LITIGATION QUARTERLY ADVISOR

IN THIS ISSUE:

FORCED ARBITRATION FOR SEXUAL ASSAULT OR HARASSMENT CLAIMS IN THE WORKPLACE NOW BANNED BY FEDERAL LAW

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 passed on March 3rd of this year, effectively banning employers from enforcing pre-dispute arbitration agreements to handle claims of sexual assault and sexual harassment. In amending the Federal Arbitration Act (the "FAA"), the Federal ban on arbitration clauses extends to all claims of sexual assault or harassment, whether they arise under federal, state, local or tribal law. The specific language reads:

> [A]t 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 pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable concerning a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

If the parties dispute whether the law applies to an employee's claim, that issue must be decided by a court, not the arbitrator, regardless of what the written agreement provides. Importantly, the law does not ban employees from choosing to arbitrate claims for sexual assault and sexual harassment; it only applies to an employer's forced use of arbitration. The new law prohibits mandatory arbitration to new sexual assault or harassment claims made on or after March 3, 2022, meaning, pre-existing filed claims may still be subject to a written arbitration mandate.

The new law prohibits mandatory arbitration to new sexual assault or harassment claims made on or after March 3, 2022

While the Act is a novel concept at the federal level, several states have already enacted laws prohibiting the enforcement of similar arbitration agreements. In 2018, a law amending the New York's civil practice rules was passed, rendering pre-dispute agreements to arbitrate sexual harassment claims unenforceable. The New York statute, and others passed by additional states, may now be preempted by federal law to the extent they are inconsistent.

Despite the amendment to the FAA, mandatory arbitration clauses remain generally enforceable and may remain useful in limiting exposure, particularly in class or collective wage and hour cases. Employers still possess the ability to compel arbitration of sex/gender discrimination, equal pay, and other employment-law-related claims. However, sexual assault and sexual harassment claims may be arbitrated, and employers should review and update their policies to reflect the new law.

For more information, contact:

Anthony M. Rainone | 973.364.8372 | arainone@bracheichler.com
Michal A. Spizzuco | 973.364.8342 | mspizzuco@bracheichler.com

CRITICAL CONSIDERATIONS IN HYBRID ENVIRONMENTS: THERE IS NO "ONE SIZE FITS ALL" MODEL

The COVID-19 pandemic created the need for employers to develop methods to allow for workforce mobility and functionality with the same efficiency levels as a pre-pandemic world. Today's reality is that the number of employees who request work schedule flexibility has dramatically increased. A Robert Half survey performed in March 2022 of 1,000 employees throughout the country reflected that 50% of the surveyed employees would look for a new job if required to return to the office on a full-time basis. Meanwhile, the New Jersey Business and Industry Association performed a Focus NJ "Back to Work in a Post-Pandemic World" study where 65% of the respondents indicated that they would either continue remote work in a post-pandemic world, or at least consider the possibility.

Other factors such as increased gas prices and inflation have cemented many employees' desire to continue working remotely, and the fluid job market is affording them the opportunity to find these roles. Employers developing policies for hybrid schedules should consider a variety of issues to reap the benefits of hybrid policies, including enhanced employee recruitment, cost savings, improved attendance and increased productivity, and strengthened employee engagement. Employers should carefully evaluate the general legal considerations arising from hybrid schedules, such as:

