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JLO Newsletter Summer 2018

The Supreme Court and Arbitration Clauses: Employers' Rights

Epic Systems Corp. v. Lewis, Nos. 16–285, 2018 WL 2292444 (U.S. May 21, 2018)

By Elle M. Lannon

Employers continue to be afforded great leeway in requiring employees to sign arbitration agreements as articulated by the Supreme Court in the anticipated *Epic Systems Corp. v. Lewis* decision. Justice Neil M. Gorsuch wrote for the Court on May 21, 2018, resulting in a 5-4 ruling in favor of the enforcement of arbitration clauses. Under this ruling, employers may now lawfully require employees, as a condition of employment, to take all employment-related disputes to arbitration and require employees to waive their right to participate in a class action suit or joint arbitration. In his opinion, Justice Gorsuch first posed the question, "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" To fully understand why this question was answered in the affirmative, it is important to analyze the Courts reasoning behind the decision.

Facts

To begin, this case consolidated three similar cases, each dealing with the enforceability of arbitration agreements between employees and employers. Each case involved a contract "providing for individualized arbitration proceedings to resolve employment disputes between the parties." However, each employee instead wanted to pursue litigation in federal court through class or collective actions. Plaintiffs made three arguments, described below, for why their class action was outside the scope of the arbitration agreements. The Court rejected plaintiffs' arguments and subsequently reinforced judicial precedent that courts will enforce arbitration agreements as written because that is what Congress intended.

Analysis

Justice Gorsuch, joined by the conservative justices – John G. Roberts Jr., Anthony Kennedy, Clarence Thomas, and Samuel A. Alito Jr. – based his opinion on the Federal Arbitration Act ("FAA"), which provides that courts can enforce arbitration clauses in contracts. The FAA, adopted in 1925, makes no exceptions for employment contracts or class-action lawsuits.

Congratulations

Jardine, Logan & O'Brien, PLLP takes pleasure in announcing that **Patrick S. Collins** and **Vicki A. Hruby** have become Partners of the Firm.

Despite this, plaintiffs argued that the FAA's "saving clause" removed any obligation to enforce the arbitration agreement since the agreement violated federal law. Specifically, plaintiffs relied on a January 3, 2012, ruling by the National Labor Relations Board ("NLRB"), which states that class-action waivers in labor-contract arbitration clauses violated employees' collective-bargaining rights under the National Labor Relations Act of 1935 ("NLRA"). The NLRB relied on language in the 1935 law that protects "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protections." Because of this, plaintiffs argued

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that the 1935 NLRA superseded the 1925 FAA. The Court disagreed.

Generally, the Supreme Court is hesitant to infer that one statute overrides another absent Congressional intent of the same. Here, as Justice Gorsuch explains, the Court found no indication that Congress meant the NLRA to supersede the FAA. However, plaintiffs argued that past courts utilized *Chevron* deference to defer to an administrative agency's interpretation of the law. The Court rejected that argument, stating that *Chevron's* essential premises are missing from the case, and therefore, deference is not appropriate. Justice Gorsuch reasoned that arbitration agreements mandating that workers proceed on an individual basis must be enforced per the FAA. Enforcement of such provisions does not contravene the NLRA since the Act is only applicable in the context of unionization or collective bargaining, not in a legal setting.

Conclusion

In this monumental decision, the Court expanded upon recent Court decisions enforcing individual arbitration provisions allowing corporations to avoid class-action suits by consumers. In his opinion, Justice Gorsuch acknowledged that the questions presented in the case are debatable as a matter of policy, but ultimately, as a matter of law, Congress instructed federal courts through the FAA to enforce arbitration agreements according to the agreement's terms, including terms relating to individualized proceedings. Although enforcement is still vulnerable to generally applicable contract defenses, this ruling highly favors employers and makes clear that once an employee signs an arbitration agreement, a court will enforce the agreement and prevent any attempts at a class-action suit. ●

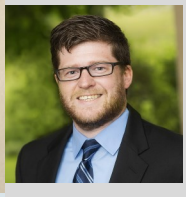
Congratulations

Congratulations to **Tessa M. McEllistrem, Lawrence M. Rocheford**, **Elisa M. Hatlevig**, **Joseph E. Flynn**, and **Vicki A. Hruby** who were named to the *2018 list of Minnesota Super Lawyers* and *Rising Stars.*

Super Lawyers is a Thomson Reuters business that provides a rating service of outstanding lawyers from more than 70 practice areas, who have attained a high-degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Rising Stars selections undergo the same selection process as Super Lawyers but recognizes attorneys who are 40 years old or younger, or have been practicing for 10 years or less. No more than 2.5% of lawyers in Minnesota are named to the Rising Stars list.

