New Federal Statute Regarding Arbitration of Sexual Assault and Sexual Harassment Cases

—

by Robert. B. Fitzpatrick
rfitzpatrick@robertbfitzpatrick.com
(202) 558-8084

Biography

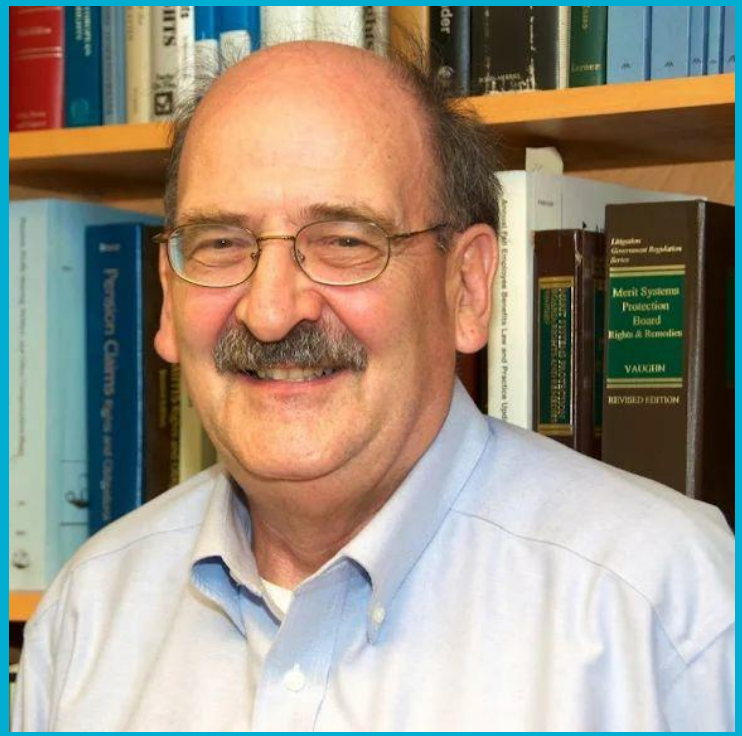
Robert (“Bob”) Brian Fitzpatrick is the principal in the law firm of Robert B. Fitzpatrick PLLC in Washington, D.C. where represents clients in employment law matters. Mr. Fitzpatrick has concentrated his practice in employment law disputes for more than fifty years. He has represented clients in individual and class actions. He has represented clients in employment discrimination, workplace harassment, retaliation, age discrimination, FMLA, ADA, whistleblower, wrongful termination, non-compete, trade secrets, Computer Fraud and Abuse Act, and wage and hour claims, among others. He counsels numerous executive clients regarding employment agreements and compensation issues. He has negotiated literally thousands of severance agreements. He is also a frequent speaker on employment law topics, and has written countless articles on employment law, a few of which can be found on his blog, Fitzpatrick on Employment Law. Prior to entering private practice, Mr. Fitzpatrick served as a staff attorney in the Jackson, Mississippi office of the Lawyers’ Committee for Civil Rights Under Law in the late 1960’s; as a staff attorney in the Office of General Counsel of the Equal Employment Opportunity Commission in the early 1970’s; and with the Washington Research Project (now the Children’s Defense Fund) training minority attorneys in the Deep South to litigate employment discrimination cases. He has been in private practice in Washington, D.C. since 1970. He is an avid hiker and kayaker. He is a Fellow of the College of Labor & Employment Lawyers, having been inducted as a Fellow at the first annual induction ceremony in 1996. He has been listed as one of The Best Lawyers in America® for at least 25 continuous years.He is admitted to practice in all courts of the District of Columbia (Superior Court, D.C. Court of Appeals, and the Federal District Court of the District of Columbia), the Federal District Court for Maryland, the Federal District Court for the Northern District of Mississippi, the Supreme Court of the United States, the Federal Circuit, the Court of Federal Claims, and the United States Courts of Appeals for the District of Columbia as well as the Fourth and Sixth Circuits.

