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Recent Developments Regarding the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

By David E. Schwartz and Emily D. Safko
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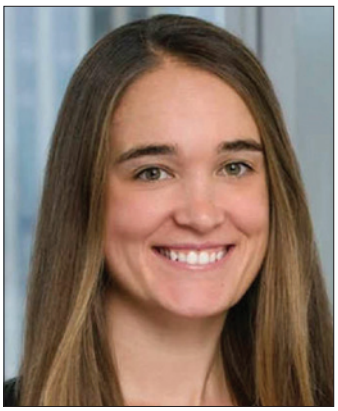
On March 3, 2022, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) into law. The EFAA amends the Federal Arbitration Act (FAA) to prohibit employers from enforcing mandatory arbitration provisions that relate to a "sexual assault dispute" or a "sexual harassment dispute." In broad strokes, employees party to arbitration agreements are able to choose – but may not be required – to bring claims involving sexual assault or sexual harassment in federal, state or tribal court or proceed to arbitration.

Since the EFAA's enactment, two issues have recurred in courts around the United States, including in New York, related to (i) whether employees who bring both sexual assault or sexual harassment and non-sexual assault or non-sexual harassment claims in one suit must resolve the non-sexual assault or non-sexual harassment claims in arbitration pursuant to a valid arbitration agreement and (ii) when a dispute is deemed to have accrued for purposes of being considered covered by the EFAA.

Related Claims

On the first issue, federal district courts in California, New York, Ohio, Pennsylvania and Texas have found that employees bringing claims based on sexual assault or sexual harassment in addition to other claims do not necessarily have to separately resolve the non-sexual assault or non-sexual harassment claims in arbitration. For example, in *Johnson v. Everyrealm, Inc.*, 657 F. Supp. 3d 535 (S.D.N.Y. 2023), the plaintiff, a former employee of Everyrealm, Inc., alleged race discrimination, pay discrimination, sexual harassment, hostile work environment and discrimination on the basis of gender, race and ethnicity, whistleblower retaliation and intentional infliction of emotional distress. Everyrealm, Inc. moved to compel arbitration.

In response, the plaintiff argued that because the dispute involved claims of sexual harassment, the mandatory arbitration provision was unenforceable. The Southern District of New York found that the



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plaintiff alleged a plausible claim of sexual harassment and, as a result, the EFAA applied. In arriving at this decision, the court noted that the EFAA extended to protect the plaintiff's non-sexual harassment claims in addition to his sexual harassment claims because the EFAA "keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute" and "not merely the discrete claims . . . that themselves either allege such harassment or relate to a sexual harassment dispute." *Id.* at 558-59.

Similarly, in *Baldwin v. TMPL Lexington LLC*, No. 23 Civ. 9899, 2024 WL 3862150 (S.D.N.Y. Aug. 19, 2024), the plaintiff, a former employee of TMPL Lexington LLC, alleged claims involving sex discrimination, sexual harassment, sexual assault and failure to pay wages, among other wage-related claims. Defendant, TMPL Lexington LLC, moved either to compel arbitration under the plaintiff's arbitration agreement or dismiss the suit.

These recent cases suggest that courts may permit non-sexual harassment and non-sexual assault claims to proceed in court notwithstanding a binding arbitration agreement if those claims are related to claims of alleged sexual assault or harassment that are plausible on their face.

The Southern District of New York denied the motion to compel arbitration and motion to dismiss, finding that the EFAA applied to the plaintiff's sexual harassment claims and that the non-sexual harassment claims "clearly relate, factually and temporally, to her sexual harassment claims." *Id.* at *8. In arriving at this decision, the court relied on *Johnson* and noted that the plaintiff's claims were "a far cry from the types of far-afield claims unrelated to sexual harassment (e.g., of antitrust or securities law violations) that *Johnson* had in mind in leaving open the possibility that the EFAA would not apply to improperly joined claims." *Id.*

By comparison, when the claims of sexual harassment or assault did not relate to the non-sexual harassment or assault claims, the entire case did not fall under the EFAA's purview. For example, in *Mera v. SA Hospitality Group, LLC*, 675 F. Supp. 3d 442 (S.D.N.Y. 2023), the plaintiff, a former employee of SA Hospitality Group, LLC, brought claims of unpaid wages and hostile work environment. The Southern District of New York required the plaintiff to arbitrate the wage and hour claims because the claims did "not relate in any way to the sexual harassment dispute." *Id.* at 448.

Similarly, to the extent a claim related to sexual harassment or assault is not viable, any viable claims unrelated to sexual harassment or assault will be subject to arbitration. In *Yost v. Everyrealm, Inc.*, 657 F. Supp. 3d 563 (S.D.N.Y. 2023), the plaintiff, a former employee of Everyrealm, Inc., alleged various claims, including claims related to pay discrimination, sexual harassment, hostile work environment, discrimination on the basis of gender, sexual orientation, disability and marital status and retaliation, among other claims.

