PROGRAM MATERIALS
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#MeToo Takes a Bite Out of Arbitration

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What We Will Cover

- (1) How did we get here?
- (2) Pre-existing Applicable Law
- (3) What is the new state of the law?
- (4) How will courts manage lawsuits containing arbitrable and non-arbitrable claims?
- (5) What does this mean for future employment lawsuits where only some claims are subject to EFAA Exclusions?

How Did We Get Here?

- In recent years, legislators on each end of the aisle have become attuned to the societal focus on mistreatment tied to sex and the desire for a growing number of their constituents to bring to light certain egregious practices.

- Prominent advocates who have worked with lawmakers on this issue include former Fox News anchor, Gretchen Carlson, who made headlines when she successfully circumvented her arbitration agreement in her sexual harassment lawsuit stemming from her work at Fox News. (https://conferences.shrm.org/presenter/gretchen-carlson)

Pre-Existing Applicable Law

- Employees typically enter arbitration agreements at the outset of employment and, generally, courts favor their enforcement.
  - The FAA provides "a written agreement 'to submit to arbitration an existing controversy arising [from such agreement] … shall be valid, irrevocable, and enforceable …." Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Georgia, Inc., 995 F. Supp. 2d 587, 608 (N.D. Tex. 2014) (quoting 9 U.S.C. § 2)).

PRE-EXISTING APPLICABLE LAW II

- "Section 2 evidences a liberal federal policy favoring arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1742, 179 L. Ed. 2d 742 (2011).

- Section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983).

- See also, *Texaco Exploration and Prod. Co. v. AmClyde Engineered Prod. Co., Inc.*, 243 F.3d 906, 909 (5th Cir.2001) (reasoning the Supreme Court has made it clear the Federal Arbitration Act establishes a "liberal policy favoring arbitration" and a "strong federal policy in favor of enforcing arbitration agreements."

PRE-EXISTING APPLICABLE LAW III

- The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."

- *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3-4))(emphasis in original).

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What is the New State of the Law?

- Enacting of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

- https://www.congress.gov/bill/117th-congress/house-bill/4445/text

What is the New State of the Law II

- The EFAA itself amends the Federal Arbitration Act ("FAA") to provide:
  - "[N]o predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."
  - 9 U.S.C. § 402(a)

What Does it Mean?

- Effectively, the EFAA prohibits compulsory arbitration of sexual harassment or civil sexual assault cases arising from workplace conduct. Instead, the EFAA gives the employee the choice to go to court to pursue these specific claims despite the existence of an overarching agreement to arbitrate all claims.

What Qualifies as "Sexual Assault Dispute" for the EFAA

- Sexual Assault Dispute means "a dispute involving nonconsensual sexual act or sexual contact, as such terms are defined by section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent." 9 U.S.C. § 401(3)

- 18 U.S.C. § 2246 – main criminal code of the federal government of the United States
  - Federal crimes and criminal procedure

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What Qualifies as "Sexual Harassment Dispute" for the EFAA

- Sexual Harassment Dispute means "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State Law."

- 9 U.S.C. § 401(4)

"Sexual Harassment" Federal Law

- 29 C.F.R. § 1604.11
  - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
    - (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
    - (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
    - (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

How will Courts Manage Lawsuits – Arbitrable and Non-Arbitrable Claims

- Federal Arbitration Act (9 U.S.C. § 3, et. seq.)

  – When lawsuits contain claims that are both arbitrable and non-arbitrable, the FAA requires a stay of the arbitrable claims in the trial court while those arbitrable claims proceed to arbitration. *KPMG, LLP v. Cocchi*, 565 U.S. 18, 22 (2011).

What Happens to the Non-Arbitrable Claims?

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Trial Court Discretion

- Current Fifth Circuit law recognizes a trial court's discretion to also stay the remaining non-arbitrable claims pending adjudication of the arbitrable claims in arbitration. Courts undertaking this consideration determine whether:
  - (1) the arbitrable and non-arbitrable claims involve the same operative facts;
  - (2) the arbitrable and non-arbitrable claims are "inherently inseparable"; and
  - (3) the litigation would have a "critical impact" on the arbitration.
    - *Rainer DSC 1, L.L.C. v. Rainter Capital Mgmt., L.P.*, 828 F.3d 356, 360 (5th Cir. 2016)
- The crux of the inquiry centers on "whether proceeding with litigation will destroy . . . the right to a meaningful arbitration." *Waste Mgmt., Inc. v. Residuos Industriales Multiquim, S.A. de C.V.*, 372 F.3d 339, 343 (5th Cir. 2004).

