Congress passes law banning mandatory arbitration of sexual assault and sexual harassment claims

Employment Alert

17 February 2022

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On February 10, 2022, the US Senate passed a landmark #MeToo bill aimed at preventing employers from requiring arbitration of workplace sexual harassment or assault claims in cases filed under federal, state, or tribal law. The bill, known as H.R. 4445 – the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act) is expected to be signed by President Joe Biden in the near future and will take effect immediately.

The use of arbitration agreements in the employment context has increased in recent years following a 2018 Supreme Court decision allowing companies to enforce arbitration agreements on a wide range of legal issues, including claims of sexual harassment and sexual assault. In response, states like California and New York passed legislation limiting or prohibiting the arbitration of such claims, leaving employers to navigate varying state laws.

If H.R. 4445 is signed by President Biden as expected, employers will be prohibited from enforcing pre-dispute arbitration provisions and class or collective action waivers with respect to sexual assault and sexual harassment claims “at the election of the person alleging” the misconduct. This means that, though employers may still include such provisions, employees may choose to be released from any pre-dispute arbitration agreement or joint-action waiver relating to a sexual assault or sexual harassment dispute.
The Act defines “sexual assault dispute” as a dispute involving a “nonconsensual sexual act or sexual contact,” as such terms are defined in section 2246 of title 18 or similar applicable tribal or state law, including when the victim lacks capacity to consent. Similarly, the Act defines a “sexual harassment dispute” as one “relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”

It is important to note that the Act applies only to “pre-dispute” arbitration provisions and waivers; it will not affect agreements entered into after a dispute has arisen. The Act is also limited to sexual harassment and sexual assault disputes and should have no effect on other employment-related claims. It remains to be seen, however, how the Act will operate in cases with multiple causes of action. For instance, if an employee brings a sexual harassment and an employment discrimination claim in one lawsuit, will both claims proceed to arbitration or can they be pursued separately?

Some commentators have suggested that an employer could move to compel arbitration of all claims other than those involving sexual harassment or sexual assault. Still others warn that Courts might take a broader approach and send all claims to arbitration whenever allegations of sexual harassment or assault are raised in the same lawsuit. In light of this uncertainty, the potential increased litigation regarding sexual harassment and sexual assault claims exists.

The Act further provides that questions concerning the applicability of the Act or the “validity and enforceability” of an arbitration agreement will be determined under federal law and by a court, rather than an arbitrator, irrespective of any language in the agreement to the contrary. Thus, when an employee brings a sexual harassment or sexual assault claim in court, the court - rather than an arbitrator - will decide the proper forum for the claims. This represents a significant departure from existing law, which requires enforcement of arbitration agreements in accordance with their contractual terms.

The new law will likely have significant implications for arbitration agreements in the employment context. Once signed by President Biden, the law will apply to all existing arbitration agreements and joint-action waivers relating to any “dispute or claim that arises or accrues” after the date of enactment. The Act is retroactive and could nullify arbitration provisions and class and collective action waivers relating to sexual harassment or sexual assault claims in existing, signed agreements.

Importantly, the Act does not restrict employers from continuing to present employees with general arbitration provisions and class or collective action waivers relating to sexual harassment or sexual assault claims in existing, signed agreements.

If you have any questions regarding these developments, please contact your DLA Piper relationship attorney, any member of the DLA Piper Employment group or any of the authors of this alert.

**UPDATE:** On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.

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