

EMPLOYMENT LAWSCENE ALERT: YOUR ARBITRATION AGREEMENTS WITH EMPLOYEES MAY BE INVALID

Last week, the Seventh Circuit Court of Appeals issued a decision stating that class waivers in arbitration agreements for employees are invalid. The Court in *Lewis v. Epic Systems Corp.* adopted the controversial position of the National Labor Relations Board (NLRB) and found that a collective and class action waiver in an employer's contract violated Section 7 of the National Labor Relations Act (NLRA) by prohibiting employees from engaging in collective activity and forcing them into individual arbitration for their wage and hour claims.

The Seventh Circuit based its decision on the concept that the NLRA prohibits an employer from barring workers from engaging in concerted activity. The Court's reasoning followed that, because class and collective actions could be considered concerted activity, an agreement that prohibited such activity was a violation of the NLRA. The Court found that individual arbitration was not bargained for by the employees and could not be rejected without penalty to the employees. Because it found that the provision was illegal under the NLRA, the Court held that the Federal Arbitration Act (FAA) did not mandate enforcement because, under the FAA, an arbitration agreement is not valid where grounds exist for the revocation of the agreement. The Seventh Circuit determined that violation of the NLRA constituted such ground for revocation. Use of arbitration agreements with class and collective prohibitions has long been a point of contention with the NLRB, but until now, it had been an issue that the NLRB was finding little success with in the circuit courts. However, the Seventh Circuit's decision gives the NLRB additional standing for its position, particularly in Wisconsin, Illinois, and Indiana, where the decision applies.

This decision creates a circuit split because the Fifth Circuit has ruled in two separate cases (*Murphy Oil and D.R. Horton*) that mandatory individual arbitration clauses in employment agreements are enforceable. The Fifth Circuit found that the NLRB, in determining that collective and class waivers were illegal under the NLRA, did not give proper deference to the FAA because the NLRA does not contain any specific language that prevents arbitration agreements from being enforced pursuant to their terms. The Fifth Circuit found that the NLRB's interpretation that such clauses violated the NLRA by prohibiting concerted activity was not entitled to the level of deference that the Seventh Circuit found it was. The Second and Eighth Circuits have issued rulings similar to those of the Fifth Circuit. Now with a split in

the federal circuits, the issue is ripe for consideration by the U.S. Supreme Court. However, with Justice Scalia's recent death, the Court's precarious 4-4 split, and the political balance of the Court dependent upon the outcome of the Presidential election, the outcome on this issue before the U.S. Supreme is anything but certain, even taking into consideration the Supreme Court's recent strong support for the enforceability of arbitration provisions.

Therefore, until this decision is overruled by the Supreme Court, employers in Wisconsin, Illinois, and Indiana should not limit their employees to individual arbitration or should, at the least, allow employees to opt out of mandatory individual arbitration without penalty.