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Daily Q&A with Chris Thrutchley: SCOTUS makes employment arbitration agreements Epic

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Q: Why is the Epic Systems Corp. v. Lewis case significant?

A: The number of class- and collective-action employment claims continues to rise. According to the Society for Human Resource Management, the value of wage and hour settlements more than tripled over the last several years. By far, class and collective actions can be some of the costliest employment cases to defend. But in the in Epic Systems Corp. v. Lewis ruling, the Supreme Court of the United States gave employers the opportunity to eliminate risk of massive employment-related class- or collective-action liability through well-drafted arbitration agreements.

Q: Why would employers want to go the arbitration route?

A: Simple. Save lots of time and money. Because of the sharp rise in costly class- and collective-action claims, employers are including class- and collective-action waivers in their arbitration agreements. Arbitration has the potential to provide a much cheaper, more efficient, confidential, and less formal alternative to litigation in court. The Epic decision reinforces these benefits and provides the additional benefit of eliminating the extremely costly risk of having to defend employment claims on a massive class- or collective-action basis.

Q: How are employers using arbitration agreements?

A: More and more employers are requiring applicants and employees to enter into arbitration agreements as a condition of being considered for employment and as a condition of being

employed. The waivers require applicants or employees to resolve all employment-related claims exclusively through arbitration and solely on an individual basis and not as a representative or member of a class or collective action. The Epic ruling affirmed a decades-long trend favoring the enforceability of arbitration agreements. After Epic, employers may require applicants and employees not only to submit all employment-related disputes to binding arbitration — thus ensuring no employment claim will ever end up in front of a jury — but also to waive the right to bring costly class and collective actions.

Q: What are traps to be wary of when adding waivers?

A: Consider addressing the arbitrability of "gateway" issues, such as the existence, validity and scope of your arbitration agreement. Don't include arbitration agreements in your employee handbook or they could be unenforceable. Clearly address the parties who are subject to arbitration (including not only the organization but also its owners, managers and possibly others). Don't strip employees of remedies available under law. Don't require the employee to cover all of the costs of arbitration if the employee can't afford it. Make sure the arbitration procedures are clear. Make arbitration mutual. After Epic, include an express class- and collective-action waiver. Verify in writing that each applicant and employee has read and understood the mandatory arbitration agreement and obtain each applicant and employee's signature on the agreement.

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