Bond

INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

MAY 23, 2018

An Epic Decision for Employers on Employment Class Action Waivers

As the end of the Supreme Court term in June approaches, Court-watchers watch their Twitter and news feeds on Mondays and Thursdays with bated breath. And this past Monday, the news did not disappoint. In a close 5-4 decision in *Epic Systems Corp. v. Lewis*, the Court ruled that the Federal Arbitration Act unequivocally provides parties the ability to enter into arbitration agreements requiring individual arbitration proceedings, such that employees waive their ability to bring or join a class action. Likewise, the Court rejected the employees' argument that Section 7 of the National Labor Relations Act prohibits employees from waiving such class action rights.

So, what does this mean for employers? Obviously, many employers are thrilled that they are able to prevent the spectre of a class action by requiring employees to enter into agreements for individual arbitration proceedings as a condition of employment. But employers should consider two things before doing so.

First, are you prepared to conduct multiple individual arbitration hearings? Class actions were created as a device to allow plaintiffs to band together to bring claims as a group, when a single plaintiff had little or no incentive to bring a claim individually. A plaintiff with a $100 claim probably won't bring suit. But, if an employer's arbitration agreement with an employee requiring individual arbitration provides that the employer will pay the expense of an arbitrator, an employee with a minor claim has nothing to lose by seeking arbitration -- and hundreds or thousands of individual arbitration proceedings can drive up costs just as easily as potential class action liability.

Second, if you do wish to have employees waive class claims in favor of individual arbitration proceedings, make sure the arbitration agreement actually contains such a provision. It is possible for an arbitrator to handle class claims -- the rules of the American Arbitration Association provide for it, for example -- so it is not sufficient simply to state that employees agree to arbitration; the agreement would also need to state that arbitration proceedings would be on an individual basis, with employees waiving class claims. Of course, an employer may decide that a class-wide arbitration is preferable to multiple individual arbitration hearings, and draft the agreement accordingly.

Bottom line, the Court majority found that arbitration agreements are enforceable as the Federal Arbitration Act intended -- a result that turned out to be quite epic for employers.

If you have any questions about this Information Memo, please contact Michael D. Billok, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS