

# Employers Triumph ? Arbitration Class and Collective Action Waivers Are Enforceable ? But What Should Employers Do'

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**PRACTICES** Labor and Employment, Litigation, Employment Litigation, Wage and Hour Litigation, Class Action Defense

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In a landmark victory for employers, the Supreme Court of the United States held that agreements requiring employees to arbitrate claims on an individual basis are enforceable.

The case, *Epic Systems Corp. v. Lewis*,<sup>1</sup> consolidated three different cases on appeal from the Fifth Circuit, Seventh Circuit and Ninth Circuit.<sup>2</sup> In each of those cases, employees challenged the validity of an arbitration agreement that provided employees were required to arbitrate disputes but could not do so on a class or collective basis. Justice Neil Gorsuch, writing for the majority, boiled down the dispute to two simple 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?

The Court, recognizing that these questions are debatable as a matter of policy, held that the answer was clear as a matter of law.<sup>3</sup> First, the Court reaffirmed that principle that the Federal Arbitration Act (FAA)<sup>4</sup> instructs courts to enforce arbitration agreements according to their terms, including those terms providing for individualized arbitration proceedings. Second, the Court held that the National Labor Relations Act (NLRA) does not create a right to class actions in the courtroom or arbitral forum. As such, the Court held that neither the FAA nor NLRA permits the Court to declare agreements to arbitrate one-on-one as illegal.

## The Federal Arbitration Act

In holding that the FAA required the Court to enforce agreements to arbitrate individually, the Court acknowledged that the FAA directs courts to “enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.”

The Court then examined the saving clause of the FAA. The saving clause 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 argued that the NLRA renders class and collective action waivers illegal and, therefore, their illegality was a “ground” that “exists at law” to revoke an arbitration agreement. The Court rejected this argument. Temporarily setting aside the NLRA issue, the Court held that saving clause’s use of the language “any contract” means that it only applies to generally applicable contract defenses—like fraud, duress or unconscionability—not defenses specific to

arbitration contracts. The Court held that the FAA saving clause did not apply to a contract just because it requires bilateral arbitration.

## The National Labor Relations Act

After holding that the FAA normally requires courts to enforce class and collective action waivers, the Court then turned to the issue of whether the NLRA overrides the FAA. The employees argued that Section 7 of the NLRA, which protects “concerted activities” of employees, encompasses class and collective actions. The Court rejected this argument.

First, examining the language of the NLRA and its regulatory scheme, the Court held that Section 7 does not speak to class or collective actions, despite heavily addressing collective bargaining and labor organization practices.

Second, because the underlying lawsuits arose under the Fair Labor Standards Act (FLSA), the Court would be required to interpret the NLRA as dictating the FLSA’s procedures and then overriding the FAA. The Court refuses to do so: “It’s a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.”

Third, citing examples, the Court decided that its own precedent rejects the notion that Congress intended to displace the FAA with another statute. The Court held that under its own case law, Section 7 applies to efforts by employees to organize and collectively bargain in the workplace—not the treatment of class or collective actions in court or arbitration proceedings.

Finally, the Court refused to apply *Chevron* deference to the National Labor Relations Board (NLRB) because the NLRB sought to interpret not only the NLRA, but also the FAA, which is outside the purview of the NLRB. Also, the Court held “*Chevron* leaves the stage” because there is not an unresolved ambiguity in the statutes after employing traditional tools of statutory construction.

## The Dissenting Opinion and Response

The dissent, authored by Justice Ruth Bader Ginsburg, accused the majority of harking back to the *Lochner* era<sup>5</sup> and the days of the Court readily enforcing “yellow dog” contracts that prevented union organizing. The dissent would hold that the text, legislative history, purposes and longstanding construction of the NLRA suggest that Congress “likely meant to protect employees’ joining together to engage in collective litigation.” The dissent also rejects the notion that anything in the FAA or the Court’s case law requires subordination of the NLRA to the FAA. Rather, even assuming that the FAA and NLRA were in conflict, the dissent would hold that the NLRA controls.

Taking the dissent head-on, the majority refused to engage in a discussion of policy, and instead sought to interpret the FAA and NLRA in a way “that gives effect to all of Congress’s work, not just the parts we might prefer.” Addressing the accusation that the Court was returning to the *Lochner* era, the Court stated: “This Court is not free to substitute its preferred economic policies for those chosen by the people’s representatives. *That*, we had always understood, was *Lochner*’s sin.”

## Advice for Employers

The Supreme Court’s decision clears the way for class and collective action waivers. The decision should lead any employer that does not already utilize mandatory arbitration agreements with these waivers to consider whether implementing these agreements makes sense for its business. From a

pure cost standpoint, for many employers, and certainly most large employers, the ability to prevent higher dollar class and collective actions has a lot of appeal. We have seen many cases in which, even if the underlying claims are not strong, the class or collective action procedure is used as a vehicle to increase costs and try to force settlement.

On the flip side, companies need to consider what impact requiring arbitration agreements with class and collective action waivers could have on employee morale. The anger in Justice Ginsburg's dissent is echoed by many employee-side commentators who decry the decision as undermining employee rights. Similarly, many on the employee rights' side argue that arbitration itself disfavors employees. These conclusions overlook the laudable attributes of arbitration proceedings and the frequent reality that, it is plaintiffs' attorneys, and not employees, who reap the most benefit from class and collective procedures. Still, the view that arbitration and class and collective action waivers disfavor employees is genuinely held by many.

No matter what, in light of the decision, all employers should consider whether mandatory arbitration agreements with class and collective action waivers make sense for their workforce.

This alert has also been published in ABA's [Business Law Today](#).

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<sup>1</sup> *Epic Systems Corp. v. Lewis*, 584 U.S. \_\_\_\_ (2018).

<sup>2</sup> *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *Murphy Oil U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

<sup>3</sup> "You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the [Federal Arbitration] Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application."

<sup>4</sup> 9 U.S.C. § 2.

<sup>5</sup> In *Lochner v. New York*, the Court held that "freedom of contract" made a state law limiting employee work time unconstitutional. 198 U.S. 45 (1905). The so-called *Lochner* era came to an end when the Court upheld a state minimum wage law in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).