5 Key Takeaways for Employers as #MeToo-Inspired Bill to Limit Arbitration of Sexual Harassment Claims Passes House with Bipartisan Support

Insights
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Despite being described as "more deeply divided than ever," Congress is poised to pass a #MeToo-inspired bill with bipartisan support that would prevent employers from enforcing pre-dispute arbitration agreements without the employee's consent in cases involving sexual harassment and sexual assault. On February 7, the House of Representatives overwhelmingly approved a bill targeting mandatory arbitration of sexual harassment and sexual assault claims by a vote of 335-97, with 113 of 212 Republicans voting in favor of the bill. More surprisingly, a nearly identical companion bill in the Senate has support from Republicans — including the bill's co-sponsor Senator Lindsey Graham — and will likely be up for a vote as soon as this week. Seeking to capitalize on this perceived momentum, the Biden administration has described the bill as a precursor to "broader legislation" which would bar forced arbitration of employment claims on the basis of "race, wage theft, and unfair labor practices." Here are five key takeaways for employers as we await enactment of this rare bipartisan employment legislation that could upend a common workplace practice.

Background

Before examining the specific provisions of the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act," some background is in order. Both the House and Senate bills would amend the Federal Arbitration Act (FAA) by narrowing its scope and applicability, thereby potentially gutting several Supreme Court rulings that employers have grown to rely upon.

In its current form, the FAA broadly encourages private resolution of employment disputes through arbitration by providing that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In other words, any state law that is more hostile to arbitration agreements than to contracts generally is invalid and preempted by the FAA.

- For this reason, the U.S. Supreme Court frequently strikes down state laws derived "precisely from the fact that a contract to arbitrate is at issue" as well as those imposing procedural requirements that "single out arbitration provisions for suspect status" (*g*. requiring notice of an arbitration clause to be typed in underlined capital letters on the first page of a contract).

- Moreover, in 2018, SCOTUS delivered a win for employers in *Epic Systems Corporation v. Lewis* by holding that mandatory class action waivers in employment-related arbitration agreements are enforceable under the FAA. Specifically, the Court held that such waivers do not violate employees' rights to engage in "concerted activities" under the National Labor Relations Act (NLRA).

As discussed below, each of these employer-friendly rulings may be undermined by the forthcoming legislation.

The House Bill

On February 7, the House of Representatives passed its version of the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" (H.R. 4445), prohibiting employers from enforcing pre-dispute arbitration agreements in cases involving sexual harassment and sexual assault without the employee's consent. This bill defines a "*sexual assault dispute*" as a dispute involving a "nonconsensual sexual act or contact," as such terms are defined under federal, tribal, or state law. Similarly, H.R. 4445 defines a "*sexual harassment dispute*" as "a dispute relating to conduct that is alleged to constitute sexual harassment" under federal, tribal, or state law.

In short, H.R. 4445 allows *employees* to decide whether any pre-dispute arbitration agreements and pre-dispute joint-action waivers (i.e., class or collective action waivers) for disputes regarding sexual assault and sexual harassment are enforceable, regardless of whether such agreements were mandatory or voluntarily agreed to by employees (*e.g.,* by way of an opt-out provision). The bill declares pre-dispute agreements invalid and unenforceable as a matter of law at the election of the employee bringing the claim. This permits an employee alleging sexual harassment to pursue an individual or class action in court even if they previously signed an agreement to arbitrate the claim individually.

Finally, H.R. 4445 provides that its applicability is always determined by a court under federal law. Unlike the FAA in its current form, this would be true even if the employee also challenges other terms of the contract, and irrespective of whether the agreement delegates the issue of "arbitrability" to the arbitrator. This is significant, as SCOTUS recently punted on the question of who decides arbitrability just last month.

The Senate Bill

The Senate Bill (S. 2342) likely to come up for a vote later this week is virtually identical to the House Bill, with one key exception. It provides a more specific definition of "sexual harassment dispute," which it defines as a "dispute relating to any of the following conduct directed at an individual or group of individuals:

1. Unwelcome sexual advances.
2. [illegible]

2. Unwanted physical contact that is sexual in nature, including assault.
3. Unwanted sexual attention, including unwanted sexual comments and propositions for sexual activity.
4. Conditioning professional, educational, consumer, health care, or long-term care benefits on sexual activity.
5. Retaliation for rejecting unwanted sexual attention."

As of mid-January, S. 2342 had the public support of 10 Republican senators – which could mean it has filibuster-proof numbers at its disposal. Initially co-sponsored by Senator Lindsey Graham of South Carolina in 2017, Senator Thom Tillis of North Carolina joined as the tenth co-sponsor in January 2022. With S. 2342 being co-sponsored by senators in consistently red states and public opinion being strongly aligned on the issue, a final version is likely to find its way to President Biden's desk in the near future.

