

PRESENTED AT

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

**29TH ANNUAL
LABOR AND EMPLOYMENT LAW CONFERENCE**

May 5-6, 2022
Austin, Texas

Federal Employment Law Update 2021-2022

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I.

INTRODUCTION

Well over two years into the COVID-19 pandemic, and over a year since President Biden took office in 2021, we continue to experience emerging and ever-changing requirements and standards with regard to health/safety, wage/hour, and even arbitrability of and legal analysis relating to discrimination, harassment, and retaliation claims. All three federal branches of government remain active and with the location, method and manner of performing work evolving at a rapid pace, we anticipate continued efforts to change pre-existing labor and employment laws and policies.

II.

2021-2022: AGENCIES AND LAWS

A. ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The new law amends the Federal Arbitration Act (“FAA”) to bar pre-dispute arbitration agreements of claims alleging sexual assault or sexual harassment and includes a prohibition against any waivers of the right to bring such claims jointly and/or on a class basis.

Under this law, a party’s allegations first control whether a claim constitutes a covered sexual assault or sexual harassment dispute, and those terms will be given broad scope. The relevant language reads:

Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable 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 new law also requires that courts—not arbitrators—decide whether a claim constitutes sexual harassment or sexual assault, regardless of whether the arbitration agreement includes a provision delegating such decisions to an arbitrator. The Act applies to any dispute or claim that arises or accrues on or after the date of enactment of the Act.¹

¹ <https://www.littler.com/publication-press/publication/congress-passes-bipartisan-arbitration-limitation>.

B. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION²

1. *EEOC Leadership*

As we enter the second full year of the Biden administration, the composition of the five-member Commission remains unchanged. Currently, the Commission is chaired by Democratic Commissioner Charlotte A. Burrows, whose term expires in July 2023. Jocelyn Samuels, also a Democrat, serves as vice chair; on July 24, 2021, she was confirmed for a second term which will expire in July 2026. The remaining three commissioners are Republican: former Chair Janet Dhillon, whose term expires in July of this year (she may continue in that position until the end of the year, conceivably, if President Biden's nomination of Kalpana Kotagal³ to replace her is still pending); Commissioner Keith Sonderling, whose term expires in July 2024; and Commissioner Andrea R. Lucas, whose term expires in July 2025.

The general counsel's position has remained unfilled since former General Counsel Sharon Fast Gustafson was removed from the position by the White House in March 2021; career Associate General Counsel Gwendolyn Reams served as acting general counsel from March 2021 until her term in that position expired on December 30, 2021. Deputy General Counsel Christopher Lage now oversees operation of the Office of General Counsel, and in the absence of a designated acting officer, any authority vested solely within the general counsel may be exercised by the chair.

The chair of the Commission exercises significant control over the administration and operations of the agency and its 53 offices around the country. The vast majority of day-to-day operations of the Commission and its field staff largely proceed apace, irrespective of which party holds the chair. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not, as well as scheduling meetings of the Commission to examine issues or vote on disputed matters (the agency has held a number of telephonic public meetings throughout the course of the COVID-19 pandemic). Significant policy changes, however, require the approval of the full Commission. Chair Burrows has not had a Democratic majority on the Commission since assuming her position. As a practical matter, this means that the agency has been limited in its ability to revisit policies from the prior administration, or to move forward on substantive policies in line with the Biden administration's agenda. When the Commission has a Democratic majority (conceivably as early as July of this year), we expect the agency to begin to move aggressively on new policy priorities of the chair and the administration more broadly. As of this writing, the White House

² See generally, Littler's ANNUAL REPORT ON EEOC DEVELOPMENTS – FISCAL YEAR 2021 (April 2022), found at <https://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2021>.

³ On April 5, 2022, the White House announced the nomination of Kalpana Kotagal to be a member of the EEOC for a term expiring July 1, 2027. See The White House, [Nominations Sent to the Senate](#) (Apr. 5, 2022). Ms. Kotagal is a partner in a Washington, D.C. law firm, where she is a member of the firm's Civil Rights & Employment Practice. According to the firm's [website](#), "A highly-acclaimed employment and civil rights plaintiffs' litigator, Ms. Kotagal represents women and other disenfranchised people in employment and civil rights class actions, involving often cutting-edge issues related to the Title VII, Equal Pay Act, the Americans with Disabilities Act, Family Medical Leave Act, as well as wage and hour issues."

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First appeared as part of the conference materials for the
29th Annual Labor and Employment Law Conference session
"Federal Employment Law Update"