President Biden Signs Legislation Barring Mandatory Arbitration of Sexual Harassment Disputes

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President Biden signed legislation on March 3 that is designed to prohibit the mandatory arbitration of sexual harassment and sexual assault disputes.

Under the Federal Arbitration Act, an agreement to submit disputes to arbitration rather than to litigation generally is binding and enforceable. Many employers wish to utilize the provisions of the FAA to refer employment?related disputes to binding arbitration in lieu of lengthy and costly formal litigation, and so include arbitration clauses in their offer letters or employment contracts, or enter into separate, free?standing arbitration agreements with employees.

Such agreements have come under significant attack in recent years, particularly in the wake of the #MeToo movement. Many commentators have criticized the use of arbitration to resolve sexual harassment and sexual assault disputes, claiming that arbitrators are too often biased against claimants and noting that arbitration typically lacks the public nature of the litigation process. That criticism recently developed into a legislative groundswell, and Congress responded by passing H.R. 4445, the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021."

Basic Provisions of H.R. 4445

The bill amends the Federal Arbitration Act, and provides that no pre-dispute agreement to submit a claim to arbitration shall be valid or enforceable in any case that "relates to" a sexual harassment or sexual assault dispute. In other words, if the employer and employee enter into an arbitration clause as part of an offer letter, employment contract, or separate arbitration agreement, that clause will not apply to a sexual harassment dispute that arises later, at any time after the parties' agreement.

The bill does not apply to arbitration agreements that are signed after a sexual harassment or sexual assault dispute already has arisen. That is, if an employee or former employee asserts a claim alleging sexual harassment, the claimant and the employer could agree at that point to submit that existing dispute to binding arbitration. But under the bill the employer could not utilize a prior agreement to compel arbitration of the dispute.

The bill also bans the enforcement of pre-dispute class action waivers in sexual harassment or sexual assault cases. More and more employers have been utilizing class action waivers since the Supreme Court authorized their enforcement in 2018; such waivers typically require that

employees and former employees pursue any claims that they may have against the employer on an individual basis, rather than as part of a collective or class action. Under H.R. 4445, such waivers will no longer be enforceable in cases alleging sexual harassment or sexual assault.

The bill does not affect class action waivers in disputes that are not related to claims alleging sexual harassment or sexual assault. Employers may continue to use such class action waivers in other types of cases, such as overtime, minimum wage, paid sick time, and wage payment claims.

Going Forward with Arbitration Agreements

Employers who already have arbitration agreements in place with current employees may wish to consider revising those agreements to address the restrictions of H.R. 4445.

Employers who wish to use arbitration agreements with new hires, or who wish to enter into new arbitration agreements with existing employees, also should consider taking the provisions of H.R. 4445 into account when drafting such agreements.

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We encourage employers who have specific questions about arbitration of employment disputes, about class action waivers, about obtaining a sample arbitration agreement or class action waiver, or about any employment law topics, to contact Don Johnsen at (602) 530?8437 or dpj@gknet.com.