportedly filed against Uber in August 2018. Because most arbitration agreements require the company to pay the arbitration fee, the cost to initiate the individual arbitrations was believed to exceed $18 million. However, most of these cases generally arose after a collective action was conditionally certified, putative class member names were disclosed, and later proceedings resulted in enforcement of class or collective action waivers. While mass arbitration filings are difficult for plaintiff's counsel to organize, they can arise under unique procedural circumstances.

Challenges to the applicability of the FAA. Another recent Supreme Court decision in *New Prime Inc. v. Oliveira* reiterates that the FAA is not without limits. Section 1 of the FAA exempts from arbitration "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Although this latter clause has historically been construed to include transportation workers involved in interstate commerce, the possibility exists that the clause will be expanded to any employees engaged in interstate commerce — a standard readily met in today's e-commerce world.

Employee resistance. While many employers rushed to adopt arbitration agreements following *Epic*, a number of tech firms have been moving in the opposite direction, fueled largely by the #MeToo movement. Microsoft and Facebook have reportedly done away with mandatory arbitration of sexual harassment claims, and Google has allegedly eliminated arbitration agreements altogether. Last year, several large law firms faced opposition from incoming law clerks who criticized the firms' arbitration policies in social media; this prompted a number of law schools to send letters to more than 300 law firms asking about their policies. Many law firms ultimately withdrew their mandatory arbitration agreements. Workers in other sectors could follow suit, prompting companies to change their practices.

Legislative action. In February 2019, Democratic legislators introduced a bill aimed at banning mandatory arbitration agreements. The Forced Arbitration Injustice Repeal (FAIR) Act proposes to do away with mandatory arbitration agreements impacting employment, civil rights, consumer, and antitrust disputes altogether, and would eliminate class waivers in other arbitration agreements. Additionally, several states have passed legislation banning mandatory arbitration of sexual harassment claims. It remains to be seen whether those state laws will survive a preemption challenge in light of *Epic*.

Notwithstanding these challenges, the benefit of the class waiver protection afforded by *Epic* is significant and should be a considerable factor in deciding whether to adopt mandatory arbitration.