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Addressing Sexual Harassment Claims After Ban on Mandatory Arbitration

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On March 3, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (Act) into law. As discussed in our previous [advisory](#), the Act prohibits the mandatory arbitration of sexual harassment and sexual assault claims. Without the option of private arbitration, employers will now be forced to defend sexual harassment claims in both the courts and the court of public opinion. This increased public scrutiny, along with the increased willingness of employees to report workplace sexual harassment, should have employers asking what they can do to address sexual harassment claims moving forward. Here are a few recommendations:

- **Review your anti-harassment and anti-retaliation policies.** Check your handbooks to ensure that all types of harassment, including sexual harassment, are prohibited. Confirm that your policies also prohibit any type of retaliation for submitting a sexual harassment claim and/or for participating in the investigation of such a complaint. Require your employees to acknowledge receipt and understanding of such policies and maintain records of those acknowledgments.
- **Audit your workplace environment.** Consider conducting employee surveys to assess whether harassment exists in the workplace. Be proactive in remediating any issues that these assessments uncover.
- **Provide multiple options for complaint reporting.** Ensure that your employees have multiple options for reporting complaints about sexual harassment. Requiring employees to report complaints to their immediate manager will not suffice if the immediate manager is the harasser. Consider providing an anonymous hotline for reporting.
- **Conduct prompt and thorough investigations.** Take all complaints of sexual harassment seriously and ensure that the employees tasked with investigating those complaints have the necessary resources to promptly address them. Consider partnering with outside counsel for complex and/or high-risk investigations. If the investigation substantiates wrongdoing, take prompt disciplinary action and document it.
- **Keep your employee training up to date.** Most sexual harassment training programs are outdated and ineffective. Ensure that your training programs are in person, interactive, frequent, conducted by qualified professionals, and tailored to your workplace. Be sure to maintain records of employee anti-harassment training.

- **Review your existing arbitration agreements.** Check your existing arbitration agreements to determine whether they cover sexual harassment and assault. Understand that the Act only invalidates these arbitration agreements to the extent that they apply to those claims. Recognize that these arbitration agreements remain otherwise enforceable.
- **Revise your arbitration agreement templates for future use.** If necessary, revise your arbitration agreement template to remove sexual harassment and assault claims from the list of claims subject to mandatory arbitration.

Please contact [Troutman Pepper's Labor + Employment team](#) if you have specific questions concerning your workplace and employees.

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