

HUMAN RESOURCES

EMPLOYMENT & IMMIGRATION LAW





Supreme Court Upholds Class Action Waivers in Employment Arbitration Agreements. Are They Right For Your Business?

On May 21, 2018, the U.S. Supreme Court issued its long-awaited decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ____ (2018). The question before the Court was whether the Federal Arbitration Act ("FAA") requires the enforcement of arbitration agreements providing for individualized dispute resolution – *i.e.*, arbitration agreements containing class action waivers.

The majority opinion, written by the newest Justice, Neil Gorsuch, provides an unequivocal answer: Yes, arbitration agreements mandating individualized proceedings must be enforced, if they are subject to the FAA.

Justice Gorsuch summarized the fundamental issue before the Court in his opening paragraph:

"Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" (Slip Opinion at 1.)

The Court majority answers the first question with a clear "yes" and the second question with a clear "no."

The Court's decision provides much-needed certainty about the status of class action waivers in employment arbitration agreements. Over the last few years, a split had developed among the federal Courts of Appeals (and also between some state and federal courts) over the enforceability of class action waivers in these agreements. California employers often found themselves in a predicament: Class action waivers generally could be enforced in state courts under the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014), but often were unenforceable in federal court under the U.S. Ninth Circuit Court of Appeals' decision in *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016).

The U.S. Supreme Court resolved any uncertainty through its *Epic Systems* decision. The Court expressly overruled the Ninth Circuit's *Morris* decision. Class action waivers in arbitration agreements governed by the FAA therefore are enforceable, and employers are free to include them in their arbitration agreements.

Why the split among various courts?

Without too deep a detour into legal history, the dispute in *Epic Systems* (and two similar cases decided with it, including *Morris*) involved a conflict between two federal statutes: the FAA (enacted in 1925) and the National Labor Relations Act ("NLRA"), enacted a decade later. The FAA makes most agreements to arbitrate "valid, irrevocable and enforceable," with limited exceptions. The NLRA, on the other hand, safeguards workers' rights to engage in "concerted activity" for their mutual benefit and protection (mostly translatable as "the right to unionize").

Not until 2012 did the NLRB have the epiphany that arbitration agreements with class action waivers somehow impair the rights of workers under the NLRA. Once it did, courts splintered – some bought into this rationale; others didn't. Why did this notion take 77 years to surface? Good question, said Justice Gorsuch.

The Court majority found that nothing in the NLRA overrode the FAA's command that arbitration agreements be enforced according to their terms. The Court was able to reconcile the objectives of both statutes, and found it notable that the NLRA expresses no opinion – pro or con – about arbitration.

The Court's four dissenters, led by Justice Ruth Bader Ginsburg, thought the majority got it "egregiously wrong." Regardless whether the outcome reflects wise policy, two facts remain: new federal legislation could always override the decision and outlaw class action waivers; but until that happens or the judicial philosophy of the Supreme Court changes, state legislative and federal regulatory efforts to impair arbitration will continue to fail.

What does this mean for employers?

For the foreseeable legal future, employers who adopt *properly drafted and implemented* arbitration agreements can count on having them enforced, even with a required waiver of class action or collective action (think Fair Labor Standards Act) claims.

At present, however, one big caveat exists for California employers: The California Supreme Court has held (in the *Iskanian* decision mentioned above) that "representative actions" under PAGA (the Private Attorneys General Act) *cannot* be compelled into arbitration – at least for the draconian civil penalties portion of PAGA. Although PAGA cases have besieged the California legal landscape for several years, at least they involve a shorter (one year) statute of limitations than the usual three or four year periods available for most other types of wage-hour claims.

Should employers adopt arbitration agreements with class action waivers?

The *Epic Systems* decision removed the only remaining cloud over whether such agreements would hold up. From a strictly legal perspective, most commentators now would say it's the only sure way to avoid the risk of employment class actions. That alone may be worth it to many employers.

