An Epic Decision for Class Action Waivers

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The 5-4 ruling in Epic Systems Corp. v. Lewis could weaken workplace protections

On May 21, 2018, the U.S. Supreme Court's decision in in Epic Systems Corp. v. Lewis, issued a big win for employers. In a 5-4 decision, the Court decided that employers can, in connection with an arbitration agreement, require employees to sign a class action waiver as a condition of employment. A class action waiver is a provision that states the employee will resolve disputes with the employer only through one-on-one arbitration, and not through any class or collective action, in court or in arbitration.

Class and collective action waivers have been allowed in the Fifth Circuit since December 2013, but the U.S. Supreme Court has now affirmed their enforceability, assuming no fraud, duress, or other traditional contract defense is involved.

Most employers in the construction industry are familiar with arbitration agreements and programs. These agreements have become popular because arbitration is, in most cases, a cheaper, more informal, more expeditious, and more private forum for dispute resolution than litigation in state or federal court. In the construction and employment contexts, these agreements also allow employers to place decision-making power in the hands of individuals with industry experience.

Arbitration clauses are included in many construction contracts, including in AIA and AGC form agreements. Now is a good time for employers to consider whether they would like to take the next step and implement a class action waiver.

There are a couple of key advantages for employers—especially large employers—that require such a waiver from their employees:

- Employers can avoid complicated, time-consuming, and expensive class and collective action suits, which often include opt-in plaintiffs that have little involvement or interest in the case; and
- By requiring that employees actively bring claims through individual arbitration (instead of through a class or collective action opt-in process), employers may reduce the chances that employees will pursue any claim, especially small claims, against the employer.

Employers should also note that individual arbitration may not always be the easiest or cheapest way to resolve large disputes. For example, in high-dollar wage-and-hour cases where dozens of individual plaintiffs are involved, certain plaintiffs' attorneys may strategically take each individual claimant to arbitration in a series of one-off proceedings.

In those cases, the plaintiff's attorney could gain an upper hand in settlement negotiations by substantially running up the employer's legal fees and taking the employer's time for multiple proceedings covering the same legal issues. Further, the employer would not likely be helped by a

victory in any previous proceeding; in effect, the plaintiffs' attorney would be given a re-try for each individual employee.

It should also be noted that if an employer proceeds with a mandatory arbitration program and class action waiver, they will want to ensure that all legal requirements, such as proper consideration for the program and waiver, are met at the time of the agreement and that the program remains enforceable as plaintiffs' lawyers and local courts respond to this Epic decision.

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