Patterson Belknap

Employment Law Alert
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The End to Mandatory Arbitration of Sexual Assault and Sexual Harassment Disputes

On March 3, 2022, President Biden signed into law the "Ending Forced Arbitration of Sexual Assault and Harassment Act of 2021" (the "Act"). The Act amends the Federal Arbitration Act (the "FAA") to give individuals asserting sexual assault or sexual harassment claims the option to bring those claims to court, even if they had previously entered into agreements to arbitrate such disputes before the claims arose. The introduction of the Act is consistent with the Biden administration's Agenda for Women and its stated goals to end violence against women and protect and empower women around the world.

Background

The FAA generally permits employers to enforce pre-dispute mandatory arbitration agreements with employees, precluding claimants from publicly filing workplace discrimination and harassment claims in federal and state court. Some states have enacted legislation banning mandatory arbitration agreements, providing employees subject to workplace discrimination and harassment the opportunity to bring their allegations to court. However, most of these efforts have been preempted by the FAA as courts have upheld the underlying principle of the FAA that written arbitration agreements are irrevocable and enforceable. As a result, employers have been able to compel employees to file their claims and allegations in confidential arbitration proceedings rather than in public courts.

The Act

The Act permits any person alleging sexual assault or sexual harassment, at his or her election, to invalidate an arbitration agreement or class and collective action waiver that otherwise would require the sexual assault or sexual harassment claim to be arbitrated. The Act applies only to claims arising or accruing on or after March 3, 2022, regardless of the date on which the parties entered into the arbitration agreement.

Under the Act, a court, not an arbitrator, has the power to determine the applicability of the Act and the enforceability of an agreement requiring arbitration of sexual harassment and sexual assault claims, even if the underlying agreement explicitly delegates such authority to an arbitrator. This marks a departure from existing jurisprudence, which generally permitted parties to delegate decisions of interpretation and applicability to an arbitrator.

Practical Considerations

While the Act does not require that employers amend their existing arbitration agreements, employers should consider explicitly carving out sexual assault and sexual harassment claims in new agreements, and consider whether existing arbitration agreements and class or collective action waivers must be modified to make clear that such claims do not need to be arbitrated.

As previously stated, the Act does not provide for a wholesale prohibition on the enforcement of arbitration agreements and class or collective action waivers; rather employees may elect whether to pursue sexual assault and sexual harassment claims in court or through arbitration. While some employees may opt to continue with an enforced arbitration to preserve confidentiality in sensitive matters, employers may see an increase in sexual assault and sexual harassment claims filed in court as employees exercise their rights under the Act.

In light of these possible consequences, employers should ensure that they have robust sexual harassment policies, trainings, and other harassment prevention efforts in place, and that their existing anti-discrimination and harassment policies are subject to strict and consistent enforcement. Strengthening workplace harassment policies will have the dual benefit of reducing exposure to harassment claims, while signaling to employees that sexual harassment and misconduct are not tolerated. Establishing a culture of zero tolerance may help limit the desire of aggrieved employees to insist upon a public airing of grievances in court.

Employers should also take note of the shifting landscape with respect to arbitration agreement enforcement in the workplace. Of note, the Biden administration has signaled support for legislation that would more broadly preclude mandatory arbitration of employment-related claims (including with respect to workplace racial discrimination, wage theft and unfair labor practices). There are similar efforts emerging at the state level, though state legislation may continue to be preempted by the FAA and it is unclear if or when efforts at the federal level will come to fruition.

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