Legal Update Article

Bill to Nullify Mandatory Predispute Arbitration Agreements Passes in U.S. House

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September 20, 2019

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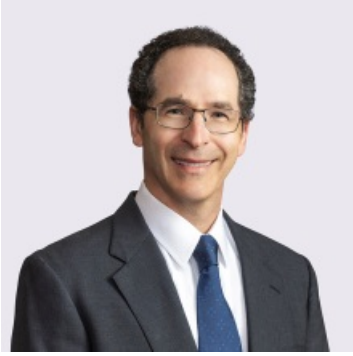

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The U.S. House of Representatives has passed the "Forced Arbitration Injustice Repeal Act" (FAIR Act), which aims to nullify mandatory, predispute arbitration agreements and class-action waivers for employment, consumer protection, antitrust, and civil rights matters.

The FAIR Act, H.R. 1423, passed 225-186 in the House on September 20, 2019, largely along party lines. The bill now goes to the U.S. Senate, where its passage is far from certain.

The FAIR Act purports to protect employees' and consumers' rights to pursue claims in court by:

- Prohibiting predispute arbitration agreements that mandate arbitration of future employment claims, and other matters; and
- Prohibiting agreements and practices that interfere with the rights of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

To accomplish this, the FAIR Act amends the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14, by adding a Chapter 4 and:

- Section 401 includes broad definitions for the terms "consumer dispute," "civil rights dispute," "antitrust dispute," "employment dispute," "predispute arbitration agreement," and "predispute joint-action waiver."
- Section 402 states: (a) "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute"; and (b) "[t]he applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator ...."

If enacted as currently drafted, the FAIR Act will become effective as of the date enacted "and shall apply with respect to any dispute or claim that arises or accrues on or after such date."

Introduced by U.S. Representative Hank Johnson (D-Ga.) in February 2019, and co-sponsored by more than 220 House Democrats, the FAIR Act's purposes include addressing concerns that sexual harassment claims are swept under the carpet by employers' use of arbitration and confidentiality agreements, consumer rights advocates' criticism of the widespread inclusion of arbitration provisions in consumer agreements and financial services contracts that prevent individuals from suing companies in court, and critics of the U.S. Supreme Court's *Epic Systems Corp. v. Lewis,* which upheld the enforceability of predispute arbitration agreements and class action waivers in employment agreements.

Opponents of the FAIR Act maintain that it is an overly broad and hastily written bill. They said it will undermine individual and institutional rights to enter into private contracts of their choosing, increase the cost of doing business and settling disputes, lead to unnecessary litigation and burden an already taxed judicial system, and carelessly upend decades of established FAA jurisprudence.

The FAIR Act has a long way to go before it becomes law and is likely to encounter opposition in the Senate. Indeed, in February 2019, Senator Richard Blumenthal (D-Conn.) introduced a companion bill to the FAIR Act in the Senate, S.610, and that bill has already met with some resistance and may not garner enough votes to pass. Moreover, on September 17, the White House issued a Statement of Administration Policy that suggested the President will veto the FAIR Act if it reaches his desk.

Jackson Lewis attorneys will continue to monitor the FAIR Act and will provide updates on any significant developments.