

Mandatory Arbitrations Now Banned in Sexual Misconduct Disputes

Update

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Today, March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which amends the Federal Arbitration Act (“FAA”) by banning mandatory arbitration in sexual assault and sexual harassment cases and allowing individuals alleging such conduct to bring their dispute in a federal, tribal or state court. The law also bans mandatory arbitration of claims of retaliation that result from internal complaints of sexual assault or harassment. Individuals alleging sexual assault, sexual harassment, or retaliation stemming from such complaints still have the option of participating in arbitration on a voluntary basis. Importantly, the new law does not apply to sex discrimination claims that are unrelated to sexual assault or harassment. The legislation, which had bipartisan support in both the U.S. House of Representatives and the U.S. Senate, was first introduced in 2017 after the rise of the #MeToo movement.

Employers have used arbitration clauses for many years. It is estimated that more than 60 million U.S. employees are currently subject to arbitration clauses. With the signing of this new law, any mandatory arbitration clauses pertaining to sexual assault or sexual harassment are void and are no longer enforceable.

States such as California, Maryland, New Jersey, New York, Vermont, and Washington have all previously passed laws banning or limiting mandatory arbitration of sexual harassment claims. Each of these state laws have generally been met with challenges of preemption by the FAA. Those preemption arguments will now be moot.

As a result of this new law, employers should promptly review any current arbitration agreements or arbitration clauses included in employment agreements. Employers who want to continue to use mandatory arbitration agreements will need to carve out any claims pertaining to sexual assault and

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sexual harassment in any future agreements. Notably, disputes previously settled through mandatory arbitration will remain closed and will not be impacted by this law.