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New Federal Law Limits Arbitration in Sexual Harassment and Sexual Assault Cases

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On March 3, 2022, President Joseph Biden signed in to law the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," which took effect immediately. The new law amends the existing Federal Arbitration Act (FAA) to prohibit employers from requiring employees to resolve sexual harassment and sexual assault claims through private arbitration *unless* the employee - *after* the claim arises - voluntarily *elects* to participate in arbitration. As a result, even if an employee has previously signed an agreement containing an arbitration provision, the employee may now choose to pursue resolution of any sexual harassment or sexual assault claims in court instead of in arbitration.

The new law applies only to sexual harassment and sexual assault disputes subject to a "predispute arbitration agreement." The law defines a "predispute arbitration agreement" as "any agreement to arbitrate a dispute that had not arisen at the time of the making of the agreement." It defines "sexual assault dispute" as a dispute involving a "nonconsensual sexual act or sexual contact." And it defines "sexual harassment dispute" as a dispute relating to "conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal or State law" -- like Title VII of the Civil Rights Act of 1964.

Importantly, employers may still require employees to enter into a predispute arbitration agreement applicable to employment claims generally. But if a sexual harassment or sexual assault claim arises *after* signing such a predispute arbitration agreement, the employee is now allowed to elect to pursue the claim in court instead of in arbitration. Additionally, any challenges to an arbitration agreement because of the application of the new law are now to be determined in court, rather than in arbitration, even if the applicable agreement provides that an arbitrator should decide the issue.

The law also impacts class action waivers. In 2018, the U.S. Supreme Court approved the use of class action waivers in valid employment arbitration agreements. However, this new law likewise prohibits the application of a "predispute joint-action waiver" to a sexual harassment or sexual assault dispute unless - *after* the dispute arises - the employee elects to waive any class or joint action. The law defines a "predispute joint-action waiver" as an agreement that would prohibit or waive the right of an employee to participate in a joint, class, or collective action, regardless whether it was part of a predispute arbitration agreement.

There are still many unanswered questions for employers under the new law. For instance, it is not clear what happens if an employee asserts claims in the same dispute for more than just sex harassment or sex assault. Does the employee's election apply to all claims in the dispute? Are the claims split between court and arbitration? And if they are split, which claims move forward first? These and other questions will need to be resolved in the courts.

Regardless, this new law reflects a significant departure from arbitration's traditional favored status under the FAA. At this point, employers with predispute arbitration agreements should anticipate any claims asserted will more likely include sexual harassment or sexual assault claims to avoid arbitration, and employers will likely see more fights over arbitration. But predispute arbitration agreements can still be beneficial to help control risk. Although the new law does not necessarily

require employers to change or amend their existing agreements, employers should consult with qualified counsel to review any existing arbitration agreements or to draft any new agreements.

Related Attorneys

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