

Client Alert: *Epic* Update

Less than a year after *Epic Systems Corp. v. Lewis* (No. 16-285, May 21, 2018) appeared to represent a nearly impenetrable shield for employers in seeking to quell employee class actions, especially in the wage & hour space, cracks in that shield have appeared from multiple fronts. As a result, many management-side employment lawyers are backing away from encouraging the implementation of mandatory arbitration provisions with class action waivers.

Epic Basics

In May 2018, the United States Supreme Court held in a 5-4 decision that class waivers in employment agreements were enforceable under the Federal Arbitration Act (“FAA”). The Court reasoned that not only did Congress require courts to respect and enforce such agreements to arbitrate, it specifically directed them to respect and enforce the parties’ chosen arbitration procedures. Since the FAA is a federal statute and strongly protects the enforcement of arbitration agreements, state laws attempting the prevention of the application of these agreements in the context of certain types of cases, like sexual harassment claims, have been largely viewed as ineffective because the FAA trumps such state statutes. This reality is part of what made the *Epic* decision seem impenetrable. State statutes trying to limit the application of *Epic* and the FAA only applied to employers who were not involved in interstate commerce and, these days, virtually all employers are involved in interstate commerce.

The Most Recent Challenge – *New Prime v. Oliveira*

In late January of 2019, the United States Supreme Court provided the most recent narrowing of the application of *Epic* through its decision in *New Prime v. Oliveira* (No. 17-40, Jan. 24, 2019). In *New Prime*, a driver for an interstate trucking company, who the company deemed to be an independent contractor, filed a class action lawsuit in federal court alleging that the company denied its drivers lawful wages. The driver, however, had signed a

mandatory arbitration provision that required all disputes, including those arising out of the parties’ relationships and an arbitrator’s authority, to be resolved via an arbitration proceeding. The Court cited the FAA §1 which states that “nothing herein” may be used to compel arbitration in disputes involving the “contracts of employment” of certain transportation workers. The language spurred two questions for the Court to consider, including: 1) When a contract delegates questions of arbitrability to an arbitrator, must a court leave disputes over §1’s exception for the arbitrator to resolve; and 2) Does the term “contracts of employment” refer only to contracts between employers and employees, or does it extend to relationships with independent contractors?

On the first issue regarding whether an arbitrator should be able to rule on all issues, including whether arbitration is the correct medium for resolving the dispute, the district court and First Circuit held that a court should first consider whether the parties’ contract falls under the FAA instead of automatically submitting the issue to an arbitrator. In reviewing, the Supreme Court looked at additional sections of the FAA. Section 2 provides that the FAA applies only when the parties’ agreement to arbitrate is in a written provision in any maritime transaction or a contract evidencing a transaction involving commerce. Section 1, however, narrows the rule in §2, stating that “nothing in the [FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

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As drivers are engaged in interstate commerce, the arbitration agreements between *New Prime* and its drivers falls beyond the boundaries of §1 and §2 and should not be submitted to arbitration presuming the drivers, independent contractors according to the terms of their contracts, had a “contract of employment” as defined by the carve-back language.

This leads to the second issue surrounding who “contracts of employment” cover. The lower courts considered whether §1’s exclusion covered employer-employee contracts as well as those involving independent contractors. Both parties stipulated that the drivers qualified as workers engaged in interstate commerce. Looking to the plain language of §1, which refers to “contracts of employment of...workers...engaged in...interstate commerce” the courts had to determine what types of employment relationships “contracts of employment” covered. Considering that the FAA was adopted in 1925 and, at the time, “contracts of employment” meant nothing more than an agreement to perform work, the courts held that both employer-employee and independent contractor relationships fell under the definition, meaning that §1’s exclusion applied and courts lacked authority to order arbitration in this case. Thus, it appears that not only are most employment disputes that involve transportation employees not subject to the FAA and the ruling in *Epic*, but further neither are independent contractor disputes if those independent contractors are transportation workers.

