An *Epic* Article: The Fate of Agreements to Individually Arbitrate Claims Arising Under ERISA After *Epic Systems Corp. v. Lewis*

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The U.S. Supreme Court's blessing of class and collective action waivers in mandatory arbitration agreements related to employment claims brings some long-awaited clarity to this topic and opens the door to waiver of class actions arising under the Employee Retirement Income Security Action of 1974 (ERISA). But open legal questions remain. Before employers rush to implement mandatory arbitration programs, a variety of factors touching on the legal, social, and practical implications of such a decision merit careful consideration.

Epic Systems Corp. v. Lewis

In a 5-4 decision written by Justice Gorsuch, the U.S. Supreme Court held that class and collective action waivers in employment arbitration agreements are not prohibited by Section 7 of the National Labor Relations Act (NLRA).[1] In other words, employees that sign such agreements are required to individually arbitrate employment-related disputes with their employers. *Epic Systems* resolved a trio of cases[2] in which employees brought suits against their employers alleging state and federal wage and hour violations. In each case, the employees had agreed to resolve any employment-related disputes through individualized arbitration. Nevertheless, they sought to litigate their claims as class or collective actions.

The Federal Arbitration Act (FAA) generally requires courts to enforce such arbitration agreements as written.[3] The employees argued that the NLRA's guarantee that employees may engage in concerted activities[4] conflicts with the FAA's directive. As a result, the class waivers in question were unenforceable, the employees argued.

The Supreme Court disagreed, explaining that courts are only relieved of their obligation to give effect to arbitration agreements when a traditional rationale for the rescission of a contract is presented, such as fraud or duress. Additionally, the Court found that the NLRA gives no indication that Congress intended to displace the FAA's general scheme: The NLRA does not mention class or collective procedures and those methods of dispute resolution were, in fact, "hardly known" when the NLRA was adopted.

The Court went on to explain that participation in class or collective litigation does not qualify as a "concerted activity" under the NLRA because that term only refers to actions that

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"employees 'just do' for themselves in the course of exercising their right to free association in the workplace." In other words, the NLRA's protection does not extend to the "highly regulated, courtroom-bound 'activities' of class and joint litigation."

The court described its conclusion as entirely in line with its longstanding precedent of rejecting efforts to "conjure conflicts between the [FAA] and other federal statutes." The court also emphasized that its decision is consistent with nearly 80 years of case law that remained largely untouched until the National Labor Relations Board (NLRB) asserted for the first time in 2012 that the NLRA nullifies the FAA in some cases.[5]

As a result of *Epic Systems*, employers are free to incorporate class and collective action waivers into arbitration agreements with employees with the certainty that they will be enforced, save for any challenge to the agreement's validity as a matter of contract law.

FAA v. ERISA

Prior to the Supreme Court's *Epic Systems* decision, several circuit courts of appeal addressed a similar issue of whether ERISA's provisions or underlying policies prohibited arbitration. The majority of federal appellate courts recognize that ERISA claims are subject to arbitration.[6] In these cases, the plaintiffs argued that ERISA's venue provision[7] provided plaintiffs a right to sue in federal court, and an arbitration provision stripped the plaintiffs of that right in violation of ERISA's provision prohibiting exculpatory provisions.[8] The circuit courts disagreed. For example, the Eight Circuit relying on the same Supreme Court precedent cited in *Epic Systems*, found:

> Under this statutory structure, an agreement to waive the judicial forum allowed for in section 1132(e) in favor of arbitration does not carry with it the waiver of any substantive duties or liabilities, and thus, no fiduciary has been impermissibly relieved of any "responsibility, obligation, or duty" imposed by part 4. An agreement of that type "only submits [the ERISA claims] to resolution in an arbitral, rather than a judicial, forum." We find nothing in the text of section 1110(a) . . . demonstrating Congress intended to prohibit arbitration of ERISA claims.[9]

These decisions are in line with the Court's recent opinion in *Epic Systems* and rely on many of the same precedents. It seems unlikely that the Supreme Court would disagree with these decisions if this issue were to reach the Court. This does not mean, however, that litigation over arbitration agreements and ERISA claims is over.

