



# Insights

## New Law Will End Forced Arbitration in Sexual Assault and Sexual Harassment Cases

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Last week, the Senate passed a bill, **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021**, that will nullify forced arbitration clauses in sexual assault and sexual harassment cases. The bill has been sent to President Biden's desk for signature and is expected to be signed into law.

Though many employers have moved away from forced arbitration clauses, the practice is still popular with larger companies. Once signed into law, employers will no longer be able to require employees to abide by arbitration clauses in situations involving sexual assault or sexual harassment. Because the bill is retroactive, the ban will apply even if an employee and employer previously agreed to such a clause, for example in an employment or severance agreement. Further, although a forced arbitration clause is likely to arise in the context of employment agreements, the law applies to any type of agreement that attempts to require arbitration of claims of sexual assault or sexual harassment. Last, the issue of whether the new law applies to a specific arbitration clause is to be determined under federal law.

The new law would define a sexual assault dispute as "a dispute involving a nonconsensual sexual act or sexual contact . . . including when the victim lacks capacity to consent."<sup>1</sup> There is also reference to federal law and state or tribal law defining sexual assault and those definitions are to be included if applicable. Similarly, a sexual harassment dispute is defined as "a dispute relating to conduct that is alleged to constitute sexual harassment under Federal, Tribal, or State law."<sup>2</sup>

Employers should be prepared for these types of claims to be litigated instead of decided through arbitration. Further, employers may want to either draft new employment agreements or amend prior agreements to take into account this new law. As it stands, existing employment agreements that contain a forced arbitration provision with respect to sexual assault or sexual harassment are fully enforceable with the exception of the forced arbitration provision. Should you have questions regarding this new law and how it will affect your company or employees, please contact **Elizabeth M. Roberson** or another member of our **Employment Law Practice**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] H.R. 4445, Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 117th Congress (2021-2022).

[2] *Id.*