THE ENDING FORCED ARBITRATION ACT – WHAT EMPLOYERS SHOULD KNOW

Background

Since the onset of the 2017 #MeToo movement, lawmakers have worked to implement legal reform related sexual assault and sexual harassment in the workplace. On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("The Act") into law. The Act amends the Federal Arbitration Act and gives individuals asserting sexual assault or sexual harassment claims under federal, state or tribal law the option to bring those claims in court even if they had previously agreed to arbitrate such claims.

Key Takeaways

- **Effective Date:** The Act applies to all sexual assault or harassment claims that "arise or accrue" after March 3, 2022, regardless of when the parties entered into an arbitration agreement. The Act does not affect claims premised on events that occurred prior to March 3, 2022.

- **Impact:** The Act specifies that the enforceability of predispute arbitration provisions and class- and collective-action waivers is "at the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct...." Arbitration agreements are therefore not per se invalid, but an individual bringing a sexual assault or sexual harassment claim can decide to revoke such agreements. Theoretically, the parties can choose to enter into an arbitration or class- and collective-action waiver agreement after the claim has been raised but that seems unlikely to actually occur.

- **The Act further provides:** "[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." It is unclear (and will likely be heavily litigated) whether the option to avoid predispute arbitration or class- or collective-action waivers applies only to sexual assault or sexual harassment claims or to all claims at issue in a case.

- **Enforceability:** Any disputes regarding the Act, including the arbitrability of a claim, must be decided by the courts. This will be the case even if an arbitration agreement gives an arbitrator the power to determine enforceability.

Next Steps for Employers

As discussed above, claimants still can elect to use the arbitration process they previously agreed to and abide by a class-action waiver voluntarily. Therefore, there is no need to for employers to immediately revise their arbitration agreements.

Still, employers may want to consider whether they want to amend their agreements to expressly exclude sexual assault or sexual harassment claims from arbitration. Employers may also want to consider including language in their arbitration agreement requiring that such exempted claims be severed from other arbitrable claims and stayed pending completion of arbitration on the claims that are subject to arbitration.

We expect employers will be further restricted in their use of mandatory arbitration agreements or class and collective action waivers in the employment law arena. President Biden noted in the Statement of Administrative Policy on the Act that his administration plans to work with Congress to address broader legislation on other "forced arbitration" matters involving race discrimination, wage theft and unfair labor practices. We will closely monitor such developments and provide ongoing updates.