

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Connie Elder Carrigan](#) is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

## Say Good-bye to Mandatory Arbitration of Workplace Sexual Harassment Claims

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On March 3, 2022, just days before the recognition of International Women's Day on March 8, [President Biden signed into law](#) landmark legislation paving a clearer path for individuals to pursue workplace sexual harassment and sexual assault claims in court. The *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, enacted with bipartisan Congressional support in early February, adds a new chapter to the Federal Arbitration Act to permit persons alleging conduct constituting sexual harassment or sexual assault under state or federal law to elect to invalidate pre-dispute arbitration agreements or joint-action waivers in class or collective actions with respect to cases that relate to such sexual harassment or assault disputes.

In signing this new legislation into law, President Biden remarked that over 60 million American workers are currently bound by mandatory arbitration provisions which "silence[] victims of abuse by forcing them into a confidential dispute forum without the right to appeal. . . Between half and three-quarters of all women report that they have faced some form of sexual harassment in the workplace, and too often they're denied a voice and a fair chance to do anything about it. Today, we send a clear and strong message that we stand with you for safety, dignity, and for justice."

### Scope of the New Law

This amendment serves to invalidate any current pre-dispute agreement forcing an employee to arbitrate a case related to a sexual harassment or sexual assault dispute unless the dispute arose prior to enacting the new law. This means that the legislation applies to all existing arbitration agreements except pending disputes, even those signed before the bill's enactment. The new law does not impact agreements to arbitrate such disputes that parties may enter into *after* such disputes arise. Any issue as to whether the amendment applies to a specific dispute and the scope, validity, and enforceability of an agreement to arbitrate that arguably falls within the stated parameters of the new law will be determined under federal law by a judge, not by an arbitrator.

In addition, the scope of the new law is not limited to the employment relationship.

Many consumer services are memorialized in agreements, including property leases, ridesharing apps, and home improvement contracts, which require the consumer to agree to arbitrate any legal claims which arise.

To the extent the consumer's claims involve sexual harassment or sexual assault, they will no longer be prohibited from litigating such claims.

### **Anticipated Interpretation by State and Federal Courts**

It remains to be seen whether future courts interpreting the amended Federal Arbitration Act will permit *all* claims in a case involving a claim of sexual harassment or sexual assault to bypass mandatory arbitration, or whether employees subject to a mandatory arbitration provision who pursue their sexual harassment or sexual assault claims in court will nevertheless be required to arbitrate any other claims they may have. Employers should also take care to review relevant state laws, including legislation passed in California, New Jersey, and New York, which may prohibit the use of mandatory pre-dispute arbitration for any employment-related discrimination, harassment, or retaliation claim. Finally, it is worthy of note that while courts have historically been hostile to efforts to limit the scope of the Federal Arbitration Act, recent federal appellate court rulings, perhaps influenced by the court of public opinion, have challenged that perspective and have required greater transparency in the resolution of such disputes.

### **Employer Takeaways**

In light of this new legislation, employers should review their policies and contractual documentation to ensure that any mandatory arbitration provision or class action waiver contained in their employment documentation includes a carve-out for claims involving sexual harassment or sexual assault. Employers should also undertake increased measures to prevent, address, and proactively resolve claims of sexual harassment.

If you have questions regarding this new legislation or other legal issues pertaining to the [employment](#) relationship, please feel free to contact [Connie Carrigan](#) at [ccarrigan@smithdebnamlaw.com](mailto:ccarrigan@smithdebnamlaw.com).

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