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# The End of Forced Arbitration of Sexual Harassment Claims

## The Bottom Line

- At this time, when it comes to navigating the unknowns of this new Act, employers should be proactive. That includes ensuring proper anti-harassment policies and procedures are in place.
- Employers should also provide their workforce with regular sexual harassment prevention training and handle sexual harassment and sexual assault complaints promptly and appropriately.

## Update

On March 3, 2022, President Biden signed the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021" into law. The law went into effect immediately upon signature.

The House of Representatives and the Senate passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act) in early February 2022 and it is widely expected that President Biden will sign it into law. The Act's intent is to preserve the right of all employees, even those who have signed otherwise enforceable arbitration agreements, to choose to publicly file sexual harassment cases in court, thereby denying employers the right to unilaterally force such cases to be heard in private arbitration forums.

The Act amends the Federal Arbitration Act (the FAA) by adding a chapter titled "Arbitration of Disputes Involving Sexual Assault and Sexual Harassment." This addition is significant because the FAA, which was originally enacted in 1925, reflects federal policy strongly favoring arbitration as a means of resolving disputes. The U.S. Supreme Court has consistently enforced arbitration agreements, including those providing for mandatory arbitration of employment-related claims such as wage claims brought under the Fair Labor Standards Act and discrimination claims brought under Title VII and Section 1981. In 2018, the Supreme

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Court, in a major win for employers, further held that class and collective action waivers were enforceable in employment-related arbitration agreements.

While numerous open issues remain as to precisely how courts will interpret the Act in various circumstances, based on the plain language of the statute, the following requirements will apply:

1. **The Act forbids predispute arbitration agreements or predispute joint-action waivers in cases filed under Federal, Tribal, or State law regarding sexual assault or sexual harassment, unless the individual alleging the conduct (or the named representative of a class or in a collective action alleging the conduct) elects it.**

   A *predispute arbitration agreement* is any agreement to arbitrate a dispute that had not yet arisen when the parties entered the agreement. A *predispute joint-action waiver* is an agreement that prohibits one of the parties from participating in a joint, class or collective action in a judicial, arbitral, administrative or other forum, concerning a dispute that has not yet arisen when the agreement was made.

   It is unclear how courts will interpret this prohibition when sexual harassment claims are alleged in addition to other claims that would subject an employee to an otherwise enforceable arbitration agreement (e.g., in a situation where sexual harassment is alleged along with claims of racial discrimination). Presumably the dispute will proceed in two separate forums, with the sexual harassment or assault claims being heard in court, and the other claims being heard in arbitration. However, it is possible that a court may seek to consolidate all asserted claims in court, irrespective of whether one or both of the dispute's parties desire such an outcome.

   It is also unclear how courts will treat arbitration agreements that do not specifically carve out sexual harassment claims that are restricted by the Act. While at this point it appears unlikely that courts will wholesale invalidate arbitration agreements for failure to include such a carve-out, it remains uncertain how courts may treat such "overbroad" agreements. Therefore, going forward, employers should consider including in their arbitration agreements (1) language that excludes sexual harassment claims and (2) a severability clause (to the extent there isn't one already included). A severability clause states that the terms in the contract are independent of one another so that the remainder of a contract will remain enforceable should a court decide one or more of its provisions is void or unenforceable. Whether such language needs to be added to arbitration agreements that were in place prior to the enactment of the Act remains unclear.

   Furthermore, while the Act specifically prohibits sexual harassment claims brought under Federal, Tribal, and State law from being subject to mandatory pre-dispute arbitration agreements, it remains unclear whether sexual harassment claims brought under city or

local law (e.g., sexual harassment claims brought under the New York City Human Rights Law) are subject to the Act's restrictions.

2. **The Act applies to any dispute or claim that arises or accrues on or after the date the Act is enacted.**

   Based on this language, it appears that Congress intends the Act to apply to both mandatory arbitration agreements that are currently in place and mandatory arbitration agreements put into place after the Act goes into effect. However, employers might still be able to enforce arbitration agreements with respect to sexual harassment claims that accrue prior to the Act's effective date but are brought in court thereafter. This issue may be the subject of future litigation as well.

3. **The Act requires a court to determine the enforceability of an arbitration agreement when sexual harassment or assault claims are at issue.**

   This provision is relatively straightforward. It does not matter whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, or whether the agreement states that such determinations must be made by an arbitrator – a court, and only a court, can decide the Act's applicability to a dispute.

## For More Information

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