Supreme Court Removes a Final (?) Roadblock for Employment Arbitration Agreements

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Class action lawsuits against employers have steadily increased both in number and in dollar value over the past two decades. These lawsuits cost employers millions, often for technical or minor violations spread over many class members and several years. The United States Supreme Court, however, just cleared a path for employers to avoid such lawsuits altogether. The Court held that the Federal Arbitration Act (FAA) allows employers and employees to agree in advance that any employment-related dispute be resolved through one-on-one arbitration rather than collectively. In doing so, the Court's majority brushed aside concerns raised by the National Labor Relations Board (NLRB) that such agreements interfered with employees' rights under the National Labor Relations Act (NLRA) to act collectively in employment-related issues. This decision is only useful, however, if employers and employees agree in advance to resolve disputes through arbitration, so employers should strongly consider adopting such agreements before disputes arise.

The Current Landscape

Litigation of employment disputes can be lengthy, costly, and unpredictable, taking an organization's energy and focus away from its core business. Many employers have sought to avoid such problems by requiring employees to agree that they will resolve employment disputes through private arbitration. In theory, arbitration is quicker, cheaper, and less risky than litigation in court: a neutral party hears both sides of a dispute, promptly gives an answer, and the parties move on to more productive things, even if they disagree with the arbitrator's decision.

However, employers have been reluctant to allow such informal procedures to apply to class action claims; where a decision may involve millions of dollars, most employers prefer to have the full procedural protections that are available in court or, better yet, avoid group claims altogether. Thus, many arbitration agreements provide that employees will not only submit claims to arbitration but also agree that any such arbitration will be one-on-one rather than as part of a group.

In recent years, however, employment agreements that require one-on-one arbitration have given rise to satellite litigation concerning the legality of such agreements. Since 2012, the NLRB has held that the NLRA prohibits arbitration agreements that limit employees to individual, as opposed to class, claims. The NLRB

held that making claims on behalf of several employees together was a form of acting concertedly for "mutual aid or protection" protected by the NLRA, and employers could no more require employees to agree to refrain from such joint claims than they could require employees to agree not to join a union. Therefore, when an employer asserted an arbitration agreement as a defense to a class action employment claim, an employee filed a charge with the NLRB, which then ordered the employer not to assert the legal defense in court.

Courts were split as to whether the NLRB's position was correct. Some agreed with the NLRB that the NLRA controlled, while others looked to the FAA, which expressed a strong federal policy in favor of arbitration, and court decisions under the FAA that had approved agreements limiting disputes to one-on-one arbitration. Faced with such disagreements, employers that wished to enter into and enforce such arbitration agreements faced a complicated process, often involving state courts, federal courts, the NLRB, and an arbitration forum. Hardly the quick and easy resolution that arbitration is supposed to promise.

On May 21, 2018, however, the United States Supreme Court put those issues to rest. It held in *Epic Systems Corp. v. Lewis* that the FAA specifically authorized employers and employees to enter into arbitration agreements that required that each employee arbitrate claims separately, and that the NLRB was wrong to invalidate such agreements under the NLRA. This ruling, combined with earlier court decisions, clears the way for employers to use these agreements with much less risk of being caught up in satellite litigation. While the ruling was decided by a close 5-4 vote, it is very unlikely to be overturned any time soon. Any change would have to come from Congress, which is unlikely in its present makeup to provide a legislative alteration.

Considerations for Employers in the Future

Now that the risk of litigation over including class/collective action waivers in arbitration agreements is greatly reduced, employers should consider whether to implement these type of agreements with their workforce. A significant benefit to such agreements is that the possibility of expensive class or collective action litigation is greatly reduced, allowing an employer to address potential problems in a more controlled and private environment rather than in a public class action lawsuit that can, in some cases, be driven as much by lawyers' fees as by fairness to an employer's workers. On the other hand, if employees feel that they cannot properly resolve workplace disputes, they may leave for other employers, or even turn to organized labor. Labor unions will almost certainly use this decision to recruit new members, arguing that employees cannot rely on the courts and thus must rely on a union. In addition, the same factors of speed, privacy, and efficiency may result in more employees making arbitration claims than bringing lawsuits, and arbitration decisions, unlike court cases, are generally subject to a limited scope of appeal, even if the arbitrator makes a clear mistake.

Moreover, several states, including New York, have recently enacted limits on arbitration agreements that relate to sexual harassment claims, and some state courts have imposed exacting contractual wording requirements before enforcing arbitration clauses that waive the right to proceed with a court action. Such state statutes and state contractual law interpretations may well be invalid under federal law, but until cases challenging these laws are decided in a court, employers still face some uncertainty. Private arbitration agreements also do not prevent state or federal enforcement agencies from bringing claims on behalf of groups of employees.

The best way to limit employee class action lawsuits, of course, is to comply with state and federal laws, particularly wage and hour laws and anti-discrimination laws. A regular review of payroll practices by legal counsel can identify potential claims that can then be resolved without litigation. Anti-discrimination and anti-harassment training should be part of every employer's regular compliance program.

But even the most responsible employer will have occasional disputes with employees, and the careful, mindful development of a credible means of resolving such disputes can go a long way toward maintaining employee satisfaction. The Supreme Court just made using a well-designed mandatory arbitration system a more attractive option for employers.