Epic or Not: The Misplaced Importance of the Supreme Court's Recent Decision in *Epic Systems Corp. v. Lewis*

by Kyle Bjornlund and Elizabeth Dillon

Kyle Bjornlund is a partner at Cetrulo LLP. His practice focuses on toxic tort litigation, products liability, and cyber-security. Elizabeth Dillon is a senior associate at Cetrulo LLP. Her practice focuses on employment advice and counseling, as well as employment, business, real estate, and probate litigation.

On May 21, 2018, the U.S. Supreme Court issued a 5-4 decision in *Epic Systems Corp. v. Lewis*.[1] In its decision, the Court upheld the right of parties in an employment relationship to contract for *individual*, rather than group, arbitration.[2] The importance of the *Epic* decision is this: Corporations can require employees, as a condition of their continued employment, to waive the right to litigate claims against the employer in a class setting.

In its decision, the Court rejected arguments[3] that individual arbitral provisions in employment contracts are rendered illegal by the National Labor Relations Act's (NLRA) protection of employees' right to "form, join, or assist labor organizations … and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[4] Specifically, the Court held that class action lawsuits are not "concerted activities" protected by the NLRA.[5]

Legal commentators criticize that *Epic* improperly *broadens* the reach of the Federal Arbitration Act (FAA).[6] *Epic* may more properly be viewed as *narrowing* the otherwise expansive scope of an entirely separate statute—the NLRA. And, while the dissenting justices[7] and aforementioned legal commentators[8] fear that *Epic* foreshadows future restrictions on workers' rights by the Supreme Court, *Epic* may portend a more innocuous future—a dialing back of the National Labor Relations Board's (NLRB) broad interpretation of the NLRA and a recognition of Congress' prescription that arbitral agreements are generally "valid, irrevocable, and enforceable."[9]

The *Epic* Decision Does Not Broaden the FAA

Critics claim *Epic* constitutes an unwarranted expansion of the FAA by the Supreme Court.[10] Specifically, these critics claim that, in enacting the FAA, Congress did not intend to permit arbitral agreements between employers and employees, but instead sought to ensure the enforceability of arbitral agreements among sophisticated businessmen.[11] Nothing in the FAA limits the statute in this way, and the statute expressly provides that the *only* employment contracts exempt from its reach are those of transportation workers.[12] Had Congress wished to exempt other employment contracts from the FAA's reach, it would have done so.[13]

Critics of *Epic* also fail to recognize that Congress' intent with respect to arbitral agreements in the employment context is immaterial to the Court's *Epic* decision. In *Epic*, the plaintiffs did not ask for the opportunity to litigate their claims in Court, but instead sought the opportunity to pursue group, rather than individual, arbitration.[14] Perhaps the plaintiffs in *Epic* did not seek to litigate their claims in a judicial forum because the general enforceability of arbitral agreements in the employment context has been settled for almost 30 years.[15] In any event, criticism of *Epic* as unfairly requiring arbitration in the employment context is misguided—plaintiffs would have been required to arbitrate even if they had won their claims.

Nor does *Epic* broaden the scope of the FAA by rendering class action waivers in arbitral agreements enforceable. As with arbitration in the employment context, the enforceability of class action waivers has been decided for some time.[16] Indeed, *Epic* is the logical conclusion of a long line of Supreme Court cases recognizing Congress' clear intention that arbitration agreements be broadly enforced, including in the employment context.[17] *Epic* did not expand the scope of the FAA to permit arbitral agreements in the employment context or class action waivers. These were already permitted.

The *Epic* Decision Narrows the NLRA

Rather than *expanding* the FAA, the *Epic* decision actually *narrows* an entirely different statute—the NLRA.

