

EO 18-03

STATE PROCUREMENT & MANDATORY EMPLOYEE ARBITRATION CLAUSES & CLASS ACTION WAIVERS

Washington State Department of
Enterprise Services

Contracts & Procurement

Draft dated July 30, 2018

To Do

- Understand where we are
- Define where we're going
- Develop a plan to get there
 - Procurement Guidance for implementing EO 18-03
 - Recommended Tools
 - Reporting Solution
- Continuously improve

"People with goals succeed because they know where they are going... It's as simple as that." **Earl Nightingale**

AGENDA

- Terminology
- Employee Arbitration Agreements & Collective Action Waivers
- Supreme Court Decision
- Executive Order 18-03
- Agency Leadership
- Procurement Procedures
- Stakeholder Session – Proposed Plan
- FAQs
- Takeaway Messages
- Stakeholder Action Plan
- Additional Resources

TERMINOLOGY

MANDATORY INDIVIDUAL ARBITRATION CLAUSE

- Means that employment grievances must be arbitrated, individually, employee vs employer
- Mandatory arbitration precludes opportunity for employee to seek redress for employment grievances through collective or class action in court or in arbitration
- Condition of employment

CLASS OR COLLECTIVE ACTION WAIVERS

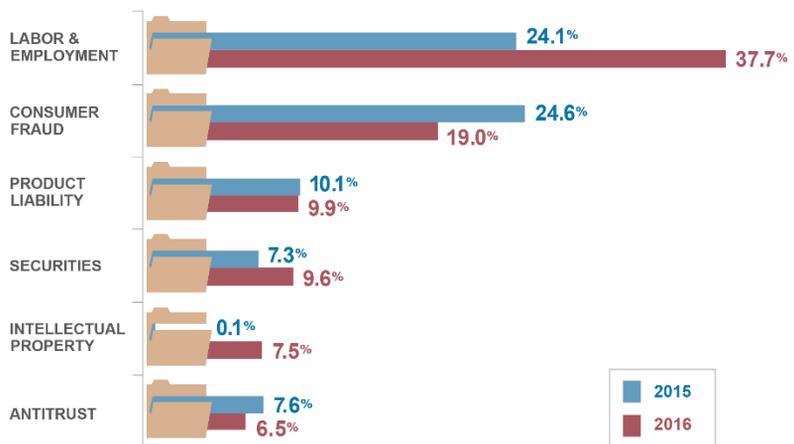
- Waives employees' right to redress employment grievances (or other matters) through collective or class action in court or in arbitration
- Means that any proceeding is a single employee vs employer

1	HARMEET K. DHILLON (SBN: 207873) harmeet@dhillonlaw.com	E-FILED 1/8/2018 9:43 AM Clerk of Court Superior Court of CA, County of Santa Clara 18CV321529 Reviewed By: R. Walker
2	RAVDEEP S. GREWAL (SBN: 308447) rgrewal@dhillonlaw.com	
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6		
7		
8	Attorneys for Plaintiffs James Damore and David Gudeman, on behalf of themselves and all others similarly situated	
9		
10		
11		
12		
13		
14	JAMES DAMORE and DAVID GUDEMAN, individually and on behalf of all others similarly situated,	Case Number: 18CV321529
15		
16	Plaintiffs,	CLASS ACTION COMPLAINT:
17		1. Violation of Cal. Labor Code § 1101
18	v.	2. Violation of Cal. Labor Code § 1102
19	GOOGLE, LLC, a Delaware limited liability company; and DOES 1-10,	3. Workplace Discrimination on the basis of Gender and/or Race in Violation of FEHA
20		4. Workplace Harassment in Violation of FEHA
21	Defendants.	5. Retaliation in Violation of FEHA
22		6. Retaliation in Violation of Public Policy
23		7. Retaliation in Violation of Cal. Lab. Code § 1102.5
24		8. Failure To Prevent Harassment, Discrimination, and Retaliation
25		9. Unfair Business Practices, Bus. & Prof. Code Section 17200 <i>et seq.</i>
26		10. Declaratory Relief
27		DEMAND FOR JURY TRIAL
28		
	 Complaint	1

'WORKPLACE' DISPUTES

- Employment discrimination
 - Gender
 - Race
 - Age
- FLSA – Wage & Hour
- ERISA claims
- Federal and State statutory claims