- **Equal Employment Opportunity Compliance:** Employers should consider which roles can be performed in an alternative or hybrid environment. It is important to ensure that the creation of hybrid opportunities does not result in discrimination on any prohibited basis. Employers should craft consistent policies that clearly define and communicate which employees are eligible to take advantage of remote work schedules.
- **Remote Policies and Procedures:** Employers should evaluate their handbooks to determine if all existing policies and procedures apply to employees when working remotely and whether new remote policies must be enacted. Policies that may require evaluation for a remote work environment include those that address smoking, alcohol/drugs (including legal prescriptions), second jobs, and dress codes. Antidiscrimination policies may also be necessary for remote work, including policies that address conduct on various online platforms, such as Zoom and Teams.
- **Technological Considerations:** Employers considering a hybrid schedule must evaluate the technology needed by employees to maintain work productivity. Implementing the correct technology can aid employers in other ways as well. For example, requiring employees to log in and out of a specific system may assist with determining a valid workers' compensation claim. Or, employing certain software programs may ensure that confidential data is protected.
- **Wage and Hour Laws:** If non-exempt employees are deemed suitable for remote work schedules, employers must consider applicable federal and state wage and hour laws. Employers should consider issues such as activities that constitute compensable working time, prohibition of off-the-clock work, requiring manager approval of overtime, and using software or other methods to track work performed remotely.
- **Workers' Compensation:** Remote work is covered under New Jersey's workers' compensation laws, where an employee is entitled to coverage for injuries that occur in the course and scope of employment. Employers may consider establishing remote workplace safety guidelines and remote reporting mechanisms to address injuries that occur while an employee is working remotely.
- **Confidentiality and Data Security:** Employers should assess the impact that working remotely may have on ensuring data privacy, and develop clear policies and guidelines for hybrid employees to follow. Such policies include ensuring that technological equipment is only used by authorized employees and for authorized business purposes.

Finally, hybrid schedules are not the only type of remote work option available to employers. Other forms of schedule flexibility include job sharing, compressed work-week, flextime, part-time schedules, and shift work.

For more information, contact:

Matthew M. Collins | mcollins@bracheichler.com | 973.403.3151

Lauren A. Woods | lwoods@bracheichler.com | 973-364-5211

DEFAMATION, DISPARAGEMENT, AND LAWSUITS

At one point or another, many of us find ourselves on the receiving end of unfavorable words or criticism, accurate or not. In recent and well-covered defamation suits against The New York Times, Sarah Palin claimed that false information was communicated about her in a Times editorial, unfairly damaging her reputation. Another high-profile trial involving actors Johnny Depp, 58, and his ex-wife Amber Heard, 36, revolves around a defamation lawsuit Depp filed against Heard in 2019 about an op-ed she wrote regarding domestic abuse in 2018. Depp says the article irreparably damaged his career, causing him to lose millions of dollars in endorsements and royalties.

The basic components of a defamation claim are (1) a communication; (2) that is "false and defamatory" concerning the plaintiff; (3) made to a third party; (4) without authorization or privilege; and (5) that causes harm. Ali v. Woodbridge Twp. Sch. Dist., 957 F.3d 174, 182-83 (3d Cir. 2020) (quoting G.D. v. Kenny, 205 N.J. 275, 292-93 (2011)). A "defamatory statement"—recently defined in New Jersey as one which is "false and injurious to the reputation of another or exposes another person to hatred, contempt or ridicule or subjects another person to a loss of the goodwill and confidence in which he or she is held by others"—"may consist of libel (i.e., a written defamatory statement) or slander (i.e., an oral defamatory statement)." Read v. Profeta, 397 F. Supp. 3d 597, 650 (D.N.J. 2019) (quoting W.J.A. v. D.A., 210 N.J. 229, 238 (2012)).

The Palin case focused on the issue of boundaries and what is needed to for a court to protect an individual's reputation. However, the judge and jury determined that Palin failed to prove that the author of the editorial either a) knew his statements were false, or b) that he published the statements with reckless disregard for their truth or falsity, and this failure proved fatal to her defamation claim.

Depp's trial, which is ongoing seeks damages over $50 million against Heard claiming her op-ed in the Washington Post resulted in Disney dropping Depp from his role in Disney's Pirates of the Caribbean franchise

Depp claims the false and defamatory claims in the article caused damage to his reputation and career.

just days after the article was published. Depp claims the false and defamatory claims in the article caused damage to his reputation and career. Defamation cases are not easy to prove. That is even more the case when the reputation of a corporation is at stake. How is a company's reputation protected? Do corporations have the same protections as individuals? When and how should a corporation pursue a defamation case? To allege defamation, a corporation and its principals must show false statements were made to third parties. This is called "publication" even though it does not involve publishing the statement in a newspaper or public forum. A corporation is defamed if the material is published about that corporation that would impact it negatively. Although a company or corporation is not considered to have a "reputation" in the same sense as that of an individual, statements that would impact the public's view of a company's financial position or managerial integrity are generally considered defamatory to a company's business reputation. A company may sue for defamation if statements tend to deter others from doing business with it.

