

President Biden Signs Law Ending Mandatory Arbitration of Sexual Assault and Sexual Harassment Claims

March 7, 2022

On March 3, 2022, President Biden signed into law H.R. 4445, the bill “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021” (the “Act”).¹ The Act amends the Federal Arbitration Act (the “FAA”) to prohibit enforcement of mandatory arbitration clauses in employment-related and other contracts to the extent they are applied to sexual assault or sexual harassment claims and to shift significantly resolution of such claims from arbitration to court. Several states in recent years, including California, New York, Washington, New Jersey, and Maryland, have passed laws restricting mandatory arbitration of harassment, discrimination, and retaliation claims. Such state laws, however, are likely preempted by the FAA, as several courts have already held. The Act, on the other hand, because it amends the FAA, will not be subject to similar preemption arguments.

The Act grew out of the #MeToo movement, which has criticized businesses for using pre-dispute mandatory arbitration agreements. Opponents of such agreements have argued that arbitration favors employers and enables them to shield sexual misconduct by supervisors from public scrutiny. Congressman Jerrold Nadler (D-NY) remarked that the law removes “barriers to justice for survivors of sexual assault or sexual harassment by giving them a real choice of whether to go to court or to arbitrate their claim.”

The new law invalidates, for covered claims, pre-dispute arbitration agreements, which the law defines as “any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.” It also invalidates pre-dispute joint-action waivers, which is an agreement that “waive[s] the right of one of the parties to participate in joint, class or collective action . . . concerning a dispute that had not yet arisen at the time of the making of the agreement.”

The new law applies to both future arbitration agreements and those now existing, but only “with respect to any dispute or claim that arises or accrues on or after the date of enactment.” The Act further provides that any disputes regarding whether a claim

¹ To read the bill, visit Congress’s website here: <https://www.congress.gov/117/bills/hr4445/BILLS-117hr4445pcs.pdf>.

should be deemed a sexual assault or sexual harassment claim falling within the scope of the Act shall be decided by a court rather than an arbitrator, even if the arbitration agreement specifically delegates the question of arbitrability to the arbitrator. The law does not apply to other employment-related claims, such as discrimination based on race, age, gender, religion, disability, or national origin.

Because the Act addresses only pre-dispute arbitration and joint-action waiver agreements, any agreement to arbitrate claims entered into by the parties *after* a claim arises remains enforceable.

Recommended Actions. Companies should consider taking proactive steps to ensure compliance with the new law, including the following:

- auditing and evaluating mandatory arbitration agreements (including class action waivers) in employment-related contracts for compliance;
- ensuring agreements with pre-dispute mandatory arbitration clauses appropriately carve out sexual harassment and sexual assault claims and exclude otherwise non-arbitrable claims; and
- seeking advice and participation of counsel when implementing or seeking to enforce mandatory arbitration agreements, especially when dealing with disputes that include both arbitrable and non-arbitrable claims.

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Please do not hesitate to contact us with any questions.



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