Congress Must Level The Employer Arbitration Playing Field

By **Alan Kabat** (August 16, 2023)


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Several states have attempted to provide greater protections to workers by enacting state-level bans on arbitration of employment claims, particularly sexual harassment and sexual assault claims. However, the federal courts have largely eviscerated these state bans by holding that the Federal Arbitration Act[1] preempts these state bans.

Last year, Congress enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,[2] which bans arbitration of sexual assault and harassment claims. However, some federal courts are limiting the EFAA's impact by requiring arbitration of all claims other than sexual assault and harassment claims, thereby forcing plaintiffs with multiple claims to litigate some claims in court and other claims in arbitration.

Congress needs to step in by amending both the FAA and the EFAA.

The FAA should be amended to make clear that the states are able to provide greater protections to workers through limiting or banning arbitration provisions on a state-by-state level, if those states choose to do so.

The EFAA should be amended to (1) make clear that plaintiffs are not required to engage in claim-splitting and can bring all of their claims in court if they so desire; and (2) expand its scope to cover all employment claims.

These changes will provide a more level playing field for employees and employers.

The FAA and Preemption of State Bans on Arbitration

The Federal Arbitration Act provides that an arbitration provision in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[3] The only employees excluded from the FAA are those engaged in interstate commerce, such as maritime workers, railroad employees and interstate truck drivers.[4]

In the nearly 100 years since the FAA was enacted in 1925, private sector employers have increasingly required arbitration for their employees through job offer letters, promotion letters, employee handbooks, and even agreements governing stock grants or options. Specifically, as Justice Ruth Bader Ginsburg's 2018 dissent in Epic Systems Corp. v. Lewis noted, "only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today [as of 2017]."[5]

In response to the proliferation of arbitration provisions, several states — notably California — have attempted to impose state-level bans on arbitration. However, the U.S. Supreme Court, in decisions from 1984 through 2022, has consistently struck down these bans as preempted by the FAA.

For example, in 1984, the Supreme Court, in Southland Corp. v. Keating, held that a California statute requiring franchise disputes to be decided in the courts, not through

arbitration, was preempted by the FAA, since California's ban violated the Supremacy Clause of the U.S. Constitution.[6]

The most recent decision is Viking River Cruises Inc. v. Moriana, in which the Supreme Court in 2022 overturned a California court ruling that arbitration was not mandatory for individual claims under the Private Attorneys General Act, a state law that allows employees to bring labor law claims against their employer, on behalf of the state.[7]

Last month, the Supreme Court of California, in Adolph v. Uber Technologies Inc. addressed an issue left open by the U.S. Supreme Court's Viking River decision — by holding that individuals could bring nonindividual or collective PAGA claims in court.[8] However, it remains to be seen whether the Supreme Court will again strike down the California court's interpretation of its own laws, by applying the FAA to mandate arbitration of nonindividual or collective PAGA actions.

Several other states enacted bans on arbitration of harassment and other discrimination claims. New York's ban, enacted in 2018, initially only covered sexual harassment claims; it was later amended in 2019 to cover all forms of unlawful discrimination.[9] However, the U.S. District Court for the Southern District of New York — in Walters v. Starbucks Corp. in 2022 and Latif v. Morgan Stanley & Co. in 2019 — held that the FAA preempted New York's ban.[10]

Maryland's ban, enacted in 2018, only covers sexual harassment claims.[11] The only Maryland decision addressing its scope, Potts v. Excalibur Associates, similarly held in May 2023 that the FAA "preempts the state law."[12]

The 2022 Federal Ban on Arbitration of Sexual Harassment and Sexual Assault Claims

In 2022, Congress enacted the EFAA, a broad ban on arbitration in sexual assault and sexual harassment cases.[13] This ban only applies to claims that arise or accrue after it was enacted on March 3, 2022.[14] It covers both sexual assault disputes, i.e., "a nonconsensual sexual act or sexual contact," and sexual harassment disputes, i.e., "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[15]

The EFAA's ban allows — but does not require — a person alleging sexual assault or sexual harassment to bring her "case" in court, including class or collective action claims, notwithstanding any predispute arbitration agreement or predispute joint-action waiver.[16] Disputes as to arbitrability are to be decided by the court, not an arbitrator, even if the arbitration agreement "purports to delegate such determinations to an arbitrator."[17]

Some Courts Improperly Require Claim-Splitting Under the EFAA

However, the federal courts are limiting the effectiveness of the EFAA. Despite the judicial preference to have all claims decided in one forum, some employers are insisting on a narrow reading of the EFAA to require claim-splitting, and the district courts are split on that issue.

This year, two federal district courts — the Southern District of New York in Johnson v. Everyrealm and Delo v. Paul Taylor Dance Foundation, and the U.S. District Court for the Northern District of Texas in Watson v. Blaze Media — allowed the plaintiffs to bring all of their claims in a single judicial proceeding, since the EFAA speaks of bringing "cases," not of

bringing discrete claims.[18]

In contrast, two other 2023 federal district court rulings — Mera v. SA Hospitality Group in the Southern District of New York and Silverman v. DiscGenics in the U.S. District Court for the District of Utah — required claim-splitting, with only the sexual harassment or retaliation claims remaining in court, and all other claims sent to arbitration.[19]

The FAA and the EFAA Should be Amended to Give Effect to Bans on Arbitration

The FAA should be amended to make it a floor, not a ceiling, by allowing the states to provide greater protection to employees, interns and independent contractors through giving individuals the option of bringing all of their employment discrimination and retaliation claims in court, notwithstanding the presence of an arbitration clause.

