Arbitration Sidebar

By Karl W. Butterer

Two developments in early 2022 highlighted the evolving role of arbitration agreements to resolve disputes between employers and employees.

Partial Ban on Arbitration of Sexual Harassment Claims

First, federal legislation has made it more difficult for employers and employees to enter agreements to resolve sexual harassment claims in a private arbitration as opposed to the public courtroom. On March 3, 2021, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The Act gives an employee the option to invalidate a pre-dispute agreement to arbitrate a "case" which is filed under federal or state law and "relates to" a "sexual assault dispute" or a "sexual harassment dispute." This leaves open the possibility that the employee may still elect to proceed to arbitration on the sexual assault and harassment disputes. The law raises strategic issues for both employees and employers where the employee has both claims which *must* be arbitrated, and claims which *may* be arbitrated.

Confidentiality of Arbitration Revisited?

Second, early this year the National Labor Relations Board signaled that it may be open to adopting a new legal standard to make it more difficult to enforce confidentiality provisions in mandatory arbitration agreements. Some employers will keep a keen eye on this development because they consider confidentiality clauses to be a key reason to enter arbitration agreements.