

What the Supreme Court Ruling on Binding Arbitration May Mean to Healthcare

The Supreme Court ruled Monday (5/21/18) that companies can prohibit workers from using class-action litigation to resolve workplace disputes. In a 5-4 decision on three consolidated cases, the justices said companies can include clauses in employment contracts that require employees to use individual arbitration to resolve disputes.

In one of the cases, Jacob Lewis sued Epic, the electronic health record vendor, for denying him and others overtime pay. Epic contended that its contracts prohibited employees from such group litigation and required them to individually undergo arbitration. The Supreme Court ultimately agreed with Epic, saying that companies can require employees to resolve disputes individually outside of court, even if the situation affects many people.

"The virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace" if workers gathered their complaints under class action lawsuits, Justice Neil Gorsuch wrote for the court (1). "This is a major victory for employers," said Richard Glovsky, co-chair of Locke Lord's labor and employment practice group (1). "The court's ruling clears the path, and a judicial logjam, to employers restricting the rights of employees to participate in class actions and who insist that they have their day in court."

Justice Ruth Bader Ginsburg read her dissent from the bench, a sign of profound disagreement. In her written dissent, she called the majority opinion "egregiously wrong." In her oral statement, she said the upshot of the decision "will be huge under-enforcement of federal and state statutes designed to advance the well being of vulnerable workers." Binding arbitration seems to favor the defendant with lower win rates and lower awards for the plaintiff compared to litigation (3). Arbitration clauses in employment contracts are a recent innovation, but they have become quite common. In 1992, Justice Ginsburg wrote, only 2 percent of non-unionized employers used mandatory arbitration agreements, while 54 percent do so today (2). Under those contracts, Justice Ginsburg wrote, it is often not worth it and potentially dangerous to pursue small claims individually. "By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation," she wrote.

The contracts may also encourage misconduct, Justice Ginsburg wrote (2). "Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations," she wrote, adding that billions of dollars in underpaid wages are at issue.

Although one of the Supreme Court cases involved Epic, the decision doesn't single out healthcare companies and won't have a unique impact on the industry. Arbitration clauses with class waivers are now commonplace in contracts for things like cellphones, credit cards, and rental cars. Generally, binding arbitration has been seldom used in healthcare, and when used, it has been between patients and nursing homes, and to a much lesser extent, between patients and hospitals or physicians. Arbitration has rarely been used in healthcare disagreements between employers and employees. However, it seems likely as healthcare organizations become larger and increasingly consolidate healthcare providers as employees this will likely change. Currently, many physicians, including myself, must sign an agreement prohibiting litigation against the hospital as conditions for hospital privileging. This Supreme Court ruling continues the trend of favoring corporations at the expense of individuals (4).

Justice Ginsburg called on Congress to fix the problem of forced binding arbitration. It seems unlikely that this will be immediately forthcoming. However, when Congressional makeup changes as it always does, the members of Congress may wish to also include healthcare providers, not as professionals, but as the employees they are increasingly becoming.

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References

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