SCOTUS MAKES EMPLOYMENT ARBITRATION AGREEMENTS EPIC

Eliminating Risk of Class and Collective Actions After Epic Systems Corp. v. Lewis

By Chris Thrutchley and Ashley Quinn

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The number of class and collective action employment claims continues to rise. According to the Society for Human Resource Management, the value of wage and hour settlements more than tripled over the last several years. By far, class and collective actions can be some of the costliest employment cases to defend. But in the May 21, 2018 ruling in *Epic Systems Corp. v. Lewis*, SCOTUS gave employers an epic opportunity to eliminate risk of massive employment-related class or collective action liability through well drafted arbitration agreements.

At issue in *Epic Systems Corp. v. Lewis* was the enforceability of what are known as class and collective action waivers in mandatory arbitration agreements. More and more employers are requiring applicants and employees to enter into arbitration agreements as a condition of being considered for employment and as a condition of being employed. And because of the sharp rise in costly class and collective action claims, more employers are including class and collective action waivers in their arbitration agreements. The waivers require applicants or employees to resolve all employment-related claims exclusively through arbitration *and solely on an individual basis and not as a representative or member of a class or collective action*. Courts were split on whether class and collective action waivers are enforceable. But in *Epic* SCOTUS affirmed a decades-long trend favoring the enforceability of arbitration agreements. After *Epic*, employers may require applicants and employees not only to submit all employment-related disputes to binding arbitration--thus ensuring no employment claim will ever end up in front of a jury--but also to waive the right to bring costly class and collective actions.

Arbitration has the potential to provide a much cheaper, more efficient, confidential, and less formal alternative to litigation in court. The *Epic* decision reinforces these important benefits and provides the additional valuable benefit of eliminating the extremely costly risk of having to defend employment claims on a massive class or collective action basis.

Courts are already recognizing the *Epic* impact and employers are reaping the benefits. Last week, GableGotwals secured an epic win for a client before a local federal court, defeating a putative class and collective action under the Oklahoma Protection of Labor Act and the Fair Labor Standards Act. The case involved an employer whose arbitration agreement included a class and collective action waiver. An employee ignored the agreement and tried to bring class and collective action wage claims against the employer. Applying *Epic*, the court compelled the employee and a putative opt-in plaintiff to arbitrate their claims individually and not as representatives or members of a class or collective action. The win has substantially reduced the employer's potential liability for

class-wide, multi-state damages, and any recovery from individual arbitration will be significantly less by comparison.

Epic and the win secured by GableGotwals highlight just how significantly employers can benefit from adding arbitration agreements with class and collective action waivers to their risk management strategy. But there are drafting and enforcement traps for the unwary that must be thoughtfully considered and properly navigated. Some include, for instance, the following:

- Consider addressing the arbitrability of "gateway" issues, such as the existence, validity, and scope of your arbitration agreement.
- Don't include arbitration agreements in your employee handbook or they could be unenforceable.
- Clearly address the parties who are subject to arbitration (including not only the organization but also its owners, managers, and possibly others).
- Don't strip employees of remedies available under law.
- Don't require the employee to cover all of the costs of arbitration if the employee can't afford it.
- Make sure the arbitration procedures are clear.
- Make arbitration mutual.
- After *Epic*, include an express class and collective action waiver.
- Verify in writing that each applicant and employee has read and understood the mandatory arbitration agreement and obtain each applicant and employee's signature on the agreement.

GableGotwals has extensive experience drafting and enforcing arbitration agreements. Our team of experienced labor and employment attorneys are here to assist you in drafting arbitration agreements or updating current policies in the wake of the *Epic* decision.

Chris Thrutchley and Ashley Quinn are attorneys in GableGotwals' Labor & Employment Practice Group who assist clients in the area of Labor and Employment Law. For help auditing and updating your employment practices and for defense of labor and employment related claims, contact **GableGotwals**.

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