Legal Update Article

Congress Passes Federal Law Restricting Arbitration Agreements for Sexual Assault, Harassment Claims

By Samia M. Kirmani, Scott P. Jang, William Robert Gignilliat, Corey Donovan Tracey &

February 10, 2022

Meet the Authors

Samia M. Kirmani
Principal
(617) 367-0025
Samia.Kirmani@jacksonlewis.com

Scott P. Jang
Principal
(415) 394-9400
Scott.Jang@jacksonlewis.com

A new law making predispute arbitration agreements and class action waivers covering sexual assault and sexual harassment claims invalid and unenforceable has passed in Congress and is headed to President Joe Biden's desk.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 amends the Federal Arbitration Act (FAA) to give employees who are parties to arbitration agreements with their employers the option of bringing their claims of sexual assault or sexual harassment in arbitration or court. President Biden reportedly is expected to sign it shortly.

Background

The FAA provides that written agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." As recently as 2018, the U.S. Supreme Court reaffirmed, in *Epic Systems v. Lewis*, that the FAA requires enforcement of arbitration agreements, including those with class action waivers, in accordance with their terms.

In response to the Court decision and the #MeToo movement, several states enacted or proposed legislation curbing use of arbitration agreements for sexual harassment or other employment claims. Such laws conflicted with the FAA as to agreements governed by it and are being challenged in litigation. Congress also has tried to pass similar bills limiting employers' ability to mandate predispute arbitration for employment disputes, such as the PRO Act, the FAIR Act, and Build Back Better. None has passed until now.

Key Provisions

Originally introduced in 2017, the Act adds a section to the FAA:

> [A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute .... no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

The Act defines "sexual assault dispute" as "a dispute involving a nonconsensual sexual act or sexual contact" and "sexual harassment dispute" as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." The term "joint-action" waiver includes class and collective action waivers.

The Act further provides that the validity or enforceability of an agreement will be determined by a court rather than an arbitrator, despite the existence of a contractual term to the contrary. Finally, the Act states that it shall apply with respect to any dispute

William Robert Gignilliat
(He/Him • Rob)
Principal
864-672-8516
William.Gignilliat@jacksonlewis.com

Corey Donovan Tracey
(She/Her)
Principal
(216) 750-0404
corey.tracey@jacksonlewis.com

Related Services

Alternative Dispute Resolution
Litigation
Sexual Harassment
Trials and Appeals

or claim that arises or accrues on or after the date of the Act's enactment.

What Employers Need to Know Now

1. As enacted, the Act applies only to "a case which is filed under Federal, Tribal, or State law and relates to the sexual assault and sexual harassment claims." This means that otherwise valid arbitration agreements remain valid and enforceable with respect to other types of claims. That said, we anticipate litigation over the scope of the law.

2. The Act applies to invalidate arbitration agreements and class or collective action waivers with respect to sexual assault and sexual harassment claims arising or accruing after the date of the Act's enactment. Regardless of the date of the agreement at issue, the Act does not affect claims that arose or accrued before the Act's enactment.

3. Employees who are parties to an arbitration agreement may choose whether to pursue their sexual assault and sexual harassment claims in arbitration or court. While arbitration is not entirely confidential, it is inherently more confidential than litigation in court because of the absence of a public record. Employees who are parties to arbitration agreements may choose the more confidential arbitration forum. The new law makes clear that, with respect to sexual assault and sexual harassment claims, it is up to the employee, not the employer, regardless of what an arbitration agreement says.

4. Despite what an arbitration agreement says, courts, not arbitrators, will decide whether claims are subject to arbitration. Thus, when an employee chooses to file a sexual assault or sexual harassment claim in court, the court, rather than an arbitrator, decides whether court is the proper forum for the claims.

What Does the Future Hold?

Employers with arbitration agreements should anticipate more sexual assault and sexual harassment claims being filed in court, rather than arbitration. In addition, we expect legislative efforts to broaden the scope of the law to add other types of employment claims to the list of claims that may not be subject to predispute arbitration agreements. In a February 1, 2022, Statement of Administration Policy, the White House stated, "The Administration also looks forward to working with the Congress on broader legislation that addresses these issues as well as other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices." The Act took years to pass in its current form and some commentators observe that its bipartisan passage is attributed to its narrow scope. For now, the law is limited to sexual assault and sexual harassment claims.

Finally, employers should continue to closely monitor developments in this area as this law likely will be used as a template for further bills prohibiting predispute arbitration agreements in other areas, such as for discrimination and discriminatory harassment claims.

Jackson Lewis attorneys will continue to track developments pertaining to employment arbitration agreements and representative actions. If you have questions about this case or issues related to arbitration agreements, contact a Jackson Lewis attorney to discuss.