



Alerts

U.S. Senate Approves Bill That Makes Mandatory Arbitration Provisions Unenforceable in Cases of Sexual Assault or Sexual Harassment

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Insights for Employers

Today, the U.S. Senate approved an amendment to the Federal Arbitration Act (FAA), rendering unenforceable any mandatory arbitration provision as applied to a dispute involving sexual assault or sexual harassment claims. The Amendment will also make unenforceable any pre-dispute joint-action waivers which prevent individuals from participating in a joint, class, or collective action in a judicial proceeding. The bill previously was passed by the U.S. House of Representatives and is awaiting signature by President Joe Biden, who is expected to sign it.

The Amendment defines a pre-dispute arbitration agreement as "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement." It defines a pre-dispute joint action waiver as one which would operate to waive the right of a party to "participate in a joint, class, or collective action in a judicial, arbitral, administrative or other forum concerning a dispute that has not yet arisen at the time in the making of the agreement."

Sexual assault and sexual harassment are defined broadly by reference to other state and federal laws. For example, a sexual harassment dispute means one relating to conduct that is alleged to constitute sexual harassment under the law of any state or Title VII. A sexual assault dispute is also defined broadly in reference to state and federal law. The Amendment states that any dispute over the change in the law will be determined in accordance with federal law, and the initial determination shall be decided by a judge rather than an arbitrator.

Employers should revise any applicable arbitration policies to comply with the new law. The Amendment will apply to any dispute or claim that arises or accrues after the bill becomes law. The Amendment also will apply to any arbitration agreement and would encompass customers, for example, or even holders of equity in an entity.

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Service Areas

Labor & Employment