Legal Update Article

Predispute Employment Arbitration Agreements in Real Estate Industry After Enactment of New Limits

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Meet the Authors

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The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 will have far-reaching implications for real estate employers that, like in many other industries, have relied on mandatory predispute arbitration agreements to resolve sexual harassment claims brought by employees. The Act limits the use of predispute arbitration agreements and class action waivers covering sexual assault and sexual harassment claims.

Many commercial and residential real estate companies require property buyers to sign arbitration agreements. Arbitration often is used as an alternative to litigation and is supposed to be more affordable and faster than litigation. Rather than a judge and jury deciding a case, an arbitrator that the parties select makes the decision. This may be preferable because the parties can select an arbitrator with a background in real estate transactions, rather than having a randomly selected decision maker. If the arbitration is binding, which most are, there are generally no appeals by using this process, so it has greater finality than litigation.

The Act

The Act provides that an employee alleging sexual assault or sexual harassment against their employer may unilaterally invalidate a predispute arbitration agreement or class-action waiver. This means employees may choose to arbitrate these claims or pursue them in court — individually or as class members or representatives — regardless of any contractual agreements with their employer.

The Act applies prospectively, which means it applies only to sexual assault and sexual harassment claims that arise or accrue after it was signed into law, March 3, 2022, regardless of the date of the arbitration agreement at issue.

The Act should not affect any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

The Act does not affect otherwise valid arbitration agreements for claims other than for sexual assault or sexual harassment.

Practical Impact for Real Estate Employers

As an initial matter, employers will need to assess whether to continue using mandatory predispute arbitration agreements with employees, knowing that sexual assault and sexual harassment claims must be excluded from mandatory arbitration. Employers also will need to carefully consider litigation strategy and whether to seek to enforce existing arbitration agreements. If an employer wants to continue using arbitration agreements, some steps should be taken.

Review the existing arbitration agreement to determine whether it should be revised. Here are a few considerations for real estate employers:

- Does the arbitration agreement have a severability provision?
- Consider adding an exclusion clause explicitly excluding claims for sexual assault and sexual harassment from the agreement.
- In states where it is still permissible, consider including a jury trial waiver in the arbitration agreement for non-arbitrable claims.
- Add language specifically requiring arbitration of claims that are arbitrable where included with non-arbitrable claims.

The Future for Real Estate Employers

Based on the language of the Act, there will certainly be litigation over judicial interpretation. President Joe Biden's Statement of Administrative Policy also foreshadowed possible additional restrictions on the use of mandatory arbitration agreements. He stated that his administration looks forward to working with Congress on broader legislation on other forced arbitration matters involving race discrimination, wage theft, and unfair labor practices.

Jackson Lewis attorneys have worked with many employers to draft lawful arbitration agreements. If you have questions or need assistance, please reach out to the Jackson Lewis attorney with whom you work.