



# Epic Fail: Class Action Waivers Take A Hit

THREE THINGS YOU NEED TO KNOW ABOUT ARBITRATION AGREEMENT RULING

Insights

5.31.16

For the first time, a federal appeals court has dealt a serious blow to class and collective action waivers in arbitration agreements. In *Jacob Lewis v. Epic Systems Corporation*, the 7th Circuit Court of Appeals held that a mandatory arbitration agreement prohibiting employees from bringing claims against their employer on a class or collective basis violates the National Labor Relations Act (NLRA). While the decision itself only directly impacts employers in Illinois, Indiana, and Wisconsin, the court's reasoning could be adopted by other circuits, or perhaps by the U.S. Supreme Court, causing even more headaches for employers around the country.

## Popularity of Mandatory Arbitration Agreements with Class/Collective Action Waivers

Agreements requiring employees to submit claims against their employer to an arbitrator, instead of a judge, have become increasingly commonplace in today's workplaces. These agreements are a favored tactic of the modern employer, lowering the cost of litigation and introducing some much-welcomed efficiency to the resolution of workplace disputes. Due to a recent series of victories at the Supreme Court over the past five years heralding the "liberal federal policy favoring arbitration agreements," the use of mandatory arbitration agreements has become safer and less apt to be challenged in court.

But mandatory arbitration agreements in and of themselves do not protect employers from their biggest fear – a class or collective action. Consequently, rather than simply requiring employees to bring workplace claims through arbitration instead of court, employers have regularly incorporated into their agreements class and collective action waivers. Pursuant to these waivers, employees agree not to pursue claims against their employer on a class or collective basis.

The result of a mandatory arbitration agreement with a class/collective action waiver is that an employee's only avenue for redress is limited to single-plaintiff arbitration hearings.

## The *Epic Systems* Case

Wisconsin-based software developer Epic Systems required employees, as a condition of employment, to sign an arbitration agreement containing a class/collective action waiver. There was no reason for Epic Systems not to feel confident in doing so. After all, the 5th Circuit (covering Texas, Louisiana, and Mississippi) had expressly approved of such provisions in the 2013 *D.R. Horton* case. Numerous other federal and state courts had also signaled their acceptance of them.

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Unfortunately for Epic Systems, the trend towards enforcing mandatory arbitration agreements with class/collective action waivers did not stop former technical writer Jacob Lewis from suing the company in a federal district court in Wisconsin. In 2015, Lewis filed a collective action alleging that he and his fellow writers were improperly denied overtime pay in violation of federal law. Disregarding the wealth of authority validating mandatory arbitration agreements with class/collective action waivers, the district court denied Epic Systems' request to force Lewis to arbitrate the claim. Epic Systems appealed the decision to the 7th Circuit.

On May 26, 2016, the 7th Circuit upheld the district court's decision to deny Epic Systems' motion to compel, ruling that the class/collective action waiver in the mandatory arbitration agreement violated the NLRA and, therefore, was unenforceable. This marks the first time any federal appeals court has invalidated a class/collective action waiver under the theory that it violates the NLRA.

Here are three things you need to know about the decision.

### **1. This Is An Epic Decision (And Not In A Good Way)**

The 7th Circuit held that class and collective action waivers, like the one in Epic Systems' mandatory arbitration agreement, violate employees' rights under Section 7 of the NLRA. Section 7 protects employees' rights to engage in concerted activity for their mutual benefit and protection. The court admittedly went out on a limb by issuing a ruling that squarely conflicts with the rulings of other courts – namely the 5th Circuit. But that didn't stop the three-member panel.

The court opined that there is nothing quite so “concerted” as a piece of class action litigation, where employees band together to collectively assert a legal challenge to a workplace practice. The National Labor Relations Board (NLRB) has consistently taken this position since its decision in *D.R. Horton*. Under such reasoning, a ban on the ability to collectively join and bring a class dispute runs counter to employees' Section 7 rights.

As other employers have successfully done in various courts, Epic Systems argued that the Federal Arbitration Act (FAA) strongly favors the validity of arbitration agreements, allowing employers and employees to negotiate just about any private agreement regarding the resolution of workplace disputes. Indeed, Epic Systems pointed out, even the Supreme Court has long relied on the FAA as the means by which to uphold the validity of mandatory arbitration agreements in general.

The 7th Circuit ruled, however, that the FAA does not permit the enforcement of an arbitration agreement that is illegal. And because, according to the court, class/collective action waivers violate the tenets of the NLRA, they are considered illegal. Thus, the FAA does not mandate that the waivers be enforced in the 7th Circuit.

### **2. Don't Tear Up Your Arbitration Agreements Quite Yet**

The 7th Circuit's decision is certainly not good news for employers operating in Illinois, Indiana, or Wisconsin. However, it is not quite time for employers in those states to rewrite their arbitration

agreements. The 7th Circuit's decision is ripe for appeal to the Supreme Court, and there is a good chance the Supreme Court will entertain it given the clear split in circuit precedent.

To date, in addition to the 5th Circuit, the 2nd Circuit (covering Connecticut, New York, and Vermont), the 8th Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), the 9th Circuit (covering California, Oregon, Washington, Nevada, Arizona, Hawaii, Idaho, Montana, and Alaska), and the 11th Circuit (covering Georgia, Florida, and Alabama) have all upheld class/collective action waivers in similar contexts.

### **3. The Future Could Be Dangerous**

Of course, just because the Supreme Court may entertain an appeal by Epic Systems does not mean it will rule in its favor. With the untimely death of Justice Scalia, the high court sits deadlocked with four conservative justices and four liberal justices. Without a majority of conservative justices, the question of whether class and collective action waivers in mandatory arbitration agreements are enforceable is uncertain, at best.

If President Obama's current nominee Judge Merrick Garland is eventually confirmed as the Court's ninth justice, it could spell bad news for employers on this issue. Judge Garland has historically deferred to federal agencies in his lower court opinions, and such a center-left attitude suggests he is more willing to allow agencies like the NLRB to take positions chipping away at the pervasive power of arbitration agreements.

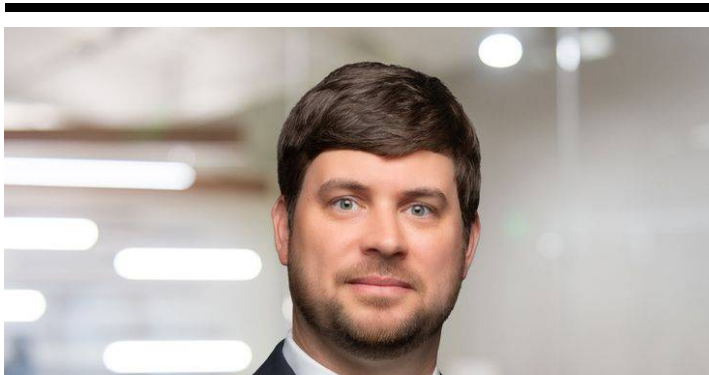
Although it is difficult to predict how any future justice would decide a specific case, no one should be surprised if a future-Justice Garland casts the fifth and deciding vote striking down the validity of class waiver provisions should this case wind its way up to the Supreme Court.

If you have any questions about this case, or how it may affect your business, please contact your Fisher Phillips attorney.

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*This Legal Alert provides an overview of a specific 7th Circuit decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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