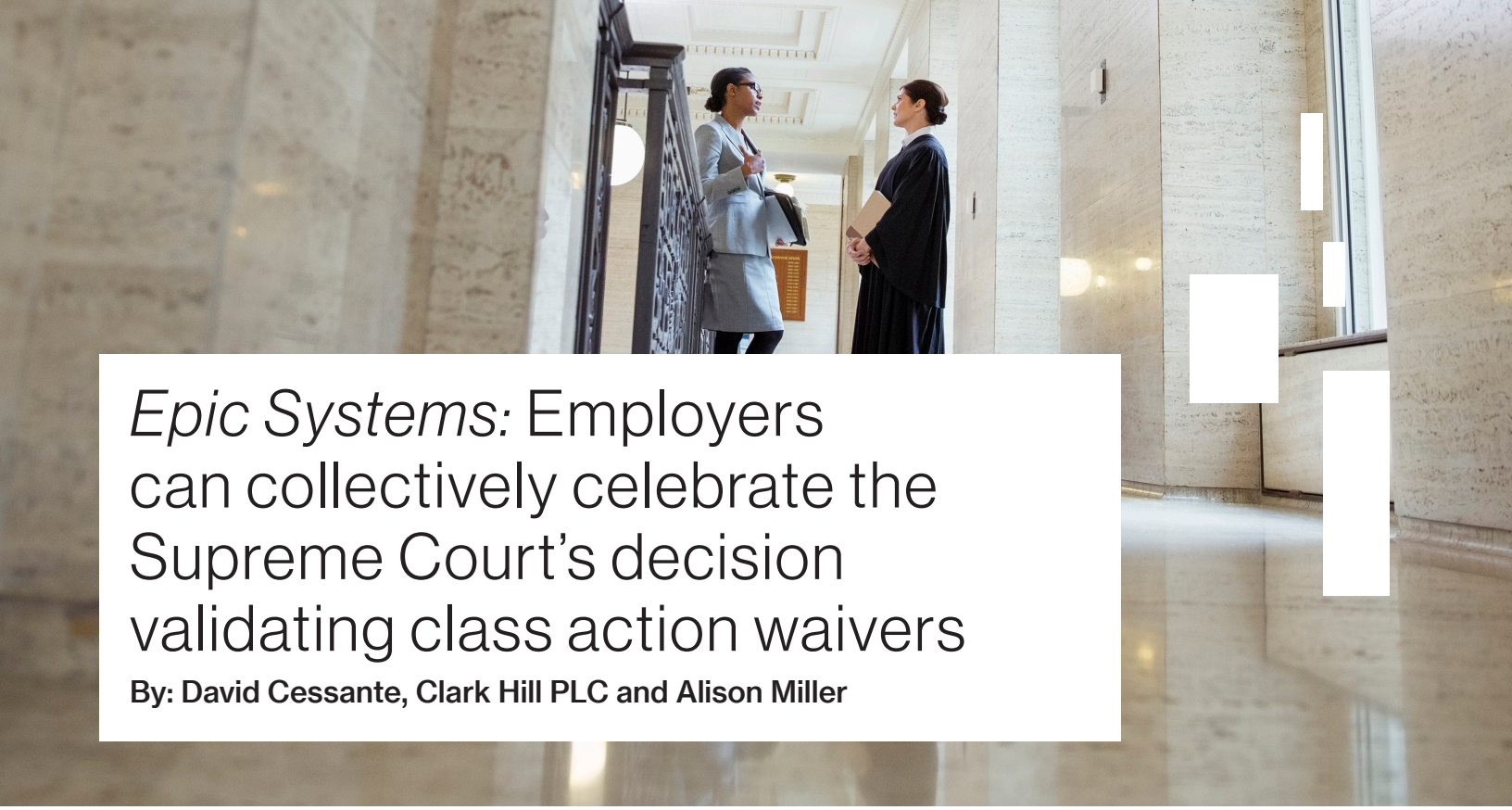

Epic Systems: Employers can collectively celebrate the Supreme Court's decision validating class action waivers

By: David Cessante, Clark Hill PLC and Alison Miller

In May 2018, the United States Supreme Court issued a decision in ***Epic Systems v. Lewis***, holding that employers can require employees to sign arbitration agreements under which employees waive the right to participate in employment-related class/collective actions. This article discusses the Court's holding in Epic Systems, issues employers should consider before deciding whether to adopt mandatory arbitration with class action waivers, state legislation that may act as an impediment to class action waivers, the short-term challenges facing employers that are currently embroiled in employment-related class or collective actions, as well as the insurance implications of the decision.

