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CLIENT MEMORANDUM

MARCH 10, 2022

Congress Passes Bill Invalidating Mandatory Arbitration and Joint-Action Waivers for Sexual Harassment and Sexual Assault Claims

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act"), which prohibits pre-dispute arbitration agreements and joint-action[1] waivers relating to sexual assault or sexual harassment disputes.[2] The Act amends the Federal Arbitration Act (the "FAA") and provides individuals alleging sexual harassment or sexual assault an option to void pre-dispute arbitration agreements or joint-action waivers covering sexual assault and sexual harassment claims arising on or after the date of the Act's enactment under federal, state or tribal law. The Act also provides that any question as to the applicability of the Act or enforceability of any agreement to which the Act applies shall be determined by a court, rather than an arbitrator. The Act became effective on March 3.

Background

The FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable."[3] The Supreme Court has made clear that the FAA reflects both a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract."[4] Specifically, in the context of arbitration agreements relating to employment disputes, the Supreme Court in *Epic Sys. Corp.* v. *Lewis* held that employment agreements providing for individualized arbitration should be enforced according to their terms, irrespective of employees' rights under the National Labor Relations Act to organize unions and to bargain collectively.[5]

In the wake of the #MeToo movement, several states have enacted legislation restricting the use of arbitration agreements for claims of sexual harassment. For example, in 2018, New York passed a law prohibiting the use of arbitration agreements for claims of sexual harassment ("Section 7515").[6] In 2019, New Jersey enacted a law invalidating provisions "in any employment

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1 "Joint-action" means a joint, class, or collective action in a judicial, arbitral, administrative, or other forum.

2 H.R. 4445, 117th Cong., https://www.congress.gov/117/bills/hr4445/BILLS-117hr4445eh.pdf.

3 9 U.S.C. § 2.

4 *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted).

5 *Epic Sys. Corp*. v. *Lewis*, 138 S. Ct. 1612, 1619 (2018).

6 N.Y. C.P.L.R. §7515. The law was subsequently expanded, effective October 11, 2019, to prohibit mandatory arbitration of all employment discrimination claims. N.Y. LEGIS 160 (2019), 2019 Sess. Law News of N.Y. Ch. 160 (A. 8421). *See* New York State, Combating Sexual Harassment: Frequently Asked Questions, https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-

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contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment" ("Section 12.7").[7] California enacted a law ("Section 432.6") prohibiting employers from requiring, as a condition of employment or employment-related benefit, any employee or job applicant to "waive any right, forum, or procedure" relating to claims arising under the California Fair Employment and Housing Act or the California Labor Code, including "the right to file and pursue a civil action or complaint."[8]

However, recent decisions by federal district courts have called into question the reach of state laws prohibiting mandatory arbitration of sexual harassment claims to the extent that they conflict with the FAA. In the Second Circuit, several district courts have found that Section 7515 is preempted by the FAA.[9] For example, the U.S. District Court for the Southern District of New York, citing Supreme Court precedent standing for the proposition that any state law prohibiting "outright the arbitration of a particular type of claim"[10]—such as a sexual harassment claim—is displaced by the FAA, concluded that Section 7515 "cannot overcome the FAA's command that the parties' [a]rbitration [a]greement be enforced" and granted defendants' motion to compel arbitration.[11] The U.S. District Court for the District of New Jersey, in the context of a lawsuit in which a nonprofit organization sought a declaration that Section 12.7 is preempted by the FAA and an injunction precluding the Attorney General of the State of New Jersey from enforcing Section 12.7, concluded that the FAA preempted Section 12.7.[12]

Last month, recognizing that "[u]nder current law, many employment and other contracts require binding arbitration for a wide range of matters before a dispute arises," the Biden administration expressed its support for the Act, which it stated would "stop employers and businesses from forcing employees and customers [who are victims of sexual assault and harassment] out of the court system and into arbitration."[13] Moreover, the Biden administration expressed its intent to work with "Congress on broader legislation that addresses these issues as well as other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices."[14]

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questions. For a more detailed discussion of Section 7515, please refer to our July 1, 2019 client memorandum and May 10, 2018 client memorandum.

7 N.J. Stat. Ann. § 10:5-12.7.

8 Cal. Lab. Code § 432.6. Unlike the Act, which is limited in scope to sexual harassment or sexual assault dispute, Section 432.6 applies more broadly to claims relating to California employment laws. *Id.* In a recent decision, the U.S. Court of Appeals for the Ninth Circuit held that Section 423.6 "is not preempted by the FAA because it is solely concerned with pre-agreement employer behavior." *Chamber of Com. of United States* v. *Bonta*, 13 F.4th 766, 781 (9th Cir. 2021) (reversing district court's conclusion that § 432.6 was preempted by the FAA). The court also held that the FAA preempted Section 432.6 to the extent it "operate[s] with [] other provisions within the California code" to impose civil and criminal sanctions. *Id.* at 771.

