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THE ENABLEMENT OF MASS INCARCERATION BY THE CALIFORNIA SUPREME COURT AND THE NEED FOR A LEGISLATIVE SOLUTION

Written by Presiding Justice J. Anthony Kline (Ret.)

THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT: FOUR YEARS FRAUGHT WITH CONFUSION AND LITIGATION

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As the fourth anniversary of the bipartisan Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA," 9 U.S.C. §§ 402 et seq.) approaches on March 3, 2026, this article examines the Act's tumultuous implementation and ongoing controversies. Among other concerns, Congress's inexcusably sloppy drafting has spawned hundreds of lawsuits and extensive ongoing litigation over fundamental questions regarding the scope, the applicability and even the effective date of the Act.

This article briefly reviews the historical and social forces that led to the EFAA's passage and analyzes: (1) how Congress's imprecise language created interpretive challenges; (2) from the plaintiff's perspective, arguments for expanding the Act to encompass all employment claims; and (3) from the defense perspective, countervailing arguments for curtailing the Act's reach, if not repealing it altogether.

I. THE ROAD TO REFORM: WHY CONGRESS PASSED AND PRESIDENT BIDEN SIGNED THE EFAA INTO LAW

The EFAA emerged from decades of growing concern among employee litigants and their lawyers about the arbitration of sexual harassment and misconduct disputes, gaining momentum from several high-profile cases that exposed how arbitration could shield sexual predators and their employers from scrutiny. The case of Jamie Leigh Jones, a Halliburton employee who was allegedly drugged and gang raped by coworkers in Baghdad in 2005, became a rallying cry for reform. When Jones sued, her employer tried to enforce the arbitration clause in her contract. Although Jones ultimately avoided arbitration, her case highlighted how employers could use these clauses to bury allegations of serious sexual misconduct.

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As public attention to workplace sexual harassment rose, bipartisan congressional efforts began to coalesce around the need to exempt sexual misconduct cases from mandatory arbitration. These efforts culminated on March 3, 2022, in President Biden signing the EFAA into law, declaring it a "momentous day for justice and fairness in the workplace."

The EFAA, the first major amendment to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., since its enactment in 1925, represented a significant victory for the #MeToo movement as the Act voids, at the election of a person alleging claims of sexual harassment or sexual assault, a predispute arbitration agreement that would otherwise govern their claims.

II. AMBIGUOUS LANGUAGE TOUCHES OFF YEARS OF LITIGATION

Unfortunately, Congress's imprecise drafting of the EFAA generated extensive confusion, debate, and litigation over multiple fundamental interpretive questions that remain unsettled to this day. The most significant ambiguities are discussed below.

A. THE "CASE" VERSUS "CLAIM" DEBATE

The EFAA provides that, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable *with respect to a case* which … relates to the sexual assault dispute or the sexual harassment dispute." (9 U.S.C. § 402(a), italics added.)

But what does "with respect to a case" mean? Does this language mean that the EFAA can be used to exempt an entire case from arbitration even if just one claim involves an alleged sexual assault or sexual harassment? Or does it merely preclude enforcement of the arbitration agreement as to sexual assault or harassment and related claims (such as retaliation for complaining about sexual harassment), while relegating the other unrelated claims to arbitration?

This ambiguity has created a split among the courts. A majority of courts have found that the EFAA's use of the word "case," instead of the word "claim," precludes arbitration as to the entire case, not just as to those claims arising from allegations of sexual assault/harassment. (See, e.g., *Doe v. Second Street Corp.* (2024) 105 Cal.App.5th 552, 577; *Liu v. Miniso Depot CA, Inc.* (2024) 105 Cal.App.5th 791; see also *Turner v. Tesla, Inc.* (N.D.Cal. 2023) 686 F.Supp.3d 917, 925.)