Class Action Matters – Breakdown by Type
PERCENT OF MATTERS

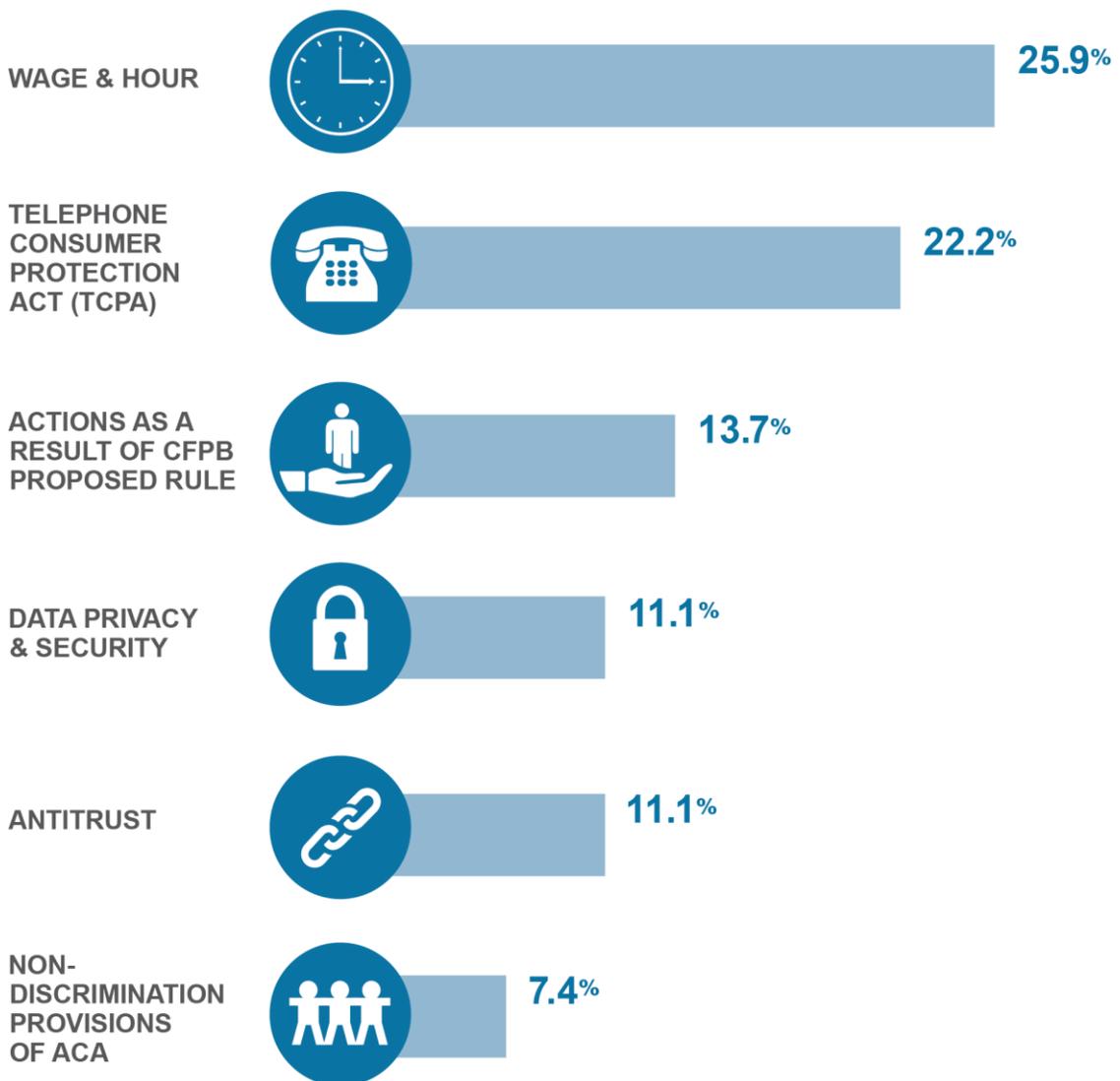


NOTE: Chart does not add up to 100%. Excludes other types of matters.
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EMPLOYER CONCERN

Predicted Next Wave of Class Actions

PERCENT OF COMPANIES



NOTE: Chart does not add up to 100%. Excludes responses under 7%.

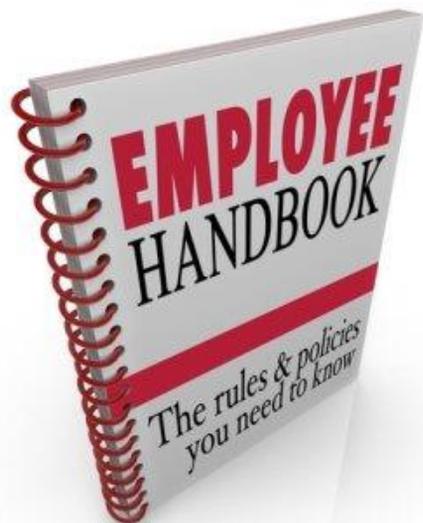
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EMPLOYEE ARBITRATION AGREEMENTS & COLLECTIVE ACTION WAIVERS

