Congress Must Act To Curb Workplace Arbitration Pacts

By **Alan Kabat and Samuel Finn** (August 11, 2021)

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Since 2018, state legislatures across the country have worked to empower individuals targeted by sexual harassment and other forms of discrimination by expanding available remedies and increasing applicable statute of limitations.

Some state legislatures have also attempted to ban or limit arbitration agreements for employment claims, either specifically for sexual harassment claims or for a wider range of claims.

These state efforts are driven by the dual desire to help victims bring their cases publicly in court, and to ensure greater accountability of alleged offenders.

At the judicial level, however, the U.S. Supreme Court and the lower federal courts have consistently struck down state-level restrictions on mandatory arbitration as preempted by the Federal Arbitration Act.[1]

Unfortunately, federal courts have routinely held that state efforts to allow victims of sexual harassment and sexual assault to bring their claims in court, rather than in mandatory arbitration, are among the state-level restrictions preempted by the FAA.

As a result, a number of states have recently enacted laws that ban mandatory arbitration for employment claims, only to see them quickly struck down in federal court.

These court decisions have demonstrated that congressional action is needed to empower victims of workplace sexual harassment and sexual assault to bring their claims out of arbitration and into the courthouse.

Section 1 of the FAA, which is found in Title 9 of the U.S. Code, covers all contracts, other than those for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," with the courts interpreting the latter exclusion as only applicable to workers who directly transport goods across state lines.[2]

Section 2 of the FAA provides that any arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

State efforts began in 2018, when four states — Maryland, New York, Vermont and Washington — enacted their respective bans on arbitration, and were followed in 2019 by California, Illinois and New Jersey.

Since then, federal courts in California, Illinois, New Jersey, New York and Washington have held that these state laws were preempted by the FAA (with the California decision currently on appeal in the U.S. Court of Appeals for the Ninth Circuit).

The Maryland and Vermont statutes were not the subject of reported opinions to date.

Without congressional action to amend the FAA, workers will continue to be forced to resolve their disputes via arbitration, because employers routinely promulgate arbitration clauses and employees usually have no choice but to accept them in order to take a job or to remain employed.

These mandatory arbitration clauses often preclude class and collective actions, and may significantly limit the discovery that would otherwise be available in courts.

New York

New York was among the first to enact a ban on arbitration in 2018, and its legislation resulted in more reported decisions than for all other states combined.

Section 7515 of the New York Civil Practice Law and Rules banned arbitration clauses "to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment except where inconsistent with federal law" or except a clause to which "the parties agree upon."

In 2019, the first part was amended to include the resolution of "any allegation or claim of discrimination, in violation of laws prohibiting discrimination".[3]

In New York's first reported federal ruling on the ban, decided by the U.S. District Court for the Southern District of New York in 2019 in Latif v. Morgan Stanley & Co., U.S. District Judge Denise Cote found that Section 7515 was preempted by the FAA, writing, "The FAA sets forth a strong presumption that arbitration agreements are enforceable and this presumption is not displaced by [Section] 7515."[4]

The Latif ruling has since been widely adopted by other New York federal court decisions.[5]

The New York state courts have also addressed Section 7515 and FAA preemption.

In Newton v. LMVH Moët Hennessy Louis Vuitton Inc., Justice Louis Nock in the New York Supreme Court held in July 2020 that the FAA did not preclude bringing sexual harassment claims in state court, because those are not "claims concerning or arising out of a transaction involving commerce, and additionally because the instant case involves purely intrastate activity."[6]

The Appellate Division, however, promptly reversed this decision, albeit on alternative grounds, i.e., that Section 7515 did not retroactively apply to agreements entered into prior to 2018. Thus, the court wrote,

> [W]e need not resolve defendant's further contention that the [FAA], which is expressly applicable to the employment agreement at issue here, is inconsistent with and therefore displaces CPLR 7515 to the extent it prohibits outright a specific type of claim.[7]

Since then, New York state courts have aligned with federal courts and have ruled that the FAA preempts Section 7515.

