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Washington Governor Jay Inslee Launches a State-Level Epic Systems Backlash

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On May 21, 2018, the U.S. Supreme Court issued its long-awaited opinion in *Epic Systems Corporation v. Lewis*, in which it held that arbitration agreements containing class action waivers were enforceable notwithstanding the National Labor Relations Act's protection for employee "concerted activity." The five-Justice majority opinion sparked a fiery dissent by Justice Ruth Bader Ginsburg, who focused on the opinion's potential impact on wage and hour litigation, among other employee activities. In response, this week, Washington State's Democratic Governor Jay Inslee issued a sweeping Executive Order seeking to discourage employers from implementing (or continuing to rely on) arbitration agreements with class action waivers. Although Governor Inslee's action is the exception so far, it may signal a broader backlash to arbitration agreements with class action waivers in the employment context.

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Borrowing themes from Justice Ginsburg's dissent, the at-issue Executive Order, entitled "Supporting Workers' Rights to Effectively Address Workplace Violations" (Executive Order 18-03), takes the sweeping position that employees who are required to execute arbitration agreements with class action waivers as a condition of employment "are stripped of a powerful tool to level the historical imbalance between employers and employees." It goes on to proclaim that "the *Epic Systems* ... decision will inevitably result in an increased difficulty in holding employers accountable for widespread practices that harm workers," without providing any examples. Interestingly, Executive Order 18-03 also references the #MeToo movement, which itself prompted numerous high-profile employers to reconsider and/or abandon their arbitration agreements in cases of alleged sexual harassment, and led to proposed legislation banning confidential arbitration and/or settlement agreements in sexual harassment cases.

Executive Order 18-03 commands all Washington State executive and small cabinet agencies to seek to contract with "qualified entities and business owners that can demonstrate or will certify that their employees are not required to sign, as a condition of employment, mandatory individual clauses and class or collective action waivers." Although it does not expressly preclude state agencies from contracting with employers who have implemented arbitration agreements with class action waivers with their employees, its message is clear: Washington will be moving its money to employers without class action waivers.

The ultimate impact of Executive Order 18-03 may be relatively limited, as it only applies to state agencies' purchasing and procurement decisions. However, the Executive Order goes on to "urge all other employers, **public and private**, to join ...in this effort."

It is, of course, too soon to tell what the impact will be of *Epic Systems* on the use of class action waivers in employment arbitration agreements. But, Governor Inslee's recent action may be the beginning of a new trend. Even though *Epic Systems* did not dramatically change the existing legal landscape (given the U.S. Supreme Court's earlier decisions in several other arbitration cases over the last several years), it appears to have sparked a politicized backlash against arbitration. Employers should keep an eye out for other legislative or similar efforts to impede the use of arbitration agreements (with or without class action waivers) between them and their employees.

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