

Employers to Defend More Sexual Harassment Claims in Court as Congress Bars Some Mandatory Arbitration Agreements

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Under new legislation passed by Congress last week, an employee, despite having signed an agreement with their employer to arbitrate all claims prior to the existence of any actual claim, would have the option to refuse to arbitrate claims of sexual assault or sexual harassment and instead bring those claims in a lawsuit filed in state or federal court, likely before a jury.

Many existing arbitration agreements require employees to submit all future civil claims, including those involving sexual harassment and sexual assault, to private arbitration.

Before passage of the bill, called the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," employees who entered into such arbitration agreements with their employer at the time employment commenced were blocked from later pursuing those claims before a judge or jury in state or federal courts, which are public forums. The bill removes this employer-friendly contractual protection by amending the Federal Arbitration Act to allow an employee who had previously waived the right to participate in a court action to disregard that waiver when it comes to claims of sexual assault or sexual harassment.

President Biden is expected to sign the bill into law shortly, capping a long effort by various lobbyists and activists to end so-called "forced arbitration" in the context of claims involving sexual harassment and assault. In a statement, the Biden Administration supported the bill, calling it "bipartisan, bicameral legislation [that] empowers survivors of sexual assault and sexual harassment by giving them a choice to go to court instead of being forced into arbitration."

Interestingly, the Biden Administration also noted it looked forward to working with Congress on other "forced arbitration" matters, including arbitration of claims alleging wage theft, unfair labor practices, and race discrimination.

Lowndes will continue to provide updates as legal developments occur and remains available to answer questions concerning arbitration agreements. Employers should revisit their arbitration policies and provisions, including any arbitration agreements or clauses currently in use and consult with counsel concerning the impact of the bill.

Please contact any Lowndes Labor and Employment Law attorney to discuss any



arbitration policies you have, as well as any other employment law issues impacting your business.