CLIENT ALERT: New Federal Law Prevents Enforcement of Mandatory Arbitration of Sexual Harassment and Sexual Assault Claims

On March 3, 2022, President Biden signed into law H.R. 4445, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act'). The Act amends the Federal Arbitration Act and prevents the enforcement of arbitration provisions against an employee alleging sexual harassment. The Act will likely increase the number of sexual harassment claims litigated in federal and state courts across the country. (This alert updates MBJ's client alert from February 9, 2022 on the same subject.)

Relevant Background

Historically, employers have used employment arbitration agreements in response to an increase in employment-related litigation. Employers generally find that arbitration, as opposed to court litigation, results in faster and less expensive dispute resolution. Additionally, many arbitration agreements contain employee waivers of any right to bring class actions against their employer, or contain so-called delegation clauses, which require the arbitrator, rather than a court, to decide what claims are subject to the arbitration provision. For decades, the Supreme Court has repeatedly upheld the enforcement of arbitration agreements.

What Is In The Act

The Act prevents a court from enforcing an arbitration agreement against a party alleging conduct that constitutes either a "sexual harassment dispute" or a "sexual assault dispute." The Act also invalidates class-action waivers and delegation clauses for these two types of disputes.

"Sexual harassment dispute" is broadly defined to mean "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." Based on current case law, this likely includes any disputes relating to:

- Unwelcome sexual advances;
- Unwanted physical contact that is sexual in nature;
- Unwanted sexual attention and comments;
- Conditioning professional or other benefits on sexual activity; or
- Retaliation for rejecting sexual attention.

This type of misconduct is typically categorized as either a "hostile work environment" claim or a "quid pro quo harassment" claim.

Importantly, the Act does not apply retroactively: it only applies to covered disputes that arise on or

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after March 3, 2022.

What Is Not In The Act

This Act does not apply to discrimination claims based on other protected characteristics, such as race or religion, or other types of retaliation claims. Nor does this law apply to other sex discrimination claims unrelated to sexual harassment, or to disputes about other contractual provisions that have drawn recent public attention, like non-disclosure agreements.

Takeaways And What's Next

The Act will move sexual harassment claims from arbitration into state and federal courts. This will result in more public testimony, discovery, and cases submitted to a jury. Given the associated costs and risks, employers would benefit from ramping up even further every step practicable to prevent and remedy sexual harassment.

The Act will also cause employers to make challenging and uncertain arbitration strategy decisions at the outset of certain matters. Consider the following example: a complaint asserts two claims, a sexually hostile work environment claim and a sex discrimination claim in which a former employee alleges that he was terminated because of his sex. Prior to the Act if an employee signed an arbitration agreement, an employer would likely elect to arbitrate all claims. Under the Act, the employee could not be compelled to arbitrate the hostile work environment claim; however, it is unclear whether that the sex discrimination claim would arbitrable. An employer may be in the unenvious position of choosing to litigate both claims in court, or defend two related matters separately, one in court and one in arbitration.

What's next is a natural question for employers with arbitration agreements. The Act's carve out of sexual harassment claims seems more like a stop on the road rather than the end destination. The White House has already signaled support for legislation that would remove other employment claims from arbitration, such as all discrimination claims and wage and hour claims. MBJ will continue to monitor legislation that impacts arbitration agreements in employment.

Employers are encouraged to contact their MBJ attorney with questions about arbitration agreements and other labor and employment matters.

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