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Should I Have My Employees Sign Arbitration Agreements?

By Greg Currey

On Monday, May 21, 2018, the Supreme Court ruled in *Epic Systems Corp. v. Lewis*, No. 16-285, that arbitration provisions containing class and collective action waivers in employment agreements are enforceable. This opinion resolved a circuit split which began in 2012 when the National Labor Relations Board (the "NLRB") ruled that the National Labor Relations Act's (the "NLRA") protections of employees' rights to engage in concerted protected activity rendered class action waivers in arbitration agreements unenforceable. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277.

The claims addressed by the Supreme Court in *Epic Systems* were wage and hour class and collective actions. Following this decision, it is unclear whether a class or collective action waiver would be enforceable for other types of employee claims such as harassment or discrimination claims.

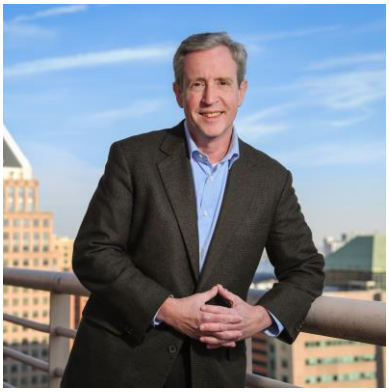
It is clear, however, that employee arbitration agreements have no bearing on any state or federal agency's ability to pursue an investigation or seek remedies on behalf of individual or a class of employees.

Following the Supreme Court's opinion in *Epic Systems*, employers should revisit (1) whether they wish to include mandatory arbitration in their employment agreements and (2) the language in their employment agreements to ensure that it includes a class or collective action waiver. A couple words of caution - for many employers, the benefits of a class or collective action waiver may be outweighed by negative aspects of arbitration, including the fact that decisions are not required to follow the law and cannot be appealed. Moreover, most, if not all, arbitration providers have "employer-pays" rules so that, if employees do file for arbitration, the employer has to bear the cost of any administrative and arbitrator fees.

For questions about the *Epic Systems* decision, whether your employment practices should include mandatory arbitration, and the correct way to impose arbitration, please contact Gregory Currey.

Maryland Adopts New (And Under-Publicized) Sexual Harassment Law

By Paul Evelius



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Last week, Governor Hogan signed the "Disclosing Sexual Harassment In The Workplace Act of 2018." The Act will take effect on October 1, 2018 and contains two main sections, one restricting all employers' attempts to limit an employee's remedies for sexual harassment and related retaliation and the other requiring employers of 50 or more employees to submit reports regarding settlements of sexual harassment claims.

Section 1 voids any contract or policy provision by which an employee purports to prospectively waive any right or remedy for sexual harassment or related retaliation. It also forbids an employer from penalizing an employee who refuses to provide such a waiver and renders an employer liable for any attorney's fees and costs that an employee incurs in resisting attempts to enforce such a waiver. Importantly, section 1 effectively outlaws any agreement requiring an employee to arbitrate (rather than litigate in court) any future-arising claims of sexual harassment or related retaliation.

Section 2, which is drafted somewhat imprecisely, provides that each employer of 50-plus employees must, on or before July 1, 2020, and again on or before July 1, 2022, submit to the Maryland Commission on Civil Rights ("MCCR") a "survey" which reports (i) the number of sexual-harassment-related settlements into which it has entered, (ii) the number of times, during the previous 10 years, that it has paid a settlement to resolve a sexual-harassment claim lodged "against the same employee," and (iii) the number of times that it has settled a sexual-harassment claim through an agreement containing a mutual-confidentiality provision. Section 2 also requires that MCCR include in the survey a space for an employer to report whether it a "took personnel action against an employee who was the subject of a settlement included in the survey." It further obligates MCCR to retain for public inspection the number of settlements which a specific employer has reported in the survey.

Employers should act promptly to bring their employment policies into compliance with section 1 of the Act. They likewise need to begin collecting and retaining the data necessary to fulfill the Act's reporting requirements.