Disclaimer of Liability and Responsibility

THE INFORMATION CONTAINED HEREIN IS BASED UPON SOURCES BELIEVED TO BE ACCURATE AND RELIABLE—INCLUDING SECONDARY SOURCES. DILIGENT EFFORT WAS MADE TO ENSURE THE ACCURACY OF THESE MATERIALS, BUT THE AUTHOR ASSUMES NO RESPONSIBILITY FOR ANY READER'S RELIANCE ON THEM AND ENCOURAGES READERS TO VERIFY ALL ITEMS BY REVIEWING PRIMARY SOURCES WHERE APPROPRIATE AND BY USING TRADITIONAL LEGAL RESEARCH TECHNIQUES TO ENSURE THAT THE INFORMATION HAS NOT BEEN AFFECTED OR CHANGED BY RECENT DEVELOPMENTS.

THIS PAPER IS PRESENTED AS AN INFORMATIONAL SOURCE ONLY. IT IS INTENDED TO ASSIST READERS AS A LEARNING AID; IT DOES NOT CONSTITUTE LEGAL, TAX, ACCOUNTING OR OTHER PROFESSIONAL ADVICE. IT IS NOT WRITTEN (NOR IS IT INTENDED TO BE USED) FOR PURPOSES OF ASSISTING CLIENTS, NOR TO PROMOTE, MARKET OR RECOMMEND ANY TRANSACTION OR MATTER ADDRESSED; AND, GIVEN THE PURPOSE OF THE PAPER, IT MAY OMIT DISCUSSION OF EXCEPTIONS, QUALIFICATIONS, OR OTHER RELEVANT INFORMATION THAT MAY AFFECT ITS UTILITY IN ANY LEGAL SITUATION. THIS PAPER DOES NOT CREATE AN ATTORNEY- CLIENT RELATIONSHIP BETWEEN THE AUTHOR AND ANY READER. DUE TO THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THIS PAPER MAY BECOME OUTDATED. IN NO EVENT WILL THE AUTHOR BE LIABLE FOR ANY DIRECT, INDIRECT, CONSEQUENTIAL, OR OTHER DAMAGES RESULTING FROM AND/OR RELATED TO THE USE OF OR RELIANCE UPON THIS MATERIAL.

rfitzpatrick@robertbfitzpatrick.com



On March 3, 2022, the President signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

- The House of Representatives passed it by a vote of 333-97
- The Senate passed it unanimously in a voice vote
- The new law is an amendment to the federal arbitration act
- Statement of Administration Policy
- EFAA: Vice President Harris' Remarks
- The new law does not ban arbitration of sexual harassment cases, but rather provides that arbitration or litigation are optional

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

- The actual text of the statute is here.
- The Act expressly prohibits mandatory agreements and pre-dispute waivers. The Act applies to claims or disputes after March 3, 2022. Specifically, the Act states, in relevant part:

  [A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no 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.

- The Act defines sexual assault by reference to the federal code and can be found here.

Effective Date

- March 3, 2022
- Does the sex harassment claim arise or accrue before or after March 3rd?
- *Zuluaga v. Altice USA* (Nov. 29, 2022)
- Fox News Case to Test New Arbitration Law's Retroactive Reach

Sexual harassment and sexual assault

- The Act only applies to sexual harassment and sexual assault, and does not apply, for example, to racial harassment.
- In light of *Bostock*, same-sex harassment would presumably considered to be sexual harassment.
- Also, presumably harassment against a gay individual would be considered to be sexual harassment.
- And, a male who claims that he was sexually harassed would be covered by The Act.
- What if the person allegedly harassed claims that the harassment was because of both gender and race, that is, an intersectional claim? See here.

Collective Bargaining Agreement

- Are there circumstances where the individual claiming sexual harassment would have to pursue their remedies under the Collective Bargaining Agreement?
- If so, would an adverse arbitration decision under the Collective Bargaining Agreement preclude their pursuit of a claim in court?

