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INSIGHT · EMPLOYMENT LAW

Q2 2022 Legal Review: Ending Forced Arbitration in Sexual Assault and Harassment Claims

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The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, codified at 9 U.S.C. §§ 401–402.

In the second quarter of 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFASASHA), codified at 9 U.S.C. §§ 401–402. The Act created an historic statutory carve-out to the Federal Arbitration Act (FAA), invalidating pre-dispute mandatory arbitration agreements and joint-action waivers for sexual assault and sexual harassment disputes nationwide.

I. The Statutory Scope of 9 U.S.C. §§ 401–402

Enacted with bipartisan support, the Ending Forced Arbitration Act represents the most significant legislative amendment to the Federal Arbitration Act (9 U.S.C. § 1 et seq.) since its enactment in 1925. Under 9 U.S.C. § 402(a), at the election of the person alleging conduct constituting a sexual assault dispute or sexual harassment dispute, no pre-dispute arbitration agreement or pre-dispute joint-action waiver is valid or enforceable with respect to a case relating to such dispute.

Crucially, Congress explicitly assigned the determination of the Act's applicability to the courts rather than arbitrators, regardless of whether the underlying agreement contains a delegation clause (9 U.S.C. § 402(b)). This statutory provision effectively neutralizes Supreme Court precedent such as *Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63 in the sexual harassment context.

II. The 'Case' vs. 'Claim' Battleground in California Litigation

Almost immediately following enactment, a sharp doctrinal debate arose in California federal and state courts: does the presence of a single sexual harassment claim render the entire *case* (including accompanying wage-and-hour or race discrimination claims) exempt from arbitration, or does the court sever the non-harassment claims?

California plaintiffs' counsel quickly adopted the 'case-wide' interpretation, relying on the plain language of § 402(a) ('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'). Federal district courts in the Ninth Circuit have increasingly embraced this broad reading, holding that where a complaint pleads non-frivolous sexual harassment claims intertwined with other statutory violations, the entire civil action remains in court.

III. Strategic Implications for Litigators & Corporate Counsel

For California employment practitioners, EFASASHA restructured pre-litigation calculus and employment contract drafting:

- **Arbitration Agreement Severability:** Employers were forced to revise standard mandatory arbitration agreements to include explicit EFASASHA carve-outs to avoid judicial determinations of total unconscionability under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.
- **Pleading Strategies:** Plaintiffs with multi-claim employment grievances gained substantial settlement leverage by joining valid sexual harassment claims under California's Fair Employment and Housing Act (FEHA; Gov. Code § 12940(j)), thereby defeating employer motions to compel arbitration.
- **Confidentiality & Public Forum Access:** By bringing claims into open court, plaintiffs gained access to public discovery and trial proceedings, shifting the publicity and risk profile for corporate defendants.

Practice	Employment Law
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