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Epic and Lamps Plus: Employment Contracts, Arbitration Agreements and Class Waivers

WEDNESDAY, AUGUST 7, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Seth R. Lesser, Founding Partner, **Klafter Olsen & Lesser**, New York

Michael W. Massiatte, Of Counsel, **DLA Piper**, Dallas

Christopher C. Murray, Shareholder, **Ogletree Deakins Nash Smoak & Stewart**, Indianapolis

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Employment Contracts After EPIC SCOTUS Decision: Arbitration And Class Waivers

Seth Lesser, Klafter Olsen & Lesser LLP
seth@klafterolsen.com

Michael Massiatte, DLA Piper
michael.massiatte@dlapiper.com

Christopher C. Murray, Ogletree Deakins
christopher.murray@ogletree.com

Strafford Webinar
August 7, 2019

OVERVIEW

- Overview of *Epic* ruling and impact on employment contracts
- Strategies for employers in drafting enforceable arbitration agreements and class waivers
- New legislation?
- Tactics to expect from plaintiffs' attorneys in light of the increasing use of class action waivers

EPIC SYSTEMS V. LEWIS

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612
- Issue Presented: Does the NLRA Prohibit Collective/Class Waivers in Employment Contracts So That Such Waivers Are Unenforceable In Employment Contracts Governed by the Federal Arbitration Act
- Three consolidated cases were heard, including the Seventh Circuit's ruling that the NLRA and FAA could be construed together to recognize that cases could be arbitrated but such waivers were not enforceable in the arbitral setting

EPIC SYSTEMS V. LEWIS

- NLRA Argument: Section 7 of the Act protects class and collective actions are "concerted activities"
- Section 7 protects "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §157

EPIC SYSTEMS V. LEWIS

- Holding (5-4): Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise
- Analysis:
  - The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select

EPIC SYSTEMS V. LEWIS

- No deference to NLRB because it is does not administer the FAA and because there is no conflict between the statutes
- Dissent: Both legal and practical
  - Practical: Contracts are not really freely entered into and contravenes NRLA's recognized history of protecting rights of employees to litigate collectively
  - Conclusion: "The court today holds enforceable this arm-twisted, take-it-or-leave-it contracts — including the provisions requiring employees to litigate wage and hours claims only one-by-one....Federal labor law does not countenance such isolation of employees."

LAMPS PLUS, INC. V. VARELA

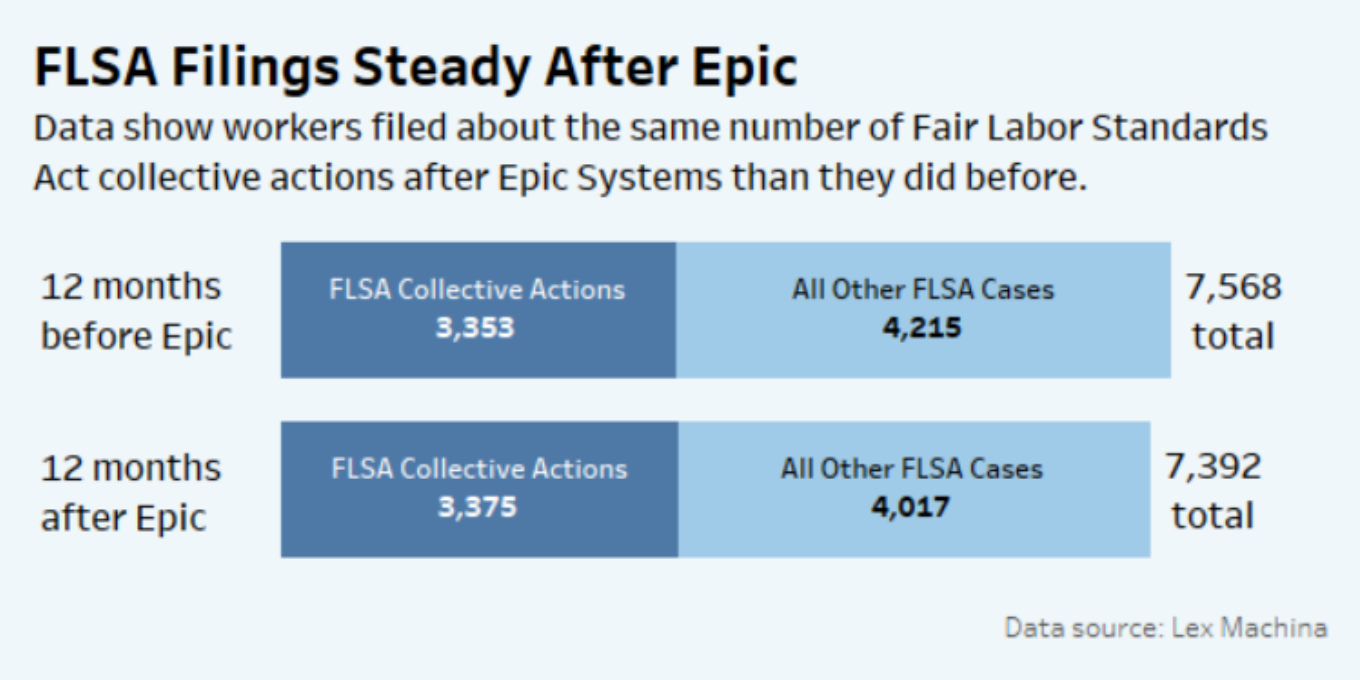
- *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)
- Issue Presented: "[w]hether the Federal Arbitration Act [FAA] forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements."
- Holding (5-4): Arbitration is a "matter of consent, not coercion." Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis. The doctrine of contra proferentem cannot substitute for the requisite affirmative "contractual basis for concluding that the part[ies] agreed to [class arbitration]."
- Bottom line: Decision is consistent with a long line of cases holding that the FAA provides the default rule for resolving ambiguities (including the scope of an arbitration provision) in arbitration agreements

