

President Biden Signs into Law Ban on Mandatory Arbitration of Sexual Harassment Claims (US)

March 4, 2022

On February 11, 2022, we reported on Congress' enactment of legislation barring the use of mandatory arbitration provisions in cases of sexual assault or sexual harassment. **On March 3, 2022, President Biden signed the bill into law, as expected, making it illegal to compel an employee to arbitrate a claim of sexual assault or sexual harassment.** The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 amends the Federal Arbitration Act (FAA) by banning mandatory arbitration of sexual assault or harassment causes, and claims of retaliation resulting from internal complaints of sexual assault or harassment, and gives claimants the option either of participating in arbitration of such claims on a voluntary basis or pursuing them in federal, state, or tribal courts. The decision rests entirely with the claimant. A few additional notable points related to the law:



Several states, including California, Maryland, New Jersey, New York, Vermont, and Washington, already had passed laws limiting the use of mandatory arbitration provision in sexual harassment claims, but these laws were challenged as preempted by the FAA. With this amendment to the FAA, these preemption arguments are now moot.

Despite the amendment to the FAA, mandatory arbitration, including individual arbitration, programs are still lawful, and should be strongly considered as a useful tool for limiting exposure, particularly in class or collective wage and hour cases. However, employers with existing mandatory arbitration programs should be careful not to move to compel arbitration of sexual assault or harassment claims. Going forward, employers should review and update their policies to clarify that sexual assault and sexual harassment claims may, but need not, be arbitrated.

Employers may continue to compel arbitration of sex/gender discrimination, Equal Pay Act, and related claims; only sexual assault and sexual harassment claims are impacted.

Claims that already have been resolved through arbitration are not disturbed by the amendment.

Employers should consult with their employment counsel and promptly review and update their, or discuss the wisdom of adopting, mandatory arbitration policies.



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