But, as with most things, it's not that simple. Employers must pay virtually all costs associated with employment arbitration. Arbitrators' fees and expenses sometimes feel like paying for a second set of lawyers! Some plaintiffs' attorneys vigorously resist going to arbitration, and litigating to compel arbitration can also be costly. While arbitration can be less cumbersome than the court system, there's no consensus that employers achieve a better win-loss ratio in arbitration than in court. All the same rights and remedies are available in arbitration – except for class and collective action procedures (at least when a properly-adopted arbitration agreement exists). And, in today's Me-Too atmosphere, mandatory arbitration has become politically toxic in some industries.

Finally, after *Epic Systems* and another U.S. Supreme Court decision last year, some observers now believe the strategy of using PAGA "representative actions" to evade arbitration may be on the path to getting its comeuppance. Under this theory, if a (California) state law could enable claimants to avoid arbitration just by invoking the mantra, "We're suing as representatives of the state," that exception would always swallow the FAA rule requiring arbitration agreements to be enforced according to their terms! If this theory plays out successfully, only employers with proper arbitration agreements will be protected from the perils of PAGA.

It's worth exploring carefully with your counsel!

James L. Morris

As the senior employment law partner at Rutan & Tucker, Jim has extensive employment and labor law litigation experience, including state and federal court defense of cases alleging wrongful termination, sexual harassment, individual and class action employment discrimination, class action wage-hour violations, and unfair competition claims. He also has significant experience in the "traditional" labor law areas of unfair labor practice charges, union organizing campaigns, collective bargaining negotiations and arbitrations. Jim also counsels employers on employee discipline matters, internal investigations, government agency investigations, personnel policies, employment contracts and separation agreements, workforce restructuring, wage-hour issues, and unfair competition matters related to employment. Jim can be reached at 714-641-3483 or jmorris@rutan.com.



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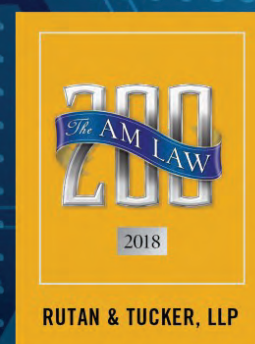
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“ The landscape of U.S. immigration is changing more now than it has in the past 25 years. One area that is markedly feeling change is corporate investment immigration. The idea that successful foreign business people can bring their business talents, expertise, and funds into the U.S. has a certain logical appeal; this has been the guiding thought behind the EB-5 immigrant investor program. ”

“Round the World” Investment Immigration

by David Hirson, Esq.

The landscape of U.S. immigration is changing more now than it has in the past 25 years. One area that is markedly feeling change is corporate investment immigration. The idea that successful foreign business people can bring their business talents, expertise, and funds into the U.S. has a certain logical appeal; this has been the guiding thought behind the EB-5 immigrant investor program. For a \$500,000 or \$1,000,000 investment into a qualifying business/project, a foreign national and his/her immediate family members could be granted a green card in exchange for creating at least ten full-time jobs in local U.S. economies. The overwhelming majority of foreigners who have participated in the EB-5 program were born in mainland China. Unfortunately, these Chinese nationals have created a significant backlog in the EB-5 program, extending the processing times for all EB-5 applicants. Long processing times, in turn, make the program less appealing to foreign nationals who are considering various immigration programs for their families.

There have been a number of additional factors causing the downfall of the EB-5 immigrant investor program in China (even though this program has been creating thousands of much needed full-time jobs for hard-working U.S. workers). First (as mentioned above), the large number of Chinese-born applicants have utilized all of their available federally-mandated allotment of EB-5 visas each year. Second, there is a lot of uncertainty in the program due to Congress repeatedly trying, and subsequently failing, to “modernize” and make permanent the EB-5 visa program. The EB-5 industry was unable to unify in a strong front to bring the program and industry together to create a better program. Third, the Chinese national government has made it extremely difficult to move large amounts of funds outside of China (no matter the reason).