Epic Systems decision

In *Epic Systems v. Lewis,* the employees signed agreements, as a condition of their employment, requiring them to resolve employment-related disputes through individualized arbitration proceedings. Under these agreements, the employees waived their right to arbitrate employment disputes as members of a class. Despite entering into these agreements, the employees filed class or collective actions alleging violations of the Federal Labor Standards Act (FLSA) and related state wage and hour laws. The employers sought to enforce the agreements by moving to compel individual arbitrations and seeking dismissal of the collective actions.

The employees and the National Labor Relations Board argued that the agreements compelling individualized arbitration violated the National Labor Relations Act (NLRA). Specifically, they argued that the bar against collective actions conflicted with the provisions of the NLRA protecting "concerted activities," which include organizing, forming and participating in unions, and collective bargaining. The employees reasoned that their right to participate as members of a class in arbitration proceedings constituted concerted activity under the NLRA. The employers argued that the agreements were enforceable under the Federal Arbitration Act (FAA), which protects agreements requiring arbitration from judicial interference, and that the NLRA did not require a different conclusion.

In a 5-4 decision, the Supreme Court rejected the employees' argument. The Court held that the right to engage in concerted activities under the NLRA did not displace the FAA. The Court based its holding on the fact that there was no evidence Congress intended to override the FAA. Nor was there any evidence that "concerted activities," as defined under the NLRA, encompassed collective actions. As such, the Court held that the agreements were enforceable, and the employees could not bring class or collective actions.

Impact of *Epic Systems*

The obvious impact of the *Epic Systems* decision is that it should prompt employers to strongly consider whether they will require their employees to sign arbitration agreements with class action waivers. While we do not see a large number of class action lawsuits under the federal and state anti-discrimination statutes, there have been a significant number of collective actions under the FLSA over the last decade, and there does not appear to be any slowdown in the near future. Part of the reason for this is that when an employer violates the wage and hour laws with regard to one employee, the employer tends to commit the same violation for a number of other similarly situated employees. This is particularly true regarding "misclassification" claims; for example, claims that the employer improperly classified an employee or group of employees as salaried, exempt, when they should have been hourly, non-exempt.

Collective actions allow plaintiffs' attorneys the opportunity to solicit a large number of employees/class members with relatively little cost or effort. Other than the lead plaintiff(s), collective actions also allow employees to participate in the collective action with little or no effort. Thus, employees who may not otherwise file their own lawsuit, may join a collective action. Employers can avoid becoming the target of a collective action if they have their employees sign arbitration agreements with class action waivers. Clearly, there is a strong incentive for employers to consider this approach.

Before making a final decision, however, employers should consider the impact of mandatory arbitration. To be enforceable relative to employment-related claims, an employer seeking to compel arbitration must provide the same procedural safeguards that would be available to the employee if the employee filed a lawsuit. This includes providing for ample discovery. An employer considering mandatory arbitration with class action waivers would first have to adopt an arbitration policy that complies with state and federal laws.

Additionally, most states require employers to pay most of the cost for the arbitration, which includes the filing fee and the arbitrator's fees. This is reflected in the American Arbitration Association's (AAA) fee schedule for employment disputes, stating that employees are required to pay no more than $300. In addition to the filing fees, the arbitrator's fees can easily reach $30,000.[1] And don't forget that employers still must pay their own attorneys who are defending the claim.

While individualized arbitrations will certainly cost less than a collective action, they are not cheap. Employers should assess the likelihood of becoming the target for a collective action before deciding whether to require mandatory arbitration.

There is also the unstated reality that summary judgment is unlikely in the context of arbitration. Employers opting for mandatory arbitration should be prepared to try most of their cases before the arbitrator, adding more time, cost and expense associated with arbitration. In addition to the cost of arbitration, the average award in employment arbitrations is approximately $100,000.[2] While the desire to avoid class or collective actions is certainly desirable, employers must consider all the pros and cons before requiring mandatory arbitration.

State laws allowing collective actions

In addition to the aforementioned considerations, employers should consider the impact of state laws before deciding whether to adopt mandatory arbitration. For example, California's Private Attorneys General Act (PAGA) allows employees to sue their employers as a class for California Labor Code violations, regardless of any arbitration or collective action waiver the employees signed.[3] This means that employment-related class actions that may not be viable in federal court because the employee waived his or her right to litigate as part of a class may nevertheless survive in California state court. Similar laws are being considered in New York, Washington and Vermont.

