"Epic" decision for employers

The Supreme Court makes a significant ruling in favor of employers

STEPHEN C. GOLDBLUM
Member
Semanoff Ormsby Greenberg & Torchia, LLC

(215) 887-5961
sgoldblum@sogtlaw.com

Insights Legal Affairs is brought to you by **Semanoff Ormsby Greenberg & Torchia, LLC**

On May 21, 2018, the U.S. Supreme Court issued its opinion in *Epic Systems Corp. v. Lewis*, which significantly undermined the power of workers to effectively assert discrimination and wage and hour claims against their employers.

"*Epic Systems* enables businesses to proactively address the wave of class action discrimination and wage and hour lawsuits that have inundated businesses in recent years," says Stephen C. Goldblum, a member at Semanoff Ormsby Greenberg & Torchia LLC.

Smart Business spoke with Goldblum about the *Epic Systems* decision and the impact it will have on both businesses and employees.

What is the background of the Epic decision?

Epic Systems involved three consolidated cases, and tens of thousands of employees at three companies: Epic Systems Corp., Ernst & Young LLP, and Murphy Oil USA Inc. The employees had signed agreements related to their employment that required them to arbitrate, not litigate, work-related claims and prohibited them from joining with other employees in class-action lawsuits against their employers.

The workers argued that their right to file class-action lawsuits over alleged wage and hours violations is protected by the National Labor Relations Act (NLRA), which was passed in 1935 to offer employees greater leverage to collectively challenge unjust treatment on the job, and which made the agreements unenforceable.

The court, in a 5-4 decision, however, sided with the employers, and Justice Neil Gorsuch wrote in the majority opinion that the 1925 Federal Arbitration Act, which favors the right to privately arbitrate disputes, supersedes the NLRA, and therefore the challenged agreements were enforceable.

What is the impact of the Epic decision?

The practical import of the Court's decision is that private-sector employees may be contractually barred by employers from the right to enter into class-action lawsuits to challenge violations of federal labor laws. Employers may lawfully require employees, as a condition of employment, to enter into agreements that compel arbitration of work-related disputes and that preemptively bar them from pursuing class action claims in court or in arbitration. Employees who enter into arbitration agreements with class waivers may only litigate claims against their employers in an individual arbitration.

How should employers proceed?

While the Supreme Court's decision in *Epic Systems* puts to rest facial challenges to the enforcement of class action waivers in arbitration agreements on the basis that they conflict with the NLRA, employees may still challenge such agreements under generally available contract defenses such as 'fraud, duress or unconscionability.' To be sure, the plaintiffs' bar and employee advocacy groups will attempt to expand these and other arguments to challenge the enforceability of arbitration agreements and class action waivers.

One reaction to class action waivers that has already occurred is the filing by plaintiffs' lawyers of dozens of individual arbitrations at once against a particular company, for which the company is often required to pay.

These continual challenges to the enforceability of arbitration agreements place an increased premium on employers' careful drafting, implementation and maintenance of agreements and class action waivers. Moreover, although arbitration has traditionally been seen as a low cost alternative to litigation, that is not necessarily the reality. Arbitration can be a costly and time-consuming process.

Employers should also anticipate that Congress may attempt, at some time in the future, to exempt certain claims, such as those for sexual harassment or discrimination, from mandatory arbitration and class action waivers.

The *Epic Systems* decision resolves certain long-standing issues regarding arbitration and class action waivers, however significant questions and issues remain that employers must confront when determining whether to implement or maintain an arbitration agreement or a class action waiver. Consult with experienced employment counsel to ensure your company's program is implemented and maintained in a manner that will support its enforceability. ●