A creature of contract

Before a court can address whether a statute, such as ERISA or the NLRA, conflicts with the FAA, the court must find that (1) there is an arbitration agreement and (2) the claim falls within its scope. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[10] These seemingly straightforward issues have been the subject of much litigation.

The contract. A variety of documents may contain arbitration agreements that cover ERISA claims. The parties to the particular contract must align with the parties in the case. This sounds simple enough but can become complex. ERISA claims can be brought by and against many parties: participants, beneficiaries, fiduciaries, the employer, the plan sponsor, or the trustee. One arbitration agreement likely will not bind them all. For example, in *Schneider Moving & Storage Co. v. Robbins*,[11] the Supreme Court refused to compel arbitration of

the claim of a trustee of a multi-employer pension fund. But the trust document did not include an arbitration provision, and the trustee was not a party to the collective bargaining agreement that did have an arbitration agreement. In short, there was no arbitration agreement between the parties in the case.

The Ninth Circuit was recently presented with the issue of who must assent to arbitration of an ERISA breach of fiduciary duty claim. The district court in *Munro v. University of Southern California*[12] held that employees' arbitration agreements did not cover ERISA breach of fiduciary duty claims because the plan did not consent. The Ninth Circuit took a slightly different view and held the claim was not covered by the language of agreement.[13] The plaintiffs, current or former USC employees, alleged that the university breached its ERISA fiduciary duties by allowing its retirement plans to hold certain investments and pay excessive fees. As part of their employment, the USC employees signed an arbitration agreement, and after the plaintiffs filed suit, USC moved to compel arbitration.

The United States District Court for the Central District of California refused to enforce the arbitration agreement because the plan had not consented to arbitration. The district court found that claims brought under ERISA § 502(a)(2)[14] are brought on behalf of the plan. The court relied on *Bowles v. Reade*,[15] a Ninth Circuit case finding that a participant's release and covenant not to sue did not prevent the participant from bringing an ERISA § 502(a)(2) claim on behalf of the plan because the participant could not settle such a claim without the plan's consent. Similarly, the court reasoned, an individual participant cannot agree to arbitration on behalf of the plan without the plan's consent.

After the *Munro* decision, the Northern District of California also found that an ERISA § 502(a)(2) claim was not subject to arbitration under similar facts in *Dorman v. Charles Schwab & Co., Inc.*[16] Here, however, the plan document contained an arbitration provision. Like *Munro*, the district court found the former employee's arbitration agreements did not compel arbitration of an ERISA § 502(a)(2) claim brought on behalf of the plan. The court did not decide whether the plan's arbitration provision provided its consent. Instead, the court found that the plan document containing the arbitration provision was not applicable to the participant's claims because it became effective after the participant terminated and took a total distribution of his assets. More recently, the Southern District of Ohio also found that a former employee was not bound by an arbitration provision added to a plan after the employee terminated and took a full distribution.[17]

In between the two California district court opinions, the Western District of Missouri, in a short slip opinion, compelled arbitration of ERISA claims.[18] Factually, the cases were similar: An employee who had signed an arbitration agreement with a class action waiver sought to bring an ERISA § 502(a)(2) claim on behalf of a defined contribution plan. But, here, the court held plaintiff's ERISA § 502(a)(2) individual claim was subject to arbitration and fell within the scope of the agreement. The court found that the plaintiff waived his right to act on behalf of a class by failing to opt out of the arbitration agreement and dismissed the suit.

Interestingly one of the circuit courts that found that ERISA claims are subject to arbitration also analyzed an ERISA § 502(a)(2) claim and an arbitration agreement between the employee and employer.[19] The issue of whether the employees' arbi-

tration agreement governed a claim brought on behalf of the plan, however, was not raised.

