Ending Forced Arbitration of Sexual Harassment … and Other Employment Claims?

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In response to the #MeToo movement, which highlighted concerns that forced arbitration of sexual harassment claims in a private forum perpetuated such behavior and minimized consequences for perpetrators and employers, Congress passed the Ending Forced Arbitration of Sexual Harassment Act of 2021 ("EFAA"). The EFAA prohibits the enforceability of a "predispute arbitration agreement or predispute joint-action waiver . . . *with respect to a case*" that relates to a sexual assault or sexual harassment dispute (emphasis added).

Relying on EFAA's use of the word "*case*," the California Court of Appeal held in two cases that none of a plaintiff's claims can be compelled to arbitration if at least one of the claims asserted in the "case" is a sexual assault or sexual harassment claim, even if the other claims arise from conduct unrelated to the alleged sexual assault or sexual harassment. *Doe v. Second Street Corp.* and *Liu v. Miniso Depot CA, Inc.*

Doe v. Second Street Corp.

In February 2023, Doe sued her employer and two supervisors. Defendants moved to compel arbitration of the claims pursuant to the arbitration agreement and argued that the EFAA did not apply to the plaintiff's claims because most of the alleged sexual harassment occurred prior to the EFAA taking effect.

The lower court held: 1) the EFAA applied because Doe alleged an ongoing hostile work environment that continued after the EFAA took effect; and 2) the EFAA prohibits mandating arbitration of all of plaintiff's claims, not just those relating to the alleged sexual harassment. The appellate court affirmed.

Liu v. Miniso Depot CA, Inc.

In October 2023, Liu sued her former employer under various individual claims, including sexual harassment, misclassification, gender discrimination, and retaliation. The employer moved to compel arbitration based on the parties' arbitration agreement. The lower court denied the employer's motion on the ground that the plaintiff alleged sexual harassment in the same suit even it is not based on the same set of facts as her other claims. The court went even further to state that the EFAA does not require that a plaintiff sufficiently plead sexual harassment; so long as a plaintiff *alleges* sexual harassment, none of the claims may be compelled to arbitration. The appellate court similarly affirmed.

California’s deviation from prior federal cases

In *Mera v. SA Hospitality Group, Inc.*, a federal case from the Southern District of New York, the plaintiff brought both individual sexual harassment claims and representative wage and hour claims. The court held that the wage and hour claims did not “relate to” the sexual harassment dispute because they were not individualized to the plaintiff, and therefore, could be sent to arbitration.

The *Doe* court distinguished its case from *Mera* on the ground that unlike *Mera*, *Doe*’s case as a whole “relates to” the underlying sexual harassment dispute in that the same plaintiff asserted all the claims against the same defendants, and all claims arose out of *Doe*’s employment.

The *Liu* court simply declined to follow *Mera*, finding it unpersuasive in view of the EFAA’s unambiguous language. It noted that *Mera* is factually distinguishable from *Liu* due to the *Mera* plaintiff’s representative claims.

The Court of Appeal left unanswered whether the EFAA bars arbitration of unrelated wage and hour *class action* claims asserted in the same *case* as the plaintiff’s individual sexual harassment claim in California.

What does this mean going forward?

Prior to *Liu and Doe*, employers had the option to compel arbitration of non-sexual harassment claims and request a stay of the sexual harassment claim pending arbitration. Not only is this arguably no longer an option for employers litigating in California state courts, plaintiffs potentially can avoid otherwise enforceable arbitration agreements by simply including sexual harassment claims in their complaints.

If you have questions about defending against claims subject to the EFAA or how these rulings may affect your business, please contact a member of Kelley Drye’s Labor and Employment team.