Daily Journal

U.S. Supreme Court, Civil Litigation, Labor/Employment

Bookmark

Jul. 18, 2018

High court delivers an Epic win to employers

On May 21, in a landmark decision, the U.S. Supreme Court held that businesses do not violate the National Labor Relations Act by including class waivers in arbitration agreements that workers must sign as a condition of employment.

EMILY A. MERTES
Kaufman, Dolowich & Voluck, LLP

Emily focuses her practice in labor and employment law representing management in all phases of litigation.

See more...

KATHERINE S. CATLOS
Managing Partner, Kaufman Dolowich & Voluck LLP

Katherine focuses on advising employers in preventing and defending claims by employees.

See more...

THIS COLUMN APPEARED IN THE 2018 LABOR AND EMPLOYMENT SUPPLEMENT

THIS COLUMN APPEARED IN THE 2018 LABOR AND EMPLOYMENT SUPPLEMENT

On May 21, in a landmark decision, the U.S. Supreme Court held that businesses do not violate the National Labor Relations Act by including class waivers in arbitration agreements that workers must sign as a condition of employment. 2018 DJDAR 4705. The court split 5-4 along ideological lines, with Justice Neil Gorsuch writing for the majority. In a divisive but unsurprising decision, the court sided with employers, permitting the use of class action waivers in arbitration agreements.

The Supreme Court's decision resolved a three-way circuit split. *Epic Systems Corp. v. Lewis*, from the 7th U.S. Circuit Court of Appeals, was consolidated with two other cases, *Ernst & Young LLP v. Morris* (9th Circuit) and *National Labor Relations Board v. Murphy Oil USA* (5th Circuit). In each case, an employee had signed an employment agreement that contained an arbitration provision waiving their right to bring class claims, but subsequently filed suit in an attempt to bring both individual and collective claims. In all the cases, the employer had argued that pursuant to the terms of the arbitration agreements, the employees were compelled to arbitrate their claims individually and waive their right to bring a class or collective action in court. The Supreme Court sided with the 5th Circuit's decision in *Murphy Oil*, permitting class action waivers.

The Reasoning

The decision resolved a dispute between two federal statutes that, until recent years, had existed together without issue for over eight decades -- the Federal Arbitration Act and the National Labor Relations Act. The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Section 2. The NLRA provides that employees have the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. Section 157.

The Supreme Court addressed the issue of whether the collective-bargaining provisions of the NLRA prohibited the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. The court saw no such conflict. It held that clauses in arbitration agreements that employees must sign as a condition of employment that restrict an employee's ability to bring a class action, *do not* violate Sections 7 of the NLRA that permit workers to join together for "mutual aid and protection."

The court rejected the NLRB's argument that class actions qualified as "concerted activities" for workers' "mutual aid" because the NRLA does not expressly mention them. "Concerted activities" include only activities "closely related to organization and collective bargaining, such as picketing." Thus, there was no conflict between the FAA and NLRA.

The court opined that Congress could always pass new legislation to reach a different result, but that it was not the duty of the Supreme Court to "substitute its preferred economic policies for those chosen by the people's representatives." The majority held that the "policy" may be debatable, but the law was clear.

The Dissent

Reading from her dissent, Justice Ruth Bader Ginsberg called the decision "egregiously wrong," citing the "extreme imbalance" that once existed with regard to the employer-employee relationship. She emphasized that the purpose of the NLRA was to help level the playing field by granting employees more power through collective action. Ginsberg said the ruling will harm workers, who are unlikely to pursue individual claims against their employers due to prohibitive costs or because they fear retaliation. She was concerned that this decision would incentivize employers to skirt their legal obligations.

This decision is undoubtedly a win for employers. Yet, despite this victory at the court for employers, the statutes themselves are always susceptible to reworking by Congress. Democrats will likely continue their efforts to amend the FAA in the wake of this decision.

The Fallout

The decision in *Epic Systems* confirms one of a number of potential benefits for employers who maintain arbitration agreements -- the ability to include a class action bar. This waiver will help minimize potential exposure from claims brought by employees.

Indeed, in the last month since *Epic Systems* was decided, employers have rushed to take advantage of its holding and halt class actions from proceeding in court. So far, the impact of this decision has reached a California federal court case concerning pay equity in a law firm (*Ji-In Houck v. Steptoe & Johnson LLP*, 2:17-cv-04595), wherein the case was redirected to arbitration. Also in California, a federal judge recently held that a proposed class of Domino's Pizza delivery drivers must arbitrate their reimbursement suit against the individual franchise owners due to an effective arbitration agreement. *John Ralph v. Haj Inc. et al.*, 17-cv-01332. Outside of California, an Illinois federal court recently granted a bid by a Pizza Hut franchisee to compel arbitration in a proposed class action over vehicle-related expenses. *Collins et al. v. NPC International Inc.*, 3:17-cv-00312. Defense counsel in a race bias class action in New York also submitted supplemental briefing to compel arbitration following the decision. *Frazier et al. v. Morgan Stanley & Co. LLC*, 1:16-cv-00804.

While the use of valid arbitration agreements with class action waivers will help businesses avert class and collective actions, not all employment disputes are subject to mandatory arbitration, such as the New York statute explicitly prohibiting mandatory arbitration for sexual harassment claims.

Moreover, *Epic Systems* will have a less pronounced effect in states like California, where employees still have rights to pursue "representative actions" under the Private Attorneys General Act, which can carry substantial penalties. This decision will not affect an employee's right to bring a civil action for PAGA penalties, which, according to both the California Supreme Court and the 9th Circuit, cannot be waived. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015).

Finally, it is important that employers are aware of any state laws and/or authority affecting the enforcement of arbitration agreements. Employers must determine whether they should utilize a stand-alone arbitration agreement or include a mandatory arbitration clause in their employee handbooks or other policies, or whether the agreement should be mutual. State laws also vary with regard to what type of consideration is required when an employee signs an arbitration agreement -- particularly whether continued employment is sufficient consideration for the agreement.

While the consequences of the *Epic Systems* decision will be far reaching, particularly with respect to pending class actions, it does not, by any means, portend the end of wage disputes or class actions. Employers should continue to audit their wage and hour policies and practices to ensure compliance with Federal and state laws.