Due to the federally mandated limit on the number of EB-5 visas that are allotted each year, with a secondary limit on how many EB-5 visas are allotted per country as well, Chinese applicants who apply for an EB-5 visa today are now facing a wait time of approximately ten to fifteen years before they can bring their families to the U.S. This extended wait time has led to the rise of a certain phenomenon that we can call “round-the-world immigration”: where a Chinese national “immigrates” to a country that is: 1) “selling” that country’s citizenship for money (which the U.S. does not do), and then 2) uses this second country’s citizenship to apply for an E-2 investor treaty visa (since China does not have E-1/2 treaty status with the U.S.). (An E-2 visa applicant makes a “substantial investment” into a U.S. company, boosting the U.S. economy. *Note:* “substantial investment” is not defined and is based on the facts of each case, including the ration of investor equity the whole of the business.)

While this process is lawful, it is possible that U.S. consular officers will deny Chinese immigrants who apply for a trade treaty visa by way of a Grenada (or similarly “purchased” citizenship) passport when the applicant is clearly Chinese and not Grenadian. The other complication here is that Chinese citizens legally forfeit their Chinese citizenship as soon as they obtain citizenship in another country. As such, the “foreign” Chinese national would be required to have a Chinese visa in his/her Grenada passport in order to be legally present in China to meet with the U.S. consular officer. When the “foreign” Chinese national is unable to present the immigration officer with a valid Chinese visa, the officer could then deny the E-2 petition and not allow the Chinese national into the U.S. based upon not having jurisdiction to adjudicate the case.

After facing such a denial, and not having many other options, many foreign nationals and their families decide to give up immigrating to the U.S. They are effectively giving up on their “great” American dream and end up not being allowed the chance to add to our nation’s strong entrepreneurial spirit. Our nation’s President seems to be set on making *all* immigration into the U.S. fraught with hurdles that take years (if not decades) to overcome. In the meantime, other nations are welcoming entrepreneurial immigrants into their borders with open arms.

Should the U.S. be making it so difficult for good, law-abiding, hard-working, enterprising, and successful immigrants into our “Nation of Immigrants?” It may be that we should all take a moment to remember where we and our forefathers came from, a majority of whom crossed the oceans looking for a better life for their families and business ventures in a new land. What state would our nation be in if not for the immigrants who came to the U.S. and contributed to the rich fabric of our nation and its economy? One could argue that the U.S. is missing out on great contributions from people who have been successful in a wide variety of areas in the nations of their birth.

Contact an Experienced Immigration Lawyer

There are critical nuances in each of these visa categories and it is extremely important to obtain expert advice and planning. If you are contemplating bringing foreign investors into your business, or you are a foreigner planning to open a business in the U.S., consult with our experienced immigration lawyers at David Hirson & Partners, LLP. Our team of immigration experts will expertly guide you along the immigration path that best meets your business and family needs.

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** The information provided in this article is for informational purposes only and is not legal advice. Please consult with a licensed attorney regarding your specific circumstances.*

David Hirson, Esq.

David is the managing partner of David Hirson & Partners, LLP. David has over 35 years of experience in the practice of immigration law. Although he practices in almost all areas of immigration law, including family law immigration and all aspects of business law immigration, he is internationally recognized as an expert in EB-5 investment immigration law. He has been certified as a Specialist in Immigration and Nationality Law by the State Bar of California, Board of Legal Specialization continuously since 1990. As an immigrant from South Africa to the U.S., he is personally aware of what immigrant families and entrepreneurs go through.





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Fair Employment Housing Commission Publishes New National Origin Discrimination Regulations

By Brian Schield, Principal, Jackson Lewis P.C.

California's Fair Employment and Housing Commission (FEHC) has published the final text of its "Regulations Regarding National Origin Discrimination" (to be codified at 2 Cal.Code Regs. §§ 11027 and 11028), which become effective July 1, 2018. The regulations expand the definition of "national origin" and protections for immigration status for the purposes of the Fair Employment and Housing Act (FEHA).

Once again, California has imposed new requirements on employers aimed at protecting its immigrant population that overlap with federal statutes. In addition to the I-9 verification mandates of the Immigration Reform and Control Act (IRCA) assuring that all U.S. employers meet requirements of verifying employment eligibility, the federal law has provisions prohibiting discrimination against any individual who is employment authorized on the basis of nationality origin and citizenship status.

