Published on *The National Law Review* https://natlawreview.com

Choice-of-Law Provisions Cannot Circumvent Ending Forced Arbitration Act, Court of Appeal Rules

Article By:

Daniel J. Ganz

On February 3, 2025, the California First District Court of Appeal held that a party to an arbitration agreement cannot rely on a choice-of-law provision to wire around the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "**EFAA**"). The case, *Casey v. Superior Court*, clarifies that a party cannot circumvent the EFAA and compel a dispute to arbitration by using a pre-litigation choice-of-law provision.

Legal Background

The Federal Arbitration Act ("**FAA**") requires courts to enforce arbitration agreements arising from transactions involving interstate commerce. Passed in 1925, the FAA embodies a liberal federal policy in favor of enforcing arbitration agreements. The California Arbitration Act ("**CAA**") was passed in 1961 and applies even in situations where the FAA does not. Like the FAA, the CAA provides that pre-dispute arbitration agreements are "valid, enforceable and irrevocable."

As we have previously written, Congress passed the EFAA in March 2022 to exclude sexual harassment claims from mandatory arbitration provisions. The EFAA provides that "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." The EFAA therefore permits a person to bring a claim for sexual harassment or sexual assault in court, even if the person previously agreed to arbitrate such disputes. The EFAA amended, and is now part of, the FAA. There is no California statutory counterpart to the EFAA.

Facts and Procedural History

In *Casey*, the plaintiff signed an employment contract in 2017 that included an arbitration agreement (the "**Employment Agreement**"). A clause in the Employment Agreement provided that the construction and interpretation of the agreement shall "*be governed by the laws of the State of California*." In September 2023, the plaintiff filed a lawsuit against her employer and a coworker, alleging that the coworker made a series of unwanted sexual remarks in late 2022. The plaintiff brought a claim for sexual harassment under the Fair Employment and Housing Act ("**FEHA**")

against both her employer and her coworker. The plaintiff's suit included several other claims against her employer only, including wage-and-hour violations unrelated to her sexual harassment dispute.

The employer and the coworker defendant jointly filed a motion to compel arbitration. The plaintiff opposed the motion, arguing that the EFAA applied and the dispute could not be compelled to arbitration. The trial court granted the motion to compel arbitration on the basis that the Employment Agreement's choice-of-law provision rendered the EFAA inapplicable to the dispute. The plaintiff immediately appealed.

The Court of Appeal's Decision

On February 3, the Court of Appeal issued a decision reversing the trial court's judgment and concluding that the plaintiff's dispute *was* covered by the EFAA. In reaching that decision, the Court of Appeal found the plaintiff's employment relationship sufficiently involved interstate commerce because both the employer's business and the plaintiff's specific job duties included interstate business and communication. The Court of Appeal also concluded that the CAA is preempted by the EFAA under the doctrine of conflict preemption—which occurs when "state law stands as an obstacle to the accomplishment and execution" of Congress's objectives. Relying on the choice-of-law provision, the Court of Appeal noted, would "directly contravene Congress's purpose and objectives in enacting the EFAA." The Court stated that in enacting the EFAA, Congress expressed an intention to guarantee judicial forums for suits involving sexual harassment or sexual assault disputes. Accordingly, the Court reasoned, the plaintiff could elect to render the arbitration provisions of the Employment Agreement invalid with respect to her sexual harassment dispute.

The Court of Appeal also rejected the employer's argument that the EFAA did not apply retroactively to the plaintiff's 2017 Employment Agreement. The Court noted that the EFAA covers any dispute or claim that arises or accrues on or after March 3, 2022. Here, plaintiff's complaint alleged the sexual harassment occurred in December 2022. Because the plaintiff's claims accrued on or after March 3, 2022, the Court found that the EFAA applied.

Finally, the Court of Appeal concluded that the EFAA applied to the plaintiff's entire lawsuit—including the wage-and-hour claims that were factually unrelated to the plaintiff's sexual harassment dispute. Accordingly, the plaintiff could not be compelled to arbitrate any part of her lawsuit. This result is consistent with prior decisions from California Courts of Appeal that we have covered here.

Ultimately, the Court of Appeal ordered the trial court to vacate its order compelling arbitration and enter a new order denying the defendants' motion to compel.

Key Takeaways

Casey confirms that parties cannot use choice-of-law provisions in arbitration agreements to circumvent the EFAA. Accordingly, if a plaintiff brings a claim involving sexual assault or harassment, the EFAA precludes the defendant from forcing the plaintiff to litigate the claims—regardless of whether a choice-of-law provision exists in the contract.

The *Casey* decision comes four months after the California Court of Appeal's decision in *Liu v. Miniso Depot CA, Inc.*—which also held that if a plaintiff brings a suit that merely includes a sexual harassment claim, none of the other claims may be arbitrated. Together, *Casey* and *Liu* ensure that more lawsuits containing sexual harassment and sexual assault claims will be heard in court and not compelled to arbitration.

Employers should consult with outside counsel to review their existing employment and arbitration agreements. In addition, employers—working with experienced counsel—should understand what these holdings mean for them and what steps they should take to prevent and defend against future lawsuits that may be subject to the EFAA.

Copyright © 2025, Sheppard Mullin Richter & Hampton LLP.

National Law Review, Volume XV, Number 56

Source URL:https://natlawreview.com/article/choice-law-provisions-cannot-circumvent-ending-forced-arbitration-act-court-appeal