

> Client Alert

President Biden Declares an End to Mandatory Arbitration of Sexual Harassment / Sexual Assault Claims

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Authors and Key Contacts

If you require any additional information regarding workplace laws concerning pre-dispute arbitration agreements or joint action waivers, or any other employment law questions please feel free to contact any of the attorneys listed below.

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On March 3, 2022, President Biden signed into law H.R. 4445, appropriately titled the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.” This new law, which goes into effect immediately, amends the Federal Arbitration Act (“FAA”) to render unenforceable, at the employee’s election, any pre-dispute agreements to arbitrate matters alleging sexual harassment and/or sexual assault in the workplace under federal, state, local or tribal law. The new law also makes unenforceable, again at the election of the employee, pre-dispute joint action waivers that would otherwise prevent employees from participating in collective action lawsuits alleging sexual harassment and/or sexual assault. To the extent that issues are raised concerning the validity and enforceability of these pre-dispute arbitration agreements or joint action waivers, those determinations would be made by a court of law, rather than through the arbitral forum.

Rather than automatically invalidating all existing pre-dispute arbitration agreements, however, the new law allows employees to proceed in court despite their prior agreement to arbitrate. The new law also does not prevent employers and employees from entering into post-dispute agreements to arbitrate sexual assault and/or sexual harassment disputes should they jointly so desire. Despite this new law, some employees, including those who have not signed pre-dispute arbitration agreements, may prefer the privacy afforded them in arbitration over the public nature of court proceedings.

The new law applies to any dispute or claim that arises or accrues on or after March 3, 2022. Although the law by its express language, applies only to those matters involving allegations of sexual harassment and/or sexual assault in the workplace, it remains an open question how or whether courts will enforce pre-dispute arbitration agreements containing allegations of both sexual harassment and other forms of unlawful discrimination not expressly covered by the new law. In signing the bill into law, President Biden expressed his support for additional legislation prohibiting mandatory arbitration of all other types of employment disputes as well. If passed this broader legislation would have a significant impact on the use of pre-dispute arbitration agreements in the workplace on a prospective basis.

Next Steps for Employers

Employers should carefully review existing written agreements with their employees and consider modifying any pre-dispute arbitration agreements or

joint action waivers contained in such agreements. Similar consideration should be given to agreement templates currently in place for new employees. If an employee evinces a desire to proceed with arbitration on a sexual harassment or assault claim, employers should obtain written confirmation from them that arbitration is their preferred method of prosecuting those claims. .

Employers should also consult with counsel regarding navigating the potential execution and enforcement of post-dispute agreements going forward.

The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice concerning the new laws governing the use of pre-dispute arbitration agreements in the workplace, as well as any expansion regarding the prohibition of mandatory arbitration to cover other types of employment disputes, or any related or other employment law questions which may arise from time to time.