Employment Agreement

- Can there be an employment agreement that mandates that any litigation be in a specified venue; that waives jury trial; and shortens the statute of limitations?
- The courts are split regarding jury trial waivers. See here; here.
- And, the courts are split as to whether the statute of limitations can be shortened by agreement. See e.g. *Logan v. MGM Grand Detroit Casino* (6th Cir., September 25, 2019); *McMillon v. City of Kalamazoo Michigan Supreme Court* (January 11, 2023); "Time's Up: Against Shortening of Statutes of Limitation by Employment Contract" (Draft) (Villanova Law Review)

Mediation as a precondition to litigation

- "A Mediation Provision Is a Condition Precedent to Litigation" (ABA)
- *MB America, Inc. v. Alaska Pac. Leasing*, 367 P. 3d 1286 (Feb. 4, 2016)
- "Are Contractual Mediation Condition Precedent Provisions Enforceable?" (Savitt, Bruce & Willey LLP)

The role of the Court

- Even if there is a delegation to an arbitrator, The Act requires that the Court decide all threshold questions.
- For example, only the Court can decide whether the plaintiff claims sexual harassment. And, as The Act uses the term “claims”, it is not at all clear whether the Court’s decision only has to be the denial of a motion to dismiss or whether it has to be a denial of summary judgment.

Pseudonymous Litigation

- Many alleged victims of sexual harassment attempt to pursue their claim anonymously as a Doe plaintiff.
- Rule 10(a) of the Federal Rules of Civil Procedure sets forth the conditions that a court is to consider in deciding whether the plaintiff can pursue the case anonymously. See here; here.
- While many sex harassment cases proceed without disclosure to the public of the plaintiff's identity, many courts refuse to allow the plaintiff to so proceed. Eugene Volokh has written extensively on this subject and has collected authorities. See here; here. See also here.

Exhaustion of administrative remedies

- Many courts have held that exhaustion of administrative remedies is not a pre-condition to arbitration. See e.g. Exhaustion of Administrative Remedies Does Not Apply in Arbitration of Employment Claims.
- But, exhaustion, while not jurisdictional, is a pre-condition to litigation if raised on a timely basis by the defense. See *Fort Bend County, Texas v. Davis*.

State sex harassment laws

- Some state statutes define sex harassment more broadly than the courts do under the federal statute.
- Some state statutes also have longer statutes of limitation and also cover employers not otherwise covered by the federal law.
- The Act allows those who claim sex harassment to opt to litigate under state law.
- The Act refers to “state” law, does that preclude pursuit of a claim under a municipal or county statute?

Arise/accrue

- The Act uses in its last section the terms “arise” and “accrue”. Are these terms synonymous or not? At least one court, the Maryland Court of Appeals, has held that the terms have quite different meanings. See *Duffy v. CBS Corp.*, (March 28, 2018).
- “Accrue? Arise? What’s the difference? Why does it matter?” (DeCaro Doran, May 15, 2018)

Accrual

- “Rivian wants to force arbitration in sexual harassment case, despite new law prohibiting it” (WGLT)
- “Continuing Violation Doctrine Held Inapplicable in Title VII Sexual Harassment Case” (Pospis Law, LLC)
- kennedy v. bernard western district of ny

Preemption

- "State Legislation Precluding Compelled Arbitration in Sexual Harassment Claims and the FAA" (ABA)
- *Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985 (S.D.N.Y., June 26, 2019)
- "New Jersey Judge Rules Federal Law Does Not Preempt State Law Prohibiting Compelled Arbitration in Sexual Harassment Cases" by Alan Schorr
- "NJ Court Ruling Signals End to FAA Preemption of NJ's Arbitration Ban for Sex Discrimination Claims" (Gebhardt & Kiefer, P.C.)
- *Sellino v. Galiher* (May 25, 2022)

Sprinkling

- What if the references to sexual harassment are simply “sprinkled” throughout the complaint, but the claim asserted is not sexual harassment, but gender discrimination?
- LINK: David Woolf of Faegre Drinker article Comments on EFAA (March 15, 2022)

The best defense is a culture change

- Linked here; here; and here are some sex harassment policies for your consideration.
- How the investigation by management is conducted can be critical. See here; here; here; here.
- Leadership from the top can go a long ways toward creating the proper culture.

