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U.S. SUPREME COURT TO EMPLOYERS: AGREEMENTS REQUIRING INDIVIDUALIZED ARBITRATION ARE ALLOWED

Today the U.S. Supreme Court resolved a circuit split regarding the enforceability of employment agreements requiring individualized arbitration of Fair Labor Standards Act ("FLSA") claims, mostly for allegedly unpaid minimum and overtime wages. *See Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018). In each of the three cases before the Court, the employees agreed to individualized arbitration—meaning that the employees could not pursue relief on behalf of other similarly-situated employees. Despite signing agreements requiring individualized arbitration, the employees filed FLSA collective-action claims on behalf of themselves and other similarly-situated employees. The Ninth and Seventh Circuits had held that arbitration provisions precluding collective actions were unenforceable, but the Fifth Circuit reached the opposite conclusion. In addition, before 2012, courts and the National Labor Relations Board (the "Board") generally agreed that arbitration agreements requiring individualized arbitration were enforceable, then later changed course and concluded that such agreements were not enforceable. Further adding to the confusion, the Trump Administration recently disavowed the Obama Board's interpretation of individualized arbitration agreements. The Court granted certiorari to resolve the confusion.

In a 5-4 opinion authored by Justice Gorsuch (over a strongly-worded dissent by Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan), the Court held that the National Labor Relations Act (the "NLRA") did not undermine or make illegal agreements requiring employees to individually arbitrate collective-action claims. The Court cited the liberal policy of the Federal Arbitration Act ("FAA") favoring arbitration that "specifically directed [courts] to respect and enforce the parties' chosen arbitration procedures." The employees argued that the FAA's savings clause—which allows courts to decline to enforce an arbitration agreement on "grounds that exist at law or in equity for the revocation of any contract"—made individualized-arbitration agreements unenforceable because such clauses were illegal under the NLRA. The employees reasoned that the NLRA guarantees them the right to participate in collective bargaining, so any arbitration provision taking away that right was unlawful. The Court disagreed and concluded that the FAA's savings clause could not apply to a defense that targeted arbitration "by attacking (only) the individualized nature of arbitration proceedings…." In other words, although the majority reasoned that illegality was a generally-applicable contract defense, it could not apply to a contract "*just because it requires bilateral arbitration*…."

Next, the employees argued that the NLRA's language preserving the right to engage in collective bargaining displaced the FAA. Again, the Court disagreed and found that the two statutory schemes were reconcilable because the NLRA did "not express approval or disapproval of arbitration."

The NLRA established rules and procedures applicable to collective bargaining, but it notably excluded a discussion of the particular dispute-resolution procedure applicable to class or collective-action claims in court or in arbitration. The Court also observed that it had rejected every prior argument that other federal statutes conflicted with the FAA, and this case was no different.

Finally, the employees contended that the Obama Board's recent interpretation of the NLRA to preclude agreements requiring individualized arbitration deserved *Chevron* deference. The Court first observed that in the cited cases the Board was not just interpreting the NLRA; it was interpreting both the NLRA and the FLSA. But because the Board is not charged with interpreting the FLSA—the statute the employees sued under—*Chevron* deference was inapplicable. The Court further pointed out that the Board itself switched positions on the issue. The Court noted that the Trump Administration disagrees with the Board's interpretation, further counseling against *Chevron* deference. The majority thus concluded that Congress's instructions in the FAA that courts enforce arbitration agreements like other contracts prevailed, and employment agreements requiring individualized arbitration of collective-action claims were enforceable.

By approving the widespread practice by employers of requiring employees to agree to arbitrate on an individual basis, this decision has far-reaching consequences in the employment context. Given the risks associated with class and collective actions, especially under the FLSA, more employers may now require employees to sign arbitration agreements containing waivers of the right to proceed on behalf of similarly-situated employees. But arbitration is expensive and comes with its own risks, such as arbitrators' resistance to summarily dismissing meritless claims and the difficulty in overturning or vacating an unfavorable arbitration award once rendered. Whether arbitration agreements make sense for a particular employer depends on the employer's headcount, the make-up of its workforce, and other factors. Employers should carefully consider whether they should implement arbitration agreements with their employees before doing so.

Questions? Please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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