

House Passes Bill Limiting Predispute Arbitration Agreements Covering Sexual Assault and Sexual Harassment

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Passed by the U.S. House of Representatives on February 7, 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ([H.R. 4445](#)) would amend the Federal Arbitration Act (FAA) to make predispute arbitration agreements covering claims of sexual assault or sexual harassment invalid and unenforceable.

A nearly identical bill (S. 2342) with the same name is pending in the Senate. Reportedly, the Senate plans to vote on the bill before the Presidents' Day recess (February 21 – February 25). If the Senate passes the bill, President Joe Biden is expected to sign it into law.

In its existing form, the Act adds a new section to the FAA, which reads:

at 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 further provides that the validity or enforceability of an agreement in question will be determined by a court rather than an arbitrator, despite the existence of a contractual term to the contrary. Finally, the Act "shall apply with respect to any dispute or claim that arises or accrues on or after the date of [the Act's] enactment"

The Act is the most recent measure in a long list of efforts to limit mandatory predispute arbitration agreements. The Department of Defense Appropriations Act of 2010 included the "Franken Amendment," which bars some Department of Defense contractors and subcontractors from using

predispute arbitration agreements as an employment condition for claims arising out of sexual assault or sexual harassment. Likewise, multiple states have passed state laws prohibiting mandatory arbitration agreements for sexual assault, sexual harassment, or other employment claims. Such laws remain subject to challenge on FAA preemption grounds. More recently, Congress has attempted to pass similar bills limiting employers' ability to mandate predispute arbitration agreements for employment and other claims (e.g., PRO Act, FAIR Act, and Build Back Better). None has passed to date. In contrast, the Act received bipartisan support in the House (335-97). The Senate bill is co-sponsored by 10 Republican senators.

Employers with arbitration agreements, and those considering implementing them, should continue to closely monitor developments in this area.

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