

## Services

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- Unfair Competition and Trade Secrets
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# Congress Passes Ban on Arbitration for Sexual Assault and Sexual Harassment Claims

On February 7, 2022, the U.S. House of Representatives passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "Act"). The Act allows prospective plaintiffs to bring their sexual assault and sexual harassment claims straight to court, notwithstanding any arbitration agreements they may have signed previously. The limit on arbitration also applies to sexual assault and sexual harassment claims brought in a joint, class or collective action.

President Biden previously issued a Statement of Administration Policy expressing support for the Act, reasoning it "advances efforts to prevent and address sexual harassment and sexual assault, strengthen rights, protect victims, and promote access to justice." Given this statement, we expect President Biden will soon sign the Act into law, and the Act will go into effect immediately. President Biden's statement also indicates support for even broader prohibitions against mandatory arbitration, "including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor practices." Congress currently has similar legislation pending, including the Forced Arbitration Injustice Repeal Act which would prohibit mandatory arbitration of employment-related claims entirely.

The Act requires courts—not arbitrators—to decide whether a claim involves sexual harassment or sexual assault. Under the Act, claims of sexual assault and sexual harassment made after the Act's effective date cannot be subject to arbitration. Therefore, employers should consider updating their employee arbitration agreements to carve out claims that cannot be arbitrated under federal law to ensure the remaining portions of their arbitration agreements are still enforceable.

If plaintiffs pursuing sexual assault or sexual harassment claims also have other employment-related claims that are subject to an arbitration agreement, such as discrimination or retaliation claims, an employer may find itself defending claims against the same employee in two separate forums, i.e., in both arbitration and in court. The Act also does not have any provisions limiting "runaway" juries from awarding excessive damages to prevailing plaintiffs.

If you have questions about your organization's use of arbitration agreements for employment-related claims, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.KutakRock.com.