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Supreme Court Holds that Class Action Waivers in Employee Arbitration Agreements are Enforceable

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On May 21, the U.S. Supreme Court issued a long-awaited decision (the *Epic Systems* decision) regarding the enforceability of employee arbitration agreements that include class/collective action waivers. In January of 2017, the Supreme Court agreed to hear this issue through three consolidated cases: *Epic System v. Lewis*, *Ernst & Young v. Morris*, and *National Relations Board v. Murphy Oil USA*, the facts of which were outlined in a previous article.

The *Epic Systems* decision resolves a significant question regarding the validity of employment agreements that require individual arbitration for the resolution of workplace disputes. In October of 2017, the Court heard oral argument on these cases and revealed the split among the Justices, which was addressed in a previous article as well.

In a 5-4 decision, the majority opinion, written by Justice Neil Gorsuch, indicated that regardless of policy considerations, the law provides a clear answer: "In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms — including terms providing for individualized proceedings." The National Labor Relations Board took the position that class waiver provisions within an arbitration agreement with employees are unenforceable in light of the employees' right to engage in "concerted activity" under the National Labor Relations Act (NLRA), arguing that concerted activity included the right to sue as a class.

The Supreme Court emphasized that the Federal Arbitration Act (FAA) and the NLRA exist harmoniously rather than in conflict. This conclusion is rooted in the FAA's "liberal federal policy favoring arbitration agreements" and a more narrow reading of Section 7 of the NLRA, which guarantees employees "the right …to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Court recognized that although "[t]he NLRA secures to employees rights to organize unions and bargain collectively, […] it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." Notably, Congress could have mandated particular dispute resolution procedures, but it did not do so. Therefore, a proper reading of these two acts in tandem indicates that the arbitration agreements at issue must be enforced as written.

Following this decision, employers can confidently include class/collective action waivers in arbitration agreements with their employees without fear that these agreements will later be found unenforceable. Ensuring that employees individually arbitrate their claims will protect employers from inevitably costly class action suits.

Notably, on Monday, April 30, 2018, the Supreme Court granted petition for a writ of certiorari in *Lamps Plus Inc., et al. v. Frank Varela*, a case involving the Ninth Circuit's broad interpretation of an employee arbitration agreement to allow for class arbitration. This signals that interpretation of arbitration agreements that do not contain an explicit waiver of class actions remains an open question and could allow for class-wide arbitration. Employers whose arbitration agreements do not currently contain an express waiver of class actions (including

class arbitration) are advised to consider doing so, and should contact counsel to ensure such agreements are properly drafted to avoid future litigation on the issue.

For additional information on this decision and how it may affect your business, please contact the authors, Elizabeth Liner and Emily Kesler, or any member of Baker Donelson's Labor & Employment Group.