NEMETH BONNETTE BROUWER PC
EMPLOYMENT LAW FOR EMPLOYERS

SUPREME COURT DECISION GIVES EMPLOYERS AN 'EPIC' WIN: EMPLOYMENT AGREEMENTS BARRING CLASS ACTION LAWSUITS AND REQUIRING INDIVIDUAL CLAIMS ARBITRATION ARE ENFORCEABLE UNDER FEDERAL ARBITRATION ACT

EPIC SYSTEMS CORP. V. LEWIS OVERTURNS 6TH CIRCUIT PRECEDENT
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PROFESSIONALS

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In a 5-4 decision announced yesterday, the Supreme Court held in *Epic Systems Corp. v. Lewis* that agreements prohibiting class action lawsuits and requiring employees to arbitrate their claims individually do not violate the National Labor Relations Act (NLRA) and are enforceable under the Federal Arbitration Act. The decision overturned Sixth Circuit precedent and is a major victory for employers in Michigan and nationwide, according to Patricia Nemeth, founding partner of Detroit-based management-side labor and employment law firm Nemeth Law.

"I can't avoid the play on words here: employers have been given an 'Epic' win with this decision," Nemeth said. "They can now feel confident that the arbitration agreements they entered into with their employees are enforceable, even if such agreements require individualized arbitrations and bar class actions."

The decision, in *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S. Supreme Ct. May 21, 2018), was issued in connection with three consolidated cases. In one, an employee had filed a class action in federal court alleging failure to pay overtime under the Fair Labor Standards Act, even though he had signed an agreement calling for individual arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." The arbitration agreements in the other cases similarly barred class actions. In defending their class action suits, the employees argued that the right to participate in class actions is protected by Section 7 of the NLRA. The employees further argued that, because the class action waivers were unlawful under the NLRA, the FAA also precluded their enforcement, because the FAA expressly permits courts to refuse enforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."

The majority held, however, that Section 7 of NLRA does not guarantee employees a right to pursue class action litigation, but instead protects the rights of employees to organize into unions, bargain collectively through their chosen representatives, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

According to the Supreme Court, Section 7 thus protects organizing, bargaining and related rights (such as picketing and striking), but not the right to engage in class or collective forms of litigation. The Court noted that such forms of litigation did not exist (except in rare circumstances) when the NLRA was adopted in 1935, and so it was "doubtful that Congress would have tucked into the mousehole of Section 7's catchall term [*i.e.,* "other concerted activities"], an elephant that tramples the work done by other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the [NLRB] as the supreme superintendent of claims arising under a statute it doesn't even administer [*i.e.,* the FLSA]."

While federal court often defer to a federal agency's interpretation of a statute administered by that agency, the Court here refused to give deference to National Labor Relations Board's interpretation of Section 7, observing that that the Board's interpretation would affect not only the NLRA, but also the FAA - which is outside the Board's jurisdiction. Further, the Court stated that deference should be given only where the use of traditional statutory construction rules leaves "an unresolved ambiguity." The Court found no such ambiguity here. In so doing, the Court continued its decades-long approval of arbitration as an appropriate forum for resolving employment and other disputes.

Deborah Brouwer, a partner at Nemeth Law, explained that while most employment discrimination claims are raised by a single employee claiming that she was specifically targeted because of a protected status, class or collective action claims are more frequent in wage cases, such as suits under the Fair Labor Standards Act seeking overtime pay.

"In those cases, a single employee's lost pay may not be large enough to interest an attorney in filing the case, but if brought as a class action, attorney fees can be significant," Brouwer said. "Where employers have arbitration agreements barring class actions, such suits would be subject to immediate dismissal. As the Supreme Court stated in *Epic,* however, governmental agencies such as the Department of Labor are still available to assist employees."

According to Brouwer, more than 60 million non-union employees in the U.S. are already subject to arbitration agreements, and about a third of those contain provisions barring class action claims.

"I can only expect that more employers will begin requiring that applicants and employees agree to arbitration agreements containing such a ban," Brouwer said. "This could definitely change the employment litigation landscape, as more disputes are resolved in arbitration and fewer in court."

About Nemeth Law, P.C.

Established in 1992, Nemeth Law specializes in workplace investigations, employment litigation, traditional labor law, management consultation/training for private and public sector employers, and arbitration and mediation. It is the largest woman-owned law firm in Michigan to exclusively represent management in the prevention, resolution and litigation of labor and employment disputes.