Factors for the claimant to consider

- The possibility of a Rule 35 mental exam.
- Discovery of documents and a deposition.
- Jury trial.
- How long a court case can last as compared to arbitration.
- Any difference in cost.

Bifurcation or not

- As The Act talks in terms of a “case”, claimants will undoubtedly argue that any case with a sex harassment claim in its entirety would not be subject to arbitration at the claimant’s option.
- We can expect the defense to file simultaneously motions to sever and Section 4 of the Federal Arbitration Act motions to compel.
- As The Act also refers to “related” claims, potentially the claimant will have the option to litigate sex harassment claims and related claims, but not unrelated claims.

The Act is not limited to employers

- A customer, a contractor, a vendor, and a patient would be subject to The Act.
- A student and the educational institution covered by Title IX would also be covered by The Act.

Consent

- The Act in referring to sexual assault, also refers to consent. RAINN has an excellent compilation of state laws dealing with the issue of consent.
- There have been a number of sexual assault cases against Uber and Lyft. Those cases would be covered by The Act.

Continuing violation

- The Supreme Court in *National Railroad Passenger Corp. v. Morgan*, (2002), held that a hostile work environment claim of sexual harassment is a cumulative claim and the Continuing Violation Doctrine applies.
- In the early years of this new act, there will be disputes as to whether discreet acts have precluded the use of Continuing Violation Doctrine. See, e.g., *Willis v. City of Carlsbad*, (April 22, 2020); *Kennedy v. Bernhardt*, (Dec. 16, 2020).

Statute of limitations

- Depending on whether the controversy in a deferral state, the Title VII Statute of Limitations would be 180 or 300 days.
- The states have different statutes of limitations. For example, New Jersey’s is two years and D.C.’s is one year.
- Title IX adopts the applicable state statute of limitations.

The Anti-Commandeering Doctrine

- “The Anti-Commandeering Doctrine in Civil Rights Litigation” by Charlotte Butash
- “Amdt10.2.4.1 Tenth Amendment: Commandeering Prohibitions” (Cornell Law School)
- “The Anti-Commandeering Doctrine: An Introduction” (10th Amendment Center)
- “State Judiciaries and the Anticommandeering Doctrine” (The Federalist Society)
- “On this day, the Supreme Court reinforces the 10th Amendment” (National Constitution Center)
- “The Supreme Court Bets Against Commandeering: Murphy v. NCAA, Sports Gambling, and Federalism” (Congressional Research Service)

Further Reading

- “#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: in the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021” by Imre S. Szalai (Northwestern Journal of Law and Social Policy)
- “Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not be Subjected to Arbitration Proceedings” by Matthew DeLange (The Journal of Gender, Race & Justice)
- “The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act” by David Horton (The Yale Law Journal, June 23, 2022)

Analysis

- “Ending Forced Arbitration of Sexual Assault and Sexual Harrasment Act Signed Into Law” Holland & Knight (March 16, 2022)
- “The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act” The Yale Law Journal (June 23, 2022)
- “5 Key Takeaways for Employers as #MeToo-Inspired Bill to Limit Arbitration of Sexual Harassment Claims Passes House with Bipartisan Support” Fisher Phillips (February 9, 2022)

Bakrac, Inc. v. Villager Franchise Sys., Inc., (11th Cir. 2006)

Parsons v. Associated Banc-Corp., (2017)

Brown v. Cushman & Wakefield, Inc., 235 F. Supp. 2d 291 (S.D.N.Y. 2002) and *Bedford, Freeman & Worth Publishing Group* -2004 US Dist LeXiS 24153 (SD NY 7:22/04

Texas-2004 WL 1966015 (Texas Sup Ct 2004)

