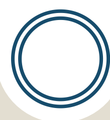


29TH ANNUAL LABOR & EMPLOYMENT LAW INSTITUTE

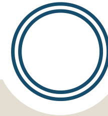
STATE BAR OF TEXAS LABOR & EMPLOYMENT LAW SECTION

STATE OF ADR

Charles C. High, Jr.

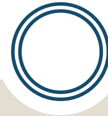
Brian Sanford

WHAT IS ADR?



- Common term we all understand
- Federal government even has a definition:
- "Any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof.
- 5 U. S. Code § 571(3) [Government Organization and Employees].

WHAT IS ADR?



- Texas Alternative Disputes Resolution Act of 1987, Tex. Civ. Prac. & Rem. Code. Ann., Chapter 154, says ADR is State policy
- Identifies5 types:
  - Mediation
  - Mini-trial
  - Moderated settlement conference
  - Summary jury trial
  - Arbitration
- Counties also authorized to establish ADR systems. Tex. Civ. Prac. & Rem. Code, Chapter 152.

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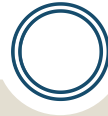
MOST COMMON – MEDIATION AND ARBITRATION

- **Mediation**
  - One step in the march toward trial
  - Many courts will not set trial until contested issues mediated. See, e.g., Rule 3.16, Local Rules of the courts of El Paso County, Texas.
  - Neutral third party – some better than others
  - Conference room setting
  - Generally opening session followed by shuttle diplomacy
  - If settled, reduced to writing and enforceable
  - Mediator reports outcome to judge

MOST COMMON – MEDIATION AND ARBITRATION

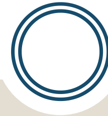


- **Mediation**
  - Not limited to courts
  - EEOC
  - NLRB
  - Courts of Appeal
- **Pros and Cons:**
  - Allows parties a chance to resolve by agreement
  - Mediator has no authority to force settlement
  - Saves money and time
  - Reduces chance of future hard feelings

MOST COMMON – MEDIATION AND ARBITRATION

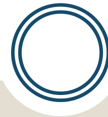
- **Arbitration**
  - Alternative to litigation in court
  - Faster
  - Less expensive
  - More control by parties – arbitrator, date, location, time
  - But no appeal from bad decision
  - Less opportunity for summary judgment
  - Employer can force use in lieu of in court litigation as part of HR policies

HOW PREVALENT IS MANDATORY?



- **Private sector non-union employees:**
  - 1992 – just over 2% of workforce
  - Early 2000's – 25%
  - Now – 56.2%
  - Employers over 1,000 employees – 65.1%
  - Results – 60.1 million employees subject to mandatory arbitration agreements
- **Source: Economic Policy Institute, Colvin, Alexander J.S., *The Growing Use of Mandatory Arbitration*, April 6, 2018**

WHO ARE THESE COMPANIES



- 80 of the companies in the Fortune 100 used arbitration for workplace disputes since 2010
- Over 50% of these 80 companies have mandatory arbitration agreements
- Of these 80, 39 have arbitration agreements with class action waivers
- Source: The Employee Rights Advocacy Institute For Law & Policy, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, Szalai, Imre S., Distinguished Professor of Social Justice, Loyola Univ. New Orleans College of Law (March 2018)

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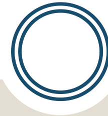
RECENT CASES



- **Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018)**
  - Consolidation of three cases for briefing and argument:
    - **Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016)**
    - **Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016)**
    - **Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015)**
  - All three cases involved mandatory arbitration agreements containing provisions requiring individual arbitration and waiving class actions
  - Question before the Supreme Court was whether the arbitration agreements were enforceable given the NLRB's finding that class action waivers violate the NLRA and the Federal Arbitration Act's savings clause which preclude enforcement if an arbitration agreement violates some other federal law

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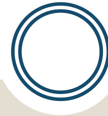
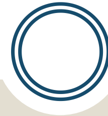
EPIC SYSTEMS V. LEWIS



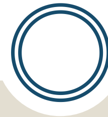
- **Here is how Justice Gorsuch stated the issue:**
  - **"Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"**

