

The U.S. Supreme Court Issues Important Decision Finding Class Action Waivers in Employment Arbitration Agreements Enforceable

On May 21, 2018, the United States Supreme Court, in a long-awaited decision, held that employment arbitration agreements with class action waivers requiring individual arbitration are enforceable under the Federal Arbitration Act (the “FAA”), notwithstanding Section 7 of the National Labor Relations Act (the “NLRA”), which protects employees’ rights to engage in concerted activities.¹ In so ruling, the Court’s 5-4 decision, issued in *Epic Systems Corp. v. Lewis*, which had been consolidated with two other cases, *Ernst & Young, LLP v. Morris* and *NLRB v. Murphy Oil USA, Inc.*,² resolved the different approaches federal courts had taken on this issue for years. Although the majority opinion³ acknowledged that the efficacy of class action waivers in arbitration agreements is, “[a]s a matter of policy[.]” debatable, it ruled that “as a matter of law the answer is clear”—federal courts must enforce arbitration agreements in accordance with their terms, including those that require individualized arbitration.⁴

The NLRB Decision that Led to the Supreme Court’s Ruling

In 2012, the National Labor Relations Board (the “NLRB”) ruled that mandatory arbitration agreements that effectively bar class or collective claims—*i.e.*, agreements requiring employees to arbitrate employment disputes through individual arbitration without providing a judicial forum for class or collective claims—violate employees’ NLRA rights to engage in “concerted action.” *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2288 (2012).⁵ After the NLRB’s decision in *D.R. Horton*, a circuit split developed; federal appellate courts began issuing conflicting opinions regarding the enforceability of mandatory class action waivers in employment arbitration agreements. For example, the Sixth, Seventh, and Ninth Circuits followed the NLRB’s approach,⁶ while the Second, Fifth, and Eighth Circuits rejected it.⁷ Since *D.R.*

¹ 29 U.S.C. § 157.

² *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. May 21, 2018).

³ The majority opinion was authored by Justice Neil Gorsuch.

⁴ *Epic Sys.*, slip op. at 2, 25.

⁵ Two years prior, the NLRB had suggested that “individual employee forum waivers . . . do[] not involve consideration of the policies of the [NLRA].” National Labor Relations Board, Office of the General Counsel, GC 10-06, GUIDELINE MEMORANDUM CONCERNING UNFAIR LABOR PRACTICE CHARGES INVOLVING EMPLOYEE WAIVERS IN THE CONTEXT OF EMPLOYERS’ MANDATORY ARBITRATION POLICIES 5 (June 16, 2010).

⁶ *E.g.*, *N.L.R.B. v. Alternative Entm’t, Inc.*, 858 F.3d 393, 405 (6th Cir. 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983-84 (9th Cir. 2016).

Horton, the NLRB has maintained the position that class action waivers in employment arbitration agreements violate the NLRA.

In January 2017, the Supreme Court granted *certiorari* in *Epic Systems Corp. v. Lewis, Ernst & Young, LLP v. Morris*, and *NLRB v. Murphy Oil USA, Inc.*, in order to resolve this split in federal circuit court decisions.

Notably, this debate was not confined to the courts, as exemplified by the fact that the Department of Justice (the “DOJ”) switched positions during the course of the Supreme Court proceedings. In September 2016, the DOJ under President Obama defended the NLRB’s position favoring employees in a petition to the Supreme Court. Thereafter, while the NLRB continued to advocate that position before the Supreme Court throughout the course of the proceedings, in June 2017 the Solicitor General under President Trump filed an *amicus* brief in support of employers, acknowledging that after the change in administrations, the Solicitor General had “reconsidered the issue and [had] reached the opposite conclusion.”⁸ This “disagreement” between the Executive and the NLRB reflected the circuit split that led to the Court’s decision to grant *certiorari*, as Justice Gorsuch acknowledged.⁹

Epic Systems, Ernst & Young, and Murphy Oil in Lower Courts

The plaintiffs in each of these cases were employees who had agreed in employment agreements to individually arbitrate any disputes arising out of their employment and to waive any class or collective claims. Despite these agreements, plaintiffs brought class or collective actions in federal court asserting wage and hour violations related to overtime pay under the Fair Labor Standards Act (“FLSA”) and analogous state laws.¹⁰ In each case, the plaintiffs argued that the class action waivers were unenforceable under the NLRA. On appeal, the Seventh Circuit in *Epic Systems* and the Ninth Circuit in *Ernst & Young* followed the reasoning of the NLRB’s decision in *D.R. Horton*, and ruled that the class action waivers were unenforceable, while the Fifth Circuit in *Murphy Oil* held that the waivers are enforceable.¹¹

⁷ *E.g.*, *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 298 (2d Cir. 2013); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013).

