

# U.S. CONGRESS PASSES SIGNIFICANT LEGISLATION PROHIBITING MANDATORY ARBITRATION OF SEXUAL HARASSMENT AND ASSAULT CLAIMS

*Hodgson Russ Labor & Employment Alert*  
February 25, 2022

The United States Congress recently passed the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021” (the “Act”) with bipartisan support. President Biden has expressed his support for the Act and is expected to sign it into law soon.

The Act amends the Federal Arbitration Act (“FAA”) to prohibit employers from enforcing most arbitration agreements and class action waivers in connection with claims of sexual harassment or sexual assault. Specifically, the Act makes any “predispute arbitration agreement” voidable and unenforceable “at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute.” It also makes any “predispute joint action waiver” voidable by the named representative in a class or collective action alleging such conduct.

The Act will significantly change federal law. Currently, the FAA strongly encourages resolution of disputes through arbitration, which can be more private, efficient and cost-effective for the parties. Accordingly, the U.S. Supreme Court and other courts applying the FAA have often found that arbitration agreements are valid and enforceable, including in the employment context. The Act will effectively overturn that case law for sexual harassment and assault claims, though it will still allow for arbitration of those claims if arbitration is the desire of the claimant.

The Act also makes clear that, in cases involving allegations of sexual harassment or sexual assault, courts, not arbitrators, must resolve any dispute as to the validity and enforceability of a predispute arbitration agreement or joint action waiver – even if the agreement at issue expressly delegates the authority to make those determinations to an arbitrator.

These new provisions will apply to any sexual assault or sexual harassment or claim – whether under federal, state, or tribal law – that “arises on or after” the date of enactment of the Act, regardless of when the arbitration agreement or joint action waiver was signed. However, given that the Act prohibits only “predispute”

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mandatory arbitration agreements, it will not prevent enforcement of arbitration agreements executed after a sexual assault or sexual harassment dispute arises.

While the Act, as passed by Congress, relates only to sexual harassment and sexual assault claims, it may be a sign of things to come. The Biden administration has signaled its desire to “work[]... with the Congress on broader legislation that addresses... forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices.”

If you have any questions about the Act, its impact on your business, or use of arbitration agreements and class/collective action waivers with your workforce, please contact [John Godwin](#) (716.848.1357), [Charles H. Kaplan](#) (646.218.7513), [Kinsey O'Brien](#) (716.848.1287), or any member of our [Labor & Employment Practice](#).