Where to locate these

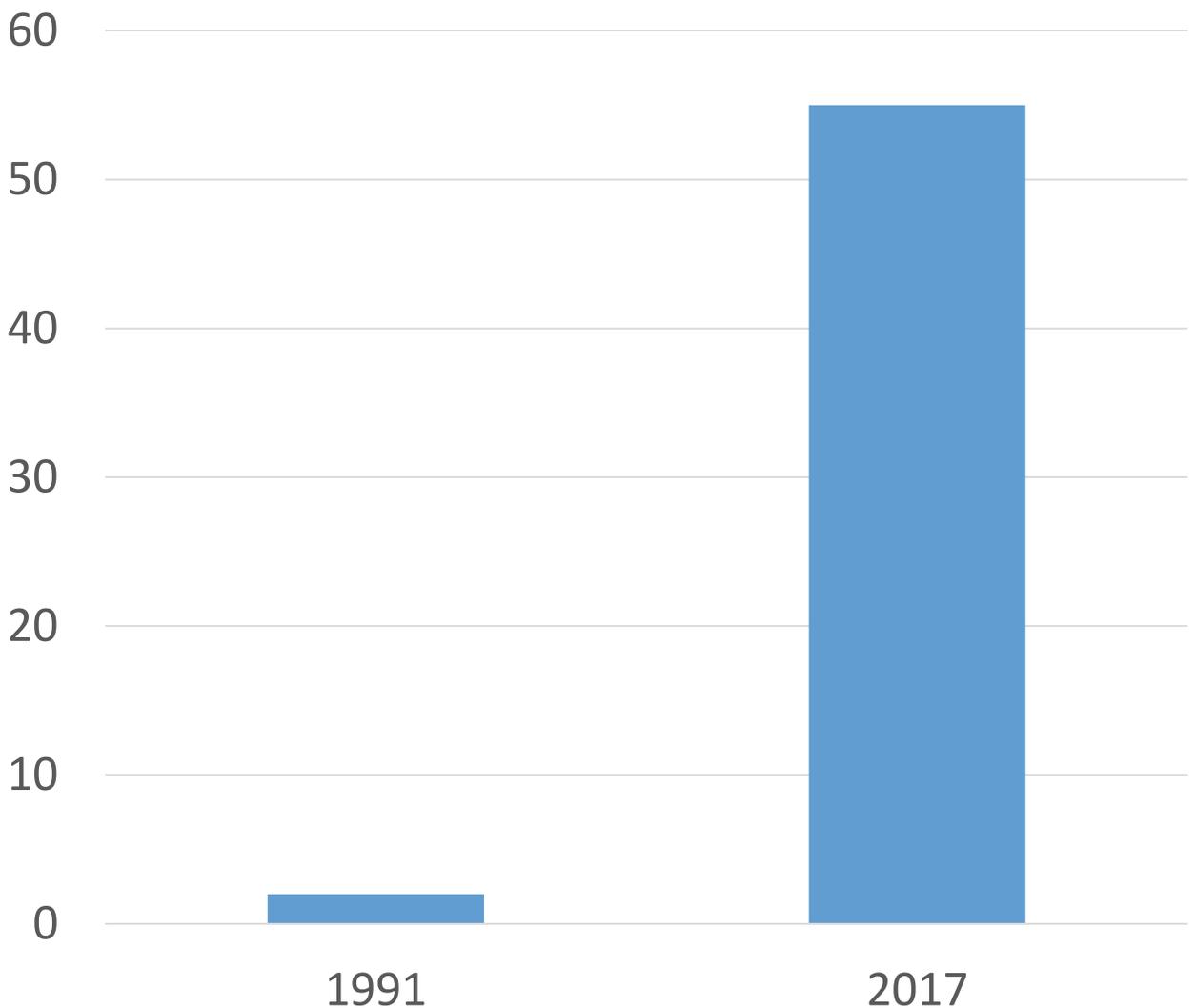
WHERE ARE THEY FOUND?

- Employment agreements
- Employee handbooks
- Employer policies



LANDSCAPE

Percentage of Non-Union, Private-Sector Workers Subject to Mandatory Arbitration



Data based on Economic Policy Institute Study (April 6, 2018)

MANDATORY ARBITRATION IN U.S. WORKPLACE BY SIZE

Employer Workforce Size	Mandatory Arbitration
Fewer than 100 employees	49.8%
100 to 499 employees	49.2%
500 to 999 employees	59.3%
1,000 to 4,999 employees	61.8%
5,000 or more employees	67.7%

Source: Economic Policy Institute (April 6, 2018)