Like the FAA, the NLRA is drafted broadly.[18] Congress drafted the NLRA in a broad manner to remedy what it viewed as "the denial by some employers of the right of employees to organize and the refusal by

some employers to accept the procedure of collective bargaining [led] to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce."[19]

The NLRA's breadth was further expanded by the NLRB—the agency tasked with its interpretation.[20] In recent years, the NLRB interpreted its authority under the NLRA in a particularly expansive fashion, including within the scope of the NLRA's "concerted activity" provisions of diverse topics such as social media,[21] workplace bullying,[22] at-will employment disclosures,[23] workplace privacy,[24] and employee handbooks.[25]

The NLRB's position in the *Epic* case—that the FAA unlawfully restricts the rights of employees to engage in the "concerted activity" of class action litigation—is another in a series of recent expansive interpretations of the NLRA by the agency.[26] Prior to 2012, the NLRB maintained that agreements to arbitrate do "not involve consideration of the policies of the National Labor Relations Act," and recognized that both employers and employees "can benefit from the relative simplicity and informality of resolving claims before arbitrators."[27]

Until recently, the Supreme Court upheld the NLRB's expansive interpretation of the NLRA.[28] *Epic* does not concern the NLRB's interpretation of the NLRA alone, but also the NLRA's interpretation of the interplay between the NLRA and the FAA. In holding the FAA in conflict with, and at least partially displaced by, the NLRA, the NLRB attempted to expand the scope of the NLRA into other statutory waters, which the Supreme Court determined was a step too far.[29]

The *Epic* decision likely heralds a new approach by the Supreme Court in limiting the scope of NLRA and in dialing back the NLRB's broad interpretation of the statute, particularly when the interpretation conflicts with statutes the NLRB was not charged with interpreting or enforcing.

Epic Does Not Signal the End of Workers' Rights

The dissenting justices and legal commentators criticize *Epic* as the beginning of the end for workers' rights.[30] Justice Ruth Bader Ginsburg, for example, cautions that the *Epic* decision will result in an array of ills, including the under-enforcement of wage and hour violations[31] and an increase in discrimination and retaliation.[32] Others warn that the decision signals disastrous results for the #MeToo movement,[33] "effectively legalizes wage theft,"[34] and will "make it easier for employers to maintain unfair or even unlawful employment structures and salary systems."[35]

Epic's critics ignore the fact that employees signing arbitral agreements are not deprived of any means for seeking redress for wrongs committed by their employers. Rather, they are relegated to an arbitral—rather than judicial—forum. Nor are employees necessarily always at a disadvantage when arbitrating their claims.[36]

Epic's critics also fail to consider the benefits of individually arbitrating employment claims, including, the avoidance of costly and protracted litigation,[37] the "quicker, more informal, and often cheaper resolutions for everyone involved,"[38] the ability of the parties to choose their decision-maker (including "expert adjudicators to resolve specialized disputes")[39] and the avoidance of the "procedural morass" attendant in class action litigation.[40]

Further, critics of the *Epic* decision fail to recognize that the *Epic* plaintiffs did not ask for, and were not entitled to, pursue their claims in a judicial forum.[41] Approximately 30 years ago, the Supreme Court determined that arbitration of employment claims are enforceable.[42] If arbitration of employment claims spells the end of workers' rights, *Epic* is simply not to blame.

Epic does not signal an end to the Court's enforcement of workers' rights as a whole.[43] Rather, the Court's decision likely demonstrates a new effort by the Court to restrain the broad interpretation of the NLRA by the NLRB, as well as a continued recognition by the Court that arbitral agreements are generally enforceable.

Lessons From *Epic*

The key lesson from the *Epic* decision is not that the Supreme Court is suddenly expanding the reach of the FAA—this is not the case. Nor is the key lesson from *Epic* that the Supreme Court will no longer uphold workers' rights—this is an overwrought interpretation of *Epic.* Rather, the key lesson from *Epic* is that the Supreme Court likely will no longer permit the NLRB to interpret the scope of the NLRA so broadly, particularly where the NLRB seeks to interpret the NLRA as restricting or conflicting with statutes it is not charged with interpreting or enforcing.

