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Are Employee Arbitration Agreements On Their Way Out?

By Jessica Summers

Over the last month, there have been a few significant developments that employers should be aware of when it comes to the use and enforceability of arbitration agreements. As summarized below, for the time being, employee or contractor arbitration agreements are still enforceable in most contexts. However, further changes may be on the horizon.

The takeaway is that, particularly in light of the developments descried below, employers should think carefully about if and when they use arbitration agreements with their workers and should ensure that the language of such agreements is designed to protect against potential issues down the road.

New Law Prohibiting Forced Arbitration of Sexual Harassment and Assault Claims

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 into law. This legislation was enacted with a rare showing of bi-partisan support. The new law amends the Federal Arbitration Act to prohibit enforcement of any agreement that forces a person to arbitrate a claim of sexual harassment or assault. The prohibitions apply to any pre-suit claims of sexual harassment or assault – including claims by employees or contractors arising from incidents in the workplace. While workers can still pursue such claim through arbitration, any agreement that compels them to do so will be unenforceable.

Unfortunately, the way that the new law is written leaves a big open question – namely, whether the fact that a party has raised a claim of sexual harassment or assault will preclude enforcement of an arbitration agreement with respect other claims raised in the same case. Specifically, the new law prohibits the enforcement of an arbitration agreement "with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute." A narrow reading of this language would suggest that a case could be split permitting the non-sexual harassment or assault portions to be sent to arbitration under an arbitration agreement while the sexual harassment or assault allegations remain in litigation. However, arguments have already been made that, as long as a claim of sexual harassment or assault has been raised in a case, no part of the case can be compelled to arbitration.

We anticipate that the scope of the new law will be the subject of upcoming litigation. In the meantime, any business that uses arbitration agreements or clauses with its workers (employees or contractors) should know that these provisions will not be enforceable at least as applied to claims of sexual harassment or assault. As a best practice, any new arbitration agreements should carve out claims of sexual harassment and assault.

Proposed Law to Prohibit All Arbitration Agreements

On March 17, 2022, the House of Representatives passed the Forced Arbitration Injustice Repeal Act (the FAIR Act) of 2022. The legislation, which has the President's support, would make any arbitration agreement invalid and unenforceable as to any "employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." The proposed law's definition of "employment dispute" is broad and includes any dispute "arising out of or related to the work relationship or prospective work relationship." Thus, if enacted into law, the restriction would likely be interpreted to apply not only to arbitration agreements with employees but also with contractors.

The FAIR Act will now move to the Senate for consideration. The bill's prospects in the Senate remain uncertain. While the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act had broad bi-partisan support, the FAIR Act only had one Republican co-sponsor in the House and its companion bill

in the Senate has no Republican co-sponsors.

Arbitration and At-Will Status

On February 24, 2022, the Fourth Circuit Court of Appeals – which is the federal appeals court for Maryland, Virginia, West Virginia, North Carolina and South Carolina – issued a decision in the case of Warfield v. ICON Advisors, Inc. which raises significant concerns for any employer in the Fourth Circuit's jurisdiction using arbitration agreements with their at-will employees.

The case involved a securities broker who was terminated by his employer. Because the employee's employment fell within the authority of the Financial Industry Regulatory Authority (FINRA), both the employer and the employee agreed and acknowledged that any employment disputes would need to be resolved through arbitration. The employee alleged that the fact that his employment was subject to an arbitration requirement meant that he was no longer an at-will employee. Accepting that argument, the arbitrator found for the employee on the employee's claim that he was terminated "without just cause." The employer filed a case in the U.S. District Court for the Western District of North Carolina seeking to vacate the award. The District Court found for the employer and the employee appealed.

In finding for the employee and reversing the District Court's decision, the Fourth Circuit found that the employer had not shown that the arbitrator manifestly disregarded the law and had not met "the sky-high standard" required to reverse an arbitration decision.

While the Fourth Circuit did not opine on the strength or legal soundness of the arbitrator's conclusion that the arbitration obligation undermined the employees' at-will status, the fact that the Fourth Circuit found that there was insufficient basis to reverse the decision should be concerning for employers in and of itself. While many (if not most) arbitrators would not find the way the arbitrator in this case did – the Fourth Circuit's decision may embolden employees to pursue the line of argument that was successful in this case.

Because this case dealt with an arbitration requirement that arose by virtue of the employee's positon rather than as a matter of contract, the case did not touch upon whether language in the arbitration agreement making it clear that the employee will remain an at-will employee would be effective. That said, employers in the DMV that are using arbitration agreements with their at-will employees should look at the specific language that they are using in the agreements and consider whether they are prepared to potentially trade at-will status for arbitration.

