Insights, News & Events

EPIC RULING GETS 2 SEQUELS: COURT APPLIES NEW SCOTUS STANDARD TO WAGE AND MISCLASSIFICATION CLAIMS

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On the heels of the Supreme Court's decision earlier this year in *Epic Systems Corporation v. Lewis*, which held that the National Labor Relations Act (NLRA) does not bar class or collective action waivers in arbitration agreements, a federal court of appeals recently took up two corollary questions about whether federal wage claims and independent contractor misclassification claims are also subject to class waivers. The good news for employers: in both cases, the 6th Circuit Court of Appeals upheld the arbitration agreements and class waivers, demonstrating the power and scope of the Supreme Court's *Epic* ruling.

These decisions come as a sweet relief for employers. There was a fear that the victory in *Epic* could be diminished by an inability to avoid costly wage and hour or misclassification collective actions on a broad—and sometimes nationwide—scale. These decisions put that fear to bed, at least for those employers with operations in the 6th Circuit's jurisdiction (Ohio, Tennessee, Michigan, and Kentucky).

FIRST TASTE OF VICTORY: COURT REJECTS WAGE AND HOUR CLASS CLAIM

Jonathan Gaffers worked for Kelly Services, Inc. as a virtual call center representative. He claimed that his employer underpaid him and an entire class of fellow employees, alleging that they were shortchanged for time spent logging into the company network, logging out, and fixing any technical problems that arose. He brought suit under the federal Fair Labor Standards Act (FLSA) seeking back pay and liquidated damages on a collective basis.

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Kelly Services moved to compel arbitration, pointing to the fact that many of those whom Gaffers hoped to represent in his collective action had signed arbitration agreements mandating that individual arbitration actions were the only legal recourse they could seek. However, a lower federal court in Michigan denied the employer's motion to compel, and Kelly Services brought the issue before the 6th Circuit Court of Appeals. On August 15, the appeals court reversed the lower court and ruled in the employer's favor.

Gaffers tried to argue that the FLSA and the Federal Arbitration Act (FAA) were irreconcilable due to the FLSA's collective action provision, and therefore the arbitration agreement could not both be enforced due to the conflict with FLSA's language. The appeals court disagreed, holding that the FLSA and FAA would only be deemed irreconcilable if the FLSA "clearly and manifestly" made class waivers unenforceable, which, in the court's opinion, the FLSA did not do.

The court reasoned that the FLSA's collective action mechanism simply "gives employees the *option* to bring their claims together," but "does not require employees to vindicate their rights in a collective action." Accordingly, the court said, the FLSA did not "clearly and manifestly" state that an arbitration agreement must allow an employee to pursue a collective action in order to be valid, and thus the court could give effect to both the FLSA and the FAA.

Gaffers next argued that, because the FLSA gives employees a right to pursue a collective action, the arbitration agreements requiring employees to pursue individual arbitration were illegal under the FAA's savings clause, "which allows courts to refuse to enforce arbitration agreements upon such grounds as exist at law or inequity for the revocation of any contract." The court again disagreed.

As the Supreme Court explained in *Epic* in addressing similar arguments under the NLRA, the FAA's savings clause only covers arguments that would apply to contracts generally, and arguments specific to arbitration agreements or that "interfere with the fundamental attributes of arbitration" will not prevail.

Relying on *Epic*, the court reasoned that the plaintiff's argument that the arbitration agreements are illegal because they require individual proceedings and bar collective

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actions undermined one of the fundamental attributes of arbitration—its "historically individualized nature." Therefore, objecting to an arbitration agreement "precisely because it requires individualized arbitration proceedings" instead of collective actions attacks the fundamental nature of arbitration itself. Just as the Supreme Court held in *Epic*, the 6th Circuit ruled that the FAA's savings clause cannot be used to make such an argument.

DOUBLE THE PLEASURE: MISCLASSIFICATION CLASS ACTION ALSO TOSSED BY COURT

About a week later, the 6th Circuit issued another ruling along these same lines, extending the SCOTUS ruling to contractor misclassification cases. The court once again relied on the *Epic* decision to strike down a proposed class action lawsuit filed by a group of exotic dancers hoping to prevail on an argument that they should have been classified as employees and not independent contractors.

The August 23 decision in *McGrew v. VCG Holding Corp.* is brief (just two pages long) and to the point. It briefly recaps the underlying case: a group of exotic dancers who worked for PT's Showclub in Louisville, Kentucky, brought a misclassification case against the hiring entity alleging they should have been classified as employees. The club defended the case by pointing to the arbitration agreements signed by each dancer containing class waiver provisions, and the lower court dismissed the class action case and ordered the dancers to proceed with individual arbitration claims. The workers appealed the decision to the 6th Circuit, which held off on a final ruling on the matter until after the SCOTUS could weigh in on the much-anticipated *Epic* ruling. Once the Supreme Court OK'd the use of class waivers in May, the stage was set for the case conclusion.

The appeals court dropped the final hammer on the dancers' class action case in the August 23 ruling. "Because the holding of *Epic*...means that individual arbitration agreements are enforceable against both employees and independent contractors," it said, there is no reason to continue with the class litigation. The three-judge panel of the appeals court affirmed the lower court ruling and dismissed the class action case, just as it did with the *Gaffers* FLSA claim.

WHAT'S NEXT?

The Supreme Court's *Epic* decision begged the question of how courts would analyze the FLSA's collective action mechanism against the FAA, and the 6th Circuit's recent decisions are a welcome sight for employers. These cases appear to be the first federal appeals court rulings extending the reasoning in *Epic* to FLSA and misclassification cases, and they should make life easier for businesses operating in Ohio, Tennessee, Kentucky, and Michigan.

Of course, in order to capitalize on these rulings—and the *Epic* ruling itself—you need to have valid arbitration agreements in place with well-constructed class waiver provisions. If you haven't had an attorney review your existing agreements to ensure they comply with local law and provide the class waiver benefits of the *Epic* decision, you should do so immediately. And if you don't have such an agreement in place, now would be a good time to work with counsel to get one crafted.

Employers outside of the 6th Circuit should still remain cautious until this reasoning is extended further. As employees and the plaintiffs' bar increasingly make similar arguments in wage disputes and misclassification cases, other federal courts will no doubt weigh in, and some may apply *Epic* differently than the 6th Circuit. Work with your counsel to assess the risks and conduct a cost-benefit analysis to determine how you should proceed.

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