⁸ Brief for the United States as *Amicus Curiae* at 13, *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. May 21, 2018).

⁹ *Epic Sys.*, slip op. at 4 (“[T]he disagreement has grown as the Executive has disavowed the Board’s (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law’s meaning. We granted certiorari to clear the confusion.”).

¹⁰ *Id.* at 1-3.

¹¹ *See Lewis*, 823 F.3d 1147; *Morris*, 834 F.3d 975; *Murphy Oil USA*, 808 F.3d 1013.

The Supreme Court's Opinion

The Supreme Court in *Epic Systems* considered two questions: (1) whether the FAA's "savings clause,"¹² which allows courts to hold arbitration agreements unenforceable "upon grounds as exist at law or in equity for the revocation of any contract," applies; and (2) whether the NLRA's guarantee of the right to engage in concerted activity overrides the FAA's requirement that arbitration agreements be enforced.

The majority opinion¹³ answered both questions in the negative.

First, relying heavily on an earlier Supreme Court decision, *AT&T Mobility LLC v. Concepcion*,¹⁴ the majority held that the FAA's "savings clause" does not apply here. The Court reasoned that the savings clause only allows invalidation of arbitration agreements on grounds that exist for the revocation of "any" contract—*i.e.*, invalidation by generally applicable contract defenses, such as fraud, duress, or unconscionability.¹⁵ The Court held that the clause does not invalidate arbitration agreements on grounds which seek to alter "one of arbitration's fundamental attributes," such as its "individualized nature."¹⁶ The majority rejected plaintiffs' argument that their cases are distinguishable from *Concepcion* because the NLRA renders class action waivers illegal, rather than unconscionable, as a matter of federal statutory law.¹⁷ The Court explained that while illegality is a generally applicable contract defense that could be grounds for a court's refusal to enforce an arbitration agreement, plaintiffs' argument was not premised on illegality, but rather on the rationale "that a contract is unenforceable *just because it requires bilateral arbitration*," which "impermissibly disfavors arbitration."¹⁸

Second, interpreting Section 7 of the NLRA and its legislative history, along with the Court's opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the majority held that the NLRA does not override the FAA. The Court explained that Section 7 of the NLRA does not contain language that would permit the Court to infer a congressional command to displace the FAA and outlaw arbitration agreements containing class action waivers. The majority reasoned that Section 7 concerns employees'

¹² See 9 U.S.C. § 2.

¹³ Justices Gorsuch, John Roberts, Anthony Kennedy, Clarence Thomas and Samuel Alito joined the majority opinion, with Justice Thomas also writing a concurrence. Justice Ruth Bader Ginsburg wrote a strong dissenting opinion, joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan.

¹⁴ 563 U.S. 333 (2011).

¹⁵ *Epic Sys.*, slip op. at 7 (citing 563 U.S. at 339).

¹⁶ *Id.* (internal citations and quotation marks omitted).

¹⁷ *Id.* at 9.

¹⁸ *Id.*

rights to organize unions and bargain collectively, not class or collective actions procedures.¹⁹ The Court rejected plaintiffs' argument that Section 7's catchall language—"other concerted activities for the purposes of . . . other mutual aid or protection"—includes class and collective actions.²⁰ The majority found that this phrase, which appears at the end of a detailed list of activities related to collective bargaining, self-organization, and the like,²¹ should be read to "protect things employees just do for themselves in the course of exercising their right to free association in the workplace, rather than the highly regulated, courtroom-bound activities of class and joint litigation."²² The Court further reasoned that its interpretation is underscored by the NLRA's structure, which establishes regulatory regimes for each type of concerted activity it lists,²³ but does not provide any comparable guidance related to class and collective actions.²⁴

Additionally, the majority found that it did not owe deference to the NLRB's decision in *D.R. Horton* under *Chevron* because one of *Chevron's* essential premises—that the statute being interpreted is one that the agency seeking deference normally administers—is lacking here.²⁵ The Court found that the NLRB was seeking to interpret its own statute (*i.e.*, Section 7 of the NLRA) in a manner that would restrict implementation of the FAA, and that because the NLRB has no hand in administering the FAA, it is not entitled to any *Chevron* deference in this case.²⁶

The majority opinion was met with a vehement dissent by Justice Ruth Bader Ginsburg, who characterized the majority opinion as "egregiously wrong."²⁷ Justice Ginsburg argued that the majority's opinion fails to consider that Congress, in enacting the NLRA, had an "acute awareness" that "for workers striving to gain from their employers decent terms and conditions of employment, there is strength in

¹⁹ *Id.* at 11.

