In *Epic* Case, Supreme Court Reverses NLRB Course on Class Action Waivers

By: John Baker and Emily Paulus
Labor and Employment Alert
5.23.18

On May 21, 2018, the United States Supreme Court upheld the validity of mandatory arbitration clauses that preclude class actions. In *Epic Systems Corporation v. Lewis*, the Court found that these mandatory arbitration agreements must be enforced under the Federal Arbitration Act (FAA).

In 2012, the National Labor Relations Board (Board) ruled that class waivers, in the form of mandatory arbitration agreements, violate workers' rights to engage in "concerted activity" under Section 7 of the National Labor Relations Act (NLRA). Protected concerted activity typically involves two or more employees acting together to improve wages or working conditions. The action of a single employee can be concerted if he or she is acting on behalf of others. Employees argued that these mandatory arbitration agreements prevented them from filing class actions, and instead required individualized proceedings. The Board agreed and held that these agreements conflict with the purpose of the NLRA and should not be upheld. That 2012 decision led to a split among courts in the country. This split put many employers in a precarious position of not knowing whether the offending employment agreements were valid until this week's decision.

The US Supreme Court left no doubt that these types of arbitration agreements must be enforced. "Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's savings clause nor the NLRA suggests otherwise." The Court then turned to Section 7 of the NLRA and stated: "[t]he notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935." Based upon the language of both statutes, the Court determined that the language of the FAA is clear in expressing Congress' intent to favor arbitrations over litigation, and that it sees no conflict between the NLRA and the FAA, contrary to what the Board found in 2012. Finally, the Court specifically noted that it will not do anything to override the policy judgments of Congress, and that if Congress disagrees with the Court, it can choose to amend the judgment.

The direct implication of this case is that employers are not violating the NLRA if they include class waiver provisions in arbitration agreements that employees are asked sign as a condition of employment. Many employers already utilize these types of arbitration clauses in their contracts, and the decision confirms that these clauses will likely be upheld if challenged.

If you have questions or would like further information, please contact John Baker (bakerj@whiteandwilliams.com; 610.782.4913), Emily Paulus (pauluse@whiteandwilliams.com; 610.782.4958) or another member of our Labor and Employment Group.