

EPIC SYSTEMS CORP. V. LEWIS:
THE UNITED STATES SUPREME COURT'S
APPROVAL OF CLASS ACTION WAIVERS
AND WHAT IT MEANS FOR EMPLOYERS
EVERYWHERE

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WHO ARE WE?

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OVERVIEW

- *Epic Systems Corp. v. Lewis* – What did it hold?
 - General background on arbitration
 - How did we get here?
 - The reasoning behind the supreme court's decision
 - An impassioned dissent
- What is next?
 - Who is impacted?
 - Practical considerations
- Questions?

EPIC SYSTEMS CORP. V. LEWIS THE HOLDINGS

- Class or collective action waivers in arbitration agreements are valid and enforceable under the Federal Arbitration Act
- Class or collective action waivers in arbitration agreements do not violate workers' rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as otherwise guaranteed by Section 7 of the National Labor Relations Act

GENERAL BACKGROUND

- What is arbitration?
 - Arbitration is a method of legal dispute resolution in which a neutral, private third party, rather than a judge or jury, renders a decision on a particular matter
 - An arbitration agreement is a contract between two or more parties to resolve disputes by the process of arbitration
- What is a class or collective action?
 - A class action is a lawsuit in which a representative plaintiff sues on behalf of a class of plaintiffs who have the same interests in the litigation as their representative and whose rights or liabilities can be more efficiently determined as a group than in a series of individual suits. A collective action is very similar but does not arise under Federal Rule of Civil Procedure 23; for example, minimum wage and overtime claims under federal law can be brought as collective actions. Individuals must also affirmatively opt-into collective actions.

THE IMPACT OF THE RULING

- The use of arbitration agreements is widespread and growing
- According to the Economic Policy Institute:
 - In 1992, only 2% of workers were subject to mandatory arbitration for resolution of disputes with their employers
 - By the early 2000s, this number had increased to nearly 25% of workers
 - By late 2017, more than 55% of workers faced mandatory arbitration
 - 65.1% of companies with 1,000 or more employees have mandatory arbitration procedures
- It is estimated a total of 60.1 million American workers are subject to mandatory arbitration of workplace disputes

Source: <https://www.epi.org/files/pdf/135056.pdf>

CLASS ACTIONS ARE EXPENSIVE

- Because class or collective actions typically involve a large number of employees, these suits can be more expensive to litigate and to settle
- The top 10 largest class action settlements in 2014 totaled \$1.85 billion, but this same figure had risen to \$2.72 billion in 2017 — a more than \$1 billion increase

Source: <https://www.workplaceclassactionreport.com>



THE FEDERAL ARBITRATION ACT (FAA) 9 U.S.C. § 1 ET SEQ.

- *In Epic Systems Corp. v. Lewis*, Justice Gorsuch summarized the FAA:
 - Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes.
 - Congress directed courts to abandon their hostility and instead treat arbitration agreements as “valid, irrevocable, and enforceable”
 - The Act . . . establishes a liberal federal policy favoring arbitration agreements
 - Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures

THE NATIONAL LABOR RELATIONS ACT (NLRA)

29 U.S.C. § 151, ET SEQ.

- Justice Ginsburg, in her *Epic Systems Corp. v. Lewis* dissent, described the NLRA:
 - § 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157.
 - Section 8(a)(1) safeguards those rights by making it an “unfair labor practice” for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7].” § 158(a)(1).
 - To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer “labor policy for the Nation”

HISTORICAL PERSPECTIVE

- Justice Gorsuch noted in the *Epic* decision that “Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms.”
- For 77 years after passage of the FAA, it was not seriously contended by anyone—and certainly not the NLRB—that the NLRA could in some instances nullify the FAA with regard to arbitration
- No court during that time had held the NLRA’s protection of concerted activity prohibited class action waivers in arbitration agreements

RECENT HISTORY

- As recently as 2010, the general counsel of the NLRB concluded mandatory class waivers in arbitration agreements did not violate the NLRA
- While the general counsel then expressed the opinion a class action lawsuit could be protected concerted activity, he concluded waivers by individual employees would be valid and an employer could seek dismissal of a class action on the grounds each purported member is bound by his or her waiver
- The general counsel at that time went as far as to conclude:
 - “The validity of such individual employee forum waivers is normally determined by reference to the employment law at issue and does not involve consideration of the policies of the National Labor Relations Act”

