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Older Workers May Be Allowed to Sidestep Arbitration, Go Directly to Court

By Rex Darrell Berry
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As I sit here safely ensconced in my seventh decade, I occasionally wonder, "What's so great about getting older?" First, of course, growing older is far better than the alternative. But there may be other bad things that happen when one grows old. Congress appears to think so: It is working toward enacting federal laws to limit (or bar completely) the application of mandatory arbitration agreements to older Americans.

When Congress enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2022 (EFAA), a key feature of the statute was the creation of an exemption from mandatory arbitration "with respect to a case" alleging claims of sexual assault and gender-based discrimination and harassment. The carve-out for these claims came in the wake of Harvey Weinstein, Roger Ailes and #MeToo, when legislators decided that workers subjected to sex or gender-based conduct should be able to bypass arbitration and have their claims heard by juries. Notably, the EFAA did not extend to any of the other protected categories under Title VII.

Now, however, the same type of special exemption may be extended to aging workers. If enacted, the Protecting Older Americans Act of 2023, S. 1979 and HR 4120, would create a similar carve-out for claims of workplace harassment and discrimination on the basis of age. The new bills, which have strong bipartisan support, were introduced in their respective chambers a year ago, and they appear on track to garner sufficient votes to ensure enactment.

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Rex Darrell Berry of Signature Resolution.

Why the push to protect seniors? And why now? Shouldn't such an exemption be extended to other protected classes? Older workers have long been considered deserving of special

protections. Although age was not expressly recognized as a protected class in Title VII of the Civil Rights Act of 1964, Congress addressed this oversight in 1967 with the Age Discrimination in Employment Act (ADEA).

The ADEA was designed to bar age discrimination in all aspects of employment, including hiring, firing, promotion, compensation, and terms and conditions of employment. The law also prohibited retaliation against employees who filed age discrimination complaints. The ADEA's protections cover those who have reached the age of 40, prompting the question: When did 40 become "old"?

In 1990, concerned that older Americans were being misled into waiving their rights under the ADEA, Congress amended the statute with the Older Workers Benefits Protection Act of 1990 (OWBPA). The OWBPA provided even more protections for workers aged 40 and older by making it even more difficult for employers to use severance agreements to settle claims based on the ADEA.

Under the OWBPA, severance and settlement agreements involving older workers must be written clearly and understandably, expressly reference their rights under the ADEA, and allow them to consult with attorneys before signing anything. Significantly, covered workers must be given at least 21 days to consider such agreements before signing, and have another seven days to revoke their agreement after signing. Once again, these extra protections were extended only to older Americans, and not to any other protected class.

Why would Congress enact these protections impacting agreements for arbitration, severance or settlement, while restricting their reach only to select protected classes? The EFAA was enacted in response to a clear and present "hot button" issue. #MeToo was the news of the day, and former Fox News anchor Gretchen Carlson was its poster child. Dozens of victims – of Ailes, Weinstein, and other moguls, movers and shakers—were coming forward with their sordid stories. Congress wanted to be seen as taking action to provide the victims their day in court.

In contrast, while older workers clearly can be subjected to discrimination and harassment, there is not the same tidal wave of sensational news coverage that was seen in the heyday of #MeToo. There are many possible explanations. The COVID-19 pandemic may have had an outsized impact on older workers, who were more physically compromised and less able to return to the workplace. Coupled with greater numbers of seniors still in the workforce, there may have been an uptick in age-related claims, and these may have been the tipping point for lawmakers intent on protecting vulnerable constituents.

From a more cynical view, it is an election year, and older Americans vote in great numbers. AARP's lobbying effectiveness is well known and feared. The bi-partisan support for the Protecting Older Americans Act could reflect lawmakers from both parties wanting to be on what they perceive to be the correct side of the issue.

Regardless of the impetus for the Protecting Older Americans Act, the law deserves some critical review as it decidedly tips the scales for the benefit of one protected class while leaving others beholden to mandatory arbitration agreements. If those agreements are deemed anathema to justice for sexual assault and age discrimination victims, should they not be equally onerous when applied to victims of

racial, religious, disability and gender harassment and discrimination? Why should certain classes be singled out by lawmakers for preferential treatment?

The proposed law could end up creating more problems than it solves. Parroting the language used in the EFAA for sex and gender-based claims, the Protecting Older Americans Act would invalidate any pre-dispute arbitration agreement "with respect to a case" asserting a claim for age discrimination. As case law demonstrates, the use of this language already has created a split among the courts as to its real meaning.

One federal court, in *Johnson v Everyrealm,* read this language to mean that, as long as a valid sex or gender-based claim was part of the mix, all claims asserted by the plaintiff in a lawsuit would be exempt from arbitration under the EFAA. A different judge came to the opposite conclusion, holding in *Mera v. SA Hospitality Group,* that an arbitration agreement was "unenforceable only to the extent that the case filed by such individual 'relates to' the sexual harassment dispute." Many commentators and pundits have encouraged either Congress or the Supreme Court to step in and resolve this dispute.

By using the same EFAA language in the Protecting Older Americans Act, Congress appears happy to punt this issue to the courts, leaving them to decide the scope of any arbitration carve-out in multiclaim employment cases. It may be only a matter of time (albeit many years) before the Supreme Court is asked to rule on the scope of the arbitration carve-outs in these two laws.

Assuming the Protecting Older Americans Act becomes law, we will be in an interesting place. When mandatory arbitration is part of employment agreements—as is predominantly the case these days—some discrimination and harassment claims will be compelled into arbitration, but some will not, depending on who is bringing the claim. As evidenced by repeated attempts to pass the Forced Arbitration Injustice Repeal (FAIR) Act, any push to exempt all protected classes is doomed to fail. It may not sound fair or rational, but at this point Congress seems unwilling to do more.

With four decades of experience focusing on employment law and arbitration issues, **Rex Darrell Berry** *now focuses his energy on dispute resolution as a mediator and arbitrator with Signature Resolution. His experience spans across all areas of employment law, including single- and multi-plaintiff litigation, restrictive covenant enforcement, employment tort, employee discharge, Title VII, FEHA, FMLA, CFRA, and ADEA. Berry was part of the legal team that presented the* Circuit City v. Adams *case before the U.S. Supreme Court.*