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Supreme Court case empowers employment agreements

5-4 decision strikes a blow to class action claims

By: Thomas Franz in News Stories June 4, 2018

A recent U.S. Supreme Court decision in *Epic Systems Corp. v. Lewis* has shown that employment agreements are enforceable even if they prohibit class action lawsuits.

The 5-4 decision conflicts with language from the National Labor Relations Act, which states that employees may bring class action claims, and the National Labor Relations Board has interpreted that part of the act to prohibit class action waivers.

"The court reviewed whether it was legally permissible in employment agreements for employers to have, as part of those agreements, arbitration agreements that also included class action waivers," said Michael Brady, chair of Warner Norcross + Judd's Litigation and Dispute Resolution Practice Group. The court said that was permissible under the Federal Arbitration Act.

The *Epic* case was one of three consolidated cases ruled on by the court. In *Epic,* the employee filed a class action lawsuit for unpaid overtime wages.

"The employer included in their employment agreements provisions that included class action waivers," Brady said of the case. "The court ultimately said you can bring a one-on-one arbitration, but not a class action. In that case, they tried to bring a class action complaint and it was remanded for arbitration."

Deborah Brouwer, a partner at Nemeth Law PC in Detroit which represents employers, said the court's decision continued several decades of affirmation for arbitration as an acceptable form to resolve many disputes, this time being an employment dispute.

"Employees were making a new argument claiming that agreements that prohibit class actions violated the NLRB act, because that act allows employees to gather collectively," Brouwer said. "What the court did in rejecting that argument is to say the NLRB act provisions that allow employees to act collectively means that they can collectively bargain, they can go on strike and they can have picket lines, but it doesn't mean that they have an absolute right to file class action lawsuits."

Brouwer and Patricia Nemeth, also of Nemeth Law, each said the Department of Labor could still provide class action remedies for workers.

"The employees can still go to the Department of Labor, which has the ability to file class actions or collective actions, but it's not an attorney on the other side filing these claims and then getting the attorney's fees on top of the potential claim," Nemeth said.

Beth Rivers, a partner at Pitt McGehee Palmer & Rivers PC in Royal Oak who often represents workers in these types of cases, said the Department of Labor is not a reliable remedy for these disputes.

"I think the statistics are that the DOL investigates 1 percent of the claims that come in front of them," Rivers said. "There's a possibility but not very likely to result in any relief to the actual employee. I think it gives the employer a pass, they can continue to misclassify or underpay employees and recognize the likelihood of litigation being brought is unlikely."

Rivers said the case is "devastating" for these types of group actions because wage and hour cases usually involve relatively low damages for lower income individuals.

"Not only can't they afford to, but in terms of the litigation, it becomes cost prohibitive in terms of doing a single case with small damages, and the amount of time and money that it would cost to bring that case, it just becomes difficult for the client and attorney to take on that burden," Rivers said.

Takeaways for attorneys

While discussing what employers should do next, Brady said attorneys should evaluate employment agreements with their clients.

"Employers should really go back and look at their agreements to see if they want arbitration," Brady said. "Then do they want to insert a clear provision that says the employee, if they bring a claim, will waive the right to the ability to bring a class action. In most situations, it would make sense to do that."

Nemeth said she expected a lot of their clients to be reaching out to determine options for their employment agreements.

"I think that for us, as counsel, we have to assist the employers in making a determination as to whether it's good or bad for them based on their particular company and work environment," Nemeth said.

The lack of class actions could result in much smaller attorneys' fees for these types of cases, therefore removing an incentive for counsel to take such cases, Brouwer said.

"With class action it would be an option, as the attorney could get 100 or 1,000 workers and get a percentage of each of their small judgments, or just leverage it into settlement for a very large attorney fee," Brouwer said. "The difference is lawyers will have to bring cases individually and whether they will or not is a big question."

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