EMPLOYMENT SERVICES ALERT

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Class Waivers in Arbitration Agreements are Given the Okay by U.S. Supreme Court

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On May 21, 2018, The United States Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, holding that "Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the [National Labor Relations Act] suggests otherwise."

In a 5-4 decision, the Court decided three cases: *Ernst & Young, LLP v. Morris*, *Epic Sys. Corp.*, v. *Lewis*, and *NLRB v. Murphy Oil USA, Inc.* In both *Epic* and *Ernst & Young*, the Ninth and Seventh Circuits found that arbitration provisions mandating individual arbitration of employment-related claims violate the National Labor Relations Act ("NLRA") and fall within the Federal Arbitration Act's ("FAA") saving clause. In *Murphy Oil,* however, the Fifth Circuit reached the opposite result and enforced an agreement requiring individual arbitration of employment-related claims. In Monday's decision, the Court reversed and remanded *Epic* and *Ernst & Young*, and affirmed *Murphy Oil*.

The employees argued that the FAA's saving clause eliminates the general requirement that courts enforce arbitration agreements when an arbitration agreement violates some other federal law. Specifically, the employees claimed that by requiring individualized proceedings, the agreements in these cases violated the NLRA. The employers, however, maintained that the FAA protects these types of provisions and that neither the saving clause nor the NLRA mandate a different conclusion. Until 2012, the National Labor Relations Board ("NLRB") would have agreed with the employers, however, since then the NLRB has repeatedly held that class waivers violate workers' right to engage in concerted action under Section 7 of the NLRA. Since the NLRB's shift in position in 2012, courts have been split on this issue.

The Court resolved this deep Circuit split on Monday addressing key aspects of this issue. Initially, the Court considered the FAA's saving clause – which allows courts to refuse to enforce arbitration agreements – and its interplay with the general principal that courts are to enforce agreements to arbitrate, including the terms of arbitration the parties select. In so doing, the Court noted that the saving clause only recognizes "generally applicable contract defenses, such as fraud, duress, or unconscionability" and not defenses related to "interfering with fundamental attributes of arbitration." The Court found that the employees' attack on the language requiring individualized arbitration was an example of the latter. The Court also analyzed the employees' secondary argument claiming that the NLRA overrides the FAA's guidance. Specifically, the employees argued that class and collective actions are concerted activities protected by § 7 of the NLRA. The Court did not agree on various grounds including the plain language of the NLRA. The Court also refused to give deference to the NLRB pursuant to *Chevron* for a number of reasons, including because the NLRB was not only attempting to interpret the NLRA, but also the FAA – which the agency does not administer.

Notably, Justice Gorsuch, writing for the majority decision, also addressed the detailed and pointed dissent led by Justice Ginsburg. In so doing, the majority maintained that its decision was in line with Congress' policy judgments and was supported by precedent. Moreover, the majority criticized the dissent's interpretation of the NLRA and its use of legislative history and policy arguments as support for the same.

For Ohio employers, it is important to note that this decision also abrogates the Sixth Circuit's recent decision in *NLRB v. Alternative Entertainment, Inc.*, which joined the Seventh and Ninth Circuits in holding that an arbitration provision requiring employees covered by the NLRA individually to arbitrate all employment-related claims is not enforceable.

Tip for employers—consider requiring arbitration agreements with class and collective action waivers or review your existing arbitration agreements and consider annotating the agreement to include a class and collective action waiver. Should you have any questions, please do not hesitate to contact any of the listed attorneys.

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