



Concerted Activities and the NLRA after *Epic Systems*

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The Supreme Court’s recent decision in *Epic Systems Corp. v. Lewis* upheld the use of mandatory arbitration agreements limiting an employee’s ability to participate in employment-related collective action (including class action lawsuits). (A related CRS Legal Sidebar on *Epic Systems* is available [here](#).) Justice Gorsuch, writing for a majority of the Court, concluded that [Section 7 of the National Labor Relations Act](#) (NLRA), which recognizes an employee’s right to engage in “concerted activities” related to employment, did not displace the application of the [Federal Arbitration Act](#) (FAA), a law enacted to ensure the validity and enforceability of arbitration agreements. While *Epic Systems* may prompt greater use of arbitration provisions in employment contracts, the decision also highlights disagreement by the Justices regarding the proper method for interpreting Section 7 of the NLRA. A similar disagreement arose in *Encino Motorcars, LLC v. Navarro*, the Court’s April 2018 decision involving the [Fair Labor Standards Act](#) (FLSA) and overtime pay for car dealership service advisors. The Justices in *Epic Systems* and *Encino Motorcars* were divided along the same 5-4 lines, with the majority eschewing consideration of the legislative histories of the relevant labor and employment laws when deciding how these statutes applied. Taken together, these cases illustrate a division in the Justices’ analytical approach to interpreting federal labor and employment laws; a division that may have implications for future administrative and judicial decisions concerning the protective scope of these laws.

Section 7 of the NLRA. Section 7 of the NLRA states that employees “shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]” Over time, the National Labor Relations Board (NLRB) has broadly interpreted the term “other concerted activities” to encompass a variety of activities, including those that do not necessarily involve collective bargaining or union organizing. In *NLRB v. Mike Yurosek & Son*, for example, the agency concluded that a group of employees who individually refused to work overtime were found to have engaged in protected concerted activity because they initially protested a change in their work schedules as a group. Similar employee efforts to improve workers’ terms and conditions of employment have also been found protected as “concerted activities for . . . other mutual aid or protection.”

In 2014, the NLRB’s broad view of the term “concerted activities” resulted in a decision finding the term applicable to certain social media activities that were unrelated to organizing. In *Three D, LLC d/b/a*

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Triple Play Sports Bar and Grille, the agency concluded that employees were engaged in protected concerted activities when they participated in a Facebook discussion about perceived errors in their employer's tax withholding calculations. The NLRB maintained that Section 7 provides employees a statutory right to act together to improve their terms and conditions of employment. According to the NLRB, this right includes the use of social media to communicate with each other and with the public for that purpose. The U.S. Court of Appeals for the Second Circuit [upheld](#) the NLRB's decision in 2015.

Section 7 and *Epic Systems*. The employees in *Epic Systems* and two other consolidated cases argued that their arbitration agreements, which permitted only individualized actions against their employers, should not be enforceable pursuant to the FAA because enforcement would deny them of their right to engage in a concerted activity. The employees contended that the ability to maintain a class or collective action constituted a protected concerted activity under Section 7 of the NLRA.

The Court's majority, however, [emphasized](#) that the Court has never "read a right to class actions into the NLRA." Citing the statute's purpose of securing the rights to organize and bargain collectively, the majority indicated that the statute "says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."

Reviewing Section 7, in particular, the majority maintained that the proper reading for the term "other concerted activities for the purpose of . . . other mutual aid or protection" should seemingly encompass only those activities related to organizing in the workplace. Applying the *ejusdem generis* canon of statutory interpretation, the majority reasoned that because the general term "other concerted activities" follows specific terms in a list – "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively" – the more general term should be understood to embrace only those subjects that are similar in nature to the more specific terms listed. The majority [concluded](#) that "[n]one of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum . . ." Accordingly, the Court concluded that "other concerted activities" do not include the ability to participate in employment-related collective action.

Writing for the dissenting Justices in *Epic Systems*, Justice Ginsburg promoted a broader interpretation of Section 7 that encompasses class and collective actions to challenge an employer over workers' terms and conditions of employment. Justice Ginsburg [questioned](#) the majority's reliance on the *ejusdem generis* canon, contending that reliance on this canon is inappropriate where it serves to undermine congressional intent: "Nothing suggests that Congress envisioned a cramped construction of the NLRA." Moreover, quoting Section 1 of the NLRA, which addresses Congress's findings and policy declaration, the dissenting Justices [maintained](#) that "Congress expressed an embracive purpose in enacting the legislation, i.e., to 'protec[t] the exercise by workers of full freedom of association.'"

Narrowing the Scope of Federal Labor and Employment Laws? Justice Ginsburg's references to congressional intent and the NLRA's legislative purpose are similar to references she made in her dissenting opinion in *Encino Motorcars*. (A CRS Legal Sidebar on *Encino Motorcars* is available [here](#).) In that opinion, Justice Ginsburg cited the FLSA's legislative history as evidence of Congress's interest in making overtime pay available to service advisors, and contended that enlarging the relevant FLSA exemption to include service advisors upsets the statute's mission of allowing only those employees within narrow and specific exemptions to be ineligible for overtime pay. The majority opinion by Justice Thomas, on the other hand, [maintained](#) that the exemptions are entitled to nothing more than a "fair reading" because the FLSA provides no textual indication that they should be construed narrowly. Applying this fair reading, which included consideration of the ordinary meanings for terms used in the relevant exemption, the majority concluded that the service advisors should be exempt from the FLSA's overtime pay requirement.

The differing conclusions reached by the majority and dissenting Justices in *Encino Motorcars* and *Epic Systems* followed from the Justices' disagreement over the relevance of legislative history and the use of various canons of statutory construction to interpret the challenged statutes. In light of the majority's discussion of Section 7 of the NLRA in *Epic Systems*, in particular, it seems possible that the NLRB and courts could revisit the kinds of activities that are protected by that section. One potential question in future litigation could be whether various activities unrelated to union organizing can be appropriately deemed concerted activities covered by the statute.

Notably, both the majority and minority acknowledged Congress's ability to respond to *Epic Systems*. Legislation that would render unenforceable agreements that require arbitration for employment-related disputes has been introduced in the 115th Congress. The Arbitration Fairness Act ([H.R. 1374/S. 2591](#)) would restrict the use of all such agreements, including, it appears, the ability of these agreements to limit class or collective actions. However, given the majority's discussion of Section 7, those who support a broad interpretation of protected concerted activities may also want to consider legislation that more explicitly identifies the kinds of activities that are meant to be protected by that section.

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