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Supreme Court Approves Employers' Use of Class-Action Waivers in Arbitration Agreements

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In a highly anticipated opinion, the U.S. Supreme Court ruled on May 21, 2018, that employers may require employees to enter into arbitration agreements waiving their rights to pursue class-action claims against the employer. The 5-4 decision was authored by Justice Neil Gorsuch and rejected the National Labor Relations Board's position that any such class-action waiver violated the National Labor Relations Act's protection of employees' right to engage in "concerted activity" relating to terms and conditions of employment. The Court's opinion resolves a split among the federal judicial circuits; the courts of appeals for the Sixth, Seventh, and Ninth Circuits adopted the NLRB's position, whereas the Second, Fifth, and Eighth Circuits found that class waiver provisions did not violate federal labor law.

Supreme Court Opinion in *Epic Systems Corp. v. Lewis*

The Supreme Court's decision in *Epic Systems* involved three consolidated cases, in each of which an employer and employee entered into a contract requiring individualized arbitration proceedings to resolve employment disputes. The enforceability of class-action waivers arose after the National Labor Relations Board ("NLRB") in 2012 asserted that, in the context of employer-employee agreements, the National Labor Relations Act ("NLRA") effectively nullified the Federal Arbitration Act's policy favoring the enforceability of arbitration agreements when class-action waivers are involved. The NLRB reasoned that employment-related class-action claims are a form of concerted activity protected by the NLRA. Since then, the circuits have split as to whether or not they must defer to the NLRB's position. The Supreme Court agreed to address the issue to "clear the confusion."

In analyzing the issue, the Supreme Court first rejected the employees' argument that the Arbitration Act's "savings clause" applied to the arbitration agreements at issue. Justice Gorsuch noted that the Arbitration Act generally requires courts to rigorously enforce arbitration agreements according to their terms, but the Act's "savings clause" permits courts to invalidate arbitration agreements based on generally applicable contract defenses, such as fraud, duress, or unconscionability. The Supreme Court found that the "savings clause" did not apply here because the employees were not challenging the arbitration agreements on the basis of legal principles that would invalidate any contract. Instead, they challenged the agreements simply because the agreements required individualized arbitration instead of class or collective proceedings.

The Supreme Court further rejected the employees' argument that the NLRA overrides the Arbitration Act. In finding no clear or manifest congressional intention to displace one law with another, Justice

Gorsuch noted that the NLRA gives workers the right to organize unions and bargain collectively, "[b]ut it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedent demands." Therefore, the Supreme Court concluded that "Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise."

The majority opinion drew sharp criticism from Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, who found the decision to be "egregiously wrong."

Practical Implications

The Supreme Court's guidance is clear: employers nationwide may now include clauses in employment contracts or in separate arbitration agreements requiring employees to resolve employment disputes through individualized arbitration proceedings, rather than through class or collective actions, when those agreements are governed by the Federal Arbitration Act. (The Arbitration Act exempts workers engaged in foreign or interstate commerce, such as interstate truck drivers, from such agreements.) Clauses requiring individualized arbitration permit employers to resolve workplace disputes more quickly and efficiently, on a one-on-one basis, without the risk of large judgments posed by class and collective actions. The opinion in *Epic Systems* further reinforces the Court's prior cases holding that the Arbitration Act requires courts to enforce agreements to arbitrate, *including the rules and procedures of arbitration the parties select*, according to their terms.

There is little doubt that this opinion will spur employers to include mandatory arbitration agreements with class and collective action waivers as a condition of employment. This development should reduce the number of collective and class actions nationwide, thereby reducing both the expense borne by employers in defending such cases and the liability risk employers face in such cases.