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The "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" Brings Significant Change to Employers with Mandatory Pre-Dispute Arbitration Agreements

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In this article, the authors discuss a new federal law that permits an employee alleging sexual assault or harassment to bring a lawsuit, notwithstanding that the employee may have signed a pre-dispute arbitration agreement or joint-action waiver.

Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445)[1] and on March 3, 2022, President Biden signed it into law (the "Act"). The Act amends the Federal Arbitration Act (the "FAA") to permit an employee alleging sexual assault or harassment to invalidate a pre-dispute arbitration agreement or joint-action waiver.

BACKGROUND

With the rise of the #MeToo movement, the push to end mandatory arbitration for sexual harassment claims gained momentum. Proponents argued that forced arbitration silences victims and protects harassers by enabling them to keep claims confidential. Employers have historically

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utilized arbitration to avoid the uncertainty, expense, and inefficiency associated with an overburdened civil justice system.

However, in light of public scrutiny, some companies voluntarily eliminated mandatory arbitration agreements. Some states, including California, New York, New Jersey, Maryland, Illinois and Vermont, passed a variety of state-level legislation prohibiting employers' ability to enforce pre-dispute arbitration agreements for certain unlawful employment practices, namely sexual harassment. However, when challenged, courts have repeatedly held that the FAA preempted these state laws, effectively making them impotent – until now.

TEXT OF H.R. 4445

The Act provides that an employee alleging sexual assault or harassment may unilaterally invalidate a pre-dispute arbitration agreement or joint-action waiver, which the law defines as:

- Any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement; and

- An agreement that prohibits or waives the right of one of the parties to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum concerning a dispute that has not yet arisen at the time of the making of the agreement.

The passage of the legislation fundamentally alters the legal landscape of pre-dispute arbitration agreements.

KEY QUESTIONS (AND ANSWERS)

Q. Can an employee choose to arbitrate?

A. An individual employee can elect to pursue a sexual harassment or assault claim in arbitration, but an employer cannot require the employee to do so.

Q. Does it matter when the claim accrues?

A. Yes. The Act states that it applies to a "dispute or claim that arises or accrues on or after the date of enactment of this Act." As such, the law will not apply retroactively to invalidate all pre-dispute arbitration agreements, just those claims that arise on or after March 3, 2022.

An open question remains as to what will happen with respect to disputes or claims that constitute a "continuing violation" – meaning acts of alleged sexual harassment that occurred prior to the enactment of the law, but then continued to occur after the enactment of the law.

Q. What type of claims will the Act apply to?

A. The Act applies to all claims of sexual assault or sexual harassment arising under federal, state or tribal law. The law states that a sexual assault dispute involves a nonconsensual sexual act or sexual contact, as such terms are defined in Section 2246 of Title 18 or similar state or tribal law. A sexual harassment dispute means a dispute involving conduct that is alleged to constitute sexual harassment under applicable federal, tribal, or state law.

Under Title VII of the Civil Rights Act of 1964 ("Title VII"), harassment on the basis of sex is: (1) unwelcome conduct that is a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive. The term "sex" includes sexual orientation, gender identity and pregnancy.

Important questions remain regarding the scope of the Act. Namely, it is unclear how courts will handle cases involving multiple claims or parties, only some of which are covered by the Act. Consider this hypothetical: a plaintiff who executed a binding pre-dispute arbitration agreement for all employment related claims brings a lawsuit alleging race discrimination and sexual harassment. Will the plaintiff be permitted to pursue all claims in court? Or can the employer successfully compel the race discrimination claims to arbitration? Will the analysis be different for claims arising in a state, like New York, where the state law prohibits mandatory arbitration of all claims of discrimination under Article 15 of the Executive Law? And what about class claims where only some parties in the class can assert a sexual harassment claim – will the class be split, will claims be split or will such a claim effectively enable the entire class to proceed in court?

Until courts weigh in on these issues, employers should be cognizant that some claims not covered by H.R. 4445 could be litigated in court despite the existence of an arbitration agreement.

In acknowledgement of this uncertainty, several Senators signaled bipartisan agreement for future efforts, if necessary, to clarify the scope of the law. Congressional Records reflect this intent, stating that the bill is narrow and only intended to address sexual assault and sexual harassment cases, and that if subsequent litigation manipulates the language of the Act to game the system, further legislation will be passed to codify the original intent. However, the degree to which courts rely on this expression of intent remains to be seen.

Q. Who gets to make decisions about what claims are subject to arbitrability – a court or an arbitrator?

A. The Act is clear that the courts, not an arbitrator, will determine arbitrability, irrespective of what an agreement between the parties says. Thus, any disputes about whether the Act applies to a claim will be resolved publicly.

Q. Could the prohibition of mandatory pre-dispute arbitration agreements be expanded to other protected categories in the future?

A. It is possible. A statement released by White House officials says that H.R. 4445 could be used as a model for limiting mandatory arbitration for other claims, including claims of "discrimination on the basis of race, wage theft, and unfair labor practices."

PRACTICAL IMPACT

The Act will have far reaching implications for employers who have relied on mandatory pre-dispute arbitration agreements to resolve sexual harassment claims brought by employees.

As an initial matter, employers will need to assess whether to continue having mandatory pre-dispute arbitration agreements with employees, knowing that sexual harassment and sexual assault claims must be excluded from mandatory arbitration. Employers will also need to carefully consider litigation strategy and whether to seek to enforce existing arbitration agreements.

NOTE

1. *https://www.congress.gov/bill/117th-congress/house-bill/4445/text*.