Could Congress Ban Arbitration Of Sex Discrimination And Harassment Claims?

Insights
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A bipartisan group of federal legislators has turned their attention to the sweeping revelations of sexual harassment in the American workplace by introducing a bill that would prevent employers from forcing claims of sex discrimination or harassment into arbitration. If passed and signed into law, this legislation could have a profound impact on employment policies and practices, not to mention litigation that results from workplace conflicts. What do employers need to know about the Ending Forced Arbitration of Sexual Harassment Act?

Background: Mounting Revelations Lead To Shift In Best Employment Practices
Over the course of the last several months, we have witnessed the birth of a movement exposing the prevalence of sexual harassment and assault in the workplace and society at large. Each day, we read new stories of high-profile businessmen, members of the media, entertainers, and politicians who have lost their positions amid allegations of sexual harassment and other improper behavior, including Bill O'Reilly, Charlie Rose, Senator Al Franken, Congressman John Conyers, and Harvey Weinstein, just to name a few. Recognizing the magnitude of this movement, Time Magazine just named those who have come forward with their stories – "The Silence Breakers" – as its 2017 "Person of the Year."

Congress has been fairly quick to react. Both the House and Senate passed resolutions to require members of Congress and their staff to take part in sexual harassment prevention training. Some legislators are also criticizing the process of how congressional staffers' sexual harassment claims against members of Congress are secretly handled, and have introduced bills that would prohibit the use of taxpayer funds to pay any settlement or award for such claims. But Congress has also turned its focus on the American workplace as a place that may be in need of a radical change.

Proposed Bill Would Lift Curtain
On December 6, a bipartisan group of legislators – Rep. Cheri Bustos (D-Ill.), Walter Jones (R-N.C.), Pramila Jayapal (D-Wash), and Elise Stefanik (R-N.Y.), along with Senators Kirsten Gillibrand (D-N.Y.), Kamala Harris (D-Calif.), and Lindsey Graham (R-S.C.) – turned their attention to sexual harassment in the American workplace by introducing the "Ending Forced Arbitration of Sexual Harassment Act" (S. 2203; H.R. 4570).

The bill would prohibit employers from enforcing arbitration agreements with respect to employee allegations of workplace sexual harassment or any claim of gender discrimination brought under

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Title VII, including alleged discriminatory pay or benefits, discharge, failure to promote, or other common adverse actions. Instead of arbitration, employees would be allowed to bring these claims in court. If passed, the law would not apply to arbitration provisions in collective bargaining agreements as long as they do not infringe on an employee's right to go to court to enforce a right arising out of the U.S. Constitution, a state constitution, a federal or state statute, or public policy.

The proposed legislation would also have more far-reaching effects on workplace dispute resolution, however, because it grants a court the power to invalidate an *entire* arbitration agreement if such agreement contains a requirement to arbitrate a sex discrimination dispute. Consequently, the vast majority of existing employment arbitration agreements would likely be in jeopardy of being completely unenforceable in the event of any employer-employee dispute.

Arbitration agreements are fairly commonplace in private workforces across the country, given employers' preference for more expeditious and cost-efficient proceedings. But because arbitration is a private alternative dispute resolution process that lacks the free and public access to documents, testimony, and judicial proceedings, critics of the process contend that arbitration also works to silence those would otherwise give voice to the sexual harassment movement. The lawmakers who proposed the bill say that preventing mandatory arbitration would shed light on the behavior of bad actors and cut off their ability to replicate untoward behavior in multiple workplaces. Bustos said the legislation "will help root out bad actors by preventing them from sweeping this problem under the rug."

What's Next?
We will keep you updated on the status of this proposed bill and related federal or state legislation, and if it becomes necessary to take affirmative steps on how to comply with this proposed law but retain your rights to arbitrate other disputes, we will provide clear recommendations on how best to do so. In the meantime, it is important for you to appreciate the power of this movement and to be prepared to be take concrete steps to avoid liability.

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 our December 2017 On The Front Lines newsletter discussing them in depth.

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

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

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