MEMORANDUM

TO: Council, ABA Section of Dispute Resolution

FROM: Larson Frisby

SUBJECT: Federal Legislative Update

DATE: August 10, 2019

The following is an update on the status of federal alternative dispute resolution (ADR) legislation and other related proposals and measures that may be of interest to the Council:

1. U.S. Department of Health and Human Services’ Nursing Home Arbitration Rule

On July 18, 2019, the U.S. Department of Health and Human Services’ Centers for Medicare & Medicaid Services (CMS) published a new final rule substantially revising its previous rule from October 2016 that sought to impose new requirements on long-term care facilities, including certain limits on nursing home arbitration. (See Department of Health and Human Services Final Rule on Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements; CMS-3342-F; RIN 0938-AT18; 84 Fed. Reg. 34718 (July 18, 2019)).

The new final CMS rule reversed the previous ban on pre-dispute nursing home arbitration agreements, consistent with the preliminary injunction that the U.S. District Court for the Northern District of Mississippi issued in November 2016 and reaffirmed in June 2017. However, the new rule also retained several key patient protections from the 2016 measure, including a requirement that nursing homes not require any resident to sign a pre-dispute arbitration agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility. The facility must also inform the resident of these rights, and the agreement must explicitly state the same. The arbitration agreement must also be explained to the resident in a manner that he or she understands; allow the resident to rescind the arbitration clause within 30 days; provide for the selection of a neutral arbitrator agreed upon by both parties and a venue convenient to both parties; and not contain language prohibiting or discouraging the resident from communicating with federal, state, or local officials, among other requirements.

In response to the original proposed rule issued by CMS in July 2015, the ABA submitted written comments identifying several areas in which the proposed rule should be strengthened or clarified, including new language: (1) supporting residents’ right to vote; (2) encouraging advance care planning; and (3) expressly prohibiting pre-dispute agreements to arbitrate disputes between nursing homes and residents. On August 7, 2017, the ABA also submitted additional written comments to CMS in response to the new proposed rule reiterating its opposition to mandatory nursing home
arbitration. The ABA’s comments were prepared by the ABA Commission on Law and Aging (ABA COLA) and the ABA Governmental Affairs Office, with input from the ABA Dispute Resolution and Tort Trial & Insurance Practice Sections. ABA COLA Director Charlie Sabatino also wrote an article last month assessing the pros and cons of the new final rule.

2. **Mandatory Arbitration of Sexual Harassment Claims**

Bipartisan legislation is also pending in Congress that would amend the Federal Arbitration Act to relax existing requirements for employees to arbitrate or mediate sexual discrimination disputes.

H.R. 1443, the Ending Forced Arbitration of Sexual Harassment Act, was introduced by Rep. Cheri Bustos (D-IL) in February 2019. The bill, with 8 Democratic and 4 Republican co-sponsors, would prohibit pre-dispute arbitration agreements to resolve sex discrimination disputes. The bill also provides that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement. H.R. 1443 was referred to the House Judiciary Committee, but no further action has been scheduled on the measure.

Although the ABA has not taken a position regarding H.R. 1443, the ABA House of Delegates adopted a policy (Resolution 107B) at the 2019 Midyear Meeting that urges legal employers not to require employees to agree, before a dispute arises, to arbitrate claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, genetic information, or status as a victim of domestic or sexual violence. The ABA also adopted a narrower policy (Resolution 300) in August 2018 urging legal employers not to require mandatory arbitration of sexual harassment claims.

3. **FAIR Act**

Congress is also considering broad legislation known as the Forced Arbitration Injustice Repeal (FAIR) Act that would invalidate all mandatory pre-dispute agreements to arbitrate consumer, employment, antitrust, or civil rights disputes. H.R. 1423 and S. 610, introduced by Rep. Hank Johnson (D-GA) and Sen. Richard Blumenthal (D-CT), respectively, would ban all such pre-dispute arbitration agreements. The bills would also prohibit all pre-dispute joint-action waivers, defined as any agreement that would prohibit or waive the right of one of the parties to participate in a joint, class, or collective action. However, any agreement to arbitrate or joint-action waiver entered into after a dispute has arisen would continue to be enforceable. The bills also provide that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement.

Unlike some previous versions of the bill introduced in recent years (which were known as the Arbitration Fairness Act), H.R. 1423 and S. 610 would create a new Chapter 4 to Title 9 and would
make only technical and conforming changes to Chapter 1 of that Title (i.e., the Federal Arbitration Act). In addition, unlike some earlier versions of the bills, H.R. 1423 and S. 610 would invalidate pre-dispute agreements to arbitrate antitrust disputes but not franchise disputes. Although H.R. 1423 and S. 610 were referred to the House and Senate Judiciary Committees, respectively, no further action has been scheduled on either measure.

