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Law Curbing Forced Arbitration Takes Shape: Midyear Report

By **Amanda Ottaway**

Law360 (June 8, 2023, 3:16 PM EDT) -- A recent decision that a federal law barring mandatory arbitration of sexual harassment and assault claims couldn't keep wage-and-hour claims in court was one of several rulings this year in which judges weighed in on the scope of the year-old statute.

The Ending Forced Arbitration of Sexual Harassment and Sexual Assault Act, which took effect in March 2022, modified the Federal Arbitration Act to invalidate predispute mandatory arbitration agreements for workers who claim they were subjected to sexual harassment or assault on the job.

Since then, court rulings, including one Saturday, have shed some light on how the law, often referred to as the EFAA, will be applied in real-world disputes. But issues such as how judges will deal with blended lawsuits that level sexual harassment allegations in addition to other claims are still evolving.

"I think what we're going to have to do is to continue to watch to see which types of claims are being sent to arbitration, despite the existence of sexual harassment allegations in the same lawsuit, and which ones are being grouped with the sexual harassment claims and being held in court," said Allegra Lawrence-Hardy, a partner at Lawrence & Bundy LLC.

"I think that's why we need a few more cases, and we need to see particularly what the courts of appeals are going to do with it."

Here's a look at how courts have applied the EFAA so far in 2023.

Judge Says Wage Claims Aren't Shielded

The EFAA says in part, "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."

"We can all read the statute; we're all super clear on what are the sexual harassment claims that are covered," Lawrence-Hardy said. "So the real question is, what about the other claims?"

A decision Saturday penned by Magistrate Judge Stewart D. Aaron in a case called Mera v. SA Hospitality Group LLC showed that courts will split up cases because of the EFAA. Judge Aaron ruled that a plaintiff in a prospective class and collective action had to arbitrate his wage and overtime claims, which he brought under the Fair Labor Standards Act and the New York Labor Law.

But the judge also said SA Hospitality Group LLC can't force ex-busboy Danilo Mera to arbitrate his sexual orientation discrimination claims, because of the EFAA.

While pay issues such as unequal pay or unpaid overtime can be part of a pattern of harassment, Mera had brought his case as a proposed class and collective action.

Fisher Phillips partner Melissa Camire wondered whether if he'd been a lone plaintiff he would have been able to better make the case that his pay claims were related to the harassment.

"It's a little harder to make that argument when you're saying, 'Everybody was subjected to practices that resulted in us not getting paid properly, but me and me alone, experienced sexual harassment,'" she said.

Kate Mueting, who represents employees as a partner at Sanford Heisler Sharp, pointed out that proponents of arbitration say it's quicker, cheaper and more efficient than going through the court system. But if claims from the same original suit must be litigated in two different venues post-EFAA, that effectively kills the efficiency argument, she said.

"So it may be that as we continue to see this play out, we just see practically that employers are fighting less to have some claims in arbitration, because they know they're going to have to face some in court anyway," Mueting said.

Entire Everyrealm Case Stays In Court

A Feb. 24 decision in New York by U.S. District Judge Paul A. Engelmayer drew attention for a broad interpretation of the EFAA that allowed all the plaintiff's claims, even those that were not strictly sexual harassment, to duck arbitration.

Ex-Everyrealm employee Teyo Johnson — who's also an ex-NFL player — sued the metaverse real estate company in August, accusing the company's CEO of sexual harassment, making racist jokes and insulting his intelligence, among other misconduct.

Judge Engelmayer shot down Everyrealm's attempt to enforce its arbitration pact with Johnson, allowing him to proceed with all his claims in court. The judge wrote that he "construes the EFAA to render an arbitration clause unenforceable as to the entire case involving a viably pled sexual harassment dispute, as opposed to merely the claims in the case that pertain to the alleged sexual harassment."

Rex Berry, a former management-side lawyer who now works in mediation and arbitration at Signature Resolution, said the Everyrealm decision surprised him.

"It's not illogical, the way he reads the statute," he said. "But it's a pretty aggressive swipe at the scope of coverage of the Federal Arbitration Act."

Berry said the issue will keep coming up.

"There's going to be conflicting decisions, and it may or may not work its way to the U.S. Supreme Court," Berry said.

Courts Largely In Step On Timing Questions

The law, which went into effect when President Joe Biden signed it March 3, 2022, covers any claim that "arises or accrues" after that date.

"The first week of June 2023, it looks like the accrual issue is starting to work itself out," said Lawrence & Bundy's Lawrence-Hardy.

Generally courts are affirming that the law is not retroactive, experts said.

"The courts have pretty universally said, 'No, the law only applies to claims that accrue after March 3, 2022. And we're looking at that as the normal definition of accrue that we all know, not some new definition of accrue,'" Fisher Phillips' Camire said. In other words, a claim accrues when the plaintiff knew, or should have known, that they were experiencing harassment, she said.

In one Florida federal case, Hodgin v. Intensive Care Consortium Inc. et al., the plaintiff argued that instead of using the date she was fired in November 2021, her August receipt of an EEOC right-to-sue letter should count as her accrual date. But the court disagreed in a March 31 ruling, saying her claim accrued when she was fired and that her dispute arose too late.

"I find that plaintiff's dispute arose when she filed charges of discrimination against her employer with the EEOC in January 2022 — still before EFAA's enactment in March 2022. … By that point, the dispute had arisen because the plaintiff was now in an adversarial posture with her employer in a forum with the potential to resolve the claim," U.S. District Judge Donald M. Middlebrooks wrote.

Ongoing Violation Thwarts Arbitration Bid

Sometimes the timing question is less straightforward. A separate case demonstrates a path forward for plaintiffs who allege chronic mistreatment.

In New York on March 31, U.S. District Judge Joan M. Azrack said in an order that Patricia Olivieri's claims against wealth management and investment banking firm Stifel Nicolaus & Co. Inc. could proceed in court instead of arbitration because Olivieri alleged the conduct was ongoing.

Stifel had argued that meant Olivieri, who initially filed suit in January 2021, couldn't benefit from the law, but Judge Azrack said because Olivieri still works there and says she is still being harassed, her claims didn't finish accruing before Biden signed the bill.

"For purposes of the EFAA, hostile work environment claims could — in accordance with well-established continuing violation precedent — 'accrue' as of the date of the 'last act that is part of the hostile work environment,'" Judge Azrack wrote, referencing Walters v. Starbucks Corp.

The Olivieri case is really "the case that speaks to the continuing violation issue," Lawrence-Hardy said. "And so until there's something else, that is I think the case that we really have to use to advise our clients on the risk here."

--Additional reporting by Joyce Hanson, Jon Steingart, Vin Gurrieri and Patrick Hoff. Editing by Amy Rowe and Neil Cohen..

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