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2019: A Year of Dramatic Changes for Mandatory Employment Arbitration

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2019: A Year of Dramatic Changes for Mandatory Employment Arbitration?

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Overview

- The Federal Arbitration Act's key provisions for employers
- How the #MeToo movement has affected public opinion on mandatory arbitration
- Efforts by state legislatures to curb mandatory arbitration
- Best practices for employers in 2019 and beyond

Arbitration Agreements Considerations

- Pros of Arbitration for Employers
  - Avoiding class and collective proceedings
  - No juries (runaway jury and extreme verdicts)
  - Confidentiality
  - May act as deterrent to plaintiffs' attorneys
- Cons of Arbitration for Employers
  - Adjudicate multiple individual claims
  - Dispositive motions unlikely and compromise likely
  - Disputes over arbitrability and drafting
- Speed, fairness, overall cost, discovery?

The Federal Arbitration Act

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2

The Federal Arbitration Act (Cont.)

Notable exceptions to coverage under the FAA:

- "[N]othing contained herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." – 9 U.S.C. § 1

- Arbitrations arising out of a collective bargaining agreement

The Federal Arbitration Act (Cont.)

Establishes a framework for federal court procedures to ensure enforcement of arbitration pacts:

- Authority to stay proceedings – 9 U.S.C. § 3
- Authority to compel arbitration – 9 U.S.C. § 4
- Appointment of arbitrators – 9 U.S.C. § 5
- Compelling witnesses – 9 U.S.C. § 7
- Procedures for the confirmation, modification, or vacatur of awards – 9 U.S.C. § § 9, 10, 11

The Federal Arbitration Act (Cont.)

SCOTUS has consistently enforced the FAA in favor of mandatory arbitration of employment claims:

- *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)*
  - Federal and state discrimination claims are arbitrable
- *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)
  - Arbitration agreements may only be invalidated based on applicable contract defenses, such as fraud, duress, and unconscionability
- *Epic Systems Corp. v. Lewis,* 138 S.Ct. 1612 (2018)
  - Under FAA, precluding class claims does not violate the NLRA
- *Lamps Plus Inc. et al. v. Varela*, 139 S. Ct. 1407 (2019)
  - Class arbitration must be explicitly authorized; silence or ambiguity is not a sufficient basis to permit class arbitration to proceed

#MeToo Movement

- Movement originated in 2006
- In October of 2017, #MeToo became a force on social media
- By the end of 2018, #MeToo media headlines became prevalent with public allegations against public figures in media and government and at various levels of corporations

#MeToo Movement (cont.)

As #MeToo continued to make headlines, striking statistical data showed the extent of the issue:

- A 2018 Pew Research Center survey found that 59% of women say they have received unwanted sexual advances or experienced sexual harassment

- A 2017 Gallup Poll survey found that 69% of adults (and 73% of women) viewed sexual harassment as a “major problem” in the workplace

- The EEOC reported a 12% increase in sexual harassment claims

#MeToo and Workplace Arbitration

- FAA was enacted to reverse judicial hostility to arbitration
- In the wake of #MeToo, the attention of public opinion turned on the "private" nature of arbitration and its perceived "silencing" of victims:
  - December of 2017, Microsoft announced that it eliminated mandatory arbitration of sexual harassment claims
  - May of 2018, Uber and Lyft announced they would no longer mandate arbitration of sexual harassment claim
  - November 2018, Google, Facebook and eBay eliminated mandatory arbitration of sexual harassment claims

#MeToo (Cont.)

- In the wake of #MeToo, the attention of public opinion turned on the “private” nature of arbitration and its perceived “silencing” of victims:
  - November 2018, Airbnb ended mandatory arbitration for all discrimination claims
  - February of 2019, Google ended mandatory arbitration for all workers’ claims

State Legislatures React to #MeToo

- Many state legislatures reacted to #MeToo with broad legislation intended to curb sexual harassment in the workplace

- A handful of states have enacted prohibitions of arbitration of sexual harassment and other types of discrimination or retaliation claims

State Legislatures (Cont.)

Washington State:

"A provision of an employment contract or agreement is against public policy and is void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a cause of action arising under chapter 49.60 RCW or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies, or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential."

