ALERTS

Legislation Ending Forced Arbitration of Sexual Misconduct Claims

February 24, 2022

Congress has passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("Act"). The Biden Administration previously has indicated the President will sign the Act into law. If enacted, the Act will amend the Federal Arbitration Act ("FAA") to permit an individual with a claim of sexual harassment or sexual assault to invalidate a signed predispute arbitration agreement or a predispute joint-action waiver. The Act does not prevent the parties from agreeing to resolve a dispute by arbitration after a dispute arises.

Background

This new legislation comes after the #MeToo movement — a social movement that urges survivors of sexual violence and sexual harassment to speak out about their experiences — placed a spotlight on mandatory arbitration clauses. Under current law, many employers have binding mandatory arbitration contracts for a wide range of matters, including claims of sexual assault and sexual harassment. A mandatory arbitration contract *requires* the parties to the agreement to resolve their disputes through an arbitration process. Proponents of these contracts argue that arbitration is an efficient means of settling disputes, whereas opponents claim the confidential arbitration system helps wrong-doers evade public accountability, limits an individual's ability to speak out regarding their experiences, and denies individuals the ability to decide to pursue their claims in court where they may be afforded greater protections.

The Act

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If enacted, the Act will give individuals with claims of sexual harassment and sexual assault the ability to forgo arbitration and sue the alleged perpetrators in court if they unilaterally choose to do so. All existing and future predispute contracts requiring claims of sexual assault and sexual harassment to be settled through arbitration will be void and unenforceable. The Act also allows individuals to bring sexual harassment or sexual assault claims individually or on behalf of a class.

For purposes of the Act, "predispute arbitration agreement" refers to any agreement to arbitrate a dispute that has not yet arisen at the time of making the agreement. "Predispute joint-action waiver" refers to any agreement that would prohibit one of the parties to the agreement from participating in a joint, class, or collective action, concerning a dispute that has not yet arisen at the time of making the agreement. The terms "sexual assault dispute" and "sexual harassment dispute" refer to disputes involving a nonconsensual sexual act or contact and to disputes relating to conduct that is alleged to constitute sexual harassment. In the event it is unclear whether a claim constitutes sexual harassment or sexual assault, the Act requires that courts, not arbitrators, decide.

The pending legislation does not cover predispute arbitration agreements in employment matters other than claims of sexual assault and sexual harassment.

Prior New York State Legislation

In 2018, New York State passed similar legislation banning mandatory workplace arbitration of sexual harassment claims, and amended that legislation in 2019 to extend the ban on mandatory workplace arbitration to all workplace claims of discrimination. Several court decisions[1] have found New York's legislation to be preempted by the FAA based on the federal law's broad acceptance of arbitration. With respect to claims of sexual harassment, if the Act is enacted then arguments of preemption will no longer be a viable defense. The New York law's provisions related to broader claims of workplace discrimination are likely to remain preempted by the FAA even after passage of the Act.

Conclusion

If enacted, the pending federal legislation will render all mandatory predispute arbitration clauses unenforceable as they relate to claims of

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sexual harassment and sexual assault, regardless of whether the agreement existed prior to the Act's enactment. In response, employers should review their current arbitration agreements for revisions if the Act is enacted.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] *See Gilbert v. Indeed, Inc.*, 513 F. Supp. 3d 374, 395-401 (S.D.N.Y. 2021); *White v. WeWork Cos. Inc.*, No. 1:20-CV-01800-CM (S.D.N.Y. June 11, 2020).

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