

# Employee Class Action Waivers are Unenforceable According to the 7th Circuit

A recent Seventh Circuit decision, *Lewis v. Epic Systems Corporation*, has declared that class action waivers within arbitration agreements are unenforceable under the National Labor Relations Act ("NLRA"). Because of this ruling, Wisconsin employers cannot require employees to waive their right to bring employment claims as a class action.

## Factual Background

In 2014, employees of Epic Systems ("Epic") received an e-mail containing an arbitration agreement and waiver of the right to participate in "any class, collective, or representative proceeding" as part of wage-and-hour disputes. Jacob Lewis, a technical writer at Epic, signed the agreement as a condition of his employment. Lewis later filed suit in federal court seeking to certify a class action under the Fair Labor Standards Act and Wisconsin law because Epic allegedly misclassified him and other employees as "exempt" from overtime wages.

Epic filed a motion to compel individual arbitration based on the arbitration agreement and class action waiver Lewis had signed. The district court, however, found that the clause violated Section 7 of the NLRA because it interfered with Lewis's right "to engage in concerted activities for mutual aid and protection."

## The Seventh Circuit's Decision

Affirming the district court's judgment, the Seventh Circuit held that Epic's mandatory arbitration agreement violated Section 7 of the NLRA by unlawfully prohibiting employees from seeking collective or class-wide relief. The court rejected an argument, which other courts have found persuasive, that the Federal Arbitration Act's policy of encouraging arbitration overrode the rights granted in the NLRA. In doing so, the Seventh Circuit joined the National Labor Relations Board, which has repeatedly found that such waivers violate the NLRA.

With its ruling, the Seventh Circuit has created a "split" among the federal appeals courts. All other appeals courts that have considered this issue have upheld class action waivers.

### POSTED:

Jun 21, 2016

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## Practical Considerations for Employers

The decision in *Epic* does not affect all arbitration agreements. For example, employees who do not have rights under Section 7 of the NLRA (such as supervisors) may be unaffected by this decision. Further, as the Seventh Circuit noted in its opinion, "If Epic's provision had permitted collective arbitration, it would not have run afoul of Section 7 either." Nevertheless, employers who have mandated arbitration of employee claims should:

1. Recognize that arbitration agreements that preclude class or collective action are now unenforceable in Wisconsin, Illinois, and Indiana.
2. Review policies and procedures that may contain class action waivers.
3. Make any necessary changes to ensure such agreements are enforceable.

If you have questions regarding this material or how to update your employment policies, please contact Robert S. Driscoll, Jessica Simons, or your Reinhart attorney.

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