Memorandum GC 10-06 (June 16, 2010)

**BUT IN 2012 THE NLRB HAD AN IDEA . . . AND SOMETIMES
IDEAS CHANGE HISTORY . . . OR AT LEAST GENERATE
SUPREME COURT DECISIONS**



THE NLRB'S NEW IDEA AND RESULTING POSITION

- The NLRB dramatically changed its position in *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012)
- DR Horton is national homebuilder which required its employees to agree, as a condition of employment, that they will not pursue class or collective litigation of claims in any forum, arbitral or judicial
- One of its employees challenged this provision by filing an unfair labor practices charge with the NLRB

D.R. HORTON (CONT.)

- The NLRB agreed with the employee that the mandatory arbitration class waiver violated the NLRA
 - “Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7”
 - “When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired”
- According to the NLRB’s new position, requiring employees to agree to class and collective action waivers in an arbitration agreement violated the NLRA, as it deprived employees of the right to engage in protected concerted activity

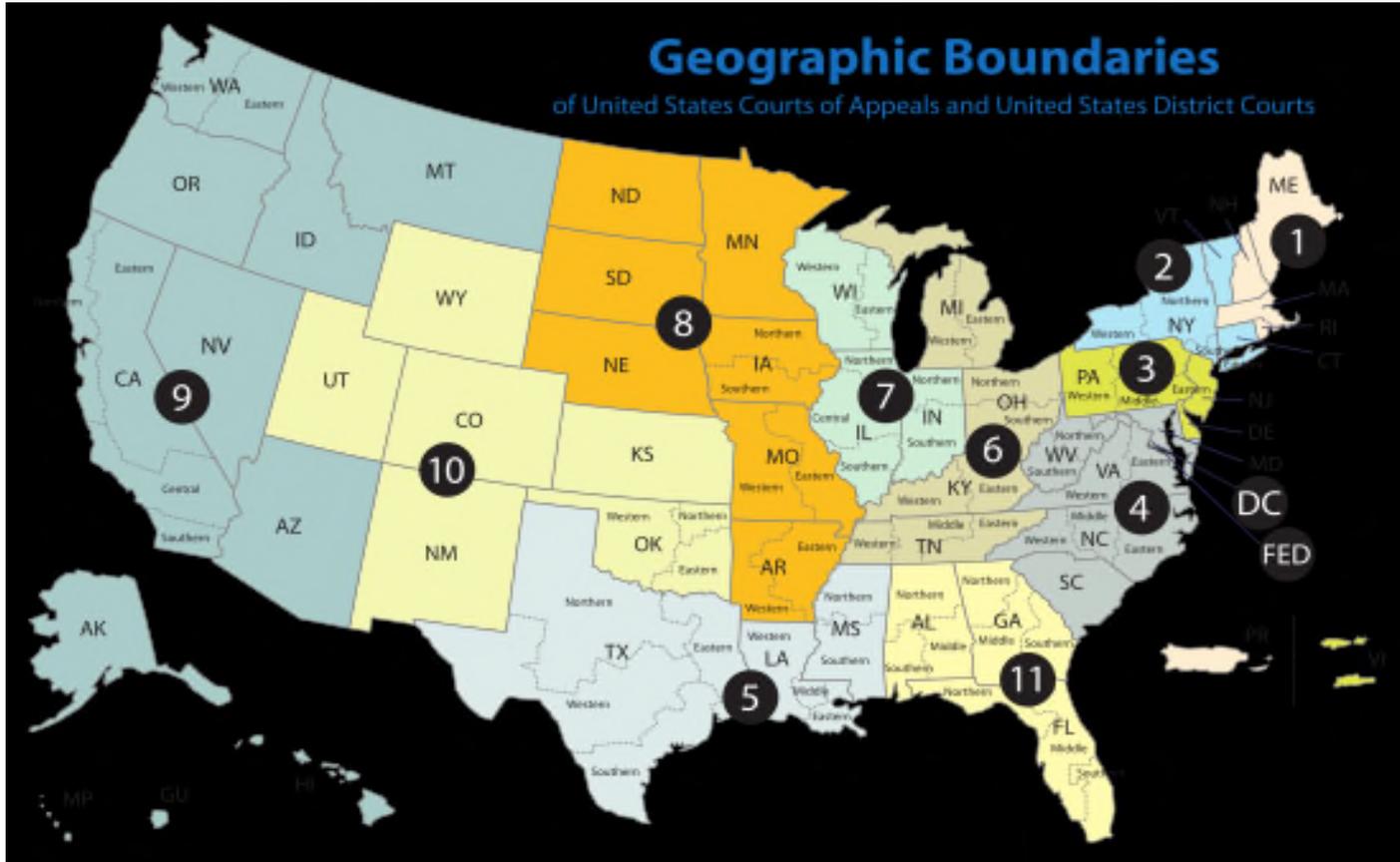
THE COURTS OF APPEALS PUSH BACK

- D.R. Horton appealed the NLRB's decision to the U.S. Court of Appeals for the Fifth Circuit, which handles appeals from federal trial courts in Louisiana, Texas, and Mississippi. The Fifth Circuit rejected the NLRB's position, and sided with D.R. Horton on the issue of class action waivers.
- Although the Fifth Circuit assumed a class or collective action could be a form of concerted activity under the NLRA, it noted the analysis does not stop there. Instead, the FAA must be considered as well.
- The FAA's purpose, according to the Court was to ensure the enforcement of arbitration agreements