These cases illustrate just one example of the legal hurdles an employer may face in obtaining assent from all of the necessary parties. If the plan must agree to arbitration of an ERISA § 502(a)(2) claim, the plan document seems the most likely place to find the plan's assent. But the *Dorman* court expressed skepticism regarding whether the plan's arbitration provision could provide consent for the plan because it was written by the plan's fiduciaries. But drafting a plan is a settlor function. And plan fiduciaries often sign arbitration agreements with third parties who manage the plan's assets, such as in most of the circuit court cases enforcing arbitration agreements. Courts have found that such an agreement is binding not only on the plan but also on participants who bring a breach of fiduciary duty claim on behalf of the plan.[20]

Another potential hurdle—especially for a large employer—is obtaining the assent of participants and beneficiaries. An employer could have all new hires sign an arbitration agreement with a class action waiver. But what about existing employees? Do employers need to collect hundreds or thousands of signatures? Apparently not. In a foot note in her dissent in *Epic Systems*, Justice Ginsburg pointed out that two of the employers in the consolidated cases—Epic Systems and Ernst & Young—emailed arbitration agreements to all of their employees that stated that their continued employment would be deemed to be assent to the agreement.[21] Although Justice Ginsburg clearly was troubled by this manner of acceptance, the practice is consistent with state contract law, as many circuit courts have held.[22] An employer wishing to use continued employment as a form of assent should pair the agreement with other communication about the arbitration program. For example, holding meetings about the implementation of an arbitration program and providing several communications about the program will help prove that the employees were informed and their continued employment amounted to assent to arbitration.

Whether an arbitration agreement with employees covers beneficiaries also could be subject to litigation. To ensure the inclusion of these potential plaintiffs, the plan and summary plan description also should have arbitration provisions. The employer will need to take reasonable efforts to ensure that participants and beneficiaries are informed of the addition of the arbitration provision to the plan and that continued participation in the plan will amount to assent. The Ninth Circuit held that failure to inform participants of an arbitration clause in a plan could give rise to a claim for breach of fiduciary duty.[23]

Employers should also be aware of the challenges associated with ensuring that sufficient consideration exists to support an arbitration agreement, which is a function of state law. In states that do not recognize continued at-will employment as sufficient consideration, a mutual obligation to arbitrate all claims related to the employment relationship is often sufficient. Yet this solution creates its own concerns because ERISA plan documents typically include language reserving the right to terminate or modify the plan with or without notice; courts have found the unilateral ability to terminate renders an agreement to arbitrate an "illusory promise." Thus, employers must take special care to tailor plan documents and arbitration agreements to avoid this result.[24]

The language. Besides figuring out in what document or documents an arbitration agreement will appear, an em-

ployer must also figure out what the agreement will say. The scope of the arbitration agreement can dictate whether a court will compel arbitration.

Courts have found that broad arbitration agreements will cover most ERISA claims. The Tenth Circuit held the phrase "arising out of" "must be broadly construed to mean 'originating from,' 'growing out of,' or 'flowing from' " the employment relationship, including ERISA claims.[25] A provision covering all claims arising out of or related to the plan also should be sufficiently broad to cover ERISA claims related to that plan.

However, the Ninth Circuit, found that a broad arbitration agreement covering "all claims" that employees may have against their employer did not include ERISA breach of fiduciary duty claims.[26] The court analogized the case to its recent decision in *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*.[27] In *Welch*, the court found that an employment arbitration agreement did not cover *qui tam* claims brought by an employee on behalf of the government under the False Claims Act because the claim belonged to the government. In *Munro*, the court reasoned that the breach of fiduciary duty claim is brought on behalf of the plan. Any relief would benefit the plan. Therefore, the arbitration agreement did not cover the claim. An employer desiring to include ERISA breach of fiduciary duty claims should consider including language covering claims an employee may bring on behalf of a third party, including the benefit plans.

Brown v. Wilmington Trust, N.A.[28] raises another drafting consideration. In Brown, the plan's arbitration provision applied to Claimants, who were defined to include employees, participants, and beneficiaries. The court held that the provision's language did not extend to a former employee who terminated and received a total distribution because, under the terms of the plan, she was no longer a participant. Arbitration provisions should include former participants' claims if the plan sponsor wants it to be all encompassing.