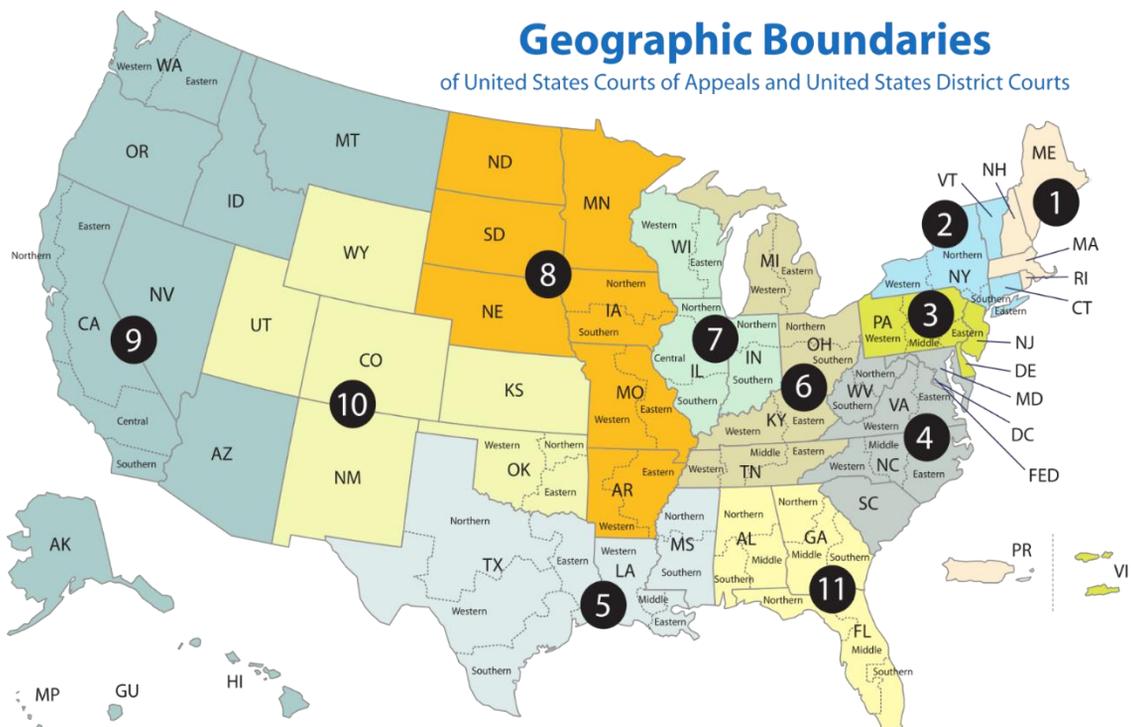
SUPREME COURT DECISION

Epic Systems Corp. v. Lewis, 584 U.S. ____
(May 21, 2018)

SUPREME COURT REVIEW

■ Three Cases

- *Epic Systems Corp. v. Jacob Lewis* (7th Circuit)
- *Ernst & Young LLP v. Stephen Morris* (9th Circuit)
- *National Labor Relations Board v. Murphy Oil USA, Inc.* (5th Circuit)



SUPREME COURT



- *Issue:* how two federal laws, the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA), relate to whether employment contracts legally can bar employees from collective arbitration

SUPREME COURT DECISION

- 5-4 Decision
 - Majority: Gorsuch, Roberts, Kennedy, Thomas, & Alito
 - Dissent: Ginsburg, Breyer, Sotomayor, & Kagen
- Majority determines that arbitration agreements requiring individual arbitration are enforceable under the Federal Arbitration Act regardless of the National Labor Relations Act.
- Dissent argued that, under its reading of the National Labor Relations Act, employment contracts can not preclude collective action.

EXECUTIVE ORDER 18-03

Supporting Workers' Rights to Effectively
Address Workplace Violations



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

EXECUTIVE ORDER 18-03

**SUPPORTING WORKERS' RIGHTS TO
EFFECTIVELY ADDRESS WORKPLACE VIOLATIONS**

WHEREAS, our nation and state have adopted numerous laws that require employers to ensure safe working conditions, fair wages, and adequate breaks, including the federal Fair Labor Standards Act of 1938 (FLSA), the Washington State Minimum Wage Act, and other wage payment and employment standard laws; and

WHEREAS, despite historical efforts to remedy the imbalance of power between employers and employees, such as passage of the National Labor Relations Act, individuals remain limited in their ability to bargain; and

WHEREAS, the United States Supreme Court, in its recent *Epic Systems Corp. v. Lewis*¹ decision, held that if employees sign an arbitration agreement requiring individual arbitration proceedings as a condition of employment, then those agreements preclude employees from pursuing a class or collective action against their employer to resolve disputes; and

WHEREAS, when employers require workers to accept an arbitration clause as a condition of employment they deny workers the opportunity to seek redress for employment grievances through collective or class action in court or in arbitration, and workers are stripped of a powerful tool to level the historical imbalance between employers and employees; and

WHEREAS, the *Epic Systems Corp. v. Lewis* decision will inevitably result in an increased difficulty in holding employers accountable for widespread practices that harm workers; and

WHEREAS, limiting an employee's right to act collectively to address workplace violations and requiring resolution through individual arbitration reduces transparency and diminishes public accountability; and

WHEREAS, collective power is a real force for change, as evidenced by the "Me Too" (#MeToo) movement. When the door to collective action is closed, it limits peoples' power and exacerbates fear of retaliation and of losing one's job; and

WHEREAS, the State has a duty to act as a responsible steward of public dollars. It is also a major employer and plays an influential role in the market place; accordingly, it is incumbent on state agencies to make every effort to encourage and support employers who demonstrate that they value workers' rights to collectively address workplace disputes.

¹ 584 U.S. ___ (2018)

NOW, THEREFORE, I, Jay Inslee, Governor of the state of Washington, by virtue of the power vested in me by the Constitution and statutes of the state of Washington do, effective immediately, hereby order and direct as follows:

1. PROCUREMENT PROCEDURES

To the extent permissible under state and federal law, when making purchasing and other procurement decisions, all state executive and small cabinet agencies shall seek to contract with qualified entities and business owners that can demonstrate or will certify that their employees are not required to sign, as a condition of employment, mandatory individual arbitration clauses and class or collective action waivers.

2. AGENCY LEADERSHIP

To ensure operational success and consistent application of this Order across state agencies, the Department of Enterprise Services (DES) shall administer implementation of this Order. The Director of DES, or the Director's designee(s), shall convene any necessary workgroups to establish best practices and consistent application of this Order statewide. It shall report on the progress and impact of this Order to the Office of the Governor, including any recommendations to further the purpose of this Order, no later than July 1, 2019 and;

I urge all other employers, public and private, to join me in this effort to protect workers' rights.

This Order is effective immediately.

