An "Epic" Opinion: Supreme Court Gives Green Light To Class Action Waivers In Arbitration Agreements

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On May 21, 2018, the United States Supreme Court issued a decision holding that class action waivers in employment arbitration agreements were valid and enforceable in the face of a challenge under the National Labor Relations Act ("NLRA"), resolving a significant disagreement among lower federal courts. By way of background, the Federal Arbitration Act ("FAA"), passed in 1925, provides for enforcement of agreements between parties to resolve disputes through private arbitration, rather than in court. Under the FAA's "savings clause," arbitration agreements may generally only be voided under traditional contract principles (for example, in cases of duress or unconscionability).

The Supreme Court has previously stated that employment disputes are no different than any other under the FAA, and that agreements to arbitrate employment-related claims are broadly enforceable (with exceptions for certain specific professions listed in the statute). In recent decades, use of arbitration agreements in employment relationships has seen a significant rise. Many of these arbitration agreements include clauses specifying that employee grievances must be arbitrated individually and separately, preventing employees from joining class action lawsuits or arbitrations.

For years, the FAA and NLRA appeared to exist independently, without any interaction. In 2012, however, the National Labor Relations Board ("NLRB") ruled that class action waivers in employment arbitration agreements violated employees' rights under Section 7 of the NLRA to engage in "concerted activity" for mutual aid or protection, and were thus unenforceable.

In the years since, a deep split developed between circuit courts of appeals across the country. Some circuits followed the NLRB and voided class action waiver clauses, while others held to the traditional view that they were valid under the FAA's "savings clause." The divide grew more complicated after the 2016 election, as the new Trump Administration's Department of Justice explicitly disavowed the Obama-era NLRB's 2012 position. In Epic Systems (actually a consolidation of three cases with similar facts), the United States Supreme Court resolved this disagreement among the courts.

In a 5-4 majority opinion penned by the newest Justice, Neil Gorsuch, the Supreme Court straightforwardly applied principles of statutory interpretation and emphasized that the Court "is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." In other words, the FAA and NLRA should be interpreted in harmony if at all possible, rather than in conflict. Congress is assumed to specifically address conflicts between statutes; thus, in order for a court to hold that one statute displaces another (as the plaintiff-employees here were asking to override the FAA with the NLRA), it requires "a clear and manifest congressional command."

The Court noted the FAA's "liberal federal policy favoring arbitration agreements," and the statute's direction that courts respect the parties' chosen procedures. In contrast, the Court noted that Section 7 of the NLRA focuses simply on employees' right to bargain collectively. It does not favor or disfavor arbitration, nor does it even hint at class actions, much less confer a right to them. The majority also recounted other circumstances
where Congress had explicitly overridden the FAA, but had not done so with Section 7. In sum, the Court found no “clear and manifest congressional command” that Section 7 of the NLRA should override the FAA’s “savings clause.”

Perhaps anticipating Justice Ruth Bader Ginsberg’s fiery dissent, the majority admitted that one can fairly debate whether the FAA is good policy or whether the balance it strikes between arbitration and litigation is wise. At the end of the day, however, “it’s the job of Congress by legislation, not th[e] Court by supposition, both to write the laws and to repeal them.” Absent new federal legislation (which was, in fact, explicitly urged by Justice Ginsberg), class action waivers are here to stay.

As the dust settles in the wake of Epic Systems, employers may now include class action waiver clauses in arbitration agreements without fear that they will be ruled unenforceable. Employers should consult with their employment counsel to draft these waivers into their arbitration agreements to avoid costly class action litigation.

One final note to keep in mind, however, especially if your arbitration agreements do not have such a clause: in April 2018, the Supreme Court agreed to hear a case arising from the Ninth Circuit involving interpretation of arbitration agreements which do not contain class action waivers. Accordingly, the question of whether an employee who is party to an arbitration agreement that does not contain an express waiver may join a class action is still unresolved. Stay tuned to this space for further developments.

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