May 23, 2018

Epic Systems Corp. v. *Lewis*

U.S. Supreme Court Holds That Class-Action Waivers in Employment Arbitration Agreements Are Enforceable Under Federal Law.

SUMMARY

In the consolidated cases of *Epic Systems Corp.* v. *Lewis*, *Ernst & Young LLP* v. *Morris*, and *National Labor Relations Board* v. *Murphy Oil USA, Inc.*,[1] the U.S. Supreme Court held on Monday that arbitration agreements in which an employee agrees to arbitrate any claims against an employer on an individual—rather than on a class or collective—basis, are enforceable and do not violate the National Labor Relations Act ("NLRA"). In reaching its decision, the Court held that Congress, through the Federal Arbitration Act ("FAA"), "has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings," and that nothing in the NLRA overcame this principle.[2] The decision resolves a conflict in the courts of appeals and provides clarity to employers that have entered into arbitration agreements with employees that contain class- or collective-action waivers. The decision may lead to more employers considering the use of such agreements.

PROCEEDINGS BELOW

In 2012, the National Labor Relations Board ("NLRB") issued its decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), finding for the first time that individual employment arbitration agreements run afoul of the NLRA, and that the NLRA overcomes the FAA. A split then developed among the federal courts of appeals—some of which adopted the NLRB's new position that class- and collective-action waivers in employment agreements are unlawful, while others maintained that they are valid. *Compare Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015) (upholding class- and collective-action waivers in employment arbitration agreements), *with Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1151, 1155 (7th Cir. 2016) (NLRA rendered class and collective action waivers in employment arbitration agreements unenforceable) *and Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016) (same).

The Supreme Court granted *certiorari* and consolidated three cases to resolve the split. The litigation had an unusual element in that lawyers for the federal government appeared on both sides. During the Obama administration, the Department of Justice filed a brief supporting the employees, but reversed course under the Trump administration and argued on behalf of the employers. The NLRB's general counsel argued for the employees.

THE SUPREME COURT'S DECISION

In a 5-4 decision for the Court authored by Justice Gorsuch, the Supreme Court held that "Congress has instructed that arbitration agreements . . . must be enforced as written" and that class- and collective-action waivers in employment arbitration agreements are permissible under the NLRA.[3]

The Court began by reviewing the FAA's "liberal federal policy favoring arbitration agreements" and the requirement that courts "rigorously . . . enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." It explained that the FAA "specifically direct[s] [courts] to respect and enforce the parties' chosen arbitration procedures."[4]

The Court then rejected each of the arguments raised by the NLRB and the individual employees. *First*, the Court held that the FAA's "saving clause"—which provides that arbitration agreements are presumptively enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"—does not "offer[] . . . refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." In other words, because this argument specifically singled out "individualized arbitration proceedings" as invalid, the "saving clause" was not implicated, and there was no "generally applicable contract defense[]" to overcome the presumption of enforceability.[5]

Second, the Court rejected the argument that the NLRA and the FAA conflict and that, because the NLRA (1935) was enacted after the FAA (1925), it should control. The NLRB and the individual employees argued that the NLRA constituted a "clear and manifest congressional command to displace the [FAA]." The Court disagreed, stating that it is not at "liberty to pick and choose among congressional enactments" and must "strive 'to give effect to both.'" It further explained that there is a "'strong presumption' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute." Section 7 of the NLRA, for example, focuses on the right to organize unions and bargain collectively, and so "does not even hint at a wish to displace the Arbitration Act." Accordingly, the Court found that "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." As stated by the majority, "Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"[6]

Finally, the Court declined to give *Chevron* deference to the NLRB's interpretation of the NLRA in *D.R. Horton, Inc.* The Court observed that *D.R. Horton, Inc.* was an outlier in Board precedent, as it "for the first time in the 77 years since the NLRA's adoption [] asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours." The Court also reasoned that the NLRB "sought to interpret [the NLRA] in a way that limits the work of a second statute, the Arbitration Act," and that, although *Chevron* deference is premised in part on the notion that "'policy choices' should be left to the Executive Branch," "here the Executive seems to be of two minds, for we have received competing briefs from the [NLRB] and the United States (through the Solicitor General)." The Court noted that none of the parties challenged the doctrine of deference to administrative determinations established in *Chevron*, but that the NLRB's interpretation of the FAA was not entitled to such deference in any event.[7]

