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(Updated) Congress Ends Mandatory Arbitration of Sexual Harassment and Sexual Assault Claims

February 18, 2022 | Blog | By **Delaney M. Busch**, **Danielle Dillon**

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UPDATE: On Thursday, March 3, 2022, President Biden signed into law the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*. Under the new law, employers can no longer compel arbitration for sexual harassment or sexual assault claims. Instead, the law gives employees a choice in pursuing such claims in private arbitration or a more public setting. The law, which we summarize below, is effective immediately.

Congress has passed the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, marking a milestone in the #MeToo movement. This **legislation** (which President Biden is expected to sign into law) will effectively end mandatory arbitration of sexual assault and harassment disputes. Employees will now have a choice to proceed with their claims via arbitration or in court.

If enacted, the bill will amend the Federal Arbitration Act ("FAA"), and provides that "pre-dispute arbitration agreements" (i.e., "agreement[s] to arbitrate a dispute that had not yet arisen at the time of the making of the agreement") and "pre-dispute joint action waivers" (i.e., agreements waiving the right "to participate in joint, class or collective actions ... concerning a dispute that had not yet arisen at the time of the making of the agreement") can be invalidated and unenforceable at the election of the employee who raises allegations of a sexual assault or sexual harassment claim. The legislation covers all claims of sexual harassment or assault, whether they arise under federal, state, or tribal law.

Therefore, if an employee signs an agreement to arbitrate employment-related claims and later experiences conduct that the employee believes constitutes a "sexual assault dispute" or "sexual harassment dispute" (as defined under the new law), the employee could unilaterally dispense with arbitration and elect to pursue the employee's claims in court. Likewise, the employee may reject a pre-dispute agreement and pursue claims on a joint basis with other alleged victims of sexual assault or sexual harassment. Employees may, however, elect to arbitrate sexual harassment and assault claims, provided the agreement to arbitrate arises after the dispute occurs and the employee agrees to arbitration in writing. Some employees may welcome the level of confidentiality arbitration affords them as well as its efficiency and may elect to proceed down that path.

While the Act was passed to address employee sexual harassment and sexual assault claims, employers should also understand that the broad language of this new law may render related claims or disputes also subject to the election option, and therefore, not subject to arbitration. For instance, if an employee brings a race discrimination claim in addition to a sexual harassment claim, a court may allow both claims to proceed in court; rather than requiring the employee to pursue the claims separately: one in court and the other in arbitration, something that might require future judicial resolution.

Importantly, once signed, the legislation's effect will be immediate and applies to any pre-dispute agreement entered into prior to the bill's enactment, potentially rendering invalid existing mandatory arbitration clauses between employees and their employers for sexual harassment and sexual assault disputes. However, the legislation's retroactive effect is only limited to where the claim has not yet accrued, meaning that if a claim has accrued already, arbitration would still need to occur. Further, any dispute over whether an arbitration clause falls under the law's prohibition will be decided by a court and not an arbitrator, regardless of whether the agreement at issue delegates such authority to an arbitrator.

Key Takeaways and Next Steps

This development is significant. Employers should proactively review their agreements containing mandatory arbitration provisions, including any with class/collective action waivers (including those in existence) for any necessary revisions with an eye towards compliance in light of this Act. For example, employers may want to consider revising their arbitration agreements to explicitly exclude all sexual harassment and sexual assault disputes in the same way workers' compensation claims are typically exempt or excluded from arbitration. Employers should also consider how to communicate those changes

to their workforce.

This also serves as an important reminder that employers should revisit and review their existing policies, procedures, and training programs prohibiting discrimination and harassment and retaliation in the workplace more generally and not just around sexual harassment, and train their workforce accordingly. Employers should seek to establish effective complaint or grievance processes, provide anti-harassment training to their managers and employees, and take immediate and appropriate action whenever an employee raises complaints. Employers should also be aware that certain state laws prohibit employment agreement clauses that would otherwise prevent an individual from disclosing sexual harassment, assault, or other related conduct in an attempt to make sure such allegations come to light.

If you have any questions on how this may impact your workplace agreements and policies, please reach out to a member of Mintz's Employment, Labor, & Benefits team.

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