This Order is not intended to confer, and does not confer, any legal right or entitlement, and shall not be used as a basis for legal challenges to any rule or to any other action or inaction of the governmental entities and employees subject to it.

Signed and sealed with the official seal of the state of Washington on this 12th day of June, 2018, at Olympia, Washington.

By:

/s/

Jay Inslee
Governor

BY THE GOVERNOR:

/s/

Secretary of State

HIGHLIGHTS - SUMMARY

- Effective Date
 - Immediately
 - Forward looking
- Recitals
 - Focus is employee rights
 - Not encouraging firms to diminish employees' right to pursue collective action
- Obligations
 - Procurement Procedures (Section 1)
 - Agency Leadership (Section 2)

'TYPE' OF EXECUTIVE ORDER

■ Three types of Executive Orders:

1. General Policy Statements

- General policy statement made by the Governor.
- The EO does NOT have the force and effect of law.
- The purpose of the EO is to persuade or encourage people to accomplish the Governor's policy.

2. Directives

- A directive from the Governor to state agencies communicating to those agencies what the Governor wants the agency to accomplish .
- The EO does NOT have the force of law
- But, agency heads serve at the pleasure of the Governor.

3. Operative Effect

- Requires that certain actions be taken.
- DOES have the force of law and serves as a source of authority for actions taken in response to the EO.

■ EO 18-03 is ... a Directive

AGENCY LEADERSHIP

Executive Order 18-03 (Section 2)

EO 18-03 §2 – AGENCY LEADERSHIP

“To ensure operational success and consistent application of this Order across state agencies, the Department of Enterprise Services (DES) shall administer implementation of this Order. The Director of DES, or the Director’s designee(s), shall convene any necessary workgroups to establish best practices and consistent application of this Order statewide. It shall report on the progress and impact of this Order to the Office of the Governor, including any recommendations to further the purpose of this Order, no later than July 1, 2019”

See EO 18-03 at § 2

ENTERPRISE SERVICES' OBLIGATIONS

- *Administrative*: Administer implementation of the EO
- *Collaborate & Implement*: Convene any necessary workgroups to establish best practices and consistent application of the EO statewide
- *Report & Recommend*: Report progress and impact of the EO to the Governor – including any recommendations to further the purpose of the EO – by July 1, 2019

WHAT IS ENTERPRISE SERVICES DOING TO IMPLEMENT THE EO?

- *Communicate*: Enterprise Services – now – is providing information and awareness
- *Collaboration*: Enterprise Services will work with stakeholders to identify and establish best practices to implement the EO statewide
- *Create*: Enterprise Services, working with stakeholders, will develop recommended tools and practices for agencies to implement the EO in a value-added fashion

PROCUREMENT PROCEDURES

Executive Order 18-03 (Section 1)

EO 18-03 §1 – PROCUREMENT PROCEDURES

“To the extent permissible under state and federal law, when making purchasing and other procurement decisions, all state executive and small cabinet agencies shall seek to contract with qualified entities and business owners that can demonstrate or will certify that their employees are not required to sign, as a condition of employment, mandatory individual arbitration clauses and clause or collective action waivers.”
See EO 18-03 at § 1

REQUIREMENTS

- EO is a 'directive' ... aspirational
- “To the extent permissible”
- Covered Entities:
 - All state executive and small cabinet agencies
- Covered Purchasing & Procurement
- “Shall seek to contract”

OBLIGATION

- Shall seek to contract with qualified entities and business owners who –
 - Demonstrate or certify that employees are not required to sign, as a condition of employment, mandatory individual arbitration clauses and class or collective action waivers

How?

- How agencies implement the EO depend on a couple of variables:
 - Type of purchasing/procurement
 - Whether the procurement is new or renewal
- Various possible tools to explore
 - Bids/Proposals:
 - Vendor certification
 - Vendor preference (e.g., evaluation/scoring)
 - Contracts:
 - Contractor representation and warranty

STAKEHOLDER SESSION

Collaborating with workgroups to establish best practices and consistent application of EO 18-03

WORKGROUP GOALS

- Develop 'EO Guidance'
- Develop Tools & Best Practices
- Reporting Plan for EO implementation

