CATALYST™

Pennsylvania Chamber of Business and Industry

Business EXPERTise

Recognized and respected issue experts from PA Chamber member companies answer businesses' most frequently asked questions about HR, Tax, Communications and Environmental concerns, compliance and best practices.

HR

Ronda O'Donnell
Marshall Dennehey Warner Coleman & Goggin

I am thinking of requiring my company's employees to sign an arbitration agreement mandating that they individually arbitrate all employment disputes in order to avoid their participation in class or collective action lawsuits against the company. Is this legal to do?

Until now, the answer to that question was decidedly up in the air. With the recent decision by the United States Supreme Court in *Epic Systems Corp. v. Lewis*, however, the short answer to that question is now, yes. In *Epic Systems*, a divided 5-4 Court upheld mandatory arbitration agreements which prohibit employees from bringing employment claims on a class or collective basis.

Consistent with your current thoughts, employers throughout Pennsylvania routinely utilize arbitration agreements in the management of employees to minimize potential expense and exposure of litigation in courts. When used properly, arbitration agreements can streamline employment disputes in a cost-effective and confidential manner. In fact, even before the *Epic Systems* decision, many arbitration agreements required that disputes be pursued individually, with employees waiving their ability to bring class and collective action claims. Over the past several years, however, "class action waivers" have been under attack, primarily through decisions handed down by the National Labor Relations Board during the Obama administration.

For employers, the Court's decision in *Epic Systems* may be one of the most important decisions in employment law for the management of a company's employees. With this decision employers may include class action waivers in their mandatory employment arbitration agreements, and those provisions will be enforced.

In its holding, the Supreme Court held that the Federal Arbitration Act is clear and unequivocal in its position that courts are to enforce arbitration agreements as written, absent very narrow grounds (such as fraud, duress or unconscionability). The Court also recognized that while the National Labor Relations Act secures employees' rights to organize and bargain about the terms and conditions of their employment collectively, the Court rejected any notion that the NLRA dictates how judges and arbitrators must try legal disputes emanating from the workplace and, more importantly, noted that a right to class actions has never been written or read into the NLRA.

The majority also found noteworthy the fact that the underlying lawsuits addressed wage claims and did not arise not under the NLRA, but under an entirely different statute, the Fair Labor Standards Act. The Court held that, based upon its previous decisions, the FLSA's collective action scheme does *not* displace the FAA or prohibit class action waivers in an arbitration agreement.

The take-away for employers from the *Epic Systems* decision is that a well-drafted mandatory arbitration agreement that contains a class/collective action waiver is enforceable. While some state laws prohibit class action waivers, Pennsylvania state law does not. For those employers who believe arbitration is the best method to resolve their employment disputes, this decision uniformly upholds their right to mandate individualized arbitration of their claims. Clauses requiring individualized arbitration permit an employer to resolve workplace disputes on a one-on-one basis, thereby avoiding the risk of large exposures seen in class/collective actions involving multiples of employees with wage and hour issues. Employers should be mindful, however, that the *Epic Systems* decision included a 30 page *dissent*. That dissent, some argue, may lay the groundwork and calls for new legislation in Congress to effectively reverse the Supreme Court's *Epic Systems* ruling. At present, however, the *Epic Systems* decision provides employers with the ability to effectively curtain the onslaught of class and collective actions, the expense of defending such actions and the related liability risks that employers encounter when faced with such litigation.

■ **Ronda K. O'Donnell** *chairs the Employment Law Practice Group in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin.*