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New federal law prohibits employers from mandating arbitration of sexual assault and sexual harassment claims - by Laura Raisty

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On March 3rd, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act), which amends the Federal Arbitration Act to invalidate pre-dispute arbitration agreements and class or collective action waivers covering sexual assault and sexual harassment claims at the election of either:

(1) The person alleging the misconduct; or

(2) the named representative of a class or in a collective action alleging such misconduct.

The Act applies to all claims that arise or accrue after March 3rd, 2022, without regard to the date of the arbitration agreement. It does not, however, affect any claim that arose or accrued before March 3rd, 2022.

Background

Many employers have entered into arbitration agreements with their employees to avoid unfavorable publicity and to have a faster and less expensive resolution to employment-related disputes than is generally provided via the judicial system. These employment arbitration agreements may also contain waivers of the employee's right to participate in a class or collective action against the employer. Additionally, many such agreements have "delegation clauses," which require the arbitrator (rather than a court) to determine what claims are arbitrable under the agreement.

Key Provisions of the Act

If an employee has an arbitration agreement with their employer, the Act now permits the employee to decide whether to pursue claims relating to a "sexual assault dispute" or a "sexual harassment dispute," in arbitration or in court. Stated differently, it gives an employee who is a party to such an agreement the option to invalidate the arbitration agreement to the extent it covers claims for sexual assault or sexual harassment.

The Act defines a "sexual assault dispute" as "a dispute involving a nonconsensual sexual act or sexual contact" and a "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal or State law." These definitions are very broad, and the definition of a "sexual harassment dispute" encompasses both quid pro quo sexual harassment claims and hostile work environment sexual harassment claims. In addition, because the Act allows employees to invalidate any provision requiring arbitration of claims relating to a sexual harassment dispute, it also encompasses retaliation claims predicated on a complaint of sexual harassment or sexual assault.

The Act also permits an employee to elect to invalidate class or collective action waivers and delegation clauses for disputes relating to sexual assault or sexual harassment. The Act further provides that a court, rather than an arbitrator, will determine the validity and enforceability of an agreement to arbitrate these claims, even if the contact provides to the contrary.

Notably, the Act does not prohibit the enforcement of agreements to arbitrate claims based on other protected categories, such as race, age, or religion or any other retaliation claims.

What's Next?

As a result of the Act, employers should expect that claims for sexual harassment and those based on a sexual assault will be litigated in court, not arbitration. The number of such claims pending in the federal and state courts will likely increase as a result. Employers should also consider strategies for defending against cases in which a sexual harassment or assault claim is only one of several workplace claims asserted. In these circumstances, the employer may be faced with a choice between litigating all claims in court, despite a valid arbitration agreement covering claims that are not related to sexual assault or harassment, or litigating in two different forums – i.e., defending the sexual assault or harassment claim in court and defending the other claims in arbitration.

Finally, when the Act was pending before Congress as a bill, the White House issued a Statement on Administration Policy February 1st, 2022, that included the following: "The Administration also looks forward to working with the Congress of broader legislation . . . including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices."

Accordingly, while the Act pertains only to claims relating to sexual assault and sexual harassment, it is likely a harbinger of things to come with regard to the arbitrability of other employment-related claims.

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