LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

THURSDAY, FEBRUARY 1, 2024

PERSPECTIVE

Can adult survivor claims disregard arbitration agreements under the EFAA?

By **Abe Melamed**

Last year, California enacted legislation that re-opened the statute of limitations for plaintiffs to bring sexual assault and harassment claims, even if those acts occurred more than a decade ago. The Sexual Abuse and Coverup Accountability Act (the Adult Survivor Act), AB 2777, extends the window for filing such claims - based on conduct that occurred as far back as 2009 until Dec. 31, 2026.

The Adult Survivor Act is likely to raise an important question in cases where the plaintiff is subject to an arbitration clause, such as those claims involving alleged acts of sexual assault that occurred in the workplace: Can plaintiffs take advantage of a federal carve-out for sex-based claims and and proceed to court rather than arbitration? It's a timely question, as well as a question of timing.

President Joe Biden signs H.R. 4445, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, into law in the East Room of the White House in Washington. | The New York Times

The EFAA

In March of 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), which amended the Federal Arbitration Act to exempt from arbitration any claims of sexual harassment or sexual assault that "arise" or "accrue" after March 3, 2022. This amendment means that plaintiffs alleging sexual harassment or sexual assault may be able to disregard otherwise valid arbitration agreements and bring their claims to court, to be decided by juries.

While the EFAA was targeted primarily at employment claims, its provisions apply to all agreements covered by the FAA, and could, therefore, extend to consumer and other claims of sexual assault in which arbitration has been invoked, even outside the employment context.

The intersection of the EFAA and the Adult Survivors Act is where things get interesting. The Adult Survivors Act brings with it a slew of sexual assault claims related to employment, as well as other relationships to which mandatory arbitration provisions apply. The underlying conduct in such cases will have occurred well before March 3, 2022, the effective date of the EFAA, in some cases dating as far back as 2009.

The question then is as follows: Can plaintiffs invoke the EFAA to disregard those arbitration agreements and proceed to court, even though the alleged conduct predates the effective date of the EFAA, or will they be bound by the arbitration agreements? This answer to this question hinges on a split in authority over the statutory reading of the EFAA.

"Arise" and "Accrue"

It is clear that where the underlying alleged sexual harassment or assault occurred after March 3, 2022, the EFAA will apply, and plaintiffs can disregard arbitration agreements and proceed to court. But what about when the alleged conduct occurred prior to the EFAA's effective date? Unfortunately, when Congress enacted the law, it failed to define the terms "arise" or "accrue." This has left courts to reconcile the apparent redundancy.

Some courts have interpreted the law broadly to mean that a dispute

"arises" as of one date and a claim "accrues" as of another. Under this reading, a dispute does not arise until there is a disagreement between two opposing sides, even if the conduct giving rise to that disagreement occurred long ago.

Courts following this interpretation have held that even when the underlying conduct occurred prior to March 3, 2022, the dispute actually arose the first time the plaintiff took an opposing position to the defendant, such as when he or she filed an administrative charge or a lawsuit. So long as the filing took place after March 3, 2022, the plaintiff can use the EFAA to disregard the arbitration agreement and proceed to court.

Other courts have read the statute more narrowly, holding that only claims based on alleged conduct that occurred after March 3, 2022 may take advantage of the EFAA's arbitration carve-out. This difference in statutory interpretation can have a profound effect on the outcome of the case, and ultimately may be a driving factor in settlement discussions.

Narrow reading

When courts have read the law narrowly, they have found that claims both arose and accrued on the date of the alleged conduct. If that predated March 3, 2022, the claim must proceed to arbitration. In *Castillo v. Altice USA, Inc.* (No. 1:23-CV-05040 (JLR), 2023 WL 6690674 (S.D.N.Y. Oct. 12, 2023)), a federal district court in New York ruled that unless the conduct took place after March 3, 2022, the EFAA did not apply. "To hold otherwise would mean that the applicability of the EFAA would hinge not on when a dispute arose or a claim accrued,... but rather on when a litigant chose to file a formal administrative charge or complaint."

The Central District of California reached a similar conclusion in *Newcombe-Dierl v. Amgen* (No. CV222-155DMGMRWX, 2022 WL 3012211 (C.D. Cal. May 26, 2022)), holding that "a claim accrues when the plaintiff knows of her injuries, not when administrative remedies have been exhausted."

Broad reading

Courts following a broad reading of the law have held that a claim does not arise until a charge is filed with the EEOC or a comparable state agency, or when the lawsuit is filed.

