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Editor: Diane Slomowitz

CONGRESS PROHIBITS ARBITRATION MANDATES AND CLASS ACTION WAIVERS IN EMPLOYMENT HARASSMENT DISPUTES

By Laurna Kinnel

Many employment contracts contain provisions mandating arbitration and/or prohibiting class action lawsuits.

These provisions may no longer be valid or enforceable for sexual assault and sexual harassment disputes under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act").

On March 3, 2022, President Biden signed the law, which Congress enacted with bipartisan support on February 10, 2022.

The Act amends the Federal Arbitration Act to provide that, *at the election of a contracting employee*, an employment contract's provisions mandating arbitration, or prohibiting class action or similar proceedings, are invalid and unenforceable with respect to disputes over conduct alleged to be sexual assault or sexual harassment under federal, state, or tribal law.

The statute only applies to allegations that "had not yet arisen" when the contract is made.

This is consistent with most employment claims, which allege wrongful conduct during employment.

Therefore, if an employee contracts, or the employer amends the employee's employment contract, to require arbitration after a potential claim has arisen, that claim will not be subject to the Act.

It is important to note that the Act does not automatically invalidate arbitration mandates or class action waivers for sexual assault or sexual harassment disputes.

If an employee does not elect to have the Act apply, an arbitration mandate and/or class action waiver will be unaffected by the Act.

The Act is retroactive in that it applies to *existing and future* employment contracts.

The Act will be applied under federal, not any state's, law.

Further, a court, not an arbitrator, will determine whether the Act applies to a provision and, if so, its validity.

This is true whether or not the employee challenges the arbitration provision specifically or as a larger challenge to the employment contract.

The Act's requirement that the court make these determinations is important because many employment contracts require such determinations

Non-Competes, cont. on pg. 2

MADDENTE ADVANCES TO SHAREHOLDER

FOS proudly congratulates attorney Lauren Maddente on being unanimously elected shareholder of the firm.

Since joining FOS in 2016, Lauren has made significant contributions to the firm and its clients.

Lauren, whose practice focuses on business law and litigation, is a member of the Board of Directors for the Association for Women Lawyers. She is also a member of the Eastern District of Wisconsin Bar Association Membership Committee.

Lauren, a Waukesha native, earned her law degree from Marquette University Law School, *cum laude*.

NOT A PREFERENCE FOR YOU!

By Diane Slomowitz

Let's say one of your vendors filed for bankruptcy some months ago.

You filed your company's claim, knowing that any bankruptcy distribution to your company will be minimal.

You filed a claim, wrote off what you could, chalked the loss off to bad karma, and you went about your company's business.

And now, months later, you receive a letter from the bankruptcy trustee demanding that your company repay to the debtor all the payments it received from the debtor in the last weeks before the bankruptcy.

How can this be?

Preference, cont. on pg. 2

CHILD TAX CREDIT

By Jamie Barwin

Starting last July 2021, many families may have noticed that they received direct deposit or were mailed advance Child Tax Credit (the "Credit") payments from the IRS, as authorized by Congress' American Rescue Plan.

Millions of eligible families received $300 per child per month for children under age 6, and up to $250 per child per month for children ages 6 to 17, through December 31, 2021.

The base Credit, which families are entitled to annually, was increased in 2021 from $2,000 per qualifying child per year, to a maximum of $3,600 per child per year for children under age 6 and $3,000 per child for children between the ages of 6 and 17.

For those who qualify, the monthly distribution amounts received in 2021 represent half of the total Credit awarded.

The remainder of this fully refundable Credit will be paid upon the filing of 2021 tax returns in 2022.

Income eligibility for this Credit's advance payment was based upon 2019 or 2020 modified adjusted gross income ("modified AGI").

Taxpayers may mistakenly assume that the Credit was available only for families with smaller incomes.