In 2010 and 2011, the ABA sent letters to the sponsors of the earlier bills expressing concerns regarding certain specific language in those bills that could have inadvertently voided existing international commercial arbitration agreements and potentially discouraged international commercial parties from engaging in commerce with U.S. parties. The ABA also provided the sponsors with proposed technical amendments designed to protect international commercial arbitration and to clarify several ambiguous definitions in the legislation. ABA representatives subsequently met with the sponsors’ senior counsels to further explain and discuss the ABA’s proposed technical amendments, and some, but not all, of the ABA’s recommendations were later incorporated into the legislation.

4. **Restoring Statutory Rights and Interests of the States Act**

Sen. Patrick Leahy (D-VT) reintroduced legislation during the 116th Congress that would amend the Federal Arbitration Act (FAA) to prohibit pre-dispute agreements to arbitrate claims brought by individuals or small businesses for alleged violations of a federal or state statute, the U.S. Constitution, or a state constitution. S. 635, also known as the Restoring Statutory Rights and Interests of the States Act, also would invalidate agreements to arbitrate that are prohibited by a federal or state statute, or the finding of a federal or state court, on grounds that the agreements are unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of public policy. In addition, the legislation would authorize the courts, rather than arbitrators, to determine whether the FAA applies to an agreement to arbitrate, irrespective of whether the party resisting arbitration challenges the agreement to arbitrate specifically or in conjunction with other terms of the overall contract containing the agreement. S. 635 was referred to the Senate Judiciary Committee, but no further action has been scheduled on the measure.

5. **Arbitration of Consumer Financial Disputes**

In February 2019, Senate Banking, Housing, and Urban Affairs Ranking Member Sherrod Brown (D-OH), introduced somewhat narrower legislation designed to invalidate pre-dispute consumer arbitration agreements. S. 630, known as the Arbitration Fairness for Consumers Act, would amend the Consumer Financial Protection Act of 2010 to prohibit pre-dispute arbitration agreements and pre-dispute joint-action waivers with respect to disputes over a consumer financial product or service. The bill also provides that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement. S. 630 was referred to the Senate Banking, Housing, and Urban Affairs Committee, but no further action has been scheduled on the measure.
Arbitration and Mediation of Labor and Employment Disputes

Congress is considering numerous bills that would either prohibit mandatory arbitration of employment disputes or require the use of ADR to resolve certain types of labor and employment disputes.

The Restoring Justice for Workers Act, introduced by Rep. Jerrold Nadler (D-NY) and Sen. Patty Murray (D-WA) as H.R. 2749 and S. 1491, respectively, would amend Title 9 of the U.S. Code to invalidate pre-dispute arbitration agreements that require arbitration of employment disputes. The bills also would ban retaliation against employees for refusing to arbitrate employment disputes and would provide additional protections to ensure that post-dispute arbitration agreements are truly voluntary and made with the informed consent of employees. In addition, the bills would amend the National Labor Relations Act (NLRA) to ban agreements and practices that interfere with employees’ right to collectively litigate employment disputes. Almost identical provisions are also contained in Section 303 of two broader employment discrimination bills, H.R. 2148 (sponsored by Rep. Katherine Clark (D-MA) and S. 1082 (sponsored by Sen. Murray).

H.R. 2749 was referred to the House Judiciary and Education & Labor Committees while H.R. 2148 was referred to those committees and to the House Administration, Oversight & Reform, and Veterans’ Affairs Committees. S. 1491 and S. 1082 were referred to the Senate Health, Education, Labor and Pensions Committee. So far, no action has been scheduled on any of the four bills.

Another bill introduced by Sen. Murray, S. 1306, would amend Section 8 of the NLRA to provide that if an employer and a newly-certified employee representative are unable to reach a collective bargaining agreement regarding the terms and conditions of employment within 90 days, the employer or representative may notify the Federal Mediation and Conciliation Service (FMCS) and request mediation. If the parties are unable to reach a settlement within 30 days after the mediation is requested, the FMCS must refer the dispute to a tripartite arbitration panel, with one arbitrator selected by the labor organization, one selected by the employer, and one neutral member mutually agreed to by the parties. Any arbitration decision by the FMCS shall be binding upon the parties for a period of two years unless it is amended during that period by written consent of the parties.