²⁰ *Id.* at 10-11.

²¹ 29 U.S.C. § 157.

²² *Epic Sys.*, slip op. at 12 (internal quotation marks omitted).

²³ *See, e.g.*, 29 U.S.C. § 159 (detailing rules for recognition of exclusive bargaining representatives).

²⁴ The Court also rejected plaintiffs' arguments under the Norris-LaGuardia Act—the NLRA's predecessor—noting that that statute offered no additional grounds to find a conflict with "Congress's statutory directions favoring arbitration." *Epic Sys.*, slip op. at 15-16.

²⁵ *Id.* at 19-21. The fact that claims asserted in the three cases before the Court were premised in part on the FLSA also played a part in the majority's reasoning, as the Court noted that it had already ruled that "an identical collective action scheme [as that established by the FLSA] . . . does not displace the Arbitration Act . . ." *Id.* at 14 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

²⁶ *Id.*

²⁷ *Id.* at 2 (Ginsburg, J., dissenting).

numbers.”²⁸ Accordingly, Justice Ginsburg argued that collective actions to enforce workplace rights should be deemed “concerted activities” protected by the NLRA, noting that the NLRB and federal courts have interpreted Section 7 as protecting activities which are not expressly covered by specific NLRA regulatory guidance.²⁹ Additionally, she argued that “nothing in the FAA or this Court’s case law” requires subordinating the NLRA’s protections and that, regardless, the NLRA should be viewed as controlling because it was enacted after the FAA and should therefore qualify as an “implied repeal” of the FAA “to the extent of any genuine conflict.”³⁰ Justice Ginsburg called for a swift legislative response to the majority opinion, writing: “Congressional correction of the Court’s elevation of the FAA over workers’ rights to act in concert is urgently in order.”³¹

Implications and Key Takeaways

The *Epic Systems* decision is a significant victory for employers. For now, it puts to bed any disagreement about the enforceability of class action waivers in the context of wage and hour claims brought under federal law, clearly finding that employment arbitration agreements limiting an employee’s remedial options to individual arbitration are enforceable. Indeed, the dissenting opinion goes so far as to predict that wage and hour claims will be under-enforced as a result of the majority *Epic Systems* decision.³²

Employers who have employment agreements requiring individual arbitration already in place can be confident that they will be enforced, at least with respect to wage and hour claims under federal law. Those employers who have not implemented such agreements may now want to consider them.

There may be some immediate activity in the Sixth, Seventh, and Ninth Circuits to the extent employers who did not originally move to compel arbitration in light of (now overruled) contrary precedent decide to do so now. Employers may argue that, under the futility doctrine, the Court’s decision—an intervening change in the law—provides them with a renewed right to compel.³³

In addition, in cases that were stayed pending the Supreme Court’s *Epic Systems* decision, lower courts now will likely uphold arbitration agreements with class action waivers requiring individual arbitration in the employment context.

²⁸ *Id.*

²⁹ *Id.* at 9-14.

³⁰ *Id.* at 18, 25 (internal citation and quotation marks omitted).

³¹ *Id.* at 2.

³² *Id.* at 26.

³³ *See, e.g., Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1129-31 (C.D. Cal. 2011) (finding that an employer had not waived its right to compel arbitration when its arbitration agreement would have been unenforceable under prior law and the law had subsequently changed).

Furthermore, the *Epic Systems* decision may have implications for claims outside the wage and hour context. While Justice Ginsburg’s dissent noted that she “do[es] not read the Court’s opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis” under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for example,³⁴ the Court’s decision could reach other types of employee claims. For example, employers may contend that class action waivers are enforceable in the benefit plans arena even though such actions are governed by Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, which allows employees to sue on behalf of a benefit plan.

There is an open question, however, as to the applicability of the *Epic Systems* decision in situations in which the FAA does not govern the arbitration agreement in question. The full scope of the *Epic Systems* decision remains to be determined, and it is unlikely that the decision will be the final word on this issue.

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³⁴ *Epic Sys.*, slip op. at 29 (Ginsburg, J., dissenting).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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