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THOUGHT LEADERSHIP SERIES

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Employment Law

Recent events prompt changes in employment law

In this Thought Leadership Q&A, attorney Sandra Blevins of the litigation and employment law firm Betz + Blevins provides answers for some of the most-asked questions about forced arbitration and newly passed state legislation related to COVID employer mandates. She also weighs in on the state's weak anti-discrimination laws.

Q: There are recent changes to federal law as it relates to forced arbitration, but give us some background on the topic first.

SANDRA BLEVINS: At least 60 million American workers are subject to arbitration agreements and at least 800 million consumer arbitration agreements are in effect in the United States. More than 60% of U.S. retail e-commerce sales require the consumer's signature on an arbitration agreement. This means that almost all American consumers and more than half of employees in the private sector who are not unionized are subject to forced arbitration agreements.

Critics of forced arbitration cite a lack of access to a jury, limited to no judicial review of the arbitrator's decisions, and diminished rights to information from the opposing side during discovery. Arbitrators are not required to have experience as an attorney or judge. Proponents of forced arbitration cite cost savings, efficiency, and privacy as the benefits of forced arbitration over litigating claims in public courts. In private arbitration, the proceedings remain confidential and are not known to the public.

Forced arbitration has proven inequitable to workers and consumers. Multiple studies have confirmed that individuals win less often in private arbitrations than in public courts, and even when they do, they recover less money than in public courts. One study showed that between 2014 and 2018, two main arbitration providers—AAA and JAMS—conducted over 10,000 arbitrations with employers who had previously been before them, yet less than 3% of those cases concluded with a monetary award to employees that surpassed any award to their employers.

Forced arbitration can apply to many facets of our lives, but several exceptions may prevent the enforcement of arbitration agreements, depending on the location of the court, the jurisdiction, and the circumstances of the case. Potential exemptions include:

1. When a company cannot establish the existence of an agreement (i.e., a company cannot prove that the consumer or employee agreed to arbitration).
2. When the contract was entered into in duress, by a minor or other incompetent person, by fraud, or through misrepresentation.
3. By waiver when the company voluntarily participates in a case in court initiated by an individual.
4. When the terms of the agreement are found to be unconscionable.
5. When the contract underlying the arbitration agreement involved residential mortgages, manufactured home loans for trailers, or some other types of dwellings.
6. When bankruptcy proceedings are ongoing.
7. Where the company seeks to enforce an arbitration agreement against a worker in the transportation industry.

Recent legislation adds a new exemption from forced arbitration: when the claims involve sexual assault or sexual harassment.

Q: What are the provisions of the new federal legislation prohibiting forced arbitration in certain types of agreements?

SANDRA BLEVINS: Under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, arbitration agreements are no longer enforceable when a claimant alleges sexual assault or sexual harassment. Not only are employees covered by this Act, but independent contractors and students as well. The Act applies to arbitration agreements that were signed before its enactment. The Act also prohibits any other law at the state, county, or municipal level from trumping the Act with its own forced arbitration provisions. And, even if a pre-existing agreement states otherwise, an employee may pursue a class or collective action in a public court alleging sexual assault/harassment.

This Act is a significant Congressional shift from U.S. Supreme Court cases enforcing the Federal Arbitration Act in various types of claims and cases. It was precipitated by the #MeToo movement and recent high-profile individuals who repeatedly sexually assaulted or harassed subordinates or co-workers without public knowledge because of non-disclosure agreements and forced arbitration provisions. In 2017, Congress amended the tax code to prohibit tax deductions of settlements or payments for sexual abuse or sexual harassment claims and attorneys' fees if the resolution is subject to a non-disclosure agreement.

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Q: Shifting to the state level, how do Indiana's discrimination laws compare to federal laws, and how might this impact the state's ability to attract new companies and talent?

SANDRA BLEVINS: Compared to federal civil rights laws, Indiana state laws are weak, limited, and ineffective. As we learned from the battle over Indiana's RFRA law a few years ago, all groups are not affirmatively entitled to protection from discrimination under Indiana law. In fact, sexual orientation and gender identity discrimination are still denied full civil rights protection.

Even for those protected categories that are afforded full state-level, civil rights protections (race, religion, color, sex, disability or national origin), the ability to pursue employers for violations of these civil rights is very limited. Unlike federal civil rights laws, Indiana does not provide attorneys' fees and expenses for those litigants who bring successful claims. Although individuals can submit claims for investigation to the Indiana Civil Rights Commission, and those claims must be investigated, Hoosiers have no private right of action against their employers (i.e., no power to file a lawsuit) under Indiana civil rights laws unless their employer agrees to it.

The fallout after the initial passage of Indiana's RFRA legislation demonstrates the economic fallout that can occur from civil rights-related legislation. Even with the eventual fix, the State of Indiana is estimated to have lost approximately $60 million in revenue because of the cancellations of conventions and other planned events, travel bans imposed by other states and cities, and cancellations of business expansions in Indiana.

Significantly, Visit Indy conducted studies on the reasons that conventions left Indianapolis following the enactment of the RFRA legislation and found that the passage of RFRA as well as the lack of state civil rights protections for sexual orientation and gender identity were main reasons offered for the departures.