- Finding no exception relating to employment class actions within the FAA, and finding no evidence that Congress intended to override the FAA with regard to rights protected by the NLRA, the Fifth Circuit found the waivers were enforceable

THE COURTS OF APPEALS PUSH BACK (CONT.)

- The NLRB did not accept the Fifth Circuit's decision and continued to take the position that class action waivers in arbitration agreements violated the NLRA when the issue was raised before it in an unfair labor practices charge
- The courts of appeal, at least initially, continued to push back and to rule such waivers were enforceable. The Second and Eighth Circuits joined the Fifth Circuit and issued opinions rejecting the NLRB's position. The Eleventh Circuit did not directly address the question, but held such provisions were valid to bar collective actions under the Fair Labor Standards Act, thus adding support to what appeared to be the consensus that the NLRB's recently created position regarding class action waivers was wrong.
- But some circuit courts of appeals started to agree with the NLRB, including the Sixth, Seventh, and Ninth Circuits

CIRCUIT SPLIT – WHAT DID IT MEAN?

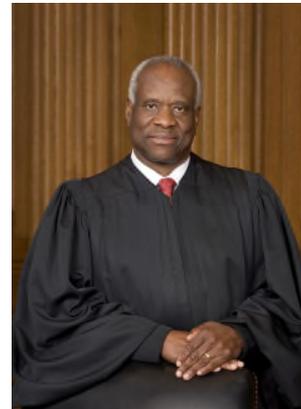
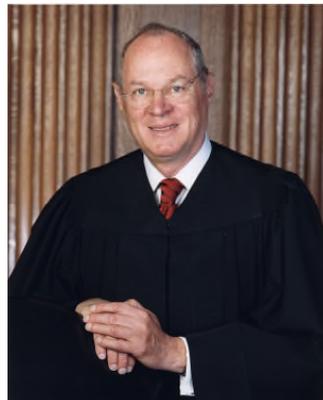


THE SUPREME COURT RESOLVES THE CIRCUIT SPLIT

- On May 21, 2018, the Supreme Court resolved the circuit split by holding that class and collective action waivers in arbitration agreements are valid and enforceable under the Federal Arbitration Act and the enforcement of such waivers does not violate the NLRA
- The decision was issued by a split court, with what many might characterize as the conservative justices upholding the use of such waivers, while the liberal justices would have held in favor of the NLRB

THE MAJORITY

- Justice Neil Gorsuch wrote for the majority, with Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joining his opinion

