Labor and Employment Alert: Supreme Court Upholds Arbitration Waivers Barring Class Actions

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Today, in a split 5-4 decision, the United States Supreme Court upheld workplace arbitration agreements that prohibit class and collective actions. The closely watched decision in *Epic Systems Corp. v. Lewis* actually involved three cases the Court consolidated for review. In short, the Court held that these arbitration agreements do not violate the National Labor Relations Act (NLRA) and, instead, must be enforced as written. This is an important victory for employers.

The employers and employees in these cases had entered into contracts that specified individualized arbitration proceedings would be used to resolve employment disputes. Despite this, the employees sought to litigate their claims under the Fair Labor Standards Act (FLSA) and state wage-hour laws as collective and class actions. The Federal Arbitration Act (FAA) generally requires courts to enforce arbitration agreements as written, and the employees' agreements clearly precluded class claims. The employees argued that the FAA's "saving clause" says that arbitration agreements need not be enforced if they violate some other federal law and that requiring individualized proceedings violated the NLRA. Justice Gorsuch, writing for the majority, framed the issue this way:

> Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers? As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.

The Court then provided several reasons why the employees' claim failed.

First, the FAA requires courts to "rigorously" enforce arbitration agreements according to their terms. The FAA's "savings clause" refers only to "generally applicable contract defenses, such as fraud, duress, or unconscionability" rather than the ones here that interfere with fundamental attributes of arbitration (with whom the parties choose to arbitrate and how that arbitration will be conducted). The FAA imparts "a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us."

Second, the NLRA does not override the FAA. "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." This principle is rooted in "respect for the separation of powers." This is because the "rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them." The Court found that Section 7 of the NLRA – which focuses on the right to organize and bargain collectively – doesn't approve or disapprove of arbitration nor mention class or collective action procedures. Had Congress wanted to overrides the FAA and allow the NLRA to control class and collective procedures, it surely would have said so in the statute. But it did not. In short, the Court concluded, there is "no conflict at all" between the FAA and the NLRA.

Third, while an administrative agency's interpretation of a statute it administers may be entitled to deference, the National Labor Relations Board's (NLRB) view that the NLRA prohibits these agreements is not. "The [NLRB] hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer." Moreover, there is no reason to defer to the NLRB because it is an Executive agency. "The Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA." So "whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable."

The bottom line of *Epic Systems* is that employers are free to implement mandatory arbitration agreement that preclude class and collective actions, and employers may wish to determine whether such agreements make sense for their workforce. In the wake of the #MeToo movement, several states have enacted or are considering enacting laws that prohibit mandatory arbitration of sexual harassment cases, but the Court's ruling today puts the validity of these prohibitions in doubt. Contact your Vorys lawyer if you have questions about implementing mandatory arbitration agreements in your workplace.