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Supreme Court class-action waiver decision: What employers should know

There's an old saying that states: "Just because you *can* do something doesn't necessarily mean you *should*." Employers ought to keep that in mind when considering their next steps following the U.S. Supreme Court's blockbuster decision this spring in the case of *Epic Systems. Corp. v. Lewis*.

That case involved the issue of "class action" lawsuits. A class-action suit is a single lawsuit brought on behalf of multiple people claiming the same injury caused by the same party under similar circumstances.

The most common types of employee class actions involve multiple employees claiming the same employer has violated wage-and-hour laws, cheating them out of pay they've earned. But employee class actions can also involve alleged safety violations, accusations of widespread sexual harassment and systemic race or gender discrimination.


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In the *Epic* case, the Supreme Court ruled 5-4 that employers can require workers to sign agreements waiving the right to bring class actions over employment disputes and agreeing to individual arbitration of any dispute instead. In other words, workers would have to proceed alone before a neutral third party instead of proceeding as a large group to a jury.

This represents a clear "win" for employers for a variety of reasons. For one thing, class actions can be costly. Even if an individual worker's level of harm isn't that high, these cases can translate into huge dollars in the aggregate. Further, juries can be unpredictable, which means employers often feel pressure to settle these cases, even when they truly believe they lack merit. In fact, according to a recent study conducted by a pair of worker-advocacy groups, large companies have paid out close to $9.2 billion in employee class actions since 2000.

But while the prospect of making class actions "go away" is enticing,

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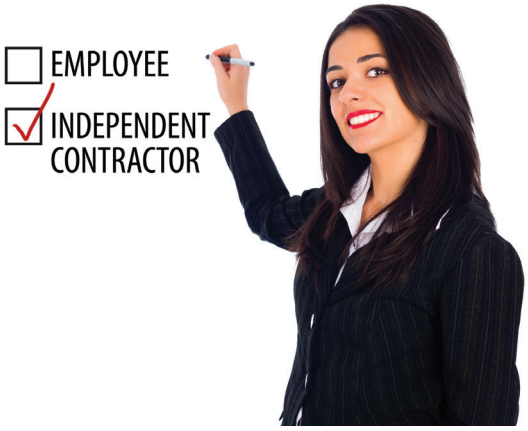
Misclassification cases can be costly

It's very tempting to hire people and label them as independent contractors. You're saving money because independent contractors aren't entitled to employee benefits, overtime and wage-and-hour protections. But this is a risky strategy because courts have been cracking down on employers who misclassify workers as independent contractors when they're really employees.

So how do you tell whether you can safely label a worker as an independent contractor? It varies a bit from state to state, but in states like Massachusetts, California and New Jersey, courts will generally assume a worker is an employee unless he or she is free from your "direction and control;" is doing something outside your company's usual course of business; and is engaged in an "independently established trade, occupation, profession or business" of the same nature as the service he or she is providing to you.

Other states focus on whether the services being provided are "an integral part" of the employer's business, how permanent the relationship is, and how much control the company has over the worker. If any of those factors are significantly present, the court might deem the worker to be employee.

Misclassification cases can be costly to the employer. In addition to damages like lost wages, you might have to pay the worker's attorney fees. So if you're wondering whether it's safe to try to classify some of your workforce as "independent contractors," you should really talk to an employment lawyer first to determine if you'd be complying with the law.



Use personality tests with caution during hiring process

Personality assessments are a commonly used tool for employers to evaluate applicants during the hiring process. But recent settlements between the federal Equal Employment Opportunity Commission and two large retail chains, CVS and Best Buy, suggest that companies using these tests should tread carefully.

That's because, according to the EEOC, these tests may be racially or culturally biased, creating a pattern of discrimination against racial or ethnic minorities.

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The EEOC did not accuse either company of intentionally discriminating. But it did observe that the tests the companies were using resulted in white applicants having dramatically different scores than non-white applicants.

In both cases, the tests being used hadn't been statistically validated. In fact, the test-makers apparently warned against using them for hiring purposes.

But even statistically validated personality tests can create risk for employers if they disproportionately harm female or minority applicants. In those cases, the employer would need to show that there was a real business need to use the test that couldn't be satisfied in any other nondiscriminatory way. That's a tough burden to meet.

If your organization uses or is considering using personality tests, talk to an employment lawyer first about what you plan to do with them. Maybe they're worth using to identify areas where you might want to better train your workforce. But if you're using them to make hiring decisions, you might be walking on thin ice.

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there are some thing employers should think about before rushing to draft a class action waiver and forcing all their workers to sign it.

First, while arbitration can be a cheaper, quicker and more predictable means of resolving disputes than a jury trial, it does have its shortcomings. In some cases it can actually be more expensive, if the employer is paying for the process aside from the worker's filing fee.

Further, arbitration is final. That's helpful if you win. But if the employee wins and you think the arbitrator got it wrong, you can't appeal.

