

insights

TYPES NOT MAPPED YET February 10, 2022 | TTR not mapped yet | Cliff A. Godiner, Zoe S. Spector, Chuck M. Poplstein, Susan M. Lorenc

New law to bar mandatory arbitration of sexual harassment and assault claims

On February 10, 2022, the United States Senate passed [H.R.4445](#), which, if signed into law, would amend the Federal Arbitration Act with respect to the arbitration of disputes involving sexual assault and sexual harassment. The bill is expected to be signed by President Biden.

The law would dramatically change the landscape for employer arbitration agreements and class or joint-action waivers in relation to sexual harassment-related disputes. It would ultimately make mandatory arbitration agreements unenforceable with regard to sexual assault and harassment disputes. Here are some key takeaways:

- Whether the arbitration or class action waiver is unenforceable ***is at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute***. In other words, the alleged victim can ultimately decide to bring the claim to court or keep it in arbitration.
- The statute amends the Federal Arbitration Act to provide that no pre-dispute arbitration agreement or joint-action waiver that requires an individual (personally or as a named class representative or in a collective action alleging such conduct) to bring a “sexual assault dispute” or “harassment dispute” in arbitration is valid and enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.
- A “sexual assault dispute” is a dispute “involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 [the federal criminal code] or similar applicable Tribal or State Law, including when the victim lacks capacity to consent.”
- A “sexual harassment dispute” is a dispute “relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”
- It is unclear how the new law will work where a sexual or sexual assault harassment claim is joined with other claims (for example, a retaliation claim). The statute could be read to mean that all claims, not only the sexual harassment / assault claims, must be resolved in court. Such a reading could be utilized as a tool to obtain a jury trial over otherwise arbitrable claims by simply including a sexual harassment or sexual assault claim in a lawsuit.
- Any disputes as to the validity and enforceability of an agreement would be determined by a court of law, rather than an arbitrator, even if the arbitration agreement delegates that authority to the arbitrator.
- The law does not apply to presently pending cases. It will apply to any case where the sexual harassment or sexual assault claims accrued after the date President Biden signs the bill into law even if the arbitration agreement was signed prior to that date.

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