

Arbitration Agreements in Employment Contracts After the “Epic” Decision

Should You Require a Mandatory Arbitration Clause?

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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”
- FAA “savings clause” invalidates arbitration agreements when the contract itself is not valid
- A contract can be invalid because
 - It was obtained by fraud
 - It was obtained by coercion
 - It is illegal

Question

If a contract seeks to waive a legally protected right, does that make it illegal?

Question

If it is illegal, does that make the arbitration clause invalid?

Answer

Yes (Ordinarily)

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 only ones who benefit
- Fear of litigation can stifle innovation
- Plaintiff's lawyers can be tempted to sell you non-participating class members

History

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

- 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 held that savings clause did not apply to specific state laws affecting arbitration

Epic Systems 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
- NLRA prohibits employers from barring employees from engaging in “concerted activity.”

Epic Systems v. Lewis

- Employer sought to enforce the arbitration agreement that prohibited class actions
- Employee argued NLRA's "concerted activity" language made the arbitration agreement illegal and therefore unenforceable under the savings clause

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

Justice 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 Justice 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 illegal failure to pay required wages

Question

**Are Mandatory Arbitration Waivers of
Class Actions and Other Types of
Claims Before a Court Right for You?**

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

Issues in Arbitration Clauses

- When to implement
- What claims are covered
 - Discrimination – any exemptions
 - Retaliation
 - Class actions
- Mandatory mediation
- Who pays for what
- How are arbitrators chosen
- Procedures in the arbitration
 - Discovery
 - Witnesses
 - Decisions
 - Relief

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

How Does Mandatory Arbitration Work for ERISA Claims?

ERISA Claims – Generally

- Claim for benefits [§ 502(a)(1)(B)]
- Claim for breach of fiduciary duty [§ 502(a)(2)]
- Claim for equitable relief [§ 502(a)(3)]

FAA and ERISA

- Most courts agree that agreements to arbitrate ERISA claims are enforceable BUT tension exists:
 - DOL Regulations limit mandatory arbitration for group health plans and plans providing for disability benefits
 - Munro v. Univ. of S. California, 896 F.3d 1088 (9th Cir. 2018)
 - A breach of fiduciary duty claim under Section 409(a) of ERISA is outside the scope of an arbitration clause in an employment contract requiring parties to arbitrate claims an employee may have against her employer

Disadvantages and Limits of Arbitration of ERISA Claims

- Advantages are largely the same as perceived benefits of arbitration in general employment litigation
 - E.g. parties control flow of the case, confidentiality, cost, etc.
- Disadvantages somewhat unique to type of claim:
 - Claim for benefits [§ 502(a)(1)(B)]
 - Benefits are similar to perceived benefits of arbitration in general employment litigation
 - DOL Regulations limit cost sharing
 - Potential loss of Firestone deference
 - Potential for expanded discovery
 - Inadvertent class creation
 - Claim for breach of fiduciary duty [§ 502(a)(2)]
 - Potential struggle to enforce provision
 - Limited chance for reversal of erroneous decision

Q&A

Thank You



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