Counsel for both employers and employees should be aware of *Epic* not only because it allows for individual arbitration agreements in the employment context, but also to the extent it signals future efforts by the Supreme Court to limit the expansive scope of the NLRA. Counsel for employees should both advise their clients that arbitral agreements (including individual arbitral agreements) in the employment context are enforceable and ensure that their legal strategy is informed by the contours of the arbitration procedure. ⊙

Endnotes

[1]*Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[2]*Id.* at 1619 ("[A]s a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command.")

[3]*Id.* at 1624.

[4]29 U.S.C. § 157 (1935).

[5]*Epic Sys.*, 138 S. Ct. at 1622.

[6]*See, e.g.*, Garrett Epps, *An* Epic *Supreme Court Decision on Employment*, Atlantic (May 22, 2018), https://www.theatlantic.com/ideas/archive/2018/05/an-epic-supreme-court-decision-on-employment/560963 (criticizing the Supreme "Court's conservatives [for their] reinterpret[ation of] the act to include what they call 'liberal federal policy favoring arbitration agreements,'" which "reflect … conservative justice's empathy for corporations and large employers facing lawsuits by consumers and employees"); Daniel Hemel, *The Arbitration Fight Isn't Over*, Slate (May 22, 2018, 3:30 PM), https://slate.com/news-and-politics/2018/05/the-epic-systems-v-lewis-mandatory-arbitration-ruling-was-awful-heres-how-states-can-counteract-it.html (categorizing *Epic* as the latest in a line of Supreme Court decisions extending the 1925 Federal Arbitration Act far beyond its original scope); Editorial Board, *The Supreme Court Sticks it to Workers, Again*, N.Y. Times (May 24, 2018), https://www.nytimes.com/2018/05/24/opinion/supreme-court-workers-payment.html; Terri Gerstein & Sharon Block, *Supreme Court Deals a Blow to Workers*, N.Y. Times (May 21, 2018), https://www.nytimes.com/2018/05/21/opinion/supreme-court-arbitration-forced.html

(cautioning that the Supreme Court has "for decades tried to extend the reach of [the Federal Arbitration Act] and protect companies from their customers and employees").

[7]*Epic Sys.*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting) ("The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers.").

[8]*See*, *e.g.*, Gerstein & Block, *supra* note 6 ("The rights of workers are under attack."); Mark Sherman, *Supreme Court Deals Defeat to Workers' Rights, Upholding Arbitration for Individuals Only*, Chicago Tribune (May 21, 2018, 12:44 PM), http://www.chicagotribune.com/business/ct-biz-supreme-court-arbitration-workers-20180521-story.html ("The [*Epic*] ruling reflected a years-long pattern at the Supreme Court of limiting class actions and favoring employer-favored arbitration over lawsuits in the courts, generally preferred by workers."); Wagatwe Wanjuki, *The Supreme Court Workers' Rights Ruling Already May Hurt Chipotle Workers in Wage Theft Case*, Daily Kos (May 27, 2018, 8:29 PM), https://www.dailykos.com/stories/2018/5/27/1767537/-The-Supreme-Court-s-workers-rights-ruling-already-may-hurt-Chipotle-workers-in-wage-theft-case ("[T]aking away workers' rights to class-action lawsuits is bad news. Allowing companies to force arbitration for worker disputes puts even more power in the hands of powerful employers. The [*Epic*] decision came down this Monday, but it looks like it won't take long for us to get to see the consequences of this ruling in action."); Mark Joseph Stern, *Neil Gorsuch Just Demolished Labor Rights*, Slate (May 21, 2018, 12:27 PM), https://slate.com/news-and-politics/2018/05/neil-gorsuch-demolished-labor-rights-in-epic-systems-v-lewis.html ("It is difficult to overstate how devastating *Epic Systems* is to labor rights in America—and how far Gorsuch strays from federal law in order to implement his preferred economic policy.").

[9]*Epic Sys.*, 138 S. Ct. at 1633 (Thomas, J., concurring) (citing 9 U.S.C. § 2 (1947)); *Accord Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA)…. Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.") (citation omitted).

