New Federal Law Will Prohibit the Mandatory Arbitration of Sexual Assault and Sexual Harassment Claims

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Key Points

- The EFASASHA will invalidate most contractual provisions requiring the arbitration of claims alleging sexual assault or sexual harassment.
- The law will also invalidate pre-dispute joint-action waivers that relate to sexual assault or sexual harassment disputes.
- Employers will need to review their mandatory arbitration agreements and joint-action waivers and re-think their approach to dispute resolution and to their anti-harassment initiatives more broadly.

On February 10, 2022, the U.S. Senate passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA), barring the enforcement of most mandatory arbitration provisions in cases alleging sexual assault or sexual harassment. Having previously passed in the U.S. House of Representatives, the bill has now gone to the desk of President Biden, who is expected to sign it into law. Once in effect, EFASASHA will apply to all pre-dispute arbitration clauses, including those in contracts executed before the law's enactment.[1] The law will also invalidate pre-dispute 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 or sexual harassment dispute. Moreover, if a dispute arises about whether a particular claim qualifies as a "sexual assault dispute" or "sexual harassment dispute," then a court, not an arbitrator, is to answer that question, even if a contractual term exists to the contrary.

EFASASHA is the latest piece of legislation inspired by the #MeToo movement. Mandatory arbitration provisions have been an increasing focus of the movement in recent years, with activists maintaining that they silence victims and prevent them from publicly airing their experiences. The law amends the Federal Arbitration Act (FAA)—which the U.S. Supreme Court long has held to espouse a broad "national policy favoring arbitration"[2]—to explicitly carve out most sexual assault and sexual harassment claims.

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In some ways, the scope of EFASASHA is limited. It applies only to claims of sexual assault and sexual harassment and—at least on its face—does not apply to other claims of discrimination (such as alleged discrimination based on race, age, religion or national origin) or claims of retaliation. The law also applies only to claims brought under federal or state laws proscribing harassment, and does not appear to cover claims under local laws. The legislation applies to "pre-dispute" arbitration provisions (i.e., contractual provisions entered into before the occurrence of the alleged harassment) and does not apply to agreements to arbitrate reached after a dispute arises. Finally, the law does not prohibit pre-dispute mandatory arbitration provisions outright, and instead provides what amounts to an "election of remedies," through which alleged victims can either arbitrate their claims or instead proceed to court. The employee's decision whether to arbitrate or proceed to court will ultimately control.

As a practical matter, the impact of the law is seismic for employers who rely heavily on the use of mandatory arbitration to resolve employee disputes. The use of such provisions is by no means limited to harassment claims, and instead extends to all manner of disputes, including compensation disputes, wrongful termination disputes, other contractual disputes and disputes arising under various federal, state and local laws. The plaintiffs' employment bar has learned how zealously employers guard their reputations, and plaintiffs' attorneys regularly threaten to "go public" via a court filing as a means to leverage a favorable settlement—including in cases in which the allegations are unsubstantiated or utterly lacking in legal merit. An employer may be confident that it will prevail in defending such claims, but must weigh the value of such a victory against the risk of adverse publicity, particularly given the futility of trying to "prove a negative" in the press.

The passage of EFASASHA ushers in a new era of the #MeToo movement and of employers' response thereto. Employers have made great strides in preventing and rooting out harassing behavior in the workplace, but now will need to redouble their efforts, including providing enhanced anti-harassment trainings, regularly communicating the importance of compliance, ensuring a process to promptly investigate credible allegations and promptly redressing any instances of harassment that may arise. Employers should also review their mandatory arbitration agreements and joint-action waivers for any needed revisions. Alternatively, employers that decide not to revise their mandatory arbitration agreements should inform employees that sexual assault and sexual harassment claims are no longer subject to the employer's arbitration agreement. We are available to further discuss these issues and to recommend best practices in light of this development.

[1] Any cases that previously were resolved through mandatory arbitration will remain closed.

[2] *Southland Corp. v Keating*, 465 U.S. 1, 10 (1984).

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