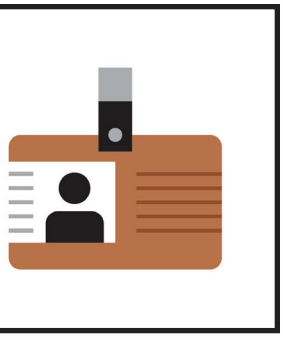
PHILLIPS LYTLE LLP ALERT
FOR BNHRA MEMBERS
LABOR & EMPLOYMENT
JUNE 2018



Employers' Use of Class Action Waivers in Arbitration Agreements Upheld

What Happened?

In a recently issued decision, *Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018), the United States Supreme Court held that employers may continue to include class and collective action waivers in mandatory arbitration agreements signed by their employees.

Previously, in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), the National Labor Relations Board ("Board") found that mandatory arbitration agreements that included waivers of class or collective actions unlawfully restricted employees' rights under Section 7 of the National Labor Relations Act ("NLRA"). Following the Board's decision, a split among the courts of appeals emerged. While the Second, Fifth and Eighth Circuits rejected the Board's reasoning in *D.R. Horton*, the Seventh and Ninth Circuits sided with the Board.

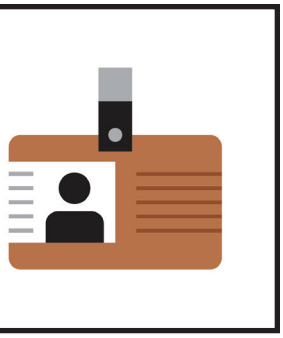
In resolving this spilt, the Supreme Court agreed with the Second, Fifth and Eighth Circuits, finding that the NLRA does not prohibit the use of class and collective action waivers in such arbitration agreements. Initially, the Court noted that the Federal Arbitration Act ("FAA") established "a liberal federal policy favoring arbitration agreements[,]" including agreements "providing for individualized proceedings." The Court held that there was no "clear and manifest" congressional intent that the NLRA should displace the FAA. The Court further held that there was no conflict between the NLRA and the FAA, as Section 7 of the NLRA does not cover "the treatment of class or collective action procedures in court or arbitration."

What Should Employers Do Now?

For employers that currently have mandatory arbitration programs, they may continue to utilize, or contemplate including, class and collective action waivers.

For employers without mandatory arbitration programs, they should consider whether to start requiring employees to participate in arbitration programs. While arbitration generally provides a number of benefits (e.g., private forum, reduced costs, and streamlined and predictable process), employers should carefully weigh a number of factors when making this decision, including, but not limited to:

- **Procedural Advantages/Disadvantages**
  Arbitration generally provides for relaxed evidentiary standards and limited rights to appeal. In addition, the arbitration process eliminates the risk of emotion-fueled, runaway juries and gives employers the ability to select an arbitrator with expertise. That said, the arbitration process generally limits discovery (e.g., depositions and requests for documents) and often provides for no dispositive motion practice. Moreover, some arbitrators tend to "split the baby" in an effort to appease both parties.
- **Using Alternative Dispute Organizations**
  Employers must consider which alternative dispute resolution organization, if any, to use in assisting with the arbitration process. Examples of such organizations include the American Arbitration Association ("AAA") and the Federal Mediation and Conciliation Service ("FMCS"). Organizations like the AAA are more expensive and provide formal procedures, whereas the FMCS merely offers a panel of arbitrators to choose from.



- **State and Local Governments**
  A number of state and local governments have been passing legislation in an effort to restrict the use of mandatory arbitration agreements by employers. For example, as previously noted in our most recent Labor & Employment Client Alert, effective July 11, 2018, New York State law will prohibit agreements that require binding arbitration of claims based on sexual harassment. Given the Supreme Court's decision in *Epic Systems* and the "liberal federal policy favoring arbitration agreements[,]" the effect of this provision may be limited as a matter of federal preemption of state law. That said, employers with arbitration programs should keep an eye on such legislative efforts to ensure their agreements comply with all applicable law.

- **Employee Morale and Public Relations**
  Requiring current employees to sign mandatory arbitration agreements may negatively affect employee morale. Employers should also be cognizant of the potential for public backlash, including social media campaigns by workers' rights organizations.

Additional Assistance

Should you have any questions regarding mandatory arbitration agreements or any other labor and employment matters, please contact any of the attorneys on our Labor & Employment Practice Team. ■

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Labor & Employment Attorneys

Partners:

James D. Donathen (716) 847-5476 jdonathen@phillipslytle.com
James R. Grasso (716) 847-5422; (212) 508-0475 jgrasso@phillipslytle.com
Linda T. Prestegaard (212) 508-0425; (585) 238-2029 lprestegaard@phillipslytle.com
Kevin J. Mulvehill (585) 238-2095 kmulvehill@phillipslytle.com
Jennifer A. Beckage (716) 847-7093; (212) 759-4888 ext. 7093 jbeckage@phillipslytle.com
Amanda L. Lowe (716) 504-5747 alowe@phillipslytle.com
Rana Jazayerli (202) 617-2711 rjazayerli@phillipslytle.com

Special Counsel:

Marc H. Goldberg (518) 618-1229 mgoldberg@phillipslytle.com

Senior Associates:

Joanna J. Chen (716) 847-5433 jchen@phillipslytle.com

Associates:

Alissa M. Fortuna Brennan (585) 238-2048 abrennan@phillipslytle.com
Jeffrey D. Coren (716) 847-7024 jcoren@phillipslytle.com
Luke B. Kalamas (585) 238-2035 lkalamas@phillipslytle.com

Phillips Lytle LLP

Albany Omni Plaza 30 South Pearl Street Albany, NY 12207-3425 (518) 472-1224
Buffalo One Canalside 125 Main Street Buffalo, NY 14203-2887 (716) 847-8400
Chautauqua 201 West Third Street Suite 205 Jamestown, NY 14701-4907 (716) 664-3906
Garden City 1205 Franklin Avenue Plaza Suite 390 Garden City, NY 11530-1629 (516) 742-5201
New York City 340 Madison Ave 17th Floor New York, NY 10173-1922 (212) 759-4888
Rochester 28 East Main Street Suite 1400 Rochester, NY 14614-1935 (585) 238-2000
Washington, DC 800 17th Street NW Suite 450 Washington, DC 20006-3962 (202) 617-2700
Canada The Communitech Hub 151 Charles Street West Suite 100 The Tannery Kitchener, Ontario N2G 1H6 Canada (519) 570-4800