I. Discussion of *Epic* decision and post-*Epic* case law – and summary of issues

A. Expanded opportunity to enforce arbitration agreements with class-action waivers

B. Benefits/drawbacks of arbitration

C. Benefits/drawbacks of class-action waivers


A. The decision:

1. Just as in the context of consumer arbitration agreements, the Federal Arbitration Act requires courts to enforce arbitration agreements between employers and employees according to their terms, including where the agreement provides for individualized proceedings.

2. Section 7 of the National Labor Relations Act, protecting collective action by employees, does not impede enforcement of class action waivers in arbitration agreements. The FAA and the NLRA are not in conflict; enforcing class action waivers in arbitration agreements pursuant to the FAA impacts no fundamental principle or provision of the NLRA.

3. The “savings clause” in section 2 of the FAA, which allows courts to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract,” does not authorize a court to deny enforcement based upon the NLRA or any argument that is focused upon the requirement in an arbitration agreement that the arbitration be bilateral, *i.e.*, bar a class action.

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C. WL 3995937 (N.D.Cal. 2018) (applying Epic to grant employer’s motion to compel arbitration of wage claims, but denying motion as to PAGA claims).

III. Arbitration

A. Benefits and drawbacks – efficiency, cost, arbitrator instead of jury, limited discovery, ability to choose adjudicator, no or limited appeal rights

1. With so few cases going to trial and so the threat of a runaway jury decreased, is arbitration, with its increased costs and less conducive forum for dispositive motions justified?

2. In determining whether to choose arbitration over litigation, to what extent should the risk of a “runaway” arbitrator be considered, particularly in a forum with limited appeal rights?

3. What impact does the jurisdiction in which cases are likely to arise impact the analysis?

4. What is your experience in defending an employment case, where (at least in CA) the employer must pay all costs of litigation in excess of what the plaintiff would have had to pay for litigation in court (Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83 (2000))? Are plaintiffs’ counsel cowed by arbitration? Do they take advantage of the expense imposed on the employer? Does the arbitration forum make the case more prone to settle?

5. As an arbitrator, how do you keep an arbitration proceeding moving? To what extent do you rely on the parties’ counsel to do so? To what extent do you encourage or insist that they do so?

6. As a party’s in-house or outside counsel, how do you keep an arbitration proceeding moving (if that is your client’s desire)?

7. As in-house counsel, how do you perform this cost-benefit analysis and advise your company? As outside counsel, what perspective/analysis/value can you add?

8. For matters/claims that are not likely to be brought as class actions, is there a benefit to arbitration?
B. In what cases do you favor arbitration? Why?

C. In what cases does arbitration not serve the company’s interests?

D. Have your views evolved over the years? If so, how and why?

E. Drafting and enforcing arbitration agreements – opt-in/opt-out
   1. After Epic, is there continued value/need for an opt-out provision?
   2. Have you modified your arbitration agreement in any other way?

IV. Class-action waivers –

A. Are there ever circumstances in which a class-action waiver is not advisable?

B. Do you have any concern about plaintiff’s attorneys filing multiple individual actions or arbitrations? Would those still be preferable to a class action, or would the cost of defending multiple cases tip the balance toward allowing a class action?
   1. As an arbitrator, do you have experience with matters where multiple cases are filed against one company/employer? Are the matters coordinated for pre-evidentiary hearing purposes? What, in your experience, are the prospects of such cases settling, and on which side is there the greater incentive?

C. Enforceability of class action waivers for PAGA and similar claims.

V. Commercial/business pressure to eliminate class-action waivers – to attract talent

A. Harvard Law students vs. Kirkland, Sidley, DLA Piper

B. Google, Uber, Facebook

C. Where does this leave workers with weaker economic clout?