This interpretive view of the "case" versus "claim" controversy is perhaps best explained in *Johnson v. Everyrealm, Inc.* (S.D.N.Y.) 657 F.Supp.3d 535, 560–562: "In its operative language, the EFAA makes a pre-dispute arbitration agreement invalid and unenforceable 'with respect to a *case* which is filed under Federal, Tribal, or State law and relates to the … sexual harassment dispute.' [Citation.] This text is clear, unambiguous, and decisive as to the issue here. It keys the scope of the invalidation of the arbitration clause to the entire 'case' relating to the sexual harassment dispute. It thus does not limit the invalidation to the claim or claims in which that dispute plays a part. [¶] … [¶] With the ordinary meaning of 'case' in mind, the text of § 402(a) makes clear that its invalidation of an arbitration agreement extends to the entirety of the case relating to the sexual harassment dispute, not merely the discrete claims in that case that themselves either allege such harassment or relate to a sexual harassment dispute (for example, a claim of unlawful retaliation for a report of sexual harassment)."

Conversely, in *Mera v. SA Hospitality Group, LLC* (S.D.N.Y. 2023) 675 F.Supp.3d 442, 447, the court reasoned that claims unrelated to the plaintiff's sexual harassment claim (in that case, wage and hours claims) could be separated from the harassment claim and sent to arbitration: "The Court holds that, under the EFAA, an arbitration agreement executed by an individual alleging conduct constituting a sexual harassment dispute is unenforceable only to the extent that the case filed by such individual 'relates to' the sexual harassment dispute; in other words, only with respect to the claims in the case that relate to the sexual harassment dispute. To hold otherwise would permit a plaintiff to elude a binding arbitration agreement with respect to wholly unrelated claims affecting a broad group of individuals having nothing to do with the particular sexual harassment affecting the plaintiff alone. [¶] … [¶] Since Plaintiff's wage and hour claims do not relate in any way to the sexual harassment dispute, they must be arbitrated, as the Arbitration Agreement requires."

Until either Congress amends the EFAA to clarify what it meant, or the Supreme Court weighs in to interpret it, this issue will continue to be heavily litigated.

B. WHAT DOES IT MEAN FOR A "DISPUTE" OR A "CLAIM" TO "ARISE" OR "ACCRUE" ON OR AFTER THE DATE OF THE ENACTMENT OF THE EFAA?

Again, Congress's imprecise drafting regarding the temporal scope of the Act has proven to be particularly contentious. The Act provides that it "shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." Because Congress chose to place "dispute" and "claim" in the disjunctive, the courts have held that the EFAA authorizes a plaintiff to void a predispute arbitration agreement in a case relating to a dispute involving a sexual assault or sexual harassment—if either the plaintiff's claim accrues, or the parties' dispute arises, on or after the Act's effective date of March 3, 2022. (See, e.g., *Memmer v. United Wholesale Mortgage, LLC* (6th Cir. 2025) 135 F.4th 398; *Doe v. Second Street Corp.* (2024) 105 Cal. App. 5th 552.)

That is well and good but, tragically, the EFAA neither defines the terms "dispute" or "claim" nor explains when disputes or claims "arise" or "accrue." (See *Kader v. Southern Cal. Med. Ctr., Inc.* (2024) 99 Cal.App.5th 214, 222 ["The Act does not define a 'dispute' or state when a dispute has 'arisen.'"].)

1. WHEN DOES A DISPUTE ARISE?

For EFAA purposes, does a "dispute" only arise when an employee files a lawsuit or an administrative charge against her employer? Or can a dispute also arise when an employee complains internally to the employer and, if so, about what specifically must the employee complain about? That is, does a dispute arise if an employee merely complains that a supervisor touched her genitals or must the employee accuse the supervisor of sexually harassing her in violation of a law such as title VII or California's Fair Employment and Housing Act?

Also, does a dispute arise if the employer actually *agrees* with the complainant that sexual harassment or assault occurred, or simply remains silent in response to the employee's internal complaint? (See, e.g., *Combs v. Netflix, Inc.* (C.D.Cal., Apr. 16, 2025, No. 2:24-cv-09037-MRA-MAA) 2025 WL 1423344, *4 [finding, without addressing contrary California authority that a party's silence in response to an accusation may be considered an admission, that an employer's silence in the face of an internal complaint of sexual harassment effectively expresses disagreement with the employee's complaint and, therefore, constitutes a "dispute"].)

While all of these questions have been frequently litigated during the nearly four years since the EFAA was enacted, there is still no clear answer.

