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Congress Amends the FAA to Limit Pre-Dispute Arbitration of Sexual Assault and Sexual Harassment Disputes

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February 15, 2022

Since the "Me Too" and "Times Up" movements, states (some successfully) and the federal government have attempted to limit the scope of mandatory pre-dispute arbitration agreements regarding sexual harassment and sexual assault disputes. On February 10, 2022, the U.S. Senate passed HR 4445, entitled Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the Act). The House previously passed the bill on February 7, 2022, and it is anticipated that President Biden will sign the bill into law; in fact, he issued a Statement of Administration Policy in support of the bill.

The Act defines *sexual assault dispute* as a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent. The Act defines *sexual harassment dispute* as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal or State law."

If signed by the President, the Act amends the Federal Arbitration Act (FAA) as follows:

- The Act permits any person or named representative of a class or collective action alleging conduct constituting a sexual harassment or sexual abuse dispute, at his or her election, to invalidate an arbitration agreement or class/collective action waiver that otherwise would require such dispute to be arbitrated.
- The Act applies to arbitration agreements and to class or collective action waivers that purport to prohibit or waive the right of employees to participate in joint, class or collective actions relating to sexual harassment or abuse disputes.
- If a party to a dispute challenges the validity or enforceability of an arbitration agreement or class/collective action waiver covered by the Act, that dispute will be adjudicated by a court applying federal law, and not by an arbitrator regardless of whether the arbitration agreement contains a delegation provision that would require an arbitrator to determine the validity and enforceability of an arbitration agreement.
- The Act permits parties to voluntarily choose to arbitrate any disputes, including sexual harassment or sexual assault disputes, if the parties enter into an agreement to arbitrate *after* the dispute has arisen.

Effect on Existing Arbitration Agreements

The Act applies to "any dispute or claim that arises or accrues" on or after the Act is enacted. Therefore, the Act will apply to any sexual harassment or sexual assault disputes that occur *after* the Act is enacted and under an arbitration agreement entered into *before* enactment. Thus, employers cannot escape the Act's effect on existing agreements.

Next Steps for Employers

In light of the anticipated enactment of the Act, employers using comprehensive arbitration agreements covering all claims between an employer and an employee should clarify or amend existing and new agreements to include a carve-out for sexual harassment or sexual assault disputes.

If you have any questions or need assistance reviewing your agreements, please contact the author or any member of Baker Donelson's [Labor & Employment Team](#).