

Employers Take Note: Mandatory Arbitration of Sexual Harassment Claims is Prohibited

On March 3, 2022, the Federal Arbitration Act was amended to allow employees subject to pre-dispute mandatory arbitration agreements to pursue their claims of sexual assault or sexual harassment in court. The amendment defines a “sexual harassment dispute” as “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.” The claimant alone may elect to arbitrate those claims if he or she desires.

One impetus for the amendment was the #MeToo movement which exposed how some entities used the secrecy of arbitration proceedings to shield serial harassers from potentially more robust accountability.

Even before the amendment, some employers voluntarily discontinued mandatory arbitration for sexual harassment claims, and several states, including New York and California, enacted laws aimed at restricting mandatory arbitration of those claims.

The amendment also addresses how a party may challenge the validity of an arbitration agreement in sexual harassment or sexual assault cases by providing that enforceability and validity of a pre-dispute arbitration agreement shall be determined by a court, rather than an arbitrator. This avenue applies regardless of whether the pre-dispute arbitration agreement delegates that task to an arbitrator. This is a significant change to the process by which the decision about whether arbitration is required is determined.

The law went into effect immediately and applies to disputes that arise as of March 3, 2022. The key date appears to be the date on which the claim arises, not the date the parties entered into the arbitration agreement.

What's next for employers?

- Review and update employee handbooks and written policies,
- Update pre-dispute mandatory arbitration agreements particularly if the agreements do not include a specific exception for disputes that cannot be arbitrated, and
- Educate management and human resources personnel regarding the new policies.

Galloway's Employment Law group is available to answer your questions.

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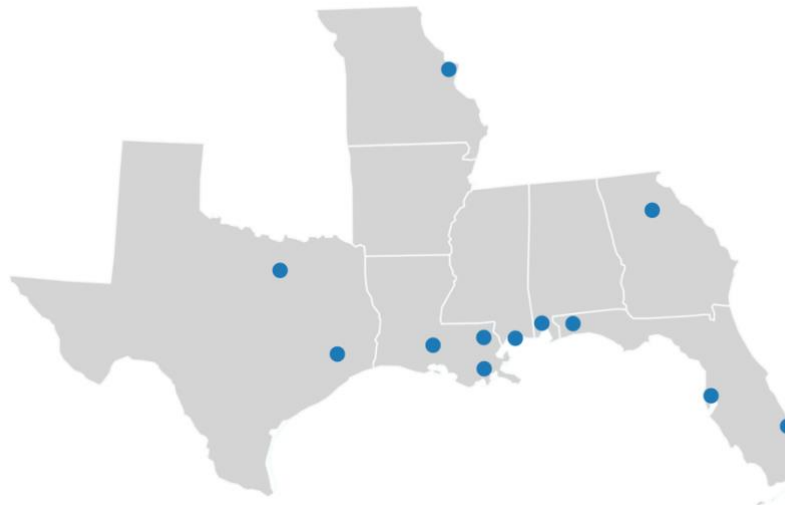
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