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The New *Epic* Considerations for Employers & Arbitration Provisions

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In *Epic Systems Corp. v. Lewis* (— S. Ct. —, May 21, 2018, J. Gorsuch) (J. Ginsburg, dissenting) ("*Epic*"), the United States Supreme Court issued a decision significant for all employers seeking strategies to avoid protracted and potentially business-ending class and collective action litigation under the Fair Labor Standards Act (FLSA), and associated state laws. In part, the decision holds that the presumption in favor of enforcing arbitration agreements under the Federal Arbitration Act (FAA) applies to terms within those agreements requiring individualized, as opposed to class or collective, proceedings and that neither Section 7 of the National Labor Relations Act (NLRA), permitting employees to engage in concerted activities, or the savings clause under the FAA overcome the presumption of enforceability.

Background

Until 2010, the majority of courts and the National Labor Relations Board's general counsel appeared in support of enforcing arbitration provisions waiving an employee's right to participate in a class or collective action. However, in 2012, the National Labor Relations Board changed course, asserting that the NLRA effectively nullifies the FAA's presumption of enforcement regarding class and collective action waivers. Thereafter, and increasingly, a number of Circuit Courts either followed the reasoning of the Board or felt obliged to defer to the agency's changed interpretation of the NLRA. In *Epic*, the Supreme Court disbanded the growing uncertainty and gives a clear directive the presumption for enforceability applies.

Creating Effective Arbitration Provisions to Avoid Class and Collective Actions

While the *Epic* decision alleviates a growing concern between employers and attorneys that requiring employees to waive the right to class or collection actions ran afoul of the NLRA's protections for concerted activities, *Epic* does not proscribe what constitutes an enforceable waiver of class and collection actions. Thus, employers need to place careful attention on drafting and implementing these waivers.

Creating an enforceable wavier starts with avoiding the traditional grounds for holding arbitration agreements and waivers of class and collective actions unenforceable. Here are steps on the road to creating an enforceable arbitration and waiver agreement starting with communicating the agreement, and the providing including clear statements of the operative terms.

First: Communicating the Agreement to the Employee

Employees often claim that he or she never received the agreement to arbitrate and, in any event, did not understand what he or she was agreeing. While many courts hold an employee's signature alone, including an electronic mark, is sufficient to find the employee received the agreement and understood what the agreement set forth, employees and their counsel nevertheless attempt to challenge even signed arbitration agreements, thus tying employers up in expensive litigation to determine the enforceability of the agreement and exposing employers to a risk the agreement might not be enforced from the outset. To minimize these risks, employers should:

- *Create a process to confirm the employee's receipt and understanding of the agreement.*

  For instance, in *Epic*, the employer sent an e-mail enclosing the waiver asking recipients to review and acknowledge the agreement by responding either by confirming he or she understood and consented, or, if the recipient did not understand, by responding with a request that someone contact the recipient to discuss further.

- *Track and audit employee responses.*

  Increasingly employees are hesitant to acknowledge an agreement or waiver seen as benefiting the employer and thus will delay or try to avoid responding, hoping the employer forgets. Employers must track and audit employee responses.

- *Provide a contact for employees in the event they do not understand the agreement as well as language options communicating what the employee can do for more information.*

  By assigning a knowledgeable contact for employees to raise concerns and questions, employers can identify and eliminate in advance potential arguments by employees that the agreement was difficult to understand, unclear or even in a language he or she cannot read. Again, as in *Epic*, this can be as simple as listing a contact in an e-mail.

Second: Provide Clear Statements as to the Contents of the Agreement

Regardless of the presumption in favor of enforcement, courts and arbitrators are and will remain loathe to enforce terms in boilerplate or difficult to understand legalese. This is especially true in the context of the employer-employee relationship, where the employer is often the one that drafted the term and is deemed a sophisticated party. Accordingly, rather than down play, the agreement and waiver should be conspicuous in highlighting the following critical terms:

- ☐ Provide a detailed explanation and recitation of the claims covered by the agreement (i.e., claims arising out of contract law, tort law, common law, wrongful discharge law, privacy rights, statutory protections, constitutional protections, wage and hour laws, including but not limited to the Fair Labor Standards Act, the Family and Medical Leave Act, the Civil Rights Acts of 1964 and 1991, as amended, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Americans with Disabilities Act, etc., and associated state law claims).