New York Supreme Court Justice Paul Goetz, in cases brought against Uber and Goldman Sachs, specifically cited Latif in holding that the FAA preempted Section 7515, and accordingly granted the defendants' motions to compel arbitration.[8]

California

Enacted in 2019, California A.B. 51 barred employers from requiring arbitration agreements for claims brought under California's Fair Employment and Housing Act or the California Labor Code.[9]

The legislation also barred employers from retaliating against employees who refused to sign an arbitration agreement.[10]

There was an exception — the statute did not apply to arbitration agreements that were valid under the FAA.[11]

Despite the carveout for agreements valid under the FAA, business organizations challenged the statute on FAA preemption grounds.

In 2020, in Chamber of Commerce of the U.S. v. Becerra before the U.S. District Court for the Eastern District of California, U.S. District Judge Kimberly Mueller granted a preliminary injunction against enforcing the statute, as it was

> preempted by the FAA because it singles out arbitration by placing uncommon barriers on employers who require contractual waivers of dispute resolution options that bear the defining features of arbitration.[12]

California's attorney general appealed the decision. The Ninth Circuit heard oral arguments on Dec. 7, 2020, but has not yet decided the appeal.[13]

Illinois

In 2019, Illinois enacted the Workplace Transparency Act, which became effective Jan. 1, 2020.[14]

The WTA prohibited unilateral agreements to arbitrate claims involving discrimination, harassment, and retaliation for complaining about discrimination or harassment.[15]

The WTA carved out agreements covered by the National Labor Relations Act and the Illinois Public Labor Relations Act.[16]

Further, employers could still negotiate arbitration agreements with employees so long as consideration was provided, and the employee retained the right to report allegations to government agencies or participate in proceedings with government agencies.[17]

It remains to be seen whether remaining employed qualifies as consideration under this law.

In May, a decision came down from the U.S. District Court for the Northern District of Illinois in Wembi v. Gibson's Restaurant Group Management Co. LLC. Although U.S. District Judge Joan Lefkow recognized that the WTA was subject to a preemption challenge under the FAA, she did not decide the issue because a disputed issue of fact — whether the employee signed the arbitration agreement — required an evidentiary hearing.[18]

Maryland

On May 15, 2018, Gov. Larry Hogan signed the Disclosing Sexual Harassment in the Workplace Act, which provides that:

> Except as prohibited by federal law, any provision of an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment shall be null and void as against public policy of Maryland.[19]

The statute also prohibits retaliation against employees who fail or refuse to enter into an arbitration agreement, and provides for attorney fees to employees when an employer "enforces or attempts to enforce a provision" that violates the statute.[20]

However, the carveout for federal law means that the Maryland statute will only apply to those few arbitration agreements not covered by the FAA, i.e., maritime and railroad workers, and others directly engaged in interstate transportation.[21]

There have been no reported court opinions addressing this statute as to date.

New Jersey

In 2019, New Jersey amended the New Jersey Law Against Discrimination by adding Section 12.7, which states:

> A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.[22]

The New Jersey Civil Justice Institute and the Chamber of Commerce quickly sued in the U.S. District Court for the District of New Jersey to block the enforcement of this provision. In March, U.S. District Judge Anne Thompson concluded in this case — New Jersey Civil Justice Institute v. Grewal — that the FAA preempted Section 12.7 of the NJLAD.[23]

The New Jersey attorney general chose not to appeal this decision to the U.S. Court of Appeals for the Third Circuit.

Vermont

In May 2018, Vermont enacted An Act Relating to the Prevention of Sexual Harassment, which prohibited employers from requiring employees to sign an agreement that waived "a substantive or procedural right or remedy available to the employee with respect to a claim of sexual harassment."[24]

Last January, this issue was litigated in Fontaine v. Interstate Management Co. LLC in the U.S. District Court for the District of Vermont. Although U.S. District Judge Christina Reiss held that the FAA required enforcement of an arbitration agreement in a sexual harassment case, neither the parties nor the court addressed the new state-law ban on arbitration.[25]

As a result, there have been no reported decisions on this provision to date.