TIMELINE

EO 18-03
June 12, 2018

Enterprise Services & AGO
June/July 2018

Stakeholder Session
August 2, 2018

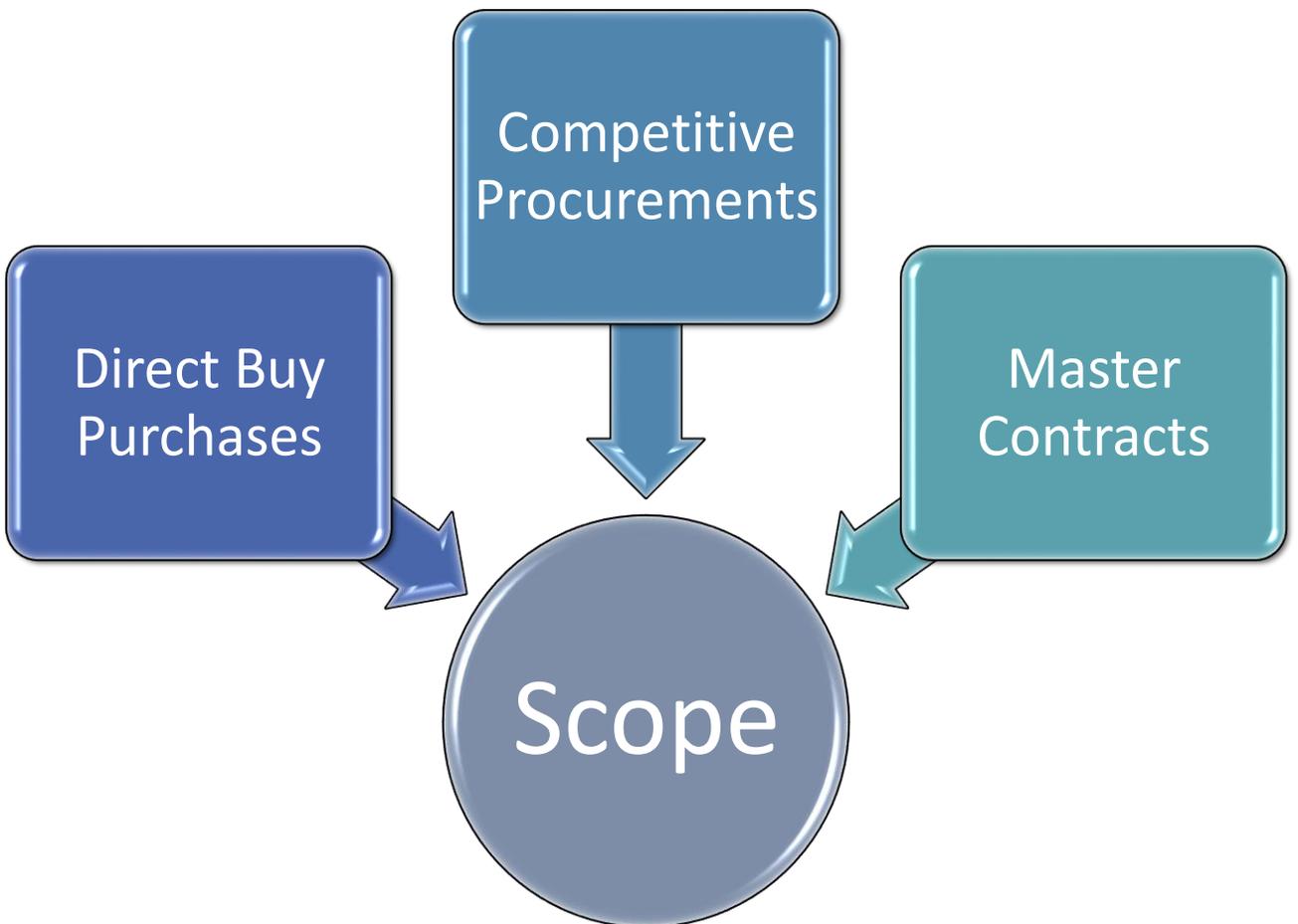
Stakeholder Input
August 2018

Implement EO Guidance &
Tools
August 2018

PROPOSED IMPLEMENTATION

- Scope
- Timing
- Guidance
- Tools
- Reporting

SCOPE



SCOPE BY CHANNEL

Competitive
Procurements

All Good &
Services
Procurements

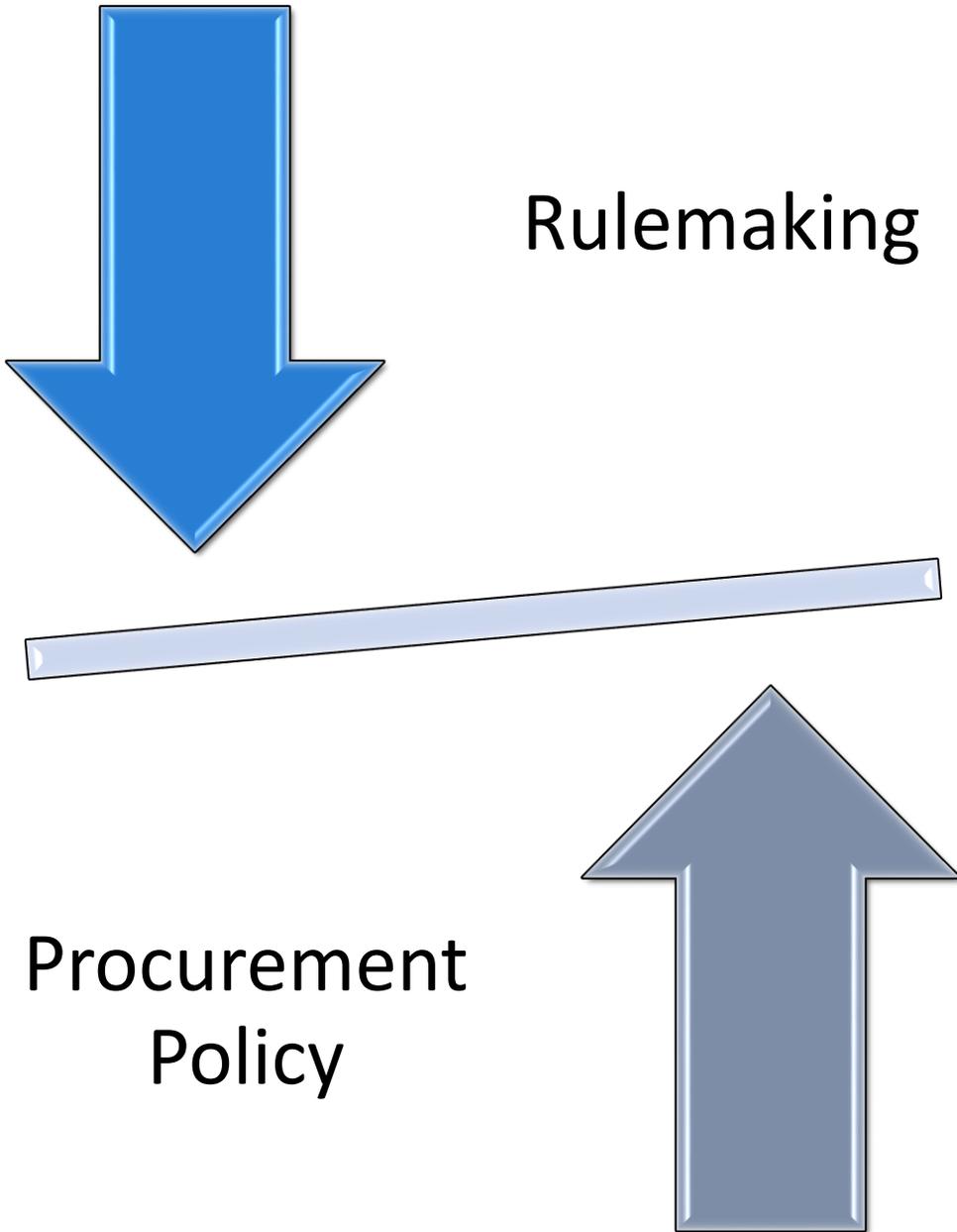
Purchases

Threshold – i.e.,
minimum
purchase amount

TIMING – AGENCY ‘PURCHASING & OTHER PROCUREMENT DECISIONS’



ENTERPRISE SERVICES' GUIDANCE



WHAT SHOULD THE POLICY COVER?

- Covered Agencies
- Scope
- Reporting requirements
- FAQs

TOOLS

Direct Buy
Purchases

Differentiation

Contract

Contract
Management

Competitive
Procurements

Procurement

Contract

Contract
Management

WHAT TOOLS SHOULD ENTERPRISE SERVICES DEVELOP?

Direct Buy

- Communication
- Certification

Procurements

- Vendor Awareness
- Certification Form
- Bid Preference
- Procurement 'backgrounder'

Contracts

- Reps & Warranty
- Assignment

WHAT ELSE?

- Information
- FAQs
- Reporting



REPORTING

- Report to Governor
 - July 1, 2019
 - Progress
 - Recommendations
- Plan ahead
 - Customers
 - Enterprise Services



FAQs

DOES EO 18-03 APPLY TO ME?

- The EO applies to all state executive and small cabinet agencies.
 - State Executive Agencies
See Governor's Office Website
[Executive Cabinet](#)
 - Small Cabinet Agencies
See Governor's Office Website
[Small Agency Cabinet](#)

WHO IS TASKED WITH ADMINISTERING IMPLEMENTATION OF EO 18-03?

- Enterprise Services

