Mandatory Arbitration After *Epic*:
A Quick Guide For Employers

By Ashlyn Smith and Ellen Adams

For employers, mandatory arbitration has emerged as a leading method to avoid the costs and risks associated with traditional litigation.[1] After *Epic Systems Corp. v. Lewis*, that popularity will only grow. [2]The Supreme Court in *Epic* sought to address an apparent conflict between the Federal Arbitration Act ("FAA") and the National Labor Relations Act ("NLRA").[3] The case arose in part after a former employee filed a class action lawsuit against his former employer alleging, among other things, violations of the Fair Labor Standards Act.[4] The employee and employer were parties to an arbitration agreement, under which claims of individual employees could not be consolidated.[5] The employer moved to compel arbitration pursuant to the agreement.[6]

The employee argued the effect of the NLRA was to invalidate the agreement, whereas the employer argued the agreement was enforceable under the FAA.[7] The stage was thus set. The FAA provides, in relevant part, that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] The NLRA provides, in relevant part, that "[e]mployees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[9] The question, as the Court put it, was this: "[s]hould employers and employees be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"[10]

Writing for the majority, Justice Gorsuch answered that question in the affirmative.[11] He explained, among other things, that neither the NLRA's "catchall" term nor the FAA's "saving clause" empowered the employee to bring the instant suit.[12] Justice Gorsuch declined, as he put it, "to read into the NLRA a novel right to class action procedures."[13] He also discredited what he described as "efforts to conjure conflicts between the Arbitration Act and other federal statutes."[14] In other words, as between the FAA and the NLRA, there was simply no conflict of which to speak.[15] An agreement to one-on-one arbitration is, therefore, generally valid and enforceable.[16] Enter the new and improved "class action waiver."

The *Epic* decision is a win for employers. That much was recognized by Justice Ginsburg, who authored

1 *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (April 6, 2018), available at https://files.epi.org/pdf/144131.pdf.

2 *See generally* 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018).

3 Id. at 619.

4 *Morris v. Ernst & Young LLP*, No. CV C-12-04964 RMW, 2013 WL 3460052, at *1 (N.D. Cal. July 9, 2013), *rev'd and vacated*, 834 F.3d 975 (9th Cir. 2016), *rev'd sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 200 L. Ed. 2d 889 (2018), *and vacated*, 894 F.3d 1093 (9th Cir. 2018), *and aff'd*, 894 F.3d 1093 (9th Cir. 2018). The Court in *Epic* consolidated *Morris* with two other cases, Lewis v. *Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). See *Epic Systems Corp.*, 138 S. Ct. at 1619–20.

5 *Morris*, 2013 WL 3460052, at *1.

6 *Id.*

7 *Id.* at *3.

8 9 U.S.C. § 2.

9 29 U.S.C. § 157.

10 *Epic Systems Corp.*, 138 S. Ct. at 1619.

11 *Id.*

12 *Id.* at 1622–28.

13 *Id.* at 1630.

14 *Id.* at 627.

15 *Id.*

16 *Id.* at 1632.

a dissenting opinion.[17] Commentators have reached the same conclusion.[18] It should come as no surprise, therefore, that employers are seizing the opportunity to include class action waivers in their arbitration agreements.[19] Of course, class action waivers are just one reason why employers may choose to include such agreements as a condition of employment. Arbitration is generally quicker and cheaper than trial.[20] Unlike a jury, an arbitrator is in the profession of resolving disputes. This often results in better, more even-keeled adjudication of the facts.[21] Moreover, arbitrators' decisions, unlike most court orders, need not be published for public consumption.[22]

These benefits are partly rooted in the history of the FAA. Before 1925, courts routinely declined to compel arbitration.[23] Ever crowded dockets, however, delayed the judicial resolution of disputes.[24] This prompted the business community to secure a more expeditious, economical means of resolving their disputes.[25] The FAA was thus born.[26] Nevertheless, even into the 1990's, few employers opted for arbitration agreements as a condition of employment.[27] Since then, the Supreme Court has consistently upheld arbitration agreements in the employment context and elsewhere.[28] This has fueled a slow but steady trend towards employer-mandated arbitration agreements.[29] Class action waivers are, indeed, only the most recent employer-friendly development in this area of the law.

On the other hand, arbitration has its downsides. For example, some have expressed concern that arbitrators are more likely to "split the baby" than deliver the tough, "right" decision.[30] Moreover, the finality resulting from an arbitrator's decision, though generally desirable for budgeting purposes, offers little protection from bad decisions by "rogue" arbitrators.[31] In the employment context specifically, concern may arise about the enforceability of mandatory arbitration where an employee is at will.[32] The good news is that these issues are largely mitigated through careful drafting of the underlying arbitration agreement. For example, parties can agree to select their arbitrator(s) from a

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17 *See id.* at 1644 (Ginsburg, J., dissenting) ("Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act.").

18 *See, e.g., Erwin Chemerinsky, Chemerinsky: Arbitration Agreements Ruling Is A Significant Loss For Workers* (June 4, 2018) (describing *Epic* as "pro-business"), available at https://www.abajournal.com/news/article/the_enforceability_of_arbitration_agreements/.

