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Supreme Court Approval of Class-Action Waivers Will Benefit Oil Field Employers and Other Industries

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(May 24) – May a company ask its employees to enter into agreements to arbitrate disputes and that also waive an employee's ability to bring a class or collective action on behalf of other present or former employees? On May 21, 2018, the United States Supreme Court said yes: Arbitration agreements between employees and employers containing class and collective action waivers are enforceable.

This important decision in *Epic Systems Corp. v. Lewis* puts to rest one of the most publicized and debated legal issues affecting employees and employers this decade.

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Now that the Court has spoken, what does this mean for employers? To begin with, non union employers that have not already done so are free to request applicants and employees to enter into agreements requiring individual arbitration of employment disputes. The question for these employers is whether arbitration agreements with class-action waivers is an appropriate and desirable employment practice for their business.

The answer will be "yes" for many companies, and "no" for others. Arbitration is not a panacea to risk of employment litigation. Arbitration has costs and disadvantages that in some contexts are not worth incurring.

Many companies have operated for years with few or no employment claims of significance. Other companies may have workforces made up largely of professionals or other classifications of employees that are less vulnerable to wage-hour claims, and there are companies whose workforce composition and diversity programs render class-action discrimination lawsuits unlikely or especially defensible in court. The point being that the opportunity to benefit from class and collective action waivers may be negligible for some employers.

That is an assessment for law departments and human resources departments to undertake for their company.

For many employers, especially those with large workforces that are vulnerable to unfair compensation claims, arbitration agreements can be very useful. The oil field is a compelling example.

That industry in Texas and elsewhere has been beset by collective action wage hour lawsuits. In view of Epic Systems, employers in the oil patch and many other industries would be remiss not to consider the pros and cons of arbitration agreements in the context of their business and industry.

Epic Systems also presents an opportunity for employers that already have arbitration agreements in place to review and possibly revise their agreements with the Court's strong endorsement of employment arbitration in mind. Take for example practices at many companies that give employees a window to opt out of arbitration programs unilaterally promulgated by the company.

Opt-out provisions have been a good practice to bolster enforceability of arbitration agreements with employees, but the value of opt-out provisions and other terms that limit the utility of arbitration programs may have declined in importance in view of Epic Systems.

Finally, Epic Systems will not be well received among many members of Congress and their constituencies. A legislative effort to undo this decision and bar class and collective action waivers is foreseeable, but by no means imminent. As one highly visible figure in Washington, D.C., is prone to say, "Time will tell."

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