Welcome

JLO welcomes **Peter F. Lindquist** and **Nicholas G. Strafaccia** as our newest associates.



Peter received his J.D. from William Mitchell College of Law in 2014. He will be assisting clients in the area of Workers' Compensation.

Nick received his J.D. from Mitchell Hamline School of Law in 2017. He will be assisting clients in the area of civil litigation

Peter and Nick look forward to helping our clients resolve their disputes.

Major Legislative Changes to the Minnesota Workers' Compensation Act

By Sarah D. Shaich Squillace

Both the Minnesota House and Senate approved proposed workers' compensation legislation during the 2018 legislative session. Governor Dayton signed the bill into law on May 20, 2018. The Workers' Compensation Advisory Council made the recommendations that are now law. There are significant changes that will affect the way in which we all review and analyze claims.

I

First, there are revisions to the way Post-Traumatic Stress Disorder (PTSD) is handled. There is now a rebuttable presumption that an employee employed on active duty in certain areas, who is diagnosed with PTSD per the DSM-V, and has not been diagnosed before, has a work related injury under the statute. This is pursuant to Minn. Stat. § 176.011, subd. 15. Those areas are: a licensed police officer; a firefighter; a paramedic; an emergency medical technician; a licensed nurse employed to provide emergency medical services outside of a medical facility; a public safety dispatcher; an officer employed by the state or a political subdivision as a corrections, detention or secure treatment facility; a sheriff or full-time deputy sheriff of any county; or a member of the Minnesota State Patrol. If the employer and insurer have information to rebut the presumption, that information must be communicated to the employee at the time of the denial. PTSD is not considered an occupational disease/compensable work injury, if the diagnosis results from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement or similar action taken in good faith by the employer.

Thus, there are defenses to the presumption that an employee has PTSD if diagnosed properly, and if he or she is employed in one of the above-mentioned positions. Granted, the nature of the employments listed does give rise to an increased possibility of difficult situations. However, an insurer can assert defenses at the time of denial. For example, a prior diagnosis of PTSD. The new PTSD rebuttable presumption applies to employees with a date of injury on or after January 1, 2019.

II

Effective October 1, 2018, the 225 week cap on Temporary Partial Disability (TPD) benefits is being increased to 275 weeks. Minn. Stat. § 176.101, subd.2. The 450 week limit on paying TPD from the date of injury still applies.

III

Pursuant to Minn. Stat. § 176.101, subd. 2a, the table of dollar amounts for calculating Permanent Partial Disability (PPD) has increased. The increase in PPD amounts is effective for injuries on or after October 1, 2018.

IV

Under Minn. Stat. § 176.101, subd. 4, the age 67 retirement presumption for claims for Permanent Total Disability (PTD) will no longer exist. Instead, PTD benefits will end at age 72. Because the amendment indicates benefits shall cease, presumably no paperwork needs to be filed. However, it would still be wise to file a Notice of Intent to Discontinue (NOID). If an employee is injured after age 67, the age 72 cutoff does not apply. If an employee is 67 or older at the time of injury and is declared PTD, then the PTD benefits cease after five years. The changes to the PTD statute take effect for dates of injury on or after October 1, 2018.

V

There is a new fee schedule for hospital outpatient services, emergency room and clinic services. The new fee schedule uses Medicare's outpatient payment system as a model. This will decrease the medical payments made for hospital outpatient services. Of note, the hospital outpatient fee schedule will not apply to Medicare-certified critical access hospitals. These hospitals are paid at 100 percent of the usual and customary charge, unless the commissioner or a compensation judge determine the charge is unreasonably excessive. The new statute directing the use of the fee schedule shall be Minn. Stat. § 176.1364.

VI

The last addition is to Minn. Stat. § 176.83, subd. 5, which adds a clause for the commissioner of the Department of Labor and Industry, in consultation with the Medical Services Review Board, to adopt rules in the treatment parameters for the treatment of PTSD. The rules for treatment of PTSD will apply to employees with all dates of injury who receive treatment for PTSD after the rules are adopted. ●

Wisconsin Legislative Update

By Elle M. Lannon

The 2017-2018 Wisconsin legislative session made expansive changes to the practice of civil litigation. Noteworthy additions and alterations to state statutes as a result of the legislative session are summarized below, including changes to discovery procedures and statute of limitations for civil actions, employment matters, and health care law.

