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Sex Harassment Arbitration Exemption: Devil Is In The Date

By **Abe Melamed** (January 3, 2024, 3:51 PM EST)


Abe Melamed

When Congress amended the Federal Arbitration Act[1] by enacting the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, or EFAA, in March 2022, it provided plaintiffs in sexual harassment cases a way out of mandatory arbitration agreements they had signed with their employers.[2] But it also created unintended confusion about the amendment's chronological reach.

For harassment that occurred before the EFAA's effective date, plaintiffs have no assurance that their claims will end up bypassing arbitration. Hundreds of these cases are now running up against applicable statutes of limitations, and the clock is ticking for claimants to bring their actions in court.

Signed into law on March 3, 2022, the EFAA states that it is applicable "with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." And therein lies the quandary: When does a dispute or claim "arise" or "accrue" under the statute?

Clearly, conduct that occurs after March 3, 2022, is subject to the EFAA, and a plaintiff can choose to proceed to court. But can a plaintiff look back and reject an arbitration agreement when the conduct occurred prior to March 3, 2022?

Possibly, if either "arise" or "accrue" means something other than the date when the underlying conduct occurs. Perhaps the statute's use of seemingly redundant language means that disputes arise as of one date and claims accrue as of another date, and one of those dates includes claims where conduct occurred prior to March 3, 2022.

This is a question being asked on an increasingly frequent basis, as plaintiffs hope to bypass arbitration. But court decisions to date have been inconsistent, and until a federal appellate court or the U.S. Supreme Court decides the issue, lower courts will continue to grapple with the meanings of "arise" and "accrue." The uncertainty around the issue often drives cases to settle.

Arise or Accrue: The Cases

Several federal district courts have addressed the question of when a dispute arises or a claim accrues under the EFAA. The broadest reading is that a dispute arises at the time the parties take opposing positions and there is a matter in controversy.

Under this view, even if the underlying conduct occurred long before the EFFA's enactment, so long as the first time the parties take opposing positions occurs after March 3, 2022, the EFAA will apply. That date might be when the employee files a complaint internally with the employer, when he or she files a charge of discrimination with the U.S. Equal Employment Opportunity Commission or a similar state agency, or even as late as the date the actual lawsuit is filed, even if it is years after the conduct occurred.

On the opposite side of the spectrum, many courts have found that the EFAA does not apply unless the underlying conduct giving rise to a claim occurred after March 3, 2022. According to this view, courts have found that the only exception to mandatory arbitration is when a continuing violation has been alleged and conduct giving rise to a claim occurred after March 3, 2022. No state courts appear to have decided the issue yet, even though the FAA has been held to apply at the state level.[3]

A summary of the federal district court cases is below.

A Narrow Reading of the EFAA

Perhaps the narrowest reading of the EFAA is that of the U.S. District Court for the Southern District of New York in Castillo v. Altice USA Inc., a decision from October 2023.[4] In Castillo, the court found that the plaintiff's claim arose and accrued only when the alleged discriminatory conduct occurred. Unless such conduct took place after March 3, 2022, the EFAA did not apply.

The court noted that to "hold otherwise would mean that the applicability of the EFAA would hinge not on when a dispute arose or a claim accrued, as the statute dictates, but rather on when a litigant chose to file a formal administrative charge or complaint." It therefore specifically rejected the plaintiff's arguments that the claim arose when she obtained her right-to-sue letter from the EEOC.

Similarly, in May 2022, the U.S. District Court for the Central District of California held in Newcombe-Dierl v. Amgen that "a claim accrues when the plaintiff knows of her injuries, not when administrative remedies have been exhausted."[5] The court did not address the redundant language in the statute or analyze when a plaintiff's dispute arises; it simply held that the EFAA did not apply because the underlying conduct giving rise to the claim occurred prior to March 3, 2022.

Providing a small carveout to this rule, in June 2023, the U.S. District Court for the Western District of Pennsylvania ruled in Barnes v. Festival Fun Parks LLC that when the alleged claim involved an isolated incident of sexual assault or sexual harassment, it accrued when the plaintiff knew of their injuries, which may have been "concurrent with the discriminatory action."[6]

When a plaintiff is alleging a continuing violation, however, the latest date for accrual is "either the adverse employment action, such as the termination of employment, or the plaintiff's injury," according to the Barnes ruling. Thus, for a continuing violation, a plaintiff could allege conduct that occurred prior to March 3, 2022, and take advantage of the EFAA arbitration exemption, but only so long as some of the conduct giving rise to the claim occurred after March 3, 2022. If no conduct occurred after that date, the EFAA would not apply.

These decisions effectively bar the application of the EFAA's arbitration carveout for any claim arising out of conduct that predated March 3, 2022.

A Broad Reading of the EFAA

Other courts, however, have taken a more liberal approach. In August 2023, the U.S. District Court for the District of Minnesota ruled in Famuyide v. Chipotle Mexican Grill Inc. that a dispute arose when the plaintiff filed her complaint in state court.[7] Because that date was after March 3, 2022, even though the conduct occurred before the EFAA's enactment, the plaintiff was able to take advantage of the EFAA and avoid arbitration.

The court reasoned that if the underlying conduct alone gave rise to a dispute, the legislature's use of the word "dispute" would be "superfluous." It held that something more than the mere act of sexual harassment or assault — namely, an EEOC complaint — was required in order to give effect to the law's intent.

The court cited Black's Law Dictionary to find that "a dispute comes into being when a person asserts a right, claim, or demand and is met with disagreement on the other side. A dispute cannot arise until both sides have expressed their disagreement, either through words or actions."

The Famuyide court held, therefore, that "while the conduct in dispute occurred earlier, the actual dispute between Famuyide and Chipotle — the moment when they took opposing positions — arose when Famuyide filed her complaint in state court. This occurred on July 26, 2022, after the enactment of the EFAA."