However, an employer must consider whether to include all ERISA claims and whether arbitration is the best vehicle for resolving ERISA disputes. Courts will provide only limited review of decisions by arbitrators. This may not suit the employer's ERISA disputes. For example, ERISA § 502(a)(2) claims are brought on behalf of the plan seeking plan-wide relief regardless of whether it is a class action or an individual arbitration. An employer may not want an arbitral decision impacting the entire plan that is subject only to limited judicial review.

Employers may want to exclude benefit claims from arbitration for different reasons. Courts recognize that ERISA was designed to provide participants a quick and inexpensive mechanism for resolving benefit disputes. Employers benefit from this process as well. Most claims are decided on the administrative record, and discovery is limited. If the plan contains the appropriate language, courts defer to the decision of the administrator unless it was arbitrary and capricious. This provides for a relatively cost-effective manner for handling benefit claims, and employers may not want to deviate from it. Furthermore, under the Department of Labor regulations, health and disability claims can be subject to mandatory arbitration only if they are part of the plan's appeals procedures and can be reviewed by the courts. Before including an arbitration provision in a plan document covering all claims "arising out of or related to the plan" or an agreement covering all claims "arising out of or related to employment," the employer should consider whether it wants to narrow that scope to exclude benefit claims.

If an employer does want to carve out benefit claims, then it should pay close attention to what the various documents say. If a broad arbitration agreement appears in an employment agreement and not in the plan documents, there could be a question of which controls: the broad arbitration agreement or the language in the plan allowing a participant to file a claim in federal court.

A similar conflict can appear between a plan document and a collective bargaining agreement (CBA). Most CBAs provide for grievance and arbitration. But plan documents and summary plan descriptions typically explain that participants can bring a civil action under ERISA § 502. Claims for ERISA benefits are excluded from arbitration when a labor agreement incorporates a plan by reference and the plan allows for litigation of claims.[29] Other benefit claims, such as disability, may not be covered by a CBA's arbitration provision if it is limited to claims arising under the agreement and that benefit is not specifically included in the CBA.[30]

Have the Parties Agreed to Arbitration?		
Arbitration Agreement	**Parties**	**Potential Legal Issues**
Arbitration agreement in employment contract or similar document	Employee and employer	• Is the agreement binding on the plan? • Would it bar claims brought by an employee on behalf of the plan? • Is there consideration?
Arbitration provision in plan document	Plan and participants, beneficiaries	• Have employees assented? • Is continued employment assent? • What type of notice is sufficient (SPD, SMM)? • How would former employees—but current retirement plan participants—or beneficiaries consent? • Is there consideration?
Arbitration provision in trust documents	Trustee and plan	• Are participants bound? • Would participants be barred from bringing a benefit claim on behalf of the plan?
Arbitration provision in collective bargaining agreement	Employee and employer	• Are benefit claims included? • Does the plan provide for the right to bring a claim in court? • Is the plan document incorporated into the CBA? • Does the agreement cover claims brought on behalf of the plan?

Things to Consider Before You Draft

Image. Consider possible non-legal consequences, including employee morale, negative media coverage and public perception, or restrictions related to government contracting.

Claims to include. Consider whether to include benefit claims, § 502(a)(2) claims brought on behalf of the plan, and claims for equitable relief under § 502(a)(3). The costs and stakes involved in litigating each claim differ. Litigation may be preferable to arbitration for some claims.

Parties to include. After deciding what claims to include, consider who can bring those claims and how to reach an arbitration agreement with each party. This may involve having an arbitration provision in employment contracts, plan documents, trust documents, or collective bargaining agreements or all of the above.

Beyond the four corners of the contract

The public reaction to *Epic Systems* was swift and largely disfavorable. Critics of the decision feared that in the #MeToo era, the consequences of the ruling would lead to more claims of sexual harassment being swept under the rug and would jeopardize the public push for transparency in the handling of such claims. The outcry also highlighted the public's perception that mandatory arbitration agreements and class action waivers disadvantage workers and are unfair when employees are forced to agree to the terms of these agreements or risk losing their jobs. An undeniable undercurrent of public shaming coursed through much of the media coverage of this topic.