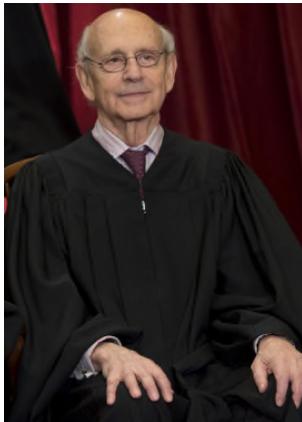


THE MAJORITY OPINION

- The majority opinion focused on the FAA's clear support for enforcing arbitration agreements. According to the majority opinion:
 - “Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures”
 - The majority further rejected that the NLRA's protection of “concerted activities” required a contrary decision, noting the NLRA does not speak to arbitration and does not mention class or collective actions. Rather, the NLRA in pertinent part focuses on “the right to organize unions and to bargain collectively.”
 - Finally, the majority determined deference to the NLRB's interpretation was not required, because the NLRB “hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act”

THE DISSENT

- Justice Ginsburg wrote a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan

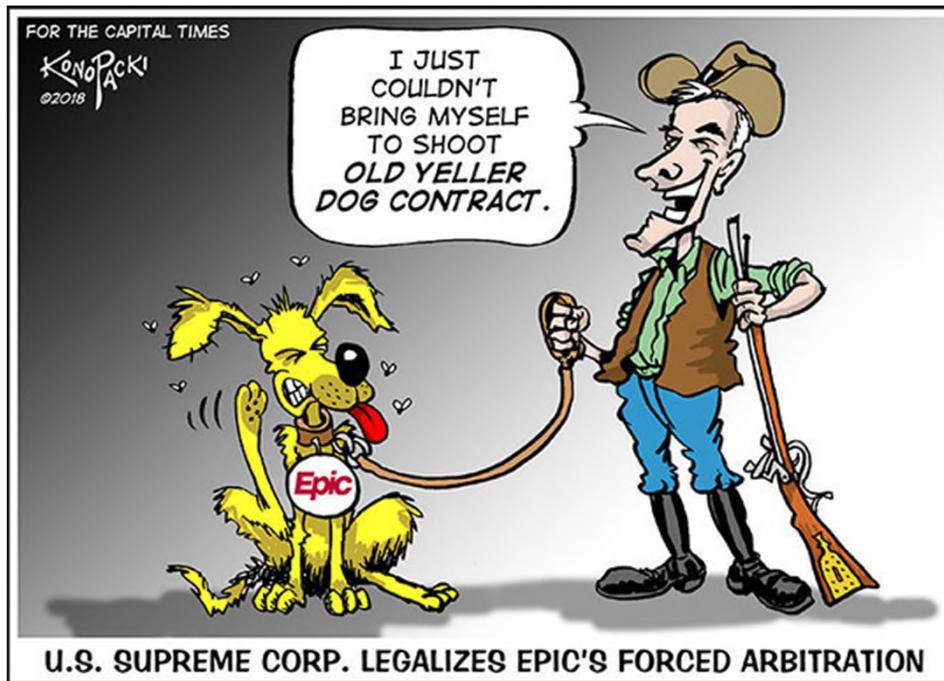


THE DISSENTING OPINION

- The dissenting opinion focused on the imbalance in power between individual workers and employers, as well as the dissenting justices' belief the NLRA's protections should be applied more broadly
 - “The employees in these cases complain that their employers have underpaid them . . . Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone . . . But by joining together with others similarly circumstanced, employees can gain effective redress for underpayment”
 - “Suits to enforce workplace rights collectively fit comfortably under the umbrella of ‘concerted activities for the purpose of . . . mutual aid or protection’”
 - Nothing in the FAA requires subordination of the NLRA's protections, and a review of the legislative history demonstrates Congress passed the FAA in response to concerns regarding business-to-business, commercial disputes between parties of equal bargaining power

THE DISSENTING OPINION (CONT.)

- The dissent compared mandatory class arbitration waivers to so-called “yellow-dog” contracts used by employers prior to the passage of the NLRA. These agreements required employees to agree not to join a union as a condition of employment.



WHAT IS NEXT?

