SEBRIS | BUSTO | JAMES

425-454-4233
sebrisbusto.com

Employment Law Note

June 2018

United States Supreme Court Allows Employers to Wave Goodbye to Class Actions Through Arbitration Agreements

By Jeffrey James, jaj@sebrisbusto.com

There are few words that carry as much dread for employers as "class action." This is because a class action allows a single plaintiff (and her/his lawyers) to bring a representative action on behalf of persons who may have no knowledge of the alleged wrong, much less interest in suing their employer. It also allows for the aggregation of relatively small individual claims, such as missed meal breaks, that can lead to six or seven figure settlements.

On May 21, 2018, the United States Supreme Court provided employers with some good news. In a truly "epic" decision, the Court ruled that employees may be required to enter into arbitration agreements that waive their rights to pursue class-action or collective action claims.

Epic Systems Corp. v. Lewis

The Court's much anticipated decision resolved three consolidated cases. In each, the employer had entered into a contract with the employee that required individualized arbitration proceedings to resolve any disputes – in other words, no class actions. Previously, the National Labor Relations Board (NLRB) had asserted that class action waivers violated the National Labor Relations Act (NLRA) because these types of waivers discouraged efforts by employees to improve working conditions and terms of employment. But another law—the Federal Arbitration Act (FAA)—favored enforceability of arbitration agreements, including those with waiver provisions. Lower courts split on which law to follow, leading to disparate results. The Supreme Court stepped in to "clear the confusion."

Writing for the majority, Justice Gorsuch rejected the employees' arguments. First, the employees argued that the FAA had a "savings" clause that applied to the agreements in question and that the savings clause permits courts to invalidate arbitration agreements based on fraud, duress, or unconscionability. Justice Gorsuch responded "nice try" (or words to that effect), reasoning that while it was true that the savings clause could apply in some circumstances, the employees could not choose to have it apply to an otherwise conscionable agreement simply because they wanted to be able to bring a class action.

Next, the Court rejected the argument that the NLRA overrides the FAA. Justice Gorsuch reasoned that while the NLRA gives employees the right to organize unions and bargain collectively, it does not provide "express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even *hint at a wish* to displace the Arbitration Act" (emphasis added). Instead, Congress has instructed under the FAA that individualized arbitration agreements must be enforced. Therefore, an individualized arbitration agreement that prohibits class actions is not barred by the NLRA.

It should be noted that four out of nine Justices found the decision to be "egregiously wrong." In a dissenting opinion, Justice Ginsberg indicated that she did not read the majority opinion to "place in jeopardy"

discrimination complaints that can be proved only on a class-wide basis (such as claims asserting a pattern and practice of discrimination), and further stated that "[c]ongressional correction" of the court's decision is "urgently in order." Only time will tell if any such congressional action will follow.

Key Takeaway for Employers

In light of the *Epic* decision, employers may now include class and collective action waivers in individualized arbitration agreements. Any employer concerned about possible class-wide litigation should therefore consider whether and how to take advantage of *Epic*. New hires can be required to sign arbitration agreements as a condition of employment. Current employees must be treated differently, as an arbitration agreement requires legal consideration to be enforceable—that is, something of value given by both parties to the agreement. While there are pros and cons to having employees sign arbitration agreements, *Epic* might tip the balance for most employers.

For more information about this month's Employment Law Note
contact us at **425-454-4233**