Congress Ends Forced Arbitration of Sex Harassment Claims — What You Need to Know

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In 2018, a study indicated more than 50% of the U.S. workforce had signed employment agreements requiring them to resolve employment-related disputes exclusively through mandatory arbitration instead of public litigation. Arbitration offers many advantages to both employers and employees, and the U.S. Supreme Court has consistently enforced arbitration agreements.

But the #MeToo movement brought unique pressure to bear on forced arbitration of sexual assault and sexual harassment claims. As a result, Congress passed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" on February 10. On March 3, President Biden signed the Act into law.

The Act prevents employers from forcing victims to arbitrate claims of "sexual assault" and "sexual harassment." Once the Act is signed by President Biden, victims of sexual assault or sexual harassment will have the power to choose to bypass confidential arbitration of their claims or resolve their claims publicly before a jury by filing suit in court. Here's what we know about the Act:

- It only applies to sexual assault or sexual harassment claims or disputes that arise or accrue on or after the date of enactment (March 3, 2022).
- "Sexual harassment" is "conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."
- "Sexual assault" is "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."
- It prevents employers from enforcing "joint action waivers," which means victims of sexual assault and sexual harassment may bring a class action lawsuit.
- A court, not an arbitrator, must determine the applicability of the Act, and the court must apply federal law in its analysis.
- An employee can still choose to arbitrate claims. In other words, this is not a complete bar on sexual harassment and sexual assault claims from proceeding in arbitration if *the employee so chooses*.

The Act should not prevent employers from enforcing arbitration agreements in other employment-related contexts and requiring employees to arbitrate other types of employment-related claims. In fact, one of the initial sponsors for the bill, Senator Kirsten Gillibrand, noted, "This bill should not be the catalyst for destroying pre-dispute arbitration agreements in all employment matters." But the Act is silent regarding the validity of existing agreements that do not explicitly carve out sexual harassment or sexual assault disputes.

Given this new legal landscape, employers should consider the following next steps:

- Evaluate whether existing arbitration agreements should be modified to conform to the Act, specifically considering whether sexual assault or sexual harassment claims should be explicitly exempted from arbitration.

- Consider implementing arbitration agreements to take advantage of the benefits that remain for resolving other employment-related claims.

- Place renewed emphasis on harassment prevention practices. Review, and, where necessary, improve upon existing harassment prevention policies, procedures, training, and corrective efforts.

- Ensure that existing reporting practices, investigation processes, and corrective efforts are actually followed.

GableGotwals' Employment & Labor team remains on the cutting edge of employment-related legal developments and are committed to helping employers navigate the nuances of emerging issues they face. Please contact any member of the team for further assistance.

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