EPIC SYSTEMS V. LEWIS



- HELD: In a 5 -4 decision written by Justice Gorsuch, the Court held that the Federal Arbitration Act requires enforcement of individualized arbitration agreements and neither the FAA or the NLRA suggest otherwise.
- Justice Ginsburg filed a 30 page dissent, joined by Justices Breyer, Sotomayor, and Kagan.
- Decision settles once and for all the issue of the validity of class action waivers but provides valuable guidance on other several other issues

WHAT EPIC SYSTEMS TELLS US



- 1. **In the FAA, Congress has instructed federal courts to enforce arbitration agreements according to their terms – including terms providing for individualized proceedings.**
- **2. The NLRA secures to employees rights to organize unions and bargain collectively, but says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.**
- **3. The Supreme Court has never read a right to class actions into the NLRA.**

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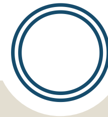
WHAT EPIC SYSTEMS TELLS US



- 4. **The FAA directs courts to enforce arbitration agreements as written, including the procedures chosen by the parties, the person or organization with whom they will arbitrate, and the rules under which they will arbitrate.**
- **5. The FAA savings clause only recognizes defenses that apply to "any" contract and thus establishes what the Court said was a sort of equal-treatment" rule for arbitration agreements. In other words, it does not apply to defenses that apply only to arbitration agreements.**

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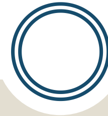
WHAT EPIC SYSTESMS TELLS US



- 6. The phrase "other concerted activities for the purpose of …other mutual aid or protection" in NLRA Section 7 refers to the specific terms before it (self-organization, form[ing], join[ing], or assist[ing] labor organizations, and bargain[ing) and does not extend to the highly regulated, court-room bound "activities" of class and joint litigation.
- 7. Arguments based NLRA Section 7, therefore, are like a "triple bank shot": the NLRA steps in to dictate the procedures for claims under a different statute (the FLSA) and thereby overrides the commands of yet a third statute (the FAA).

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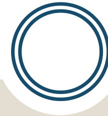
WHAT EPIC SYSTEMS TELL US



- 8. **This violates the general rule that Congress does not alter the fundamental detail of a regulatory scheme in vague terms; therefore, it is doubtful that Congress hid in Section 7's catchall phrase a requirement that the NLRB is the supreme superintendent of claims arising under a statute it doesn't even administer.**
- **9. A statute that expressly provides for collective legal action does not necessarily mean that it precludes individual attempts at conciliation through arbitration.**

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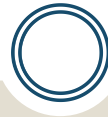
WHAT EPIC SYSTEMS TELLS US



- 10. **No *Chevron* deference is due when an agency, here the NLRB, interprets a statute it administers in a way that limits the work of a second statute, here the FAA.**
- **11. When a company emails an arbitration agreement with class action waivers to employees and tells them that continued employment will be deemed acceptance did not seem to bother the majority.**
- **The divide between the majority and minority views is wide and deep. The majority does not read Section 7 as encompassing the right of employees to join together in a class action while the minority believes such right is clear and consistent with prior cases.**

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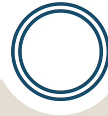
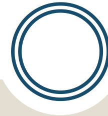
RECENT CASES



- **Gaffers v. Kelly Services, Inc., 2018 WL 3863422 (6th Cir. August 15, 2018).**
  - Call center employee sued under the FLSA for unpaid wages for logging in/logging out. 1600 others opted in.
  - About half signed arbitration agreements requiring individualized arbitration
  - Gaffers did not but was class representative
  - Company filed motion to compel arbitration; Gaffers responded claiming unenforceable because of NLRA and FLSA; District Court agreed and denied motion
  - On appeal, Court said *Epic Systems* controls the NLRA question

