Employment & Labor Law Alert
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#MeToo—The Next Phase of Transparency: Federal Law Now Bans Mandatory Arbitration Agreements for Sexual Assault, Harassment Claims

The arc of the #MeToo movement continued to reveal itself on March 3, as President Joe Biden signed into law HR 4445 (the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021), which bars employers from requiring employees to individually arbitrate sexual harassment or sexual assault claims. The bipartisan, bicameral legislation was passed by the Senate on Feb. 10 and the House of Representatives on Feb. 7.

The law significantly amends the Federal Arbitration Act (FAA) to allow any person—or named class or collective action representative—alleging sexual harassment or sexual assault to elect to invalidate (and therefore make unenforceable) a "predispute arbitration agreement" or "predispute joint-action waiver" relating to sexual assault or sexual harassment suits in a federal, state or tribal court.

- A predispute arbitration agreement is defined as "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement."
- A predispute joint-action waiver is defined as "an agreement, whether or not part of a predispute arbitration agreement, that would prohibit, or waive the right of, one of the parties to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement."

HR 4445 also includes definitions of sexual assault and sexual harassment claims:

- A sexual assault claim is "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."
- A sexual harassment claim is "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

In addition to effectively invalidating arbitration and class action waiver agreements as they relate to sexual harassment and assault claims, HR 4445 expressly requires a court applying federal law, rather than an arbitrator, to resolve questions of whether the law applies in a particular dispute or to an agreement, as well as challenges to the validity and enforceability of an agreement—even if the agreement otherwise requires an arbitrator to determine arbitrability.

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The new law applies to disputes or claims (not agreements) that arise or accrue on or after the date it is enacted. Parties to a sexual harassment or sexual assault dispute may still agree to arbitrate after the dispute comes to light; the law does give employees the option to choose to arbitrate rather than bring suit in a court.

Employer Actions and Takeaways

- HR 4445 effectively removes sexual harassment and sexual assault claims from mandatory employment arbitration. Employees bringing these claims may still wish to proceed in arbitration for other reasons (for privacy considerations, expedited hearings or other considerations).
- Employers should review their arbitration programs and policies generally, and in particular those dealing with sexual assault and harassment claims, to ensure compliance with the upcoming new law. While the law does not require employers to amend their existing agreements, any arbitration or class action waiver provision or agreement will likely not be enforceable in sexual harassment and sexual assault claims now that HR 4445 has been signed into law. Employers with broad arbitration agreements covering all employment claims should consider clarifying or amending those existing agreements and revising agreements to be used with new hires.
- Additionally, employers should monitor efforts to ban mandatory arbitration agreements at the state level. In California, for example, Assembly Bill 51 would prohibit mandating arbitration as a term and condition of employment in the state. However, the U.S. Chamber of Commerce and others sued the state to stop the bill's enactment. A district court agreed to enjoin the enactment, but a Ninth Circuit Court of Appeals panel reversed that decision. An appeal for a rehearing by the full appeal court is pending.

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