The new FEHC regulations limit practices for verifying work eligibility. Employers may not make an inquiry into an applicant's immigration status, including requiring documentation, unless "the person seeking discovery or making the inquiry has shown by clear and convincing evidence that such evidence is necessary to comply with federal immigration law." Employers cannot take adverse action against an employee for updating his or her name, social security number or employment documents. The regulations now specify that threatening to contact immigration or law enforcement authorities may be a form of harassment and/or retaliation.

The new FEHC regulations necessitate that employers take precautions when conducting internal audits of I-9 employment verification records, during

reverification of employee I-9s, and when making changes to employee documentation that may have bearing on their immigrant status. In such cases, it may be difficult for employers to strike a balance between compliance with IRCA regulations and following California's FEHA prohibitions.

Consequently, training of an employer's human resource professionals on these new rules that limit certain practices for verifying work eligibility is extremely important to avoiding potential discrimination claims.

For any questions about these regulations or other immigration issues, please contact Brian Schield, or for a more detailed explanation of this regulation please visit our blog at www.californiaworkplacelawblog.com.

Brian Schield

Brian Schield is a Principal in the Los Angeles, California, office of Jackson Lewis P.C. with more than 30 years of experience in business-related immigration matters. Mr. Schield works with clients ranging from large international organizations to individuals and families. He can be reached at Brian.Schild@jacksonlewis.com or 213-630-8283.



With 850 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.

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E-1/E-2 (Not EB-5) Visas

By Richard M. Wilner; Partner; Wilner & O'Reilly, APLC

The E-1/E-2 visa categories are available to nationals of countries that have a treaty of friendship, commerce, and navigation ("FCN") with the United States. According to the Department of State, the visa applicant must be coming to the United States to engage in substantial trade, including trade in services or technology, in qualifying activities, principally (greater than 50%) between the United States and the treaty country (E-1), or to develop and direct the operations of an enterprise in which the applicant has invested a substantial amount of capital (E-2).

Neither category is limited to individuals. Instead, a foreign entity may participate in the visa program and lateral specific types of employees to the United States. The nationality of a privately held entity is determined by the nationality of the majority of its shareholders whereas the nationality of a publicly traded company is determined by the nationality of the exchange upon which it trades. In the case of a multinational corporation whose stock is traded in more than one country, the applicant must prove the business possesses the nationality of the treaty country and that the applicant is a national of the same treaty country.

For the E-1 visa, over 50 percent of the total volume of the international trade conducted by the treaty trader regardless of location must be between the United States and the treaty country of the applicant's nationality. The remainder of the trade in which the foreign national is engaged may be international trade with other countries or domestic trade. The trade must be a continuous flow that should involve numerous transactions over time. If the treaty-trader meets this (greater than) 50 percent requirement, the duties of an employee need not be similarly apportioned to qualify for the visa. For an example, if a U.S. subsidiary of a foreign entity is engaged principally in trade between the United States and the treaty country, it is not material that the E-1 employee is also engaged in third-country or intra-U.S. trade or that the parent firm's headquarters abroad is engaged primarily in trade with other countries (9 FAM 402.9-5(D)(c)).

The E-2 visa does not require substantial trade. Rather, it requires substantial investment. Substantial is not defined in terms of dollars. Instead, whether or not

an investment is considered substantial is determined according to a particular three part "discretionary formula", namely: (1) A proportionality test, e.g. amount of qualifying funds invested vs. the cost of the business; (2) Sufficiency of investment to ensure the commitment to the successful operation of the enterprise; and (3) the overall magnitude of the investment to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

Unlike most every other type of visa category, there is no requisite pre-application process in the United States. Instead, visa applicants may apply directly at the appropriate U.S. consulate with jurisdiction over their application. The E-1 and E-2 visas are extremely flexible and may be renewed indefinitely.