19 *See* Carlton Fields, *2019 Class Action Survey,* available at https://classactionsurvey.com/wp-content/uploads/2019/04/2019_Class_Action_Survey.pdf.

20 *See* Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L.Rev. 1 (2019).

21 *See* Barbara L. Johnson et al., *Arbitrating Employment Disputes: Avoiding 10 Mistakes In Preparing And Implementing A Pre-Dispute Arbitration Program*, SK013 ALI-ABA 829 (2004).

22 *See California Commerce Club, Inc.*, 369 NLRB No. 106 (June 19, 2020) (holding an employer lawfully included confidentiality language in an arbitration agreement its employees were required to sign as a condition of employment).

23 *Epic Systems Corp.*, 138 S. Ct. at 1642 (Ginsburg, J., dissenting).

24 *Id.* (Ginsburg, J., dissenting).

25 *Id.* (Ginsburg, J., dissenting).

26 *Id.* at 1643 (Ginsburg, J., dissenting).

27 *Id.* at 1644 (Ginsburg, J., dissenting).

28 *Id.* (Ginsburg, J., dissenting).

29 *Id.* (Ginsburg, J., dissenting).

30 *See* Barbara L. Johnson et al., *Arbitrating Employment Disputes: Avoiding 10 Mistakes In Preparing And Implementing A Pre-Dispute Arbitration Program*, SK013 ALI-ABA 829 (2004).

31 *e* Caroline Simson, Canadian Co. Can't Nix 'Rogue' Arbitrator's $1.8M Award, Law360 (October 24, 2019), available at https://www.law360.com/articles/1213085/canadian-co-can-t-nix-rogue-arbitrator-s-1-8m-award.

32 Courts have held, for example, that unilaterally including mandatory arbitration in an employee handbook is insufficient to bind the employee. *See, e.g., Lee v. Red Lobster Inns of Am., Inc.,* No. 02-5188, 2004 WL 187564 (6th Cir. Jan. 27, 2004).

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specific pool of reputable, time-tested professionals.[33] In certain cases, parties can agree to reserve the right to an appeal of the arbitrator's decision if such a right is so desired. [34] An arbitration agreement can also be drafted to bind an at will employee if the agreement clearly expresses that the employee's continued employment is conditioned on the employee's agreement to arbitrate.[35]

These mitigation strategies highlight the importance of a well-drafted arbitration agreement. A poorly drafted agreement, by contrast, does little good for employers. That much is shown by the litany of cases which, notwithstanding the FAA, have allowed arbitrable employee claims to proceed towards judicial resolution for one reason or another.[36] At times, these cases have turned on the most fundamental principles of contract law.[37] At other times, they have turned on more nuanced rules applicable only to arbitration agreements in the employment context.[38] Suffice it to say, if compelling arbitration is the goal, keeping up with the rules is key. That was true before *Epic*, and it remains true now. If *Epic* is any indication, failing to keep up with the rules will, at the very least, prevent employers from maximizing the benefits of mandatory arbitration.

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33 *See* Ryan Boyle & Susan D. Lewin, *ADR Does Not Mean Splitting The Baby,* Corp. Counsel Bus. J. (March, 2019), available here: https://go.adr.org/rs/294-SFS-516/images/AAA%202019%200304%20Boyle%20Lewin.pdf.

34 *See, e.g., Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1364, 190 P.3d 586, 606 (2008) (under California's arbitration act, "parties may limit the arbitrator's authority by providing for review of the merits in the arbitration agreement").

35 *See, e.g., Jones v. Tenet Health Network, Inc.*, No. Civ. A. 96-3107, 1997 WL 180384, at *3 (E.D. La. Apr. 7, 1997) (signing "Acknowledgment Form" referencing agreement to arbitrate as a condition of continued employment sufficient to bind employee).

36 *See, e.g., Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994) (a trade-secrets claim is not arbitrable under a contract providing for arbitration of disputes "arising out of this Agreement" where such arbitration provision did not also include "relating to" language).

37 *See id.*

38 *See, e.g., Prime Healthcare*, 368 N.L.R.B. No. 10 (2019) (arbitration agreement unlawfully restricted employee's access to NLRB).

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Ellen Adams is a shareholder in the Oklahoma City office of GableGotwals. Her practice primarily consists of defending corporate and individual clients in a wide variety of complex business litigation in state and federal courts, with an emphasis on employment law. In addition to her litigation practice, Ellen counsels and advises clients on developing policies, procedures, and training; responding to complaints; handling investigations; and other employment matters.

Ellen is often requested to speak on topics of concern in the areas of employment law and general civil litigation. Her recent speaking engagements include topics such as ADA compliance, sexual harassment, and medical marijuana in the workplace. Ellen has also presented at the EEOC TAP's Conference on GINA (Genetic Information Nondiscrimination Act), Oklahoma Human Resources Conference and Expo, and the Equal Employment Opportunity Commission's Oklahoma City Technical Assistance Seminar. In addition to participating in a variety of professional organizations, Ellen has also been involved in several community organizations over the years, including the Down Syndrome Association of Central Oklahoma (DSACO).

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