

# Commission Overrules Xu v. Epic Systems, Finds Valid Arbitration Agreement or Waiver Bars Prosecution of WFEA Claims Before ERD

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In *Ionetz v. Menard, Inc.*, the Wisconsin Labor and Industry Review Commission overruled its previous and highly controversial decision *Xu v. Epic Systems, Inc.*.

In *Ionetz v. Menard, Inc.*, the Wisconsin Labor and Industry Review Commission overruled its previous and highly controversial decision *Xu v. Epic Systems, Inc.*.

In *Xu*, the commission held that an employee cannot waive his or her right to file a discrimination complaint against his or her employer under the Wisconsin Fair Employment Act (WFEA). It further held that an employee may prosecute his or her WFEA claims on the merits against his or her former employer and that he or she can potentially receive a judgment against the former employer before the Wisconsin Equal Rights Division (ERD), even if he or she waived and released all such claims against his or her employer in a valid severance agreement. The commission based its decision on the conclusion that the ERD is an agency comparable to the Equal Employment Opportunity Commission (EEOC) and

that the “language used in the severance agreement . . . was intended to preserve the complainant’s right to file a complaint with the ERD.” Also, the commission incorrectly concluded that, as with federal agencies such as the EEOC, “the complainant cannot be prohibited from . . . filing a complaint with the ERD.”

However, just months later in *Ionetz*, the commission overruled *Xu* and held that the law is just the opposite for WFEA claims before the ERD. As declared in *Ionetz*, “[u]nlike the broad investigative, enforcement and prosecutorial authority granted to EEOC . . . ERD’s statutory authority is limited to that of an adjudicative body charged with deciding particular disputes that are filed with it.” Also, “unlike the EEOC . . . [ERD] has no independent ability to prosecute claims for violations of the WFEA.” Rather, according to the commission in *Ionetz*, the ERD’s “only statutory role in enforcing the WFEA is to **adjudicate** claims between employers and their employees.” (Emphasis in original)

“Consequently, where an employee has agreed to waive his or her discrimination claim against an employer, or to have it adjudicated in another forum [e.g., in arbitration], there remains no ancillary ERD authority that requires protection.” Also, “parties cannot by contract impose obligations on ERD that are inconsistent with the authority granted to it under the WFEA.” Ultimately, “the parties’ agreement to preserve the employee’s right to file a claim with the agency cannot require—or even empower—ERD to investigate or adjudicate claims that have been waived or committed to an alternate forum for resolution.” The commission then held that ERD was without authority to advance such claims and overruled *Xu*.

As a result, a valid arbitration agreement or a waiver of claims in a settlement or severance agreement bars prosecution of WFEA claims before the ERD. “[O]nce the individual claim is waived (or . . . required to be submitted to another forum for resolution) there remains no additional investigative, enforcement or other function for ERD to perform.”

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