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### NLRB Says Employers Can Change Arbitration Agreements After Being Sued

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Following the Supreme Court's [Epic Systems v. Lewis](#) decision last year, which approved of employers' use of mandatory arbitration agreements with class action waivers, questions remained unanswered. Two of those lingering questions were answered on August 14, when the National Labor Relations Board's pro-employer majority ruled that employers may lawfully – under the National Labor Relations Act – update their mandatory arbitration agreements in response to workers participating in wage and hour class or collective actions under either the Fair Labor Standards Act or state laws. Going even further, employers can condition further employment on the new arbitration agreement and warn employees that failure to agree will result in termination.

The case stemmed from a group of employees filing a collective action that alleged violations of federal and state wage laws. After the suit was filed, the employer required its employees to sign an updated arbitration agreement, which prohibited employees not only from filing collective actions but also from opting in to collective action suits. The NLRB said that because *Epic Systems* made mandatory arbitration agreements lawful, the revised arbitration agreement was lawfully implemented. The Board reiterated that past precedent still prohibits employers from terminating or disciplining employees for filing a class or collective action or engaging in any other conduct deemed to be “protected concerted activity,” but the requirement that employees agree to arbitrate their disputes instead of opting into a collective action – and face termination if they do not sign that agreement – is lawful under *Epic Systems*.

The Board's decision represents a small expansion of *Epic Systems* and gives employers another tool to use in reducing their risk for costly litigation. Employers not only can require employees to sign arbitration agreements, but also can do so after a collective action has been filed as a means to reduce

the likelihood of other employees opting into the suit.

