



Mandatory Arbitration of Sexual Assault and Sexual Harassment Claims Prohibited

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On March 3, the [“Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021”](#) (“the Act”) took effect. It amends the Federal Arbitration Act (FAA) and bans the mandatory arbitration of sexual assault and sexual harassment claims or disputes (“claims”). The Act, on its face, does not impact otherwise valid arbitration agreements for claims not related to sexual assault and sexual harassment.

How will this Act impact employers? The following questions and answers highlight the salient provisions of the Act and a glaring ambiguity which will inevitably be litigated in court.

What Are the Key Elements of This Act?

- Employers no longer can mandate the arbitration of sexual assault or sexual harassment claims filed under federal, state, or tribal law, as those terms are defined by those applicable laws. Employers must pay careful attention to how a particular state defines those terms. Some states may define “sexual harassment” more broadly than it is defined under federal law. Additionally, some states’ discrimination/harassment laws apply to employers with less than the Title VII “15 or more employees” standard.
- The Act also bars any waivers of the right to bring sexual assault and/or sexual harassment claims jointly or on a class or collective basis (“waiver agreements”).
- The Act does not solely apply to claims made by employees. It protects any individual who may execute a mandatory arbitration or waiver agreement. For example, a non-employee (e.g., customer, patient, vendor, contractor) who alleges sexual assault by a Widget Company employee would not be barred from filing a lawsuit despite signing a boilerplate contract that

contained a mandatory arbitration clause.

- The Act retroactively applies to existing agreements if a claim arose or accrued on or after March 3, 2022. An employer, however, can enforce an existing agreement that contains a mandatory arbitration and/or waiver agreement with respect to sexual assault and sexual harassment claims that arose or accrued before March 3, 2022.
- The Act applies only to predispute arbitration and waiver agreements. It will not impact agreements entered after a claim arises.
- Questions concerning the applicability of the Act and the “validity and enforceability of an agreement” will be determined under federal law and by a court – not an arbitrator. In other words, a court will decide the proper forum (court or arbitrator) to address the sexual assault or sexual harassment claims.

What is the Glaring Ambiguity in the Act?

The Act does not clearly address how a court should handle multiple claims brought in the same lawsuit that, in part, include sexual assault and/or sexual harassment claims (e.g., race/disability discrimination or harassment claims). The Act states “no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case [that] relates to the sexual assault dispute or the sexual harassment dispute.” (Emphasis added).

The above highlighted language will trigger an avalanche of litigation over its scope and interpretation. Courts may interpret those words to mean all filed claims must remain in court if they relate to a sexual assault or sexual harassment claim. That single word “relate” alone will spawn numerous lawsuits. Courts also could more narrowly determine that only the sexual assault and sexual harassment claims will be litigated in court, and the remaining claims must be arbitrated. Employers, therefore, could concurrently defend the same basic set of allegations in two separate forums.

Can An Employee Voluntarily Agree to Arbitrate?

Yes. The Act permits employees to decide whether to pursue sexual assault or sexual harassment claims in court or through arbitration. Some employees may choose to arbitrate their claims in a private proceeding versus a public (court) forum.

Are There Any State Law Concerns?

Of course. Prior to this Act, several states (e.g., California, Maryland, New Jersey, New York, Vermont, and Washington) restricted or banned mandatory arbitration of sexual harassment claims. Employers with multi-state operations must carefully navigate these various state law prohibitions that could, in some states, ban mandatory arbitration of other employment claims, not just sexual assault and sexual harassment claims.

Should Employers Continue to Mandate Predispute Arbitration and/or Waiver Agreements?

The Act does not prohibit employers from requiring employees to execute arbitration or waiver agreements. Rather, employers can no longer mandate arbitration of sexual harassment and sexual assault claims. Accordingly, employers should review their mandatory arbitration and/or waiver agreements and revise them to expressly exclude sexual assault and sexual harassment claims.

Employers who decide not to revise their current agreements should alert employees that sexual assault and sexual harassment claims arising after March 3, 2022, are not subject to the employer's arbitration and/or waiver agreements. Transparency is the best policy.

Employers' Next Steps

In response to this Act, employers should do more than simply edit their current agreements going forward. An employer's objective should be to stop any sexual assault and sexual harassment claims before they arise. That objective, in turn, can be met by the following steps: draft sound harassment/discrimination policies;

have a clear reporting procedure; conduct prompt and thorough investigations after the receipt of a complaint; emphasize there will be no retaliation for reporting such complaints; and squarely and effectively address and/or remove the offending employee.

If you have any questions about this Act, please contact [Anne E. Duprey](#), [Jeff Lindemann](#), [Jeff Shoskin](#), or any member of Frost Brown Todd's [Labor and Employment](#) practice group.

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