[10]*See* Garrett Epps, *How the Supreme Court Could Reshape Employment Law*, Atlantic (Feb. 25, 2018), https://www.theatlantic.com/politics/archive/2018/02/how-the-supreme-court-could-reshape-employment-law/554009 ("When originally enacted, the FAA was applied mostly to enforce agreements among businesses to settle their disputes out of court. But with the appointment of Justice Antonin Scalia, the Supreme Court's view of the FAA has expanded. Over the past 30 years, the Court has interpreted the FAA to encompass consumer and financial-services contracts.").

[11]*Id.*; *Epic Sys.*, 138 S. Ct. at 1642-43 ("The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes…. The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts.") ((Ginsburg, J., dissenting) (emphasis in original).

[12]*See* 9 U.S.C. § 1; *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 119 (Section 1 exempts from the FAA only contracts of employment of transportation workers.).

[13]*Id.*

[14]*See Epic Sys.*, 138 S. Ct. at 1636 ("In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge that they must have access to a judicial forum. They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.") (Ginsburg, J., dissenting) (citation omitted).

[15]*See Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 1991 ("Employee was required to arbitrate Age Discrimination in Employment Act claims.").

[16]*See AT&T Mobility LLC v. Concepcion*, 536 563 U.S. 333 (2011).

[17]*See Epic Sys.*, 138 S. Ct. at 1619, 1621 (In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms … [and prescribed] 'a liberal federal policy favoring arbitration agreements'" (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

[18]*Id.* at 1636 ("Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights 'to form, join, or assist labor organizations' and 'to bargain collectively through representatives of their own choosing,' the act protects employees' rights 'to engage in *other* concerted activities for the purpose of … mutual aid or protection.'" (Ginsburg, J., dissenting) (emphasis in original) (citing 29 U.S.C. § 157); *United Auto., Aerospace & Agric. Implement Workers of Am. Local 3047 v. Hardin Cnty., Ky.*, 842 F.3d 407, 410 (6th Cir. 2016) ("The National Labor Relations Act is a *broad* federal law.") (emphasis added); Nicholas A. Ashford, *Changes and Opportunities in the Environment for Technology Bargaining*, 62 Notre Dame L. Rev. 810, 813 (1987) ("The legislative history provides evidence that Congress intended collective bargaining to have a dynamic and *expansive* scope designed to meet changing problems arising from labor-management relations.") (emphasis added); Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 Emp. Rts. & Emp. Pol'y J. 159, 185 (2011) ("The scope of the NLRA is *expansive*, extending to almost any person within the common meaning of the term 'employee.'") (emphasis added); Rebecca White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 Fla. L. Rev. 723, 739 (1992) ("The broad wording and significant gaps in the NLRA, however, have allowed the United States' labor policy to change over time, often in response to changes in administrations.").

[19]29 U.S.C. § 151 (1935); *see* Allen Al-Haj, *Which Statute Will Trump: The Validity of Class-Action Waivers in Employment Arbitration Agreements*, 5 Tex. A&M L. Rev. 105, 111 (2017) ("Congress passed the NLRA in order to add statutory remedies for employees to pursue against their employer and tasked the NLRB with the NLRA's enforcement.") (citation omitted).

[20]*See Taylor v. N.L.R.B.*, 786 F.2d 1516, 1520 (1986) (the NLRB has a statutory duty to enforce the National Labor Relations Act and exclusive jurisdiction to decide unfair labor practices).