A company must meet the same requirements as an individual to bring a defamation claim. A company may sue for defamation if it can show that the published material has caused the company, or is likely to cause the company, financial loss. If the required elements exist, a corporate plaintiff may recover presumed damages. This means that harm is presumed, and a fact finder may assess damages in the amount deemed appropriate.

If your business has fallen victim to defamatory statements, you should consult with counsel to investigate the matters.

For more information, contact:

Rose A. Suriano | rsuriano@bracheichler.com | 973-403-3129
Ryan E. Kotler | rkotler@bracheichler.com | 973-403-3132

NEED TO KNOW - KEY HIGHLIGHTS THAT COULD IMPACT YOUR BUSINESS LITIGATIONS

UPDATE ON "AUTHORIZED ACCESS" UNDER THE COMPUTER FRAUD AND ABUSE ACT

In As remote and hybrid work arrangements became common during the Covid pandemic, company files became more widely accessible through remote access.

The Computer Fraud and Abuse Act (CFAA), a federal statute, protects against unauthorized computer access, such as someone hacking into a company's computer network. But what happens when an employee has authorized access to digital information but plans to use it for an improper purpose or with improper motives? Will the CFAA still provide protection?

The United States Supreme Court, in Van Buren v. United States, No. 19-783 (June 3, 2021), ruled that an individual does not "exceed authorized access" under the CFAA when accessing the information on a computer normally available, even if it is accessed with improper motive or for an improper purpose.

In Van Buren v. United States, Nathan Van Buren, a sergeant with the Police Department in Cumming, Georgia, ran a license-plate search in a law enforcement computer database, not in the course of his work, but for a personal reason in exchange for money. His conduct violated department policy. A federal grand jury convicted him of one count of felony computer fraud in violation of the CFAA, 18 U.S.C. § 1030(a)(2). The Eleventh Circuit upheld his conviction. However, the U.S. Supreme Court reversed and held that his conduct did not "exceed authorized access" as defined in the CFAA.

Under the CFAA, an individual may be subject to criminal penalties or civil liability if he or she "intentionally accesses a computer without authorization or exceeds authorized access." 18 U.S.C. § 1030(a)(2). This provision initially applied to accessing financial information but has since been expanded to cover any information from any computer "used in or affecting interstate or foreign commerce or communication" (18 U.S.C. § 1030(e)(2)(B)) and now includes all computers that connect to the internet. The statute defines the term "exceeds authorized access" to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled to obtain or alter." 18 U.S.C. § 1030(e)(6). Violations of the statute include penalties such as fines and sentences of imprisonment for up to 10 years. 18 U.S.C. § 1030(c)(2). The CFAA permits a private right of action for persons who have suffered damage or loss from a CFAA violation. 18 U.S.C. § 1030(g).

The Court performed a close textual analysis of the statute and considered the legislative history. It expressed concern that the statute could criminalize a wide variety of unintended conduct, including, for example, an employee using a work computer to send a personal email or read the news or use a website beyond its terms of service. The Court hesitated to extend criminal liability to those various circumstances.

The Court held that an individual will "exceed authorized access" under the CFAA when he or she accesses a computer without authorization and obtains information located in particular areas of the computer, such as files or databases, that are off-limits to him. Because Van Buren had access to the license plate information he accessed, the Court reversed the Eleventh Circuit's opinion. Thus, employers should carefully review employees' computer access, as access for improper purpose may be permitted under the CFAA.

For more information, contact:

Keith J. Roberts | kroberts@bracheichler.com | 973.364.5201
Robyn Lym | rlym@bracheichler.com | 973.403.3124

WINS AND SIGNIFICANT BRACH EICHLER LITIGATION DEVELOPMENTS

- Welcome **Peter Agostini**, Counsel in the firm's Litigation Group. Peter is a Certified Trial Attorney, and received his JD from CUNY Law School. Before attending law school, Peter attended Fordham University where he received his Bachelor of Arts degree. Prior to joining Brach Eichler, Peter was Associate General Litigation Counsel at PSEG.
- **Thomas Kamvosoulis** and **Eric Alvarez** settled a large commercial litigation for approximately $10 million, recovering the entirety of damages requested by the client. In October 2021, Brach Eichler took over a case in its infancy and amended the pleadings to assert a wide array of contract and tort claims, arising from an international conspiracy to defraud the client out of the monies owed after the sale of an IT staffing business. After several months of complex

negotiations, the defendants agreed to pay the client all the consideration due and owing under the sales transaction immediately.

