On March 4, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. The new law invalidates pre-dispute arbitration agreements and class and collective waivers for sexual assault and sexual harassment claims, and it applies to any such disputes that arise after March 4, 2022.

Background

Beginning with the #MeToo movement in 2017, lawmakers have focused on legal reform related to sexual assault and sexual harassment in the workplace. Suggestions have included prohibiting nondisclosure agreements as conditions of employment, ending mandatory arbitration, or fining employers who retain employees accused of sexual harassment.

Several states have already implemented some of these measures. For example, California, Hawaii, New Mexico, New York, Virginia, and Washington prohibit or limit the use of nondisclosure agreements as conditions of employment or with the purpose or effect of concealing sexual assault or sexual harassment in the workplace.

Provisions

In July 2021, the federal "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" (EFASASHA) was introduced in the House of Representatives. A nearly identical measure was introduced in the Senate. The measure passed in both chambers by February 10, 2022. On March 4, 2022, President Biden signed the bill and EFASASHA became law.

EFASASHA provides that no predispute arbitration agreement or joint action waiver is valid or enforceable with respect to a case that relates to a sexual assault or harassment dispute. EFASASHA therefore renders mandatory arbitration provisions or class and collective action waivers contained in employment agreements unenforceable to the extent they otherwise would have applied to a case, including a claim of sexual assault or sexual harassment, but only for claims that arise or accrue after March 4, 2022. Although employees may voluntarily elect to proceed to arbitration or to proceed on an individual, rather than a class or collective basis, EFASASHA dictates they cannot be compelled to do so.

Takeaways

Employers should be aware of several key takeaways.

First, EFASASHA will apply to any sexual assault or sexual harassment dispute that arises or accrues on or after March 4, 2022. For such disputes that arose before March 4, 2022, predispute arbitration agreements and class or collective waivers remain enforceable. In short, the amendment ties its application to the date on which a sexual assault or harassment claim arises, not the date on which the parties entered into the agreement.

Second, the applicability and enforceability of EFASASHA to a particular dispute or agreement shall be decided by the court, not an arbitrator, even if the parties agree to arbitration or the agreement itself delegates such decisions to an arbitrator. This is a significant change from the status quo, which permitted parties to delegate decisions of interpretation and applicability to an arbitrator.

Third, and perhaps most importantly, EFASASHA is likely to incentivize employees to bundle sexual assault and/or sexual harassment claims together with other types of claims as a means to avoid arbitration. EFASASHA states that no predispute arbitration agreement or class or collective waiver is enforceable “with respect to a case” relating to sexual assault or harassment, as opposed to merely stating that the claims for sexual assault and/or sexual harassment are exempted from arbitration. It is unclear how courts will interpret this language, which is likely to be a central battle as EFASASHA is subject to judicial interpretation.

Courts may decide that the word “case” means that all claims asserted together in a “case” with a sexual assault or harassment claim are precluded from arbitration. On the other hand, courts could look to legislative history and congressional intent. Members of Congress made their intent clear before the enactment of EFASASHA: Where claims are related, all claims should stay together in court, but employees should not be able to manipulate the system to keep unrelated claims out of arbitration.

Employers should be prepared to move to sever unrelated claims from sexual assault or harassment claims early in litigation and before or simultaneously with moving to compel arbitration. Employers may also want to consider revisions to their arbitration agreements outlining how claims exempted by EFASASHA will be handled.

Finally, creative plaintiffs may attempt to invalidate broad arbitration agreements and class or collective waivers that do not specifically carve out sexual assault or harassment claims. EFASASHA does not require such claims to be specifically carved out from arbitration agreements and class or collective waivers and does not void or invalidate agreements that do not expressly do so. Nevertheless, there may be attempts to invalidate agreements on this basis.

What Next?

Employers with arbitration agreements should consult with their legal counsel on whether they want to amend their agreements to expressly exclude sexual assault or sexual harassment claims from arbitration. To avoid a broad interpretation that an entire “case” cannot be
arbitrated, employers may want to consider including language in their arbitration agreement requiring that such exempted claims be severed from other arbitrable claims and stayed pending completion of arbitration on the claims that are subject to arbitration. Whether such provisions will be accepted in the face of EFASASHA remains an open question that will no doubt be tested in the near term. And, of course, such provisions add litigation costs by virtue of creating dual-forum litigation.

EFASASHA may be a harbinger of restrictions to come on the use of mandatory arbitration agreements or class and collective waivers in a wide variety of employment claims. Indeed, in the Statement of Administrative Policy on EFASASHA, President Biden noted that his administration looks forward to working with Congress on broader legislation on other forced arbitration matters involving race discrimination, wage theft and unfair labor practices. McGuireWoods will continue to monitor these developments.

For questions about these changes or assistance implementing these changes into existing employment agreements, contact the authors of this article or another member of the McGuireWoods labor and employment team.

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