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OP-ED

Supreme Court ruling will deter construction workers' claims for unpaid wages

Decision on arbitration clauses favors employers in a key New York industry

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Published: June 19, 2018 - 6:00 am

A much-anticipated decision late last month by the U.S. Supreme Court will have a profound effect on employer-employee relationships, particularly in New York, where construction is king. At issue in Epic Systems Corp. v. Lewis was the enforceability of employer-employee arbitration agreements. The central question as framed by the court:

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?

In the 5-4 majority opinion authored by Justice Neil Gorsuch, the answer is crystal-clear: such arbitration agreements are valid and trump any effort by employees to bring class-action claims in court, including those over wage and hour disputes.

Specifically, the court held that the National Labor Relations Act, which guarantees employees various rights to collectively organize and bargain, cannot prevent the enforcement of individual arbitration clauses in employment agreements. The court's strong enforcement of arbitration is consistent with its decades of recent pro-arbitration decisions.

Court dockets today are replete with class-action lawsuits seeking overtime and prevailing wages under the federal Fair Labor Standards Act and New York's Labor Law. Approximately 7,500 to 8,500 such cases are filed annually, with the Southern and Eastern Districts of New York being two of the most popular venues. Epic Systems may stem that tide. The decidedly pro-employer decision will encourage employers to insulate themselves from lawsuits, particularly class actions, simply by requiring that each employee sign an arbitration agreement as a condition of employment.

Consider the potential effects in the construction industry. Rather than suing collectively on wage claims in one unified lawsuit, employees who agree to arbitrate will be required to file their own individual standalone arbitration proceedings. In so doing, they must hire their own attorney to present their claims to an arbitrator who will decide whether they have been properly paid. Because there will be no unified lawsuit covering all similarly-situated employees, all represented by the same attorney, it is far less likely employees will pursue wage claims. After all, weighing the potential recovery against the cost of retaining an attorney on a case-by-case basis for an individual arbitration, it is often not worth the effort.

The pending lawsuits arising out of wage disputes on construction projects are premised on a recurring fact pattern: Four or five workers on a large construction project retain one attorney to sue their common employer to recover the alleged difference between the monies they were paid and what federal and state law mandate they should have been paid. Those same laws contain provisions that, when applicable, also assess monetary damages, attorney's fees and accrued interest against the employer on any unpaid monies.

When there are numerous (and sometimes hundreds) of other similarly situated employees, the lawsuit is filed as a class action, meaning that the plaintiffs' attorney will eventually seek court approval for "certification" to represent all of the allegedly underpaid employees who worked on a particular project for the same contractor. If certification is granted (and it often is), the defendant-employer must now defend against a large number of claims rather than just several. Proceeding as a class gives the plaintiffs the ability to act collectively using economies of scale to make the litigation an affordable reality, creating the prospect of a huge liability to an employer who violated the wage laws. It also motivates their attorneys to file class-action lawsuits because, if successful, the attorney's fees awarded are significant.

In light of the Epic Systems decision, general contractors and subcontractors now will seriously consider requiring their workers to sign agreements, as a condition of their employment, requiring that any disputes between them be resolved through individual arbitration proceedings, thereby quashing the ability of multiple employees from banding together to sue as a class.

The decision is not without controversy. Justice Ruth Bader Ginsburg wrote in her dissent, "The inevitable result …will be the under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers." She asserts that the small recoveries associated with individual arbitration cases will not provide the incentive for employees to protect their right to receive fair wages.

All players in the construction industry—particularly contractors, subcontractors, union representatives and trade workers—should take note of this decision. Epic Systems emphatically reinforces the power of arbitration agreements in employment contracts.

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