

*California Employment Law Update:*  
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# ***BREAKING NEWS: EPIC SYSTEMS CORP. v. LEWIS***

- Previously, the National Labor Relations Board considered class action waivers to be violations of the NLRA and an unfair labor practice and unenforceable
- Circuit Courts were split on the issue
- **Update** - On May 21, 2018, the U.S. Supreme Court (SCOTUS) held in *Epic Systems* that class action waivers are valid and enforceable under the Federal Arbitration Act (FAA)

***It's time to review existing and reconsider implementing employment arbitration agreements***

# LITIGATION / ARBITRATION / MEDIATION

- **Litigation**

- is court, with a judge and jury

- **Arbitration**

- is like litigation, but confidential, with an “arbitrator.”

- **Mediation**

- is a negotiation with the help of a “mediator.”

# WHAT IS A CLASS ACTION WAIVER?

- A class action waiver is an agreement with an employee that says that he will bring any claims he has only as an individual and not as part of any class
- If you have an arbitration agreement with employees who could form a class, it should include a class action waiver
- To take advantage of the ruling, the enforceability of the arbitration agreement must be governed by the FAA, and **not** state or local laws

# DO YOU WANT MANDATORY ARBITRATION?

## Pros -

- No jury (i.e. no run-away jury)
- Sometimes faster
- Sometimes simplified processes
- Generally private and confidential
- Finality – generally no appeals
- **You can lawfully require class action waivers**

# DO YOU WANT MANDATORY ARBITRATION?

## Cons -

- Cost of arbitrator and arbitration
- Tends to increase settlement value of low-value cases
- Harder to get summary judgment/more likely to have trial
- Limitations on streamlined procedures
- Arbitrators tend to split the baby
- Complications from new limitations on whether harassment claims must be arbitrated

# TUNING UP YOUR ARBITRATION AGREEMENT

Check out your arbitration agreements and ask:

1. Is the enforcement governed by the Federal Arbitration Act (and not some other law or state law)?
2. Does an arbitrator or a court get to decide if the arbitration agreement is enforceable?
3. If the agreement fails, where will a class action be litigated – in court or in arbitration?
4. Does the arbitration agreement call for arbitration in a specific place and is that reasonable?

# TUNING UP YOUR ARBITRATION AGREEMENT

5. Is there a valid class action waiver? Collective action waiver? Representative action waiver?
6. Is there a clause severing unenforceable parts and what would happen if it was invoked?
7. Are all state-law and local-law requirements met? (like limitations on sexual harassment arbitration, signature and opt-out requirements,
  - What about CA Private Attorney General Act claims?
  - Are there state law limitations on requiring arbitration? (Sexual Harassment Legislation)
  - Does it have adequate consideration to support it? Is continued employment sufficient in your state(s)?



# Questions?

Thank you for attending today's presentation. Any questions?



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