SCWA Legislative Update

March 7, 2022

Legislative Outlook

From Ukraine, to the open seat on the Supreme Court, to the State of the Union, to countless items in between, the first quarter of 2022 has seen a lot of issues taking up oxygen and attention in D.C.
Several of the topics were discussed by our 2022 SCWA Keynote Newt Gingrich.

While many members of Congress will soon be looking to move into election mode, big ticket items remain that will continue to keep the legislature on its toes.

FY2022 Budget

Congress now has until March 11, 2022 to approve a budget for the 2022 federal fiscal year. FY2022 began on October 1, 2021. Since then, Congress has avoided a government shut down by passing a series of stopgap funding bills. The most recent of these, which was passed on February 17, will, with a few limited exceptions, continue to fund the government at 2021 levels through March 11, 2022.

In recent weeks, Democrat and Republican leadership have indicated that they have made progress in reaching a broad framework on the spending package – generating some optimism that Congress may be able to enact an omnibus appropriations bill for FY2022 without further extensions.

However, potentially complicating all this are the concerns raised by the Biden Administration that the county does not have sufficient funding to prepare for, or address, another COVID surge. The Department of Health and Human Services has announced that, in conjunction with the ongoing FY2022 budget process, it plans to request an additional $30 billion for vaccines, tests, and other measures to continue to combat COVID-19. The Administration has reported to Congress that all of the funds provided for last year by the American Rescue Plan have been completely spent or allocated and that further funds are necessary to ensure that the nation is equipped to respond to a new variant or surge.

The sheer amount that was allocated as part of the $1.9 trillion American Rescue Plan last year, combined with questions about what impact the spending had on inflation has some lawmakers hesitant about committing to additional spending.

The Status of Build Back Better

While the Administration has continued to mention the Build Back Better bill, the future of the legislation, and the provisions found therein, remains uncertain. Senator Joe Manchin (D-WV) came out against the House-passed version of the bill in late December. Since then, the White House appears have stepped back its efforts to negotiate

a full-scale package that could pass the Senate. In the State of the Union the President made no mention of "Build Back Better" but did highlight certain core elements of the proposal – a move that was met with public skepticism by Senator Manchin. The Democratic leadership in the Senate has continued to discuss potential legislative options with Senator Manchin and other potentially hesitant members, though Senator Manchin has indicated that he favors a bi-partisan bill and would, at very least, want to see any proposals go through the regular legislative and committee processes.

(As Discussed by Jacob Monty During the 2022 SCWA Convention) - ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

In a rare showing of bi-partisanship, on February 10 the Senate passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445). The legislation was introduced in the Senate by Senators Lindsey Graham (R-SC) and Kirsten Gillibrand (D-NY) and in the House by Representatives Morgan Griffith (R-VA) and Cheri Bustos (D-IL). The bill passed the House on February 7 and the President is expected to sign it into law.

When enacted, the legislation will amend the Federal Arbitration Act to prohibit the enforcement of any agreement that would require a worker to submit a claim of workplace sexual harassment or assault to arbitration. While a worker can still choose to pursue a claim through arbitration, this new law will prevent agreements under which employees are asked to prospectively waive their right to pursue a claim of sexual harassment or assault through in the courts.

What remains to be seen here is how courts will interpret and apply the law. In particular, the legislation prohibits the enforcement of an arbitration agreement "with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute." The open question is what will happen with cases that involve both claims of sexual harassment or assault and other claims, such as discrimination or retaliation. A narrow reading of the statute would mean that a case could be split with the non-sexual harassment or assault portions being sent to arbitration while the sexual harassment or assault allegations remain in litigation. On the other hand, a broad reading of the statute would mean that, as long as a case included a claim of sexual harassment or assault, no part of the case could be compelled to arbitration under an otherwise enforceable arbitration provision. The legislative history and comments made by the bill's sponsors suggest that Congress intended the former narrower approach. However, the Supreme Court has expressly held that legislative history shouldn't be used in evaluating the Federal Arbitration Act, meaning that courts interpreting the law may find themselves restricted in what they can look to to interpret the meaning of the new law.

The big take-away here is that any business that has historically used arbitration agreements or clauses with its workers should carve out claims of sexual harassment or assault from its mandatory arbitration provisions and should consider the potential implications of having a case split between arbitration and the courts.

All Employers Are Required to Display Federal and State Postings

All employers are required to post certain federal and state postings.

On a federal level, if an employer has less than 50 employees, they are required to post 5 notices: Fair Labor Standards Act; Employee Polygraph Protection Act; Equal Employment Opportunity; Uniformed Services Employment and Reemployment Rights Act; and Occupational Safety and Health Administration.

If an employer has 50 or more employees, federal law requires that they also post a notice related to the Family and Medical Leave Act.

Each state has varying requirements on what notices must be posted.

Please contact us with any questions.

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