

Changes Coming for Employers Seeking to Enforce Arbitration Clauses Covering Sexual Assault and Harassment Claims

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On Feb. 10, 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. This bipartisan measure, which President Biden is expected to sign into law, amends the Federal Arbitration Act by banning mandatory arbitration of sexual assault and sexual harassment claims brought under federal, state, or tribal law. In doing so, the act will prohibit employers from enforcing pre-dispute agreements with their employees that would require the parties to arbitrate claims of sexual assault and sexual harassment.

Prior to this legislation, employers were able to enforce pre-dispute arbitration agreements with employees with respect to sexual assault and sexual harassment claims regardless of whether employees preferred to litigate their claims in court. However, under the act, employees may no longer be required to arbitrate via any pre-dispute agreements requiring arbitration of sexual harassment and sexual assault claims, such as employment agreements signed at the start of or during employment prior to the claims arising. Instead, the measure permits arbitration only if the employer and employee agree to arbitrate the employee's sexual assault/harassment claims *after* such claims arise. The act also bans agreements that prohibit, or waive the right of, an employee's right to participate in a joint, class, or collective action in court, arbitration, or any other forum that relates to a sexual assault or a sexual harassment dispute.

It is important to note the act applies to any dispute or claim that arises or accrues on or after the date of the measure's enactment. Therefore, if employers currently have agreements in place that require employees to arbitrate sexual harassment or sexual assault disputes, they must be prepared to forego the arbitration provisions in these agreements as soon as the bill is signed into law, unless the employee agrees to arbitrate post-dispute. While it is unclear at this point how courts will treat provisions that require arbitration of sexual harassment or sexual assault claims, employers may want to consider reviewing and revising any agreements containing

arbitration provisions in accordance with the act to avoid a court invalidating the entire arbitration provision.

The legislation does not apply to claims of alleged gender-based and other forms of discrimination at this time. However, some lawmakers have expressed their goal to one day extend this ban on compulsory arbitration to other types of employee complaints. Employers should have this in mind as they take steps to comply with the provisions of the act.

If employers have additional questions about this or any related matter, please contact Nexsen Pruet's Employment & Labor Law team for individualized guidance.