Supplement to the Los Angeles and San Francisco
Daily Journal
JULY 10, 2019

LABOR & EMPLOYMENT

Strategies shift after *Epic Systems*

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In May 2018, the U.S. Supreme Court issued its landmark decision in *Epic Systems Corp. v. Lewis*, holding that class action waivers in employee arbitration agreements do not violate the National Labor Relations Act, and paving the way for potentially monumental changes in how employment claims are litigated. Now, as more and more employers implement arbitration programs, attorneys representing workers face narrowing options for pursuing claims on behalf of groups of employees. In California, employees increasingly exploit a loophole in the form of the Private Attorneys General Act, a bounty hunter statute allowing plaintiffs to recover civil penalties on behalf of other employees that has been held to be exempt from mandatory arbitration. Another emerging strategy is the filing of multitudes of individual arbitrations, hoping to make employers feel the pain with a "beware what you wish for" response to class waivers.

In *Epic Systems*, the Supreme Court rejected the employees' argument that the NLRA's protection of concerted activity precluded class waivers in arbitration agreements, finding that such protections do not overcome the Federal Arbitration Act's directive "to enforce arbitration agreements according to their terms." That decision cemented an already growing trend towards arbitration and class waivers, and with it the potential elimination of class or collective litigation of wage and hour and other employment disputes by forcing employees to pursue claims on an individual basis. In April, the Supreme Court followed up *Epic Systems* with another employer-friendly arbitration decision, holding in *Lamps Plus, Inc. v. Varela* that classwide arbitration is not available unless an arbitration agreement expressly provides for it. In response to narrowing options, plaintiff attorneys have pivoted away from direct challenges to arbitration and class waivers and shifted towards alternatives to traditional class litigation.

In California, PAGA is one such alternative. PAGA allows an "aggrieved" employee to step into the shoes of the state to prosecute violations of the Labor Code and recover civil penalties on behalf of other employees. The wrinkle under PAGA is that 75% of any money collected goes to the state, and only 25% to employees. Nonetheless, PAGA penalties can be substantial and add up quickly with a large group of employees. The availability of attorney's fees to prevailing employees, and the absence of traditional class action requirements, also make PAGA claims attractive to the plaintiff's bar. Adding to the risk faced by employers is the uncertainty posed by PAGA actions. Only a handful of PAGA cases have gone to trial, and courts continue to grapple with ambiguities in the PAGA statute, such as questions regarding standing, manageability, and calculation of penalties.

Although the PAGA statute is 15 years old, for much of that history PAGA claims were often an afterthought, tacked onto class claims that were the focus of the litigation. That has changed in recent years, with PAGA claims taking center stage and often filed as stand-alone cases apart from class claims. Fueling a growth in PAGA claims was the California Supreme Court's decision five years ago in *Iskanian v. CLS Transportation Los Angeles LLC* that PAGA claims are exempt from mandatory arbitration and class waivers, because "compel[ling] the waiver of representative claims under [] PAGA ... is contrary to public policy and unenforceable as a matter of state law." *Iskanian* remains good law under *Epic Systems*, at least for now. According to government statistics, while 4,400 new PAGA claims were filed in 2010, that number had jumped to nearly 8,000 per year by 2017. Although up-to-date statistics are not yet available, that number can only be expected to increase in the wake of *Epic Systems*.

Another strategy employed by some plaintiff attorneys has been to embrace arbitration, by filing individual claims en masse against single employers. A number of high profile companies — including Chipotle, Buffalo Wild Wings and Uber, among others — have been inundated with individual arbitrations after enforcing their arbitration agreements to defeat class actions. In the case of Uber, more than 10,000 individual arbitrations have been filed.

This tactic exploits a long-standing rule that employers pay all the costs of arbitration, aside from a small filing fee. When a large number of employees is involved, the result is an immediate expense that could reach into the hundreds of thousands or even millions of dollars. The cost of arbitration fees alone could be enough to bring an employer to the settlement table, or even waive their arbitration agreements altogether and agree to proceed in court.

Employers are not without other options, though, if faced with mass arbitrations. One strategy to control costs is to seek an agreement to arbitrate a handful of test cases first, which would allow all sides to evaluate the risk and settlement value of the combined cases. An employer who prevails in those initial cases would presumably have the upper hand in negotiating globally with remaining claimants. The opposite, of course, could also be true for an employer who loses.

Employers might also take advantage of their often greater resources in defending against mass arbitrations. Small plaintiff firms may be at a relative disadvantage in handling numerous arbitrations simultaneously, and advancing the costs needed to prosecute them. Plaintiff firms, though, could attempt to even the playing field by banding together on cases, as they have done in some instances.

Employers might also take solace in the hope that it will be more difficult for plaintiff attorneys to sign up hundreds or thousands of employees for individual arbitration in new cases. The mass arbitrations filed so far are generally remnants of class litigation that predates *Epic Systems*. While the employers in those cases were ultimately able to defeat or narrow classes by enforcing their arbitration agreements, employee contact information had likely already been produced to plaintiff's counsel during the course of litigation. Going forward, with the enforceability of class waivers now established, and lacking contact information for other employees obtained through a prior class action, plaintiff attorneys may have greater difficulty reaching potential claimants for new cases.

While the long-term effectiveness of these or other strategies remains to be seen, one thing is for sure. *Epic Systems* can be expected to continue to shape the landscape of employment litigation for years to come.

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