

Will We Need to Say Goodbye to Our Employee Arbitration Agreements? A To-Do List in Light of the New Federal #MeToo Law.

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The New York Times article detailing the accounts of survivors of Harvey Weinstein's sexual misconduct sparked a wave of revelations and stories from survivors of sexual harassment and abuse in multiple industries throughout the United States. The deluge of stories was dubbed the #MeToo Movement, and it led to a reckoning in American society about how to address claims of sexual misconduct. Five years later, Congress has passed a new piece of federal legislation to address this issue, and President Biden signed it into law on March 3, 2022. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act"), colloquially known as the #MeToo law, demonstrates how the cultural shift in attitudes towards survivors of sexual misconduct in the workplace has moved into the legislative sphere. ***In light of this new law, many employers may be wondering: What does that mean for our current arbitration agreements? What steps do we need to take to make sure we are complying with this new law? Are we saying farewell to arbitrations in the future?***

The Act amends the Federal Arbitration Act ("FAA") by prohibiting mandatory arbitration agreements between employers and employees for both "sexual assault disputes" and "sexual harassment disputes." These types of binding arbitration agreements were criticized during the #MeToo movement because arbitration proceedings are not usually open to the public. Commentators noted that this feature prevented survivors from sharing their stories publicly, which contributed to the continuation of abuse.

Under the Act, a "sexual assault dispute" is "a dispute involving a nonconsensual sexual act or sexual contact." And a "sexual harassment dispute" is "a dispute relating to conduct that is alleged to constitute sexual harassment." While employers may no longer be able to *mandate* arbitration claims of sexual assault or sexual harassment, employees can still *voluntarily* opt in to arbitration on these claims if he or she chooses; employees will always have the option to go to court to pursue these claims as well. The Act applies retroactively, so even if an employee signed a mandatory arbitration agreement years ago, he or she can bring any claims that arise after March 3, 2022 in court. Some states have passed similar statutes already, but the new legislation applies to employers that

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are subject to the FAA, apart from certain exceptions such as employers with collective bargaining agreements.

It is unclear what effect the Act will have on other employment claims. Employees often bring multiple claims, and courts will eventually have to confront cases with claims that can be subject to mandatory arbitration and claims that cannot be subject to mandatory arbitration. At this point, it is safe to assume the new law will result in an uptick in sexual harassment and abuse claims and make them more complicated and expensive to resolve. Employers should be prepared to face potential claims in arbitration and court simultaneously if courts regularly sever arbitrable and non-arbitrable claims.

We've put together a to-do-list for employers in light of this new federal law. Each of the following items are actions to take to ensure compliance with the law and prepare for any potential claims of sexual harassment or abuse:

- **Review your arbitration agreements.** You should revise the language of all future mandatory arbitration agreements to either exclude claims of sexual harassment or abuse, or include clear language stating that the employee signatory has **the choice** to bring their sexual harassment or assault claims in court and that they are not required to individually arbitrate claims.
- **Revisit your sexual harassment policies.** Adopt a policy, included in your handbook, informing employees that they are no longer required to arbitrate sexual harassment or sexual assault claims, even if those are covered in an agreement that the employee may have entered into in the past. As the law applies retroactively to arbitration agreements that have already been entered into containing mandatory provisions, we recommend focusing on future mandatory arbitration agreements as having all employees who have already signed an agreement to re-sign can be burdensome.
- **Remind employees of appropriate conduct and refocus on training.** Many states require sexual harassment prevention training, but now is a good time to revisit that. Make sure that managers and supervisors are equipped with the tools to address and prevent sexual harassment. If you have a remote or hybrid workforce, remind your employees of appropriate remote work conduct, as remote work can present new ways in which employees may be exposed to harassment such as inappropriate material or comments during virtual meetings.
- **Determine whether you have the tools to handle sexual harassment claims.** These include channels at your organization for employees to report instances of potential sexual harassment and setting up processes for investigating sexual harassment claims. If you are not equipped with these tools, now is a good time to revisit your organization's policies and procedures to ensure you are prepared to address any potential sexual harassment claims. Additionally, you should make sure that these processes are clearly communicated to employees. This is especially important as many workplaces are moving to a hybrid environment in which employees may not be in the office every day. Make sure it is clear to employees that there are still people within your organization that they can communicate with if they are experiencing harassment, even if they have not had the opportunity to meet these people in person.