

Arbitration agreements and class waivers after Epic Systems: A practical guide for employers

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Earlier this summer, the U.S. Supreme Court settled a growing dispute among courts across the country when it issued its 5-4 decision in *Epic Systems Corp. v. Lewis*, 132 S. Ct. 1612 (2018), upholding class action waivers in employment arbitration agreements under the Federal Arbitration Act. The takeaway from this important decision is clear: Agreements in which employers and employees decide to resolve disputes through individual arbitration proceedings are enforceable.

This was seen by many as a major victory for employers. Not only does this push many employment disputes to an arbitrator (not a court) for resolution, but it requires employees to raise their issues on an individual basis, rather than collectively with other employees in a class setting.

What does this mean from a practical perspective? For employers who currently utilize arbitration agreements with class waivers, the Supreme Court's decision, authored by Justice Neil Gorsuch, has minimal impact and leaves in place a familiar business practice. Well-drafted arbitration agreements that include class waivers likely will provide to these employers a valid and enforceable defense against class actions. Of course, employers nevertheless should review their arbitration agreements and class waivers to ensure the agreements comply with state law principles.

Employers that maintain arbitration agreements without class waivers, however, should seriously consider including an



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express class waiver. Without a class waiver, these agreements leave the door open for class arbitration, the worst-case scenario. Class arbitration includes too much uncertainty and raises the potential exposure such that the risk outweighs the benefit of a class waiver provision.

Finally, employers who do not have arbitration agreements should consider whether implementation of an arbitration program with a class waiver is beneficial or appropriate for their business. While the downsides of arbitration can include high arbitrator fees and a lower chance of winning on a dispositive motion, benefits include more predictable outcomes when compared to juries, quicker resolution of claims, greater confidentiality of the proceeding and outcome, and potentially lower attorneys' fees.

Regardless of an employer's current practice, arbitration agreements with class waivers remain a valuable option for reducing potential class and collective action exposure.

Jackson Lewis P.C. represents management exclusively in workplace law and related litigation. Our attorneys are available to assist employers in their compliance efforts and to represent employers in matters before state and federal courts and administrative agencies.

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