Washington

In March 2018, Washington amended its Law Against Discrimination to add a provision that banned arbitration, which reads:

> A provision of an employment contract or agreement is against public policy and is void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a cause of action arising under chapter 49.60 RCW or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies, or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.[26]

However, In Logan v. Lithia of Seattle, a disability discrimination and wage law case, Judge John McHale of the King County Superior Court held in 2-19 that this provision was "preempted by federal law, thereby requiring arbitration of Plaintiff's claims."[27]

Congressional Action

These state legislative efforts have made it clear that congressional action is required if lawmakers want to provide employees the opportunity to bring their harassment, discrimination and retaliation claims in federal or state courts.

Indeed, Justice Ruth Bader Ginsburg recognized this in her dissenting opinion in the Supreme Court's 2019 decision in Lamps Plus Inc. v. Varela, in which she quoted her 2018 dissent in Epic Systems Corp. v. Lewis to declare that "'Congressional correction of the Court's elevation of the FAA over' the rights of employees and consumers … remains 'urgently in order.'"[28]

Even Chief Justice Warren Burger, in a dissenting opinion penned 40 years ago (in which he objected to allowing wage claims to be brought against a union in court instead of through arbitration), recognized that principle in the Supreme Court's 1981 decision in Barrentine v. Arkansas-Best Freight System Inc.:

> Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens.[29]

Toward that end, Democrats in the U.S. House of Representatives proposed and passed the Forced Arbitration Injustice Repeal, or FAIR, Act in the 2019-2020 session of Congress.[30] However, the FAIR Act did not reach a vote in the Senate in that session.

The FAIR Act would add a new Chapter 4 to Title 9 of the U.S. Code, which would preclude mandatory arbitration of employment, consumer, antitrust and civil rights disputes, with the most recent proposal resubmitted in early 2021.[31]

In a new development — and before any vote was taken on the 2021 version of the FAIR Act — some of the same representatives recently reintroduced the Restoring Justice for Workers Act.[32]

A narrower legislative proposal than the FAIR Act, the Restoring Justice for Workers Act would amend the FAA by adding a new Chapter 4 that would cover both employees and contractors, and preclude both (1) predispute arbitration agreements and (2) post-dispute arbitration agreements, unless the employee affirmatively consented and the agreement was not required by the employer as a condition of employment.[33]

This was the second piece of arbitration-focused legislation introduced in July, with the first being the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which would also amend the FAA but would only apply to sexual assault and sexual harassment claims.[34]

Although it remains to be seen which of these three overlapping proposals will be passed by the House, let alone by the Senate, all three proposals seek to ensure that employees and contractors have the ability to go to court to enforce their rights under federal, state and local employment discrimination and retaliation statutes.

These bills also reflect an increased recognition that employer-required arbitration agreements have reduced accountability for workplace discrimination and harassment by forcing those claims into private arbitration.

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[1] See, e.g., Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1622-33 (2018); AT&T Mobility, LLC v. Concepcion, 563 U.S. 323, 341-44 (2011).

[2] See, e.g., Capriole v. Uber Technologies, Inc., No. 20-16030, 2021 WL 3282092 (9th Cir. Aug. 2, 2021).

[3] N.Y. C.P.L.R. § 7515(a), (b).

[4] Latif v. Morgan Stanley & Co., No. 18-cv-11528 (DLC), 2021 WL 2610985, *3 (S.D.N.Y. June 26, 2019).

[5] See, e.g., Wyche v. KM Systems, Inc., 19-cv-7202 (KAM), 2021 WL 1535529, at *2 (E.D.N.Y. Apr. 19, 2021) (Matsumoto, J.); Rollag v. Cowen, Inc., No. 20-cv-5138 (RA), 2021 WL 807210, at *4-*6 (S.D.N.Y. Mar. 3, 2021) (Abrams, J.); Charter Communications, Inc. v. Garfin, No. 20 Civ. 7049 (KPF), 2021 WL 694549, at *13-*14 (S.D.N.Y. Feb. 23, 2021) (Failla, J.); Gilbert v. Indeed Inc., No. 20-cv-3826 (LJL), 2021 WL 169111, at *12 (S.D.N.Y Jan. 19, 2021) (Liman, J.); Whyte v. WeWork Companies, Inc., No. 20-cv-1800 (CM), 2020 WL 3099969, at *4-*5 (S.D.N.Y. June 11, 2020) (McMahon, J.); order denying petition for certification of interlocutory appeal, 2020 WL 4383506 (S.D.N.Y. July 31, 2020).