[21]*See* Robert Sprague, *Facebook Meets the NLRA: Employee Online Communications and Unfair Labor Practices*, 14 U. Pa. J. Bus. L. 957 (2012); *see also The NLRB and Social Media*, Nat'l Labor

Relations Bd., https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited Oct. 9, 2018).
[22]*See* Maria Greco Danaher, *Prohibiting Certain "NLRB finds policy against certain 'verbal comments or physical gestures' may restrict concerted activity," May Violate NLRA*, 16 Law. J. 10 (2014).
[23]*See* Frank Day, *The NLRB's Expanded Agenda*, 49 Tenn. B.J. 28 (Jan. 2013).
[24]Whole Foods Mkt. Inc., 363 N.L.R.B. 87205 (2015) *aff'd*, *Whole Foods Mkt. Inc. v. N.L.R.B.*, 691 F.Appx. 49 (2d Cir. 2017).
[25]*See* Boeing Co., 365 N.L.R.B. 154 (2017).
[26]*See* D.R. Horton Inc., 357 N.L.R.B. 184 (2012).
[27]*See Epic Sys.*, 138 S. Ct. at 1620 (citing Memorandum from Ronald Meisburg, NLRB Gen. Couns., Off. of the Gen. Couns., to All Regional Directors, Officers-in-Charge and Resident Officers, Memorandum GC 10-06, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies 2, 5 (June 16, 2010)).
[28]*See* Al-Haj, *supra* note 19, at 111 ("The Supreme Court has expansively interpreted Section 7 of the NLRA to protect more than an employee's right to form unions and engage in collective bargaining. In *Eastex Inc. v. NLRB,* the Court stated that it is well settled that 'mutual aid or protection' includes an employee's attempt 'to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.' The Court held that Section 7 'protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.'") (citing *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978)).
[29]*Epic Sys.*, 138 S. Ct. at 1629 ("An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively bootstrapping itself into an area in which it has no jurisdiction.") (citation omitted).
[30]*See supra* notes 10-11.
[31]*Epic Sys.*, 138 S. Ct. at 1647.
[32]*Id.* at 1647-48.
[33]Nina Totenberg, *Supreme Court Decision Delivers Blow to Workers' Rights*, NPR: All Things Considered (May 21, 2018, 10:55 AM), https://www.npr.org/2018/05/21/605012795/supreme-court-decision-delivers-blow-to-workers-rights.
[34]Stern, *supra* note 8.
[35]Epps, *supra* note 6.
[36]*See* David Horton & Andrea Cann Chandraskher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457 (2016).
[37]*See Adams*, *supra* note 12, at 123.
[38]*Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).
[39]*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).
[40]*See Concepcion*, 536 U.S. at 334.
[41]*See Epic Sys.*, 138 S. Ct. at 1636.
[42]*See Gilmer*, 500 U.S. 20.
[43]*Epic Sys.*, 138 S. Ct. at 1630 ("But like most apocalyptic warnings, this one proves a false alarm.").

President's Message *continued from page 3*

prosecution, the defense, and the judiciary. For example, in violation of the U.N. Basic Principles on the Role of Lawyers, the U.N. Declaration on Human Rights Defenders, and other international norms, lawyers have been prohibited from conferring with their detained clients, have had client meetings recorded by authorities, have been barred from reviewing charges and evidence, and have been banned from courtrooms. Often, when lawyers go to jail to meet with their clients or appear in court to represent their clients, the lawyers are detained and find *themselves* jailed and under prosecution.

Prosecutors and the judiciary have fared no better. In violation of the U.N. Basic Principles on the Independence of the Judiciary and the U.N. Guidelines on the Role of Prosecutors, a staggering 4,400-plus judges and prosecutors—more than one-fourth of all of the judges and prosecutors in the country—have been summarily dismissed, and many have been detained, arrested, prosecuted, and imprisoned. The prosecutors and judges who have not been purged fear for their families, their jobs, and their freedom, tainting all trials, judgments, and sentences with the stench of threats and intimidation. The civil justice system has been similarly decimated. The independence of the judiciary, and the Turkish justice system as a whole, are casualties of President Erdogan's massive purge.

Protecting the safety, security, and independence of judges, lawyers, and other human rights defenders is a responsibility of all lawyers everywhere. As we mark the annual International Day of the Endangered Lawyer, the FBA stands in solidarity with the inspirational judges, lawyers, and human rights defenders worldwide who serve and champion justice and the rule of law. ⊙