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45 Congressional Sponsors Seek to End Employment, Consumer, and Franchise Arbitration

The proposed Arbitration Fairness Act of 2009, currently pending in Congress, would substantially amend the Federal Arbitration Act ("FAA") to render unenforceable certain types of common arbitration agreements, including agreements to arbitrate employment, consumer, and franchise disputes.

Background on the FAA

The FAA, enacted in 1925, was designed to counter the longstanding judicial hostility to arbitration. The Act created substantive federal law that made arbitration agreements enforceable like any other contract. With some limited exceptions, the FAA is coextensive with Congress's Commerce Clause power. Thus, arbitration agreements that affect interstate or foreign commerce ordinarily are governed by the FAA. State laws that provide less favorable treatment to arbitration agreements are preempted.

Background on the Arbitration Fairness Act

Versions of the Arbitration Fairness Act were introduced in 2009 in both the House and the Senate. Forty-five Members of Congress and Senators are co-sponsors of the bills, H.R. 1020 and S. 931. The findings accompanying the bills express concern that arbitration agreements are often unfair to employees and consumers and that arbitration undermines the development of the law in important areas.

To address these concerns, the House bill provides that "[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of . . . an employment, consumer, or franchise dispute." The Senate bill is substantially the same. "Employment," "consumer," and "franchise" disputes are broadly defined. For example, a "consumer dispute" is defined in the House bill as "a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit."

Similarly, an "employment dispute" is a dispute "arising out of the relationship of employer and employee as defined in the Fair Labor Standards Act" ("FLSA") (the House version), or "as defined in section 3" of the FLSA (the Senate version). Section 3 of the FLSA expansively defines the employment relationship.

Potential Effects of the Arbitration Fairness Act

The Act represents a retrenchment of the federal policy in favor of arbitration. The Arbitration Fairness Act would prevent parties in employment, consumer, and franchise relationships from arbitrating their disputes even, it appears, if state law would permit arbitration. The Act as currently written includes no exception for sophisticated parties with significant bargaining power. Moreover, the Act would apply to "any dispute or claim that arises" after it becomes law and is not limited to contracts which are entered into after enactment.

Because many employers, producers of consumer goods, and franchisors rely on arbitration clauses in their contracts, the Arbitration Fairness Act would substantially affect the way that many companies do business. In addition, the Act could upset the settled expectations of parties who carefully negotiated arbitration clauses in their contracts and increase the costs to resolve common types of disputes. The looming changes therefore require focused attention on how companies will resolve disputes in the future.

How Venable Can Help

Venable's team of former members of Congress, congressional staff, Cabinet members, and key agency professionals stand ready to help assist our clients in expressing their views on matters pending before Congress. In addition, our lawyers can counsel you as to the likely effect of the Arbitration Fairness Act on your business practices. We also have expertise in employment and other types of arbitration, as well as in the complex relationship between the arbitration and litigation processes. We can therefore assist you in anticipating and resolving the challenging issues that will arise if the bill becomes law.
