NOTE TO MEDIA: LeClairRyan's labor and employment, and class action attorneys are available as a resource for your coverage of labor, wage-hour and other legal matters.

For: LeClairRyan, Los Angeles
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FOR IMMEDIATE RELEASE

Employment Attorneys Offer Class-Action Waiver Guidance Following Court's EPIC Decision
--Supreme Court's decisive ruling strengthens arbitration agreements,
but concerns still exist, caution LeClairRyan attorneys in recent webinar

LOS ANGELES (9/6/18)— The decisive 5-4 Supreme Court opinion in *Epic Systems Corp. v. Lewis* that class action waivers in employment arbitration agreements must be enforced under the Federal Arbitration Act (FAA) — despite the FAA's "saving clause" and opposition from the National Labor Relations Board (NLRB) — reaffirms longstanding federal policy favoring arbitration. But employers who seek to utilize an arbitration clause in employment contracts that bars employees from bringing class actions may continue to face hurdles, particularly in plaintiff-friendly states like California and New Jersey, cautioned veteran LeClairRyan labor and employment and class action defense attorneys during a recent webinar.

Arbitration can offer significant advantages compared to a court trial, noted Guillermo M. Tello, a Los Angeles-based partner at LeClairRyan. "Judges hear many diverse matters, while an arbitrator has likely devoted his or her entire career to dealing with a particular area and has subject matter experience," he said. "Also, particularly in states like California, you may avoid plaintiff-friendly juries that have a propensity to make out-of-control awards."

Tello and his colleagues, Rafael Nendel-Flores, a partner in LeClairRyan's Los Angeles office, and James P. Anelli, a Newark, N.J.-based member of the firm and co-leader of its Labor and Employment team, discussed the measure during an August 23 webinar, *What Employers Should Know About Class Waivers After Epic Systems Decision*.

Perhaps the biggest benefit of a class action waiver clause is the ability to strip down the plaintiff pool "from potentially thousands of employees and millions of dollars of liabilities — particularly in wage-hour matters — to a single named plaintiff who's likely got modest claims," explained Nendel-Flores. "But it's not a silver bullet, since a sophisticated plaintiff lawyer may file 500 individual arbitration claims with the defense being on the hook for the fees."

Another concern is California's AB3080, commonly known as the "Workers' Right to Sue" bill, added Tello. "This bill, which may likely be signed by Governor Jerry Brown, would generally prohibit employers from making arbitration agreements a condition of employment for new hires or for continued employment. Employees can still agree to an arbitration agreement, but they cannot lose their job or be excluded from hiring because they don't agree to lose their right to sue."

In response, "I and other defense lawyers are advising clients to include an opt-out provision that lets employees decline to exercise their 'Right to Sue' clause," said Nendel-Flores. "Even though most employees will not opt out, this step forecloses a plaintiff claim of procedural unconscionability," or inequalities between the parties to a contract.

Anelli observed that some states have been "pushing back against certain Supreme Court decisions," and wondered if arbitration requirements may be outlawed at the state level, setting the stage for a conflict with Supreme Court rulings.

"I think employee-friendly courts like the Ninth Circuit will continue to read the cases narrowly until the Supreme Court comes down hard and asks, 'What is it about the last five decisions that you didn't understand,?'" Anelli continued. "Some state courts are already focusing on contract formation issues instead of substantive issues underlying the agreement, so it's important for employers not to get ahead of case law. Keep your arbitration contracts simple and clear."

During the hour-long webinar, the LeClairRyan panelists also covered topics like avoiding forum selection or choice-of-law clauses that could spur a court to toss the entire arbitration agreement. They also suggested eliminating "one-sided carve outs," including clauses requiring employees to arbitrate claims against the company, while exempting the employer from going to arbitration for claims brought against employees, such as ones concerning intellectual property or misappropriation of trade secrets.

The full recording is available at:
https://leclairryan.webex.com/leclairryan/lsr.php?RCID=64c4f3c876ad481cb1461ded0b715fb6

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