“To ensure operational success and consistent application of this Order across state agencies, the Department of Enterprise Services (DES) shall administer implementation of this Order.”

See EO 18-03 at § 2

WILL ENTERPRISE SERVICES PROVIDE PROCUREMENT TOOLS TO SUPPORT STATE AGENCIES IN IMPLEMENTING EO 18-03?

- Yes.
- These tools are being developed collaboratively.

Enterprise Services “shall convene any necessary workgroups to establish best practices and consistent application of this Order statewide.”

See EO 18-03 at § 2

CAN I DO BUSINESS WITH A FIRM THAT USES MANDATORY INDIVIDUAL ARBITRATION CLAUSES?

- Yes.
- The EO does NOT create a blacklist.
- Best Value Procurements
 - EO 18-03 requires covered agencies to seek to purchase and procure from firms that do not have mandatory individual arbitration clauses
 - EO 18-03 is similar to other Legislative and Executive procurement preferences regarding how the state spends its money

CAN I DO BUSINESS WITH A FIRM THAT USES CLASS OR COLLECTIVE ACTION WAIVERS?

- Yes.
- The EO does NOT create a blacklist. See prior slide.

DOES EO 18-03 APPLY TO COMPETITIVE PROCUREMENTS?

- Yes.
- EO 18-03 applies to the covered agencies' competitive procurements.

DOES EO 18-03 APPLY TO LEGACY CONTRACTS?

- No.
- The EO is forward-looking.

DOES EO 18-03 APPLY TO MASTER CONTRACTS?

- Yes.
- EO 18-03 applies to Enterprise Services'
 - Master Contracts
 - Cooperative Purchasing Agreements

DOES EO 18-03 APPLY TO NONCOMPETITIVE PROCUREMENTS?

Type	
Direct Buy Purchases	Yes
Sole Source Contracts	No
Emergency Contracts	No

DOES EO 18-03 APPLY BEYOND GOODS AND SERVICES?