Never mind the waiver: State laws permitting employee collective actions

California

Originally enacted in 2003, PAGA allows employees to sue for civil penalties for violations of California employment laws that he or she personally experienced in addition to violations for those that other current or former employees experienced. In 2014, the California Supreme Court held that PAGA was not preempted by the FAA. [4]

New York

For years, worker advocates in New York have been organizing to get state lawmakers to pass the Assembly Bill A7958. The law, called the "Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act," is modeled after PAGA and would provide employees with similar rights. The bill is currently in committee. [5]

Vermont

The Vermont legislature is currently considering a PAGA-like bill.[6] House Bill 789 would allow employees to sue their employers delegating public enforcement powers to private attorneys general for violations of state employment laws.

Washington

On June 12, 2018, Washington Governor Jay Inslee issued an executive order decrying Epic Systems and requiring government contracts to be made only with businesses that do not require their employees to sign arbitration agreements that include collective action waivers.[7] He later foreshadowed the introduction of state legislation that would give employees "more options to enforce violations of the state's wage-and-hour laws."

In light of the *Epic Systems* decision, it is quite possible (if not probable) that other states will adopt similar laws. Although employers with class action waivers will still be immune from national wage and hour claims under the FLSA, they may not be able to escape collective actions under state law.

The Buffalo Wild Wings Effect

While *Epic Systems* certainly presents a long-term victory for employers, the short-term impact for employers that are already embroiled in collective actions remains to be seen. This is best illustrated by a collective action that was filed against Buffalo Wild Wings in 2015. The collective action involves 5,500 employees who are alleging violations of the FLSA. Of this group, 822 employees signed arbitration agreements that waived their right to sue or arbitrate as part of a class. By virtue of the *Epic Systems* decision, Buffalo Wild Wings now has the option of compelling all 822 of these plaintiffs to individually arbitrate their claims. Buffalo Wild Wings, like other employers confronted with the same issue, must consider whether it will be cheaper to litigate each of these claims individually or continue to defend the collective action.

The good news is that, while the Buffalo Wild Wings scenario presents some short-term pain, the *Epic Systems* decision should effectively prevent this from happening in the future because plaintiffs' attorneys simply won't be able to obtain as many clients on an individualized basis. Stated differently, without the benefit of collective actions, plaintiffs' attorneys simply won't have the same platform to recruit large numbers of employees.

Insurance considerations

While the *Epic Systems* decision will decrease employers' exposure to wage and hour class actions under the FLSA, there are other areas of exposure which were not eliminated by the decision:

- State laws allowing collective actions (as outlined above) – For example, California's Private Attorneys General Act (PAGA).
- Agency initiated actions (i.e., DOL, EEOC suits) – In a recent ruling by the Labor Commissioner's Office, more than $4 million in citations were issued against The Cheesecake Factory and a chain of companies to which it contracted out janitorial work for withholding breaks and overtime pay from the workers who cleaned the restaurants at night.
- Multiple plaintiff claims.
- Plaintiffs' counsel filing multiple single-claimant arbitration matters against the employer at the same time. While arbitrations are less expensive and more efficient than class actions, if an employer were faced with multiple individualized arbitrations, the results could be costly.
- EEOC charges.
- Non-employee plaintiffs – Allegations of failure to hire where the plaintiffs were not hired and thus, would not be subject to class action waivers, can be litigated as a class action.
- Sexual harassment – Due to the media attention associated with the #MeToo movement, employers should strongly consider the potential ramifications before imposing arbitration for sexual harassment matters. Several states have already passed laws to prohibit mandatory arbitration of sexual harassment cases.

In light of the above, it is clear that there are still exposures which need to be addressed via employment practices liability and wage and hour insurance. Therefore, the eventual impact of the *Epic Systems* decision on the employment practices liability and wage and hour insurance marketplace remains to be seen.

Source

[1] *See* Honore Johnson, *Adopting an Employment Arbitration Process,* 70 DISP. RESOL. J. 65 (2015) (reciting findings that in employment arbitration, average arbitration fees were $6,340 per case overall, and $11,070 for cases disposed of by an award following a hearing).

[2] *See* Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes,* 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (detailing findings that average award amount was $109,858 for arbitration cases won by employees).

[3] *See* CAL. LAB. CODE § 2968, et seq.; Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 146, (2014).

[4] *See* Iskanian, 327 P.3d at 153.

[5] *See* N.Y. State Senate, *Assembly Bill A7958*, https://www.nysenate.gov/legislation/bills/2017/a7958 (last accessed July 25, 2018).

[6] *See* Vermont General Assembly, H.789, https://legislature.vermont.gov/bill/status/2018/H.789 (last accessed July 25, 2018).

[7] *See* Executive Order 18-03, __ Wash. Reg. ___ (June 12, 2018).

Contact

David Cessante
Clark Hill PLC
+1 313 965 8574
dcessante@clarkhill.com

Alison Miller
Willis Towers Watson
+1 610 254 5675
alison.miller@willistowerswatson.com

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