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Supreme Court Allows Employers to Prevent Class Action Lawsuits through Properly Drafted Arbitration Agreements

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On May 21, 2018, the United States Supreme Court decided that employers may prevent their employees from filing certain class action lawsuits through a properly drafted arbitration agreement. *Epic Systems Corp. v. Lewis*, 2018 WL 2292444 (U.S. May 21, 2018). After this landmark decision, employers seeking to avoid class action lawsuits should review their arbitration agreements to ensure that they are properly drafted.

An arbitration agreement prevents an employee from filing a lawsuit against the employer in court. Instead, the employee is required to submit the claim to arbitration – a private, out-of-court proceeding in which the dispute is resolved by an impartial arbitrator. Some arbitration agreements go one step further and also prohibit the employee from joining with other employees and bringing a class action claim against the company. It was this type of an agreement – an arbitration agreement containing a class action waiver – that the Supreme Court approved in *Epic Systems*.

The Supreme Court's decision resolved a debate that had been festering among the federal courts for years. Prior to *Epic Systems*, the courts disagreed as to whether class action waivers in arbitration agreements were enforceable. While the Seventh and Ninth Circuit Courts of Appeals prohibited them, the Second, Fifth, Eighth and Eleventh Circuits enforced them. The Supreme Court resolved this debate in favor of employers. Consequently, after *Epic Systems*, companies looking to protect themselves against class action lawsuits now have a much more powerful tool in their arsenal.

Contrary to some assertions in the media, *Epic Systems* does not declare an end to employee attempts to challenge the legitimacy of arbitration agreements. In fact, *Epic Systems* might actually lead to more disputes over the precise language used in arbitration agreements, especially those that are out-of-date or not drafted with the assistance of counsel. With the costs of employment litigation continuing to increase, especially in the #MeToo era, carefully drafted arbitration agreements can provide cost-effective protection for employers. Additionally, arbitration provides the added benefit of privacy over traditional litigation. After *Epic Systems*, employers looking to avoid costly and public lawsuits should review their employment contracts and arbitration agreements. Below are some common mistakes and pitfalls to avoid in your own arbitration agreement:

- **Requiring Employee to Pay Excessive Costs of Arbitration**: The Ninth Circuit Court of Appeals struck down an arbitration agreement that required an employee to pay half the costs of arbitration. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013). The same court also found unconscionable an arbitration agreement requiring lower-wage employees to bear arbitration costs that would greatly exceed their financial capacities. *Capili v. Finish Line, Inc.*, 699 Fed. Appx. 620 (9th Cir. 2017). Other courts have struck down arbitration agreements requiring employees to pay costs exceeding those that they would pay if they filed a lawsuit in court.

- **One-Sided Agreements**: The Third Circuit refused to enforce an employment contract giving the employer sole control over arbitration modifications and the choice of whether to pursue arbitration or litigation. *Nino v. The Jewelry Exchange*, 609 F. 3d 191 (3d Cir. 2010). The court also found troubling the imposition of a five-day notice requirement (as opposed to the American Arbitration Association's ("AAA") 30-day requirement). *Id.*

- **Broadness, Vagueness or Ambiguity**: Arbitration agreements must be drafted carefully with an attention to every detail. For example, Florida's Fifth District Court of Appeal recently ruled that a requirement to arbitrate "any claim or controversy that arises out of or relates to [the employee's employment contract]" did not cover claims for sex discrimination or negligent hiring because these claims technically "did not relate directly to the contract itself." *Saunders v. St. Cloud 192 Pet Doc Hosp.*, 224 So. 3d 336 (Fla. 5th DCA 2017). Instead, the court explained that the claims could have been filed even if the employee did not have a contract. *Id*. When drafting an arbitration agreement, the details matter.

- **Addressing the Specifics**: At a minimum, the AAA recommends that arbitration agreements should address the "Five Ws:" the who, what, when, where, why and how of the arbitration process. However, prudent employers should include additional details to establish their own preferred framework for the arbitration process. Examples include limitations on discovery; choice of law and forum provisions; arbitrator identity and qualifications; opportunity for appeal; and the requirement of a written opinion accompanying any dispute resolution reached.

- **EEOC Charges**: An issue currently on appeal to the Eleventh Circuit is whether an arbitration agreement is invalid if it fails to explicitly state that the employee is permitted to file a charge with the Equal Employment Opportunity Commission ("EEOC"). *EEOC v. Doherty Enters.*, 126 F.Supp. 3d 1305 (S.D. Fla. 2015), *appeal filed*, No. 18-11982 (May 11, 2018). We will follow this appeal and report the decision when it is rendered.

Should you have any questions regarding your arbitration agreements or class action waivers, or if you would like to explore if such an agreement is appropriate for your business, Shumaker's labor and employment attorneys are happy to guide you through that process.

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