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Legislators respond to recent sexual harassment scandals by introducing bills to ban arbitration in sex bias cases

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01.10.2018

Many employers rely on pre-dispute arbitration agreements, usually entered at the beginning of employment, to resolve disputes that may arise during employment. The objective is to address matters through binding and private arbitration rather than public litigation. Now a bipartisan coalition in Congress, including Sen. Lindsay Graham, R-S.C., and Rep. Walter Jones, R-N.C., is trying to make arbitration agreements unenforceable in any "sex discrimination dispute."

Companion bills titled "The Ending Forced Arbitration of Sexual Harassment Act" were introduced in the U.S. House of Representatives and the Senate on December 6, 2017. Despite the title, the proposed act would go beyond harassment cases alone; it provides that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute."

Given the measure's broad definition of "sex discrimination dispute," it would end arbitration not just in harassment cases, but also in all cases alleging sex discrimination and retaliation, including sex-based failure to hire, pay, and promote; termination; and pregnancy discrimination cases. Also, the bill says any arbitration agreement that does not exclude sex discrimination disputes would be invalid, meaning that the employer could not enforce the agreement to require arbitration of other kinds of claims, such as breach of contract.

Gretchen Carlson, who sued her former employer Fox News and its CEO and reached a $20 million settlement in the case, is a proponent of The

Ending Forced Arbitration of Sexual Harassment Act. She has stated that arbitration "keeps harassment complaints and settlements secret" and that it "allows harassers to stay in their jobs, even as victims are pushed out or fired."

In actuality, many disputes that are subject to arbitration are filed in court and then moved to an arbitration forum—so the allegations are public. And many employers and employees prefer arbitration because it is usually faster and less expensive than litigation and it allows for the confidential disposition of claims that neither party wants to publicize.

If The Ending Forced Arbitration of Sexual Harassment Act becomes law, it would have a big impact on employers who use arbitration agreements. Most employment arbitration agreements would have to be rewritten to be enforceable. And Congress may then try to ban arbitration of additional types of employment claims.

Some state legislators and governors are also taking steps to ban arbitration in sex bias cases. On December 13, 2017, a bi-partisan coalition in the South Carolina House of Representatives introduced a bill that is similar to the proposed federal measure and has the same name. It is likely that comparable legislation will be proposed in other states.

Although employers should welcome efforts to deter sex discrimination and harassment in the workplace, the pending bills would likely have unintended consequences. We will track them as they make their way through the legislative process. Regardless of the outcome, and given the current media and legislative focus on sexual harassment, employers should continue to make sure they have in place and enforce clearly written anti-harassment policies that take into account recent developments, related training programs, and procedures for promptly and appropriately responding to complaints.

We will discuss arbitration and other timely topics related to sexual harassment claims and settlements in the #Me Too era at our upcoming round of Quarterly Breakfast Briefings. You can register for one of the briefings here. Also, let us know if you have particular issues you would like to hear addressed at the breakfast briefings.