GARDNER SKELTON
ATTORNEYS AT LAW

LEGAL NEWS FOR YOUR BUSINESS

APRIL 2022

General Business Alert

EMPLOYERS WITH ARBITRATION AGREEMENTS – TAKE HEED!

On March 3, 2022, President Biden signed into law the ***Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*** (the "Act"). The Act amends the Federal Arbitration Act (FAA) and prohibits employers from enforcing pre-dispute arbitration agreements, and class or claim waivers, in connection with claims of sexual assault or sexual harassment.

The Act is an unprecedented departure from the federal government's nearly century-old love affair with arbitration as an alternative to in-court litigation. Any litigator will tell you that if an agreement so much as mentions arbitration, and the other side wants to enforce it, it is a bear of a fight to get out of it. A fight quite often lost. The Act's scope is narrow, covering only claims of sexual assault or sexual harassment. However, with this never-imagined-it-would-happen exception to forced arbitration, one wonders if additional exceptions will someday follow.

Takeaways

1. Under the Act, an employee may elect to invalidate arbitration agreements and class or collective action waivers, but only with respect to claims of sexual assault or sexual harassment.
2. The Act applies to any dispute or claim that arises or accrues on or after March 3, 2022, regardless of when the agreement was executed. *It is unclear whether the Act will apply to claims that constitute a "continuing violation" (i.e., acts that occurred before March 3, 2022, but are alleged to have continued to occur after March 3, 2022).
3. The Act defines "sexual assault dispute" as a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in Section 2246 of Title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent. The Act defines a "sexual

harassment dispute" as relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.
4. The Act does not change the existing requirement that Title VII claims must initially be filed with the EEOC, or applicable state agency.
5. It is unclear how courts will handle cases with multiple claims (e.g., claims of racial discrimination *and* sexual harassment) or parties.
6. The Act *is* clear that the courts, and not an arbitrator, will determine whether an arbitrator has authority to rule on a dispute.

Recommended Action

First and foremost, stay vigilant to avoid claims from arising in the first place – continue stamping out workplace sexual assault and harassment. If claims nevertheless arise, know that arbitration very likely may not be an option and factor that into your decision making. If we can help, please do not hesitate to contact us.

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EEOC ISSUES NEW GUIDANCE ON PANDEMIC-RELATED DISCRIMINATION

On March 14, 2022, the Equal Employment Opportunity Commission (EEOC) issued ***new guidance*** warning employers that discrimination against an employee with caregiving responsibilities may be unlawful under federal employment discrimination laws.

Although Congress has not carved out a new protected class for "caregiver," according to the EEOC, caregiving discrimination violates federal laws when it is based on:

1. An applicant's or employee's sex, race, color, religion, national origin, age (>40), disability, or genetic information;
2. An applicant's or employee's association with an individual with a disability, or on the race, ethnicity, or other protected characteristic of the individual for whom care is provided; or
3. Intersections among these characteristics (e.g., discrimination against Black female caregivers based on racial and gender stereotypes).

The technical assistance document issued by the EEOC includes helpful questions and answers, with various examples of how employers may, intentionally or unintentionally, discriminate against employee caregivers. For example, it is illegal to refuse to hire a female applicant or promote a female employee based on an assumption that, because she is female, her primary focus is (or should be) caring for young children who may attend school remotely due to Covid-19 closures or caring for her elderly, high-risk parents. It is also unlawful to deny men leave or permission to work a flexible schedule to care for a family

member that contracted Covid-19 if the employer grants such requests when made by similarly situated women.

LGBTQI+ applicants and employees are similarly protected. For example, employers cannot impose more burdensome procedures on LGBTQI+ employees who make caregiver-related requests, such as requiring proof of a marital relationship with the individual needing care, if such a requirement is not imposed on other similarly situated employees.

With respect to a caregiver's rights to reasonable accommodations (e.g., telework, flexible schedules, or reduced travel), according to the EEOC, federal employment discrimination laws generally do not apply. However, there are caveats. For example, employees unable to perform their job duties due to pregnancy, childbirth, or related medical conditions must be treated the same as other employees who are temporarily unable to perform job duties. If employees who have severe fatigue, difficulty breathing, or headaches due to Covid-19 are granted leave to recover and/or light duty when they return to work, employers must provide the same options to employees who are temporarily unable to work or perform job duties due to pregnancy. Additionally, employers should be careful to assess whether the Family and Medical Leave Act (FMLA) provides protection where federal employment discrimination laws do not.

Now is a good time of year to assess your EEO policies, train your managers on applicable employment laws and HR best practices, and ensure your company has a plan for addressing caregiver requests. The EEOC's ***best practices document*** provides suggestions for incorporating caregiver issues into EEO policies, and there are several other helpful links throughout the body of the EEOC's technical assistance document that are worth exploring. Likewise, Gardner Skelton attorneys are available to answer questions, revise policies, or assist with training. If we can help, please give us a call.

NICOLE GARDNER

(704) 335-0350 phone
(704) 390-7007 direct
nicole@gardnerskelton.com

HEATHER SKELTON
(704) 335-0350 phone
(704) 390-7042 direct
heather@gardnerskelton.com

JARED GARDNER
(704) 335-0350 phone
(704) 390-7019 direct
jared@gardnerskelton.com