In addition to these mediation and arbitration requirements, S. 1306 would also amend the NLRA to invalidate any pre-dispute agreement in which “an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction.” However, this prohibition shall not apply to employees who a represented by a labor organization and covered by a collective bargaining agreement with the employer.

S 1306 was referred to the Senate Health, Education, Labor, and Pension Committee, but there has been no further action on the measure.
7. **Mandatory Arbitration for Servicemembers**

Congress is currently considering legislation that would make it more difficult to enforce mandatory arbitration agreements against U.S. servicemembers with respect to their employment and reemployment rights.

H.R. 2750, introduced by Rep. David Cicilline (D-RI), would invalidate any pre-dispute agreement to arbitrate employer-employee disputes arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA) or the Servicemembers Civil Relief Act. The legislation would also ban any pre-dispute agreement to prohibit, or waive the right of, a party to participate in a joint, class, or collection action suit or proceeding. However, any agreement to arbitrate or joint-action waiver entered into after a dispute has arisen would continue to be enforceable. The bill also provides that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement. H.R. 2750 was referred to the House Judiciary and Veterans’ Affairs Committees, but no hearings or other action has been scheduled to date.

Although the ABA has not formally endorsed this bill, the ABA House of Delegates adopted a policy in August 2011 ([Resolution 120](#)) supporting various amendments to USERRA, including making unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act. Therefore, the ABA generally supports the substance of H.R. 2750.

8. **Mandatory Arbitration of Data Breaches**

At the beginning of the 116th Congress, Rep. Ted Lieu (D-CA) introduced legislation aimed at ending mandatory arbitration of disputes involving data breaches. H.R. 327 would prohibit entities from requiring, as part of their customer agreements or other similar agreements, that an individual agree to arbitrate disputes related to a computer security breach. The bill would allow victims to bring a private right of action in court for violations and also provides for enforcement by the Federal Trade Commission and states. H.R. 327 was referred to the House Energy and Commerce Committee, but no further action has been scheduled. During the previous 115th Congress, Rep. Lieu introduced a similar bill, H.R. 5165, but that measure failed to advance.

9. **Settlements Under the Endangered Species Act**

Legislation has also been introduced in the 116th Congress that would amend the Endangered Species Act to establish a procedure for approving settlements in certain types of federal lawsuits. S. 1426, introduced by Sen. John Cornyn (R-TX), would require the Secretary of the Interior to publish any complaint filed against the Department that alleges a failure to perform an act or duty related to an endangered or threatened species. The bill also would provide all affected parties—including businesses and state and local governments—with a reasonable opportunity to intervene in the suit. If the court grants a motion to intervene, it would be required to refer the matter to
mediation or a magistrate judge to facilitate settlement discussions. The legislation would also allow
the court to award litigation costs—such as attorneys’ fees and expert witness fees—to any
appropriate party as part of a final order, but such costs could not be awarded if the case is resolved
by a consent decree or settlement agreement. The court would also be prohibited from approving a
consent decree unless each state and county containing the relevant species is given notice and
either approves of the settlement or fails to respond within 45 days. Although S. 1426 was referred
to the Senate Environment and Public Works Committee, no further action has been scheduled.

10. **Safety Over Arbitration Act**

Early in the 116th Congress, Sen. Sheldon Whitehouse (D-RI) introduced legislation that would ban
pre-dispute arbitration agreements that have the potential to harm the health and safety of the
public. S. 620, also known as the Safety Over Arbitration Act, would invalidate any arbitration
agreement to resolve a future claim or controversy alleging facts relevant to a public health or safety
hazard. However, any such agreements to arbitrate that are entered into after a dispute has arisen
would continue to be enforceable. The bill also provides that if the parties proceed with the
arbitration, the arbitrator must provide the parties with a written explanation of the factual and legal
basis for any award or other outcome, and the explanation “shall not be made under seal by the
arbitrator or a court.” S. 620 was referred to the Senate Judiciary Committee, but there has been no
further action on the measure.

11. **Protecting Whistleblowers Reporting Tax Evasion**

On April 9, 2019, the House passed bipartisan legislation known as the Taxpayer First Act that
would reform the IRS in various ways, including strong protections for employees and other
whistleblowers that provide information to the government about possible tax evasion by companies
and other employers. H.R. 1957, introduced by Rep. John Lewis (D-GA) and cosponsored by 18
Democratic and 10 Republican Representatives, also contains language invalidating any pre-dispute
agreement to arbitrate disputes relating to the discharge or other acts of retaliation against an
employee whistleblower. A companion measure, S. 928, was also introduced by Sen. Charles
Grassley (R-IA). Although S. 928 was referred to the Senate Finance Committee, no further action
has been scheduled on the measure.

