Labor and Employment Alert: Mandatory Workplace Arbitration Survives #MeToo Legislation For Now…

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#MeToo inspired many legislative changes, such as requiring workplace anti-harassment training and limiting confidentiality provisions in settlement agreements. The thesis was that by shining more light onto the issue, the continuing problem of workplace harassment would diminish.

Arbitration, being a private dispute resolution process, became an obvious target of such efforts. Starting in 2017, California, New York, New Jersey, Vermont, Maryland, and Washington State passed laws prohibiting the mandatory use of arbitration by employers to resolve employee claims of discrimination under state law. Federal law, however, specifically protects the enforcement of arbitration agreements. Some states, such as New York, tried to take this into account, while other states, like New Jersey, did not bother to navigate the conflict. Given the widespread use of mandatory arbitration to resolve workplace disputes, judicial intervention was inevitable.

To date, federal trial courts have uniformly placed federally protected arbitration enforcement rights above state laws, prohibiting the arbitration of discrimination claims. Just recently a New Jersey federal district court enjoined the State of New Jersey from enforcing its ban against the mandatory arbitration of discrimination claims by applying generally well-accepted federal pre-emption principles *N.J. Civil Justice Inst. v. Grewal*, Civ. No. 19-17518 (D.N.J. Mar. 25, 2021). Federal district courts in New York and California had previously come to the same conclusion. See *Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985 (S.D.N.Y. June 26, 2019); *White v. WeWork Cos., Inc.*, 2020 WL 3099969, at *5 (S.D.N.Y. June 11, 2020); *Rollag v. Cowen Inc.*, No. 20-CV-5138 (S.D.N.Y. Mar. 3, 2021) and *Chamber of Commerce of U.S. v. Becerra*, 438 F Supp. 3d 1078 (2020) (enjoining enforcement of California law).

The following steps are recommended for employers with mandatory arbitration programs, or those looking to institute such programs:

- Determine if the mandatory arbitration agreement is the type of contract covered by the federal arbitration law. When the agreement covers only contracts “evidencing a transaction involving commerce” and certain types of contracts, such as those covering transportation workers engaged in interstate commerce, are explicitly exempted. If the contract is not covered, state law will govern the program.
- Continue to watch for judicial developments. No federal appellate court has yet to rule on the issue (though *Chamber of Commerce of U.S. v. Becerra* is currently on appeal) and some state laws (Washington, Maryland, and Vermont) have not yet been tested in federal court. In *Logan v. Lithia Motors*, No. 18-2-19068-1 SEA (July 12, 2019) a state court found Washington State’s law pre-empted.
- New York, Washington, Maryland, and Vermont employers should be particularly careful. Unlike New Jersey and California where injunctions preventing enforcement of state laws are in place, each case is up to the court. At least one New York State court has found that the New York State law is **not** preempted.
- Review the other terms of the program for compliance with changing caselaw. There have been significant developments about what is considered an effective waiver of the right to a jury trial and whether the program illegally bars access to government agencies like the EEOC and the NLRB.
- Continue to comply with the other aspects of the #MeToo inspired laws. New York employers must periodically provide anti-harassment training to their employees, as well as to their regular independent contractors.

Please contact any of our Labor and Employment attorneys below for assistance:

Anthony Rainone, Member and Co-Chair, Labor and Employment Practice, at arainone@bracheichler.com or 973-364-8372

Matthew Collins, Member and Co-Chair, Labor and Employment Practice, at mcollins@bracheichler.com or 973-403-3151

Jay Sabin, Counsel, Labor and Employment Practice, at jsabin@bracheichler.com or 917-596-8987