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Legislation Ending Mandatory Arbitration of Sexual Assault and Sexual Harassment Claims

Longstanding caselaw has been overturned by a bill that ends mandatory arbitration in workplace sexual harassment cases.

On February 10, 2022, the Senate passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the "Bill"). The Bill is on its way to President Biden to be signed into law. The White House has expressed its support of the Bill.

In recent years the Supreme Court has held that the Federal Arbitration Act ("FAA") (which compels judicial enforcement of arbitration agreements that are contained in most contracts) applies to employment agreements. The Supreme Court has also held that the FAA preempts state arbitration laws that limit the circumstances under which arbitration can be compelled. For example, in the wake of the #MeToo movement, New York passed legislation prohibiting mandatory arbitration provisions because it shielded perpetrators of workplace sexual harassment and gagged employees who had been subject to harassment or assault. The law was ultimately struck down by the New York Court of Appeals.

Under the proposed Bill, arbitration is still available at the employee's option. There are plenty of reasons that an employee might choose arbitration. Sometimes the targets of sexual harassment prefer the privacy and confidentiality of an arbitration. Similarly, these employees are often more comfortable with a smaller, more private forum as opposed to the very public court system. Finally, arbitration is less costly and time consuming than litigation, and the rules of evidence are not as rigid. Although it's understandable that the mandatory nature of these provisions can be problematic, there are still many benefits to arbitration.

Given the Supreme Court's trend towards enforcing arbitration provisions, the number of employers - especially large employers - with mandatory arbitration provisions has been on the rise. The new prohibition will have a significant impact on a large number of employers and employees.

The Bill would nullify any mandatory arbitration clauses in existing contracts that require arbitration for claims pertaining to sexual assault or sexual harassment, not merely in new contracts. The Bill does not prohibit mandatory arbitration provisions in other types of employment disputes. Cases previously resolved through mandatory arbitration will not be re-opened.

For assistance with drafting arbitration provisions in employment contracts, please contact the HNRK employment group.

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Amory represents employers and executives in all aspects of the employment relationship with a focus on counseling, litigation avoidance and, when necessary, litigation. Her counseling experience on behalf of a broad range of employers includes advice on issues ranging from discrimination and retaliation to wage-and-hour issues to compensation. She also regularly drafts, updates, and negotiates agreements and policies on behalf of clients concerning executive employment agreements, separation agreements, and other business arrangements.

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Kathleen's practice focuses on employment matters on behalf of both employees and employers, and also includes general commercial litigation. She advises employers on compliance with federal, state, and local employment statutes. She has defended mass transit agencies, as well as other U.S. and foreign defendants, in suits by employees alleging sex, race, and disability discrimination, civil rights violations, violations of the Family and Medical Leave Act, and violations of the Fair Labor Standards Act.

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