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Pre-Dispute Arbitration Agreements and Class Action Waivers Now Invalid and Unenforceable for Sexual Harassment and Sexual Assault Claims

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On March 3, 2022, President Biden signed into law H.R. 4445 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The legislation passed Congress with bipartisan support. The #MeToo-inspired bill is intended to allow sexual assault and sexual harassment survivors to have their day in court, try their claims before a jury, and prevent the concealment of their allegations. While this bill only relates to sexual harassment and sexual assault claims, the Biden Administration hopes to work with Congress to create similar legislation for race discrimination, wage theft, and unfair labor practice claims. The law is effective as to any dispute or claim that arises or accrues on and after the date of enactment.

The bill amends the Federal Arbitration Act in three important ways. First, it prohibits employers from enforcing a "pre-dispute arbitration agreement" for sexual harassment or sexual assault claims, but allows employees to agree to arbitrate after the claim has arisen. Second, the legislation prohibits employers from enforcing an agreement that waives the right of an employee or other protected individual worker to participate in a joint, class, or collective action concerning sexual harassment or sexual assault claims that have not yet arisen. Third, the bill states that a court, rather than an arbitrator, will determine whether the new law applies to a particular agreement and whether an agreement is valid and enforceable under the new law.

The new legislation leaves some questions unanswered, which could become the subject of future litigation. First, the bill states that employers are prohibited from enforcing arbitration agreements "with respect to a case" that relates to a dispute over alleged sexual harassment or sexual assault. What happens, for example, when a sexual harassment claim is combined with an age or race discrimination claim? This language does not make it clear whether an additional claim brought in the same lawsuit with a sexual harassment or sexual assault claim will be allowed to proceed in court (i.e., the entire "case") or if all non-sexual harassment or non-sexual assault claims must go to arbitration. Second, while the bill states that it applies "to any dispute or claim that arises or accrues on or after the date of enactment," it is not clear when a "dispute or claim" "arises or accrues" for purposes of this legislation. What about claims that accrue over time with instances of harassment occurring before the enactment of this law and continuing after its enactment? Does the legislation apply when the sexual harassment or sexual assault occurs or when the employee makes a complaint? Third, what is the effect of a release (including, for example, releases signed to settle an employee's claims or as part of a separation agreement) if another employee files a later class action or collective action alleging sexual harassment or sexual assault? Does this new legislation invalidate a pre-dispute settlement agreement or a release contained in a separation agreement to allow the employee to participate in the class or collective action?

Employers may want to prepare for these new prohibitions by reviewing arbitration agreements, employment agreements, and template settlement agreements to determine whether any language should be modified. Employers may also want to consider establishing or enhancing their anti-

harassment policies and procedures, including internal processes for addressing sexual harassment and sexual assault in the workplace. Further, employers may desire to ensure measures are in place to help prevent workplace harassment, such as by implementing regular anti-harassment training. Employers with questions about the legislation also may wish to consult competent employment counsel.

FOR MORE INFORMATION

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