RCWA 49.44.085, Effective June 7, 2018

State Legislatures (Cont.)

Vermont:

"An employer shall not require any employee or prospective employee, as a condition of employment, to sign an agreement or waiver that does either of the following: . . . except as otherwise permitted by State or federal law, purports to waive a substantive or procedural right or remedy available to the employee with respect to a claim of sexual harassment . . .

Any provision of an agreement that violates . . . this subsection shall be void and unenforceable."

21 V.S.A. 495h, Effective July 1, 2018

State Legislatures (Cont.)

Maryland:

"Except as prohibited by federal law, a provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment is null and void as being against the public policy of the State . . . An employer may not take adverse action against an employee because the employee fails or refuses to enter into an agreement that contains a waiver that is void under subsection (a) of this section."

MD Code, Labor and Employment, 3-715, Effective October 1, 2018

State Legislatures (Cont.)

New Jersey:

“A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.”

N.J.S.A. 10:5-12.7, Effective March 18, 2019

State Legislatures (Cont.)

New York:

"The term "prohibited clause" shall mean any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination, in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law . . .

. . . Except where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause . . . ."

NY CPLR 7515, Effective October 11, 2019

State Legislatures (Cont.)

Illinois:

"Any agreement, clause, covenant, or waiver that is a unilateral condition of employment or continued employment and requires the employee or prospective employee to waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit related to an unlawful employment practice to which the employee or prospective employee would otherwise be entitled under any provision of State or federal law, is against public policy, void to the extent it denies an employee or prospective employee a substantive or procedural right or remedy related to alleged unlawful employment practices, and severable from an otherwise valid and enforceable contract under this Act."

Public Act 101-0221 (Workplace Transparency Act) (Effective January 1, 2020)

State Legislatures (Cont.)

California:

"A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act . . . or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation . . ."

AB 51 (Effective January 1, 2020)

FAA Preemption of State Laws?

Latif v. Morgan Stanley & Co., et al., 2019 WL 2610985 (SDNY June 26, 2019)

- On July 11, 2018, New York prohibited arbitration of sexual harassment/discrimination claims

- Latif, a former Morgan Stanley employee, reported inappropriate sexual conduct and, months later, was fired in or around August 1, 2018

- Latif filed a lawsuit on December 10, 2018, alleging a host of federal and state claims against Morgan Stanley

FAA Preemption (cont.)

Latif

- Defendants moved to compel arbitration of sexual harassment claim, raising legal question of whether FAA preempts New York law

- District Court held the law preempted by the FAA, stayed Latif's lawsuit, and compelled arbitration

- Latif appealed the decision to the Second Circuit on July 25, 2019; Morgan Stanley and other appellees moved to dismiss the appeal

FAA Preemption (cont.)

Latif – Key Takeaways

- Only current case to address the question of FAA preemption of state laws banning arbitration
- Key provision in Morgan Stanley's arbitration agreement: the agreement shall be governed by the FAA
- Agreement at issue in *Latif* was not subject to FAA exceptions, and was not subject to invalidation under ordinary contract principles

Mandatory Arbitration – Federal Action

- H.R. 1423 – FAIR Act
  - Introduced February 2019
  - Would prohibit mandatory arbitration of "employment disputes"; as well as class/collective action waivers
  - Received in Senate September 2019

- H.R. 2148 – BE HEARD in the Workplace Act
  - Introduced April 2019
  - Would bar mandatory arbitration of a "work dispute"
  - Not yet received in Senate

Best Practices for Employers?

Continue to monitor legislative efforts:

- *Latif* as leading case on State legislative efforts to curb mandatory arbitration
- Neither Federal bill is likely to advance out of Senate, but November 2020 elections could change calculus

Best Practices for Employers?

Consider the types of claims prevalent in the workplace

- Wage and hour
- Breach of contract
- Discrimination, harassment, retaliation
- State whistleblower

Evaluate whether arbitration is desired forum

Determine whether state law bans arbitration of certain claims and consider FAA pre-emption arguments

Best Practices for Employers?

If desire to continue mandatory arbitration program, revise agreements

- Address FAA pre-emption
- Consider carving out claims that cannot be subject to mandatory arbitration in applicable jurisdictions
- Ensure agreement contains all other required elements

Questions?