

# CLIENT ALERTS

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## President Biden Signs Bill Prohibiting Mandatory Arbitration of Sexual Assault and Harassment Claims

### Client Alert

3.9.2022

On March 3, 2022, President Biden officially signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (“the Act”). As the name implies, the Act seeks to end the practice of forcing victims of sexual harassment or assault to arbitrate, rather than litigate, their claims. Specifically, the Act amends the Federal Arbitration Act to prohibit enforcement of a mandatory arbitration agreement “with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.” Importantly, the Act provides that a mandatory arbitration agreement is not enforceable “at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct.” Meaning, these disputes can still proceed to arbitration if the victim so chooses.

The Act is limited to pre-dispute arbitration agreements, i.e. an agreement the parties entered into before the alleged sexual assault or harassment occurred. The parties could mutually agree to enter into an agreement to arbitrate the victim’s claims after they have arisen.

The Act does provide for relatively broad definitions of a “sexual assault dispute” and a “sexual harassment dispute”:

- Sexual Assault Dispute – 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.
- Sexual Harassment Dispute – A dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

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Unfortunately, the Act does not define how broad the term “a case” is meant to be. For example, if an individual has both a sexual harassment and a race discrimination claim, can they be forced to arbitrate the race discrimination claim? Or does the Act prohibit forced arbitration of the race discrimination claim because it is part of “a case” involving a sexual harassment dispute? It is likely that this, and other issues, will be the focus of litigation in the coming months.

The Act is effective immediately, meaning employers cannot compel victims of sexual assault and harassment to arbitrate even if the arbitration agreement was signed in the past. Going forward, employers should consult with counsel to determine whether to modify any existing arbitration agreements with employees and independent contractors or how best to craft new arbitration policies.

Butzel will be monitoring the implementation of the Act, particularly for any court decisions resolving some of the outstanding issues the Act presents. If you have any questions about the status of the Act, arbitration agreements generally, or any other Labor & Employment issue, please contact your Butzel Labor & Employment Attorney.

**Brett Miller**

313.225.5316

[millerbr@butzel.com](mailto:millerbr@butzel.com)

**Blake Padget**

248.258.1305

[padget@butzel.com](mailto:padget@butzel.com)