

State of Washington Executive Order May Be Preempted by FAA

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An [Executive Order](#) issued by Washington Governor Jay Inslee on June 12, 2018 seeks to rebuff the U.S. Supreme Court's ruling in *Epic Systems LLC v. Lewis*, 138 S. Ct. 1612 (May 21, 2018), by implementing new state procurement procedures that overtly discriminate against companies whose employment agreements contain arbitration provisions with class action waivers. However, the Executive Order may be preempted by federal law.

Epic Systems held that class action waivers in employment arbitration agreements are valid and enforceable under the Federal Arbitration Act (FAA) and are not prohibited by the National Labor Relations Act. Nevertheless, the Executive Order requires Washington State executive and 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 arbitration clauses and class or collective action waivers.”

The preamble to the Executive Order makes clear that it is specifically targeted to avoid the application of *Epic Systems*. It states that the “decision [*Epic Systems*] will inevitably result in an increased difficulty in holding employers accountable for widespread practices that harm workers,” that “collective power is a real force for change, as evidenced by the ‘Me Too’ movement” and, therefore, “it is incumbent on state agencies to make every effort to encourage and support employers who demonstrate that they value workers’ rights to collectively address workplace disputes.” A statement by the Governor’s Office confirmed that the Executive Order

is predicated on public policy considerations that are antithetical to *Epic Systems*:

In our state, we value companies that respect workers' rights There is power in numbers. There is power in transparency. And there is power in our pocketbook to influence companies to do the right thing. We can't change the Supreme Court's ruling but we can change how we do business.

The Executive Order states that it is effective "[t]o the extent permissible under state and federal law." Because the FAA preempts inconsistent state laws, the Executive Order may be preempted by federal law. The FAA requires rigorous enforcement of arbitration agreements "'according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'" *Epic Systems*, 138 S. Ct. at 1621, quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013). As the Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011):

States [cannot take steps that] ... conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons

The Executive Order is arguably preempted by federal law because it harnesses the economic power of Washington State to discriminate against companies that desire to enter into employment contracts containing arbitration agreements with class action waivers that the *Epic Systems* Court expressly declared to be lawful and enforceable in an opinion that is the law of the land. Under substantive federal policy embodied in the FAA, states are forbidden from discriminating against arbitration or singling out arbitration agreements for special treatment. See, e.g., *American Express Co. v. Italian Colors Restaurant*, 517 U.S. 681, 687 (1996). That could be the Achilles' heel of the Executive Order, since it blatantly discriminates against certain companies based solely on the fact that their employment contracts contain arbitration agreements specifying "*with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." In any event, we consider the Executive Order to be misguided since arbitration is more beneficial to individual employees than class action litigation.

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