Legal Update Article

How Law Limiting Arbitration Agreements for Sexual Assault, Harassment Claims Affects Construction

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In an industry often targeted by anti-discrimination agencies, construction industry employers need to be aware of a new law that makes it more difficult to enforce existing arbitration agreements for sexual assault and sexual harassment claims that arise after March 3, 2022. That is the date President Joe Biden signed federal legislation limiting the use of predispute arbitration agreements and class action waivers covering sexual assault and sexual harassment claims.

For decades, arbitration agreements have been in existence and enforceable as a substitute for bringing legal claims in state or federal courts. Now, the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" amends the Federal Arbitration Act to provide employees who are parties to arbitration agreements with their employers the option of bringing claims of sexual assault and sexual harassment in arbitration or in court. It also gives the same option to the named representative of a class or in a collective action alleging such conduct.

Now that employees have options, they can choose to enforce arbitration agreements in venues that may be more employer friendly. However, they also can choose to pursue their claims in court in venues that may be more employee friendly.

The new law applies only to claims arising or accruing after March 3, 2022, regardless of the date the parties entered into the arbitration agreement. The new law is also limited to claims related to sexual assault and sexual harassment claims.

(For more details about the law, see our article,Congress Passes Federal Law Restricting Arbitration Agreements for Sexual Assault, Harassment Claims.)

For construction industry employers, the new law represents potentially greater risk for sexual assault and sexual harassment claims. Where employers may have been relying on the cost-efficiency of litigating these types of claims in arbitration, employees who now elect to bring their claims in state or federal court could increase the cost of defending such claims. Where employers may have depended in the past on the confidential nature of arbitrations, they now should be concerned with the possibility that these types of claims become much more public in state or federal courts.

Certainly, this new law makes it more urgent for employers to review existing arbitration agreement language for enforceability and to address the implications of this law and evaluate their equal employment opportunity and anti-harassment policies, their reporting procedures, and their internal mechanisms for fielding these types of claims and conducting timely and thorough investigations. To be sure, additional training should be considered.

Jackson Lewis attorneys are available to assist with employment arbitration agreements, representative actions, and workplace policies and training.