12. **Arbitration of College Enrollment Disputes**

Congress is also considering legislation known as the Court Legal Access and Student Support
(CLASS) Act that would invalidate all mandatory pre-dispute agreements to arbitrate controversies
involving enrollment agreements between a student and a college. H.R. 1430 and S. 608, introduced
by Rep. Maxine Waters (D-CA) and Sen. Richard Durbin (D-IL), respectively, state that Chapter 1
of Title 9 of the U.S. Code relating to enforcement of arbitration agreements shall not apply to
enrollment agreements between students and institutions of higher education. The bills also would
amend Section 487(a) of the Higher Education Act of 1965, 20 U.S.C. § 1094(a), to prohibit such
institutions that participate in federal student aid programs from requiring a student to agree to any
restriction on the student’s ability to pursue an individual or group claim against it in court. The
legislation would take effect one year after the date of enactment. Although H.R. 1430 was referred to the House Education & Labor and House Judiciary Committees, and S. 608 was referred to the Senate Health, Education, Labor, and Pensions Committee, no hearings or markups have been scheduled on the bills to date.

13. **Arbitration of Student Loan Disputes**

Several bills have been introduced in the House and Senate that would prohibit all mandatory pre-dispute agreements to arbitrate disputes involving postsecondary education loans.

H.R. 3764, introduced by Rep. Mary Gay Scanlon (D-PA), would ban all such arbitration agreements and would also prohibit all pre-dispute joint-action waivers, defined as any agreement that would prohibit or waive the right of one of the parties to participate in a joint, class, or collective action. However, any arbitration agreement or joint-action waiver entered into after a dispute has arisen would continue to be enforceable. H.R. 3764 also provides that the validity and enforceability of such arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement. Similar language banning these arbitration agreements and class action waivers is also included in S. 1354, a broad student loan reform bill introduced by Sen. Richard Durbin (D-IL).

Although H.R. 3764 was referred to the House Judiciary Committee and S. 1354 was referred to the Senate Health, Education, Labor and Pensions Committee, no further action has been scheduled on either measure.

14. **Arbitration of Surprise Medical Bills**

Congress is also considering several bipartisan bills that would use arbitration to help resolve disputes between patients and out-of-network medical providers for care received during emergencies.

S. 1531, introduced by Sen. Bill Cassidy (R-LA) and cosponsored by 14 Democratic and 12 Republican Senators, would prohibit out-of-network medical providers from balance billing patients for emergency care by charging them for the remaining cost of treatment not covered by insurance. Instead, the patient’s group health plan or health insurance issuer would be required to pay the medical provider the median in-network rate under the plan or coverage, less any applicable copayments, coinsurance, or deductibles owed by the patient for covered emergency services. After such payments, the plan or issuer would have to notify the provider about how it may initiate “independent dispute resolution” (IDR), i.e., binding arbitration, to resolve the billing dispute. If the parties are not able to settle the dispute and IDR is initiated, the health plan or issuer and the provider would submit their final offers to the IDR entity, which would then decide which offer was more reasonable based on factors outlined in the bill. The IDR entity’s decision would be final and binding on the parties, and the non-prevailing party would pay all fees charged by the IDR entity.
Several similar bills, S. 1266 and H.R. 3502, were also introduced by Sen. Rick Scott (R-FL) and Rep. Raul Ruiz (D-CA), respectively. S. 1531 and S. 1266 were referred to the Senate Health, Education, Labor and Pensions Committee, but no further action has been scheduled on either bill. Meanwhile, H.R. 3502, with 32 Democratic and 39 Republican cosponsors, was referred to the House Education & Labor, Energy & Commerce, Oversight & Reform, and Ways & Means Committees, though no hearings or other action have taken place on the bill so far.

15. **Ombudsman Legislation**

During the 116th Congress, numerous bills have been introduced that would establish or reform ombudsman positions in certain federal agencies. For example:

- S. 3, introduced by Sen. Benjamin Cardin (D-MD), would amend the Patient Protection and Affordable Care Act to create a public health insurance option and establish an **Office of the Ombudsman for the Public Health Insurance Option** within the Department of Health and Human Services. The new ombudsman would have duties regarding the public health insurance option that are similar to the duties of the Medicare Beneficiary Ombudsman under Section 1808(c)(2) of the Social Security Act. S. 3 was referred to the Senate Finance Committee, but no further action has been scheduled on the measure.

