On May 21, 2018, the U.S. Supreme Court issued a 5-4 decision in Epic Systems Corp. v. Lewis. In its decision, the Court upheld the right of parties in an employment relationship to contract for individual, rather than group, arbitration. 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 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.” Specifically, the Court held that class action lawsuits are not “concerted activities” protected by the NLRA.

Legal commentators criticize that Epic improperly broadens the reach of the Federal Arbitration Act (FAA). Epic may more properly be viewed as narrowing the otherwise expansive scope of an entirely separate statute—the NLRA. And, while the dissenting justices and aforementioned legal commentators 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.”

The Epic Decision Does Not Broaden the FAA
Critics claim Epic constitutes an unwarranted expansion of the FAA by the Supreme Court. 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. 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. Had Congress wished to exempt other employment contracts from the FAA’s reach, it would have done so.

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. 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. 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. 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.

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. 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.”

The NLRB’s breadth was further expanded by the NLRB—the agency tasked with its interpretation. 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, workplace bullying, at-will employment disclosures, workplace privacy, and employee handbooks.

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. 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.”

Until recently, the Supreme Court upheld the NLRB’s expansive interpretation of the NLRA. 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.

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. 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 and an increase in discrimination and retaliation. Others warn that the decision signals disastrous results for the #MeToo movement, “effectively legalizes wage theft,” and “will make it easier for employers to maintain unfair or even unlawful employment structures and salary systems.”

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.

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

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. Approximately 30 years ago, the Supreme Court determined that arbitration of employment claims are enforceable. 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.** 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**

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.
5 Epic Sys., 138 S. Ct. at 1622.
(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”).

“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.”).


“Ild; 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).

“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.).

“Id. 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).

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


“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 M’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

“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 emotively. 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 3947 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 Environment for Technology Bargaining, 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.”).

“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).

“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).

“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 NLRA and Social Media, NAT’L LAB.
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. ○