- Enterprise Services' procurement oversight authority is limited to goods and services contracts. *See* RCW chap. 39.26.
- Covered agencies, if authorized, can implement the EO more broadly.
- EO Implementation: Begin with goods and services procurements & direct buy purchases

DOES THE EO CHANGE THE PROCUREMENT CODE?

- No.
- EO 18-03 does not amend RCW chap. 39.26.

WHAT IF THE VENDOR IS A CRITICAL SUPPLIER, DOES EO 18-03 STILL APPLY?

- Yes, but ...
 - “To the extent permissible under state and federal law ...”
 - Legislature may have required certain vendors – e.g., ferry vessels must be built in Washington
- EO 18-03, however, does NOT preclude state executive and small cabinet agencies from purchasing or contracting with particular firms.

DOES EO 18-03 APPLY TO CONTRACT EXTENSIONS?

- It depends on the contract.
- Contract renewals – No.
 - Here, for example, you have a 6 year term, but contract was set up to require year-by-year ‘renewal.’
- Contract extensions – possibly.
 - If original contract term is over, then yes.

DOES EO 18-03 APPLY TO SUBCONTRACTORS

- It depends on what the contract states.
- Generally speaking, the EO will apply to the Contractor.

TAKEAWAY MESSAGES

REMEMBER



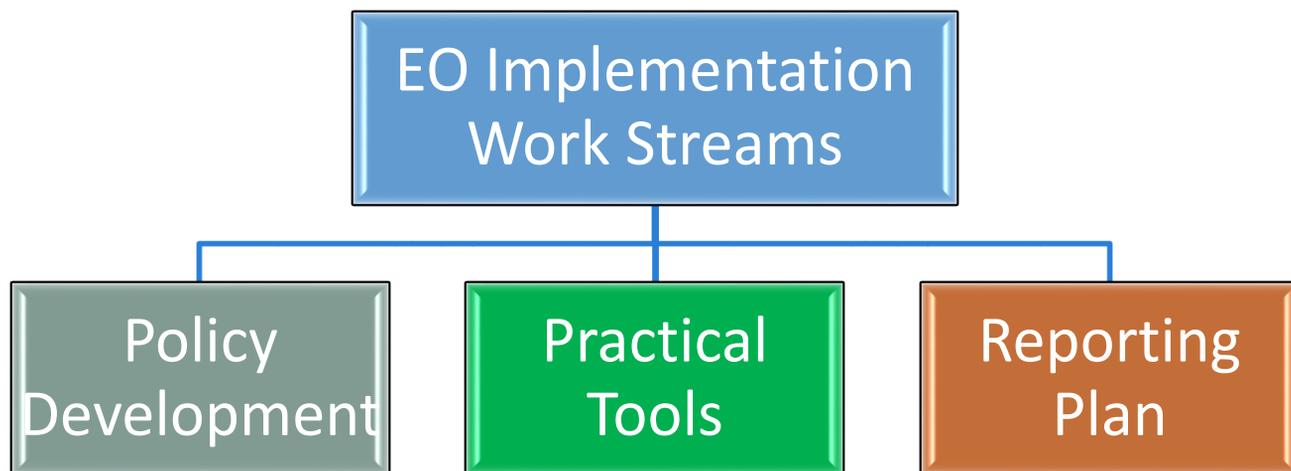
- The U.S. Supreme Court's decision is the law in the United States
- EO 18-03 is a directive to covered state agencies
- Enterprise Services is collaborating with stakeholders to identify and establish best practices to implement the EO statewide

STAKEHOLDER ACTION PLAN

WORKGROUP GOALS

- Develop 'EO Guidance'
- Develop Tools & Best Practices
- Reporting Plan for EO implementation

WORK STREAMS



NEXT STEPS



ENGAGEMENT

The image shows a Microsoft Word document window. The title bar at the top reads "I WANT TO VOLUNTEER". The ribbon includes "File", "Home", "Insert", "Page Layout", "References", "Mailings", "Review", "View", "Design", and "Layout". The "Design" tab is active. The document content features a large title "I WANT TO VOLUNTEER" in a bold, red, serif font, centered on the page. Below the title is a table with the following headers: "VOLUNTEER NAME", "PHONE (HOME)", "PHONE (CELL)", "EMAIL", "AREA OF EXPERTISE/INTEREST", and "DAYS/TIMES AVAILABLE". The table has 15 rows, numbered 1 through 15 on the left side. The status bar at the bottom indicates "Page: 1 of 2", "Words: 70", "English (U.S.)", and a zoom level of "48%".

	VOLUNTEER NAME	PHONE (HOME)	PHONE (CELL)	EMAIL	AREA OF EXPERTISE/INTEREST	DAYS/TIMES AVAILABLE
1						
2						
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ADDITIONAL RESOURCES

ADDITIONAL RESOURCES

- [Executive Order 18-03](#) – *Supporting Workers’ Rights to Effectively Address Workplace Violations* (June 12, 2018)
- [Epic Systems Corp. v. Lewis](#), 584 U.S. (May 21, 2018)
- [AGO Opinion 1991 No. 21](#) (June 11, 1991)
- Economic Policy Institute, [The Growing Use of Mandatory Arbitration](#) (April 6, 2018)

THANK YOU