Justice Thomas concurred in the majority opinion, but wrote separately to add that the FAA's saving clause means that the only grounds for revoking an arbitration contract are "those that concern the formation of the arbitration agreement," such as fraud or adhesion. The employees' argument that the arbitration agreements are unenforceable under the NLRA is a public-policy defense, not an argument that "concern[s] the formation of the arbitration agreement."[8]

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented, arguing that the Court paid "scant heed" to NLRB precedent that "the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment." She opined that the number of suits brought by employees is likely to decrease in light of the decision based on the "[e]xpenses entailed in mounting individual claims . . . far outweigh[ing] potential recoveries," "[f]ear of retaliation," and "the slim relief obtainable" in individual suits. She argued that, as a result of the Court's decision, "employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations."[9] The majority, responding to this argument, noted that "the dissent retreats to policy arguments."[10] Justice Ginsburg further stated that "[c]ongressional correction" of the court's decision is "urgently in order."[11]

IMPLICATIONS

The decision provides employers and employees guidance regarding the legality of class- and collective-action waivers in their employment documents and policies.

On Monday, the NLRB issued a statement saying that it "respects the Court's decision, which clearly establishes that arbitration agreements providing for individualized proceedings, and waiving the right to participate in class or collective actions, are lawful and enforceable." The NLRB also stated that it currently has 55 pending cases with allegations that employers violated the NLRA because their arbitration agreements contained class waivers, adding that it is "committed to expeditiously resolving these cases in accordance with the Supreme Court's decision."[12]

In addition, employers currently facing class or collective actions in federal or state courts may be able to compel individual arbitrations if the employees previously entered into agreements waiving their rights to participate in class or collective actions.

The decision also has effects in state and local jurisdictions. For example, in July 2017, the New York Appellate Division for the First Department held that "arbitration provisions . . . , which prohibit class, collective, or representative claims, violate the National Labor Relations Act (NLRA) and thus, that those provisions are unenforceable."[13] That decision will no longer be controlling law.

Nonetheless, it is not possible to predict how Congress will react to the Court's opinion. In December 2017, for example, Senators Lindsey Graham (R–S.C.) and Kirsten Gillibrand (D–N.Y.) introduced a bill that would prohibit clauses in employment agreements requiring mandatory arbitration to resolve claims of sexual harassment or other discrimination. Because the Court's decision rested on statutory, rather than Constitutional grounds, Congress could effectively reverse the Court's decision by enacting new legislation. This is what happened after the Supreme Court decided *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), which held that the statute of limitations for presenting equal-pay discrimination claims began on the date the employer first made an illegal payment decision, not on the date of the last paycheck.

The decision may also signal a narrowing of the Supreme Court's interpretation of Section 7 of the NLRA. The Court explained that "Section 7 focuses on the right to organize unions and bargain collectively," and that its protection of "other concerted activities" should be read as referring to activities that are "like the terms that precede it." In other words, Section 7 serves "to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound activities of class and joint litigation.'" The majority concluded by criticizing the dissent for "impos[ing] a vast construction on Section 7's language."[14]

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ENDNOTES

1 *Epic Sys. Corp.* v. *Lewis*, 584 U.S. __, No. 16-285 (May 21, 2018).

2 *Epic Sys. Corp.*, slip op. at 2.

3 *Id.* at 25.

4 *Id.* at 5 (citations and quotations omitted).

5 *Id.* at 5-8 (citations and quotations omitted).

6 *Id.* at 4, 9-19 (citations and quotations omitted).

7 *Id.* at 19-21 (citations and quotations omitted).

8 *Id.* at 1-2 (Thomas, J., concurring).

9 *Id.* at 2, 10-11, 27-28 (Ginsburg, J., dissenting).

10 *Epic Sys. Corp.*, slip op. at 24.

11 *Id.* at 2 (Ginsburg, J., dissenting).

12 *Supreme Court Issues Decision in NLRB v. Murphy Oil USA*, NLRB (May 21, 2018), https://www.nlrb.gov/news-outreach/news-story/supreme-court-issues-decision-nlrb-v-murphy-oil-usa.

13 *Gold* v. *N.Y. Life Ins. Co.*, 153 A.D.3d 216, 221 (N.Y. 1st Dep't 2017).

14 *Epic Sys. Corp.*, slip op. at 12, 23.

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