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Employers May Require Employees to Waive the Right to Participate in Class Actions, According to the U.S. Supreme Court

On May 21, 2018, in *Epic Systems Corporation v. Lewis,* the United States Supreme Court upheld the enforceability of employment contracts that require the use of individualized arbitration to resolve employment disputes. This decision represents a win for employers seeking to contain costs of dispute resolution by handling claims brought by employees against employer in one-on-one arbitration proceedings, rather than class actions in court.

The decision resolves a split between the federal appellate courts on the enforceability of such provisions and overturns precedent in the Seventh Circuit (encompassing Wisconsin, Illinois and Indiana) that previously held such provisions unenforceable under the National Labor Relations Act (the "NLRA"). We previously discussed that decision in "Seventh Circuit decision in Employee Class Action Waivers are Unenforceable According to the 7th Circuit."

The Supreme Court's decision stems from a trio of cases in which employers required their employees to sign agreements that required the employees to individually arbitrate employment-related claims. The employees, in other words, waived their right to participate in a class action against their employer. The employees later challenged the enforceability of the agreements, arguing that the arbitration provisions violated the NLRA because they prohibited employees from engaging in "concerted activities."

The Supreme Court rejected this argument, emphasizing that the Federal Arbitration Act (the "FAA") requires courts to enforce agreements to arbitrate, including the specific terms of arbitration that the parties select. According to the Court, although the "bread and butter" of the NLRA is union organization and collective bargaining in the workplace, it does not confer a right to participate in a class or collective action. Consequently, the FAA requires courts to enforce arbitration provisions requiring individual arbitration of employment claims.

By reversing the Seventh Circuit's previous ruling that mandatory individual arbitration provisions were unlawful, it will also change the landscape in Wisconsin. Here are five takeaways for employers in light of the *Epic* decision:

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1. The decision provides employers with the go-ahead to negotiate arbitration provisions that require individual arbitration for resolution of disputes without fear that such provisions violate the NLRA. Employers who have or had such agreements should consider whether the arbitration provision is sufficiently broad to meet their needs. Any employers that do not require employees to sign class action waivers should assess whether implementing such an agreement is warranted.
2. Arbitration has many advantages for employers: confidentiality, no runaway juries, limited discovery and the potential for cost savings. However, there are also possible disadvantages that should be considered. By prohibiting employees from engaging in class or collective actions, employers may have to address multiple arbitrations involving similar claims at the same time. There is the potential for inconsistent or even contradictory decisions from arbitrators. Finally, arbitration decisions are subject to very limited judicial review.
3. Employers should assess whether to create an exception to mandatory arbitration for certain claims, such as sexual harassment. In the wake of the #MeToo movement, many state (not currently including Wisconsin) and federal legislatures have proposed legislation to prohibit mandatory arbitration of sexual harassment claims. Further, certain employers, such as Microsoft and Uber, have already created an exception for sexual harassment claims from the mandatory arbitration provision.
4. Nothing in this decision prohibits an agency, such as the Equal Employment Opportunity Commission, from pursuing litigation against employers for systemic discrimination, which would seek damages on behalf of a class of employees much like a class action.
5. Finally, employers with employees in California should be aware of a potential loophole via California's Private Attorney Generals Act. Under this Act, employees, acting as a private attorney general, can sue their employers based on workplace violations of state labor laws individually but also as a representative of other current or former employees. These representative suits are similar to class actions. These claims may be exempt from *Epic* as the employees are bringing the suit on behalf of the state, which does not have a contract requiring arbitration. In light of *Epic*, other states may move in the direction of promulgating similar statutes.

If you have questions about your arbitration provision or need assistance preparing one, please contact a member of Reinhart's Labor & Employment group or your Reinhart attorney.