Analysis

Congress Acted To Help Sex Harassment Victims. Now What?

By Amanda Ottaway · Feb 11, 2022, 8:29 PM EST · Listen to article

Congress' recent passage of legislation banning mandatory arbitration for sexual harassment and assault claims marked a rare bipartisan effort to make a meaningful change to federal employment law.

Congress recently passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which one attorney and adjunct professor called "the most significant arbitration-related law in recent memory." (AP Photo/J. Scott Applewhite)

Experts told Law360 that aside from legislation created in response to the COVID-19 pandemic, they believe the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act is the first big workplace reform law since the Lilly Ledbetter Fair Pay Act of 2009, as well as the most significant arbitration law in recent memory.

"I think it's a significant law. I think there's a lot of employers that are not very

happy right now. And I think we'll have to see if it really results in a lot more sexual harassment litigation that might not otherwise have come to pass because of the arbitration provision," said Stephanie Adler-Paindiris, a principal at employer-side firm Jackson Lewis PC.

Here are three takeaways now that lawmakers have delivered the bill to President Joe Biden's desk.

It's a Big Deal for Everybody

If signed by Biden, the bill will modify the Federal Arbitration Act to invalidate predispute mandatory arbitration agreements for workers who claim they were subjected to sexual harassment or assault. Proponents of the bill have said it would give employees the ability to choose where and how they pursue such claims.

"This is certainly the most significant arbitration-related law in recent memory," said Brian Farkas, an attorney at Arent Fox LLP who represents businesses, and who also teaches arbitration and dispute resolution as an adjunct professor at Cardozo School of Law.

There remains widespread disagreement over whether the arbitration process is fair, or favors employers over workers. Several experts also noted that some victims of workplace sexual misconduct may in fact prefer arbitration because of its confidential nature, given the intimate nature of their claims.

But Julie G. Reiser, a partner at plaintiff-side Cohen Milstein Sellers & Toll PLLC, said she's "relieved" that the bill passed, saying it at least gives victims and survivors agency in how they pursue those claims.

"I do think there are instances where the parties can agree to an arbitrator, after the misconduct is known, and that's their choice. But the idea that as a term and condition of your employment, you must agree to mandatory arbitration, is what bothers me," she said.

Helene Wasserman, a shareholder at management-side firm Littler Mendelson PC, said she's disappointed.

"I am not thrilled with the bill. I appreciate that there is the opt-out, if you will — the ability for an employee to be able to elect to stay in the arbitration setting. Generally speaking, I believe that the ability to contract and the ability to make

decisions that affect the employer and the employee should remain with the employer and the employee," she said.

Jackson Lewis' Adler-Paindiris noted that the legislation could give more leverage to plaintiffs to get good settlements, because there's now no guarantee that claims will remain private. It could also mean that people wrongfully accused of sexually harassment have their names dragged through the mud anyway, she added.

"Who can't get behind not wanting people who sexually assault people to not be held accountable?" she said. "I'm all for that. … I think when it comes to sexual harassment, it's a little bit less clear."

Reginald Holmes, a lawyer based in California who serves as a "neutral," or a third party in arbitration and other alternative dispute settings, said he was happy the bill had passed.

"It's a good thing for arbitration, because arbitration is not the evil here. Unfair rules, unfair processes are the evil here," he said.

'Definitely Some Ambiguities'

Arent Fox's Farkas said he's on a listserv of law professors that has been buzzing about the legislation this week, raising questions about potential litigation that could bubble up as a result.

For example, it's not entirely clear what should happen in some situations when a worker is making a number of allegations of mistreatment, such as being both sexually harassed and discriminated against based on their race or religion.

On the Senate floor before the vote Thursday, sponsor Sen. Kirsten Gillibrand, D-N.Y., emphasized that the bill specifies only claims that "relate to" sexual misconduct can dodge an arbitration agreement.

"When a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims. … If those claims on harassment or assault are dismissed, then she would go back to the arbitration process," she said.

Farkas said disagreements are inevitable. "Like any new legislation, this will

result in a lot of litigation over the precise definitions of these words, like 'related to,'" he said.

Jackson Lewis' Adler-Paindiris agreed. "What about an intentional infliction of emotional distress, is that 'related to'? Or battery, is that related?" she said.

Littler's Wasserman said she could see judges going both ways, with some deciding that everything relates to a harassment claim, and others being more selective.

On the Senate floor Thursday, Sen. Dick Durbin, D.-Ill., another sponsor of the bill, referenced a 2015 scenario in which a woman faced blowback for reporting a sexual assault by a manager, and he said her whole harassment and retaliation case was shunted to arbitration.

"Under this bill, that would change. Her case and all of its claims were related to the assault and harassment. Under this bill, the survivor would get the choice to bring that case in court, and the bill does not require dismissal of some claims in the case if other claims are not ultimately proven," Durbin said. He added it was "essential" that the entirety of the company's behavior around the incident be exposed.

In some cases where there are multiple claims but not all are sexual harassment or assault-related, things could get messy in other ways, experts said.

Adler-Paindiris said she could envision a scenario in which an employer is simultaneously defending itself against a sexual harassment claim in arbitration and a different claim in court, with the same lawyers handling both.

Wasserman said the legislation might result in unintended consequences when it comes to claim-splitting.

"It's odd because it's really the splitting of claims, in a way, that we're not used to doing it," she said. "Are we going to take the plaintiff's deposition twice?"

She also wondered how the new legislation would play out in state courts versus federal courts. One question will be whether this applies only to claims under, for example, federal anti-bias law like Title VII of the Civil Rights Act of 1964, or whether it will also apply to state anti-discrimination laws, she said.

"I would definitely argue this would not apply to cases brought under state law. But given how it is being touted, I expect that somebody is going to say this should apply to the state claims as well," Wasserman said.

Tip of the Iceberg?

Adler-Paindiris noted that the Biden administration has expressed interest in broadening the arbitration ban to other kinds of claims.

"I think this could be the tip of the iceberg," she said. "I think that this type of exclusion about mandatory arbitration could be expanded."

Cohen Milstein's Reiser referenced California's "Silenced No More" Act, which went into effect last month and broadened restrictions on the use of nondisclosure agreements when settling employees' bias and harassment lawsuits. She said she's rooting for bipartisan support for a similar law on the federal level.

"It would not surprise me if this legislation gets expanded in several years," she said of the new federal bill, later adding, "It would be even better if the statute extends to other forms of workplace discrimination, including race."

At a press conference following the Senate's passage of the bill Thursday, Sen. Lindsey Graham, R-S.C., said that while there's a place for arbitration, the practice can also be abused.

"There's some reforms in the Arbitration Act that need to be made to make it more balanced and a better product," he said of the Federal Arbitration Act. "So yeah, I'll continue to listen, and if I can find common ground, we'll act."

--Additional reporting by Vin Gurrieri and Lauren Berg. Editing by Haylee Pearl.