

The End of Mandatory Arbitration of Sexual Harassment Claims

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Mar 04, 2022



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Employers will be defending more sexual harassment claims in court rather than through arbitration as a result of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which President Biden signed into law yesterday.

Under the new law, an employee-or, more likely, a former employee-despite having signed an agreement with their employer to arbitrate all claims against their employer prior to the existence of any actual claim, has the option to refuse to arbitrate claims of sexual assault or sexual harassment and, instead, bring those claims in a lawsuit filed in state or federal court, likely before a jury. This right to bring sexual assault and sexual harassment claims in court (a public forum), despite having previously agreed to arbitration (a private forum), also extends to the named representative of a class or in a collective action alleging sexual assault or sexual harassment in the workplace.

Many existing arbitration agreements, usually signed at the outset of the employment relationship as a condition of employment, require employees to submit all future civil

claims, including those involving sexual harassment and sexual assault, to private arbitration. Before the new law went into effect yesterday, employees who entered into such arbitration agreements with their employer were blocked from later pursuing those claims before a judge or jury in state or federal courts.

The new law removes this employer-friendly contractual protection by amending the Federal Arbitration Act to allow an employee who had previously waived the right to participate in a court action to disregard that waiver when it comes to claims of sexual assault or sexual harassment.

In addition, many arbitration agreements include a provision that disputes regarding the validity and enforceability of that very same arbitration agreement will be determined by an arbitrator. Under the new law, a dispute regarding the validity and enforceability of an arbitration agreement purporting to mandate arbitration of claim of sexual assault or sexual harassment must be determined by a court, even if the arbitration agreement says otherwise.

Employers should revisit the arbitration agreements and arbitration clauses currently in use and consult with counsel concerning the impact of the new law. Please contact any Lowndes Labor and Employment Law attorney should you wish to discuss any arbitration agreements your company might already have in place or plan to roll out in the future, as well as any other employment law issues impacting your business.