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SUPREME COURT APPROVES ARBITRATION AGREEMENTS THAT PRECLUDE PARTICIPATION IN CLASS ACTION SUITS

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The United States Supreme Court has just resolved an important dispute among lower federal courts involving mandatory arbitration provisions in employment contracts. In a case involving Epic Systems Corp., the Court (in a 5-4 decision with a vehement dissenting opinion) held that contract provisions that require employees to resolve employment disputes individually or through one-on-one arbitration (as opposed to class action lawsuits) are enforceable. Lower federal courts had reached inconsistent decisions on this issue, including the Seventh Circuit Court of Appeals, which previously held such arbitration provisions to be unenforceable. The Seventh Circuit is significant because appeals from Wisconsin federal trial courts are decided there.

The Supreme Court recognized as a starting point in *Epic Systems Corp. v. Lewis*, decided May 21, 2018, that federal law and policy strongly favor arbitration as an alternative dispute resolution procedure. The Federal Arbitration Act, in particular, provides that arbitration provisions in contracts should be enforced, according to their terms, just as any other contract provision would be enforced. Agreements to arbitrate, according to Section Two of the Act, are "valid, irrevocable, and enforceable, save upon such terms as exist at law or in equity for the revocation of any contract." Under this standard, the only recognized exceptions to enforcement have involved arbitration provisions procured by impermissible means, such as fraud, duress, unconscionability, etc.

The Supreme Court then held that enforceable arbitration provisions may exclude participation in class actions, whether in court or as a collective arbitration. The Court reasoned that the procedures necessary for a class action are inherently inconsistent with the fundamental attributes of arbitration. The Court identified some of the defining attributes of "bilateral" arbitration as including stream-lined procedures, efficiency, procedures tailored to specific disputes, confidentiality, etc.

The Supreme Court also expressly rejected the argument that prohibiting class action participation violates the right created by the National Labor Relations Act to engage in collective and/or concerted activity. The Supreme Court concluded that the right to engage in collective activity under the National Labor Relations Act is limited to organizing or unionizing activity rather than litigation of employee disputes.

The takeaway from the Supreme Court's *Epic Systems* decision is that arbitration clauses in employment contracts will be rigorously enforced, even if they include prohibitions on participation in class action litigation. The Court's decision is clear and emphatic, with no apparent ambiguity or nuance.

The Supreme Court's decision suggests significant reasons for employers to include arbitration provisions in their employment agreements. Most compelling is potential cost advantages. Defending a class action in an employment dispute, such as claims for wages or overtime, can be extremely expensive, even if the employer is ultimately successful. In addition, the liability risk to employers, if unsuccessful, can be devastating. The amount that may be owed to a large class of employees can obviously be considerable, and most wage claims are brought under statutes that include fee-shifting provisions, meaning that the opposing parties' attorneys' fees must also be paid. The cost advantages of an arbitration provision that prohibits class action participation by employees, therefore, may be significant.

Employers should be aware, however, that arbitration is not always cost effective. The parties to arbitration will be obligated to pay the arbitrators for their time, usually on an hourly basis. Costs may also include the expense of professional court reporters to transcribe evidentiary proceedings. The obligation to pay arbitration costs exists independent of the outcome of the arbitration, and usually is borne disproportionately by the employer. As a practical matter, moreover, most arbitrators require an up-front deposit for their estimated costs. By contrast, the cost of a judge's time in a court proceeding is not imposed directly on the parties.

Drafting effective arbitration provisions suitable to an employer's particular circumstances should be done with careful consideration. While courts now may scrupulously enforce arbitration clauses, their utility as actual dispute resolution procedures depends on a variety of factors. Among the items that should be included are the following: (1) procedural rules to be followed, such as arbitration rules promulgated by the American Arbitration Association; (2) procedure for selecting arbitrators; (3) time limits for completing arbitration; (4) limits on discovery and other litigation practice; (5) specifications of arbitrator qualifications specific to the employer's circumstances; (6) choice of law and venue provision; (7) strict confidentiality requirements; and (8) limitation on appeal rights.

In the end, the advantages to employers of avoiding entanglement in class actions with employees are very significant. Almost all of the statutory bases that underlie employee class actions involve potential attorney fee-shifting, multiple damages or exemplary damages, with potentially large numbers of individual employees bringing aggregate claims. The Supreme Court's *Epic Systems* decision opens the door for employers to utilize arbitration provisions that will effectively protect against class action involvement. Employers who are not presently incorporating such provisions into their employment agreements or requiring such agreements to be signed as a condition of employment should consider doing so.

The enforceability of agreements to arbitrate under the Federal Arbitration Act does not require that such provisions be incorporated into comprehensive written employment agreements. Instead, employers may request new employees to sign a stand-alone agreement to arbitrate disputes relating to the employment. Employers may also require existing employees to sign an agreement to arbitrate as a condition of continued employment. Any employer wishing to require current employees to sign such agreements should consult with legal counsel to ensure that proper steps are taken to support the validity and enforceability of the agreement.