

Arbitration and Class Action Waivers in Employment Contracts

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Background

- Federal Arbitration Act of 1925 (“FAA”) passed to address hostility to private arbitration
- “A liberal federal policy favoring arbitration agreement”
- Arbitration agreements are “valid, irrevocable, and enforceable”
- FAA “savings clause” invalidates arbitration agreements when the contract itself is not valid
- A contract can be invalid for a number of reasons including:
 - It was obtained by fraud
 - It was obtained by coercion
 - It waives a legally protected right (e.g. work for less than minimum wage)

*Can you waive the right to bring a
class action lawsuit over wages?*

History

Class Action Waivers in Warranty and Service Contracts *ATT v. Conception (2011)*

- NY State law prohibited as “unconscionable” class action waivers in certain contracts
- Plaintiffs argued that NY law made the waiver illegal and therefore under the savings clause, the arbitration provisions were not enforceable
- U.S. Supreme Court sided with ATT, holding that Federal Arbitration Act preempts state laws that prohibit contracts from disallowing class-wide arbitration

Epic v. Lewis

- Multiple cases consolidated into one
- Junior accountant signs employment agreement with a clause saying that he agrees to arbitrate claims “that could otherwise be decided by a court”
- Plaintiff leaves his job and brings a class action against his employer for misclassifying junior accountants as salaried employees
- National Labor Relations Act (NLRA) prohibits employers from barring employees from engaging in “concerted activity.”

Epic v. Lewis

- Employer sought to enforce the arbitration agreement, which required the employee to individually arbitrate all disputes with the employer, which effectively barred an employee bringing or joining a class action against the employer
- Employee argued that a class action lawsuit in court on behalf of himself and his coworkers was protected "*concerted activity*," therefore, the arbitration agreement was unenforceable under the FAA's savings clause

Class Action Waiver Held Enforceable in Employment Claims in Epic Case U.S. Supreme Court Decision May, 2018

Judge Gorsuch, writing for the majority, reasoned:

- FAA was passed before the FLSA and the NLRA
- FLSA and the NLRA say nothing about waivers of collective action and certainly do not prohibit waivers on the part of employees
- As in *Conception*, savings clause of the FAA does not apply to specific statutes, but instead only applies to provisions that would make ANY contract illegal such as fraud or duress

Dissent by Judge Ginsburg

- All laws must be read in context of situation
- NLRA protects certain rights – “collective rights”
- Direct conflict – so savings clause applies
- Intent of the law was not to preempt sensible and fair claims through class actions
 - Arbitration essentially prohibits relief for small injuries
 - Even failure to pay required wages

*Is Mandatory Arbitration of All
Employee Claims Right for You?*

Increasing Use of Arbitration Agreements

- 56% of non-union private–sector employees are subject to mandatory individual arbitration procedures (about 60 million workers in the U.S.)
- 80% of Fortune 100 require mandatory arbitration (almost half contain class action waivers)
- Some reversal of the trend following #metoo; e.g., Google and Facebook no longer require arbitration of sexual harassment claims

Class Action

Pros

- Make smaller claims more economically justified by combining with other claims
- Companies held accountable for many small offenses
- Form of private, non-government regulation
- Settlements can guarantee total peace to defendants

Cons

- Individual plaintiffs and class members see little relief
- Lawyers are the ones who see most benefit
- Fear of litigation can stifle innovation
- Plaintiff's lawyers can be tempted to sell you non-participating class members

Perceived Benefits of Arbitration

- The parties can choose deadlines, pace, and rules of the litigation, especially discovery
- Pleadings, evidence, and results can be kept confidential
- The parties choose the identity and number of arbitrators
- Often reach resolution faster and cheaper (but not always)
- Employer may be able to limit forms of relief
- Lessens the burdens on publically funded court system

Perceived Disadvantages of Arbitration

- Depending upon arbitration decisions on process, can end up costing just as much as litigating in court
- “Precedent” is weak and the outcome predictability is less certain
- You have to pay the arbitrators
- Arbitrators may be able to exercise fairly broad discretion on process
- Appeal rights significantly limited
- Still expect a fight around a motion to compel arbitration

How Do I Decide?

- Conflict history
- Types of conflicts
- Cost history
- Outcome history
- Internal capabilities
- Are you insured for the most common claims
 - Size of deductible
- What is the competition doing
- What will be the reaction of the work force
 - Do you cover everyone?