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#MeToo – Not Anymore: How the Supreme Court's Decision in Epic Systems Corp. v. Lewis Keeps Employment Disputes Individualized and Out of the Public Sphere

The Supreme Court soundly rejected the argument that an employee has a right to bring a class action lawsuit in federal court where the employee had previously agreed in an employment contract to individualized arbitration. In Epic Systems Corp. v. Lewis, Justice Gorsuch authored the 5-4 majority opinion finding that the National Labor Relations Act ("NLRA") was not violated by an individualized arbitration clause in an employment contract. The main issue in Epic Systems was whether the right to class action litigation was encompassed within the NLRA, which generally protects collective-bargaining activities and concerted action by employees, and consequently whether the NLRA would render the employee's contract agreeing to individualized arbitration void. The Supreme Court held that the NLRA did not provide a right to class action litigation for employees and therefore, enforcement of the employment contract requiring arbitration did not violate the NLRA. As a result, the Supreme Court concluded that the United States Arbitration Act ("Arbitration Act") mandated enforcement of the arbitration clause and required the employee to participate individually in arbitration to resolve the wage and hour dispute. Justice Ginsburg issued a biting dissent from the majority opinion.

Why does this matter? At the heart of this dispute is a power struggle between the employer and the employee. An employee has more power, and thus negotiating leverage, as part of a class action and is able to affect change for more employees if class actions are permitted. Moreover, a single employee is financially constrained and may not be able to afford to litigate a dispute against a large employer without assistance from other class members. On the other hand, the employer has more power in individualized arbitration, where the employer can limit the dispute to one employee in a streamlined arbitration process. Moreover, arbitration proceedings are not public and an employer can avoid public accountability by handling employment disputes outside of the courthouse.

The decision in Epic Systems upheld an employer's right to enforce an individualized arbitration provision against an employee and this has the direct effect of preventing the employee from engaging with other employees in concerted activity for their mutual aid and protection. Moreover, the employer can do so by hushing the proceedings away in private arbitration where other employees who are similarly situated are prohibited from participating as members of the public. In effect, this insulates employers from concerted action of their employees and public disclosure of any questionable business practices. It also has the effect of potentially chilling employees from bringing lawsuits because a single employee likely cannot alone afford the cost of litigation.

In the current climate, this type of private, individualized dispute resolution flies in the face of surging public movements, in particular, the #MeToo movement. There is power in numbers. The #MeToo movement is a recent phenomenon due in large part to the sheer number of individuals that have come together in a concerted way to decry unlawful and harassing behavior of powerful employers. If the participants of the #MeToo movement were not permitted to band together or given a public forum, the movement would have likely died on the vine.

What does this mean moving forward? Employers are going to add individualized arbitration clauses in a myriad of contracts with the employees including offer letters, employment agreements, and promotional paperwork. Employees must be vigilant and understand that employment contracts are significant and require close attention and attorney review. Arbitration clauses, like any other contract provision, are

negotiable. Employees should exercise their rights and negotiate these clauses like they would negotiate salary and benefits.

In addition, arbitration proceedings should be treated like court proceedings. Simply because a dispute is moved to arbitration does not mean legal counsel and legal strategy are any less important. If multiple employees are affected by the same unlawful policy, this could be evidential of a pattern or practice and admissible as evidence. Even though the named employee cannot represent a class, the employee can use the testimony of similarly situated individuals to prove the underlying claim.

Finally, while arbitration is generally private, an employee should not give up rights to speak publicly about the proceeding or the outcome. The procedures for arbitration can be negotiated by the parties and are not automatically confidential. While the proceeding itself is not open to the public, it can certainly be reported to the public through the use of traditional media or the expanding social media network so long as there is not a confidentiality provision governing the arbitration.

Employment counseling and contract negotiation are crucial moving forward after Epic Systems. Do not be fooled into complacency and know that arbitration clauses are powerful vehicles to quell employment disputes and will be enforced by the courts.

If you have any questions about these issues, please contact:

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Hyland Levin LLP is a multi-practice firm established in 2009. Practice areas include business law, real estate, litigation and succession planning, trusts and estates.

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