Challenge #2 – The #MeToo Movement

The second challenge to the effective implementation of mandatory arbitration clauses with class action waivers in employment agreements came from a moral challenge of sorts. The most high-profile example of this challenge was experienced by the technology industry where a large company used arbitration agreements to resolve prior, alleged sexual harassment incidents involving senior executives privately through arbitration. Recently,

years after these claims were resolved, and in the height of the #MeToo movement, employees of the company learned of the resolutions and protested so vehemently that the company initially agreed to withdraw the enforcement of arbitration agreements in the context of sexual harassment claims. Even more recently, they agreed not to enforce arbitration agreements in any employment dispute. As a result, many other large technology companies followed suit and agreed not to arbitrate sexual harassment claims, at a minimum. Similar movements have occurred in the legal community with, for instance, law schools refusing to allow law firms to recruit on campus if the firm requires attorneys to sign arbitration agreements. Both employee pressure and customer pressure are expected to have similar affects in other industries, further challenging the wisdom of implementing or enforcing such agreements.

Challenge #3 – Courts’ Unwillingness to Enforce Arbitration Agreement on Fairness Grounds

Some courts have refused to enforce arbitration agreements where there was evidence of a failure to properly advise employees about what they were agreeing to give up or where they failed to properly explain to the employees any ability to opt out of mandatory arbitration agreements. These decisions are still rare and are fact-specific, but the willingness of courts to require evidentiary hearings to resolve these factual questions in court before enforcing an arbitration agreement has risen since the advent of the *Epic* decision. This procedural hurdle prior to being able to enforce arbitration agreements further limits the efficiency of the agreements.

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Challenge #4 – Mass Arbitration

As promised by many plaintiff's firms at the time of the *Epic* decision, a number of plaintiffs' attorneys have responded to situations where mandatory arbitration agreements with class action waivers have been enforceable by filing mass arbitrations. These mass arbitrations are, in some ways, far worse and more expensive for employers than if they had been able to litigate cases via the customary class action mechanism. For instance, a number of wage and hour cases against restaurant chains and gig economy firms have resulted in the filing of hundreds, and sometimes thousands, of individual arbitrations against each of these companies. Since the employer is usually responsible for the cost of the arbitrator and filing fees, the costs of just those aspects of these disputes can add up to several million dollars.

Challenge #5 - PAGA

California Private Attorney General Act ("PAGA") claims are a form of collective actions in which one employee may sue his or her employer on behalf of the state of California and on behalf of any similarly aggrieved employees for alleged violations of any of the state's labor statutes. While the PAGA mechanism has been around since 2004, it was not until 2014 that the California Supreme Court ruled that the right to bring a PAGA action could not be waived by an arbitration agreement. More importantly, because employees only retain 25% of any PAGA award, this mechanism was not attractive to plaintiffs' attorneys until it became more certain that arbitration agreements with class action waivers were enforceable in the employment context. As a result of *Epic* and the *AT&T Mobility v. Conception* cases that made enforceability more certain, the number of PAGA cases has sky-rocketed as plaintiffs' attorneys more commonly face situations where class action claims are not an option. Ultimately, since PAGA limits the recovery of the plaintiffs, but allows for comparatively generous recoveries of contingent attorney's fees, the cases are more attractive to

counsel than they are to the aggrieved employees. Worse yet, PAGA does not require the initial step of certifying a purported class of employees, which is an initial, expensive procedural hurdle that would normally have to be passed by plaintiffs' counsel if a wage claim was brought as a purported class action. PAGA claims can theoretically be brought on behalf of one employee or thousands of employees, making these matters less costly for plaintiffs' counsel to bring.

In Summary

While many employers already have arbitration agreements with class action waivers in place and these agreements, in many instances, may be enforceable after *Epic*, there appears to be a growing list of reasons suggesting the lack of enforceability of such arbitration agreements. Therefore, employers are encouraged to work with their employment attorneys both internally and externally to continually reassess this issue on a case-by-case basis.

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