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Labor & Employment Client Alert

New Federal Law Prohibits Companies from Requiring Employees to Arbitrate Their Sexual Harassment and Sexual Assault Claims

By: Robert Rosenthal | March 1, 2022

On February 10, 2022, Congress, on a bipartisan basis, passed a bill called “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act” (the “Act”), which President Biden is expected to sign into law. The following is a brief synopsis of the Act, along with some practical advice for employers.

Overview of the Act

- The Act invalidates *pre-dispute* arbitration agreements between employers and employees relating to employees’ claims of sexual harassment and sexual assault.
- The Act invalidates *pre-dispute* agreements that waive an employee’s right to participate in a joint, class or collective action in court, arbitration or other forum that relates to sexual harassment or sexual assault claims.
- If there is a dispute regarding what qualifies as “sexual assault” or “sexual harassment”, a court, not an arbitrator, must resolve the issue, even if the agreement specifies otherwise.
- The Act permits an employee and employer to agree to arbitrate sexual harassment and sexual assault disputes, provided that such an agreement arises after the claim arises and the employee’s consent is in writing.
- The Act applies retroactively, invalidating any existing agreement which forces parties to arbitrate sexual harassment and sexual assault disputes on an individual basis or as a class or collective action.
- The Act does not prohibit employers from mandating arbitration or class/collective action waivers for other types of employment claims, including discrimination, retaliation, wage and hour, etc.

Recommendations for Employers Going Forward

- **Existing Employees:** Employers that have binding arbitration agreements that cover claims for sexual harassment and sexual assault should either,
 1. Have employees sign a new binding arbitration agreement that exempts sexual harassment and sexual assault claims; or

2. Advise employees in writing that their binding arbitration agreement no longer covers disputes involving sexual harassment or sexual assault, and have employees sign an acknowledgement of receipt.
- **New Employees:** Employers should revise their binding agreements for all new employees.

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