I. Tort Reform

Signed into law on April 3, 2018, Wisconsin Act 235 was enacted directly by the legislature, thereby significantly departing from the standard practice of first consulting the Wisconsin Supreme Court or Judicial Council. Despite this, the Act gained support for its modifications and additions to civil litigation provisions.

Scope of Discovery

This law specifically alters the language of *Wis. Stat. § 804.01, subd. 2* relating to the scope of discovery. The law now reads in pertinent part, "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable." This modification adopts the proportionality standard from the 2015 Federal Rules of Civil Procedure amendments. Significantly, the law requires that material or information sought be both relevant and proportional but now does not have to be admissible in evidence to be discoverable.

Statute of Limitations

The new law also modifies the statute of limitations for different actions. First, the statutory period to bring a cause of action to recover damages for statutory claims, an injury to the character or rights of another, fraud, and some claims by franchised motor vehicle dealers is shortened from six years to three years (unless a different period is expressly prescribed). Second, the statute of limitations for actions for injuries resulting from an improvement to real property is shortened from ten years to seven years and the injury must now be suffered in years five and seven after completion to trigger the extension.

Stay of Discovery

Under the new law, a filing of a motion to dismiss, motion for judgment on the pleadings, or motion for a more definite statement delegates a stay for all discovery requests "unless the court finds good cause upon the motion or any party that particularized discovery is necessary." The stay is active for 180 days or until the day the motion is decided.

Electronically Stored Information

The new law added a provision stating that a party is now not required to provide discovery of certain categories of ESI without a showing by the moving party of substantial need and good cause, which is subject to a proportionality assessment. ESI subject to this provision includes (1) data that cannot be retrieved without substantial additional programming or form transformation, (2) substantially duplicative backup data that is available elsewhere, (3) legacy data remaining from obsolete systems that are unintelligible on successor systems, and (4) any other data not available in the ordinary course of business and that the producing party identifies as not reasonably accessible because of undue burden or cost. The burden is on the producing party to show that the ESI is not reasonably accessible.

Limitations on Discovery

This new law also alters the limitations for parties' discovery options. Parties are now limited, unless otherwise stipulated or ordered, to a reasonable number of depositions, which is not to exceed 10 and are each limited to a maximum of seven hours. Parties are now also limited to a reasonable number of interrogatory requests, which is not to exceed 25 interrogatories, unless otherwise stipulated or ordered.

Further, the new law provides that courts shall limit the frequency or extent of discovery in certain situations upon motion. A court's discretion to limit discovery does not require a finding that the discovery is unreasonable.

Sanctions

Under the new law, parties may now be sanctioned for failing to produce copies of documents in response to a document request.

Cap on Discovery Period

This law now provides that document requests shall be limited to a reasonable time, which shall not exceed five years before accrual of the cause of action (unless otherwise stipulated or ordered). There is a limited carve out for certain areas, including health care and similar records.

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II. Other Relevant Legislation

Employment Law

Assembly Bill 748 passed the Legislature and preempts local governments from enacting and enforcing ordinances relating to different employment matters. Specifically, AB 748 prohibits ordinance regulations that relate to wage claims and collections, employee hours and overtime (including scheduling of employee work hours or shifts), employment benefits an employer may be required to provide to its employees, and employers' rights to solicit information regarding the salary history of prospective employees. State or local governments are prohibited from enacting any statute or ordinance that would require any person to accept any provision that is a subject of collective bargaining under state or federal labor laws. Finally, state or local governments cannot require any person to waive his or her rights under state or federal labor laws as a condition of any other approval by the state or local government.

Health Care Law

Signed into law as 2017 Wisconsin Act 165, this new law permits terminally ill patients access to investigational drugs, devices, or biological products not approved by the FDA if the drug, device, or product has, among other things, completed a phase one clinical trial and FDA approval is pending. To be eligible, a patient must have had considered all other available treatment options, received a treating physician's recommendation or prescription order for an investigational drug, device, or biological product, and given written informed consent for use of the drug, device, or product, among other things. The law provides a limitation of liability under state law for a manufacturer, distributor, pharmacist, physician, or other practitioner if they exercise reasonable care in providing the investigational drug, device, or product to an eligible patient. ●

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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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