9 *Gilbert* v. *Indeed, Inc.*, 513 F. Supp. 3d 374, 397 (S.D.N.Y. 2021) (holding that the FAA preempted Section 7515 given that "New York State cannot exempt Plaintiffs' federal employment discrimination and state law claims [as well as claims under city discrimination laws] from mandatory arbitration under the FAA" and granting defendants' motion to compel arbitration of plaintiff's discrimination claims); *Whyte* v. *WeWork Companies, Inc.*, 2020 WL 3099969, at *5 (S.D.N.Y. June 11, 2020) (holding that Section 7515 "is displaced by the FAA and [plaintiff] may not rely on it to defeat [defendant's] motion to compel arbitration" of plaintiff's discrimination claims), *motion to certify appeal denied*, 2020 WL 4383506 (S.D.N.Y. July 31, 2020). *See also Newton* v. *LVMH Moet Hennessy Louis Vuitton Inc.*, 192 A.D.3d 540, 541 (1st Dep't 2021) (granting defendant's motion to compel arbitration of plaintiff's claims of sexual harassment and retaliation and declining to rule on whether the FAA "is inconsistent with and therefore displaces CPLR 7515 to the extent it prohibits outright a specific type of claim").

10 *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 341 (2011).

11 *Latif* v. *Morgan Stanley & Co. LLC*, 2019 WL 2610985, at *4 (S.D.N.Y. June 26, 2019).

12 *New Jersey Civ. Just. Inst.* v. *Grewal*, 2021 WL 1138144, at *6 (D.N.J. Mar. 25, 2021).

13 Executive Office of the President, Statement of Administration Policy: H.R. 4445 – Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (Feb. 1, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/HR-4445-SAP.pdf.

14 *Id.*

The Act passed 335 to 97 in the House, and passed unanimously by voice vote in the Senate.[15] In signing the Act into law, President Biden lauded bipartisan support for the Act, which he said could potentially affect 60 million Americans who are subject to mandatory arbitration clauses in the workplace.[16] The Equal Employment Opportunity Commission (the "EEOC") also expressed support for the Act, stating that it "offers essential protection for workers who are subject to sexual assault or harassment and will significantly advance the promise of our nation's anti-discrimination laws."[17]

The Act

The Act amends the FAA which, as discussed above, applies to arbitration agreements involving a maritime transaction or a contract evidencing a transaction involving commerce.[18]

The Act defines a "predispute arbitration agreement" as "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement" and a "predispute joint-action waiver" as "an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action . . . concerning a dispute that has not yet arisen at the time of the making of the agreement."[19] A "sexual assault dispute" means "a dispute involving a nonconsensual sexual act or sexual contact," and a "sexual harassment dispute" means "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[20]

The Act provides that, at the election of a party alleging conduct constituting a "sexual harassment dispute" or "sexual assault dispute," or the named representative of a class or in a collective action alleging such conduct, no "predispute arbitration agreement" or "predispute joint-action waiver" shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law. Notably, the Act applies only to *pre-dispute* arbitration agreements and does not prevent parties from entering into an agreement, after a dispute covered by the Act has arisen, to arbitrate that dispute. The Act is silent as to whether its scope is limited to employment agreements.

The Act applies with respect to any dispute or claim that arises or accrues on or after the date of its enactment.[21] Accordingly, the Act does not apply retroactively to claims that arose or accrued prior to its enactment on March 3, 2022.

The Act expressly states that any issue as to whether the Act applies with respect to a dispute and whether an agreement is enforceable under the Act shall be determined under federal law in a judicial forum, as opposed to an arbitral forum.

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15 Actions Overview H.R. 4445 – 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/4445/actions.

16 The White House, Remarks by President Biden at Signing of H.R. 4445, "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" (Mar. 3, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/03/remarks-by-president-biden-at-signing-of-h-r-4445-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act-of-2021/.

17 EEOC, EEOC Chair Applauds Passage of Ending Forced Arbitration Act (Mar. 3, 2022), https://www.eeoc.gov/newsroom/eeoc-chair-applauds-passage-ending-forced-arbitration-act; Executive Office of the President, Statement of Administration Policy: H.R. 4445 – Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (Feb. 1, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/02/HR-4445-SAP.pdf.

18 Act § 2.

19 Act § 401.

20 *Id.*

21 Act § 3.

Implications for Employers

- The Act prohibits unilateral enforcement of pre-dispute arbitration agreements or joint-action waivers covering disputes involving claims of sexual harassment and sexual assault that arise on or after March 3, 2022.
- The Act amends the FAA to expressly prohibit pre-dispute arbitration agreements relating to sexual assault or sexual harassment claims, as opposed to employment discrimination claims in general.
- Given that the Act does not expressly limit its scope to employment agreements, employers are advised to review their arbitration agreements in any contract, as well as employment agreements, to ensure that such agreements are in compliance with the Act and other federal, state and local laws.
- In light of the Biden administration's expressed support for "broader legislation that addresses arbitration of claims regarding racial discrimination, wage theft and unfair labor practices," and the possibility that similar state legislation may follow, employers are also advised to monitor updates regarding further legislation on this topic.
  - The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 can be found here.
  - The Biden administration's Statement of Administration Policy on the Act can be found here.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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