Companies that maintain or choose to implement mandatory individual arbitration programs may face opposition from their employees and communities. And employers may face other unintended consequences: Labor experts postulate that the decision may send employees without the recourse of collective litigation running into the arms of union representation. As a result, even if employers favor mandatory individual arbitration programs, the potential "public relations" downside may cause them to reconsider.

Uncertainty remains

Although post-*Epic Systems*, employers can be confident that class action waivers will generally be enforced, the public backlash that followed the Supreme Court's decision may leave the legal landscape less than settled. The Court's majority opinion appeared to invite Congress to reconsider the policy underlying its decision, and Justice Ginsburg stated that "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order." In fact, when *Epic Systems* was decided, Congress was already considering legislation that would amend the FAA to limit the validity of arbitration agreements. The Arbitration Fairness Act of 2018, introduced in the U.S. Senate, would invalidate any agreement to arbitrate claims related to employment, consumer, antitrust, or civil rights disputes.[31] Bipartisan bills are also pending in both houses that would amend the FAA to prohibit agreements to arbitrate claims related to sex discrimination.[32]

State and local governments have already signaled a willingness to regulate this sphere. A handful of states have enacted or are considering legislation that would prohibit mandatory arbitration of sexual harassment claims.[33] While state statutes likely will not touch the resolution of ERISA claims and may face challenges that they are preempted by the FAA, state and local governments may take other steps to discourage employers from implementing mandatory arbitration and class action waivers. For instance, state and local governments could enact disclosure requirements that would require employers to disclose whether they use such agreements or to publish data about the resolution of employment-related claims submitted to arbitration. They may also decline to contract with companies that require arbitration and class and collective action waivers.

Conclusion

In sum, before adopting an

arbitration agreement, an employer should consider whether arbitration is the best method to resolve some or all of its ERISA disputes and whether such an agreement reflects its company culture. Adding a class action waiver may blunt some high-dollar class lawsuits if done effectively. But there may be unintended consequences. Any arbitration agreement must be carefully crafted to include the desired parties and claims. This may require including provisions in several documents.

NOTES:

[1]Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 211 L.R.R.M. (BNA) 3061, 27 Wage & Hour Cas. 2d (BNA) 1197, 168 Lab. Cas. (CCH) P 11091 (2018).

[2]Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young LLP, 834 F.3d 975 (9th Cir. 2016).

[3]9 U.S.C. § 2 ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")

[4]29 U.S.C. § 157 ("Employees shall have 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 purpose of collective bargaining or other mutual aid or protection . . .").

[5]D.R. Horton, Inc., 357 NLRB 2277 (NLRB 2012), *enforcement granted in part, rev'd in part* D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

[6]*See* Williams v. Imhoff, 203 F.3d 758, 767 (10th Cir. 2000); Kramer v. Smith Barney, 80 F.3d 1080, 1084 (5th Cir. 1996); Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1121 (3d Cir. 1993); Bird v. Shearson Lehman/Am. Exp., Inc., 926 F.2d 116, 120 (2d Cir. 1991), *cert. denied*, 501 U.S. 1251 (1991); Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475, 479 (8th Cir. 1988); *see also* Comer v. Micor, Inc., 436 F.3d 1098, 1100 (9th Cir. 2006) ("We have, in the past, expressed skepticism about the arbitrability of ERISA claims . . . but those doubts seem to have been put to rest by the Supreme Court's opinions in Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) . . . and Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)").

[7]ERISA § 502(e), 29 U.S.C. § 1132(e).

[8]ERISA § 410(a), 29 U.S.C. § 1110(a).

[9]Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc., 847 F.2d 475, 478 (8th Cir. 1988) (internal citations omitted).

[10]United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409 (1960).