Similarly, in a March 2023 decision, the U.S. District Court for the Southern District of Florida in Hodgin v. Intensive Care Consortium Inc. cited Merriam-Webster's definition of "dispute" in holding that a "dispute entails disagreement, not just the existence of an injury (which would be the claim accruing)."[8] Therefore, the plaintiff's dispute arose when she filed a charge of discrimination with the EEOC.

Because Katherine Hodgin filed her EEOC charge before March 3, 2022, however, the court found that the EFAA did not apply. But the clear implication is that a plaintiff whose dispute arose after March 3, 2022, through the filing of an EEOC charge should benefit from the EFAA carveout even if the underlying conduct occurred prior to March 3, 2022.

The court held that the filing of a discrimination charge with the EEOC may be sufficient because "[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."

According to these more liberal cases, a plaintiff who has not raised a dispute in an adversarial way until after March 3, 2022, can take advantage of the EFAA, even if the underlying conduct giving rise to the claim occurred long before March 3, 2022. In states such as California and New York, this could potentially mean that conduct dating as far back as March 3, 2019, and as far forward as March 2, 2022, could be entitled to the EFAA carveout.

Potential Implications of a Broad Reading of the EFAA

As with most claims of workplace discrimination or harassment, under federal law and most state laws, plaintiffs in sexual harassment cases are required to first exhaust administrative remedies by filing a charge with the EEOC or a similar state agency such as the California Civil Rights Department. After the agency investigates the claim, it issues a right-to-sue letter, allowing the plaintiff to proceed to court.

The deadline to file a charge with the EEOC ranges from 180 days to 300 days from the day the discrimination took place.[9] Once filed, a charge may remain with the agency for six months or more, and the claimant has another 30 days to file a lawsuit after obtaining a right-to-sue letter.

So, under federal law, a claimant who was subjected to sexual harassment in December 2021 might have filed a charge with the EEOC as late as 300 days later, in October 2022. If the charge remained with the EEOC for six months, the right to sue would have been issued in April 2023. The lawsuit relating to conduct that occurred prior to March 3, 2022, would then be filed in May 2023.

At what point, then, does that claim or dispute arise or accrue? Is it when the conduct occurred — before the EFAA was enacted — in which case the plaintiff must submit to arbitration?

Is it when the EEOC charge was filed — after the EFAA was enacted — so the plaintiff can choose to file in court? Or is it when the lawsuit was filed — well after the EFAA was enacted — again, giving the plaintiff a choice of court over arbitration?

These questions are now emerging in cases that were filed in 2023, and they are coming to a head as plaintiffs oppose motions to compel arbitration under the EFAA.

More expansively, in California, a plaintiff has three years from the date of the alleged violation to file a charge with the California Civil Rights Department;[10] and in New York, no agency filing is required, and a plaintiff has three years from the date of the alleged violation to file a lawsuit.[11] In states with such expansive statutes of limitations, cases involving conduct dating as far back as March 3, 2019, and as far forward as March 2, 2022, could be entitled to EFAA protection. And we might not see those lawsuits for years to come.

In California, for example, if a claimant filed a charge in December 2023 for conduct that occurred in December 2020, he or she would have until December 2024 to file a lawsuit. For conduct that occurred as late as March 2, 2022, the claimant could file a charge as late as March 2, 2025, and not file the lawsuit until March 2, 2026.

Under the broad reading of "arise" or "accrue" in Famuyide and Hodgin, a significant number of claims could thus be headed to court rather than arbitration, and we may not even see those cases for years to come. Given data showing that arbitration outcomes for employment plaintiffs are consistently less favorable than comparable claims decided by juries,[12] plaintiffs will continue to make this argument until a federal appellate court, or ultimately the U.S. Supreme Court, decides the issue once and for all.

Until then, courts will have to figure out when claims arise or accrue in order to determine whether plaintiffs can avail themselves of the EFAA arbitration exemption. Stay tuned.

Abe Melamed is a mediator, arbitrator and special master with Signature Resolution.

[1] U.S. Code: Title 9, https://www.law.cornell.edu/uscode/text/9.

[2] Pub. L. 11/1-/20, Mar. 3, 2022; https://www.congress.gov/117/plaws/publ90/PLAW-117publ90.pdf; https://dhr.ny.gov/system/files/documents/2022/05/nysdhr-sexual-harassment.pdf.

[3] https://harvardlawreview.org/print/vol-134/state-courts-and-the-federalization-of-arbitration-law/.

[4] Castillo v. Altice USA Inc., No. 1:23-CV-05040 (JLR), 2023 WL 6690674 (S.D.N.Y. Oct. 12, 2023).

[5] Newcombe-Dierl v. Amgen, No. CV222155DMGMRWX, 2022 WL 3012211 (C.D. Cal. May 26, 2022).

[6] Barnes v. Festival Fun Parks LLC, No. 3:22-CV-165, 2023 WL 4209745 (W.D. Pa. June 27, 2023).

[7] Famuyide v. Chipotle Mexican Grill Inc., No. CV 23-1127 (DWF/ECW), 2023 WL 5651915 (D. Minn. Aug. 31, 2023).

[8] Hodgin v. Intensive Care Consortium Inc., No. 22-81733-CV, 2023 WL 2751443 (S.D. Fla. Mar. 31, 2023).

[9] https://www.eeoc.gov/time-limits-filing-charge.

[10] https://legiscan.com/CA/text/AB9/id/2056851; https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2023/01/CRD-Intake-Form_Right-to-Sue_ENG.pdf.

[11] https://dhr.ny.gov/new-workplace-discrimination-and-harassment-protections; https://www.nysenate.gov/legislation/bills/2023/S3255.

[12] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.