Richard M. Wilner

Richard is a founding member of Wilner & O'Reilly, APLC and chairs the firm's Employment-based practice group. He is certified as a specialist in immigration law by the State Bar of California's Bureau of Legal Specialization and is AV-rated by Martindale Hubbell. Contact Richard at 714-919-8880 or richard@wilnereilly.com.



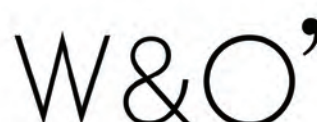
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Navigating the Immigration Maze as a Human Resources Manager

by James Y. Pack, Partner and Amrita Jolly-Sodhi, Associate, Fragomen Worldwide

Within most companies, the Human Resources department manages immigration matters for current and prospective employees. Some companies employ multiple reps who have immigration related training and / or solely focus on employees who have U.S. visas, but more often than not the HR professional is left to her own devices and instructed to “figure it out.” As the need for skilled workers increases, and as the US government imposes additional restrictions on legal immigration, more than ever HR Managers require a framework to address immigration issues.

First, engage with a trusted immigration attorney. Immigration attorney-client relationships vary, from almost-completely-outsourced to advisors who act as consultants when an issue becomes too difficult for the company to manage inhouse. Consider an “immigration audit” – a review of your immigration procedures and policies, which includes an analysis of strengths, weaknesses, and recommendations for improvement.

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Second, develop and implement an immigration Policy. The specifics within the Policy will depend on the nature of the company’s business, makeup of the overall employee population, and the number of type of employees who are employed pursuant to visas. Benchmarking, therefore, is important before drafting the company’s immigration Policy.

Maintaining an immigration program/ policy allows a company to easily (among other benefits):

- ▶ Understand I-9 requirements for new hires and how to complete and maintain compliant I-9 records;
- ▶ Highlight that visa and/or employment statuses can affect a potential employee’s start date in order to manage expectations;
- ▶ Outline various visa types that will best suit the company’s needs taking into account the position being offered;
- ▶ Ensure worksite compliance in the event of on-site visits by USCIS;
- ▶ Develop long term solutions for key employees that leads to their ability to work in the United States permanently.

Finally, HR professionals should take advantage of immigration-specific training resources including in-person and virtual courses and seminars, HR conferences that are specifically tailored to immigration professionals, and other tools, manuals, etc.

Ultimately, taking the above steps will allow the HR to professional to learn how to protect employers by understanding compliance risks and developing best practices relating to employment of foreign national workers.

James Y. Pack

James is a Partner at Fragomen Worldwide’s Irvine offices. He provides immigration counsel to large, medium, and small companies in a wide range of industries, including developing wireless technologies, animated feature film production, video game development, and pharmaceuticals. As a Committee Member of the American Immigration Lawyers Association, James has worked directly with USCIS Service Centers to change policies and procedures and to resolve problematic specific issues. He is a frequent presenter on immigration topics for various organizations. James can be contacted at jpack@fragomen.com or 949-660-3531.



Amrita Jolly-Sodhi

Amrita is an Associate at Fragomen’s Irvine office. She is a member of the firm’s Private Client Practice, which focuses on immigration solutions for high net worth foreign nationals and includes EB-5, E-2, L-1, EB1-A, EB1-C and National Interest Waiver matters, among others. Amrita also helps employers establish and execute effective immigration programs. She can be contacted at ajolly@fragomen.com or 949-660-3519.



Business Jargon – I Have no idea What You Just Said!

by Kathi Guiney, SPHR, GPHR, SCP, President YES! Your Human Resources Solution

busi-ness jar-gon /ˈbiznəs ˈjɑːrgən/ *n.* a once refreshingly creative expression that, over time and overuse, has become an annoyance.