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PRACTICAL CONSIDERATIONS FOR EMPLOYERS

- Generally speaking, all employers and employees are impacted by this decision
- Prior to the *Epic Systems Corp. v. Lewis* decision, employers—even in states covered by appeals courts which ruled to the contrary—could be subject to the cost and expense of defending an unfair labor practices charge if they utilized class action waivers
- Non-unionized employers which have already determined arbitration is appropriate should strongly consider adding class and collective action waivers
- Unionized employers should review their collective bargaining agreements and if appropriate make the issue of class or collective action waivers the subject of the next negotiation
- Employers should require both new and existing employees to sign class action waivers

SHOULD EMPLOYERS NOW REQUIRE ARBITRATION?

- If an employer does not currently require mandatory arbitration, then should it in light of the *Epic Systems Corp. v. Lewis* decision? Arbitration has its own unique costs, and whether the marginal utility of including a class action waiver changes an employer's calculus should be considered carefully.
 - An employer does not have to pay a judge, but an employer generally pays the arbitrator's fees, which can amount to many hours at hundreds of dollars per hour. It can be akin to adding a new lawyer to the case.
 - Multiple, individualized arbitrations can sometimes be more expensive than a class or collective action litigated in court
 - An arbitrator's decision is only in very rare circumstances subject to review and reversal, whereas an employer subject to an unfair final court ruling can almost always seek redress from a higher court
 - Employers win at a high rate in court

WHAT DOES A CLASS ACTION WAIVER LOOK LIKE?

- Each party waives the right to litigate in court or to arbitrate any claim or dispute as a class action, either as a member of a class or as a representative
- Employee agrees that Covered Claims will be arbitrated only on an individual basis, and that both Employee and Company waive the right to participate in or to receive money or any other relief from any class, collective, or representative proceedings. No party may bring a claim on behalf of other individuals, and any arbitrator hearing a Covered Claim may not: (i) combine more than one individual's claim or claims into a single case; (ii) participate in or facilitate notification of others of potential claims; or (iii) arbitrate any form of a class, collective, or representative proceeding. By signing this Agreement, the Parties waive any substantive or procedural rights they may have to bring an action on a class, collective, representative, or other similar basis against each other. Notwithstanding, if there is more than one Covered Claim between Employee and Company, then all such Covered Claims shall be heard in a single proceeding.

RELATED ISSUES

- Employers should be careful not to violate other protected rights by inclusion only of a broad arbitration agreement or class action waiver
 - For example, the agreement should specifically state that it does not prevent employees from filing unfair labor practices charges directly with the NLRB
- Employers should not to retaliate against employees who complain about having to sign class action waivers, as such complaints may themselves be protected concerted activity. But while the issue has not been resolved by a court or the NLRB yet, the termination of, or decision not to hire, an individual who refuses to sign a class action waiver as a condition of employment is most likely valid. It is also very unlikely to be challenged by the NLRB as it is presently comprised.
- Existing Employees: Is continued employment sufficient consideration for requiring them to sign a new arbitration agreement containing a waiver?

RELATED ISSUES (CONT.)

- Private Attorney General Act (PAGA)
 - California allows employees to sue their employers for violations of state labor and employment law in the capacity of a private attorney general
 - In 2014, the California Supreme Court held provisions requiring arbitration of representative claims brought under the PAGA statute were not enforceable. See *Iskanian v. CLS Transportation Los Angeles*.
 - The US Supreme Court declined review of the *Iskanian* decision. While the *Epic Systems* decision suggests the *Iskanian* ruling runs contrary to the FAA, until such time as the US Supreme Court considers the interplay between PAGA and the FAA, such claims may not be subject to arbitration.
 - Labor advocates may seek passage of similar laws in other states as a means to avoid the *Epic Systems*' decision.

THE ME TOO MOVEMENT

- On February 12, 2018, all 50 state attorneys general wrote a letter to Congress requesting legislation which would end mandatory, confidential mediation in the case of claims of sexual harassment

Source: [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf)

- Companies such as Uber, Lyft, and Microsoft have recently stopped requiring arbitration of these disputes after public pressure to do so

Source: <https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400>

- While generally the benefits of continuing to require arbitration, including a class action waiver, in this context likely still outweigh the cost, companies should consider whether the Me Too Movement changes the analysis. For example, it could possibly be seen by the public as an attempt to hide a widespread pattern of abuse.
- If such legislation passes, then companies should consider revising their arbitration agreements to exclude such claims to avoid invalidation on grounds such as illegality

QUESTIONS?



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THANK YOU

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