masuda funai

News & Types: クライアント・アドバイザリー

セクシャル・ハラスメントおよび性的暴行に基づく請求ー従業員が裁判前仲裁を経ずに、裁判所で訴訟提起可能に

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Practices: 雇用／労働法／福利厚生

UPDATE

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, effective immediately. Employee disputes or claims covered under this law that arise or accrue on or after March 3, 2022, may be directly filed in court and cannot be subject to mandatory arbitration.

FEBRUARY 2, 2022 CLIENT ADVISORY:
President Biden is expected to sign landmark legislation into law which will allow plaintiffs to bypass pre-dispute arbitration when sexual harassment or sexual assault claims are made. More specifically, employees who have entered into mandatory pre-dispute arbitration agreements with their employers may soon opt out of arbitration with the option of pursuing sexual harassment or sexual assault claims in court instead. Under the Act, the decision of whether to arbitrate such claims will rest solely with the employee. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the “Act”) was passed in February 2022 with extensive bipartisan support and amends the Federal Arbitration Act (“FAA”).

While certain states already had prohibitions against mandatory employment arbitration of the same or similar types of claims (*e.g.*, New York, New Jersey and California), courts had held such state laws were preempted by the FAA. The Act creates a uniform method of regulating all agreements covered by the FAA by preventing employers from requiring pre-dispute arbitration of sexual assault and sexual harassment claims. The Act does not, however, forbid arbitration on other claims between employers and employees.

Once enacted, the Act would apply to “any dispute or claim that arises or accrues on or after the date of enactment of the Act.” This language makes clear that the Act is not retroactive in nature. It is still important to distinguish that even with an employee arbitration agreement in place prior to enactment of the new law, it appears that employee claims or disputes arising *after* enactment *would not be* arbitrable under the agreement.

The significance of this Act is likely to be felt by employers that have implemented mandatory pre-dispute arbitration programs requiring the employer and its employees to arbitrate most or all types of employment claims. Of course, some employees may still choose to voluntarily elect arbitration of *all claims* due to privacy and cost considerations, so an individualized assessment with respect to each current and new employee is recommended. Employers are advised to at least begin reviewing and updating their arbitration policies and arbitration agreement templates now, in anticipation of the Act's effective date. At a minimum, employers are advised to confirm that any current agreements with employees include language that carves out non-arbitrable claims under federal law or to consider revising such agreements. Prospectively, employers should consider revising language within arbitration agreements for new employees that specifically carves-out sexual assault and sexual harassment claims.

We will continue to monitor this matter and provide an update as soon as new information is available. If you need any assistance in revising your company's arbitration policies and arbitration agreements, we are available to assist.