5. Nebraska-DAB Inc v Sunbelt Rentals

6. Penn.-Beach v Berns Int'l Self Services-593 A2d 1285 (Pa Superior Ct 1991)and Aamco Trans Inc v Harris-1990 Us Didt LEXIS 7387 (ED Pa 1990)

7. Duquesne Business Law Journal , vol 8 at page 55-the enforceability of Pre-dispute Jury Waiver Agreements in Employment Discrimination Cases

Questions

1. Does the new law only apply to claims that accrue after the president signs it? The term “accrual” may have a different meaning under state law.
2. What if the individual has both sexual assault and sexual harassment claims as well as other claims not addressed by the statute? Are they all potentially not subject to arbitration or do we have two proceedings?
3. Can the Congress dictate to Native Americans what is to be tribal law?
4. What effect does the new law have on collective bargaining agreements that are governed by Section 301 of the LMRA?
5. Can churches, whose priests are accused of sex abuse, demand that these cases go to arbitration?
6. Under the new Act, the Court is to decide whether the predicate of sexual assault or sexual harassment has been established. Can the Court decide this at the dismissal stage or only at the summary judgement stage?

Questions II

7. Can arbitration agreements be voided if they do not emphasize that the individual has an option as to whether or not to go to arbitration?
8. Are jury trial waivers permissible? Must they be knowing and voluntary or knowing and intentional? Some states may prohibit such waivers entirely. Who has the burden to establish an effective waiver.
9. As the new Act uses the term “individual” rather than “employee”, does it apply to, for example, customers, patients, vendors, and contractors?
10. Should a revised agreement have a severability clause?
11. The new Act only refers to state laws and thus one wonders if it applies to county and municipal sexual assault and sexual harassment laws?
12. State laws may more broadly define what constitutes sexual harassment, and presumably that definition would be applicable.

Questions III

13. Can the employer and employee by contract agree that mediation is a condition precedent to the filing of a lawsuit?
14. Can the employer place pre-conditions on a lawsuit for sexual harassment?
15. Can the employer require a new employee to agree at onboarding to a pre-dispute waiver of jury trial?
16. What if the plaintiff files a multi-count lawsuit that includes claims of sexual harassment and other claims?
17. Does the new statute apply to arbitration under collective bargaining agreements?
18. What does the new law mean when it states that whether it applies to a dispute shall be determined “under” federal law?

Questions IV

19. Is the new law constitutional insofar as it applies to the states?
20. Should employers redraft arbitration agreements to provide that all sexual harassment claims are to be arbitrated under the state arbitration law?
21. When does a sexual harassment claim accrue before March 3, 2022?
22. Is the date on which the notice-of-right-to-sue is issued, the date when the sexual harassment claim accrues under Title VII?
23. The new statute applies to claims against a landlord, a student under Title VII, one's doctor, a retailer, a priest, and an equity partner
24. How are retaliation claims to be handled under the statute?

Questions V

25. The statute defines a “sexual harassment dispute” as a “dispute relating to conduct that is alleged to constitute sexual harassment under applicable…law”. Given the use of the term “alleged” does that mean that so long as the complaint on its face does not violate Rule 11, that is sufficient to avoid arbitration?
26. What if the court determines in an IQbal-Twombly Motion that the complaint does not allege a cognizable sexual harassment claim?
27. What does the language regarding “joint-action waivers” mean? Does that mean that one can proceed to arbitration as a class representative or does that only mean that the plaintiff can participate in a class or collective action?

Questions VI

28. The new law provides that there is an option to opt for litigation of a pre-dispute sexual harassment dispute. Does that mean that the parties, after the sexual harassment claim accrued, can enter into an arbitration agreement?
29. What if a mention to compel arbitration is granted or the employer simply initiates arbitration, and the parties are in arbitration for a considerable period of time? Can the plaintiff still exercise the option to litigate and forego arbitration? What impact would the Supreme Court's decision in *Sundance* have?

rfitzpatrick@robertbfitzpatrick.com

