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Class Arbitration – Two Cautionary Tales for Employers

Labor & Employment Workforce Watch

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The Supreme Court's 2018 decision in *Epic Systems Corporation v. Lewis*, 138 S. Ct. 1612 (2018), validated the use of class action waivers, providing employers with a valuable tool to preserve bilateral employment arbitrations and manage risk. However, employers carefully should weigh the costs and benefits of whether and how to wield this tool. Two recent decisions underscore this point.

First, a recent decision of the United States Court of Appeals for the Ninth Circuit, *Adams v. Postmates, Inc.*, 2020 WL 5793745 (9th Cir. 2020), serves as a reminder to employers to exercise caution whether they implement class action waivers as part of their arbitration program (or use an arbitration program at all).

In *Adams*, the Ninth Circuit upheld a district court decision requiring Postmates to litigate roughly 5,200 separate arbitrations, rather than as a class action, and pay the associated filing fees (totaling approximately ten million dollars).

As *Adams* demonstrates, though there may be value in preventing a class or collective action, the emerging byproduct of filing scores of individual arbitrations can create significant expense and frustrate the goals the employer sought to achieve in adopting waiver language. As a result, employers should make conscious and sagacious decisions when determining whether to require disputes to be resolved through class or collective actions or via individual arbitrations.

Second, a case the Supreme Court recently declined to review, *Sterling Jewelers, Inc. v. Jock*, 2020 WL 5882321 (2020), suggests that employers exercise caution how they implement their arbitration programs and class action waivers. Jock was filed in 2008 as a class action. After initial procedural wrangling, and over the objection of Sterling Jewelers, the case was referred to an arbitrator deemed to decide whether the language of the applicable agreement permitted class arbitration.

Though silent on class claims, the arbitrator nevertheless found class arbitration was available under the agreement. The arbitrator later ruled that this decision applied not only to the claimants before the arbitrator, but also to other absent class members who had signed the same agreement.

Following the Supreme Court's decisions in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), and *Stolt–Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. 662 (2010), the law now is clear: ambiguity does not allow for class arbitration because "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis." *Lamps Plus*, 139 S. Ct. at 1419. Despite this unambiguous case law,

the United States Court of Appeals for the Second Circuit affirmed the arbitrator's determination and the Supreme Court declined to review it.

The takeaway from *Jock*: employers should be cognizant of who (the court or arbitrator) is tasked with deciding the enforceability of the class action waiver in an arbitration agreement. If this ruling is left to an arbitrator, the employer's ability to appeal an adverse determination may be quite limited.

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