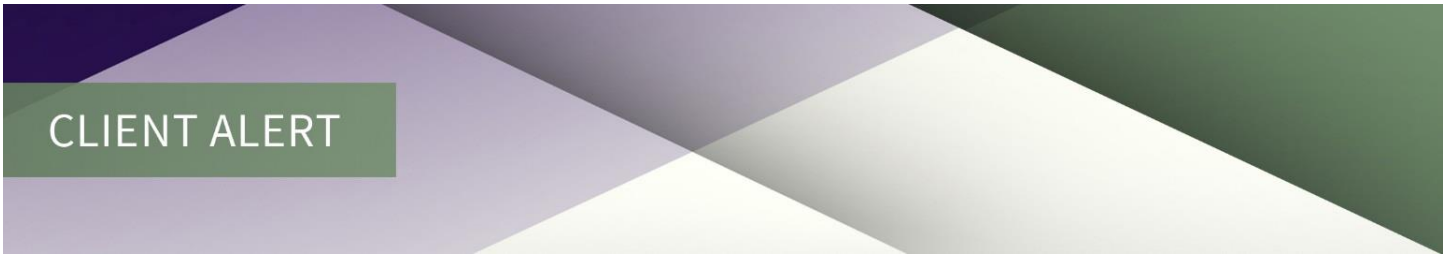

Federal Arbitration Act Amended to Prohibit Enforcement of Mandatory Arbitration Agreements for Claims of Sexual Harassment and Sexual Assault

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On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the "Act"), which amends the Federal Arbitration Act ("FAA") to prohibit employers from requiring employees or contractors to arbitrate claims of sexual harassment or sexual assault. The Act allows any person subject to a pre-dispute arbitration agreement to elect to file a claim of sexual harassment or sexual assault that arises or accrues on or after March 3, 2022 in court or in arbitration; the Act also invalidates class action waivers with respect to such claims.

Takeaways for Employers

1. The Act limits pre-dispute arbitration agreements only with respect to claims of sexual harassment or sexual assault. Therefore, mandatory arbitration agreements may still be used to compel arbitration of other employment-related claims. While certain states, including New York, have attempted to curb the use of arbitration agreements, such laws remain subject to attack on the ground that they are preempted by the FAA, except with respect to claims covered by the Act.

2. The Act does not preclude the arbitration of claims of sexual harassment or sexual assault. However, it will be up to the claimant to decide whether to file such claims in court or in arbitration, regardless of whether the claimant signed a mandatory arbitration agreement.

3. The Act does not prevent employers from enforcing a mandatory arbitration agreement regarding a claim of sexual harassment or sexual assault that arose or accrued prior to March 3, 2022.

4. Employers should review current arbitration agreements and evaluate whether any revisions are required. Employers may want to consider revising the terms of their mandatory arbitration agreements to reflect that, pursuant to the Act, claims of sexual harassment and sexual assault may be, but are not required to be, arbitrated.

5. Any dispute regarding the enforceability of a pre-dispute arbitration agreement concerning claims covered by the Act must be decided by a court under federal law. One area of interest will be the extent to which courts are willing to bifurcate cases that involve both allegations of sexual harassment or sexual assault and other claims, particularly given that the Act purports to apply to any "case" that "relates" to allegations of sexual harassment or sexual assault.

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