GAFFERS V. KELLY SERVICES



- **FLSA Claim:**
  - Gaffers argued the FLSA and FAA were irreconcilable because FLSA provides for collective actions
  - Citing *Epic Systems*, Court said Gaffers must prove that the FLSA includes a clear and manifest congressional intent to make individual arbitration agreements unenforceable
  - Such a showing requires more than just showing that the FLSA provides a right to engage in collective action; must show that Congress expressly stated that an arbitration agreement poses no obstacle to pursuing a collective action and the FLSA contains no such statement

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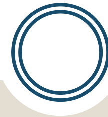
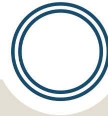
GAFFERS V. KELLY SERVICES



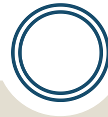
- Instead, the FLSA gives an employee the option of bring her claim together with others but does not mandate she do so
- Thus, the Court said, employees who did not sign an arbitration agreement can bring a collective action but those who signed cannot
- Court also rejected the argument that the arbitration agreements were illegal and unenforceable under the FAA savings clause because they required individual arbitration; does not apply because apply only to arbitration, not all contracts; reversed and remanded

RECENT CASES



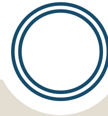
- Williams v. Dearborn Motors 1,LLC, 2018 WL 3870068 (E. D. Mich., Southern Div.)(August 15, 2018)
- Plaintiff filed suit under Title VII, ADA, and ADEA claiming that requiring employees to sign arbitration agreements with class action waivers was a “pattern and practice” that denied their access to rights under federal statutes
- Motion to compel arbitration granted

WILLIAMS V. DEARBORN MOTORS 1



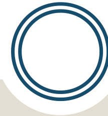
- Employees argued that *Epic Systems* limited to FLSA claims
- Court rejected; said nothing in Title VII, ADA, or ADEA that overrides the FAA's mandate to enforce arbitration agreements
- While each statute allows class or collective actions, such procedures are not mandatory so parties can contract for individualized arbitration

RECENT CASES



- **Guerrero v. Halliburton Energy Services, Inc., 2018 WL 3615840, (E.D. Cal. July 26, 2018)**
- **Plaintiff filed collective action for unpaid wages, failure to provide meal periods, and failure to pay overtime, among others**
- **Removed to federal court**
- **Argument that the arbitration agreement with class action waiver was unenforceable rejected because of *Epic Systems***

GUERRERO V. HALIBURTON



- Also claimed arbitration agreement was unconscionable under California law because had class action waiver
- HELD: Not unconscionable because of *Epic Systems* and the fact that the FAA preempts California law

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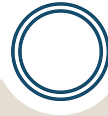
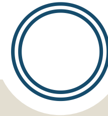
RECENT CASES



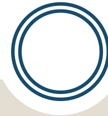
- Huckaba v. Ref-Chem, L.P., 892 F.3d 686, 2018 WL 2921137 (June 11, 2018)
- Former employee sued claiming sexual harassment, discrimination, and retaliation in violation of Title VII
- Employee had signed the arbitration agreement but Ref-Chem had not (space for signature was blank)

HUCKABA V. REF-CHEM



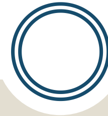
- On appeal, the 5th Circuit reversed and remanded, holding that:
  - Whether there is a valid arbitration agreement is a question of state contract law and is for the court;
  - Under Texas law, whether a signature is required to bind a party to a contract is a question of the parties' intent;
  - Here, the express language of the arbitration agreement required the parties' signatures before they would be bound;
  - The employer never signed and therefore the agreement was not enforceable

HUCKABA V. REF-CHEM

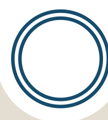


- *In re Halliburton Co.* (arbitration agreement enforceable even though not signed) distinguished for two reasons:
  - *Halliburton* focused on the employer's acceptance of the agreement while this case was about the execution of the agreement under Texas law; and
  - In *Halliburton*, the language of the agreement stated that submission to arbitration was a term of employment and commencing work constituted acceptance and bound the parties. Such language was not present here.
- Court concluded that neither party bound to arbitrate because express language of the agreement indicated an intent to be bound by signing and Ref-Chem never signed.

THE END



- **Thank you for your time and attention.**



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