Congress Moving Forward To Limit Employers' Right to Arbitrate Sexual Harassment Claims – A Slippery Slope

Description

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The Value of Arbitration Clauses

It is not uncommon for employers to require that all employment related disputes with employees be resolved by binding arbitration and not in court. Advantages of arbitration can include: (i) significant cost savings in legal fees in defense of a claim; (ii) lower time expenditure by executives in the defense of a claim; (iii) a decision by an arbitrator who assumably would be less biased, more predictable and have a greater background in the applicable laws than a jury; and (iv) avoiding the dispute automatically being in the public record. Practically speaking, mandatory arbitration provisions also help employers because plaintiffs' attorneys, who often get paid on a contingency fee rather than by the hour, are more likely to choose to bring suit against employers that have not implemented mandatory arbitration agreements.

Mandatory arbitration agreements became popular in the employer context after a 2018 United States Supreme Court decision invalidated the National Labor Relations Board's position the agreements were illegal (click here to view) and further legislation did not pass to significantly limit the scope of such agreements (click here to view).

While the validity and enforcement of arbitration clauses seem to be always under attack, the Federal Arbitration Act (FAA), which strongly favors arbitration and acts to invalidate any state law to the contrary, has to date usually won the day. But the FAA is facing its biggest test yet in the form of legislation that is being supported by both the U.S. Senate (Senate) and House of Representatives (House).

Legislation Passes both the House and the Senate

On February 7, 2022, the House approved a bill titled the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" (H.R. 4445). This bill would amend the FAA and prohibit employers from enforcing pre-dispute arbitration agreements in cases involving sexual harassment and sexual assault without the employee's consent. Doing so would essentially eviscerate the protections of arbitration clauses as to sexual harassment claims so that it would be the employee's decision as to whether to arbitrate or proceed to court before a jury, as well as whether to proceed individually or as part of a class action claim. Several states, such as California and New York, already do not allow mandatory arbitration in the sexual harassment context.

Oftentimes legislation seen as "employee friendly" will gain traction in the House but not pass through the Senate. That is not the case here, as the Senate quickly followed suit and on February 10, 2022, passed S. 2342, which is largely identical to the House bill, though it does have a more restrictive definition of what types of conduct fall under the definition of sexual harassment or assault. It is expected that the two bills will, through further negotiations, come into complete conformance at some point, and if that happens it will be extremely likely that the surviving bill will be signed into law by the President.

A major concern of many employers is that, while these bills are targeted at sexual harassment and assault, they could just be the tip of the iceberg to what will then likely be broader attempts to carve out further exceptions to the protections of the FAA.

Of further note is that both bills state that it is the court that decides if the particular claim is subject to

arbitration. While typically that is the case, it is possible for the employer and employee to include in the arbitration agreement a clause to the effect that the arbitrator – and not the court – decides if the particular issue is subject to arbitration. Under the pending legislation, that will no longer be possible.

Finally, and very significantly, the legislation is retroactive and would cover all disputes arising after the passing of the law, even if they were subject to an arbitration agreement entered into prior to the law's effective date.

Summary

If this legislation is signed into law, an employee alleging sexual harassment or assault will now be able to choose to move forward under the arbitration agreement that was signed or instead pursue the claim in court and/or to pursue the claim as a class action and not on an individual basis. It also may lead to new legislation being brought forth that will seek to further extend the arbitration ban to include other employment claims such as those alleging race or other forms of discrimination or unfair labor practices.

Employers should monitor this legislation so it properly assesses the risk of claims and understands which claims are covered by their mandatory arbitration provisions.

The Employment & Labor Practice Group at Partridge Snow & Hahn are ready to answer questions regarding this legislation, arbitration agreements and general employment issues, including those relating to COVID-19. For additional information and resources visit the firm's website at www.psh.com.

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