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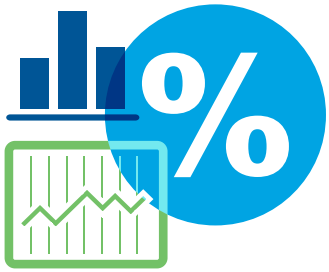

Financial Services Employment Arbitration Q&A

A Mini "Franken"-Stein? New York Assembly May Clamp Down on Employment Arbitration

By Cameron Smith

Inspired by the so-called "Franken Amendment," which prohibits federal defense contractors with contracts in excess of $1 million from requiring arbitration of their employees' claims for discrimination or harassment, the New York State Assembly recently passed a bill that would impose the same prohibition on State contractors.

The bill, passed on May 5, 2014, would add a new section to the State Finance Law barring New York State from entering into any contract with a vendor that has a mandatory arbitration program with its employees. It is broader than the Franken Amendment since it applies to all contracts with the State (the Franken Amendment applies only to contracts involving more than $1 million in defense appropriations). It could affect financial services companies if they do business with the State such as bond offerings, extending credit, or providing investment advice, treasury management, or trade execution to the State or a State fund. The ban would apply to companies that require their employees or independent contractors to submit to private arbitration any claim "under Title VII … or any tort related to or arising out of discrimination, sexual assault or harassment," including assault and battery, intentional infliction of emotional distress and negligent hiring claims. The law would not apply to businesses with mandatory arbitration clauses set forth in a collective bargaining agreement.

The bill's supporting memorandum refers to the case of Jaime Leigh Jones, an independent contractor who worked for Halliburton Co. and claimed in 2005 that she was raped by her coworkers in Iraq. Her contract required that claims of sexual assault against coworkers proceed in arbitration. In response, Senator Al Franken (D-Minnesota) sponsored federal legislation that prohibits defense contractors with contracts in excess of $1 million from requiring employees to submit to arbitration claims under Title VII or any tort related to discrimination, sexual assault or harassment. The sponsors of the New York bill say they were inspired by the Franken Amendment and seek to adopt the same rule for all State contracts.

The Assembly's effort to require a judicial forum for the resolution of employment discrimination and harassment claims may be preempted by the Federal Arbitration Act. In *AT&T Mobility v. Concepcion*, the Supreme Court held that the FAA preempts state law rules that conflict with the general federal policy favoring arbitration as a dispute resolution mechanism. The specific prohibition in *Concepcion* was a California rule that rendered class action waivers unenforceable. While the Supreme Court struck that down, it is less clear whether the FAA would prevent a state from using its power of the purse to require that companies doing business with the state permit their employees to resolve certain disputes in court. For financial services employers, they may be able to rely on an additional preemption argument that mandatory arbitration pursuant to FINRA Form U4 has been approved by the U.S. Securities and Exchange Commission and thus reflects the delegated authority of Congress.

The bill now moves to the Republican-controlled State Senate, where it is sponsored by Republican Carl Marcellino and has a decent chance of passing. Governor Cuomo has not publicly taken a position on the legislation.

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