A Word of Caution Regarding Employer-Employee Arbitration Clauses

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Whether you're an employer or employee, it is possible that your employment relationship is governed by an arbitration agreement which requires that any disputes between the employer and employee to be resolved not via litigation, but via binding arbitration. This may be a non-issue to you—something that you only think about when a dispute actually arises—however in light of a recent court decision, it's something you should think about now.

Arbitration is a form of alternative dispute resolution that differs from litigation in that, instead of proceeding through the court system according to the applicable procedural rules and presenting the case in front of a judge or jury, disputes are resolved outside of the courts before an impartial adjudicator. Those in favor of arbitration argue that, in light of crowded court dockets, arbitration provides a more speedy resolution. They also note that arbitration, unlike litigation, can be kept confidential—a bonus, particularly for employers who do not want claims against them to be aired for all to see. Those opposed to arbitration point out that arbitration can be more costly than litigation, can limit the parties' ability to conduct discovery, and can curtail appeal rights in the event of a mistake by the arbitrator.

Whether you're a fan of arbitration or not, the use of arbitration agreements—including those which ban employees from proceeding as a class or otherwise joining together in a collective action—has been increasingly widespread over the past decade. The United States Supreme Court approved the use of arbitration agreements in two decisions, issued in 2011 and 2013 respectively and, until recently, lower courts around the country have followed its lead by largely upholding arbitration clauses when they were challenged. Employers have therefore learned to rely on the validity of arbitration agreements governing their relationships with employees. In light of a recent federal decision out of the Seventh Circuit Court of Appeals in Chicago, however, that reliance may be questionable, as many arbitration clauses previously thought to be iron clad may actually be on shaky ground.

Specifically, on May 26, 2016, the Seventh Circuit decided Lewis v. Epic Systems, in which it considered the legality (and in turn, enforceability) of an employer-employee arbitration agreement which mandated that wage and hour claims be brought only through individual arbitration and provided that employees waived the right to participate in or receive relief from any "class, collective, or representative proceeding." In considering the legality of the agreement, the court analyzed a federal law—the National Labor Relations Act—which, among other things, protects employees' right to unionize, bargain collectively, and engage in "other concerted activities." The National Labor Relations Act also makes it illegal for an employer to interfere with those rights. After considering legal precedent, the court concluded that history and purpose of the National Labor Relations Act confirm that the phrase "other concerted activities," as used in the Act, includes resort to representative, joint, collective, or class legal remedies. The court then concluded that Epic Systems' arbitration agreement was illegal and unenforceable because it prohibited collective action in violation of the National Labor Relations Act.

This decision is controversial because it represents a departure from prior decisions which have upheld arbitration clauses that prohibit collective action. Because there is now a split of authority among the federal courts as to this issue, it is possible that it will find its way to the United States Supreme Court sometime in the near future. In the meantime, however, every employer-employee arbitration agreement that bans collective action is at risk of being deemed illegal.

In sum, if your employment relationship is governed by an arbitration clause, it is important for you to revisit the language of that clause to determine whether it bans collective action. If it does, and the clause is something you have been relying on, it is time to do some redrafting. Because the enforceability of a particular arbitration clause is a fact-sensitive issue that will vary depending on the circumstances, employers and employees alike are advised to seek legal advice tailored to their specific situation.