



# Class Action Waivers Get Much-Needed Lyft

THREE THINGS YOU SHOULD KNOW ABOUT LATEST COURT DECISION

Insights

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A federal court recently upheld the validity of an employer's class action waiver, forcing a disgruntled worker into arbitrating his case individually instead of using the court system to launch a large-scale class action. Typically, this kind of decision would not be particularly significant; after all, many businesses employ class waivers, and the overwhelming number of federal courts examining them have approved their use. But this case is noteworthy for two reasons: it was the first time a federal court published an opinion on class waivers since the 7th Circuit became the first court to reject them, and the decision boosts the burgeoning gig economy (*Bekele v. Lyft, Inc.*).

## Background: Class Waivers Are Popular

Agreements requiring employees to submit workplace claims 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 a worker's only avenue for redress is limited to single-plaintiff arbitration hearings.

## Recent "Epic Failure" Concerned Employers

Despite the overwhelming acceptance of class waivers, a federal appeals court dealt a serious blow to these agreements in the case of *Lewis v. Epic Systems Corp.* On May 26, 2016, the 7th Circuit Court of Appeals held that class waivers violate Section 7 of the National Labor Relations Act (NLRA) because, as the court concluded, they interfere with workers' rights to engage in concerted activity (in this case, class action litigation) for their mutual benefit and protection.

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, but no federal appeals courts followed the NLRB’s lead until the 7th Circuit went out on a limb with its May 2016 decision.

While the decision itself only directly impacted employers in Illinois, Indiana, and Wisconsin, there was concern that 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. Employers waited with bated breath to see whether the *Epic Systems* case was merely an outlier, or the first of a series of dominoes falling against them.

### **Massachusetts Federal Court Gives Employers A Lyft**

The case itself is fairly simple. Plaintiff Yilkal Bekele has worked as a Lyft driver since 2014, and in 2015 he filed a class action lawsuit in Massachusetts federal court against the ride-sharing company. He alleged that its “misclassification” of drivers as independent contractors led to an inappropriate requirement that drivers pay for their own vehicles, maintenance, gas, and insurance.

Lyft’s defense was also very simple. Before even getting to the main issue of whether Bekele and the other drivers were classified properly, the ride-sharing company said that court was an inappropriate forum for the case because Bekele agreed to a binding arbitration agreement, and that class action was similarly inappropriate as a legal tactic because Bekele also agreed to a class waiver.

Before agreeing to drive for the company, Bekele clicked “I accept” to a Terms of Service arbitration agreement that clearly said:

You and we agree that any claim, action, or proceeding arising out of or related to the Agreement must be brought in your individual capacity, and not as a plaintiff or class member in any purported class, collective, or representative proceeding. The arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative, collective, or class proceeding. YOU ACKNOWLEDGE AND AGREE THAT YOU AND LYFT ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS ACTION OR REPRESENTATIVE PROCEEDING.

Bekele argued that this restriction should not apply to him because he didn’t remember reading it, because the terms were too small to be read on his smartphone, and because the agreement was unconscionable. The court rejected each of these arguments applying state law principles. Bekele also argued, citing the recent *Epic Systems* decision out of the 7th Circuit, that the class waiver should be barred under the NLRA. The court also rejected this position for the reasons described below.

Here are three things you need to know about the *Lyft* decision

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

### **1. The Decision Completely Rebukes The *Epic* Failure**

The court could not have been more critical of the 7th Circuit's decision in *Epic Systems*. It first noted the near-unanimity of courts that rejected the NLRA illegality argument, pointing out that the 7th Circuit (covering Illinois, Indiana, and Wisconsin) stood alone against all other federal circuit court decisions.

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

The Massachusetts court concluded that the class action waiver was valid and enforceable because, it said, bringing a class action lawsuit was not a substantive right protected by NLRA Section 7's "concerted activities" provision. Instead, the ability to bring class action litigation was a procedural vehicle by which an employee could seek to enforce a substantive right. Therefore, denying an employee the chance to bring a class action lawsuit was not blocking him from engaging in NLRA-protected concerted activities.

### **2. Employers Not Out Of The Woods Yet**

This decision is certainly a positive development, but it needs to be put into context. It was issued by a federal district court judge, and will almost certainly be appealed to the 1st Circuit Court of Appeals. In other words, the decision itself only impacts employers in Massachusetts, and does not even yet extend to the other states in the same federal circuit (Maine, New Hampshire, and Rhode Island).

For now, although the 7th Circuit stands alone in contradicting the other circuit courts, there is a split in authority across the country. Until another 7th Circuit panel overturns the *Epic Systems* decision, or until the Supreme Court resolves the split in favor of upholding the class waivers, there will still be uncertainty for a portion of the nation's employers.

### **3. Gig Employers Can Feel Good About Decision**

Finally, it is worth noting that this important decision directly involves an employer in the burgeoning gig economy. Sometimes known as the "sharing economy" or the "app economy," the gig economy includes businesses that harness a large number of contingent workers using a digital platform (usually a consumer's smartphone). Most people are familiar with car-sharing services like Lyft or Uber, but the gig economy is far bigger than just those two companies, including some 800,000 workers.

These companies are often fragile in their infancy, and rely on cost-saving techniques like arbitration agreements and class waivers to avoid getting entangled in expensive and distracting court battles. This recent decision, specifically involving one of the two foremost gig companies in the country, should give confidence to gig employers using class waivers. If you are in this boat, you would do

well to specifically examine the method and manner in which Lyft implemented the class waiver, taking into account state and local legal requirements, and mimic its same policies.

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 federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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