

New Law Prohibits Employers from Mandating Arbitration of Sexual Assault or Harassment Claims

On March 3, 2022, President Biden signed a new federal law prohibiting any U.S. employer from requiring employees to arbitrate sexual harassment or sexual abuse claims. The new law (HR 4445) is entitled the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021” (the “Act”). Before heading to President Biden’s desk, the Act passed the U.S. House and Senate with wide bipartisan support, and is part of a larger legislative movement aimed at creating greater transparency in relation to sexual harassment claims in the workplace.

The Act applies to “pre-dispute” arbitration agreements and class-action waivers. Such provisions are typically included in stand-alone arbitration agreements or in employment agreements, signed at the time of hire or during employment in connection with increased employment benefits or terms. While employees can still be required to sign pre-dispute arbitration agreements and class-action waivers, the Act provides employees with the right to decide, at the time the sexual harassment or sexual abuse claim is brought, whether to proceed with arbitration or to pursue their claims in court. Whether the Act applies to a given employee’s claims is to be determined by a court, not an arbitrator/arbitration panel.

Next Steps

- Employers should review their existing arbitration provisions and class-action waivers to determine if their wording is affected by the passage of the Act. The Act does not require employers to amend previously-executed agreements to explicitly reference the Act, but employers should be mindful that they should not attempt to enforce an arbitration provision if an employee brings a sexual harassment or sexual abuse claim in court in the future.
- While the Act does not explicitly require reference to it in future arbitration agreements or provisions, employers should consider amending the language of any mandatory arbitration provisions or class-action waivers to explicitly exclude sexual harassment and abuse claims.
- As always, employers are encouraged to seek the advice of counsel both when conducting these reviews, and when drafting and/or revising their agreements and policies.

If you have questions regarding these developments, please contact a member of the Labor & Employment team.

Labor & Employment Team

Alison F. Reif
Practice Group Leader – Labor & Employment
617-248-5157 | areif@choate.com

Lyndsey M. Kruzer
Principal – Labor & Employment
617-248-4790 | lkruzer@choate.com