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Congress Seeks to End Forced Arbitration for Sexual Assault, Sexual Harassment, and Related Claims

By Kenneth W. Gage, Sara B. Tomezsko & Ryan Gribbin-Burket

On February 10, 2022, Congress passed and President Biden is expected to sign H.R. 4445: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("H.R. 4445"). The new law would amend the Federal Arbitration Act ("FAA") specifically to address predispute arbitration agreements and joint-action waivers for sexual assault and sexual harassment disputes.

What does the new law do?

The new law, once signed, will allow a person alleging sexual assault or sexual harassment to invalidate a predispute arbitration agreement or predispute joint-action waiver. The new Section 402 of the FAA provides specifically that, "at the election of the person" making such allegations or "the named representative of a class or in a collective action alleging such conduct," no predispute agreement to arbitrate or joint action waiver is valid or enforceable "with respect to a case which is filed under Federal, Tribal, or State law and relates to" the sexual assault or sexual harassment dispute. By its terms, the amendment applies to "any dispute or claim that arises or accrues" on or after its enactment.

Federal law would govern the applicability of the amendments. Once enacted, a court, not an arbitrator, must decide questions of arbitrability in the first instance, notwithstanding any contractual language to the contrary.

Notably, predispute arbitration agreements would remain otherwise enforceable under the FAA. Moreover, nothing in the new provision precludes post-dispute arbitration agreements covering sexual assault and harassment disputes if that is the alleged victim's preferred forum.

Can a plaintiff avoid arbitration of other claims by also alleging sexual assault or harassment?

The plaintiff's right to elect out of arbitration applies to a "case which . . . relates to the sexual assault dispute or the sexual harassment dispute." Whether this impacts the arbitrability of other claims, for example wage and hour, retaliation or race discrimination claims, asserted together in a "case" alleging sexual assault or harassment will likely be the subject of litigation. The Congressional Record suggests that the new law is not intended to invalidate arbitration agreements for wage and hour collective actions, simply because one of the named plaintiffs also asserts an individual sexual harassment claim. Indeed, a number of senators pledged to further amend the law if necessary to ensure litigants do not

"game the system" by asserting frivolous claims for sexual harassment or assault simply to avoid their contractual obligations to arbitrate. The extent to which courts will look to the legislative history for guidance will vary. Fortunately, the FAA provides a right to appeal when a motion to compel arbitration is denied, so employers can seek prompt review in situations where the amendment is broadly applied.

What should employers do in response?

First, under current law, there are other federal claims already non-arbitrable. Therefore, existing agreements may already exclude disputes that may not be subject to predispute arbitration agreements, generally or specifically. Employers with predispute arbitration agreements should consider whether further modification is necessary, including by specifically referencing the election permitted by these amendments.

Second, employers should evaluate critically whether unrelated claims are included in cases with sexual harassment or assault allegations to determine whether there is a basis for moving to compel arbitration of the unrelated claims.

Third, at least in jurisdictions that allow for knowing and voluntarily jury trial waivers, employers might consider adding such waivers to their agreements to avoid the uncertainties of a jury trial.

We will continue tracking developments on this issue.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings New York lawyers:

Kenneth W. Gage
1.212.318.6046
kennethgage@paulhastings.com

Sara B. Tomezsko
1.212.318.6267
saratomezsko@paulhastings.com

Ryan Gribbin-Burket
1.212.318.6644
ryangribbinburket@paulhastings.com