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Forced arbitration is under siege in U.S. like never before

VIEWPOINT
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Although employment agreements containing mandatory arbitration of employee disputes have been unsuccessfully challenged in both the courts and in Congress, their demise may be occurring as a result of a groundswell of employee opposition, including recent mass walkouts.

It is estimated that over half of the nonunionized workers in this country have employment agreements containing so-called mandatory arbitration clauses for any dispute, including complaints of sexual harassment. Some of America's most well-known companies, including Walmart, Starbucks, Macy's, Uber, Google and McDonald's, require some or all of their workers to sign such agreements. By signing the agreements, not only do employees forfeit their right to file a lawsuit in court, they also relinquish their right to join with other employees in class action lawsuits.

Furthermore, employers generally prefer the arbitration process since studies demonstrate that employees are less successful in arbitrations as compared to court proceedings, and when they do win, they typically are awarded less money. In addition, arbitration proceedings are private and there is no automatic right to appeal the decisions.

The purpose of this article is to summarize the present state of the law with respect to challenges to mandatory arbitration in both the courts and in Congress and the recent success of employees engaged in concerted actions. This review demonstrates that the inclusion of mandatory arbitration clauses in employment agreements may be on the decline.

Challenges in court

Since the adoption of the Federal Arbitration Act, or FAA, in 1925, which encouraged the use of arbitrations to resolve disputes, courts have consistently struck down attempts to limit the FAA's impact. In essence, courts have concluded that if parties entered into an agreement to arbitrate disputes they should defer to the parties' judgment and enforce any arbitration clauses contained in the agreements. Furthermore, challenged arbitration awards were regularly affirmed by the courts unless the arbitrator exceeded his or her jurisdiction, some type of corruption or misbehavior occurred by the arbitration panel, or the award was rendered in manifest disregard of the law.

On May 21, 2018, the U.S. Supreme Court issued its long-awaited decision in the case of Epic Systems Corp. v. Lewis 584 U.S. __ (2018). In a 5-4 decision, the court ruled that an employee was barred from litigating a claim under the Fair Labor Standards Act since the employee had entered into an employment agreement, which required any dispute to be submitted to arbitration. This decision reversed the Seventh Circuit Court of Appeals decision, which had ruled that forced arbitration prevented employees from exercising their rights guaranteed by the National Labor Relations Board Act (NLRB). In essence, the U.S. Supreme Court ruled that an arbitration agreement superseded any rights employees had under the NLRA.

Actions in Congress

There have been numerous attempts in Congress to undermine the enforceability of mandatory arbitration, whether contained in an employment agreement or a consumer financial contract. All of the challenges have been unsuccessful to date. For example, former Senator Al Franken repeatedly introduced the Arbitration Fairness Act in the U.S. Senate, but it was never voted out of the Judiciary Committee.

Last December, a bipartisan group of senators and representatives introduced the "Ending Forced Arbitration of Sexual Harassment Act," which exempts sexual harassment cases from required arbitration, but that proposal has not yet been voted out of committee. In March of this year, Sen. Richard Blumenthal, D-Conn., and a group of other Democrats again proposed the Arbitration Fairness Act, which would eliminate mandatory clauses in any employment agreement. However, this proposed legislation has not yet been voted on in the Judiciary Committee. As long as Republicans control the U.S. Senate and the White House, it is unlikely that any limitation on the use of forced arbitration in employment agreements will be enacted in Congress.

Mass walk-outs

In view of the absence of favorable court decisions or congressional action, employees have recently joined together to protest mandatory arbitration with respect to sexual harassment and discrimination claims.

On Nov. 1, 2018, Google employees staged a walk-out to protest the company's handling of sexual harassment and misconduct claims. In response, Google announced that it would end its policy of forced arbitration for employees claiming workplace harassment. Facebook thereafter followed suit, announcing a similar position. Prior to the changes in the policies of Google and Facebook, Uber and Lyft exempted sexual harassment claims from any forced arbitration; Microsoft had previously adopted a similar position.

It is evident that the #MeToo Movement has sparked widespread opposition to any type of forced arbitration with respect to sexual harassment claims. This movement may not only be spreading to other companies regarding these type of claims, but it may end the inclusion of mandatory arbitration clauses in all employment agreements.

This form of concerted action directed to forced arbitration has also found favor in law schools. For example, it has recently been reported that a group of Harvard law students, in an attempt to pressure one of the country's largest law firms, Kirkland & Ellis, to drop its use of mandatory arbitration for employees, has encouraged their fellow students to boycott the firm during the upcoming summer associate recruiting season. It has also been reported that the Harvard students are in communication with students in other law schools in an attempt to heighten the pressure on Kirkland & Ellis.

It is evident that we have not seen the end of the efforts to dismantle forced arbitrations in employment agreements. However, one thing is certain, the winds of change are increasing in their intensity, and it is simply a matter of time before forced arbitration is a distant memory.

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