The Southern District of New York found that the plaintiff's claim of sexual harassment was implausibly pled and, accordingly, the EFAA did not apply. The court noted that permitting the plaintiff, whose claim of sexual harassment did not pass muster, to bring an entire case into court "would invite mischief, by incenting future litigants bound by arbitration agreements to append bogus, implausible claims of sexual harassment to their viable claims, in the hope of end-running these agreements." *Id.* at 588.

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Accrual of a Dispute

The EFAA provides that it applies to "any dispute or claim that arises or accrues on or after [March 3, 2022]." Pub. L. No. 117-90, 136 Stat. 28. Though it is clear that the EFAA is not retroactive, questions have arisen as to when exactly a dispute or claim accrues within the meaning of the EFAA.

In *Famuyide v. Chipotle Mexican Grill, Inc.*, 111 F.4th 895 (8th Cir. 2024), the plaintiff alleged that she was sexually assaulted by a coworker in November 2021. Following the assault, in February 2022, the plaintiff's counsel sent two letters to her former employer. The first letter provided that the plaintiff's counsel was investigating potential claims and requested that the former employer preserve all information relevant to the matter. The second letter provided

that the plaintiff's counsel was considering pursuing civil action and requested that the employer provide answers to various information requests.

On March 1, 2022, the former employer responded to the letters. In July 2022, the plaintiff filed suit in Minnesota state court, but then voluntarily dismissed the action without prejudice and attempted – unsuccessfully – to resolve the action in mediation. The plaintiff later filed suit in Minnesota district court, and the employer moved to compel arbitration, arguing that the dispute arose before March 3, 2022. Specifically, the employer argued that the dispute arose on Nov. 23, 2021, the date of the alleged assault.

The employer argued in the alternative that the dispute arose in February 2022 when the employer received the letters from the plaintiff's counsel. The district court disagreed and found in favor of the plaintiff, holding that the dispute arose after March 3, 2022. The Eighth Circuit affirmed, finding that "there was no conflict or controversy between company and employee . . . and no 'dispute' between the parties that could have been submitted to arbitration" when the alleged assault occurred in 2021 or when the plaintiff's counsel sent the company correspondence in February 2022. *Id.* at 898. Because the court concluded that the dispute accrued after March 3, 2022, the plaintiff was permitted to litigate her claims in court rather than proceed to arbitration.

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In contrast, in *Olivieri v. Stifel, Nicolaus & Co.*, 112 F.4th 74 (2d Cir. 2024), the plaintiff filed suit in 2021 against her then current employer, alleging claims of sexual assault, repeated sexual harassment and a hostile work environment characterized by discrimination and retaliation, among others. The employer moved to compel arbitration. The Eastern District of New York granted the employer's motion to compel arbitration on March 28, 2022, just weeks after the EFAA was enacted.

The plaintiff then moved to amend her complaint to add additional allegations and defendants and asked the court to reconsider compelling arbitration in light of the recently passed EFAA. The Eastern District of New York granted the plaintiff's motions and found that the continuing violation doctrine applied, which resulted in her ongoing hostile work environment claims accruing after March 3, 2022.

The Second Circuit, affirming the district court, explained that, consistent with the way "the statute of limitations for hostile work environment claims runs from the time of the last act in the continuing course of discriminatory or retaliatory conduct," because the plaintiff's hostile work environment claim "persisted after the EFAA was enacted," the claim accrued after March 3, 2022. Under the continuing violation doctrine, "claims [that] are made up of a series of acts . . . accrue and reaccrue with each successive act that is part of the singular unlawful practice." *Id.* at 88. In *Olivieri*, the plaintiff alleged that she experienced a retaliatory hostile work environment that occurred before and persisted after the enactment of the EFAA, bringing her claim within the scope of the EFAA.

Famuyide and *Olivieri* address different issues regarding accrual under the EFAA. Pursuant to *Famuyide*, the EFAA may still apply even if the conduct underlying the allegations of sexual assault or sexual harassment occurred prior to the EFAA's effective date as long as the dispute itself – which is not evidenced by exploratory letters between counsel – accrues after March 3, 2022. Under *Olivieri*, claims subject to the continuing violation doctrine are deemed to have accrued after March 3, 2022, for the purpose of the EFAA, as long as successive acts occurred after March 3, 2022. Both cases collectively reflect a more flexible or broader approach to the application of the EFAA.

In light of these developments, employers should understand the limits of their arbitration agreements and consider other risk management strategies to reduce claims of sexual assault or harassment such as effective training programs.