The full Credit was available to married taxpayers filing joint (or qualifying widows or widowers) with modified AGI up to $150,000; head of household filers with modified AGI of up to $112,500; and single filers or married filing separately taxpayers with modified AGI up to $75,000.

Taxpayers with income above these thresholds were entitled to a substantial portion of the Credit as well.

However, the Credit is reduced as one's income increases.

For married filing joint taxpayers (or qualifying widows or widowers), for example, the extra credit is reduced as modified AGI increases from $150,000 to $400,000 (for married filing joint filers) - by $50 for every extra $1,000 in modified AGI.

Similar reductions occur for other types of filers.

The IRS is encouraging taxpayers to check their IRS online accounts (these can be accessed or created at www.IRS.gov) to confirm Credit amounts paid in 2021, particularly if there was a December change in address or bank account.

Online accounts are intended to reflect official figures within the IRS system.

In January 2022, the IRS also began issuing written notifications to Credit recipients reporting the Credit amount paid to them in 2021 and the number of qualifying children used to compute the payments.

Tax Credits, cont. on pg. 3

Non-Competes, cont. from pg. 1

to be made by an arbitrator, not a court.

It is also important because courts have held that a court can only address a specific challenge to an arbitration provision itself, while an arbitrator can resolve a challenge to an entire employment contract, including an arbitration provision.

If you have questions regarding the Act or its applicability to your or your company's employment contracts, contact your FOS attorney.

Preference, cont. from pg. 1

Unfortunately, it's true. A bankruptcy court's demand for repayment of such funds is called a "preference demand."

The Bankruptcy Code allows a debtor, under certain circumstances, to get back from a creditor a "preference" - any payments made to the debtor within 90 days of the filing of the bankruptcy petition.

The purpose of this statute is to prevent a debtor from favoring one creditor over another a short time before the bankruptcy is filed.

Statutory defenses exist to a preference claim, including contemporaneous exchange, issuance of new value, or acting in the ordinary course of business.

While creditors may be generally aware of preferences in bankruptcy, many creditors are not aware of how long after a bankruptcy filing such claims can be made.

Generally, a formal preference action must be filed by the later of (1) two years after the order for relief or one year after the appointment of a trustee, if that is earlier than the order for relief; or (2) the closure or dismissal of the bankruptcy.

This means that a preference demand may arrive long after you have forgotten about the bankruptcy.

So, if a customer files for bankruptcy, keep monitoring your mail/email for a potential preference claim.

Contact FOS with questions.

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DOJ ANNOUNCES ROBUST CORPORATE CRIMINAL ENFORCEMENT

By Jacob Manian

Companies under investigation will often seek credit from the government for cooperation in hopes of a more favorable resolution.

The Department of Justice ("DOJ") recently announced significant policy changes for corporations facing enforcement investigations seeking to earn cooperation credit.

Under the Biden administration, DOJ has identified three significant areas where companies can expect a tougher stance before such credit is granted.

First, DOJ will now require that corporations identify all individuals involved in alleged misconduct. Previously, companies were typically only required to divulge individuals "substantially" involved in wrongdoing.

DOJ's casting of a wider net will undoubtedly ensnare those once considered "minor players" in its enforcement crosshairs.

Second, DOJ will now scrutinize any and all prior misconduct, even if unrelated to the present investigation.

Corporations looking for cooperation credit previously understood that DOJ would usually only view similar prior bad acts unfavorably.

DOJ has signaled, however, that it will also routinely consider unrelated prior corporate misdeeds.

Prosecutors, for example, will examine a company's civil and regulatory history, including IRS wrongdoing, when considering how best to resolve a current investigation.

Given DOJ's new guidance, companies must be prepared to explain and differentiate any prior corporate malfeasance, even as to unrelated matters.

Third, DOJ will now return to using independent compliance monitors. The previous administration all but did away with this DOJ tool.

This means that, where DOJ deems it necessary and appropriate, DOJ will require independent monitors to ensure corporate compliance.