When business jargon is par for the course, it tees up annoyance and confusion with vague phrases people are tired of hearing. Take your communication to the next level by – gasp! – saying what you mean, and by losing this jargon immediately:

- ▶ **“Out of pocket”** – What used to mean you paid for something yourself now means that you’re unreachable. But it could also mean you are getting a facial or at the car wash. How about you say, “I’m on vacation” or “I’m out of the office?”
- ▶ **“Do more with less”** – This recession rally cry now means, “Do more work with less resources but same results,” Nothing motivating here!
- ▶ **“Win-win situation”** – This outcome involves many compromises and sounds like it makes everybody happy, when it often makes nobody happy. Who wants to sign up for a “lose-lose situation?”
- ▶ **“Limited bandwidth”** – You are not a Cloud-based service, and sometimes you will be too busy to accept more tasks. Reinforce this with plain English: “Today is crazy! Can we meet tomorrow morning?”
- ▶ **“Take it offline”** – Your meeting is veering off topic! Unless you *do* exist in the Cloud instead of physically in this conference room, rein in your *Ready Player One* and try, “Let’s talk more about this after the meeting.”

Annoying and confusing business jargon can make you wish you were out of pocket! It’s best to take this topic offline to build more effective business communication. And if you find your bandwidth too limited to adopt new lingo, doing more with less may create a win-win situation.

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Veterans: The Perfect Combination of Technical and Soft Skills

In today's employment market, companies are challenged to find employees with the perfect combination of soft and technical skills. A simple solution is to look at the abundance of U.S. Veterans who are returning to civilian life, bringing with them skills learned through deployment. Skills and qualities corporations value such as, setting and accomplishing goals efficiently, the ability to work under pressure, and the ability to lead team efforts to successful and productive results.

Broad View

It takes a few weeks, or even months, for new hires to get through the learning curve and completely assimilate into a new work environment, new processes, and unfamiliar programs. Although the ramp up period varies by new hire, hiring employees who already have experience utilizing specific skills can save managers and employees time when training. Veterans enter the workforce with the ability to complete tasks based on achieving team and personal goals. They enter into new positions with the intention of learning what the end result needs to be and applying themselves to deliver those results. Although exceptional at understanding and focusing on the big picture, veterans also understand attention to detail is crucial. Due to the fact that veterans have developed and executed these skills while deployed, they enter the workforce ready to utilize them within any team.

High Pressure Situation? No Problem.

While exposed to various high pressure environments, military veterans acquired the necessary skills to adapt to circumstances that are continuously changing. Veterans are proven to keep their composure and adapt in order to utilize their problem-solving abilities in high-stress situations. Although the type of work performed while on duty may be different than that of a corporate workplace, veterans have already learned that in order to be successful they must manage their priorities and be tactical when faced with a heavy workload or with quickly approaching deadlines.

Leadership & Teamwork

Regardless of their rank, military veterans are experts on the definition of teamwork, and as such, they will always lead by example.

While embarking on a military career, they rise through the ranks as they age. By



the time they are ready to enter the workplace, they already attained years of leadership experience. A veteran's definition of leadership does not necessarily mean being at the top; rather, they have spent time learning how to lead by example providing direction, delegation and motivation, making them a versatile addition to any team.

Many companies struggle to filter through candidates with the perfect combination of technical skills and people skills; however, turning towards veterans is a simple solution. These candidates have mastered working with and leading teams to a common goal.

Many veterans work closely with local organizations in order to connect with businesses seeking quality candidates. Marquee Staffing's Veteran Outreach Program is proud to work with organizations such as Military Inclusion, Camp Pendleton, and Santa Ana WORK Center in order to employ veterans. Veterans are a beneficial addition to many teams, and Marquee Staffing is proud to be working with them!

Marquee Staffing recruiters specialize in placing talent in some of the fastest growing Medical Device, BioTech, Engineering, Cyber Security, and IT companies in Southern California. We also provide the benefit of our knowledge and experience to help you improve employee retention, productivity and much more.

Nina McCann

Nina McCann works to network with local organizations in an effort to connect our veteran community with available opportunities. As the Veteran's Outreach Specialist at Marquee Staffing, Nina ensures that the skills veterans worked so hard to acquire while serving our country, are utilized beneficially in the workplace. Nina participates in various job fairs in order to provide veterans with fitting opportunities upon returning home. Events such as mock interviews in Camp Pendleton help prepare veterans for entering the workplace.



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