EPIC & LAMPS PLUS TOGETHER

- 1. Number 1 take-away of decisions from Employer's perspective
- 2. Number 1 take-away of decisions from Employee's perspective
- 3. What about class action waivers outside of arbitration agreements?

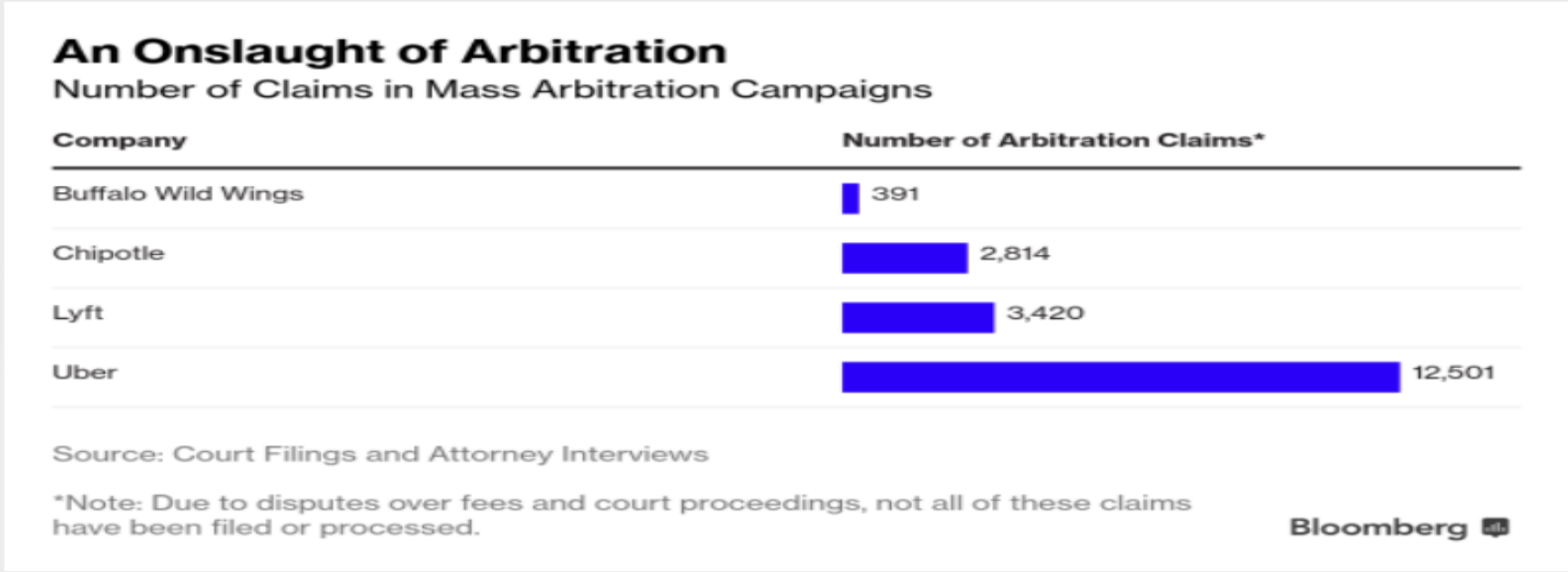
HAVE FILINGS CHANGED?

- FLSA cases have dipped only slightly between May 21, 2018 and May 17, 2019
- AAA filings are down approximately 200 from the prior year



STRATEGIC RESPONSES TO *EPIC SYSTEMS*

- Plaintiffs' attorneys' responses?
  - Alternatives to class actions?
  - Mass arbitrations to coerce settlement?



