The FAIR Act: A New Bill Banning Mandatory Arbitration Agreements

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Concerning the ongoing assault on mandatory arbitration agreements, we recently blogged about the passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (P.L. 117-89), colloquially the "MeToo" law. The MeToo law formally amended the Federal Arbitration Act ("FAA") to ban mandatory arbitration agreements for sexual assault and harassment claims. The MeToo law is "partially" retroactive: it bars mandatory arbitration of sexual harassment claims arising from conduct that occurred *after* the law went into effect, but not of claims where the alleged conduct occurred *before* the law's passage.

On March 17, 2022, a mere two weeks after the MeToo Law's passage, the U.S. House voted to advance the Forced Arbitration Injustice Repeal, or FAIR Act (H.R. 963), a bill which could effectively void *all* pre-dispute mandatory arbitration agreements in employment, antitrust, consumer and civil rights disputes as well prohibit waivers of joint, class, or collective action in such matters. So from an employment perspective, the FAIR Act, if enacted, would go far beyond the MeToo law's prohibition against arbitration of sexual harassment claims—it would bar mandatory arbitration of *all* employment-related claims.

Perhaps for that reason, the FAIR Act doesn't enjoy the same bipartisan support as the MeToo law, which has already been signed into law by President Biden. The FAIR Act passed the House on a 222-229 vote, essentially on partisan lines (with Democrats predictably in favor and Republicans predictably opposed). The FAIR Act has no Republican sponsors and has little traction in an evenly divided Senate. So it's far from clear that the FAIR Act will actually become law.

If it does, however, the FAIR Act will represent a radical departure from the way the FAA has worked since 1925. Aided by very favorable Supreme Court interpretations of the FAA, which broadly allow parties to agree to arbitration if they want to, mandatory arbitration agreements have been widely used by employers for decades. The FAIR Act would change all of that.

So, what should employers do?

First things first— if you use mandatory arbitration agreements that require arbitration of sexual harassment claims, those specific provisions are now unlawful under the MeToo law. You should work with employment counsel to amend them now.

Given that the FAIR Act is not yet law, you should use this time to consider what you would do if the law actually comes into effect. The FAIR Act would not be retroactive, meaning that if you have arbitration agreements in place now, they will still be enforceable. However, the FAIR Act could cast a much wider net than the MeToo Law, if the bill passes the Senate and is signed into law. If you've

been using mandatory arbitration agreements, the new risks to employers if the FAIR Act passes would include:

- No more mandatory arbitration of employment disputes. (Note that employers and employees could agree to arbitrate after a dispute arises, but it doesn't take much to imagine how that might go.)
- Critically—since the FAIR Act would bar mandatory arbitration in all employment claims—employers would no longer be able to rely on arbitration agreements that bar employees from pursuing class actions on behalf of larger groups of employees.

So what would that really mean? It would mean that employers could no longer use arbitration agreements as tools to reduce risk; instead, employers would have to reduce risk by actually auditing and fixing their wage payment policies, overtime practices, and exempt/nonexempt classifications, among other things. And when it comes to alleged discrimination or harassment, the best protection would be to reconsider and, if necessary, revamp internal policies and practices to encourage employees to raise complaints internally, in order to fix problems before they turn into formal legal disputes, rather than just inviting employees to sue.

Stay tuned for updates on the status of the FAIR Act on this blog. And, as always, working with outside counsel when assessing the impact of burgeoning laws is key to staying compliant and predicting risks. For individualized guidance on the FAIR Act and other developing laws, contact Kelley Drye & Warren LLP.