- **Bob Kasolas** successfully obtained dismissal on nearly all causes of action in a membership dispute litigation seeking to apply New Jersey law to a limited liability company organized under the laws of the State of Delaware. Despite the operating agreement containing a choice of law provision purporting to apply New Jersey law to membership disputes, the Appellate Division held that Delaware's internal affairs doctrine was mandatory, and courts in New Jersey were bound to apply Delaware law. Consequently, plaintiffs' claims for corporate waste, misappropriation, and usurpation of business opportunities were dismissed.
- **Anthony Rainone** and **Eric Magnelli** obtained summary judgment in which the District Court entered a Declaratory Judgment ruling that our client is not a signatory to a collective bargaining agreement and therefore cannot be compelled to arbitrate a Benefit Funds' claim for unpaid employee contributions. The Funds' sought over $250,000 in unpaid contributions for non-union workers, arguing that the client was bound to a CBA due to executing a short form agreement. The Court ruled that the short form agreement was void for fraud in the execution saving the client from arbitration against the Funds, being liable for unpaid contributions, and being bound to a CBA.
- **Rose Suriano**, **Stuart Polkowitz**, and **Robyn Lym** successfully obtained a temporary restraining order in a dispute involving a Board's election procedures and amendments to an Association's Bylaws. Plaintiffs alleged that the governing Board of Directors sought to amend certain provisions of the By-Laws in violation of election procedures outlined in the By-Laws. The court entered a temporary restraining order to enjoin any results of the elections from being implemented, pending an investigation into whether the election procedures did comply with the By-Laws.

ATTORNEY **SPOTLIGHT**

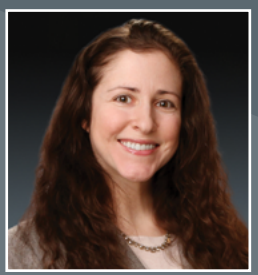
Get to know the faces and stories of the people behind the articles in each issue. This month, we invite you to meet Member Anthony M. Rainone and Associate Lauren Adornetto Woods

ANTHONY RAINONE

Anthony Rainone has built a successful practice handling labor and employment issues as well as a wide range of commercial and construction disputes. No client's legal challenges are the same. Therefore, at the outset of each matter, Anthony's priority is to understand his client's needs and then tailor an individualized, strategic approach. This high degree of personal service combined with his command of the law consistently yields favorable outcomes for his clients. He is as comfortable resolving a matter through negotiation as he is litigating a matter through trial and appeal.

On the weekends, Anthony looks forward to mountain biking, snowboarding, surfing, soccer, and coaching his kid's baseball and soccer teams.

LAUREN ADORNETTO WOODS



Lauren Adornetto Woods is a litigator with experience representing businesses and individuals in a variety of federal and state court matters, with a focus on complex commercial litigation. In addition to commercial disputes, Lauren's experience extends to construction litigation, labor and employment, and consumer fraud actions. She has also represented individual officers and directors defending against claims of fraud, breach of fiduciary duties, and other business torts.

In her spare time, Lauren enjoys reading and spending time with my toddler and husband.

On May 16, Litigation Co-Chair and Member **Keith Roberts**, wrote an article in the New Jersey Law Journal about "What a Medical Provider Should Do When a Patient is Threatening a Lawsuit."

On April 28, Brach Eichler was highlighted in NJBIZ, ROI-NJ, and NJLJ for celebrating its 55th Anniversary and expanding its headquarters by 15% in Roseland, NJ.

