Forced Arbitration for Sexual Assault or Harassment Claims in the Workplace now Banned by Federal Law

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 passed on March 3rd of this year, effectively banning employers from enforcing pre-dispute arbitration agreements to handle claims of sexual assault and sexual harassment. In amending the Federal Arbitration Act (the "FAA"), the Federal ban on arbitration clauses extends to all claims of sexual assault or harassment, whether they arise under federal, state, local or tribal law. The specific language reads:

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, no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable concerning a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

If the parties dispute whether the law applies to an employee's claim, that issue must be decided by a court, not the arbitrator, regardless of what the written agreement provides. Importantly, the law does not ban employees from choosing to arbitrate claims for sexual assault and sexual harassment; it only applies to an employer's forced use of arbitration. The new law prohibits mandatory arbitration to new sexual assault or harassment claims made on or after March 3, 2022, meaning, pre-existing filed claims may still be subject to a written arbitration mandate.

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While the Act is a novel concept at the federal level, several states have already enacted laws prohibiting the enforcement of

similar arbitration agreements. In 2018, a law amending the New York's civil practice rules was passed, rendering pre-dispute agreements to arbitrate sexual harassment claims unenforceable. The New York statute, and others passed by additional states, may now be preempted by federal law to the extent they are inconsistent.

Despite the amendment to the FAA, mandatory arbitration clauses remain generally enforceable and may remain useful in limiting exposure, particularly in class or collective wage and hour cases. Employers still possess the ability to compel arbitration of sex/gender discrimination, equal pay, and other employment-law-related claims. However, sexual assault and sexual harassment claims may be arbitrated, and employers should review and update their policies to reflect the new law.

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