Recommended placement of EFASASHA: Chapter 2 (Defenses to Arbitration), after Section 7 (State Consumer Protection Law) and before Section 8 (Allocating the Costs).

Recommended additional references to EFASASHA: Chapter 1, page 56. Add a Question 4. Should all types of disputes be arbitrable? Can you think of any that definitely should not from a policy perspective? See Chapter 2 for a discussion of the newly enacted EFASASHA, which blocks mandatory arbitration in cases of sexual assault or sexual harassment.

Chapter 2, page 448, add a Question 3: S*ee also* EFASASHA discussion regarding voiding predispute class-action waivers in cases of sexual assault or sexual harassment arbitration. Can arbitration bring to light widespread abuse as effectively as class actions?

NOTE ON THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT

A. What is EFASASHA and Why Was it Needed

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFASASHA"), adopted in 2022, amended the Federal Arbitration Act. The amendment states in part:

> At the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative in a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint action waiver…shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law…

9 U.S.C.S §402.

EFASASHA voids, at the option of the victim of sexual assault or sexual harassment, predispute mandatory arbitration clauses when the agreement falls under the FAA.

To understand the full impact of the amendment, it is helpful to be aware of the long-standing tension existing between arbitration and traditional court. Proponents of arbitration argue it is faster, cheaper, and more informal both for the claimant and defendant. These characteristics make it more likely an employer/employee relationship survives the experience than long and acrimonious litigation.

Proponents of mandatory arbitration even in cases of sexual assault or harassment allegations have argued that confidentiality, not arbitration itself, is harmful to victims. Therefore, voiding a predispute arbitration agreement in the case of sexual assault or sexual harassment fails to address the root harm of confidentiality because most cases settle before making it to court anyway, and often with a confidentiality agreement. *See* Rachel M. Schiff, *Not So Arbitrary: Putting an End to the Calculated Use of Forced Arbitration in Sexual Harassment Cases,* 53 UC Davis L. REV. 2693, 2714 (2020).

Opponents of predispute mandatory arbitration agreements argue that such agreements make it less likely a claimant will be able to find legal representation because arbitration is historically harder for employees to win. (21% of employees win in mandatory arbitration, compared to 38% in state courts and 59% in federal courts, according to a 2011 study). *Id.* at 2710. Further, arbitration claimants that do win are likely to recover lower damages. (The median arbitration award in the 2011 study was $36,500 as compared to $85,560 in state court and $176,426 in federal court). *Id.* These factors result in many victims of sexual assault and sexual harassment being turned away by attorneys who might otherwise represent them if they had a higher likelihood of success and greater potential for damages. *Id.*

Another important consideration is the 5-4 Supreme Court decision in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018), in which the Court held that although the FAA allows courts to invalidate arbitration agreements "upon such grounds as exists at law or in equity for the revocation of any contract," this provision does not apply where the ground for challenging the arbitration agreement is the fact that the agreement requires individualized arbitration instead of class action. In other words, the savings clause of the FAA can only be invoked when there is a challenge that would be applicable to "any contract," such as an arbitration agreement having been extracted by fraud, duress, or in an unconscionable way. The fact that there is an arbitration agreement itself cannot provide a basis for voiding the agreement. The Court further held that class wide proceedings are inherently inconsistent with arbitration, which (according to the Court, at least) involves only individualized relief. Dissenting, Justice Ginsburg predicted that "the inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers." *Id.* at 1646.

EFASASHA is not the only exception to the FAA. Andrew McWhorter, *A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration,* 52 COLUM. J.L. & Soc. Probs. 521, 534 (2019) reviews several exceptions to the FAA and the reasons for them. Exceptions include: parties to a motor vehicle franchise contracts may agree to a post-dispute arbitration agreement but are not required to; a prohibition on mandatory arbitration of consumer credit contracts among active military personnel; parties to a livestock or poultry contract may decline inclusion of mandatory arbitration provision; a ban on the use of mandatory arbitration agreements in residential mortgages and whistleblower disputes; and finally, a prohibition on federal contractors receiving Department of Defense funds from requiring employees to arbitrate Title VII claims. These carve outs are found piecemeal among

