New York Law Journal

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An ALM Publication

VOLUME 267—NO. 34

THURSDAY, APRIL 28, 2022

LABOR RELATIONS

Expert Analysis

SASH Act Targets Predispute Arbitration Agreements

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Since the #MeToo movement began in 2017, legislators have enacted various legal reforms aimed at reducing and eliminating sexual assault and sexual harassment in the workplace. Many of the changes have been on the state level, including in New York. Recently, on Feb. 10, 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the SASH Act). Despite the partisan split in Congress, the SASH Act received overwhelming bipartisan support. Soon after, on March 3, 2022, President Biden signed the SASH Act into law. The SASH Act amends the Federal Arbitration Act (FAA) to prohibit employers from enforcing predispute arbitration agreements or joint-action waivers relating to sexual assault or sexual harassment disputes brought under federal, tribal or state law.

Key Terms and Purpose Of the SASH Act

The SASH Act defines a predispute arbitration agreement as "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement." A predispute joint-action waiver is defined as "an agreement [] that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action [] concerning a dispute that has not yet arisen at the time of the making of the agreement." The SASH Act invalidates both predispute arbitration agreements and predispute joint action waivers "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" unless "the person [or] named representative of a class or in a collective action" elects otherwise.

In other words, claimants now have the choice to bring sexual assault or sexual harassment claims in court or proceed to arbitration—notwithstanding any agreement they may have signed requiring such claims to be resolved through arbitration. Claimants may also choose to bring suit individually or as a class, even if they signed an agreement waiving their right to collective

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legal action. As President Biden stated prior to signing the SASH Act, "there will be cases where victims want their claims resolved in private. But some survivors will want their day in court. And that should be their choice and nobody else's choice."

Further, the SASH Act provides that its applicability to a particular claim "shall be determined by a court, rather than an arbitrator, [regardless of] whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, [or] whether the agreement purports to delegate such determination to an arbitrator." In other words, the court—rather than an arbitrator—will decide whether a particular claim qualifies as a sexual harassment or sexual assault dispute for purposes of the SASH Act. Prior to the law's enactment, parties were permitted to delegate interpretation or applicability decisions to arbitrators through contract or otherwise.

The Scope of the SASH Act

The SASH Act became effective immediately and applies to all past and future agreements, including agreements that were entered into before the law was enacted. However, it only applies to disputes or claims that arise or accrue on or after March 3, 2022. The SASH Act does not apply to agreements to arbitrate entered into after a dispute arises. It also does not impact disputes that have already been resolved through arbitration. Notably, the SASH Act is not limited to the employment context; it applies to any agreement or contractual provision that provides for arbitration with respect to sexual harassment or sexual assault claims.

> The SASH Act may mark the beginning of a greater movement toward eliminating predispute arbitration agreements.

Policy of the SASH Act

Arbitration enables employers to keep allegations of sexual misconduct confidential, which limits public accountability. In the Feb. 1, 2022 Statement of Administrative Policy regarding the SASH Act (the Statement of Administrative Policy), President Biden emphasized that "[m]ore than 60 million Americans are subject to mandatory arbitration clauses in the workplace, often without realizing it until they come forward to bring a claim against their employer." President Biden also noted that "between 50–75 percent of women have faced some form of unwanted or unwelcome sexual harassment in the workplace" and "mandatory arbitration clauses [] shield companies and businesses from being held publicly accountable for the harm caused." President Biden declared that the SASH Act would "stop employers and businesses from forcing employees and customers out of the court system and into arbitration" and would "advance[] efforts to prevent and address sexual harassment and sexual assault, strengthen rights, protect victims, and promote access to justice."

The #MeToo movement sparked legislation aimed at reducing and eliminating sexual assault and sexual harassment in the workplace. Specifically, legislators have worked to increase employer accountability as a means to incentivize employers to reassess their approach to preventing sexual misconduct. Toward that end, states such as New York, California, Washington, Hawaii, New Mexico and Virginia have enacted laws that restrict or prohibit employers from requiring employees to sign nondisclosure agreements as a condition of employment or as a means to conceal instances of workplace sexual misconduct. For example, since Oct. 11, 2019, New York employers have been prohibited from including any term or condition in a settlement

or similar agreement that would "prevent the disclosure of the underlying facts and circumstances" of a claim or action alleging discrimination, or violation of an anti-discrimination law, unless the confidentiality term or condition is the complainant's preference. When the complainant prefers a confidentiality term or condition, the complainant must be given 21 days to consider such terms or conditions prior to executing the agreement, and seven days to revoke his or her consent to the agreement. The law originally only covered sexual assault and harassment claims, but was broadened in 2019 to cover all claims alleging employment discrimination.

Similarly, in April 2018, New York enacted a law invalidating pre-dispute arbitration agreements covering sexual harassment claims "except where inconsistent with federal law." In 2019, the law was expanded to cover all forms of discrimination. However, several New York courts have rejected employees' attempts to rely on this law to invalidate arbitration agreements, finding that the FAA preempts New York's ban on agreements to arbitrate discrimination claims.

The SASH Act is the latest piece of legislation targeted at increasing accountability for employers but also visibility for victims. Upon signing the SASH Act, President Joe Biden stated: "when it comes to sexual harassment and assault, forced arbitration shielded perpetrators, silenced survivors, and enabled employers to sweep episodes of sexual assault and harassment under the rug. And it kept survivors from knowing if others have experienced the same thing, in the same workplace, at the hands of the same person."

Considerations for Employers

The SASH Act does not require employers to amend or rewrite already existing arbitration or joint-waiver agreements, as some claimants can and may still elect to arbitrate their claims pursuant to their agreements. Nonetheless, employers should consider revising future arbitration agreements to comply with the SASH Act. Employers may consider adding language in future agreements that provides that non-arbitrable sexual misconduct claims will be severed from arbitrable claims. Still, employers should consider how such language—and effectively, creating two litigation forums—might increase expenses. Employers should also be mindful about excluding sexual misconduct claims from any joint-action waivers in their arbitration agreements. The SASH Act does not address how actions that include both sexual harassment and other claims that are subject to arbitration should be resolved. In these situations, litigants may face multiple actions, such as equal pay for failure to hire or promote, which could not only increase costs, but also may raise issue and claim preclusion concerns.

The SASH Act may mark the beginning of a greater movement toward eliminating predispute arbitration agreements. In the Statement of Administrative Policy, President Biden stated that "[t]he Administration also looks forward to working with the Congress on broader legislation that addresses these issues as well as other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices." If adopted, these kinds of legislative changes would mark a significant departure from a federal policy encouraging the use of arbitration. Employers should monitor potential legislative action.

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