SUPREME COURT DELIVERS "EPIC" VICTORY FOR EMPLOYERS

On May 21, 2018, the United States Supreme Court finally resolved an issue that had split lower federal and state courts over the last several years. In *Epic Systems Corporation v. Lewis*, Supreme Court of the United States, Nos. 16-285, 16-300, 16-307 (May 21, 2018), the Court ruled that class-action waivers in arbitration agreements with employees covered by the National Labor Relations Act are enforceable. This means that employees may be barred from joining together to litigate claims related to pay and working conditions and instead may be required to resolve such disputes through individual arbitration.

The National Labor Relations Board had previously ruled, in *D.R. Horton*, 357 NLRB No. 184 (2012), that class-action waivers in arbitration agreements are not enforceable against employees because they limit employees' rights under the NLRA to engage in "concerted activities" in pursuit of their "mutual aid or protection." Many federal courts, including the courts of appeals for the Second, Fifth and Eighth Circuits, disagreed with the Board's decision and refused to follow it. However, in 2016 the Seventh Circuit Court of Appeals agreed with the Board's decision in *Epic Systems v. Lewis*, and the Ninth Circuit and Sixth Circuit followed suit soon thereafter, creating a split among the courts and uncertainty for employers.

The Supreme Court, in a 5-4 decision, relied heavily on the broad federal policy favoring arbitration agreements. Justice Neil Gorsuch wrote for the majority: "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA - much less that it manifested a clear intention to displace the Arbitration Act." In a dissenting opinion, Justice Ginsburg argued that the court's decision "ignores the destructive consequences of diminishing the rights of employees to band together in confronting an employer." The majority, however, strongly denied that the decision would roll back rights under the NLRA: "The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA - and for three quarters of a century neither did the National Relations Board."

The *Epic* decision is a major victory for large employers which may face class action employment discrimination cases and benefit from standardized arbitration due to economies of scale. However, it is less applicable to smaller employers which very rarely face a class action lawsuit and should carefully consider the benefits, risks and costs of arbitration before imposing such a provision on its employees.

Please contact David Lawrence or Sarah Heisler Gidley if you have any questions regarding employee arbitration provisions or other employment law issues.