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Supreme Court Upholds Waiver of Class and Collective Actions in Employment Arbitration Agreements

June 1, 2018 – Last week, the Supreme Court issued a potentially landmark decision in *Epic Systems Corp. v. Lewis*, ruling and confirming that employers can use arbitration agreements with its employees to avoid having to defend class action or collective action lawsuits. Specifically, the Supreme Court resolved a split in decisions among the federal circuit courts of appeals and confirmed, as a matter of law, that pursuant to the Federal Arbitration Act ("FAA"), arbitration agreements providing for individualized, case-by-case arbitration proceedings are enforceable.

The Supreme Court's 5-4 majority was unmoved by employee advocates who argued that the National Labor Relations Act ("NLRA")—enacted after the FAA—which seeks to protect workers who engage in "concerted activities," required a different result. Indeed, Justice Neil Gorsuch, writing for the majority, stated that the NLRA "does not even hint at a wish to displace [the FAA] – let alone accomplish that much clearly and manifestly." Justice Gorsuch also wrote that if the employee advocates' arguments were accepted, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace."

Since 2011, when the Supreme Court ruled that the FAA allows companies to avoid class action suits by including individualized arbitration provisions in contracts with consumers, there has been uncertainty as to whether the same reasoning should apply in the context of employment law. This lack of clarity was demonstrated by the fact that, on the one hand, the Seventh Circuit and Ninth Circuit Courts of Appeals took the position that collective action waivers as a condition of employment violated the NLRA; while the Fifth Circuit Court of Appeals, on the other hand, ruled in favor of employers' collective action waivers, deferring to the FAA. Although the Supreme Court has now definitively ruled in favor of employers and the FAA on this issue, there is no certainty that Congress will not in the future act to legislatively reject the Supreme Court's decision in *Epic Systems Corp*.

This ruling also leaves open the question as to what impact, if any, its decision in *Epic Systems Corp.* will have on recently enacted New York state legislation that prohibits, effective July 11, 2018, mandatory binding arbitration of sexual harassment claims in employment. As we noted

in a prior client alert, it is uncertain how the courts will reconcile this new, limited prohibition against arbitration in sexual harassment claims by New York State legislature with the Federal Arbitration Act. In the meantime, employers in New York can either create an exception for sexual harassment claims within their arbitration agreements or expect to face an initial uphill battle in moving to compel arbitration when sexual harassment claims are filed in court.

Nevertheless, in light of the Supreme Court's recent decision, employers – particularly those vulnerable to wage-and-hour claims that usually lend themselves to collective or class actions – should review their current policies and employment agreements and strongly consider implementing workforce-wide arbitration agreements that mandate individualized, case-by-case arbitration.

If you require any additional information concerning the Supreme Court's recent decision or the use of arbitration agreements in employment in general, or about any other employment-related issues, please do not hesitate to contact us:

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