FUTURE LAWSUITS

- A recent case from the Northern District of Texas, *Vuoncino v. Forterra, Inc. et al.*, No. 3:21-CV-01046-K, 2022 WL 868274 (N.D. Tex. Feb. 28, 2022)

- Provides some guidance as to how courts may determine the issue of whether to stay non-arbitrable claims subject to the EFAA when there are arbitrable claims in the same lawsuit.

WHAT HAPPENED IN *FORTERRA*?

- The Forterra case involves a dispute with multiple claims that are subject to an arbitration agreement, as well as a non-arbitrable retaliation claim under the Sarbanes-Oxley Act ("SOX").

- Like the EFAA's sexual harassment and sexual assault arbitration exclusion, SOX retaliation claims are expressly exempt from predispute arbitration agreements, 18 U.S.C § 1514A(e)(2).

Forterra Reasoning

- In Forterra, the Northern District refused the defendants' request to stay the SOX retaliation claim and allowed the plaintiff to pursue that SOX claim concurrently in court while the parties arbitrated the remaining claims in arbitration.

Forterra Reasoning II

- Even though the underlying facts giving rise to the SOX claim and were similar to some of the facts giving rise to the arbitrable claims, the *Forterra* Court reasoned that the plaintiff's interest in having a direct path to court for his SOX claim outweighed the defendants' interest in enforcing their right to "meaningful arbitration." Critical to that decision was SOX's explicit arbitration exclusion language, which is similar to the arbitration exclusion of the EFAA.

Forterra Reasoning III

- Because the EFAA extends to any state law relating to sexual assault or sexual harassment, employers whose arbitration agreements are subject to the FAA will not evade the EFAA's exclusions where plaintiffs pursue claims under the state law corollary statutes or torts.

ANOTHER APPROACH

- *Endresen v. Banc of California, Inc.*, No. SACV1800899CJCDFMX, 2018 WL 11399501, at *4 (C.D. Cal. Sept. 20, 2018)

  – Like *Forterra*, plaintiff asserted a number of different claims (8 in total), including a SOX retaliation claim that precludes arbitration

  – Plaintiff conceded SOX retaliation is not arbitrable but asked the Court to stay it pending arbitration disposition

ANOTHER APPROACH II

- "[T]he power to stay proceedings is incidental to the power inherent in every court to control disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

- Power to stay proceedings requires discretion and weighing of competing interests. Among those interests are "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay."

ANOTHER APPROACH III

- "The circumstances here warrant a stay of proceedings on Plaintiff's SOX claim until the resolution of arbitration on Plaintiff's non-SOX claims. Plaintiff herself characterizes the seven non-SOX claims as intertwined with her SOX claim."
  - "Judicial economy and efficiency."
  - "Avoid duplication of effort as Plaintiff's claims proceed on separate tracks."
  - "Plaintiff's seven non-SOX claims predominate over her one SOX claim."
  - "Staying the case on Plaintiff's SOX claim avoids inconsistent results."
  - "This employment dispute is also the kind of controversy that is well-suited to arbitration's informal and expeditious proceedings."

Other Case Citing EFAA

- *Guc v. Raymours Furniture Co., Inc.*, A-3452-20, 2022 WL 729539, at *5 (N.J. Super. Ct. App. Div. Mar. 11, 2022)

- Reduced to a footnote reference – did not address the underlying issues of the EFAA

Moving Forward

- Regardless of the venue, the *Forterra* decision and its line of reasoning should alert employers with mandatory arbitration agreements that they face a real possibility of concurrent, bilateral litigation and arbitration of lawsuits involving non-arbitrable sexual harassment or assault and claims subject to an arbitration agreement.

- It is unlikely this Congress will make any further effort to amend the FAA. However, any significant change to the legislature following this year's midterm elections could lead to further efforts to chip away at the FAA.

QUESTIONS?

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