CLIENT ALERTS & INSIGHTS

Congress Passes Legislation Curtailing Arbitration of #MeToo Lawsuits

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On February 10, 2022, the U.S. Senate passed, with wide bipartisan support, the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (HR 4445)." This landmark legislation amends the Federal Arbitration Act and will allow plaintiffs to invalidate any agreement, executed before the at-issue claim arose, that purports to compel arbitration and/or prohibit the pursuit of a class action for cases that "relate" to sexual assault or sexual harassment. President Biden has expressed support for the legislation, and it is expected to become law in the coming days.

What Claims Are Impacted by the Legislation? The Act applies to predispute arbitration agreements regarding claims of sexual harassment and/or sexual assault. Specifically:

- Predispute agreements affected only: The Act only applies to agreements to arbitrate claims that have not yet arisen at the time of the making of the agreement. Thus, agreements to arbitrate sexual harassment and/or sexual assault claims made after such claims have arisen remain enforceable and cannot be invalidated by the plaintiff(s).
- Limited to sexual harassment and sexual assault claims: The Act applies only to claims concerning sexual assault and sexual harassment. "Sexual assault" is defined as a nonconsensual sexual act or sexual contact as such terms are defined under applicable federal and state law. "Sexual harassment" is defined as (1) unwelcome sexual advances, (2) unwanted physical contact that is sexual in nature, (3) unwanted sexual attention (including sexual comments and propositions), (4) conditioning professional benefits on sexual activity, or (5) retaliation for rejecting unwanted sexual attention.
- Plaintiff's option to invalidate: The Act gives the plaintiff the option to invalidate an arbitration agreement to the extent a defendant seeks to compel arbitration of sexual assault and/or sexual harassment claims. The Act does not require that courts find such provisions unenforceable in the absence of a plaintiff's request.
- Courts, not arbitrators, decide if the Act is applicable: The Act states that determining whether the Act applies to a plaintiff's claims is an issue of federal law that is to be decided by a court irrespective of any provision in the arbitration agreement to the contrary.

Do Employers Need to Take Any Action in Light of the Legislation?

No, at least as to any specific re-write of an existing agreement. As written, the legislation focuses on the "case" filed, and not any particular language of an arbitration agreement. Of course, as with any new legislation, we will have to follow how the courts interpret that language. Employers may want to consider requiring a pre-dispute mediation step as part of the arbitration agreement. Such a step could afford the parties a pre-filing process to address and/or segregate any arbitrable versus non-arbitrable claims for those situations involving allegations of sexual assault or sexual harassment.

For more information, please reach out to a member of Benesch's Labor & Employment Practice Group.

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