

# Legal Update

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## SUPREME COURT RULING MAKES ARBITRATION CLAUSES IN EMPLOYMENT AGREEMENTS MORE ATTRACTIVE

By Paul M. King

In *Epic Systems Corp. v. Lewis*, the United States Supreme Court held that employment agreements may require employees to resolve employment disputes in separate arbitration proceedings, rather than as a group through a class action in court. The case involved employees who filed a class action lawsuit against their employer despite having signed agreements providing that each employee had to arbitrate any dispute with the employer individually in a separate arbitration. The employees argued that the agreements were invalid because they prevented class arbitration, which, they asserted, is an activity protected by the National Labor Relations Act. The Court disagreed.

### **What does this mean for employers?**

The Supreme Court's decision gives employers greater certainty about using arbitration clauses in the employment context and makes it easier for employers to head off employees' class actions. Arbitration clauses can decrease the cost of employment-related disputes by requiring those disputes to be privately arbitrated rather than brought in court. Arbitration can also be more confidential than the court system. The Supreme Court's ruling strengthens employers' rights to enforce arbitration agreements, reducing the prospect of large group lawsuits. This can further increase cost savings because a single employee's claim may be small enough that the employee deems it not worth pursuing. Arbitration clauses, however, are effective only if they are enforceable. The Supreme Court acknowledged in *Epic* that standard contract defenses such as unconscionability and duress can still invalidate an arbitration clause.

### **What should employers do?**

The following are a few tips for preparing an enforceable arbitration clause:

- Place the arbitration clause in the employment agreement, rather than as a separate agreement or in an employee handbook;
- Have the arbitration clause in easily readable font and in a conspicuous place in the employment agreement;
- Allow the employee ample time to read the relevant contract (and therefore the clause);
- Document that the employee had read and agreed to the clause;
- Use appropriate language to clearly define what type of disputes must be arbitrated;
- Specify which rules will govern the arbitration (e.g. American Arbitration Association's Employment Arbitration Rules) and provide the employee with those rules;
- Make sure that there is a process for selecting a neutral arbitrator; and
- Do not place a majority of the financial burden for the arbitration on the employee (e.g. one sided attorney's fees or require the employee to pay all the arbitration costs).

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While the Court's decision is good news for employers, the Court only ruled on federal law. State law can still invalidate an arbitration clause. Every state has developed its own unique contract law that can invalidate arbitration clauses. For example, some states may require additional consideration to the employee for signing. This may be especially true if the employee is already employed when he or she signs it. Some states may also require the employer to pay for the cost of arbitration and some states may invalidate an arbitration clause if it places too many limitations on the remedies available to the employee.

State and federal employment law are not the only considerations when drafting an arbitration agreement. Employers may miss some intended benefits because of a poorly drafted arbitration clause. For example, a settlement in an employment arbitration may or may not be deductible for tax purposes depending on the terms of the arbitration clause.

### **Conclusion**

There is much to consider when drafting an arbitration clause for employees. It is a complicated and ever evolving area. Employers should consult legal counsel to discuss their specific situations and applicable state law, and should also regularly audit their standard employment agreements to ensure compliance with all legal requirements.

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