

Prohibiting Arbitration of Sexual Harassment at Forefront of Amendment to Federal Arbitration Act

On February 10, 2022, the Senate passed H.R. 4445, an amendment to the Federal Arbitration Act (FAA) otherwise known as the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.”

Pre-dispute Arbitration Agreements

The amendment invalidates any pre-dispute arbitration agreement or pre-dispute joint action waiver for disputes regarding sexual assault or sexual harassment under federal, state, or tribal law. The claimant, and only the claimant, however, may still elect to arbitrate claims of sexual assault or sexual harassment where a pre-dispute arbitration agreement is already in place. The amendment defines “sexual assault dispute” as “a dispute involving a nonconsensual sexual act or sexual conduct,” under federal, state, or tribal law. The amendment defines “sexual harassment dispute” as “a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.”

This law may sound familiar to employers in New York and California as those states, and a few others, already prohibit mandatory arbitration of sexual harassment and sexual assault claims. The FAA, however, preempts state law so the amendment is expected to provide clarity and consistency to those employers operating in states where a similar state law is in place.

Challenges to Pre-dispute Arbitration Agreements

The amendment also changes the process by which a party may challenge the validity of an arbitration agreement. The amendment states that the enforceability and validity of a pre-dispute arbitration agreement shall be determined by a court rather than an arbitrator, regardless of whether the pre-dispute arbitration agreement delegates that task to an arbitrator.

Effective Date of the Amendment

The amendment applies to any dispute or claim of sexual harassment or sexual assault that arises or accrues on or after the date of enactment of the amendment. A plain reading of the amendment seems to state that the key inquiry is the date on which a dispute or claim arises and not the date on which parties enter into a pre-dispute arbitration agreement.

President Biden is expected to sign the amendment into law.



Arielle Eisenberg

Member

aeisenberg@cozen.com
Phone: (786) 871-3953
Fax: (305) 704-5955

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