ALERT MEMORANDUM

Legislation Passed To End Mandatory Arbitration of Sexual Misconduct Cases

March 7, 2022

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act[1] into law. The law amends the Federal Arbitration Act ("FAA") to prohibit the use of mandatory arbitration provisions to resolve sexual harassment and sexual assault claims, allowing survivors the option of litigating their claims in court.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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Background

The use of mandatory arbitration provisions in employment and other contracts for claims involving sexual harassment and sexual assault has garnered increased public scrutiny in the past few years. Today, more than 60 million Americans are currently subject to mandatory arbitration clauses, requiring binding arbitration for a wide range of workplace disputes.[2] This latest legislation amends the FAA for disputes specifically involving sexual harassment and sexual assault to allow employees and consumers the option of litigating claims in court or of pursuing closed-door arbitration. As it stands, the FAA provides that arbitration provisions in contractual agreements shall be upheld and binding on the parties with limited exceptions.

[1] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, S.2342, 117th Cong. (2021). https://www.congress.gov/bill/117th-congress/senate-bill/2342/text (hereafter the "Amendment").
[2] *See* Statement of Administration Policy, Executive Office of the President, H.R. 4445 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (Feb. 1, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/HR-4445-SAP.pdf.

In the shadow of the #MeToo Movement, several states have enacted laws specifically targeting mandatory arbitration provisions related to sexual harassment and sexual assault that preempt the FAA. For example, California passed Labor Code § 432 in 2019, broadly banning mandatory arbitration agreements and prohibiting employers from retaliating against applicants who refused to sign an arbitration agreement.[3] New York passed N.Y. C.P.L.R. § 7515 in 2018, prohibiting the use of arbitration agreements for claims of sexual harassment.[4] Other states including New Jersey, Maryland, Vermont and Washington have enacted state laws to similar effect.

Bipartisan proponents of the Amendment view it as a means of employee and consumer protection, providing a narrow carve-out for the otherwise expansive scope of the FAA. They argue that the Amendment will provide accountability and transparency, so that companies are no longer shielded from public scrutiny.[5] Opponents argue that arbitration in private can afford complainants greater confidentiality protections, and simultaneously serve as a more cost-efficient and expedient alternative to litigation.

Implications

While the Amendment focuses specifically on sexual harassment and sexual assault claims, it may contemplate a future for other unprecedented legislative carve-outs to the FAA, including potentially, for discrimination claims. It also opens the stage for broader state legislation currently being debated across the country, such as: prohibiting mandatory arbitration provisions in general, or requiring proactive notice of mandatory arbitration provisions at the time of contract signing.

Employers and other companies that have previously relied on mandatory arbitration provisions, even for workplace disputes at large, will need to revisit their contracts to ensure compliance with the Amendment. This may be an opportunity for companies to reassess their current dispute resolution mechanisms and update policies and procedures for clear guidance.

Additionally, companies will need to think about how best to handle multi-claim disputes, in which only a subset of claims may be subject to mandatory arbitration provisions as a result of the Amendment. Companies will need to ensure that processes are in place to handle such multi-claim disputes, and that contracts are clear in addressing this point.

Lastly, the Amendment does not foreclose the option of voluntary binding arbitration, though an increasing number of states may impose stricter requirements, including signed affirmations, to ensure parties enter into contracts with full knowledge of any arbitration provision. While some states still allow the inclusion of confidentiality provisions in out of court settlements, a number of states like California have recently enacted laws prohibiting confidentiality provisions in settlements related to sexual harassment, sex discrimination and retaliation claims, so it will be critical to closely follow legislative developments in this space.

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[3] *See Chamber of Com. of the U.S., et al. v. Bonta, et al.*, No. 20-15291 (9th Cir. 2021).
[4] *See Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985 (S.D.N.Y. 2019).
[5] Press Conference (February 10, 2022), https://www.c-span.org/video/?517877-1/senators-speak-reporters-passing-bill-ending-forced-arbitration-sexual-misconduct-cases.