Famuyide v. Chipotle Mexican Grill, Inc. (8th Cir. 2024) 111 F.4th 895, a case in which Famuyide sued Chipotle for workplace sexual assault and sexual harassment, is an example of this debate over the meaning of "dispute." When Chipotle moved to compel arbitration based on its employment agreement with Famuyide, Famuyide opposed the motion on EFAA grounds. Chipotle, in turn, argued that the EFAA did not apply because its dispute with Famuyide arose prior to the enactment of the EFAA.

Chipotle argued that, prior to the enactment of the EFAA, a dispute arose when: (1) a coworker sexually assaulted Famuyide at work; (2) Famuyide complained internally about the sexual assault; and (3) Famuyide's counsel sent two letters to the company indicating that they were "investigating potential claims" and asking Chipotle to preserve all information that was potentially relevant to the matter. The Eighth Circuit affirmed the district court's decision denying the motion to compel arbitration finding that none of the foregoing actions was sufficient to constitute a dispute between the parties; thus, any "dispute" arose within the meaning of the EFAA arose after the statute's enactment.

Similarly, in *Kader*, the California Court of Appeal held that a "dispute" does not "arise" within the meaning of the EFAA merely from the fact that sexual assault or harassment allegedly occurred; rather, in the court's view, a "dispute" arises only when one party asserts a "right, claim, or demand" *and* the other side "expresses disagreement or takes an adversarial posture" to the right, claim, or demand. (*Kader*, 99 Cal.App.5th at 222.)

But in *Castillo v. Altice USA, Inc.* (S.D.N.Y. 2023) 698 F.Supp.3d 652, the court took a different approach finding that a "dispute" arose when the plaintiff complained to her supervisors and HR about sexual harassment and was then retaliated against by being placed on a corrective action plan and subsequently demoted. Similarly, and perhaps most recently, in *Lewis v. Tesla* (N.D.Cal. Sept. 16, 2025, No. 24-cv-08178-AMO) 2025 WL 2653639, a district court held that the dispute arose at the time the employee filed an administrative complaint with the California Civil

Rights Department, which the employee failed to establish occurred on or after the EFAA's effective date of March 3, 2022.

As this issue continues to be litigated, we can expect even more judicial divergent pronouncements of when and whether a dispute arises for purposes of the EFAA.

2. WHEN DOES A CLAIM ACCRUE?

Equally unresolved is the question of when a claim "accrues" under the EFAA. Is it when the employer commits the injurious act? When the employee experiences the injury? When the employee discovers, or should have discovered, the injury? Or, because hostile work environment sexual harassment claims can accrue serially via the continuing violation doctrine, does a claim not accrue—starting the running of the limitations period—until the last discriminatory act in furtherance of the hostile work environment? (See *Olivieri v. Stifel, Nicolaus & Co.* (2d Cir. 2024) 112 F.4th 74, 89.)

As with the split in the courts over the meaning of the word "dispute," the courts have also splintered over what it means for a claim to "accrue."

The continuing violation doctrine adds another layer of complexity. In *Olivieri*, the Second Circuit focused on the concept of "accrual" in the context of hostile work environment claims and the continuing violation doctrine. It explained that such claims "accrue" and "reaccrue" with each successive act that is collectively part of the "singular unlawful practice":

"Because hostile work environment claims continue to accrue 'until the last discriminatory act in furtherance of' the hostile work environment, such claims can have multiple accrual dates.... [¶] ... [¶] [I]f Congress wanted the EFAA to apply only to claims that 'first' accrue after its enactment, it could have said so. Congress is clearly familiar with the phrase, which appears in multiple other statutes. If Congress had tied the effective date of the EFAA to when a claim first accrues, we might reach a different conclusion. But it didn't, and we do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." (*Olivieri*, 112 F.4th at 89 (cleaned up).) Under this approach, ongoing harassment beginning before March 3, 2022 but continuing after may fall under the EFAA's protection.

