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Congress Passes Prohibition on Mandatory Arbitration of Certain #MeToo Claims

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On February 10, 2022, the US Senate passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The Act, once signed into law by President Joe Biden, as expected, will amend the Federal Arbitration Act (FAA) to prohibit agreements that mandate arbitration of sexual harassment and sexual assault claims in advance of such conduct occurring.

The Act reflects a resurgence for the #MeToo movement at the federal level. While the movement spurred a wave of state legislation combating workplace sexual misconduct, efforts to prohibit mandatory arbitration of claims involving sexual misconduct have been less successful. Even when states such as New York and Washington enacted these prohibitions, they were overturned by courts due to the FAA's well-established preemptive effect over conflicting state arbitration laws. By amending the FAA, the Act eliminates this procedural obstacle.

What does the Act say?

Under the Act, a party to a "predispute arbitration agreement," or an agreement to arbitrate a dispute that had not yet arisen at the time the parties enter the arbitration agreement, cannot enforce this arbitration agreement against a person who files a case alleging either (i) conduct that would constitute sexual harassment under federal, tribal, or state law (a "Sexual Harassment Dispute") or (ii) nonconsensual sexual act or sexual contact (a "Sexual Assault Dispute").

Similarly, in response to a Sexual Harassment Dispute or a Sexual Assault Dispute, a responding party cannot enforce a "predispute joint-action waiver," which is an agreement, that would prohibit, or waive the right of a party to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum, concerning a dispute that has not yet arisen at the time of the making of the agreement. This limitation on joint-action waivers applies regardless of whether it is included in a predispute or postdispute arbitration agreement.

The Act notably does not extend to any other types of disputes, including those based on claims of discrimination or retaliation. It also would not apply to claims brought under local law.

Who determines if the Act applies?

The Act states that a court, rather than an arbitrator, will determine whether the Act applies to an agreement to arbitrate and whether such agreement is valid and enforceable under the Act. The court is not bound by the language of the arbitration agreement, including any language delegating such determination to an arbitrator. The court also must use federal law, meaning any conflicting state laws will be superseded.

Will the Act apply immediately?

Yes. Once signed, the Act will immediately apply to any dispute or claim that arises or accrues after the date of enactment. As it

stands, the Act could jeopardize the enforceability of arbitration agreements that predate the Act's enactment.

Action items for businesses

While the Act obviously aims to give employees a path to bring sexual assault and harassment claims in a public forum, the Act is notably not limited to just arbitration agreements between employers and employees. Any "predispute arbitration agreement" or "predispute joint-action waiver" will be governed by the Act. As such, in anticipation of these new restrictions on arbitration agreements, employers and others who utilize individualized arbitration agreements in the course of business should conduct a thorough review of their arbitration agreements and dispute resolution procedures to determine whether modifications are required.

We are closely tracking developments on the Act and will publish further guidance when additional information becomes available. If you have any questions related to the Act, please reach out to a member of the Cooley employment team.

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