Simpson Thacher

# Memorandum

## Supreme Court Deals Blow to Civil Class Actions for No-Poach Agreements

May 25, 2018

On Monday, May 21, 2018, the Supreme Court ruled in *Epic Systems Corp. v. Lewis* that companies may enforce arbitration clauses in employment contracts to prevent employees from bringing collective or class action suits regarding workplace issues. The Court held that the Federal Arbitration Act trumps the National Labor Relations Act, which confers protections for collective bargaining and other acts of mutual protection, and that federal courts must enforce arbitration clauses as written. Among other wide-ranging effects, the decision will deal a substantial blow to class action plaintiffs' lawyers looking to capitalize off of the recent focus of federal antitrust authorities on prosecuting so-called "no-poach" and "wage-fixing" agreements among competing employers.

In October 2016, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission jointly issued "Antitrust Guidance for Human Resource Professionals," in which the agencies officially delineated their intent to prosecute no-poaching and wage-fixing agreements among competing employers as criminal conspiracies under federal antitrust laws. The DOJ has since brought its first prosecutions (albeit as civil law violations because the conduct pre-dated the new Guidance) for an alleged no-poach agreement reached between employers in the rail equipment suppliers market. The DOJ has also stated publicly that it has opened numerous other investigations into alleged no-poach agreements, expressing "shock" at how prevalent such agreements have become.

The DOJ's heightened focus on no-poach and wage-fixing agreements raised expectations that there may be a related surge of civil class actions filed against employers for the same conduct. Civil class actions are commonly filed in the wake of federal antitrust investigations because such actions are particularly potent: in a no-poach case, a savvy plaintiffs' lawyer can rely on one employee to file an action on behalf of all similarly situated employees and then pursue any culpable employers (jointly and severally) for three times the value of the collective damages. As a result, class action suits in no-poach cases can be enormously

costly. For example, in 2015, Adobe Systems, Inc., Apple Inc., Google Inc., and Intel Corp. settled a class action suit alleging no-poaching conduct for $415 million.

The Supreme Court's ruling in *Epic Systems* offers substantial relief from the potential threat of class action liability for no-poach agreements to those companies whose employment contracts include mandatory arbitration clauses. The decision stands for the proposition that employers can bar potential class action litigation by requiring employees to pursue damages claims through individualized arbitration proceedings.

In light of the DOJ's current enforcement agenda, employers would be well advised to heed the lesson of *Epic Systems* and consider whether to incorporate language into their employment contracts requiring mandatory arbitration. This is particularly true with regard to those categories of more senior and highly-specialized employees whose employment contracts may not typically include arbitration clauses. Employers can also mitigate risk by taking steps to protect against ever having to face no-poach allegations, including: (i) implementing compliance policies to limit information sharing with companies who recruit similar employees, and formally prohibit no-poaching and wage-fixing agreements; and (ii) providing compliance training for HR personnel and executives involved with recruitment to sensitize them to potential antitrust risks.

For further information regarding this memorandum, please contact one of the following:

NEW YORK CITY

**Peter Guryan**
+1-212-455-2750
peter.guryan@stblaw.com

**Brian D. Robbins**
+1-212-455-3090
brobbins@stblaw.com

**Ellen L. Frye**
+1-212-455-2352
efrye@stblaw.com

**Kelly Karapetyan**
+1-212-455-7268
kelly.karapetyan@stblaw.com

**Andrew M. Kofsky**
+1-212-455-7437
andrew.kofsky@stblaw.com

**Daniel J. Venditti**
+1-212-455-7387
daniel.venditti@stblaw.com

LONDON

**David E. Vann**
+44-(0)20-7275-6550
dvann@stblaw.com

WASHINGTON, D.C.

**Abram J. Ellis**
+1-202-636-5579
aellis@stblaw.com

**Andrew M. Lacy**
+1-202-636-5505
alacy@stblaw.com

**Sara Y. Razi**
+1-202-636-5582
sara.razi@stblaw.com

**John Terzaken**
+1-202-636-5858
john.terzaken@stblaw.com

**Peter Thomas**
+1-202-636-5535
pthomas@stblaw.com

**Peter C. Herrick**
+1-202-636-5881
peter.herrick@stblaw.com

**Elizabeth H. French**
+1-202-636-5866
elizabeth.french@stblaw.com


Simpson Thacher Worldwide

## UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

## EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

## ASIA

Beijing
3901 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
25th Floor, West Tower
Mirae Asset Center 1
26 Eulji-ro 5-Gil, Jung-Gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

## SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000