Other federal anti-discrimination statutes specifically provide that the statutes are a floor, not a ceiling, and that the states remain free to enact greater protection — the same should be done for the FAA. Title VII of the Civil Rights Act of 1964 provides that: "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State."[20]

The Supreme Court, in California Federal Savings & Loan Association v. Guerra in 1987, stated that this provision made clear that "Congress has explicitly disclaimed any intent categorically to pre-empt state law or to 'occupy the field' of employment discrimination law."[21]

Similarly, the Family and Medical Leave Act of 1993 provides that: "Nothing in this Act … shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act."[22]

The Supreme Court, in Nevada Dept. of Human Resources v. Hibbs in 2003, stated that this provision meant that "Congress established 12 weeks [leave] as a floor, thus leaving States free to provide their employees with more family-leave time if they so choose."[23]

These provisions in both Title VII and the FMLA allow many state and local governments to choose to provide broader protections to their residents. For example, some state statutes cover employers who are too small to be covered by the federal laws, or create additional protected classes not covered by the federal laws, or allow individuals to go directly to court on their claims, without having to engage in administrative exhaustion with the U.S. Equal Employment Opportunity Commission or a state agency.

The federal arbitration statutes should be amended to provide broader protections to workers. Section 2 of the FAA, which mandates enforcement of arbitration clauses for all workers except those in interstate commerce, could be amended to allow the states to enact state-level bans on arbitration.

More broadly, either (1) Section 2 of the FAA could be amended to exclude arbitration of federal, state, and local employment discrimination and retaliation claims, or (2) the EFAA could be expanded from covering only sexual harassment and sexual assault claims to cover all employment discrimination and retaliation claims.

Further, the EFAA should also be amended to make clear that workers are free to bring all their claims in one judicial forum if they desire, and are not required to engage in claim-

splitting whereby the sexual harassment and sexual assault claims are decided by a jury, and any other claims are decided by an arbitrator.

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[1] See 9 U.S.C. § 1 to § 16.

[2] See 9 U.S.C. § 401, § 402.

[3] See 9 U.S.C. § 2.

[4] See 9 U.S.C. § 1.

[5] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1644 (2018) (Ginsburg, J., dissenting) (citing Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration /1-/2, 4 (Sept. 27, 2017)), available at https://www.epi.org/files/pdf/135056.pdf.

[6] Southland Corp. v. Keating, 465 U.S. 1, 16-17 (1984).

[7] Viking River Cruises Inc. v. Moriana, 142 S. Ct. 1906, 1913-15, 1925 (2022).

[8] Adolph v. Uber Technologies Inc., 14 Cal. 5th 1104 (2023).

[9] See N.Y. C.P.L.R. § 7515.

[10] Walters v. Starbucks Corp., 623 F. Supp. 3d 333, 338 (S.D.N.Y. 2022); Latif v. Morgan Stanley & Co., No. 18-cv-11528 (DLC), 2019 WL 2610985, at *3-4 (S.D.N.Y. June 26, 2019).

[11] See Md. Code, Labor & Empl., § 3-715.

[12] Potts v. Excalibur Assoc. Inc., No. 8:22-cv-02565-PX, 2023 WL 3251410, at *3 (D. Md. May 3, 2023).

[13] See 9 U.S.C. § 401, § 402.

[14] See Pub. L. 117-90, § 3, 136 Stat. 26, 28 (Mar. 3, 2022) ("This Act … shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act").

[15] See 9 U.S.C. § 401(3), (4).

[16] See 9 U.S.C. § 402(a).

[17] See 9 U.S.C. § 402(b).

[18] Johnson v. Everyrealm Inc., No. 22 Civ. 669 (PAE), 2023 WL 2216173, at *18-19 (S.D.N.Y. Feb. 24, 2023); accord Delo v. Paul Taylor Dance Foundation Inc., No. 22-cv-9416 (RA), 2023 WL 4883337, at *4-5, *8 (S.D.N.Y. Aug. 1, 2023); Watson v. Blaze Media LLC, No. 3:23-cv-0279-B, 2023 WL 5004144, at *3 n.1 (N.D. Tex. Aug. 3, 2023) ("a predispute arbitration agreement is unenforceable as to 'the entirety of the case relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute'") (quoting Johnson).

[19] Mera v. SA Hospitality Group LLC, No. 1:23-cv-03492 (PGG)(SDA), 2023 WL 3791712, at *3 (S.D.N.Y. June 3, 2023) (magistrate judge's ruling, on appeal to the district court); Silverman v. DiscGenics Inc., No. 2:22-cv-00354 (JNP)(DAO), 2023 WL 2480054, at *2-3 (D. Utah Mar. 13, 2023).

[20] See 42 U.S.C. 2000e-7 (Section 708 of the Civil Rights Act of 1964).

[21] California Federal Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987) (plurality op.).

[22] See 29 U.S.C. § 2651(b) (Section 401 of the Family and Medical Leave Act of 1993).

[23] Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 739 n.12 (2003).