Client Update – December 2019

Mandatory Employment Arbitration Agreements Under Attack

Written by Oleg Rivkin, Of Counsel

For many years U.S. employers routinely included mandatory arbitration and confidentiality clauses in employment agreements, secure in the knowledge that these would be enforced by the courts. This presumption of enforceability no longer applies.

With the advent of the #*MeToo* movement a number of state legislatures rushed to enact laws that would limit or outright ban mandatory arbitration and confidentiality agreements in employment contexts. U.S. Congress as well is halfway through enacting a bill that would pave the way for employees' freedom – or at least, their option – to pursue discrimination claims in courts.

The current legal terrain is in a state of flux, for a number of reasons.

For one thing, state laws that have been passed to date are not uniform in their scope. For example, New Jersey has passed one of the most sweeping laws that renders unenforceable any provision in employment contact "which has the purpose or effect of concealing the details relating to claim of discrimination, retaliation or harassment," as well as any provision that requires employees to waive "any substantive or procedural right or remedy."

Maryland and California have passed similar broadly-worded laws. Other states, like New York and Vermont, have limited the ban to sexual harassment claims only.

Under Washington's new statute, a contractual clause in an employment contract will be void if it requires an employee "to submit a claim of discrimination to confidential arbitration" or "waive the right to publicly pursue a claim under state or federal anti-discrimination laws."

States whose legislatures are currently taking up similar legislations include Illinois, Louisiana, Texas, Connecticut, Massachusetts and Hawaii. More states will likely jump on the bandwagon.

There is also some uncertainty as to the constitutionality of these anti-mandatory arbitration laws. Under the Federal Arbitration Act (FAA), agreements to arbitrate are generally deemed enforceable, and, importantly, supersede any state law to the contrary. At least one federal court has held that the statute (New York) prohibiting mandatory arbitration agreements is unenforceable as preempted by the FAA. Additional similar challenges are expected.

U.S. Congress has joined the fray, with the House recently passing the so called FAIR – "Forced Arbitration Injustice Repeal" – Act. (Washington's penchant for deconstructed acronyms is emblematic of the a**-backwards way the capital operates). The Act, if it passes the Senate and is signed by the President – both far from certain – would resolve any ambiguity as to the enforceability of state laws barring mandatory arbitrations. If the Act is not passed, the Supreme Court will likely soon weigh in on the question of FAA's preemption of state laws.

In the meantime, lawyers advising their clients on employment contracts need to take special care to be up to date on the fast-evolving and uncertain legislative and judicial environment that currently prevails.