



Client Alerts

California Compliant: California's Courts Broadly Apply Ending Forced Arbitration Act to Claims Other Than Those for Sexual Assault/Harassment

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It's been more than two years since President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA") into law, but two recent decisions of California's Court of Appeal highlight the law's far-reaching impact on employers who seek to enforce predispute agreements to arbitrate workplace disputes. Although the EFAA's stated purpose is to amend the Federal Arbitration Act ("FAA") "with respect to arbitration of disputes involving sexual assault and sexual harassment," California's courts have interpreted the legislation as exempting from mandatory arbitration *all claims, of whatever type*, asserted against an employer so long as *any* claim in the same case is based on alleged sexual harassment or assault.

Background – the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act

Among the many federal legislative responses to the #MeToo movement was Public Law 117-90, a bipartisan bill that added a provision to the FAA (9 U.S.C. § 1, *et seq.*). New Section 402 grants a victim of sexual assault or sexual harassment the ability to void a predispute agreement to arbitrate claims "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." The EFAA applies to claims of sexual assault or harassment that arose after March 3, 2022 (the law's effective date).

When he signed the EFAA, President Biden said that "forced arbitration" of sexual assault or harassment claims has "shielded perpetrators, silenced survivors, and enabled employers to sweep episodes of sexual assault and harassment under the rug." He said, "some survivors will want their day in court," and that the EFAA will allow them to choose whether to pursue their claims in a judicial or an arbitral forum even if they signed an agreement requiring them to arbitrate such claims.

The EFAA also gives sexual assault/harassment victims the right to pursue such claims on a class or collective basis. Section 402 states that no "predispute joint-action waiver shall be valid or enforceable" when it relates to a sexual assault/harassment dispute. The EFAA defines a "predispute joint-action waiver" to mean "an agreement, whether or not part of a predispute arbitration 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 in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement."

California Courts' Broad Application of the EFAA to *all Claims in a Case Involving Sexual Assault or Harassment*

The American Bar Association has estimated that around 60 million workers, or more than half of the non-unionized private-sector workforce, are subject to mandatory arbitration agreements. California repeatedly has sought to shield its workforce from compulsory arbitration of employment disputes. For example, although it later was found to be preempted by federal law when the FAA applies, Labor Code Section 432.6 (AB 51, enacted in 2019) prohibits employers from requiring, as a condition of employment, that employees waive their rights to resolve in court claims asserted under the Labor Code or the state's Fair Employment and Housing Act ("FEHA").



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The EFAA follows California's lead in attempting to limit employers' ability to require their employees to arbitrate workplace disputes. Now, California's courts have interpreted the EFAA as broadly permitting a victim of sexual assault/harassment to insist that all of the victim's claims against the employer – including for violations of wage/hour provisions, for example – be tried in court even if the employee signed a predispute arbitration agreement.

Doe v. Second Street Corp.

On September 30, 2024, a division of the Second District of California's Court of Appeal (*Doe v. Second Street Corp.*, Case No. B330281) affirmed a trial court's ruling that all of a plaintiff's causes of action against her employer were exempt from mandatory arbitration. In that action, plaintiff Jane Doe alleged she had been subjected to "a pattern of sexual harassment and discrimination" and had suffered "a variety of wage-and-hour violations." Her employer alleged that she had acknowledged receiving an employee handbook that included a provision requiring arbitration of claims arising out of her employment, and moved to compel arbitration. The trial court denied the motion based on the EFAA, and the employer appealed the ruling.

The reviewing court affirmed the ruling, stating that "the EFAA precludes arbitration of the entire case," not just the causes of action involving sexual assault/harassment. The court noted that the EFAA makes predispute arbitration agreements voidable "with respect to a case," as opposed to a "cause of action." A "case," the court reasoned, "does not differentiate among causes of action within it"; rather, it is "an undivided whole." Although the plaintiff asserted some causes of action that did not arise out of alleged sexual harassment, all of her claims were asserted "against the same defendants, and arise out of [her] employment." The court ruled that the agreement to arbitrate therefore was "unenforceable as to each cause of action alleged."

Liu v. Miniso Depot CA, Inc.

One week later, on October 7, 2024, a different division of the Second District (*Liu v. Miniso Depot CA, Inc.*, Case No. B338090) discussed "whether the EFAA exempts from arbitration all causes of action in a complaint that asserts both sexual harassment and non-sexual harassment claims, or whether a trial court may still compel arbitration of the non-sexual harassment claims." The procedural posture was similar to the *Doe* case: the trial court had denied the employer-defendant's motion to compel arbitration, which was basis for the appeal. The *Liu* court reached the same conclusion as its colleagues did in *Doe*, stating: "the plain language of the EFAA exempts a plaintiff's entire case from arbitration where the plaintiff asserts at least one sexual harassment claim subject to the act." Because at least one of the causes of action related to sexual harassment, all of her causes of action – including those based on her alleged misclassification as an exempt employee and wage/hour violations – could be resolved in court even though she had signed an arbitration agreement when she accepted an offer of employment.

Takeaways for Employers

Based on *Doe* and *Liu*, employees who have signed a predispute arbitration agreement but wish to have their claims heard in court may be more likely to add a cause of action based on sexual assault or harassment so that they can avoid arbitration. In theory, California's rules of professional conduct prohibit attorneys from presenting a claim "that is not warranted under existing law." But especially in cases where the facts have not been developed, employers may expect to see more aggressive assertion of sexual assault/harassment claims as a tactic precluding otherwise mandatory arbitration of employment disputes.

In drafting arbitration agreements, employers may choose to exclude disputes based on alleged sexual assault or harassment from the scope of arbitrable claims. They likewise may consider modifying existing arbitration agreements in the same way. Doing so may reduce the likelihood that the agreement will be challenged as unconscionable based on the EFAA and/or Labor Code Section 432.6. Claims seeking civil penalties on a non-individual basis under California's Private Attorneys General Act also are non-arbitrable and could be identified in the agreement as excluded claims.

Regardless of where or whether an employee chooses to assert claims for sexual assault/harassment, employers should remember that California's "Silenced No More Act," which amended FEHA effective January 1, 2022 (SB 331), generally



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prohibits employers from asking employees to agree that they will not discuss or disclose "information about unlawful acts in the workplace," including harassment.

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- Kate LaQuay