Changes to Employment Arbitration Agreements Under the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act": FAQs

Insights
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As we predicted, on February 10, 2022, Congress passed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" (the Act) with strong bipartisan support, thus amending the Federal Arbitration Act (FAA) to prohibit employers from unilaterally enforcing arbitration agreements for disputes involving sexual harassment or sexual assault. President Biden has already voiced his support for the bill and is expected to sign it into law. This means all employees subject to arbitration agreements will have the right to unilaterally choose to bring covered claims in arbitration or in court. The Act also allows an employee to bring these sexual harassment or sexual assault claims individually or on behalf of a class. We set out the key components of the Act in our prior insight. Below we cover some anticipated FAQs as employers work through the new law's practical effect.

Does this law apply to existing arbitration agreements and claims?

Yes. Section 3 of the Act specifically states that it "shall apply with respect to any dispute or claim that arises or accrues on or after the date" of its enactment. This suggests that it applies only prospectively. Given this language, employers may still be able to enforce arbitration agreements for claims that arise or accrue prior to enactment, but that are brought in court following the effective date.

Are all arbitration agreements between employees and employers now void?

No, but parts of them may be. For example, if the facts supporting an employee's claim for sexual harassment or assault arise after the law is enacted, the employer will be unable to force arbitration of those even with an otherwise valid agreement.

Does my company need to revise arbitration agreements going forward?

Maybe. Depending on the language of the agreement and definition of covered disputes, it could be open to a new challenge. Contract formation is governed by the law of the state where the agreement is signed. Some states (or judges) will invalidate entire contracts based on substantive unconscionability alone and may not simply strike the single offending clause. Assuming the Act is signed into law, employers should consider whether to include language that expressly

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signed into law, employers should consider whether to include language that expressly communicates the employee's right to elect to bring disputes falling within the Act's definition of sexual harassment and sexual assault in arbitration or court. Clauses that purport to obtain an employee's waiver of their rights under the Act altogether are likely unenforceable.

What about retaliation claims arising from the same set of facts as the sexual harassment claim?

As noted in our prior insight, the Senate Bill (S.2342) provided a more specific definition of "*sexual harassment dispute*" than in the adopted House Bill (H.R. 4445), including "retaliation for rejecting unwanted sexual attention." But on February 10, the Senate passed and adopted the House's version, defining a "*sexual harassment dispute*" more generally as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." Because the Act does not expressly include retaliation claims, employers have the argument that retaliation claims are not covered. Employers may still be able to compel arbitration of retaliation claims, even though the employee's sexual assault or harassment claims may play out in court. This is an issue that will likely be disputed in litigation.

Are class action waivers in sexual assault and harassment cases invalid?

At the election of the employee, if the asserted claims fall within the Act's definition of sexual harassment or sexual assault, the class action waiver would not be enforceable. Employers facing a putative sexual assault or harassment class action will need to rely on the usual defenses to class certification, such as a lack of commonality or typicality between the class representative's claims and those for the remainder of the potential class. Class action waivers as to other types of claims should remain valid under *Epic Systems Corporation v. Lewis.*

Is a jury trial waiver a viable alternative?

Maybe. Courts across the country differ on whether it is possible to obtain a valid jury trial waiver outside of an arbitration agreement governed by the FAA. Because this law amends the FAA, there is a strong argument that the jury trial waiver will be enforceable to a claim brought in court, although this will likely be disputed in litigation.

Does this law affect arbitration or grievance procedures set out in collective bargaining agreements (CBAs)?

Probably, but the effect may not be a large change from current law. Under § 301 of the Labor Management Relations Act, claims that are based on a right solely based on a CBA or are "substantially dependent" on interpretation of the CBA are preempted and must be pursued under the CBA's procedures. However, claims based on state law that exist independent of the CBA, and do not depend on interpretation of its terms, already may be pursued independently and in court. Discrimination claims, including sexual harassment, are examples of claims that are often found to exist separately from the CBA and allowed to proceed in court.

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What's next?

We will continue to developments related to this legislation and provide updates as warranted, so make sure you subscribe 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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