For example, hot off the press is a decision from the California Court of Appeal, Second Appellate District, Division Five, holding that a pre-dispute arbitration agreement was invalid even though the alleged sexual conduct predated the EFAA's effective date. In *Kader v. Southern Cal. Medical Center, Inc.* (CA2/5B32-6830 1/29/24), the court ruled that for a dispute to arise, a party must first assert a right, claim, or demand, and the dispute only arose in the case when the employee filed a charge with the Department of Fair Employment and Housing, which occurred after the effective date of the EFAA.

The Southern District of Florida in *Hodgin v. Intensive Care Consortium, Inc.* (No. 22-81733-CV, 2023 WL 2751443 (S.D. Fla. Mar. 31, 2023)) similarly held that a "dispute entails disagreement, not just the existence of an injury." Hodgin's claim therefore arose when she filed a charge of discrimination with the EEOC. However, because that was before March 3, 2022, the EFAA did not apply, but the court stated that had it been filed after that date the carve-out would apply even though the underlying conduct occurred prior to the effective date.

In August 2023, the U.S. District Court for the District of Minnesota gave the EFAA an even broader reading, finding that a dispute arose only when the plaintiff actually filed her complaint in court. Because that date was after March 3, 2022, even though the conduct occurred before the EFAA's enactment, the court held that the plaintiff was able to take advantage of the EFAA's carve-out and avoid arbitration. The court held that if the underlying conduct alone gave rise to a dispute, the legislature's use of the word "dispute" in addition to the word "claim" would be "superfluous." Therefore, something more than the mere act of sexual harassment or assault was required to give effect to the law's intent. So, even though the conduct occurred earlier, the actual dispute between the parties, the point at which they took opposing positions, arose only when the plaintiff filed her complaint in state court, after the enactment of the EFAA. (*Famuyide v. Chipotle Mexican Grill, Inc.*, No. CV 23-1127 (DWF/ECW), 2023 WL 5651915 (D. Minn. Aug. 31, 2023).)

FEHA sexual harassment claims

In California, in the employment context, a plaintiff has three years from the date of an alleged violation under the Fair Employment and Housing Act (FEHA) to file a charge with the California Civil Rights Department (CACARD). A plaintiff then has an additional year from receiving a Right to Sue letter to file a lawsuit.

In cases with an arbitration agreement, under a narrow reading of the EFAA, if the alleged conduct occurred prior to March 3, 2022, a plaintiff would not be able to take advantage of the EFAA and would be required to arbitrate those claims. But under a broad reading of the law, so long as the CACARD charge or the lawsuit is filed after March 3, 2022, even if the conduct occurred long before, a plaintiff may be able to disregard arbitration and proceed to court. This would mean that claims based on conduct as far back as February of 2021 would be subject to the EFAA if the CACARD charge was filed after March 3, 2022.

Adult Survivor Act Claims

What does this mean for cases involving claims under the Adult Survivors Act? As noted above, the Adult Survivor Act extends the window for filing such claims until Dec. 31, 2026, even if they are based on conduct as far back as 2009. So, if a plaintiff brought a claim for employment-related sexual assault or abuse outside the three-year FEHA statute of limitations, or if a consumer claim was brought related to medical care, recreational activities, or other nonwork interactions, based on the Adult Survivor Act, the chronological reach of the EFAA becomes critical.

For Adult Survivor Act claims that would otherwise have been subject to an arbitration agreement, we must now ask whether such claims will become subject to the EFAA's arbitration carve-out when the lawsuits are now filed, which is after March 3, 2022. The answer to this question may ultimately hinge on the same statutory interpretations in which courts have engaged with respect to traditional FEHA lawsuits.

If the first time the plaintiff asserts a right, claim, or demand is when they file a lawsuit under the Adult Survivor Act, courts such as the *Kader* appellate court may hold that those claims can take advantage of the EFAA and proceed to trial. Other courts, such as the *Newcombe-Dierl* court, are likely to find that the claims arose and accrued when the plaintiffs knew of their injuries, which even with a new statute of limitations under the Adult Survivor Act would be before March 3, 2022, and the EFAA would not apply.

Conclusion

In light of the ongoing confusion surrounding the definitions of "arise" and "accrue" for purposes of applying the EFAA's arbitration exemption, as well as the inconsistency among trial courts that have read the statute, it seems inevitable that the California Supreme Court or the U.S. Supreme Court will be asked to decide the issue once and for all. Until then, lower courts will have to grapple with the meanings of those terms, and attorneys will have to deal with the uncertainty and inconsistency of results when the i ssue arises. Because the forum often drives settlement value, the uncertainty surrounding the issue is likely to drive many of these cases to settle.

Abe Melamed *is a mediator, arbitrator and special master with Signature Resolution. He predominantly handles employment, sexual assault/abuse and data privacy and consumer class actions throughout California and New York.*