other statutes – i.e. Title VII, the 2002 Motor Vehicle Franchise Fairness Contract Arbitration Fairness Act, the 2006 Military Lending Act, etc. – primarily as public policy responses to particular issues that arose in implementing the FAA's broadly pro-arbitration stance. *Id.* An important theme underlying these exceptions is that exceptions to mandatory arbitration provisions are often found where one party is particularly vulnerable to predatory contracts of adhesion (such as active-duty members of the military), or when social movement pressure influences the court to reinterpret existing statutory language. Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?* 54 HARV. C.R.-C.L. L. REV. 155, 161-62 (2019).

So why was an FAA carve-out needed when it comes the claims of sexual assault and sexual harassment? For one, much literature exists on the special nature of sexual assault and harassment victims arguing that arbitration claims are "especially likely to suppress claims of vulnerable employees" for several reasons. *Id.*

Victims of sexual assault and sexual harassment have weaker claims as a matter of law because the law in this area is underdeveloped. Arbitrators, due to their need to maintain clients, are feared to be less likely to imaginatively interpret or expand existing laws to protect victims. Attorneys are less likely to take the cases of victims due to reduced likelihood of success and lower potential damages. Victims are often faced with significant evidentiary issues, such as lacking access to employment documents or co-worker witnesses being unwilling to come forward for fear of becoming the next victim. Marginalized members of society are already less likely to come forward as victims of sexual assault or harassment at work because they themselves tend to be lower income, less aware of their legal rights, and in fear of potential

"embarrassment, retaliation, deportation, or the substantial emotional burdens that inevitably come with bringing a claim against one's employer." *Id.* at 185.

Some argue that the #MeToo movement, which relies on public pressure to shame predators out of companies or attempts to impact a company's bottom line until the predator is pushed out, has been far less effective for ordinary people in most workplaces. Low-wage-earning victims of workplace sexual assault or harassment are far less likely to get public coverage of the kind major celebrities receive. Therefore, the impact of confidentiality in mandatory arbitration is especially felt when victims are ordinary workers who literally *can't* get their stories out to the public. *Id.* at 160.

Perhaps Gretchen Carlson, a vocal proponent of the #MeToo Movement, said it best when she wrote that "forced arbitration is a sexual harasser's best friend: it keeps the proceedings secret, findings sealed, and victims silent." She further outlined the harmful impacts of forced arbitration on victims of sexual assault and harassment, such as being pushed out of their careers post-complaint, blacklisting, and lack of control over the narrative in the workplace. Gretchen Carlson, *The Supreme Court Tried to End #MeToo: Here's How We're Fighting Back,* https://www.yahoo.com/entertainment/gretchen-carlson-supreme-court-tried-150628150.html. In short, an exception to the FAA was needed because most Americans still need both private representation and public pressure to vindicate their right to a workplace free from sexual assault and harassment.

B. What are the Anticipated Effects of EFASASHA

Initial responses to the amended Act were positive. The Chair of the EEOC stated in a press release in March 2022 that he was "delighted" by the change. The release cited to a 2020 report by the EEOC Select Task Force on the Study of Harassment in the Workplace, finding

that 50-70% of women have faced unwanted sexual harassment in the workplace. In the view of the Chair, the amendment advances the promise of anti-discrimination laws and increases the ability of citizens to fully vindicate their rights to be free from sexual harassment. *Press Release,* U.S. Equal Opportunity Employment Commission, https://www.eeoc.gov/newsroom/eeoc-chair-applauds-passage-ending-forced-arbitration-act.

Indeed, the amendment passed with a wide margin in the House (335-97) and on a voice vote in the Senate. Senator Kristin Gillibrand (D.-N.Y.) described the law as "one of the most significant workplace reforms in American history." Others have their doubts.

David Horton, in his article *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,* Yale L. J. Forum (2022), emphasizes a design choice that will almost certainly limit the impact of the new law. EFASASHA only governs where the FAA governs. As previously noted, the FAA has several major exceptions. When a potential sexual assault or sexual harassment claim falls into one of these exceptions, state law will apply.

