

# Employment Practices Liability

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## U.S. Supreme Court Holds Individual Arbitration Agreements are Valid Despite National Labor Relations Act's Protection of Concerted Activity

by **Cindy Cieslak, Partner; Rose Kallor, LLP**

On May 21, 2018, the U.S. Supreme Court held in *Epic Systems Corp. v. Lewis*, a 5-4 decision, that an agreement for individualized arbitration of legal claims stemming from an employment relationship does not violate Section 7 of the National Labor Relations Act (NLRA) which protects concerted employee activity.

**Issue:** The U.S. Supreme Court answered the following questions: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"

**Court's Analysis:** The Court held that "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."

In so holding, the Court was required to find a balance between the language of two federal statutes: the Arbitration Act, which instructs courts to enforce arbitration agreements as valid, irrevocable and enforceable according to their terms, and the NLRA, which protects employees' rights to bargain collectively and unionize, which historically has been held to broadly protect concerted employee activity.

In the consolidated cases before the courts, employers sought to enforce arbitration agreements when their employees attempted to bring class actions under the Fair Labor Standards Act (FLSA), which governs wages earned and hours worked. The employees argued that the NLRA protected their right to bring a class or collective action under the FLSA even when they had previously agreed to arbitration.

The NLRA does not expressly permit class or collective action lawsuits. Rather, the employees argued that the savings clause of the Arbitration Act permitted their collective claims despite their arbitration agreements. The savings clause of the Arbitration Act allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." The employees, therefore, argued an illegality defense to their arbitration agreements, i.e. that enforcing an arbitration agreement is illegal under Section 7 of the NLRA which protects their rights "to engage in other concerted activities for the purpose of collective bargaining and other mutual aid or protection."

The Supreme Court held that Section 7 of the NLRA "may permit unions to bargain to prohibit arbitration," but "it does not express approval or disapproval of arbitration" and "it does not mention class or collective action procedures." The NLRA expressly protects rights related to collective bargaining and unionization, therefore, the more general language of the statute upon which the employees relied serves to protect rights relating to free association in the workplace and cannot be read so broadly so as to protect rights protected by another statute, such as the FLSA. Indeed, the majority opinion stated that "when Congress wants to mandate particular dispute resolution procedures it knows exactly how

to do so," citing to provisions of the FLSA and Title VII of the Civil Rights Act concerning methods of resolving "actions," "claims," "charges," and "cases." Additionally, Congress has on other instances used clear, express language to override the Arbitration Act when it meant to do so. In this case, the NLRA neither expressly refers to class or collective action procedures nor renders arbitration agreements invalid.

Justice Gorsuch issued the majority opinion, in which Chief Justice Roberts and Justices Kennedy, Thomas and Alito joined. Justice Thomas issued a concurring opinion. Justice Ginsburg issued a dissenting opinion, in which Justices Breyer, Sotomayor and Kagan joined.

**Conclusion:** The Court's opinion suggests that if Congress intended otherwise, it can amend current legislation to further protect workers' rights and make clear that arbitration agreements cannot be enforced when employees bring class or collective actions for wage and hour issues. However, the Court emphasized that its role is to interpret current law, which the majority believes supports a finding that employers may continue to enforce arbitration agreements without violating the NLRA. Accordingly, some employers may find it useful to utilize such agreements with their employees in order to resolve claims in a less formal and less expensive setting, in lieu of proceeding in federal court in a class or collective action.

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Cindy Cieslak is a partner at Rose Kallor, LLP. Rose Kallor, LLP regularly represents and advises private and public sector employers on matters pertaining to the employer-employee relationship, including discrimination, harassment, and wage and hour issues. If you have questions about this legal update, please contact Rose Kallor, LLP at 860-361-7999. If you wish to receive future updates on labor and employment related topics, please contact Carolyn Field, CIRMA Communications Supervisor at [cfield@ccm-ct.org](mailto:cfield@ccm-ct.org).

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