SULLIVAN & CROMWELL LLP

S&C memo

February 10, 2022

Congress Passes Bill Limiting Pre-Dispute Arbitration Agreements Covering Sexual Assault and Sexual Harassment

The "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" Prohibits Mandatory Arbitration of Disputes, Including Class and Collective Actions, Involving Sexual Assault and Sexual Harassment Claims

SUMMARY

On February 10, 2022 the Senate passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the "Act"), which amends the Federal Arbitration Act ("FAA") to make pre-dispute arbitration agreements covering sexual assault and sexual harassment claims unenforceable.[1] The Act, which previously was passed by the House of Representatives with widespread bipartisan support, applies to any claim arising or accruing on or after the date of enactment. President Biden is expected to sign the bill into law in the coming days.

In the wake of the #MeToo movement, some state legislatures moved to curb the enforceability of arbitration agreements in sexual misconduct cases, but courts have generally found such efforts to be preempted by the FAA and its strong presumption favoring arbitration. In amending the FAA, Congress has now restricted the use, in the context of sexual assault and sex harassment claims, of pre-dispute arbitration agreements and has similarly limited the scope of Supreme Court precedent that permitted parties to provide in arbitration agreements that the parties waived participation in class or collective actions. It remains to be seen whether the Act will serve as a template for future bills precluding mandatory arbitration in other contexts.

BACKGROUND

Following the #MeToo movement, mandatory arbitration of sexual harassment and sexual assault cases had come under increased scrutiny, and some employers and state legislatures moved to curb the enforcement of such agreements in recent years. Several high-profile employers eliminated mandatory arbitration in alleged sexual misconduct cases. Companies also acted to provide more rigorous anti-sexual harassment training, and improve their internal processes for reporting and investigating complaints.[2]

An example of state legislation designed to preclude mandatory arbitration in sexual harassment and discrimination cases is New York's 2018 law, Section 7515 to the New York Civil Practice Law and Rules ("C.P.L.R."), providing that no written contract shall contain "any clause or provision . . . [requiring] that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment," and that any "mandatory arbitration clause" with respect to such claims is null and void. New York later amended that law in 2019 to expand the prohibition on mandatory arbitration to cover all employment discrimination claims. In 2018, Maryland passed similar legislation, providing that "except as prohibited by federal law, a provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment is null and void as being against the public policy of the state."[3] And, in 2019, New Jersey enacted a law providing, "[a] provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable."[4]

These statutes, however, have failed to have any substantial effect on the arbitration of alleged sexual misconduct disputes because courts have repeatedly found that, to the extent the arbitration agreement was arguably in interstate commerce, they are preempted based on Supreme Court authority holding that the FAA "preempt[s] any state rule discriminating on its face against arbitration—for example, a law prohibiting outright the arbitration of a particular type of claim."[5] For example, in *Latif* v. *Morgan Stanley & Co. LLC*, the court found that because C.P.L.R. Section 7515 reflected a "state law prohibit[ing] outright the arbitration of a particular type of claim"—sexual harassment claims—it was preempted by the FAA.[6] Similarly, in *Lee* v. *Engel Burman Grande Care at Jericho*, the court granted a motion to compel arbitration of sexual harassment and discrimination claims, rejecting plaintiff's argument that the claims were not arbitrable under C.P.L.R. Section 7515 because "when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[7]

Accordingly, only Congress was positioned to amend and narrow the scope of the FAA. Congressional attempts to curtail the breadth of the FAA have been ongoing for over four years. In December 2017, Senators Kirsten Gillibrand and Lindsey Graham introduced the Ending Forced Arbitration of Sexual

Harassment Act of 2017, an earlier version of the Act. The 2017 version proposed to render unenforceable any arbitration agreement compelling an employee to arbitrate "sex discrimination disputes," which were defined as a "a dispute between an employer and employee arising out of conduct that would form the basis of a claim based on sex under Title VII of the Civil Rights Act of 1964 . . . , regardless of whether a violation of such Title VII is alleged." The revised version of the bill, introduced in the House on July 16, 2021, is narrower, limiting the prohibition on mandatory arbitration to lawsuits involving sexual harassment and sexual assault.

THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

The Act amends the FAA to prohibit enforcement of pre-dispute arbitration agreements as well as waivers of class and collective actions in disputes claiming sexual assault and sexual harassment. The Act defines a "sexual assault dispute" relatively narrowly, as "a dispute involving a nonconsensual sexual act or sexual contact as such terms are defined in [the U.S. Criminal Code] or similar applicable Tribal or State law, including when the victim lacks capacity to consent." "Sexual harassment dispute" is defined as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

The Act specifies that, at the election of the person claiming sexual assault or harassment or the named representative of a class or collective action alleging such conduct, any pre-dispute arbitration agreement or joint-action waiver relating to the sexual assault or harassment dispute shall be rendered invalid or unenforceable. In addition, the Act provides that any dispute over its provisions will be determined under federal law and by a court rather than an arbitrator, irrespective of whether the arbitration agreement purports to delegate such determinations to an arbitrator. Thus, plaintiffs may file their lawsuits in court in the first instance if there is a question over the arbitrability of the claim. The Act applies to claims arising or accruing on or after the date of enactment.

In the House, the bill passed 335 to 97, including 113 Republicans who voted in favor of the legislation. In the Senate, the bill passed unanimously by voice vote. President Biden is expected to sign the bill within days.

IMPLICATIONS

First, following the Act's enactment, employees who have entered into arbitration agreements covered by the FAA will no longer be bound to arbitrate any disputes arising on or after the date of enactment and asserting claims of sexual harassment and sexual assault.

It is important to note, however, that the FAA applies to arbitration agreements in interstate commerce (other than to agreements involving certain transportation workers), and thus there may be agreements

entered into by employers operating solely within individual states that would remain enforceable in states that have not enacted separate state law prohibitions. Also, it bears noting that the bill does not prevent parties from agreeing, after a dispute has arisen, to arbitrate that dispute. The bill is directed only to pre-dispute arbitration agreements.

Second, the Act prohibits the enforcement of class or collective action waivers relating to sexual harassment and sexual assault disputes, which are included in many arbitration agreements. The Act essentially reverses as to sex assault and sex harassment claims the Supreme Court's decision in *Epic Systems* Corp. v. *Lewis*, in which the Court found that class and collective action waivers in employment arbitration agreements are enforceable.[8] Following the Act's enactment, courts may well see an influx of joint actions involving sexual harassment and sexual assault disputes that were previously adjudicated only as individual arbitrations under *Epic*.

Third, in cases involving multiple causes of action, nothing on the face of the legislation precludes a defendant from moving to compel to arbitration as to all claims other than those involving sexual harassment and sexual assault. The Act may lead to an uptick in plaintiffs adding sexual harassment and sexual assault claims to their lawsuits in an attempt to avoid arbitrating at least some claims.

Finally, it is uncertain whether the Act will serve as a model for future legislation on the federal level precluding mandatory arbitration in other contexts. In supporting the legislation, the White House has signaled that it intends to work with Congress on "broader legislation" that addresses "other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices."[9] One such proposal is the Forced Arbitration Injustice Repeal ("FAIR") Act, which would prohibit pre-dispute arbitration agreements that require arbitration of employment, consumer, antitrust, or civil rights disputes and bars joint, class, or collective action waivers in such agreements. The House Judiciary Committee voted to advance the bill on November 3, 2021, but it does not appear to have nearly the same level of support as the Act. Absent additional Congressional action akin to the Act, employees and states are unlikely to succeed in limiting the use of arbitration to resolve claims regarding particular subjects beyond sexual harassment and sexual assault.

* * *

ENDNOTES

[1] "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," H.R. 4445, 117th Cong., available at https://www.congress.gov/117/bills/hr4445/BILLS-117hr4445eh.pdf.

[2] *See, e.g.*, "Google Ends Forced Arbitration for All Employee Disputes," N.Y. Times (Feb. 21, 2019), www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html.

[3] Md. Lab. & Empl. Code § 3-715(a).

[4] N.J. Stat. § 10:5-12.7.

[5] *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017) (citing *AT&T Mobility Corp.* v. *Concepcion*, 563 U.S. 333, 341 (2011)).

[6] *Latif* v. *Morgan Stanley & Co. LLC*, 2019 WL 2610985, at *3–4 (S.D.N.Y. June 26, 2019).

[7] *Lee* v. *Engel Burman Grande Care at Jericho, LLC*, 2021 WL 3725986, at *6 (E.D.N.Y. Aug. 23, 2021)

[8] *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018).

[9] "Statement of Administration Policy: H.R. 445 – Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," The White House (Feb. 1, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/HR-4445-SAP.pdf.

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers or to any Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.