Legal Update Article

# California Court Exempts Entire 'Case' from Mandatory Arbitration Under Ending Forced Arbitration Act

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As courts continue to work out the scope of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), the California Court of Appeal in two decisions held that a plaintiff cannot be compelled to arbitration if at least one of the claims asserted in the "case" is a sexual assault or sexual harassment claim covered by EFAA. *Doe v. Second Street Corp.* and *Liu v. Miniso Depot CA, Inc.*

This is true, the California Court of Appeal explained, even if the other claims asserted in the case arise from conduct unrelated to the alleged sexual assault or sexual harassment (such as unrelated wage and hour claims).

### EFAA's Unclear Scope

The 2022 EFAA limits use of predispute arbitration agreements and class or collective action waivers in disputes related to sexual assault and sexual harassment. EFAA's legislative intent was to respond to the #MeToo movement and its criticism that private arbitration could be misused to shield sexual misconduct from public scrutiny.

Despite EFAA's focus on sexual assault and harassment disputes, as well as comments during the Senate debate on EFAA that the law does not affect claims unrelated to sexual assault or sexual harassment, the law uses the word "case" when describing which claims are exempt from mandatory arbitration under the law. EFAA states, in relevant part:

> Notwithstanding any other provision of [the Federal Arbitration Act], at the election of the person alleging conduct constituting a sexual harassment dispute ..., 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 harassment dispute.

9 U.S.C. § 402(a) (emphasis added).

This language has left courts grappling with (and split on) the question of whether claims unrelated to sexual assault or sexual harassment that are included in the same case are also exempt from mandatory arbitration under EFAA.

### Court of Appeal Decisions

In reaching its decision, the California Court of Appeal stressed the plain language of EFAA and its distinct use of the word "case" (as opposed to, for example, the words "claim" or "cause of action") when describing the scope of EFAA's exemption from mandatory arbitration. In *Liu*, this meant that the plaintiff's individual misclassification claims, gender discrimination claims, and retaliation claims, like the plaintiff's sexual harassment claim, were exempt from mandatory arbitration under EFAA. In *Doe*, this meant the plaintiff's individual wage and hour claims, like the plaintiff's sexual harassment claim, were exempt from

mandatory arbitration under EFAA.

## Looking Forward

While the two decisions provide some clarity on how California state courts might rule on the scope of EFAA's exemption from mandatory arbitration, the decisions leave an important question unanswered:

- Are otherwise unrelated wage and hour *class action claims* asserted in the same case as a plaintiff's sexual assault or sexual harassment claim also exempt from mandatory individual arbitration under EFAA?

In *Liu*, the court specifically noted that it was not called upon to rule on that question. In*Doe*, the court left open the possibility that EFAA might not apply to wage and hour class action claims that are not asserted by "the same plaintiff" and do not arise out of the same course of employment with the defendant. Jackson Lewis attorneys will continue to monitor how courts answer this critical question.