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The Shrinking Scope of Arbitration and Confidentiality Clauses in Sexual Harassment and FEHA Cases

Introduction. The #MeToo movement continues to reshape the law at the federal and state level. On March 3, 2022, President Biden signed into law the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021* (Act), completely barring mandatory arbitration of sexual harassment cases nationwide. In California, the *Silenced No More Act*, effective January 1, 2022, expanded the restriction prohibiting confidentiality clauses in sexual harassment cases to *all* claims brought under the Fair Employment and Housing Act (FEHA). These new laws impact the way sexual harassment and FEHA cases are now litigated and settled in California.

Arbitration of Sexual Harassment Cases. The Act amended the Federal Arbitration Act (FAA) and applies to "pre-dispute arbitration agreements," entered into before claims have accrued, and "pre-dispute joint action waivers" that seek to limit an employee's right to "participate in joint, class, or collective actions," and renders them invalid and unenforceable. Current and former employees may elect to arbitrate for privacy or other reasons providing they agree to do so in writing and after their claims arise.

The Act's reach is broad, applying to all claims of sexual assault and sexual harassment arising under applicable Federal, Tribal, or State law; and was effective immediately, applying to any pre-dispute agreement, even those formed before enactment. Questions regarding arbitrability are to be determined under federal law by the court, not the arbitrator, even if the arbitration agreement delegates such authority to the arbitrator.

Derivative and Related Claims. California Labor Code Section 432.6, also enacted in the wake of #MeToo, prohibits employers from conditioning employment, or an "employment-related benefit," on an employee's consent to waive any "right, forum, or procedure" for violation of any provision under FEHA or the Labor Code. The law applies to arbitration agreements executed, modified, or extended after January 1, 2020. Arbitration agreements executed before that date are enforceable.

Section 432.6 would seem to bar arbitration of most employment disputes, except it includes a specific carve-out of arbitration agreements that would be subject to the FAA. The carve-out was included in Section 432.6 after former Governor Jerry Brown twice vetoed previous versions of the law in light of FAA preemption (AB 465 in 2015 and AB 3080 in 2018). Section 432.6 expressly states: "Nothing in this section is intended

to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."

To summarize, both federal and California law now prohibit mandatory arbitration of sexual assault and harassment claims. Lawsuits that include sexual assault or harassment claims with other causes of action raise a myriad of procedural and practical questions.

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Arbitration of the non-sexual harassment claims would not be barred under the FAA, but would be prohibited under Section 432.6, unless the carve-out of FAA preemption applies. Thus, employers still may seek to compel arbitration of all other causes of action under the FAA carve-out. Numerous questions will arise regarding the sequence and timing of the two forums - the sexual harassment claim in court and the other claims in arbitration – when the court grants such motions.

***California's Silenced No More Act* (SB 331)**. In 2018 the California Legislature enacted a number of statues in response to #MeToo, including the *Stand Together Against Nondisclosure (STAND) Act*. The law added Code of Civil Procedure Section 1001 that voided any confidentiality provisions in settlement agreements resolving claims for sexual harassment under Civil Code Section 51.9, workplace sexual harassment or discrimination, failure to prevent harassment, and retaliation for reporting sexual harassment or discrimination.

In late 2021 SB 331 was enacted to expand Section 1001 beyond sexual harassment to *any* protected characteristic under FEHA, including race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, familial status, sex, gender, gender identity, gender expression, age, sexual orientation, and veteran or military status. Any settlement agreement entered into after January 1, 2022, that violated SB 331 is void as a matter of law and against public policy. The new law distinguishes agreements reached in litigation, separation agreements, and other employment-related agreements.

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Litigation Settlement Agreements. A litigation settlement agreement may not prevent the disclosure of factual information concerning any form of FEHA harassment or discrimination regarding claims asserted by an employee in civil court or before an administrative agency. Employers may require the claim's settlement amount remain confidential. If requested by the employee, the employee's identity, and all facts that could lead to the discovery of that identity, shall remain confidential.

Separation Agreements. SB 331 also expanded FEHA [Government Code] Section 12964.5 to prevent the use of confidentiality and non-disparagement clauses to limit a current or former employee's right to disclose "unlawful acts in the workplace." Those acts are defined to

include “harassment or discrimination or other conduct that the employee has reasonable cause to believe is unlawful.” If an employer includes a confidentiality or non-disparagement provision in a separation agreement, it must state: “Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful.”

SB 331 does *not* apply to a separation agreement resulting from a “negotiated settlement” to resolve a FEHA claim through an employer’s pre-litigation internal complaint process. A “negotiated settlement” is achieved when: (1) the separation is voluntary, deliberate, and informed; (2) consideration of value is given to the employee; and (3) the employee is given notice and an opportunity to retain an attorney for a period of five days, unless the employee is represented by counsel. The employee may waive the five-day period providing the decision is knowing and voluntary and not induced by the employer.

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Other Employment Agreements. SB 331 also proscribes confidentiality provisions that prevent an employee from disclosing FEHA-type unlawful acts in the workplace in exchange for a raise, bonus, or as a condition of continued employment. As with separation agreements, the law does not apply to these other employment agreements when a “negotiated settlement” is consummated.

Conclusion. The changes in federal and state law that shrink the scope of arbitration and confidentiality clauses will affect how cases are litigated and settled in California, and require a thoughtful and strategic plan by both plaintiff and defense counsel. Employment counsel should review the arbitration and confidentiality provisions in their client’s agreements to ensure compliance under the FAA and SB 331. Finally, great care must to taken to draft settlement and separation agreements that comply with the new confidentiality provisions.

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