[11]Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 374, 104 S. Ct. 1844, 1850, 80 L. Ed. 2d 366 (1984) ("In the absence of evidence to the contrary, therefore, we will not infer that the parties to the two multiemployer trust funds intended to condition the trustees' enforcement authority on the arbitration procedures contained in petitioners' separate collective-bargaining agreements.")

[12]Munro v. Univ. of S. California, No. CV166191VAPCFEX, 2017 WL 1654075 (C.D. Cal. Mar. 23, 2017).

[13]Munro v. Univ. of S. California, No. 17-55550 (9th Cir. July 24, 2018).

[14]29 U.S.C. § 1132(a)(2).

[15]Bowles v. Reade, 198 F.3d 752, 760 (9th Cir. 1999).

[16]Dorman v. Charles Schwab & Co. Inc., *2018 Employee Benefits Cas. (BNA) 18676, 2018 WL 467357 (N.D. Cal. 2018).*

[17]Brown v. Wilmington Trust, N.A., No. 3:17-cv-250 (S.D. OH July 24, 2018).

[18]Ducharme v. Defendants Systems, Inc., No. 4:17-CV-00022-BCW, 2017 WL 7795123 (W.D. Mo. June 23, 2017).

[19]Williams v. Imhoff, 203 F.3d 758, 765 (10th Cir. 2000).

[20]Bevere v. Oppenheimer & Co., 862 F. Supp. 1243, 1249 (D.N.J. 1994).

[21]Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1636 n. 2, 211 L.R.R.M. (BNA) 3061, 27 Wage & Hour Cas. 2d (BNA) 1197, 168 Lab. Cas. (CCH) P 11091 (2018) (J. Ginsburg dissenting).

[22]*See, e.g.,* Tillman v. Macy's, Inc., 735 F.3d 453, 460 (6th Cir. 2013) (continuing employment was valid assent to arbitration agreement under Michigan law); Brown v. St. Paul Travelers Companies, Inc., 331 F. App'x 68, 70 (2d Cir. 2009) (same under New York law); Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470, 478 (10th Cir. 2006) (same under Oklahoma law); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1375 (11th Cir. 2005) (same under Georgia law).

[23]Chappel v. Lab. Corp. of Am., 232 F.3d 719 (9th Cir. 2000).

[24]*See, e.g.*, Lizalde v. Vista Quality Markets, 746 F.3d 222 (5th Cir. 2014) (considering whether termination provision in benefit plan rendered agreement to arbitrate in separate agreement "illusory").

[25]Williams v. Imhoff, 203 F.3d 758, 765 (10th Cir. 2000).

[26]Munro v. Univ. of S. California, No. 17-55550 (9th Cir. July 24, 2018).

[27]United States ex rel. Welch v. My Left Foot Children's Therapy, LLC, 871 F.3d 791 (9th Cir. 2017).

[28]Brown v. Wilmington Trust, N.A., No. 3:17-cv-250 (S.D. OH July 24, 2018).

[29]Teamsters Local Union No. 783 v. Anheuser-Busch, Inc., 626 F.3d 256, 263 (6th Cir. 2010); United Steelworkers of Am., AFL-CIO-CLC v. Commonwealth Aluminum Corp., 162 F.3d 447, 451–52 (6th Cir. 1998); Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 10 v. Waukesha Engine Div., Dresser Indus., Inc., 17

F.3d 196, 198 (7th Cir. 1994); Local Union No. 4-449, Oil, Chem. & Atomic Workers Union, AFL-CIO v. Amoco Chem. Corp., 589 F.2d 162, 164 (5th Cir. 1979).

[30] *See* United Steelworkers of Am., AFL-CIO-CLC v. Rohm & Haas Co., 522 F.3d 324, 332 (3d Cir. 2008).

[31] S. 2591, 115th Congress (2018).

[32] S. 2203, 115th Congress (2017); H.R. 4570, 115th Congress (2017).

[33] *See, e.g.*, S.B. 7507C, 2018 State Leg., Reg. Sess. (N.Y. 2018); S.B. 6313, 65th Leg., 2018 Reg. Sess. (Wash. 2018).