States Ask Congress To Prohibit Arbitration In Sex Harassment Claims

2.13.18

A unanimous block of attorneys general from all 50 states and the District of Columbia, not to mention several U.S. territories, sent a letter to Congress yesterday asking federal lawmakers to prohibit the use of mandatory arbitration agreements when it comes to claims of sexual harassment. If Congress responds by passing legislation as requested, employers would need to adjust to a new reality that would have significant implications on human resources practices and employment litigation.

Background: #MeToo Movement In The Legislatures

It’s no secret that the #MeToo movement has already had a profound impact on workplaces across the country. Employers have recognized the need for enhanced training and enforcement of their anti-harassment policies as employees become increasingly emboldened to report claims of unprofessional behavior, spurred on by high-profile examples across all industries.

In response to this wave of activism and attention, several states have already floated proposals to combat perceived concerns related to harassment. For example, California, New York, New Jersey, Pennsylvania, South Carolina, and Washington have all proposed legislation that would take aim at various employment practices, such as nondisclosure agreements and arbitration provisions. Moreover, late last year, a bipartisan group of federal legislators introduced a bill that would prevent employers from forcing claims of sex discrimination or harassment into arbitration (otherwise known as the Ending Forced Arbitration of Sexual Harassment Act).
States Ask Congress To Prohibit Arbitration In Sex Harassment Claims

With yesterday’s letter, the state attorneys generals have joined forces to support some form of blanket prohibition on arbitration agreements that would stretch from coast to coast. If Congress passes comprehensive legislation as requested, it could lead to one of the biggest revolution in employment practices of the past decade.

What Did The State Attorneys General Propose?

The two-page letter (not counting the three-plus pages needed to fit 56 authors’ signatures) is brief and to the point. “We ask for your support and leadership in enacting needed legislation to protect the victims of sexual harassment in the workplace,” it begins. “Specifically, we seek to ensure these victims’ access to the courts, so that they may pursue justice and obtain appropriate relief free from the impediment of arbitration requirements.”

The letter signals that the collective group of state legal officials believes arbitration agreements to be fundamentally unfair because they are often found in the “fine print” of lengthy employment policies, and are usually presented in boilerplate “take-it-or-leave-it” fashion by employers. As a result, the letter argues, employees are often unaware that they are bound by arbitration provisions until they seek their day in court.

The letter then points out that arbitration agreements are uniquely problematic in the context of sexual harassment claims for two very specific reasons:

- First, the letter contends that arbitrators are not always qualified to issue rulings in cases of sexual harassment. According to the state attorneys general, victims of sexual harassment should not be forced to have their cases heard by arbitrators “who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.”

- Second, because arbitration agreements typically include secrecy clauses, the letter concludes that they run counter to the public interest of outing perpetrators of sexual harassment by keeping both the harassment complaints and any settlements confidential. “This veil of secrecy,” the letter contends, “may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief.” By ridding the nation of arbitration agreements in sexual harassment cases, the state attorneys general hope to “put a stop to the culture of silence” that surrounds these claims.

What’s Next?

The letter acknowledges that both the House and Senate are considering legislation that would accomplish this goal, and asks Congress to take action to ensure that victims of sexual harassment “have a right to their day in court.” While the letter takes no position on the specific legislation currently sitting in Congress but instead supports any “appropriately tailored legislation” that would
accomplish the requested goal, it is clear that momentum is building for some form of comprehensive legislative reform.

You should be prepared to adjust your arbitration policies if Congress follows through on the request from the state attorneys general. You may even want to consider proactively adjusting your policies as several high-profile employers have already done.

In the meantime, to protect your employees and minimize liability, we recommend you follow our five-step plan to address growing harassment concerns. This includes a review of your existing policies, proper dissemination of the same, robust managerial training, prompt investigations, and consistent application of disciplinary measures. For a detailed review of these recommendations, we refer you to an article from a recent On The Front Lines newsletter discussing them in depth.

If you have questions about this legislative request or about the five-step plan, please contact your regular Fisher Phillips attorney.

This Legal Alert provides information about a specific legislative request. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.