5 Key Takeaways for Employers

With all of that background out of the way, what are the five biggest takeaways for employers as we begin to envision a life without the full array of arbitration solutions at your disposal?

1. **The Ball Would Be in the Employee's Court**

   Congressional intent is unequivocally clear, as both the H.R. 4445 and S. 2342 stand in stark contrast to SCOTUS precedent interpreting the FAA. If either of these Bills are signed into law, employers can expect that going forward: (i) an employee alleging sexual harassment may, but is not required, to pursue claims of sexual harassment in court; and (ii) the employee may elect to bring such claims individually or as a class.

2. **Courts, Not Arbitrators, Would Decide Whether Sexual Harassment and Sexual Assault Claims Are Subject to Arbitration**

   Just as the proposed bills are clear as to the employee's choice of forum, they are equally clear about who decides which dispute resolution method is proper. If an employee files a sexual harassment or sexual assault claim in federal court, it would be for the court, not an arbitrator, to apply federal law and determine whether the claims are subject to arbitration. Therefore, once an employee chooses to litigate a claim of sexual harassment or sexual assault in federal court, the case would be likely to remain there.

3. **Not All Claims of Sexual Harassment and Sexual Assault Would Be Filed in Court, As Some Employees May Prefer the Privacy Afforded by Arbitration**

   Proponents of these bills assert that of the more than 60 million Americans estimated to have signed arbitration agreements, virtually all of them would prefer to litigate sexual harassment claims in court. According to advocates of the bills, mandatory arbitration agreements discourage victims of sexual harassment or sexual assault from coming forward.

However, multiple studies have shown that this assessment is complicated, and victims of sexual harassment or sexual assault may be afraid of the publicity or scrutiny that may follow should they choose to come forward. Therefore, while the number of sexual harassment and/or sexual assault claims filed in court would be likely to increase with this legislation, many employees could still elect to pursue arbitration instead.

4. **Employer Concerns About the Lack of Confidentiality May Be Overblown**

   Many employers prefer arbitration based upon a mistaken belief that the proceedings are completely confidential. While arbitration proceedings are not filed on an electronic public docket like litigation in federal court, that does not mean that the proceedings are confidential or that the outcome will not become public. Rather, in the absence of an enforceable confidentiality provision in the arbitration agreement, the outcome (including an award in favor of the employee) is likely to become publicly available.

5. **The Biden Administration Will Seek to Further Limit Arbitration of Employment Disputes, While Some Republicans Worry About a "Slippery Slope"**

   The passage of H.R. 4445 is consistent with the Biden administration's agenda, which is "committed to eliminating sexual harassment and assault" – and has the broader goal of ending arbitration of various types of employment disputes. Upon the bill's passage, the White House stated that it looks forward to working with Congress on broader legislation that addresses "other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices."

   While H.R. 4445 is a win for the Biden administration, some Republicans have expressed concern about the "slippery slope" effect of broader legislation, and the potential eradication of arbitration clauses in virtually all types of employment matters. This could be of concern to employers in the future, as broader legislation may further empower plaintiffs and vastly increase the number and cost of civil lawsuits.

   In fact, in 2019, House Democrats passed the Forced Arbitration Injustice Repeal Act (FAIR Act), which would have broadly prohibited mandatory pre-dispute arbitration agreements as well as class or collective action waivers. The FAIR Act did not pass the Senate in 2019, but was reintroduced in March 2021 and may be revisited at some point during the current session. As bipartisan support continues to build over S. 2342, employers should prepare for additional legislation surrounding arbitration agreements in the employment realm, as the Biden administration seeks to capitalize on its current advantage.

Conclusion

In a divisive and vitriolic political environment, it is surprising to see Democrats and Republicans work together to legislate mandatory arbitration of sexual harassment and sexual assault claims. If this bill passes the Senate and is signed into law by President Biden, employers should be prepared

for increased litigation in court related to sexual assault and harassment claims. We will monitor developments related to this legislation and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney or the authors of this Insight.

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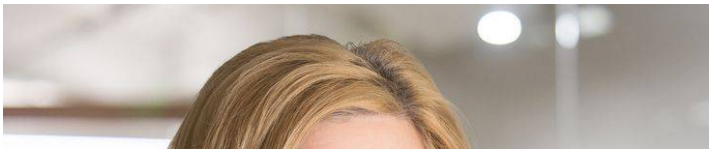

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