



What's Next for Employers, Post *Epic Systems*?

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On May 21, 2019, the U.S. Supreme Court in the *Epic Systems* case affirmed the ability of companies to use mandatory arbitration clauses in employment agreements that are accompanied by waivers of class processes in litigation and arbitration. So what's next, both for dispute resolution and employers (particularly in the context of the #MeToo movement)?

"Redefining Winning"

This is one of the important messages that my organization, the CPR Institute, imparts to the business community. Dealing with conflict is not a zero sum game and often the best solutions that preserve relationships are achieved mediating disputes and using other alternative dispute resolution approaches, rather than litigating in court. I suggest that this way of thinking is even more apt

to conflicts in the employment context.

The Supreme Court's opinion in *Epic Systems* was quite clear: Employers who are using mandatory arbitration clauses in their employment agreements may continue along their course and are in no way required to change processes or programs when it comes to dispute resolution in the workplace. They "won"... for now.

But there may be a way for them to win differently, in a bigger and more sustainable way. Let's face it, arbitration is generally viewed today as standing against the #MeToo movement. This certainly does not need to be the case. The Supreme Court decision provides both a practical and valuable employee engagement (and public relations) opportunity for thoughtful employers to revisit, re-think and revitalize their employment practices. In the absence



of legislative certainty, and facing suspicion from the #MeToo movement and the “court of public opinion,” this is a unique opportunity for companies to consider utilizing flexible and creative approaches to address these issues in a way that favorably resonates with their stakeholders. This article will suggest some possible paths.

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Moving Step by Step,...to Success

Whether an employer ultimately arrives at an arbitration approach for workplace disputes, there are a multitude of other issues to address well before the adjudication step becomes an issue. A strong workplace disputes program that is designed to allow employees the ability to address workplace issues fairly, efficiently and informally can garner extensive good will, especially if it provides choices for employees. As described in greater detail in [Cutting Edge Advances in Resolving Workplace Disputes](#), some options to be considered and/or combined when creating an

integrated and multi-option conflict management system include:

- Online collaboration tools – online platforms can help solves challenges arising from time, place and cost
- Open door policies – these can include consultation and counseling
- Ombuds offices or outside mediators – an ombudsman is an individual whose dedicated role within an organization is to interact with and support the conflict management system of all stakeholders
- Coaching or training programs – employers should aim to develop a team of people who can prevent, spot, diffuse and resolve conflict within their organizations
- Internal facilitation programs
- Peer or managerial, non-binding mediation
- External mediation or other voluntary approaches
- A stepped mediation-arbitration combination
- And, finally, arbitration

The key to the success of any approach is for the employee to feel heard and protected. Protected from retaliation, of course, but also protected by a program that provides due process (a truly impartial neutral),



privacy and gives them a reasonable degree of control over the situation.

The Option of Opting Out

Litigation can be difficult, costly, time consuming and a drain on everyone involved. Not having to sue to be made whole is a significant employee benefit, part of the company's broader benefits package, which employers can offer to employees through the implementation of such an integrated conflict management program.

Today, some employers make their programs mandatory for all employees. No exceptions. On the other side, some commentators argue that employees should be able to derive all the benefits of these programs, but should then be free to choose how they want to adjudicate unresolved disputes. I would offer a middle ground that allows employers to plan and run programs with a degree of certainty...but also give employees choice.

Employers can provide for employees the ability to "opt out" at the start of the program, when introducing it. And for a new employee, she or he could have the opportunity to participate or not. Key to this, of course, would be to provide an impeccably fair opportunity to consider the workplace disputes program in its entirety and

provide sufficient notice and information to the employees to allow them to make an informed decision. And, of course, employees who choose not to participate should not, in any way, be adversely impacted.

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As discussed, although it would not be reasonable to provide an employee the ability to hop in and/or out of the program at will, an employer should provide employees with an opportunity to participate or opt-out if the terms of the conflict management program were to change materially after first implemented.

Carving Out Certain Claims?

Companies might also consider whether certain types of claims, e.g., the types of sexual harassment claims the #MeToo movement is shining a spotlight on, should be treated differently than others. For example,



to highlight a company's sensitivity to these sorts of claims, companies may consider fashioning an individual opt-out that provides for employees to participate in the program in all respects other than sexual harassment claims. Stated differently, when an employer introduces a conflict management program (or a new employee is presented with this as an option), the employee is informed that sexual harassment claims will not be covered by the conflict management program unless the employee wants them to be, which they can indicate—again, during the initial “enrollment” period only—by this time “opting *in*.”

The beauty of alternative dispute resolution is that, unlike litigation, there is an almost infinite universe of “interest based” approaches and combinations that can be implemented, as opposed to merely following a more rigid litigation process with fixed results and remedies.

Managing and Marketing Your Program

There is plenty of guidance out there for creating and managing such an integrated conflict management system. An employer's existing HR department and legal department resources can play key roles.

Also key to the creation of a successful integrated conflict management system is clear and targeted communication to stakeholders. Employee satisfaction and morale matter and can be just as powerful as public perception in affecting your bottom line. Therefore, employers should also think about how to best communicate their policies for handling workplace disputes to their employees or even prospective employees, who may be confused or concerned about what this recent Supreme Court ruling, and resulting media coverage and commentary around arbitration, mean for them.

A thoughtful, fair and balanced workplace dispute program can be a positive indicator that employers value their employees—something that can benefit a company's reputation publicly, well beyond its employee and prospective employee pool. So, through internal communications, brown bag lunches, town halls or webinars, any employer creating such an integrated system will want to market it, making sure everyone understands the options, their purpose, the protections they provide and the process for taking advantage of them. Think about who your employees are, where and how they access such information, and make sure you are reaching them there.



In sum, the fundamental goal of alternative dispute resolution should always be to maximize its broad promise as a better and more effective path to dispute resolution. Employers and employees can mutually benefit from it, particularly if it is developed, implemented and communicated in a fair and thoughtful manner.

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ABOUT CPR

CPR is the only independent nonprofit organization whose mission is to help global business and their lawyers resolve commercial disputes more cost effectively and efficiently. For over 30 years, the legal community has trusted CPR to deliver superior arbitrators and mediators and innovative solutions to business conflict.

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