#MeToo and Mandatory Arbitration of Sexual Harassment Claims: An Evolving Legal Landscape

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For the past several months, the news headlines have been dominated by high profile stories of sexual harassment in the workplace, including the Harvey Weinstein, Matt Lauer, and Al Franken scandals. At the same time, the #MeToo movement has gained immense momentum on social media, with millions of women and men voicing their support for victims of sexual misconduct or gender discrimination. Against this backdrop, there is a growing national conversation regarding the necessity to curb sexual harassment in the workplace and beyond. One of the specific questions being raised in these discussions concerns the propriety of mandatory arbitration requirements for sexual harassment claims in the employment context.

In recent years, numerous employers have instituted mandatory arbitration programs in their workplaces. According to a September 2017 study conducted by the Economic Policy Institute, more than 60 million American workers have mandatory arbitration clauses in their employment contracts. As a part of these programs, employees are required to arbitrate workplace disputes, including without limitation employment discrimination or harassment disputes, rather than litigating them in court. Employers cite many advantages to arbitration programs, including lower litigation costs, more timely and efficient resolutions, and often the waiver of employees' ability to institute class or collective proceedings. Perhaps most significantly in the framework of the recent sexual harassment debate, arbitrations generally are confidential, private proceedings and usually the decisions do not become part of the public record. With the prominent news stories and accompanying rise in the number of sexual harassment allegations following the growth of the #MeToo movement, commentators and advocates have questioned whether employers should be able to use mandatory arbitration requirements to prevent sexual harassment claims from becoming public.

There has been a growing trend by lawmakers at both the federal and state levels to prohibit such requirements. Currently, Congress is considering the Ending Forced Arbitration of Sexual Harassment Act, a bipartisan bill sponsored by Senators Kirsten Gillibrand (D-NY) and Lindsay Graham (R-SC) that would effectually invalidate mandatory employment arbitration for gender-based harassment and discrimination claims. There is comparable legislative movement at the state level. State legislators in New York, California, New Jersey, and several other states have proposed bills with the intent of reducing the use of mandatory arbitration provisions in employment contracts. These initiatives are not limited to the political arena; there is noteworthy change occurring in corporate America too. For instance, Microsoft announced in December of 2017 that it was waiving the contractual requirement for the arbitration of sexual harassment claims in its arbitration agreements for the limited number of employees who had this requirement. Brad Smith, president and chief legal officer at Microsoft, issued a statement saying: "We concluded that if we were to advocate for legislation ending arbitration requirements for sexual harassment, we should not have a contractual requirement for our own employees that would obligate them to arbitrate sexual harassment claims."

Given the proposed changes in the law, employers that have implemented or are considering the implementation of mandatory arbitration requirements for employment-related disputes, especially sexual harassment claims, should be mindful of the evolving legal landscape in this area. Regardless of whether mandatory workplace arbitration programs ultimately are deemed unlawful, however, employers should meaningfully consider the advantages and disadvantages

of including arbitration clauses that encompass sexual harassment claims in their employment-related agreements. In particular, employers should weigh the negative publicity and fallout that could result from enforcing such provisions. As demonstrated by the many scandals involving sexual misconduct that have dominated the headlines in recent times, this negative publicity often can present just as meaningful a risk to employers as the potential legal liability.

If you have any questions regarding mandatory arbitration programs in the workplace or how to address sexual harassment claims following #MeToo, please contact one of the authors or any member of AGG's Employment Law Team.

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