- ☐ Arbitration is the only litigation forum for resolving covered claims and the right to a trial by judge or jury is waived.

- ☐ The distinct waiver of class and collective claims, which specifies that all claims shall be brought only on an individual basis and subject to an individual.

- ☐ The agreement does not change the at-will nature of the employment relationship.

- ☐ Explanation of any claims not covered by the agreement.

- ☐ Acknowledgement of each parties' right to representation in arbitration.

- ☐ Allocation of fees and costs associated with arbitration, and whether the employee is obligated to pay any portion of the initial filing fee if the employee initiates the arbitration process.

- ☐ Whether the parties intend to pursue mediation in good faith before or during the arbitration proceeding.

- ☐ Acknowledgement the agreement and arbitration is governed by the FAA, the desired applicable substantive law and location for hearing.

- ☐ Acknowledgement of the desired arbitrating body (i.e., AAA, JAMS, etc.) and reference and incorporation of the desired rules of procedure for the proceeding (i.e., the JAMS Employment Arbitration Rules and Procedures).

- ☐ Acknowledgement that any dispute as to the jurisdiction and/or enforceability of the agreement shall be determined solely by the arbitrator and, if possible, reference and incorporation of the applicable rule of procedure governing jurisdiction of the arbitrator (see, e.g., Rule 11, entitled Interpretation of Rules and Jurisdictional Challenges, of the JAMS Employment Arbitration Rules and Procedures)

- ☐ If specific limitations on the scope and extent of discovery and disclosure in the proceeding are desired, the limitations should be acknowledged and not so restrictive so as to prevent the employee a fair opportunity to obtain information and documentation in advance the hearing before the arbitrator.

- ☐ A savings and conformity clause for any provisions found to be unenforceable or overly broad.

- ☐ Procedures, if any, for modification or amendment of the agreement modified or amended, and any applicable time frames for retroactivity associated with changes.

- ☐ Acknowledgement that the agreement governs all covered claims regardless of monetary value and that the monetary value of the claims (whether minimal or otherwise) is not a basis for prosecuting the claim in any proceeding or venue other than arbitration.

- ☐ Acknowledgement of any reduced periods of limitations.

- ☐ Acknowledgment of consideration for the agreement (i.e., employment, continued employment, etc.) and that the employee had the opportunity to review and read the entirety of the agreement and signs the agreement voluntarily, intelligently and in the absence of duress.

The foregoing statements are not an exhaustive list of all the terms and provisions an employer may desire in an agreement, nor are employers required to follow a specific format for their agreements. For instance, depending the strategic import of the term, employers and their attorneys may prefer standalone agreements dedicated to specific terms to strengthen and further highlight the term. Notably, in *Epic*, the waiver of class and collective actions was set forth in a standalone agreement.

Avoiding Arguments of Unconscionability

Ultimately, agreements and waiver provisions will not be enforced if they are deemed unconscionable. For instance, in writing for the dissent in *Epic*, Justice Ginsburg opined that the financial impact of requiring employees to arbitrate wage claims of minimal monetary value on an individual basis rendered the waiver itself unconscionable. Although Justice Ginsburg's perspective as to the unconscionability of the waiver did not impact the ultimate decision in *Epic*, it provides a warning that judges and arbitrators may look to when considering whether a particular term or provision causes an undue burden or hardship for an employee.

Accordingly, employers and their attorneys must ensure that certain minimum levels of fairness are set forth in the agreement and waiver. In the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, for instance, suggests that procedural fairness dictates, at a minimum, that any arbitration agreement should provide that the remedies available before a court of law remain available at arbitration, that employees have a right to participate in the selection of the arbitrator, that discovery and disclosure rules allow the parties access to core information to their claim, that the employee has a right to be represented by counsel, and that the employee have fair access to the location and timing of the arbitration without undue burden.

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