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Employers can't mandate arbitration of sexual assault and harassment claims

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Courts have long favored arbitration as a method of dispute resolution under the Federal Arbitration Act (FAA). In 2018, the U.S. Supreme Court reinforced the policy favoring arbitration agreements in Epic Systems Corp. v. Lewis. The Court ruled that the FAA requires enforcement of arbitration agreements that fall within its scope, including agreements in which employees prospectively waive their rights to file a suit against their employers.

Shortly thereafter, arbitration agreements came under significant attack (largely due to the #MeToo movement). Congress responded to such attacks by passing the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act).

What does the Act prohibit?

The Act, which took effect earlier this year, amends the FAA and says that pre-dispute agreements by employees to submit a claim of sexual harassment or sexual assault to arbitration will be invalid and unenforceable. Simply put, while an employer and employee may agree to pre-dispute arbitration in an offer letter, employment agreement, or arbitration agreement, that clause will not apply to any sexual harassment disputes that may arise later.

The Act doesn't prohibit post-dispute arbitration agreements, however. In other words, if an employee asserts a sexual harassment claim against an employer and signs an arbitration agreement after asserting the claim, that dispute may be submitted to arbitration.

The Act also bans enforcement of class or collective action waivers in sexual assault and sexual harassment cases. To be clear, class or collective action waivers not related to claims alleging sexual harassment or sexual assault are still enforceable under the *Epic* decision.

Critically, the Act gives employees, not employers, who are subject to a pre-dispute arbitration agreement the ability to choose whether to pursue their sexual harassment or sexual assault claims in arbitration or in court.

What do employers need to do?

Employers who previously executed arbitration agreements with their employees should consider revising those agreements to be certain that they comply with the new restrictions placed on employers by the Act. This suggestion is a best practice, as the Act only invalidates the portion of an arbitration agreement that deals with sexual assault or sexual harassment claims.

Employers who want to implement arbitration agreements and class action waivers going forward—with new hires or existing employees—should consider the Act when drafting and implementing new agreements.

What's next?

The passage of the Act comes at a time when employers are already seeing an increase in collective and class actions filed by (typically former) employees. In 2020, labor and employment class and collective actions comprised 22.5% of all class action lawsuits, according to a survey of more than 400 major corporations in more than 25 industries. This figure increased to 25.6% in 2021.

Employers should remain vigilant and be prepared for possible further restrictions on the use of arbitration agreements with employees. The Biden Administration has expressed its intent to work with Congress to expand restrictions on arbitration agreements.

Further restrictions are not farfetched, especially considering that the House of Representatives passed the Forced Arbitration Injustice Repeal Act (the FAIR Act) earlier this year. There has been no progress on it since reaching the Senate, however. The FAIR Act protects the rights of everyday consumers, workers, and small businesses by prohibiting the enforcement of forced arbitration clauses in consumer, labor, antitrust, and civil rights disputes that are often buried deep within the fine print of everyday contracts.

Employers with specific questions about arbitration agreements, class action waivers, or any employment law matters are encouraged to contact their employment counsel.

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