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Employment Law Update: Employer Agreements Can No Longer Require the Arbitration of Sexual Harassment or Sexual Assault Claims

Part I in a Two Part Series

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The Ending Forced Arbitration of Sexual Assault and Sexual Harassment ("EFA") Act was passed this month by both the U.S. House of Representatives and the U.S. Senate. Currently, the bill is awaiting President Biden's signature. Since he has expressed his support for the Act, he will most certainly sign it into law. The EFA Act amends the Federal Arbitration Act. It effectively prevents employers from requiring that employees arbitrate sexual assault or sexual harassment disputes against employers. The EFA Act applies to individual employee sexual assault or harassment disputes as well as those involving multiple employees, a class or a collective.

Definitions of Sexual Harassment and Sexual Assault in the EFA Act

According to the EFA Act, a sexual assault dispute means a dispute involving a nonconsensual sexual act or sexual contact, including when the victim lacks capacity to consent. A sexual harassment dispute is defined as relating to conduct that constitutes sexual harassment under state or federal law. A court, not an arbitrator, must determine whether a dispute constitutes a sexual harassment dispute or a sexual assault dispute. This applies even if the arbitration agreement specifically states that an arbitrator may determine whether a dispute constitutes a sexual assault or sexual harassment dispute.

The EFA Act is Not Retroactive

The EFA Act specifically states that it "shall apply with respect to any dispute or claim that arises on or after the date of enactment of this Act." It appears that the EFA Act will not be applicable to those disputes or claims that arose before the date of the enactment of the Act. However, it is likely that an employer that has an arbitration agreement which was in effect prior to the EFA Act's enactment date cannot require employees to arbitrate sexual assault or sexual harassment claims that arise after the EFA Act's enactment date.

What Steps Should Employers Take Now?

Employers should examine their current arbitration agreements to determine whether they need to be revised in light of the EFA Act. Employer arbitration agreements may need to be revised to include language that carves out an exception to their requirement that all employment law claims must be arbitrated. That language should make clear that sexual abuse and sexual harassment employment disputes are not required to be arbitrated under the agreement.

TAKEAWAY: Employers should take note of the prohibition against requiring arbitration for sexual harassment and sexual abuse claims and review their arbitration agreements according. If you need help reviewing an employer arbitration agreement or regarding any other federal or New Jersey employment law, contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

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