The pandemic together with the #MeToo movement and Black Lives Matter protests have caused many employers to try to diversify their workforce. With jobs tough to fill, Indiana should consider enacting effective civil rights legislation to attract the business it lost over the last few years since the enactment of RFRA. Meaningful state civil rights laws would signal to potential employees that Indiana supports

diversity, and that all employees are welcome and protected in Indiana.

Effective statewide civil rights legislation just makes good business sense.

Q: On to another hot topic. Are employers permitted to mandate COVID vaccines and mask wearing for employees, and how does this differ for public, private or health care employers?

SANDRA BLEVINS: Private employers can mandate vaccination and/or mask wearing for those employees who physically enter the workspace. The federal government was recently prevented from imposing a vaccine-or-testing directive on federal workers but is permitted to impose masking requirements on federal employees. Health care employers can impose vaccinations and/or mask wearing. The U.S. Supreme Court recently upheld federal regulations requiring those health care entities that accept federal funds to impose vaccine-or-testing requirements.

The EEOC has created a useful resource with updated questions and answers at the following website: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Q: Are there any exceptions or exemptions to COVID vaccine or mask-usage mandates, and what should an employer consider before imposing these mandates?

SANDRA BLEVINS: Under federal law, there are two main exceptions to COVID vaccine mandates by private employers: (1) religious accommodations under Title VII; and (2) disability accommodations under the Americans with Disabilities Act (ADA).

Under Title VII, employees can request an accommodation of their sincerely held religious beliefs or practices. Employers are not required to provide a religious exemption when the accommodation would create an "undue hardship" (i.e., "more than a minimal burden on the operation of the business").

Employees can also request reasonable accommodations for their disabilities to help them perform their jobs. If an accommodation of an employee's disability is obvious, an employer may also be obligated to work with the employee to identify a reasonable accommodation. Employers are not required to provide accommodations for their employees' disabilities under the ADA when they present an "undue burden" (i.e., a significant difficulty or expense) to the employer or if the employee would present a "direct threat" to workplace safety that could not be eliminated or reduced by a reasonable accommodation.

"Under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, arbitration agreements are no longer enforceable when a claimant alleges sexual assault or sexual harassment."

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Before imposing vaccine or mask mandates, employers should consider instituting specific policies and procedures by which accommodation requests may be efficiently evaluated on a case-by-case basis. In preparation, employers should assess the specific burden that granting accommodation requests may present to each worksite and each job when risk differs from position to position. Employers may also want to consider whether remote working is a reasonable solution to such accommodation requests. The persons making accommodation decisions should be well versed in the requirements of Title VII and the ADA.

Q: What Indiana legislation recently passed related to COVID vaccine mandates?

SANDRA BLEVINS: Indiana Gov. Eric Holcomb recently signed into law House Bill 1001, which immediately went into effect.

This law imposes restrictions on COVID vaccine mandates. Indiana adopted federal requirements that compel the consideration of medical and religious exemptions. This legislation also exempts employees from COVID vaccines when the employee tests positive in the previous three months for antibodies. Employers can require testing up to twice per week for those employees who qualify for exemptions.

One notable distinction of this new Indiana law is that an employer must provide a medical exemption when an employee provides either (1) a signed note from a doctor, physician's assistant, or advanced practice registered nurse; or (2) proof of immunity acquired from a recent COVID infection.

This legislation excludes certain employers from its provisions, such as health care entities, professional sports organizations, and entertainment venues.

Q: In Indiana, when are employers subject to COVID-related liability?

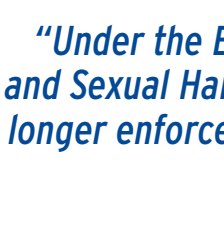
SANDRA BLEVINS: Indiana, like many other states, has enacted wide-ranging protection for health care entities and businesses, including employers, who could face potential COVID-related liability. The statute provides immunity from damages "arising from COVID-19," which means "an injury or harm caused by or resulting from: (1) the actual, alleged, or possible exposure to or contraction of COVID-19" and "(2) services, treatment, or other actions performed for COVID-19." This law also prohibits class action lawsuits "based on tort damages arising from COVID-19."

The only exceptions to the grant of this broad immunity are when the claim involves "actions or omissions that constitute gross negligence or willful or wanton misconduct (including fraud and intentionally tortious acts)." Also, claims under Workers' Compensation, Workers' Occupational Disease Compensation, Occupational Health and Safety Act, or Unemployment Compensation are excluded from the provisions of the statute.

To avoid application of the broad immunity in the statute, claimants must prove their claims by "clear and convincing evidence." Most claims in civil cases only require a claimant to show it was more likely than not that a law was violated (i.e., by "the preponderance of the evidence").

This statute applies to causes of action that accrue between March 1, 2020, and Dec. 31, 2024, when this statute is set to expire.

The information included in this article is not, nor is it intended to be, legal advice. You should consult an attorney for advice regarding your individual situation.



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Sandra Blevins is the managing partner and majority owner of Betz + Blevins and has been a Super Lawyer for the past five years. Her areas of legal focus cover employment law, individual rights and general litigation. Sandra's career aligns with her values, specifically her passionate commitment to making the workplace fairer. She represented employers against employee claims before becoming an advocate for individuals in 2003 handling employment and individual rights cases. Her background defending employers gives her an invaluable global perspective that informs her current work on behalf of employees.

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