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Biden Signs Act Restricting Forced Arbitration of Sexual Harassment or Assault Claims

On March 3, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act), which amends the Federal Arbitration Act (FAA) to make pre-dispute arbitration agreements relating to claims of sexual assault or sexual harassment invalid and unenforceable, and also prohibit waivers of the right to bring such claims on a class or collective basis. The Act received bipartisan support in the U.S. Senate and the U.S. House of Representatives (which overwhelmingly passed the bill by a 335-97 bipartisan vote). While the Act allows employees (and other persons) alleging sexual assault or sexual harassment to pursue their claims in court despite any pre-dispute agreement to arbitrate these claims, they may still agree to arbitrate a sexual assault or sexual harassment dispute *after* such dispute arises.

The Act takes effect immediately and states that it "shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act." These restrictions appear to apply to all existing arbitration agreements, even those signed prior to the Act's enactment. As a result, the presumption that an arbitration agreement will govern claims of sexual harassment or sexual assault compelling an employee or other alleged victim to pursue those claims in an arbitration forum rather than in court no longer exists.

The Act further mandates that a court, not an arbitrator, must determine the applicability of the Act to an arbitration agreement and the enforceability and validity of the agreement. This is true even if the agreement itself delegates that determination to an arbitrator. Moreover, the Act mandates that federal law will apply to all disputes regarding the applicability of the Act.

What's Next

Prior to this action at the federal level, some states passed laws seeking to limit mandatory arbitration of certain claims of unlawful discrimination, harassment and retaliation (e.g., New York and New Jersey). These laws, however, were challenged on the ground that they were preempted by the FAA. In light of the Act, the FAA's new prohibition on mandatory arbitration of sexual assault and sexual harassment claims will now be consistent with these state laws. Employers should also be on the lookout for more laws affecting arbitration agreements, as the Biden administration has stated that it "looks forward to working with the Congress on broader legislation that addresses these issues as well as other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices." Employers should carefully review any arbitration agreements they use with their workers and assure that they are compliant with both state and federal laws relating to arbitration of claims of discrimination and harassment.

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