GT GreenbergTraurig

Alert | Labor & Employment

February 2022

Employee's Choice: No More Forced Arbitration of Sexual Harassment and Sexual Assault Claims

Employers can no longer mandate pre-dispute arbitration for claims of sexual assault or sexual harassment by employers. On Feb. 10, 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "law") ending any dispute as to whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. (FAA), preempted state laws seeking to prohibit mandatory pre-dispute arbitration of employee sexual harassment claims. The law amends the FAA and makes pre-dispute arbitration agreements between employers and employees that would otherwise obligate the parties to arbitrate claims of sexual assault or sexual harassment invalid and unenforceable. President Biden is expected to sign the Act into law.

The law permits an employee and employer ***to agree*** to arbitrate sexual harassment and sexual assault disputes provided such agreement arises ***after*** the dispute occurs and the employee so agrees in writing. An employee may voluntarily choose to arbitrate their claim to ensure otherwise embarrassing or sensitive information remains private. The employee's decision whether to do so will control.

The law also prohibits agreements that waive an employee's right to participate in a joint, class, or collective action in court, arbitration, or any other forum that relates to a sexual assault dispute or a sexual harassment dispute (both defined terms).

Notably for employers, the law invalidates any existing arbitration agreement which forces parties to arbitrate sexual harassment and sexual assault disputes on an individual basis or as a class or collective

action. Thus, to the extent current employees are subject to arbitration agreements that require them to arbitrate sexual harassment or sexual assault disputes, such agreements are not enforceable vis-à-vis any such disputes that arise or accrue on or after the date of enactment.

If there is a dispute about whether a particular claim qualifies as a "sexual assault dispute" or "sexual harassment dispute," a court, not an arbitrator, is to answer that question, even if there is a contractual term to the contrary.

The law still permits employers to mandate employees arbitrate many employment claims including discrimination (even gender discrimination claims not grounded in allegations of sexual harassment or sexual assault), retaliation, and wage and hour claims. However, it also raises a number of unanswered questions. For example, what if an employee agrees post-dispute to arbitrate a sexual harassment or sexual assault claim and then reneges on that agreement after starting the arbitration process? Also unclear is whether an employer would have to seek an injunction in court to require the employee to return to arbitration.

Practical Considerations

In response to the law, employers have options short of rolling out entirely new arbitration agreements. Employers can continue to use current arbitration agreements that require employees to arbitrate sexual harassment and sexual assault disputes, but may no longer enforce the agreement when an employee raises such a claim. If an employer decides not to revise its arbitration agreement, for clarity, the employer will want to issue a policy clearly stating sexual harassment and sexual assault claims are no longer subject to the Company's arbitration policy/agreement.

Alternatively, employers can revise their current arbitration agreements–and may want to do so on a going-forward basis–to exempt explicitly all sexual harassment and sexual assault disputes from arbitration (in the same way workers' compensation claims and ERISA claims are generally exempt from arbitration), *unless the employee agrees post-dispute and in writing to arbitrate these claims*.

Authors

This GT Alert was prepared by:

- Johnine P. Barnes | +1 202.331.3154 | barnesj@gtlaw.com
- James N. Boudreau | +1 215.988.7833 | boudreauj@gtlaw.com
- Adam Roseman | +1 215.988.7826 | rosemana@gtlaw.com