



Insights: Alerts

Senate Passes Groundbreaking Harassment Arbitration Law

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On February 10, 2022, the Senate passed H.R. 4445, the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.” The bill now awaits President Biden’s signature and the President is expected to sign the bill into law. H.R. 4445 will amend the Federal Arbitration Act by making pre-dispute arbitration agreements between employers and employees unenforceable in cases involving sexual harassment or sexual assault disputes.

H.R. 4445 does not prohibit employers and employees from agreeing to arbitrate their disputes generally. However, if a sexual harassment or sexual assault dispute arises between the parties, the employer cannot enforce the arbitration agreement against the employee. H.R. 4445 further provides that a court has exclusive authority to determine whether the dispute is covered by the new law, regardless of whether the arbitration agreement otherwise assigns questions of arbitrability to the arbitrator. Importantly, H.R. 4445 does not prevent an employee from voluntarily choosing to arbitrate a sexual harassment or sexual assault dispute if the employee chooses to do so. H.R. 4445 also extends to class action waivers. Accordingly, a class arbitration waiver would not be enforceable in class action involving a sexual harassment or sexual assault dispute.

There have been numerous previous unsuccessful attempts at the state level to pass similar legislation and these laws have faced challenges in the face of Supreme Court precedent interpreting the Federal Arbitration Act as strongly favoring the arbitration of disputes. As such, Congress has ensured the bill’s success by amending the Federal Arbitration Act itself. With the passage of H.R. 4445, it is likely that we will see proposals for additional amendments to the Federal Arbitration Act.

H.R. 4445 likely does not require employers to revise existing arbitration agreements with employees. Employers should, however, review their arbitration agreements and consider whether any changes should be implemented going forward. As always, employers should continue monitoring legal developments in response to H.R. 4445.

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