New Federal Law to Prohibit the Mandatory Arbitration of Sexual Harassment Claims

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Key Points

- The EFASASHA will invalidate most contractual provisions requiring the arbitration of claims alleging sexual harassment or sexual assault.
- The new law will have an outsized impact in the alternative asset management industry, given firms' reliance on arbitration to resolve all manner of disputes.
- Firms will need to re-think their approach to dispute resolution and to their antiharassment initiatives more broadly.

Yesterday, 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 harassment or sexual assault. Having previously passed the U.S. House of Representatives, the bill will now go 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]

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 harassment and sexual assault claims. The passage of EFASASHA follows the enactment of similar laws at the state level, including under the New York State Human Rights Law, which had faced serious preemption challenges under the FAA.

In some ways, the scope of EFASASHA is limited. It applies only to claims of sexual harassment and sexual assault 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, such as the New York City Human Rights Law. The legislation

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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.

As a practical matter, however, the impact of the law is seismic, particularly for the alternative asset management industry. Investment managers operate under unrelenting scrutiny—from regulators, investors, potential investors, industry consultants and others—and rely heavily on the use of mandatory arbitration to resolve internal 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, partnership disputes, other contractual disputes, and disputes arising under various federal, state and local laws. The plaintiffs’ employment bar has learned how zealously managers 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. A manager 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 asset managers’ response thereto. Firms 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 antiharassment 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. 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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