In *Lewis*, the court conversely held that the termination of employment was not part of an ongoing unlawful practice: "The only action alleged to have occurred on or after March 3, 2022 was the employee's termination, which does not constitute a hostile act, because unlike discrimination claims, harassment 'consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management,' such as 'hiring and firing.'" (*Lewis*, , *2025 WL 2653639* at 3, quoting *Reno v. Baird* (1998) 18 Cal.4th 640, 646-647.)

While the question of when a plaintiff's claim arose or "accrued" for purposes of the EFAA will become increasingly less critical as we move further from the EFAA's enactment, it remains a point of statutory ambiguity for which interpreting courts have found no clear resolution.

C. DOES EVEN AN "IMPLAUSIBLE" SEXUAL HARASSMENT CLAIM FALL WITHIN THE SCOPE OF THE EFAA?

Another roiling controversy is what standard (if any) applies to determine whether a sexual harassment or sexual assault claim has been slipped into a complaint as a poison pill to defeat an otherwise enforceable arbitration agreement. Perhaps the earliest significant decision, *Yost v. Everyrealm, Inc.* (S.D.N.Y. 2023) 657 F.Supp.3d 563, 582, determined the plaintiff's sexual harassment claim was not "plausible"—and, therefore, not subject to the EFAA. In *Yost*, which turned on various comments made by a coworker, the plaintiff alleged no comments related to the her own sex or gender and only two alleged comments made to or in the plaintiff's presence about *other* employees' sexual orientations. Because the sexual harassment claim was not sufficiently plausible to survive a threshold pleading challenge, the EFAA did not apply. *Yost*'s approach — requiring some degree of plausibility to support the alleged sexual harassment allegations based on the federal pleading standard — has been endorsed by at least one court outside New York.

More recently, another federal district court rejected *Yost* and, instead, held that "the view that is more faithful to Congress' language and intent is that a plaintiff need only plead *nonfrivolous* claims relating to sexual assault or ... sexual harassment." (See *DiazRoa v. Hermes L., P.C.* (S.D.N.Y. 2024) 757 F.Supp.3d 498, 533, italics added.)

So, the question remains: Must a sexual harassment or assault claim be at least plausible or is it enough for it to be merely *nonfrivolous*? The answer to this question is extremely important because (employment defense attorneys argue) plaintiffs' lawyers are increasingly inserting tenuous claims of sexual harassment and assault into all manner of employment litigation cases with the clear and deliberate intent to defeat an otherwise enforceable arbitration agreement. (See, e.g., Oncidi et al., *The Latest in the War on Arbitration: Implausible Sexual Harassment Claims*, *Los Angeles & San Francisco D.J.* (Jul. 30, 2025).)

In a related phenomenon, employers have begun to notice that plaintiffs' lawyers are increasingly conflating sexual harassment claims with gender discrimination claims, contending the latter are the same as the former and that the entire lawsuit is, therefore, shielded from arbitration. For example, in *Johannessen v. JUUL Labs, Inc.* (N.D.Cal. June 24, 2024, No. 3:23-cv-03681-JD) 2024 WL 3173286, a district court held that the EFAA did not apply to a plaintiff's claims, even though she had labeled one harassment, because the plaintiff's allegations involved discriminatory "[p]ersonnel actions" (such as changes to job duties and exclusion from meetings). As the *Johannessen* court explained, "[t]he critical point for … purposes [of the EFAA] is that sexual harassment and sexual discrimination are not the same." Similarly, in *Van De Hey v. EPAM Systems*, the court found that allegations that the plaintiff's supervisors were mostly male and that she "was consistently denied equal pay" failed to constitute sex harassment for purposes of the EFAA, even if the allegations "may indeed describe sex discrimination." ((N.D.Cal. Feb. 28, 2025, No. 24-cv-08800-RFL) 2025 WL 829604, *4.)

These and related questions involving the EFAA are the subject of an important case currently pending before the United States Court of Appeals for the Second Circuit. (See *Brazzano v. Thompson Hine LLP* (2d Cir. 2025). No. 25-0927-CV).)

III. THE PLAINTIFF'S PERSPECTIVE: THE EFAA SHOULD BE EXTENDED TO ALL EMPLOYMENT CLAIMS

The EFAA's success in protecting sexual harassment victims from the constraints of arbitration has prompted calls for a broader exclusion from arbitration off all employment claims as the exact same power imbalances, secrecy concerns, repeat player biases, and limits on discovery rights that justified the EFAA apply equally.

