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Federal Arbitration Act Will Likely Be Amended to Prohibit Pre-Dispute Arbitration Clauses for Sexual Assault and Sexual Harassment Claims

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President Biden is expected to soon sign into law an amendment to the Federal Arbitration Act (FAA) that would prohibit mandatory arbitration of sexual assault and sexual harassment claims regardless of whether the claims arose under federal, state, or tribal law. The White House's statement in support of H.R. 4445 stated, "This bipartisan, bicameral legislation empowers survivors of sexual assault and sexual harassment by giving them a choice to go to court instead of being forced into arbitration."

Called the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," the amendment pertains to "pre-dispute arbitration agreements" entered into by parties, including employees or prospective employees who agreed to arbitrate their disputes with one another. The amendment defines pre-dispute arbitration agreements as "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement." H.R. 4445 Section 401(1). Further, the amendment states that no pre-dispute arbitration agreements containing waivers that require mandatory arbitration of sexual assault or sexual harassment claims (including joint, class, or collective actions) shall be valid or enforceable (at the election of the person who alleges those claims).

The option to pursue arbitration, rather than litigating these claims in court, is still available to those pursuing these types of claims, which they may prefer for privacy or other reasons — the law makes it clear that it is their exclusive choice to do so.

Importantly, the amendment only would apply prospectively to such claims. Further, the proposed new law would require that a court rather than an arbitrator determine both the applicability of H.R. 4445 to a given arbitration agreement and the validity and enforceability of any agreement to which the proposed new law would apply, regardless of whether the agreement at issue delegated that authority to an arbitrator. This is a significant departure from recent U.S. Supreme Court precedent interpreting the FAA as requiring an arbitrator to determine whether a dispute is subject to arbitration when the parties clearly and unmistakably agreed to delegate arbitrability questions to an arbitrator.

Prudent employers should consult with experienced counsel when preparing arbitration agreements and/or employment agreements to ensure they comply with the FAA, state, and other federal laws.

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