Based on this change, corporations should self-implement a robust internal corporate compliance program.

A corporation's effective compliance program will be considered and hopefully positively weighed by DOJ when it determines the resolution of any corporate investigation. The current DOJ has made clear that it will prioritize corporate criminal enforcement, including holding individual corporate representatives accountable for corporate wrongs.

Corporations should proactively develop and strengthen robust corporate compliance programs to identify and eliminate potential criminal, civil and regulatory violations.

These programs should also work to mitigate the harm from any corporate criminal investigation.

Tax Credits, cont. from pg. 2

The IRS hopes this will reduce tax return errors and processing delays.

2021 tax returns will serve as a reconciliation mechanism for any Credit overpayment or underpayment.

Families who received payments for which they are not eligible, based on higher 2021 AGI, compared to 2020 or 2019, can return the payments now or pay them back when filing their 2021 tax returns.

Families who did not receive advance Credit payments can still claim them on their 2021 federal tax returns.

PRACTICE CORNER: NEW YEAR, NEW NON-COMPETE RULES?

Non-compete agreements are widely used to protect important employer relationships and protect the investment employers make in their employees.

They have historically been upheld when reasonably necessary to protect the employer's interests and were reasonable in duration, geography, and customers.

Last summer, President Biden issued an executive order urging the Federal Trade Commission ("FTC") to "curtail the unfair use of non-compete clauses…that may unfairly limit worker mobility."

So far, nothing much has happened at the federal level in response.

This has left employers and attorneys confused and speculating over how to contractually and reasonably restrict employees' post-employment conduct.

Will the FTC act?

The executive order does not require the FTC to do so.

If it does, it is unlikely that the FTC will ban non-compete agreements outright.

But what will the FTC do?

One hint might come from laws passed by several states, including Illinois, limiting the use of non-compete agreements with low-wage workers, as discussed in the Fall 2021 *FOS News*: foslaw.com/wp-content/uploads/2021/09/Fall-2021-Newsletter.pdf.

During this period of potential change and uncertainty, it is critical that non-compete agreements be drafted carefully, so they are not considered overly broad or restrictive.

FOS is actively monitoring for developments in this area.

If you have questions regarding the use of non-compete agreements in your business, or if you are subject to non-compete restrictions with a former employer, contact your FOS attorney.

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NEW LAW SHOULD MEAN GETTING OCCUPATIONAL LICENSES MORE QUICKLY IN WISCONSIN

By Lauren Maddente

Anyone who has ever applied for a license to work in a regulated occupation is aware that the process can be incredibly cumbersome.

A new Wisconsin law should make the process smoother and hopefully faster.

The bipartisan legislation (2021 Wisconsin 118) signed by Governor Evers on December 9, 2021, aims to fast-track the occupational licensing process.

This law applies to many occupations, including general contractors, dentists, nurses, bartenders, social workers, cosmetologists, manicurists, counselors, and emergency medical technicians.

Prior to the law's enactment, an application for an occupational license would go to one of the State's nearly 300 credentialing boards for review.

Cumbersome procedures and requirements followed.

Under the new law, the Department of Safety and Professional Services ("DSPS") must review and forward the application to the applicable licensing board, with a recommendation for approval, denial, or conditional approval.

If DSPS forwards the application recommending it be approved, the law requires that the relevant board approve the application.

If the board does not act to approve the application within ten business days of its receipt from DSPS, the application will be deemed approved, with any conditions recommended by DSPS.

The law also authorizes licensing boards to delegate authority to DSPS itself, to decide whether an occupational license application should be approved or denied. Since DSPS has been delegated such authority, it must approve, conditionally approve, or deny the application at this first step.

The law authorizes DSPS and the licensing boards to promulgate rules to effectuate its provisions.

If rules are proposed, the process should begin in the next few months.

FOS will continue to monitor these developments.

If you have any questions about this new law, general employment issues, or any other legal matter, contact your FOS attorney.