Horton notes two important scenarios: 1) state courts are sometimes hostile to arbitration, but not always; and 2) because the Supreme Court has expanded some exceptions to the FAA, many cases of sexual assault or sexual harassment will not fall under the FAA and will therefore remain subject to mandatory arbitration.

In *New Prime v. Oliveira,* 139 S. Ct. 532 (2019) the Court held that the FAA §1 exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in…interstate commerce" applied to independent contractors. This interpretation freed many workers from FAA coverage, meaning they are now free to attempt to avoid mandatory arbitration clauses under state law defenses.

In a state that has adopted the Revised Uniform Arbitration Act ("RUAA") the outcome is likely the same as it would have been under FAA. RUAA says that an arbitration provision is "valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." RUAA does not exempt any class of workers or type of claim. David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,* Yale L. J. Forum, 2022 at 21.

However, those independent contractors who would have been covered by FAA pre-*New Prime,* are now not subject to the FAA *or* the EFASASHA. In RUAA jurisdictions they will be subject to mandatory arbitration. This means that while exceptions to the FAA are broadened, EFASASHA's scope of impact is considerably narrowed by the *New Prime* decision. *Id.* at 15.

Similarly, the FAA does not govern non-contractual documents. Mandatory arbitration provisions in documents such as trusts, declaration of covenants, and tariffs, for example, fall outside of the FAA. Consider that many companies employ a common practice of specifying that their manuals and handbooks are not contracts. Thus, workers in those companies are not covered by the FAA. This can be seen as a positive in cases where plaintiffs wish to be free from the Act to challenge the provision on state law grounds, but where the plaintiff is a victim of sexual assault or sexual harassment the exclusion also means that the plaintiff is not covered by the EFASASHA. *Id.* at 16-17.

C. What is Next for the EFASASHA

The solution to the gaps in EFASASHA can come in several forms. One is Congress. According to Horton, the easiest fix would be for Congress to unlink EFASASHA from FAA, thereby covering more people. Alternatively, state legislatures can ban mandatory arbitration in cases of sexual assault and sexual harassment. Similarly, employers and large companies can

end their practices of using mandatory arbitration in all disputes, a step that has been taken by some already. Finally, judges can void, where possible, mandatory arbitration on public-policy grounds as a contract defense.

QUESTIONS

1. EFASASHA uses the word "case" rather than "claim" to describe what cannot be subject to mandatory arbitration. Recall from your Civil Procedure course that "case" and "claim" have very well-established – and very different – meanings. Congress's use of the word "case" indicates that so long as a plaintiff's Title VII complaint alleges sexual harassment or assault, any other claims also alleged in the complaint – such as Title VII race discrimination or retaliation claims, or state-law tort claims – also cannot be forced into arbitration so long as they are somehow related to the sexual harassment/assault claim. See Sandra F. Sperino, ________ [forthcoming article].
2. At one time, the Supreme Court interpreted Title VII as not protecting women from discrimination or harassment because of pregnancy. Congress then amended Title VII to reverse the Court's holding. Congress did so, however, not by adding "pregnancy" to the list of characteristics protected by Title VII, but by defining "sex" – already a protected characteristic – to include "pregnancy, childbirth, and related medical conditions." Because pregnancy is thus a form of sex discrimination, assault or harassment on the basis of pregnancy is covered by EFASASHA. See Sandra F. Sperino, ________ [forthcoming article].
3. *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,* Yale L. J. Forum, 2022 at 22 for a relevant hypothetical. "'A railroad conductor [who has signed an arbitration agreement]...br[ings] sexual harassment

claims based on events that took place in the railroad company's corporate office.' The plaintiff's status as a railroad employee exempts her from the FAA under section 1. But because the FAA and [EFASASHA] are coextensive, she also cannot invoke Congress's new prohibition on forced arbitration of sexual-misconduct allegations. Thus, the arbitrability of her lawsuit hinges on state law – which, in a jurisdiction that follows RUAA, mandates arbitration without excluding any category of workers or claims."

4. Is it appropriate to expect arbitrators to keep pace with social movements by expanding their interpretation of laws? How could arbitrators be incentivized to do what is right for victims while maintaining their client base and neutrality?