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

#MeToo – Is Mandatory Arbitration On The Chopping Block?

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On an almost daily basis, the news is filled with reported allegations of harassment by news anchors, Hollywood titans, Senate candidates, sitting congressmen, celebrity chefs, network executives and even the president. The coverage includes large settlements, mishandled investigations and more. Employer concerns have been elevated from the HR department to the boardroom as compliance programs receive greater scrutiny.

The focus on these allegations, some of which are from long ago, has included trying to understand why some victims did not come forward sooner. In addition to discussing the power differential between the accused and the accusers and the victims' fears of retaliation, there is renewed attention on mandatory arbitration clauses in employment relationships.

For example, Congress introduced a bill early this year, the Arbitration Fairness Act of 2017, proposing that pre-dispute arbitration agreements like those commonly included in employment agreements or handbooks be unenforceable for employment, civil rights and some other claims. That bill did not generate much traction. However, after the recent spate of high-profile sexual misconduct allegations, a bipartisan group in the House and Senate including Senators Kirsten Gillibrand, D-NY, and Lindsay Graham, R-SC, has recently introduced legislation focused on arbitration agreements and their adverse impact on bringing sex harassment and discrimination claims to light.

The Ending Forced Arbitration of Sexual Harassment Act would essentially nullify mandatory employment arbitration for gender-based harassment and discrimination claims. Gillibrand characterized mandatory arbitration as requiring the accuser to "go into a secret meeting with their employer and try to work out some kind of deal that really only protects the predator. They are forbidden from talking about what happened and then they are expected to keep doing their job as if nothing happened to them."

Those are strong words and come on the heels of a recent report that more than 50 percent of U.S. workers are subject to mandatory arbitration provisions. This is not the only legislative endeavor seeking to release employees of obligations to limit the disclosure of information relating to sex harassment claims. As we reported, the Pennsylvania legislature introduced a bill to limit restrictions of employment-based confidentiality agreements and permit the disclosure of certain types of information about sexual misconduct. It is very likely that there will be other such efforts at the state and federal level. While it is too early to tell the fate of the new federal proposal, Graham has asked the U.S. Chamber of Commerce to be supportive. What will the Chamber do?

In the meantime, what should employers do about arbitration? Properly drafted arbitration agreements are clearly enforceable in the employment context and we highly recommend that all employers consider the pros and cons of including arbitration clauses in their employment-related agreements. While such clauses do not guarantee that a company will be immune from substantial damages awards, arbitration agreements provide the benefit of lower dispute costs, quicker resolution and, generally, non-public airing of employment-related disputes. Of course, at this time, companies should factor in the potential adverse publicity of enforcing arbitration confidentiality provisions.

Pre-dispute arbitration clauses also apply to a broad range of employment-related disputes, most particularly terminations.

Even in this highly charged atmosphere, it is likely to be a heavy lift for Congress to ban arbitration of sex-based harassment claims, but we will watch this closely and report on future developments.

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National Law Review, Volume VII, Number 352

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