[6] Newton v. LVMH Moet Hennessy Louis Vuitton Inc., No 154178/2019, 2020 WL 3961988 (N.Y. Sup. Ct. July 10, 2020).

[7] Newton v. LVMH Moet Hennessy Louis Vuitton Inc., 140 N.Y.S. 3d 699, 700, 192 A.D.3d 540, 541 (2021).

[8] Crawford v. Goldman Sachs Group, Inc., No. 159731/2020, 2021 WL 743913 (N.Y. Sup. Ct. Feb. 23, 2021); Fuller v. Uber Tech. Inc., No 150289/2020, 2020 WL 5801063 (N.Y. Sup. Ct. Sept. 25, 2020).

[9] Cal. Labor Code, § 432.6(a).

[10] Cal. Labor Code, § 432.6(b).

[11] Cal. Labor Code, § 432.6(f).

[12] Chamber of Commerce of the U.S. v. Becerra, 438 F. Supp. 3d 1078, 1099 (E.D. Cal. 2020).

[13] Chamber of Commerce of the U.S. v. Becerra, No. 20-15291 (9th Cir.). The panel consisted of Ninth Circuit Judges Fletcher and Ikuta, and Tenth Circuit Judge Lucero (sitting by designation).

[14] 820 Ill. Comp. Stat. § 96/1-1 et seq.

[15] 820 Ill. Comp. Stat. § 96/1-25.

[16] 820 Ill. Comp. Stat. § 96/1-10(a).

[17] 820 Ill. Comp. Stat. § 96/1-25(c).

[18] Wembi v. Gibson's Restaurant Group Mgmt. Co. LLC, No. 21 C 586, 2021 WL 2272399, at *2 (N.D. Ill. May 13, 2021). The motion to compel arbitration was subsequently granted, without any ruling on preemption. Wembi, No. 21 C 586, Judgment (ECF No. 28) (N.D. Ill. June 23, 2021).

[19] Md. Code, Labor & Empl., § 3-715(a).

[20] Md. Code, Labor & Empl., § 3-715(b), (c).

[21] See Sean Keene, The Disclosing Sexual Harassment in the Workplace Act, Maryland's New Workplace Harassment Law: Is this Crab Cake all Filler?, 50 Univ. of Baltimore Law Forum 137, 143-44 (2020).

[22] N.J. Stat. Ann. § 10:5-12.7(a).

[23] New Jersey Civil Justice Institute, et al. v. Grewal, No 19-17518, 2021 WL 1138144, at *6-*8 (D.N.J Mar. 25, 2021); see also Meshefsky v. Restaurant Depot, LLC, No. 21-3711, 2021 WL 1921529, at *2 n.2 (D.N.J. May 13, 2021) (same).

[24] 21 Vt. Stat. Ann. § 495h(g)(1), (2).

[25] Fontaine v. Interstate Management Co., No. 2:19-cv-00133, 2020 WL 128987, at *4-*5 (D. Vt. Jan. 9, 2020).

[26] Wash. Rev. Code § 49.44.085.

[27] Logan v. Lithia of Seattle, et al., No. 18-2-19068-1 SEA, Order, at 9 ¶ 42 (King Co. Sup. Ct. July 12, 2019). As there was one claim (alleged failure to rehire) that was not covered by the arbitration agreement, that one claim remained in state court. Id. at 9, 10. According to the court's docket, the parties subsequently settled.

[28] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting).

[29] Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting).

[30] See, e.g., 165 Cong. Rec. H7,840, H7,852 (daily ed. Sept. 20, 2019) (House vote of 225 to 186 on H.R. 1423, FAIR Act, 116th Congress); see also Press Release, Congressman Hank Johnson, "Rep. Johnson Re-Introduces Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers" (Feb. 11, 2021).

[31] H.R. 963, 117th Congress, 1st Sess. (Feb. 11, 2021); S. 505, 117th Congress, 1st Sess. (Mar. 1, 2021).

[32] H.R. 4841, 117th Cong., 1st Sess. (July 29, 2021).

[33] Id.

[34] H.R. 4485, 117th Cong., 1st Sess. (July 16, 2021); S. 2342, 117th Cong., 1st Sess. (July 14, 2021).