One advantage to a class action is that you only have to defend one case. If you're dealing with multiple individual claims being handled on a case-by-case basis, you could lose some of them, depending on how good each worker's attorney is or who you get as an arbitrator.

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Finally, you should think hard about whether your arbitration agreement covers sexual harassment cases, particularly in the #MeToo era, when there's been so much buzz about harassment being swept under the rug by shunting cases off to secret arbitration. From a PR standpoint, it may be better to exclude these types of cases while making a firm commitment to addressing potential harassment and gender bias in the workplace.

Common mistakes made in non-compete agreements

An increasing number of employers have been making workers sign "non-compete" agreements. These are agreements where employees pledge not to work for a competitor if they leave the company for any reason. The purpose of these agreements is generally for a company to protect its trade secrets, its confidential information and its customer/client relationships, and they can be enforced in court through legal action against the worker, the new employer or both. But before rushing to make your workers sign non-competes, there a few things to consider, including:

- *How long does it last?*

Courts won't enforce non-competes that last for more than a reasonable amount of time. How long is "reasonable?" That can vary. Generally six months to two years is seen as a reasonable amount of time. There have been cases where courts have enforced non-competes for up to five years when the employer made a good case for why that might be reasonable. But if it looks like you're trying to hold workers hostage and prevent them from engaging in their trade, courts will take a harsh view.

- *How wide is its reach?*

Judges take an equally dim view of non-competes that cover too broad a geographic territory. For example, a non-compete that covers the entire U.S. will in most cases be too broad. A court might enforce a non-compete that covers multiple states, but it's a bad idea to go beyond the states where you actually do business. Some non-competes block out certain counties or a certain radius around the employer's headquarters. Even in these cases, however, you generally need to show you actually have customers or business interests you need to protect within that area.

- *Who are you restricting?*

There's a strong temptation to saddle all your employees with non-competes, and a lot of employers today are trying to do just that, even binding the most entry-level workers. But you're more likely to be able to enforce your non-compete if you limit it to workers who can really do you harm by bringing trade secrets and confidential information to your competitors or by poaching your clients. If you operate a restaurant or a retail outlet, a court will not look kindly on your efforts to block cashiers, fry-machine operators or floor help from working elsewhere.

- *What activities does it cover?*

The best non-competes are narrowly tailored to a specific employee to protect against specific harm he or she can cause. That means you don't want a one-size-fits-all non-compete for all employees. You want to be as specific as possible in defining the activities that would constitute "competition." For example, instead of barring your entire sales force from working for any competitor, you're better off barring them from reaching out to specific clients they dealt with a lot when they worked for you.

This is just the tip of the iceberg. Talk to an employment attorney where you live to learn more.

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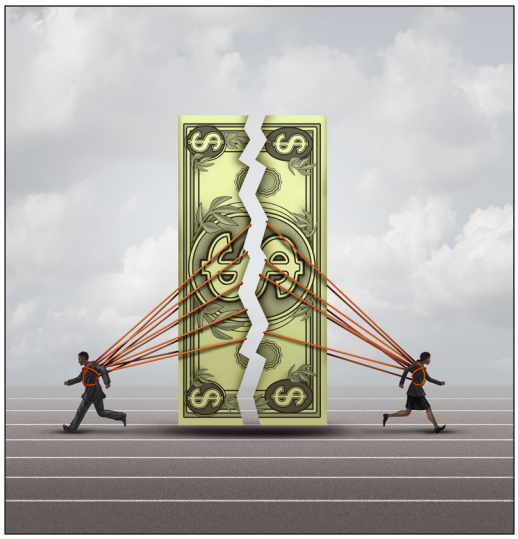
Basing pay on salary history creates risk of Equal Pay Act violation

It's very common for employers to ask job applicants for their salary history to determine how to set their pay. But if a recent decision from a federal appeals court is any indication, that's a dangerous practice, particularly if you're using it to determine the salary of a female employee.



In that case, Aileen Rizo took a job as a math consultant in the Fresno, Calif., public school system. To calculate her pay, the district took her most recent salary, added five percent and put her at the corresponding step on the salary chart.

Before taking the job, Rizo made about $50,000 a year as a math teacher in Arizona. Even with the five percent increase, however, her new salary was at the bottom of the Fresno pay schedule. It also resulted in her being paid less than an apparently less-experienced male employee who did the same work but because of his salary history was hired at a much higher step on the schedule.

Rizo took the district to court, arguing that it violated the federal Equal Pay Act by using her salary history as an excuse to pay her less than males doing the same job.

The district argued her claim should fail because the pay disparity was based on a "factor other than sex." A federal trial court judge agreed and dismissed the case.

But the 9th Circuit reversed, agreeing with Rizo's argument that using prior salary alone to calculate current pay just perpetuates a pay gap that already exists due to prior sex discrimination and is contrary to the Equal Pay Act's goal of addressing the wage gap.

This, of course, doesn't mean there are no permissible reasons to consider a worker's salary history. But the law can be complicated, so it's a good idea to consult with an employment attorney to make sure your own pay practices don't get you in trouble.