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Dust Off Your Template Employment Agreements

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February 23, 2022

Ed. Note: This article was updated to reflect President Joe Biden's recent signing of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 into law on March 3, 2022.

Mandatory Arbitration and Class Action Waivers for Sexual Harassment or Sexual Assault Prohibited In Any Pre-Dispute Agreement

We often encounter template employment agreements that have not been revised for years or even decades in practicing employment law. This can have a detrimental impact on the enforceability of employment agreements, particularly as it relates to non-compete, non-solicitation, and non-disclosure provisions because state laws (either judge-made laws or statutes) are constantly changing. In recent years, certain state laws have evolved to prohibit mandatory arbitration agreements relating to employment disputes.

Now, all employers, regardless of location, need to reexamine their employment agreements to determine the potential impact of the new federal law. On March 3, 2022, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act") into law, which immediately bars mandatory arbitration of disputes involving sexual assault or sexual harassment arising under state or federal law. While the Act applies to any and all agreements, this law most significantly impacts employment-related agreements.

Specifically, the Act prohibits:

1. Any agreement to arbitrate a sexual assault or sexual harassment dispute when such dispute has not yet arisen; and
2. Any agreement that would prohibit or waive one of the parties' rights to participate in a joint, class, or collective action concerning a sexual assault or sexual harassment dispute when such dispute has not yet arisen.

Key takeaways from the Act include:

- **The Act defers to state, federal, and tribal law.**
  Although the Act is a federal law applying to all individuals (and employers), the prohibitions are not limited to Title VII and extend to disputes arising under state and tribal laws. The Act defines sexual assault as a nonconsensual sexual act or sexual contact, as defined in 18 U.S.C. § 2246 (the federal law criminalizing sexual abuse) or similar applicable tribal or state law. The Act even more generally defines sexual harassment as conduct that is alleged to constitute sexual harassment under applicable federal,

tribal, or state law.

- **Agreement to waive a jury trial is not addressed** .
  The Act explicitly prohibits a pre-dispute waiver of participating in a joint, class, or collective action regarding a sexual assault or harassment dispute, suggesting that a pre-dispute agreement (i.e., an employment agreement) *could include* a provision waiving the parties' rights to seek a jury trial. **Note, however**, that North Carolina employers (and anyone in the state, for that matter) cannot require a jury trial waiver as part of any contract. (See N.C. Gen. Stat. § 22B-10)
- **Employers could keep *optional* arbitration clauses.**
  The Act states that the person alleging sexual abuse or sexual harassment may elect to deem mandatory arbitration or waiver of joint action provisions unenforceable. Thus, employers could modify their employment agreements to remove language mandating arbitration or waivers while allowing the employee to opt for arbitration.
- **Previously executed agreements are not exempt from the Act's prohibitions.**
  The Act applies to any dispute or claim that arises or accrues on or after the date of the Act's enactment. Accordingly, any mandatory arbitration clause or joint action waiver can be voided at the employee's option upon instituting a sexual assault or sexual harassment claim, regardless of when the underlying employment agreement was executed.

Practical considerations for employers:

- Employers should amend any employment agreement with a mandatory arbitration clause or joint action waiver provision.
- Although the text of the Act suggests that the entire agreement will not be invalid or unenforceable due to the inclusion of a prohibited provision, employers should be proactive in modifying the enforcement provisions. Specifically, since arbitration will be voidable by the person seeking a sexual harassment or sexual assault claim, the agreement should include court venue provisions relating to such claims.
- Employers could choose to simply add a provision clarifying that the mandatory arbitration and/or joint action waiver clause does not apply to sexual harassment or sexual assault claims. However, employers should consider whether keeping such provisions will be more of a hurdle in the long run. Consider the following:
  - Arbitration is a private, binding process that does not involve any court or public judicial system, which can be very beneficial to employers in having more control over the litigation process.
  - There also are potential downsides to arbitration for employers, such as substantial administrative and arbitrator's fees that are paid in full by the employer under some arbitration rules; risk that the employee will litigate the enforceability of the mandatory arbitration provision; reluctance of arbitrators to grant dispositive motions thus allowing the matter to move forward to hearing; the possibility of having arbitrators with less experience with or less tendency to accept procedural defenses such as statutes of limitations or to reject evidence-based on relevancy or hearsay; and the very limited ability to succeed on appeal of an arbitration decision.
  - Private arbitration does not prohibit administrative agencies (such as the Department of Labor or the Equal Employment Opportunity Commission) from investigating and suing employers.
- To carry out modifications to employment agreements, whether through a new agreement or an amendment, employers must ensure they are providing adequate consideration to form a valid contract. This varies based on state law, but North Carolina employers should note that executing any new agreement with restrictive covenants (i.e., non-competes), or amending an agreement's restrictive covenants, requires consideration beyond continued employment.

Employers should consult with legal counsel on what changes should be made, if any, to your employment

agreements. After all, the law changes nearly every day!

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