New Law Outlaws Forced Arbitration of Employee Sexual Harassment and Sexual Assault Claims

By: Edward S. Schenk III & Matthew T. Anderson

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On March 3, 2022, President Biden signed into law the ?Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.? The law, which had bipartisan congressional support, ends the practice of including claims for ?sexual assault? and ?sexual harassment? (defined terms in the new law)[1] within the class of employment disputes that can be subject to mandatory, forced arbitration.

Often, arbitration agreements require employees to submit to private, confidential arbitration to resolve a variety of workplace disputes (*i.e.*, claims for discrimination, harassment, retaliation, wage & hour violations, etc.). Arbitration agreements generally prohibit employees from filing a civil lawsuit against their employer and from having their ?day in court? in the traditional sense. This standard practice applies to millions of employees across the nation. Historically, employers touted arbitration as a more efficient, cost-effective, and timely means of resolving employment disputes. Arbitration?s proponents also regard it as producing more consistent and less volatile results than traditional jury trials. The new law specifically amends the Federal Arbitration Act (FAA) and makes pre-dispute arbitration agreements between employers and employees that would otherwise obligate the parties to arbitrate claims of sexual misconduct unenforceable (with respect to those claims only).

Now, **all** forced arbitration provisions that pertain to sexual misconduct are deemed void, including those contained in agreements executed prior to the enactment of the law (*i.e.,* the law is retroactive). However, the law permits an employee and employer to mutually agree to arbitrate sexual misconduct disputes, but only if the agreement is in writing and entered into *after* the dispute arises. This gives employees the choice of forums in which to have their sexual misconduct claims heard. The law also prohibits agreements that waive employees? rights to participate in joint, class, or collective actions in court, arbitration, or any other forum that relates to sexual misconduct disputes.

Note, the new law does not affect the general rules governing mandatory arbitration of other employment disputes that are unrelated to sexual misconduct. As a practical matter, employers may

want to consider the impact of the new law on their current agreements, including whether to adopt entirely new agreements or whether there are other means of conforming existing agreements to the new law (*i.e.,* by issuing policy statements that specifically address changes to sexual misconduct claims).

Please contact our Williams Mullen employment attorneys for any additional guidance on this update.

[1] Although ?sexual assault? and ?sexual harassment? are defined terms in the new law, for ease of reference they are collectively referred to in this article as ?sexual misconduct.?

Related People

- Matthew T. Anderson ? 804.420.6289 ? manderson@williamsmullen.com
- Edward S. Schenk III ? 919.981.4303 ? eschenk@williamsmullen.com

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