Class Action Waivers To Become Unlawful Under Proposed Law

By Chris S. Thrutchley and Ashlyn M. Smith
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The U.S. House of Representatives recently introduced and is expected to pass the Protecting the Right to Organize Act of 2021 (the "PRO Act"), which would then proceed to the U.S. Senate for further consideration. The PRO Act has been described by some as "a historic proposal that restores fairness to the economy" and, by others, "a union boss wish list." Political persuasion aside, the PRO Act is clearly chock-full of new employee protections that employers should be aware of in the event the PRO Act becomes law. One of those protections has to do with class action waivers, which are commonly found in employer-employee arbitration agreements. In short, the PRO Act would make them unlawful.

The PRO Act would accomplish this by amending the National Labor Relations Act ("NLRA") to expressly override portions of the Federal Arbitration Act ("FAA"), the latter of which the U.S. Supreme Court relied on in its landmark 2018 decision *Epic Systems Corp. v. Lewis*. The *Epic* case was a win for employers and ushered in the era of what we previously described as "the new and improved class action waiver." The PRO Act, it appears, attempts to overrule the *Epic* decision.

The pertinent language of the PRO Act is straightforward in this regard:

> Notwithstanding . . . the 'Federal Arbitration Act' . . . or any other provision of law, it shall be an unfair labor practice . . . for any employer—
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> (1) to enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of ***joint, class, or collective claim*** arising from or relating to the employment of such employee ***in any forum*** that, but for such agreement, is of competent jurisdiction;

(Emphasis added). The PRO Act would also make it unlawful to, among other things, retaliate against an employee for not signing a class action waiver. Although the exact effect of this language will not be known until such point as it works its way through the courts, on its face, the PRO Act looks like a death-blow to class action waivers.

Bottom line: if the PRO Act becomes law, employers should expect unfair labor practice charges to be filed in response to the enforcement of class/collective action waivers.

GableGotwals is experienced in helping employers comply with labor and employment laws, auditing and updating arbitration agreements, policies, and procedures, training managers and supervisors, and providing real-time guidance to decision-makers to help minimize risk of costly claims. Our team of attorneys also defend employers in labor and employment disputes before all federal and state courts and agencies, and in arbitration proceedings. We are available to help you navigate state and federal employment laws and regulations. Please contact any GableGotwals Labor & Employment attorney for assistance.

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