

Uber's Move Away From Arbitration Falls Short, Attys Say

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By **Vin Gurrieri**

Law360 (May 15, 2018, 10:15 PM EDT) -- Uber won plaudits Tuesday with its announcement that it would no longer steer sexual misconduct claims into arbitration, but critics were quick to pump the brakes on the praise, noting that the ride-hailing giant can still use arbitration to keep class actions from seeing their day in court.

In a lengthy blog post Tuesday, Uber Technologies Inc. Chief Legal Officer Tony West laid out a series of reforms the company will undertake to address the problem of sexual misconduct, including that it will **no longer require mandatory arbitration** for individual claims of sexual assault or sexual harassment that are made by Uber's riders, drivers or employees.

West highlighted the importance of giving survivors of sexual assault and harassment "control over how they pursue their claims," and said the company wouldn't insist on having confidentiality provisions included in any settlements, something that "will help to end the culture of silence that surrounds sexual violence."

But while many plaintiff-side attorneys and legal observers applauded Uber's move as a good first step, they also pointed out that the company refrained from any promises that it would free victims from arbitration agreements if their claims are part of class action litigation.

"Uber's announcement appears to be a wolf in sheep's clothing," said Seth Lesser, a partner at Klafter Olsen & Lesser LLP, a New York firm that specializes in workers' rights.

"The company is ending its long-standing policy of mandatory arbitration only for individual claims, but not for class action lawsuits, knowing full well that class actions are the only way most employees can afford to wage such a legal battle," Lesser said. "If Uber really wanted to protect its employees, it would do away with mandatory arbitration altogether, rather than enact what appears to be a token gesture at generating unearned goodwill."

Hannah Brenner, an associate professor of law at California Western School of Law who specializes on issues surrounding gender-based violence, said Uber's move "is a great win for consumers" since the confidentiality that surrounds arbitration proceedings often keeps such cases under wraps and out of the public eye, but also said it's "unfortunate" the policy didn't extend to class actions.

"From the broader social perspective where we know there is a widespread problem with sexual violence, [there] is an importance in being able to expose these problems and allow victims to have their day in court, so to speak," Brenner said. "I wish we would live in a world

where we didn't have enough people to form the basis [for a class action] but I know that's the reality. It's unfortunate that that's been taken away as a possible tool, because it can be a powerful one."

In addition to highlighting the company's new position on arbitration, West's blog post also outlined other reforms Uber has undertaken, including strengthening its driver screenings and installing an "emergency button" in the app that can alert police to a vehicle's location.

Uber also committed to publishing a safety transparency report that will include data on sexual assaults and other incidents that occur on the Uber platform, even though data on safety and sexual assaults is sparse and inconsistent, according to West's blog post.

An Uber representative told Law360 on Tuesday that the company believes the actions it took are "very significant" and "get to the heart" of the underlying issue of whether victims have a choice as to where to pursue their claims and whether they settle without confidentiality as to the facts of their cases. Uber also pointed out that nearly all claims involving the company that relate to sexual harassment and sexual assault are individual in nature.

The one exception in Uber's case is a federal class action by a group of women suing under Jane Doe pseudonyms alleging that the company maintained lax background-check, monitoring and safety policies despite hundreds of riders' reports of sexual violence by their Uber drivers.

The women recently sent a letter to Uber's board of directors in April ahead of a May 4 deadline for the company to respond to the class action seeking to be freed from the constraints of arbitration provisions contained in their consumer agreements.

And Uber on Tuesday — the same day it unveiled its policy for towards individual sexual misconduct claimants — asked a California federal court to send to arbitration the class action claims the plaintiffs brought under the state's Unfair Competition Law and the Consumer Legal Remedies Act.

The motion, however, did not ask that the plaintiffs' individual assault and battery claims also be sent to arbitration. The motion also noted that arbitration agreements the class action plaintiffs agreed to don't require the arbitration proceedings to be confidential and that there is no restriction on plaintiffs' ability to discuss their allegations in public.

Jeanne M. Christensen, a partner at [Wigdor LLP](#) and attorney for the plaintiffs in the class action, praised Uber for its action but also cautioned that it should only be the first step in improving safety for riders.

"Uber has made a critical step in this direction, but preventing victims from proceeding together, on a class basis, shows that Uber is not fully committed to meaningful change," Christensen said. "Victims are more likely to come forward knowing they can proceed as a group. This is the beginning of a longer process needed to meaningfully improve safety."

Michael Barasch, managing partner of plaintiff-side personal injury firm [Barasch McGarry Salzman & Penson](#), told Law360 that it can be difficult for sexual misconduct victims to find lawyers if their claims are not part of aggregate actions. He noted that some plaintiffs lawyers can't afford to take smaller cases on a contingency fee basis unless a truly serious injury has occurred, while plaintiffs class action attorneys are "much better funded" to take on large companies like Uber.

"Basically, what [Uber has] done now, by telling people, 'OK, you can go ahead and sue,' no one's going to sue," Barasch said, adding that a meaningful change would be "if they told people, 'OK, you can now bring class actions against us.'"

The issue over whether victims of sexual misconduct can be forced to arbitrate their claims has become a hot-button topic following a series of high-profile scandals involving media moguls Roger Ailes and Harvey Weinstein, which led to the #MeToo movement against sexual harassment and assault.

Congress has taken notice of the issue, with a group of bipartisan lawmakers, including Sens. Kirsten Gillibrand, D-N.Y., and Lindsey Graham, R-S.C., introducing the Ending Forced Arbitration of Sexual Harassment Act of 2017 in December. The bill would make it illegal for businesses to enforce workers' arbitration agreements if their allegations involve either sexual harassment or gender discrimination under Title VII of the Civil Rights Act. Instead, workers would have the option of taking those types of claims to court.

Companies too have joined the chorus. Shortly after Uber's announcement, its rival [Lyft Inc.](#) said it would drop mandatory arbitration for sexual harassment or sexual assault claims.

They follow [Microsoft Corp.](#), which announced in December that it backed the proposed bipartisan legislation and would no longer require employees who pursue sexual harassment claims to do so in arbitration rather than in court.

Linda Lipsen, CEO of the [American Association for Justice](#), a nonprofit advocacy and lobbying group for plaintiffs lawyers, said Tuesday in response to Uber's policy shift that it "strongly supports" affording sexual assault survivors access to a public courtroom, but said "nothing in current law prevents" Uber and other companies from changing their policies at any time in the future to force victims into arbitration.

"That is why we're calling on Congress to pass comprehensive legislation to restore the constitutional rights of all Americans to take their cases to court," Lipsen said. "Until the law is changed, thousands of Americans will continue to have their rights stripped away in silence. No one should ever be at the mercy of the corporation who hurt them."

--Additional reporting by Linda Chiem. Editing by Katherine Rautenberg.