Claims of Sexual Assault and Sexual Harassment Can No Longer Be Kept Out of Court Through Mandatory, Pre-Dispute Arbitration Agreements

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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 Act"), also referred to as the "#MeToo Act." This legislation provides that, with respect to claims for sexual assault and sexual harassment, pre-dispute mandatory arbitration agreements are invalid and unenforceable. Thus, even if a claimant signed a mandatory arbitration agreement, claims of sexual assault and sexual harassment can proceed to court.

Does this impact pending litigation or claims currently at the EEOC stage? No. The Act applies to any dispute or claim that arises or accrues on or after the date of enactment of the legislation.

Does an employer need to quickly revise its arbitration agreement to address this legislation? Probably not. Although the Act makes an agreement to arbitrate these claims invalid at the election of the claimant, it does not declare the use of any such agreement to be an act of discrimination or otherwise unlawful. But, if you are already planning an update to your arbitration agreement or program, it would be a good idea to consider specifically excluding these types of claims from the arbitration requirement.

Could the Act be construed to prohibit mandatory arbitration of some claims in litigation other than sexual assault and sexual harassment? Maybe. The Act invalidates pre-dispute arbitration agreements "with respect to a *case* which … relates to the sexual assault dispute or the sexual harassment dispute." What does "relate to" mean in this context? It is hard to say, but the Act may prevent compelled arbitration of other claims brought in the same lawsuit with a sexual harassment claim, particularly for claims like intentional infliction of emotional distress or negligent hiring/retention that often involve overlapping allegations.

Who decides what "related to" means here? The Act makes it clear that the court, not an arbitrator, will decide the validity of a pre-dispute arbitration agreement in cases where there are claims raised that relate to claims of sexual assault or sexual harassment.

Contact Chuck Lee or any member of our Labor & Employment practice group for help navigating this new law and how it will impact your company's class action waivers and mandatory arbitration agreements.