CLIENT ALERT

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# Employers Take Note: Mandatory Arbitration Provisions Soon To Be Invalid for Cases Involving Sexual Harassment Allegations

On February 10, 2022, the U.S. Senate passed a bill that will make mandatory arbitration provisions unenforceable for claims in the United States "relating to sexual harassment disputes or sexual assault disputes." It is anticipated that President Biden will sign the bill and once signed, it becomes the law of the land. Importantly, the law will *not* be retroactive, meaning it will apply only to "any dispute or claim that arises or accrues on or after the date of enactment." Therefore, if a case was initiated prior to the law's effective date, the applicable arbitration clause is not affected by the new law and would still be enforceable. Any existing arbitration clauses, however, would be unenforceable for cases initiated after the law becomes effective. Similar bills were first introduced in Congress in 2017 during the onset of the #MeToo movement when there was strong public pressure to address the difficulties women have traditionally faced in pursuing sexual harassment claims in the civil justice system, but these bills were never enacted.

It is estimated that more than 60 million workers in the United States are covered under some sort of mandatory arbitration clause in an employment or independent contractor agreement. These provisions are generally held to be enforceable as long as they meet the language requirements of the applicable state law and are voluntarily and knowingly entered into. However, proponents of the bill argued that mandatory arbitrations unduly restrict an employee's ability to make claims in open court and require that such matters be resolved in private with an appointed arbitrator with an outcome that leaves little room for the employee to appeal the decision.

On the other hand, opponents of the bill maintain that arbitration is often considered to be a more efficient dispute resolution process than litigation. Arbitration disputes are traditionally decided more quickly than those filed in the court system, (which often take years to be resolved), are decidedly less expensive for all parties involved, and usually allow for more flexibility in terms of the process and procedural issues that may arise. Moreover, while judges generally have to be "jacks-of-all-trades" and not focused on a particular area of law, it is common for arbitrators to have significant experience and expertise in a specific subject matter, which may also assist in expediting and achieving a just resolution.

Employers must take careful note of this bill because its implications may have far-reaching impacts on future claims. Specifically, the bill makes clear that

mandatory arbitration clauses are unenforceable not only as to the sexual harassment or assault claims alleged, but instead would be invalid as to all claims made by the complainant in any case where sexual harassment or assault claims are also alleged. There has been speculation that employees may allege sexual harassment or assault in a complaint when the main focus of the case is actually on other causes of action for the purpose of invoking the protections of the bill and having arbitration barred for the entire case. The inability to resolve such disputes privately will also factor into the manner in which the litigation is handled because public pressure may now play a role in an employer's response to these types of claims.

The bill also provides that the determination of whether any claim is arbitrable in cases where sexual harassment or assault is alleged, the issue must be decided by a court of competent jurisdiction applying federal and not state law. Typically, arbitration provisions attempt to delegate arbitrability authority to the arbitrator, but the bill nullifies the ability of parties to contract such a delegation of authority.

To mitigate the risk of enforcement issues for broadly drafted mandatory arbitration provisions, employers should work with qualified counsel in this area of law to carefully consider reviewing and revising such provisions to exclude claims of sexual harassment and assault.