The promise of our nation's antidiscrimination laws has not been fully realized because our current enforcement and legal system has failed to confront the fundamental power imbalance underpinning the employment relationship. This power imbalance exists whether an employee faces sexual harassment, racial discrimination, age discrimination, or any other form of workplace misconduct.

IV. THE DEFENDANT'S PERSPECTIVE: THE EFAA SHOULD BE REPEALED

Unfortunately, the EFAA perpetuates a pernicious and erroneous suggestion that there is "something wrong" with arbitration. There isn't. Despite what the plaintiffs' bar strenuously contends, the substantive and due process guarantees that legislatures around the country and respected ADR organizations such as the American Arbitration Association and JAMS already have put in place do an excellent job in protecting the interests of employees and employers alike. It is simply not true that there are systemic "power imbalances," "repeat player biases," or "unfair limits" on discovery. (See Oncidi et al., *Six Reasons Why Arbitration Offers Equitable Resolutions*, <www.law360.com/articles/2313060/6-reasons-why-arbitration-offers-equitable-resolutions> (Mar. 25, 2025).)

What plaintiffs' lawyers do not like to admit (at least in mixed company) is that they oppose arbitration primarily for this one reason: It is much more difficult to bamboozle an experienced arbitrator (typically a retired judge or practitioner) than a jury into awarding a seven-, eight-, or even nine-figure sum to an employee who has a sympathetic story to tell about alleged mistreatment by a well-heeled employer defendant.

There is a reason plaintiffs' lawyers lovingly refer to the trial courts in California as "The Bank": In recent years, runaway California juries have awarded employees astronomical amounts of money, including:

- **$465 million** to two plaintiffs who alleged retaliation for making complaints about harassment in the workplace (*Martinez v. SoCal Edison*, Los Angeles Super. Ct. (June 2, 2022))
- $**186 million** to an alleged victim of workplace discrimination and harassment (*Juarez v. AutoZone Stores, Inc.* (S.D.Cal. Nov. 18, 2014))

- **$168 million** to an employee who alleged hostile work environment and sexual harassment (*Chopourian v. Catholic Healthcare West* (E.D.Cal. Feb. 29, 2012))
- **$155 million** to an employee who alleged age, gender and disability discrimination, among other claims (*Rudnicki v. Farmers Ins. Exch.*, Los Angeles Super. Ct. (Dec. 16, 2021))
- **$137 million** to an employee who claimed racial harassment and constructive discharge (*Diaz v. Tesla, Inc.* (N.D.Cal. Oct. 4, 2021)). Three days after this stunning verdict was delivered, Elon Musk announced that Tesla was moving its headquarters from California to Austin, Texas.

It is no secret that plaintiffs' lawyers prosecute these cases on a contingency-fee basis and typically recover up to 50 percent of whatever amount their clients receive—in short, lower average monetary recoveries in arbitration adversely affect the bottom line of the lawyers who prosecute these cases.

V. CONCLUSION

Four years after its passage, the EFAA stands as a triumph for some and a cautionary tale for others. It succeeded in giving victims of sexual assault and harassment meaningful choice in how to pursue their claims, fulfilling a key goal of the #MeToo movement. However, its ambiguous drafting has created a new battlefield for litigation, consuming resources and creating uncertainty.

The extensive litigation over when disputes "arise," what constitutes a "case," and how broadly the EFAA applies suggests that Congress should revisit this legislation. Whether through clarifying amendments, expansion to all discrimination claims, or more fundamental reform, the status quo of ambiguity serves no one well.

As we mark the EFAA's fourth anniversary, we must acknowledge that the debate over the EFAA reflects broader tensions in American employment law between efficiency and justice, between federal power and state autonomy, and between protecting vulnerable workers and preserving contractual freedom. As courts continue to interpret the Act and Congress considers potential amendments, these fundamental tensions will shape the future of workplace dispute resolution. The only certainty is that the conversation sparked by the EFAA's passage four years ago is far from over.

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