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Employment Law Update: Biden Signs Law Prohibiting Employer Agreements From Requiring the Arbitration of Sexual Harassment or Sexual Assault Claims

Part II in a Two Part Series

03/16/22

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment ("EFA") Act was signed into law by President Biden on March 3, 2022. In the first part of the two-part series, Employer Agreements Can No Longer Require the Arbitration of Sexual Harassment or Sexual Assault Claims, we examined how the EFA Act amends the Federal Arbitration Act. This blog examines how the new federal law prevents employers from requiring that employees arbitrate sexual assault or sexual harassment disputes against employers that arise on or after March 3, 2022.

Do employers have to revise their arbitration agreements?

Employers should first examine the arbitration agreements currently in place to determine whether a revision is necessary since employees can no longer be required to arbitrate sexual harassment and sexual abuse claims. A court may be more likely to enforce an arbitration agreement if it contains a catch-all clause, such as "employment law claims must be arbitrated to the extent allowed by federal and state law." The EFA Act makes it clear that there is no required arbitration of sexual harassment or sexual abuse claims under federal law.

However, if an employer's current arbitration agreement contains no such catch-all clause, the employer may wish to revise its form of agreement. A revised employer arbitration agreement should include language that carves out an exception to the requirement that all employment law claims must be arbitrated. In addition, that language should specify that sexual abuse and sexual harassment employment disputes are not required to be arbitrated under the agreement.

Is there anything employers can do to dissuade employees from choosing to litigate sexual harassment or sexual abuse claims?

The EFA Act does not prevent employers from offering the choice to arbitrate a sexual abuse or sexual harassment claim. However, the option must be entirely the employee's decision. Accordingly, employers may want to include incentives in their employment arbitration agreements that are attractive to employees with sexual harassment or sexual abuse claims. For example, the employer may offer to pay all arbitrator fees and costs of the arbitration. The employer may also want to pay for pre-arbitration mediation of employees' claims which may be attractive to some employees who wish to avoid the possible unpleasant experience of a formal hearing.

TAKEAWAY: Employers should review their arbitration agreements to ensure compliance with the new law against requiring arbitration of employee sexual harassment or sexual abuse claims and determine whether to include incentives to encourage employees to choose arbitration of those claims. If you need help reviewing an

employment 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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