On April 1, Brach Eichler Promoted Ten Attorneys. Congratulations to newly promoted Members **Paul De Lisi**, **Al Habjan**, **Edward Hilzenrath, Thomas Kamvosoulis, Samantha Karni, Sean Smith, Jonathan Walzman, Edward Yun,** and Counsel **Autumn McCourt**, and **Brian Peykar.**

Congratulations to Brach Eichler's 2022 New Jersey Super Lawyers! **Edward P. Capozzi, Matthew M. Collins, Riza I. Dagli, Susan Dromsky-Reed, John D. Fanburg, Stuart M. Gladstone, Joseph M. Gorrell, Carol Grelecki, Alan R. Hammer, Thomas Kamvosoulis, Eric Magnelli, Allen J. Popowitz, Anthony M. Rainone, Keith J. Roberts, Carl J. Soranno, Frances B. Stella**, and **Rose A. Suriano**. We also applaud our 10 attorneys from the firm listed as 2022 New Jersey Rising Stars: **Alex S. Capozzi, Shannon Carroll, Corey A. Dietz, Jeremy L. Hylton, Autumn M. McCourt, Kristofer C. Petrie, Cheryl L Ritter, Kelley M. Rutkowski, Michael A. Spizzuco, Jr.**, and **Ella M. Yusim**.

On March 29, Litigation Co-Chair and Member **Rose Suriano** was on a NJ State Bar Association panel about "The Crossover between Chancery and Business Court: Does your case belong in Chancery? Does your case belong in Law Division?" On February 12, Labor and Employment Counsel **Jay Sabin**'s recent case involving a Wells Fargo Financial Advisor taking advantage of his client, an elderly eye doctor, was highlighted in the New York Post.

*A special thanks to **Mike Spizzuco** and **Robyn Lym** as the Spring Litigation Quarterly Advisor editors.*

BRACH | EICHLER LLC
Counsellors at Law

LITIGATION PRACTICE | 101 EISENHOWER PARKWAY, ROSELAND, NJ 07068

CO-CHAIRS

Keith J. Roberts | 973.364.5201 | kroberts@bracheichler.com
Rose Suriano | 973.403.3129 | rsuriano@bracheichler.com

MEMBERS

Matthew M. Collins | 973.403.3151 | mcollins@bracheichler.com
Riza I. Dagli | 973.403.3103 | rdagli@bracheichler.com
Charles X. Gormally | 973.403.3111 | cgormally@bracheichler.com
Bob Kasolas | 973.403.3139 | bkasolas@bracheichler.com
Thomas Kamvosoulis | 973.403.3130 | tkamvosoulis@bracheichler.com
Stuart J. Polkowitz | 973.403.3152 | spolkowitz@bracheichler.com
Anthony M. Rainone | 973.364.8372 | arainone@bracheichler.com
Sean Alden Smith | 973.364.5216 | sasmith@bracheichler.com
Carl J. Soranno | 973.403.3127 | csoranno@bracheichler.com
Frances B. Stella | 973.403.3149 | fstella@bracheichler.com

COUNSEL

Colleen Buontempo | 973.364.5210 | cbuontempo@bracheichler.com
Shannon Carroll | 973.403.3126 | scarroll@bracheichler.com
Anthony M. Juliano | 973.403.3154 | ajuliano@bracheichler.com
Eric Magnelli | 973.403.3110 | emagnelli@bracheichler.com
Autumn M. McCourt | 973.403.3104 | amccourt@bracheichler.com
Thomas J. Spies | 973.364.5235 | tspies@bracheichler.com

ASSOCIATES

Eric Alvarez | 973.364.8330 | ealvarez@bracheichler.com
Lindsay P. Cambron | 973.364.5232 | lcambron@bracheichler.com
Mark E. Critchley | 973.364.8339 | mcritchley@bracheichler.com
Paul J. DeMartino, Jr. | 973.364.5228 | pdemartino@bracheichler.com
Emily J. Harris | 973.364.5205 | eharris@bracheichler.com
Ryan Kotler | 973.403.3132 | rkotler@bracheichler.com
Angelo Langadakis III | 973.364.8359 | alangadakis@bracheichler.com
Robyn K. Lym | 973.403.3124 | rlym@bracheichler.com
Michael A. Rienzi | 973.364.5226 | mrienzi@bracheichler.com
Kelley M. Rutkowski | 973.364.5215 | krutkowski@bracheichler.com
Michael A. Spizzuco, Jr. | 973.364.8342 | mspizzuco@bracheichler.com
Lauren Adornetto Woods | 973.364.5211 | lwoods@bracheichler.com
Joanna Zwosta | 973.364.6582 | jzwosta@bracheichler.com

Roseland, NJ | New York, NY | West Palm Beach, FL | www.bracheichler.com | 973.228.5700