RESPONSES TO *EPIC SYSTEMS*

- What are management attorneys telling their clients to expect in litigation?
- How are companies responding to *Epic Systems*?
  - Interest in mandatory arbitration and class action waivers has increased

PROS AND CONS OF ARBITRATION

- Quicker
- Lower costs (?)
- No right of appeal
- Fewer summary judgment victories for defendants, more hearings
- No risk of runaway jury awards
- More compromise awards

DRAFTING TIPS

- Opt-out provisions
- Delegation clause
- Forum selection clause
- Who is covered?
  - All employees?
  - Applicants?

DRAFTING TIPS

- Roll-out only to new hires? To current employees?
- What claims are covered?
  - Claims that cannot be arbitrated by law
  - Preliminary relief
  - Exclude sexual harassment claims? (More later.)

WHAT TYPE OF PROGRAM?

- Arbitration only?
- Multi-step Alternative Dispute Resolution (ADR)?
  - Open door / management conferences
  - Peer review panel
  - Mediation
  - Binding arbitration

DRAFTING TIPS

- What works best in ADR and arbitration from the employees' point of view?

- Should arbitration agreements contain a confidentiality provision?
  - Should it be optional?
  - What should it cover?

PREPARE FOR UNCONSCIONABILITY CHALLENGES

- *Armendariz v. Foundation Health Psyche Services, Inc.* (California) says mandatory employment arbitration agreements must provide for:
  - neutral arbitrator
  - more than minimal discovery
  - a written award
  - all relief available in court
  - employees not required to pay unreasonable costs or any arbitrators' fees or expenses

A #METOO BACKLASH?

The New York Times | https://nyti.ms/2yV6c26

Opinion | OP-ED CONTRIBUTOR

Gretchen Carlson: How to Encourage More Women to Report Sexual Harassment

By GRETCHEN CARLSON OCT. 10, 2017

#METOO EFFECTS

- Employee advocates (ACLU and Economic Policy Institute) have ramped up pressure on companies—mainly large technology companies (*e.g.*, Amazon, Apple, Facebook, Google, etc.)—to scrap mandatory employment arbitration agreements
  - **Google**
    - 20,000 employees walked out of work in November 2018
    - Effective March 21, 2019, Google stopped enforcing its arbitration agreements for *all* work related disputes
  - **Uber, Lyft, Facebook, Airbnb and eBay**
    - Each announced that they will allow employees to bring sexual misconduct and harassment claims in court

EPIC EFFECT – LAW FIRMS

- The Pipeline Parity Project, founded by law students at Harvard, have encouraged law students to boycott law firms that require employees to sign arbitration agreements
- In response, several law firms have scrapped their arbitration agreements
  - Munger Tolles & Olson
  - Orrick
  - Skadden Arps
  - Kirkland
  - Sidley
- The ABA announced that it is opposed to mandatory arbitration agreements

A LEGISLATIVE RESPONSE?

- Limiting employment arbitration
  - Passed: New York, Maryland, Washington, Vermont, New Jersey
  - Considering: Massachusetts, others
  - Preemption by Federal Arbitration Act?
    - Struck down: New York

A LEGISLATIVE RESPONSE?

- Congressional Bills
  - Bars arbitration of *all* sex discrimination claims, not just harassment
  - Bipartisan bill
  - 50 Attorneys General letter

CALIFORNIA ISSUES: PAGA

- ***Iskanian v. CLS Transportation*** **(Cal. Sup. 2014)**
  - California Private Attorney General Act ("PAGA") claims not subject to arbitration
  - PAGA-only lawsuits to avoid arbitration?

PAGA IN OTHER STATES?

- Others to follow?
  - EMPIRE Act: New York's version of PAGA?
  - Connecticut, Illinois, Oregon, Vermont
- Do Plaintiffs' attorneys consider PAGA-type actions a reasonable substitute for class actions?
- How will the Supreme Court treat PAGA?

EMPLOYEES' RESPONSE

- Unions to use *Epic Systems* as a rallying cry to organize?

- Are employees becoming more aware of ADR and arbitration program?
  - If so, does it affect their decisions in choosing a job?

LOGISTICS OF THE ROLL-OUT

- Don't bury in an employment agreement or employee handbook
  - Stand-alone document? *Sanchez v. CarMax Auto Superstores of California, LLC*224 Cal.App.4th 398, 403 (2014).
- Attach, or clearly reference, rules that will govern any arbitration.

LOGISTICS OF THE ROLL-OUT

- Obtaining signatures/acknowledgments

- Best practice tips
  - Centralized team for roll-out
  - Signed agreements maintained in 2 locations

ELECTRONIC AGREEMENTS

- How to prove electronic distribution of agreements to all employees

- How to prove employee received and electronically acknowledged receipt

CAUTION IF CLASS CASES ARE PENDING

- Use caution when rolling out arbitration agreement while class action is pending.
- Courts may invalidate agreement on that basis alone.
- Consider carving out pending class actions.