- S. 719, introduced by Sen. Richard Durbin (D-IL) in March 2019, would create a **Civil Rights Ombudsman within the Bureau of Prisons** to review, investigate, and attempt to remedy any civil rights complaints by inmates. The ombudsman also would be required to refer all prison staff misconduct and possible violations of law to the Bureau of Prisons and the Department of Justice, recommend improvements to the Bureau of Prisons’ solitary confinement and civil rights policies, and make periodic reports to the House and Senate Judiciary Committees. S. 719 was referred to the Senate Judiciary Committee, but there has been no further action on the bill to date.

- H.R. 2034 and S. 992, known as the Dignity Act and introduced by Rep. Pramila Jayapal (D-WA) and Sen. Cory Booker (D-CT), would require the Attorney General to designate an **ombudsman within the federal penal system** to oversee and monitor prisoner transportation, use of segregated housing, strip searches of prisoners, and alleged civil rights violations. The bills were referred to the House and Senate Judiciary Committees, respectively, but no further action has been scheduled.

- S. 720, introduced by Sen. Tom Udall (D-NM), would amend the Higher Education Act to require the **Student Loan Ombudsman of the Department of Education** and the Department’s contractors and vendors to provide student loan data to the Director or to the **Ombudsman of the Consumer Financial Protection Bureau**. A House companion bill, H.R. 2833, was also introduced by Rep. Katie Porter (D-CA). S. 720 was referred to the Senate Health, Education, Labor and Pensions Committees, and H.R. 2833 was introduced to the House Education & Labor and Financial Services Committees, but no further action has been scheduled on either bill.
• H.R. 3524, introduced by Rep. Zoe Lofgren (D-CA), would create an **Ombudsman for Border and Immigration Related Concerns in the Department of Homeland Security (DHS)** to receive, investigate, and resolve complaints from individuals, associations, and employers regarding the border security and immigration activities of DHS. H.R. 3524 was referred to the House Homeland Security, Judiciary, Foreign Affairs, and six other Committees, but there has been no further action on the bill.

• Section 105 of H.R. 3931, the FY 2020 Department of Homeland Security (DHS) Appropriations bill, would create an **Immigration Detention Ombudsman within DHS** to receive, investigate, and resolve complaints from individuals affected by potential misconduct, excessive force, or violations of law or detention standards by DHS officers or other personnel. H.R. 3931 was approved by the House Appropriations Committee on July 24, 2019 and referred to the full House for further consideration.

• S. 1409 and H.R. 2673, introduced by Sen. Jeanne Shaheen (D-NH) and Rep. Andy Kim (D-NJ), would expand the ability of the **Small Business Administration’s (SBA) Office of the National Ombudsman** to assist small businesses to meet regulatory requirements and would authorize the SBA National Ombudsman to develop additional outreach initiatives to promote greater awareness of its services. H.R. 2142, a related measure introduced by Rep. Antonio Delgado (D-NY), would amend the Small Business Act to require the SBA Ombudsman to create a centralized website for compliance guides. S. 1409 was referred to the Senate Small Business and Entrepreneurship Committee, and H.R. 2673 was referred to the House Small Business Committee. Meanwhile, the House approved H.R. 2142 on July 15, 2019 by voice vote.

• H.R. 3060, introduced by Rep. Sheila Jackson Lee (D-TX), would establish an **Office of Disaster Response Ombudsman** and an **Office of Disaster Recovery Ombudsman** within FEMA to examine and resolve complaints arising from disaster response or disaster assistance provided to individuals, organizations, or state or local governments receiving federal government funding. H.R. 3060 was referred to the House Homeland Security, Education & Labor, Energy & Commerce, Financial Services, Judiciary, Small Business, and Transportation & Infrastructure Committees, but no further action has been scheduled on the measure.

The ABA has previously adopted several resolutions favoring the greater use of “ombuds” both in the public and private sectors. In August 2001 and February 2004, the ABA House of Delegates approved resolutions encouraging the greater use of “ombuds” to resolve complaints and endorsing general standards for the establishment and operation of ombudsman offices. The ABA also previously adopted other resolutions in 1971, 1989 and 1995, recommending that the federal government experiment with the creation of several different types of ombudsman programs.
At the ABA’s 2017 Annual Meeting, the House of Delegates adopted Resolution 103, sponsored by the Section of Dispute Resolution, which encourages the greater use and development of ombuds programs that comply with generally recognized standards of practice.

Copies of the legislation described above or any other federal legislation involving ADR issues can be obtained directly from the U.S. Congress web site at https://www.congress.gov/, or by contacting Larson Frisby in the American Bar Association’s Governmental Affairs Office at (202) 662-1098 or larson.frisby@americanbar.org.