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Congress Passes Bill Prohibiting Mandatory Arbitration and Class Action Waivers for Sexual Harassment and Sexual Assault Claims

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On February 10, 2022, the Senate passed H. 4445, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the "Act"), by a voice vote. The bill had previously passed the House of Representatives by a vote of 335-97. The White House has indicated President Biden will sign the bill.

If enacted, the Act would amend the Federal Arbitration Act to prohibit enforcement of mandatory pre-dispute arbitration agreements, as well as agreements prohibiting participation in a joint, class or collective action in any forum, "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct." The Act also provides that any dispute concerning whether a claim falls within the scope of the Act's prohibitions will be decided by a court and not an arbitrator, irrespective of whether the arbitration agreement at issue purports to delegate such determinations to an arbitrator.

A "sexual assault dispute" is defined as one "involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 18 or similar applicable Tribal or State law, including when the victim lacks capacity to consent." A "sexual harassment dispute" is defined as one "relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."

The new restrictions would apply “with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act,” meaning that once enacted, millions of American workers could elect to be released from existing arbitration agreements and/or class and collective action waivers as relating to sexual harassment and sexual assault claims that arise after the law goes into effect. However, because the law only addresses pre-dispute arbitration and class/collection action waiver agreements, any agreement to arbitrate claims entered into by the parties after the claims arise remains enforceable.

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