Decision Leaves Fate of Employee Class Actions to Congress and the Court of Public Opinion

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By **Jeffrey Campolongo and Alisha L. McCarthy** | May 25, 2018

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assault claims to be determined through private arbitration proceedings going forward. Instead, Uber will defend all such claims going forward in the forum of the plaintiff's choice—including in open court, if that is where the plaintiff opts to file.

Then, on May 21, the U.S. Supreme Court issued a decision that can be viewed as a boon for all companies seeking to hold their employees to individual (i.e., private) arbitration agreements that include class or collective action waivers. In a 5-4 decision, with Justice Neil Gorsuch writing for the majority, the court ruled that employee arbitration agreements must be enforced according to their terms—including to the extent that such agreements require one-on-one arbitration, as opposed to collective arbitrations or class action suits, see *Epic Systems v. Lewis*, — S.Ct. –, No. 16-285 (May 21, 2018).

Uber's May 10 announcement was met with mixed feedback. Some applauded it as an important measure at a time when the use of nondisclosure agreements—a common component of settlements in sexual harassment cases—is a topic of hot debate. (See, e.g., "Would the Stormy Daniels NDA Be Enforceable Under Pennsylvania Law?" (https://bit.ly/2s6iRyl) published April 2, 2018, in The Legal Intelligencer.) The move was seen by many as an effort to level the playing field for sexual harassment and assault victims. In a statement announcing the decision, Uber emphasized that its new mantra is, "We do the right thing, period. Accomplishing that requires three key elements: transparency, integrity and accountability."

Critics, however, said that the company did not go nearly far enough in protecting workers, because the change left Uber's policy relating to class and collective actions undisturbed. At least for now, Uber's employees and customers remain bound by their waivers of such actions in cases of all types, including those brought under the rubric of sexual harassment or assault. Class actions are seen as an important legal

mechanism for enforcing the rights of plaintiffs whose claims, standing alone, may be significant to those individual plaintiffs, but which have a monetary value that cannot justify the often-high cost of one-on-one litigation.

The issue of enforcing collective action waivers then came into sharper focus just a few days ago when the Supreme Court decided *Epic Systems v. Lewis*. In *Epic Systems*, the court held that the Federal Arbitration Act (FAA) binds employees to arbitration clauses in their employment agreements, including where such clauses would preclude those employees from joining in or filing putative class or collective action lawsuits. Gorsuch, writing for the majority, reasoned that the FAA requires "courts to respect and enforce agreements to arbitrate" and "also specifically directs courts to respect and enforce the parties' chosen arbitration procedures."

The court rejected the employees' argument that individual arbitration clauses are illegal under the National Labor Relations Act (NLRA), which grants workers the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." After analyzing the language of both statutes, the court determined that the FAA's broad mandate—favoring the enforcement of agreements to arbitrate—is not superceded by the "concerted activities" right granted to workers under the NLRA. The majority concluded that employee arbitration agreements with class action waivers "must be enforced as written." This is a blow to workers who do not have the resources to bring individual lawsuits against their employers.

Justice Ruth Bader Ginsburg, in an emphatic dissent joined by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan, called the majority's decision "egregiously wrong" and an "elevation of the FAA over workers' rights to act in concert." She asserted that "Congressional correction" of that result "is urgently in order." In the view of the dissenters, "suits to enforce workplace rights collectively fit comfortably under the umbrella of 'concerted activities for the purpose of … mutual aid or protection'" established by the NLRA. Ginsburg further argued that "nothing in the FAA or this court's case law … requires subordination of the NLRA's protections."

While the precise application of *Epic Systems* by state and lower federal courts remains to be seen, the decision leaves little wiggle room for employees who have signed valid, binding arbitration agreements, and who are contemplating lawsuits against their employers through collective arbitrations or class actions. Depending on the language of the relevant employment agreement, an employee may be bound to pursue all manner of claims against his employer—including wage and hour, discrimination, assault and personal injury—through an individualized arbitration proceeding focused only on that employee's claims.

As a practical matter, few cases based on assault or discrimination claims can be brought as collective actions in any event. For any case to proceed as a class action, federal and state laws require that there be issues of fact and law common to all members of the proposed class. Harassment and assault claims are, as a general matter, inherently fact-specific and distinctive in nature, and thus are not well-suited for collective and class action proceedings.

Companies nevertheless may find themselves torn between what they are legally authorized to do after *Epic Systems*, and what their customers will tolerate. Lawyers have rightly predicted that *Epic Systems* could prompt companies to revisit (and fortify) the arbitration provisions in their employment agreements. Class actions can be particularly expensive and burdensome for corporate defendants, and many employers may find it in their interests to avoid class actions, even if it comes at a cost to their workers.

On the other hand, there is a business risk associated with undertaking employment practices that could be deemed unjust by today's consumers, who in recent years have shown that they are willing to speak with their wallets. Company boycotts and social media campaigns have been effective in prompting companies to take action to make changes in response to widespread demand. (See, e.g., Starbucks). Uber's policy change evidently was part of its response to widespread criticism in recent

months, arising in part from public accusations of discrimination and misogyny woven into the fabric of the company—which in turn prompted outrage from users of the app.

There will always be some inherent tension between the respective rights of employers and employees, and whether Congress will intervene in that tension following *Epic Systems* remains to be seen. However, as a business matter—if not a legal one—companies evaluating their policies will likely be mindful that they may be asked to account for those policies not only in the court systems, but also in the increasingly vocal court of public opinion. Even as legal cases mend their way through the painfully slow court system, companies must find ways to meet the demands of the court of public opinion. Nothing speaks louder than the power of the pocketbook.

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