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PERSPECTIVE

Older workers may get a broad arbitration carve-out

By Barry M. Appell

When Congress enacted the bipartisan Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) in 2022, it intended to create a means for plaintiffs in workplace sexual harassment and assault disputes to have their day in court. Even where mandatory arbitration clauses appeared in employment agreements, the law exempted claims alleging sex-based misconduct.

Congress is now considering a new carve-out from mandatory arbitration. The Protecting Older Americans Act of 2023, S. 1979 and its counterpart HR 4120, would create an express arbitration carve-out for claims of age discrimination in the workplace. The bills were introduced in their respective chambers on June 14 and, given the strong bipartisan sponsorship, they have an excellent chance of passage.

But unless the final bill is redrafted, the Protecting Older Americans Act will leave open a potentially significant loophole. The current text of the bill mirrors language in the EFAA. Specifically, new Section 502(a) of U.S. Code Title 9 would read as follows:

"Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting an age discrimination dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable **with respect to a case** which is filed under Federal, Tribal, or State law and relates to the age discrimination dispute." (emphasis added)

When Congress enacted the EFAA, it carved out from arbitration "cases" related to sexual assault or harassment disputes. This word choice has resulted in a series of judicial decisions focused on the intended scope of the carve-out. In February, New York U.S. District Judge Paul Engelmeyer ruled, in two separate cases against the same employer, both implicating the EFAA, that Congress's use of the word "case" - rather than "claim" - was deliberate and dictated how all claims in those cases should be treated.

In *Johnson v. Everyrealm Inc.* (S.D.N.Y. 2023) 22 Civ. 6669 (PAE)), Judge Engelmeyer found that, because one of the plaintiff's claims involving sexual harassment was a plausible action that could not be compelled into arbitration, all related claims brought against the employer were exempt from arbitration. "[A]s long as a claim of sexual harassment pends in a case, the EFAA, by its terms, blocks arbitration of the entire "case" containing that claim.

In the second case, the judge came out on the other side. In *Yost v. Everyrealm* (22 Civ. 6549 (PAE) (S.D.N.Y. Feb. 24, 2023), he ruled that absent a plausible claim of sexual harassment under New York law and the EFAA, there were no grounds for bypassing mandatory arbitration. The plaintiff, the judge ruled, had not stated sufficient grounds for a plausible claim of sexual harassment; therefore, the entire case fell outside the EFAA.

Another court came to yet a different conclusion. In *Mera v. SA Hospitality Group, LLC et al.* (No. 1:2023cv03492 - Document 32 (S.D.N.Y. 2023)), U.S. Magistrate Judge Stewart Aaron ruled that even though the plaintiff had established a plausible claim of sexual harassment under the EFAA, other claims asserted in the lawsuit - for wage and hour violations - should remain subject to arbitration.

"The Court holds that, under the EFAA, an arbitration agreement executed by an individual alleging conduct constituting a sexual harassment dispute is unenforceable only to the extent that the case filed by such individual 'relates to' the sexual harassment dispute, see 9 U.S.C. §402(a); in other words, only with respect to the claims in the case that relate to the sexual harassment dispute. Since Plaintiff's wage and hour claims under the FLSA and the NYLL do not relate in any way to the sexual harassment dispute, they must be arbitrated."

These EFAA cases make clear that nothing is clear right now when it comes to the scope of the arbitration carve-out. This means that - assuming Protecting Older Americans become law - the same analyses will be conducted by courts reviewing multi-claim employment cases asserting age-based discrimination.

One would assume that legislators and their staff are aware of the EFAA cases cited above. They have had adequate opportunity to draft Protecting Older Americans differently from the EFAA in order to address this uncertainty. That they have not - to this point - modified the language at issue suggests that they intend to allow this potential loophole to remain in the new bill.

Will this make it easier for plaintiffs to bypass arbitration for a host of claims in addition to sex-and age-based claims? The new bill presents an interesting twist in the mandatory arbitration terrain. There is reason to believe that additional arbitration carve-outs - for race, religion, disability and other forms of harassment and discrimination - may be proposed in the future. Will those bills extend the exemption to "cases" related to such disputes, or will they be more narrowly drafted to tie the carve-out to specific claims? If the carve-out is tied to specific claims, will a standard develop for a trial court to determine at an early stage if the specific claims are plausible and not simply a deliberate effort to avoid arbitration by adding such claims for this purpose?

Ultimately, the question may find its way to the nation's highest court. This is a panel that has historically favored arbitration, ruling that the Federal Arbitration Act preempts laws such as PAGA that seek to bypass arbitration. At the same time, the Supreme Court includes strict constructionists who may support Judge Engelmeyer's literal reading of the word "case." The jury is still out.

Barry Appell *is a neutral with Alternative Resolution Centers who has represented both employers and employees.*