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California Courts Greatly Expand Scope of "Ending Forced Arbitration of Sexual Harassment Act"

Article By:

Raymond J. Nhan

Two recent decisions from the California Courts of Appeal could have massive ramifications for employers seeking to enforce arbitration agreements. Specifically, each court each held that the Ending Forced Arbitration of Sexual Harassment Act ("**EFAA**") prohibits separating and arbitrating wage and hour claims that are part of the same suit as a sexual harassment claim. These holdings give plaintiffs' lawyers a new tool try and defeat arbitration agreements and keep cases in litigation. Accordingly, California employers should be prepared for an influx of sexual harassment claims being tacked on to otherwise unrelated wage and hour lawsuits.

The EFAA

In March 2022, Congress passed the EFAA to exclude sexual harassment claims from mandatory arbitration provisions. In relevant part, the EFAA reads, "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault 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 assault dispute or the sexual harassment dispute." (emphasis added). Simply put, the EFAA permits a person bringing a claim for sexual harassment or sexual assault to opt out of a mandatory arbitration provision that they may otherwise be bound by.

As discussed below, the statute's use of the word "case," instead of the word "claim," had important ramifications for the California courts presiding over these matters.

The Lawsuit in *Doe v. Second Street Corp.*

In *Doe*, the plaintiff filed a lawsuit in February 2023 against her former employer, a hotel, and two individual supervisors. The plaintiff alleged that another coworker (who is not a party to the lawsuit) sexually assaulted her in October 2019. Because of the alleged sexual assault, the plaintiff asked not to be scheduled on shifts with the coworker who allegedly victimized her. Starting in October 2021, however, plaintiff's supervisor allegedly dismissed her concerns and began to schedule her to work with the allegedly offending coworker. In May 2022, plaintiff's doctors recommended she cease work because she was suicidal. The plaintiff has not returned to work since. In her lawsuit, plaintiff brought 11 claims—three relating to the alleged sexual harassment; six for wage and hour violations; and two

for slander and libel.

The employer filed a motion to compel arbitration of the entire case, which the trial court denied. When doing so, the trial court held that *all* of plaintiff's claims were subject to the EFFA because the statute "invalidates an arbitration clause as to the entire case." Therefore, the court reasoned, the arbitration provision in *Doe* could not be enforced as to any of plaintiff's claims—**not just those alleging sexual harassment**.

The employer appealed the trial court's ruling to the California Court of Appeal – Second Appellate District, Division Three.

The Lawsuit in *Liu v. Miniso Depot CA, Inc.*

One week after *Doe* was decided, *Liu* was issued. Liu, who is a lesbian and dresses in a unisex style, sued her former employer, Miniso, in October 2023. The suit alleges that Miniso's employees would make unwelcome remarks to Liu. Among other things, Liu claimed that employees made comments regarding her appearance, and that employees would describe homosexuals as "creepy." Liu also alleged she was misclassified as an exempt employee and that Miniso failed to pay her minimum wage, overtime, and for all the hours she worked.

In her suit, Liu brought a cause of action for sexual harassment. But Liu also included claims for whistleblower retaliation, constructive discharge, and various wage and hour violations under the California Labor Code.

Miniso filed a motion to compel arbitration. In its motion, Miniso argued that Liu's complaint did not trigger the EFAA because her allegations—taken as true—could not support a sexual harassment claim as a matter of law. The trial court denied Miniso's motion and refused to compel arbitration. When doing so, the trial court held that the EFAA does not employ or require a pleading sufficiency analysis to determine whether a plaintiff's claim falls under the statute. And, like *Doe*, the trial court held EFAA barred arbitration of the plaintiff's entire case.

Miniso appealed to the California Court of Appeal – Second Appellate District, Division One.

The Appellate Courts Affirm

Each appellate court affirmed the trial court's holding. Specifically, both courts of appeal held that EFAA covers a plaintiff's entire case—not just the sexual harassment claims brought therein.

The *Doe* court focused on the term "case" to conclude that the EFAA prohibited arbitrating plaintiff's wage and hour claims. First, the court noted the difference between a "claim" and a "case." A "claim," the court said, is considered the basis for recovery, whereas a "case" encapsulates the entire legal proceeding. Accordingly, the EFAA's use of the word "case" extends the statute to cover plaintiff's entire lawsuit, not just individual claims. In reaching this conclusion, the court distinguished *Doe* from a federal case, *Mera v. SA Hospitality Group, Inc.*, which concerned a sexual harassment claim and a wage and hour class action. The *Mera* court reasoned that the class claims could be separated from the sexual harassment claim and arbitrated since the class claim did "not relate in any way to the sexual harassment dispute." Conversely, the *Doe* court concluded that even though not all of the plaintiff's claims "arise out of her sexual harassment allegations," the "case" as a whole unquestionably "relates to" a sexual harassment dispute. In reaching this conclusion, the court noted with importance that all of plaintiff's claims were asserted against the

same defendants and arose out of her employment by the hotel. Thus, the court concluded the EFAA also barred mandatory arbitration of the plaintiff's wage and hour claims.

The appellate court in *Liu* reached the same conclusion. The *Liu* court similarlydistinguished between the terms "claim" and "case." The court reasoned that if Congress wanted the EFAA to cover only parts of a "case," it would have instead used the word "claim." But the court in *Liu* went even further. Rather than attempting to distinguish *Mera* on the basis that case was a wage and hour class action, the *Liu* court simply found *Mera* unpersuasive. Specifically, the *Liu* court reasoned that *Mera* impermissibly added words to the EFAA to conclude that a "case" could be split up. Finding the EFAA's language unambiguous, the *Liu* court also refused to consider the statute's legislative history when making its ruling.

Key Takeaways

Liu and *Doe* could have massive ramifications for California employers. In the short term, employers may see a spike in potentially-frivolous sexual harassment claims being added to wage and hour lawsuits—as plaintiffs' lawyers try to avoid arbitration. But the issue could be relatively short lived. In all likelihood, the California Supreme Court or the United States Supreme Court will eventually consider whether the EFAA's impact is as broad as *Liu* and *Doe* have held.

For now, employers should continue to vigorously assert arbitration defenses through their answers in order to preserve their right to arbitrate claims in the event *Liu* and *Doe* are overturned. Employers should also continue to try and compel arbitration in spite of *Liu* and *Doe* by distinguishing those cases through any means possible.

As always, employers should consult with experienced labor and employment litigation counsel for strategies in light of the shifting legal landscape.

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