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CLIENT ALERT: Congress Moves To Compel The Litigation Of Workplace Sexual Harassment Claims

On February 7, 2022, the House of Representatives passed a significant bill that prevents the enforcement of arbitration provisions against an employee alleging sexual harassment. While not yet law, the bill is expected to pass the Senate with major support from both parties and President Biden. This bill will likely increase the number of sexual harassment claims litigated in federal and state courts across the country.

Relevant Background

Recently, many employers have used employment arbitration agreements in response to an increase in employment-related litigation. Employers generally find that arbitration, as opposed to court litigation, results in faster and less expensive dispute resolution. Additionally, many arbitration agreements contain employee waivers of any right to bring class actions against their employer. Likewise, many arbitration agreements contain so-called delegation clauses, which require the arbitrator, rather than a court, to decide what claims are subject to the arbitration provision. For decades, the Supreme Court has repeatedly upheld the enforcement of arbitration agreements.

What Is In The Bill

The House-passed version of the bill, H.R. 4445, prevents a court from enforcing an arbitration agreement against a party alleging conduct that constitutes either a "sexual harassment dispute" or a "sexual assault dispute." The bill also invalidates class-action waivers and delegation clauses for these two types of disputes.

"Sexual harassment dispute" is broadly defined to mean "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." Based on current case law, this includes any disputes relating to:

- Unwelcome sexual advances;
- Unwanted physical contact that is sexual in nature;
- Unwanted sexual attention and comments;
- Conditioning professional or other benefits on sexual activity; or
- Retaliation for rejecting sexual attention.

This type of misconduct is typically categorized as either a "hostile work environment" claim or a "quid pro quo harassment" claim. The bill also encompasses retaliation claims that result from internal complaints of sexual harassment.

What Is Not In The Bill

This bill does not apply to discrimination claims based on other protected characteristics, like race or

religion, or other types of retaliation claims. Nor does this bill apply to other sex discrimination claims unrelated to sexual harassment, or to disputes about other contractual provisions that have drawn recent public attention, like non-disclosure agreements.

Takeaways And What's Next

If it becomes law, this bill will move sexual harassment claims from arbitration into state and federal courts. This will result in more public testimony, discovery, and jury verdicts. Given the associated costs and risks, employers would benefit from ramping up even further every step practicable to prevent and remedy sexual harassment.

The narrow nature of the bill will also force employers to make challenging arbitration strategy decisions at the outset of certain matters. Consider the following example: a complaint asserts two claims, a sexually hostile work environment claim and a sex discrimination claim in which a former employee alleges that he was terminated because of his sex. If the employee signed an arbitration agreement, under current law an employer would likely elect to arbitrate all claims. Under the House-passed bill, the employee could not be compelled to arbitrate the hostile work environment claim, even though the sex discrimination claim could still be arbitrated. In such a scenario, an employer would be in the unenvious position of choosing to litigate both claims in court, or defend two related matters separately, one in court and one in arbitration.

What's next is a natural question for employers with arbitration agreements. This bill's carve out of sexual harassment claims seems more like a stop on the road rather than the end destination. The White House has already signaled support for legislation that would remove other employment claims from arbitration, such as all discrimination claims and wage and hour claims.

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