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Client Alert: Employers Prepare for End of Mandatory Arbitration of Sexual Harassment Claims

On February 10, 2022, the U.S. Senate passed H.R. 4445, a landmark bill that renders invalid and unenforceable any mandatory arbitration provisions pertaining to claims of sexual harassment or sexual assault. The Bill, which is expected to be signed by President Biden, will amend the Federal Arbitration Act (FAA) to guarantee employees the right to file sexual harassment and sexual assault claims in court, including as representatives of a class or a collective action, should they decide to do so, regardless of whether they previously agreed to mandatory arbitration (e.g., through employment or separation agreements). The ban on mandatory arbitration would kick in immediately and apply retroactively (except to already pending cases).

The anticipated signing of H.R. 4445 into law will be impactful for many employers – including, in particular, younger, growing investment-backed companies that often prefer the private, contained format for dispute resolution to publicly accessible court proceedings and the possibility of jury trials. It is precisely the ubiquity of mandatory arbitration agreements, and #MeToo activists' and politicians' shared view that these fail to adequately prevent or appropriately remedy harassing conduct in the workplace, that has led to a strong bipartisan push towards the passage of the Bill.

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Under the currently existing federal framework, employers may require employees to sign agreements mandating the resolution of any potential disputes, including disputes involving allegations of harassment and discrimination in the workplace, through private arbitration. Multiple blue states, including California, Illinois, and New York, have enacted laws targeting mandatory arbitration of harassment disputes, with mixed success. For example, courts in California and New York have held that the FAA preempted the legislation. *See Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985 (S.D.N.Y., June 26, 2019); *Chamber of Commerce of the United States of America, et al. v. Bacerra, et al.*, 2:19-cv-2456 (E.D. Ca. 2019). However, the recently enacted Workplace Transparency Act (WTA) in Illinois, which bars "unilateral" contracts to arbitrate claims of harassment and discrimination, remains good law, while still allowing employers and employees an opportunity to agree to and enforce such dispute resolution.

In anticipation of H.R. 4445's enactment into law, employers would be well advised to review their current dispute resolution practices and related agreement forms, as well as their existing policies, training protocols, and other strategies aimed at preventing harassment involving their employees at all levels of the organization.

If you have any questions regarding employer rights and obligations under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, please contact Sonya Rosenberg, Kaytee Okon, or your Neal Gerber Eisenberg attorney.

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