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# Employment Lawyers Await Ruling as SCOTUS Mulls Class Action Waivers

As the clock ticks on the current Supreme Court term, labor and employment lawyers from both the plaintiffs and defense bars are watching closely for a ruling in *Epic Systems v. Lewis*.

By Miriam Rozen | May 02, 2018

The U.S. Supreme Court is poised to issue a ruling soon that could reshape the influence of class action plaintiffs on the workplace—not to mention the workloads of employment lawyers nationwide.

The justices heard arguments in three related cases, consolidated as *Epic Systems v. Lewis*, on Oct. 2, 2017, the very first day of this term. The court is [evaluating](#)

(<https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/12/04/su>



***U.S. Supreme Court building in Washington, D.C. Photo: Diego M. Radzinski/ALM***

court-examines-intersection-of-class-waivers-and-employees-

rights/) whether mandatory arbitration agreements between individual employees and employers that include class action waivers are enforceable.

The court is expected to settle whether a National Labor Relations Act provision allowing for workers to engage in collective actions trumps the Federal Arbitration Act's dictate that arbitration agreements are irrevocable. Notably, in its 2011 ruling *AT&T Mobility v. Concepcion*,

([https://www.law.com/americanlawyer/almID/1202491965010/?](https://www.law.com/americanlawyer/almID/1202491965010/?id=1202491965010)

[id=1202491965010](https://www.law.com/americanlawyer/almID/1202491965010/?id=1202491965010))the high court ruled that a clause in a California state contract law failed to trump the FAA.

(Kirkland & Ellis' Paul Clement argued for Epic; University of Virginia law professor Daniel Ortiz argued for one of the employees in the case; Richard Griffin Jr., then-general counsel at the NLRB, argued for the agency. Deputy U.S. Solicitor General Jeffrey Wall, now at Sullivan & Cromwell, argued for the United States, which sided with the employers after the change in presidential administrations.)

A ruling for employers could prompt a nationwide rush for companies to ink individual class-action-waiver-larded arbitration agreements with NLRA-covered employees to reduce potential liabilities.

"Everyone is eagerly awaiting this," said Edward Berbarie, a shareholder at Littler Mendelson (<https://www.law.com/law-firms/?firm=littler&ranking=&location=>), a firm that regularly represents employers. "I think absolutely this affects all employers with national operations," he said.

Employers have already used the class action waivers in arbitration agreements, and those waivers have survived previous challenges in some circuits but lost in others. "A lot of employers have rolled out arbitration agreements with class waivers," Berbarie said. A split among the circuits on the question helped propel these cases to the Supreme Court.

Could a ruling favorable for employers recast employment law and related practices—or even reduce the demand for lawyers engaged on those issues?

“My personal opinion is no,” Berbarie said. “This will not be that disruptive, because class waivers have withstood so many challenges in so many circuits. Most employers and companies who philosophically want to go this route have already done so. I don’t think you are going to see a huge uptick.” He also emphasized that the ruling will only apply to employees covered by the NLRA.

Linda Friedman of Stowell & Friedman has represented hundreds of employees who have filed class actions against their employers for alleged discrimination. In 2013, she represented a class of African-American employees who filed race discrimination claims against Merrill Lynch and secured a \$160 million settlement (<https://www.law.com/litigationdaily/almID/1202617530737/litigators-of-the-week-linda-friedman-suzanne-bish-and-george-robot/>).

Lawyers on Friedman’s side of the employment bar are also eager to read a high court ruling in *Epic Systems*. But she also stresses the limits of a decision’s consequences—no matter how the Supreme Court majority rules.

“It will not be the end of class actions,” Friedman said, adding that even if the Supreme Court allows employers to keep class action waivers in mandatory arbitration agreements, that will not doom her type of practice.

“The pendulum always swings. After a series of difficult decisions in the late 1980s, there was a civil rights bill in 1991 that reversed and amended those decisions. Likewise, many pundits thought class actions were over after *Dukes v. Walmart*,” she wrote in an email, referring to a 2011 case in which the high court ruled unanimously that a class of women Walmart employees should not be certified.

“So long as thoughtful and creative lawyers are in the fight to challenge class action waivers, there is hope,” she wrote. “It is difficult to imagine this country without class actions as so much of our progress is owed to the courageous people who brought

them,” she added.

For now, she’s hopeful that the justices will take a stand against restrictive waivers. “It would be a great victory for workers but perhaps not definitive either,” she wrote, noting the ruling would not apply to employees who are not covered by NLRA.

Mary Christine “M.C.” Sungaila, a partner at Haynes and Boone (<https://www.law.com/law-firms/?firm=haynes&ranking=&location=>) who drafted an amicus brief for Epic Systems on behalf of the International Association of Defense Counsel, said she will welcome the high court’s clarification. Given the circuit split, as it stands: “You don’t know what circuit you might be hailed into. You really don’t have any certainty no matter where you are geographically,” Sungaila said.

She expects a ruling that favors employers. “People are optimistic, but obviously they [the justices] are taking their time since it was argued the first day of their term,” Sungaila said.

But if the justices do deliver a ruling that helps employers, will she have to cope with a smaller workload?

Sungaila laughed and said: “I never underestimate the creativity of each side of the bar. If we win on this, it doesn’t mean that there won’t be another new theory.”