

# Congress Votes To End Mandatory Arbitration Of Sexual Assault And Sexual Harassment Claims

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In a bipartisan vote, Congress passed a new law poised to end employers' ability to require employees to arbitrate claims for sexual harassment or sexual assault through a pre-dispute arbitration agreement. This new law is the latest in an ongoing series of state and federal laws inspired by the #MeToo movement, and the most significant federal legislation involving the issue of arbitration in recent years.

On February 7, 2022, the House of Representatives passed "The Ending Force Arbitration of Sexual Assault and Sexual Harassment Act" by a 335-97 vote. The Senate passed the bill three days later without amendment. The legislation now heads to President Biden's desk, who has already expressed support for the bill and is expected to sign it.

The bill, if signed by the President, will amend the Federal Arbitration Act ("FAA")—which has previously precluded prior attempts by states to limit the scope of employment arbitration clauses—to explicitly carve out sexual assault and sexual harassment claims from being compelled into arbitration by employers. In particular, the bill would allow employees asserting claims of sexual assault or sexual harassment to bring such claims in court on an individual or class action basis regardless of whether the employee had signed a pre-dispute arbitration agreement that requires such claims to be only in arbitration on an individual basis. The new bill, however, does allow arbitration of sexual assault and sexual harassment claims if the employee voluntarily opts to proceed with arbitration.

Once signed, the law will apply to "any dispute or claim that arises or accrues on or after the date of enactment" of the Act. Notably, because the law does not actually specify or define when a dispute or claim "arises or accrues," it remains open as to whether this law would apply to claims of sexual assault or sexual harassment where the events underlying the claim(s) occurred after enactment of the new law or whether it applies to any claim filed in court (or with a state agency) after enactment of the new law. In either event, the law reserves this issue solely for the courts to decide and specifies that the law's application may not be decided by an arbitrator even if the parties' agreement

delegates such authority to the arbitrator.

## **Key Takeaways for Employers**

The impact of this new law, if signed, is significant for employers who rely on arbitration agreements as a tool to efficiently (and confidentially) resolve employee disputes involving claims of sexual harassment and sexual assault. Such claims will be more likely to proceed in court, where they will be litigated publicly either on an individual or a putative class basis. It also remains to be seen how courts will apply the Act in cases that assert both sexual harassment and other types of claims. Such a scenario could lead to bifurcation of claims, in which the sexual harassment and sexual assault claims proceed in court, while arbitrable claims proceed in arbitration. In that case, courts may stay the court action pending the outcome of the arbitration, which could result in the likely unintended consequence of delaying adjudication of sexual harassment claims.

Since this new law is likely to be signed by the President, employers may wish to begin a review now of their existing arbitration agreements and joint-action waivers to assess whether changes may be required. In addition, this new law is a good reminder for employers to review their anti-harassment policies and practices to mitigate the likelihood of sexual harassment lawsuits arising in the first place and to ensure they are well-positioned to defend such lawsuits if and when they arise.

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