Recent Legislation Prohibits Mandatory Arbitration for Workplace Sexual Harassment Claims

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Employers can no longer use mandatory arbitration agreements to address sexual assault and sexual harassment claims following the recent passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act). The new law amends the language of the Federal Arbitration Act (FAA), and invalidates any pre-dispute arbitration agreements and class and collective action waivers for sexual assault and sexual harassment claims. The Act was in many ways passed as a direct response to issues raised by the #MeToo movement, which highlighted how mandatory arbitration agreements kept sexual harassment claims out of public forums.

The limited scope of the Act raises questions about whether its passage marks a one-time response to the #MeToo movement, or if it signals the start of a greater trend toward limiting the use of mandatory arbitration agreements in the workplace. Congress is now considering another bill that would further curb the use of arbitration for employee claims.

Here is everything employers need to know about the Act, and what changes they need to make to their policies and agreements.

What the Act Says

The Act has amended the language of the FAA to make any pre-dispute arbitration agreements for sexual assault or sexual harassment claims invalid and unenforceable at the election of the employee. What does that mean for employers?

- Although employees remain free to mutually agree with employers to a post-dispute arbitration agreement after a dispute has arisen, they no longer can be compelled to do so by employers when it comes to claims of sexual assault and sexual harassment.

- The scope of the Act is limited only to claims involving sexual assault and sexual harassment. Therefore, arbitration agreements about other employment claims outside of these limited categories remain unaffected.
- While the Act is effective immediately to invalidate any pre-dispute arbitration agreements that have been agreed to prior to March 3, 2022, any sexual assault or sexual harassment claims that arose before March 3, 2022 may remain subject to existing pre-dispute arbitration agreements, and any completed arbitrations concerning sexual assault or sexual harassment claims remain valid.
- Courts, rather than an arbitrator, have the authority to determine the validity and enforceability of requiring arbitration of sexual harassment and assault claims. Courts will determine the preliminary issue of whether the Act applies, rather than an arbitrator.
- The Act would override any contractual language that would provide that an arbitrator has the power to determine the enforceability of an arbitration agreement, and requires that a court makes that determination despite any contractual language to the contrary.

Compliance with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

Employers often use arbitration agreements to help reduce litigation costs, resolve claims efficiently, and maintain confidentiality, but in light of these changes, employers should examine any arbitration agreements and joint action waivers that may be in place to determine whether they contain provisions concerning sexual assault or sexual harassment claims that would be invalidated by the Act. Employers should then consult with an employment attorney to update policies and agreements as necessary to ensure compliance with the Act.

This law again highlights the need for employers to maintain effective sexual harassment policies and training, and to take a proactive approach to prevent, investigate, and resolve any issues that might arise.

In examining the broader trends relating to workplace arbitration agreements, the fact that the Act passed with wide bipartisan support raises the question about whether its passage was solely meant to address issues raised by the #MeToo movement, or whether it signals a broader desire to address general fairness and transparency issues surrounding mandatory arbitration agreements in the workplace.

The Forced Arbitration Injustice Repeal (FAIR) Act passed the U.S. House of Representatives on March 17, 2022, largely on partisan lines. The FAIR Act, which has the support of the Biden Administration, seeks to act far more broadly than the Ending Forced Arbitration Act, and would prohibit all pre-dispute mandatory arbitration provisions in employment, consumer, antitrust, and civil rights disputes. While the FAIR Act remains to be addressed by the Senate, employers should continue to monitor for further developments.