

Biden Signs Law Curbing Use of Arbitration Agreements for Sexual Assault and Harassment Disputes

The new legislation may significantly impact the utility of mandatory and voluntary arbitration agreements in the employment setting.

Key Points:

- The law permits predispute arbitration agreements and joint, class, and collective action waivers to be voided with respect to cases filed under federal, state, or tribal law relating to sexual assault disputes and/or sexual harassment disputes.
- This means employees and independent contractors who file cases relating to sexual assault and/or sexual harassment disputes may be able to litigate their claims in court if they prefer, despite having previously agreed to arbitrate such claims, and may do so on a joint, class, or collective basis, in court or in arbitration, even if they previously waived that right.
- The law affects both mandatory and voluntary predispute arbitration agreements and joint, class, and collective action waivers.
- The law applies to any dispute or claim that arises or accrues on or after the date of the law's enactment, March 3, 2022.

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. The law amends the Federal Arbitration Act and related conventions to allow plaintiffs to void agreements to arbitrate — and agreements to waive the ability to bring a joint, class, or collective action with respect to — cases that are filed under federal, state, or tribal law that relate to sexual assault disputes and/or sexual harassment disputes. Plaintiffs may still elect to proceed with arbitration and/or proceed separately from other plaintiffs, but cannot be compelled to do so.

Below are eight common questions and answers about the new law:

1. What is a predispute arbitration agreement? A predispute arbitration agreement is any arbitration agreement that the parties sign before a sexual assault dispute or sexual harassment dispute arises. Typically, in the employment context, such arbitration agreements are signed at the outset of employment or during employment, sometimes voluntarily and sometimes as a condition of employment.

2. What is a predispute joint-action waiver? A predispute joint-action waiver is any agreement that is entered into before a sexual assault dispute or sexual harassment dispute arises, pursuant to which someone forgoes their right in the future to bring or participate in a joint, class, or collective action. Such agreements are also typically entered into at the outset of employment or during employment, either voluntarily or as a condition of employment.

3. How does the law affect arbitration and waiver agreements already in place? The law applies to existing agreements to the extent a dispute or claim arises or accrues on or after the date of enactment of the legislation. An employer with an existing arbitration or waiver agreement can enforce the agreement as to claims or disputes that have already arisen or accrued prior to March 3, 2022, but not as to claims or disputes arising or accruing on or after that date.

4. What cases will the law apply to? The law applies only to cases relating to sexual assault disputes, which are defined as disputes involving a nonconsensual sexual act or sexual contact as defined in 18 U.S.C. Section 2246 or similar state or tribal law, and/or sexual harassment disputes, which are defined as disputes relating to conduct that is alleged to constitute sexual harassment under federal, state, or tribal law.

5. What if a case has claims beyond sexual assault disputes and/or sexual harassment disputes? The law does not clearly address how a court should handle multifaceted disputes, such as a case combining sexual and racial or other types of harassment. We expect defendants will seek to compel arbitration on the portions of any actions that do not relate directly to sexual assault disputes or sexual harassment disputes.

6. What if a claimant wants to arbitrate? The law allows claimants to choose whether or not to void the agreement to arbitrate (and/or the class/collective action waiver) as to cases relating to sexual assault disputes or sexual harassment disputes. While many claimants are likely to opt out of arbitration, some may prefer a private proceeding and choose to arbitrate their claims.

7. Does the law apply to state and tribal law claims? Yes, the law specifically covers state and tribal law claims.

8. Should employers continue to require employees to sign predispute waiver and/or arbitration agreements? Employers are likely to continue to benefit from including predispute waivers in their agreements as there are other claims, such as wage and hour claims, for which employers would benefit from having predispute waivers. However, on the question of whether to maintain a practice of requiring employees to sign predispute arbitration agreements or asking them to do so voluntarily, different employers may come to different conclusions. For example, an employer in California faced with this new federal law, a state statute prohibiting mandatory arbitration agreements covering sexual harassment claims, and current case law preventing enforcement of arbitration agreements of claims under the Private Attorney General Act (which allows enforcement and recovery of penalties for many labor code violations on a collective basis) may conclude that the benefits of arbitration are unavailable under too many circumstances, while other employers, particularly those not subject to other limitations on arbitration, may still prefer to require arbitration when they can. Latham attorneys can help guide you through the decision process to determine if predispute arbitration agreements would be advisable with respect to some or all of your workforce.

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The authors would like to thank Ana Cenaj and Alina Preiss for their contribution to this *Client Alert*.

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