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Federal Court Declares That a Ban on Mandatory Arbitration of Sexual Harassment Claims Is Inconsistent with Federal Law

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Launched more than a decade ago, the #MeToo movement made its way into the national (and international) conversation in 2017, and, by 2018, the movement had such momentum that it spurred a cornucopia of new state laws. One of these new laws, which became effective July 11, 2018, is a New York State statute that prohibits employers from requiring employees to submit sexual harassment claims to mandatory arbitration. This new law is codified in Section 7515 of the Civil Practice Law & Rules of the State of New York ("C.P.L.R."), entitled "Mandatory arbitration clauses; prohibited." Section 7515 reflects the New York State Legislature's (which consists of the New York State Assembly and the New York State Senate) determination that employees should be allowed to have their sexual harassment claims adjudicated in a court of law, if that is their preference. The introductory clause of Section 7515 also indicates, however, that legislators understood that an unqualified prohibition of mandatory arbitration might not pass muster under federal law:

Prohibition. Except where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section. (C.P.L.R. § 7515(b)(i).)

Hence, the statute engendered substantial uncertainty among employers. Now, almost one year after C.P.L.R. § 7515 became law, a U.S. District Court Judge, the Hon. Denise Cote of the Southern District of New York, has addressed this confusion by opining on whether New York State may outlaw privately negotiated agreements to submit *all* disputes, inclusive of claims for sexual harassment, to arbitration. In *Latif v. Morgan Stanley & Co. LLC, et al.*, No. 1:18-cv-11528 (S.D.N.Y. June 26, 2019), Judge Cote delivered a clear message about the collision of C.P.L.R. § 7515, which operates to constrain parties' rights to agree to arbitrate claims, and the Federal Arbitration Act (the "FAA"), which, as repeatedly reinforced by the U.S. Supreme Court in recent years, mandates substantial deference to private arbitration agreements. Employers, especially those in the financial services industry, have reason to cheer Judge Cote's opinion in *Latif*, which restores a degree of certainty about whether a mandatory arbitration clause governing an employment relationship may still be enforced—at least in some courts.

The essential facts are as follows: Mahmoud Latif ("Latif") signed an employment agreement (the "Offer Letter") that incorporated by reference Morgan Stanley's mandatory arbitration program. Read together, these documents formed the "Arbitration Agreement" between Latif and Morgan Stanley. The Arbitration Agreement provided that any "covered claim" that arose between Latif and Morgan Stanley would be resolved by final and binding arbitration, and that "covered claims" included, among other causes of action, discrimination and harassment claims. Nevertheless, Latif commenced an action against Morgan Stanley in federal court, asserting, among other charges, claims of sexual harassment under federal, state and municipal law. The Morgan Stanley defendants moved to compel arbitration of the entire case, inclusive of the sexual harassment claims. Latif opposed that motion on the basis of C.P.L.R. §7515, which, according to Latif, expressed New York State's "general intent to protect victims of sexual harassment," and required the Court to retain jurisdiction over the sexual harassment claims—even though those claims fell clearly within the ambit of the Arbitration Agreement.

In granting Morgan Stanley's motion to compel arbitration, *inclusive of the sexual harassment claims*, Judge Cote held that C.P.L.R. §7515 could not serve as the basis to invalidate the Arbitration Agreement. The Court's rationale is straightforward: C.P.L.R. §7515 purports to nullify agreements to arbitrate sexual harassment claims "except where inconsistent with federal law," and the statute is indeed inconsistent with the FAA's "strong presumption that arbitration agreements are enforceable." Judge Cote therefore stayed Latif's court action pending the outcome of arbitration proceedings.

In light of the foregoing, to maximize the likelihood of full enforcement of an arbitration agreement, inclusive of claims for sexual harassment, employers should promptly consider the prospect of removal of a New York State court action to federal court, if circumstances otherwise permit such removal.

Finally, employers also should note that, on June 19, 2019, the New York State Legislature voted to amend Section 7515 to prohibit not only the mandatory arbitration of sexual harassment claims, but also the mandatory arbitration of *any*allegation or claim of discrimination. While, as of this writing, the amendment has not yet been signed into law by the executive, it appears safe to predict that states will continue, in the near future, to attempt to prohibit or constrain mandatory arbitration of discrimination/harassment claims in a way that generates apparent conflict with federal law. The Supreme Court's adjudication of a constitutional challenge to C.P.L.R. §7515, and/or like statutes, under the Supremacy Clause of the U.S. Constitution seems to be a likely end-game.

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