



The Future of Arbitration:

Analyzing federal legislation precluding arbitration of sexual harassment claims

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Seyfarth Shaw LLP

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Noah A. Finkel

Partner
Chicago

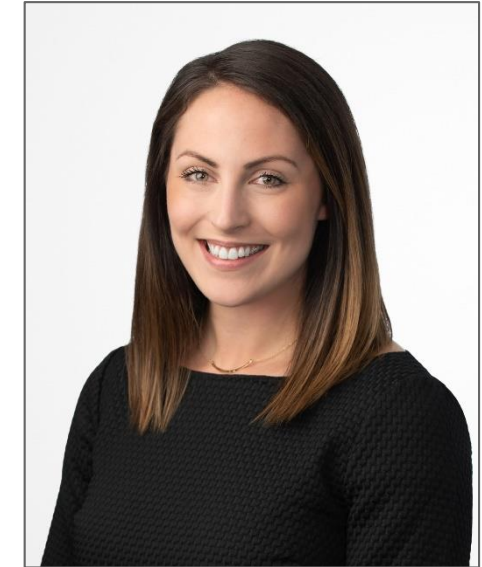
nfinkel@seyfarth.com



David S. Baffa

Partner
Chicago

dbaffa@seyfarth.com



Molly C. Mooney

Associate
Boston

mmooney@seyfarth.com

Participant Poll



What is the *primary* reason your organization has an arbitration program?

- a) Avoid class and collective actions
- b) No jury and minimize the risk of runaway verdict
- c) Maintain the confidentiality of proceedings
- d) Minimize cost and cycle time
- e) My organization does not have an arbitration program

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445)

- H.R. 4445 was passed by the House of Representatives on February 7, 2022, and passed by the Senate on February 10, 2022
- President Biden has expressed support for the legislation, so it is expected that he will sign the bill into law very soon.

February 01, 2022
(House Rules)

STATEMENT OF ADMINISTRATION POLICY
H.R. 4445 – Ending Forced Arbitration of Sexual Assault and Sexual Harassment
Act of 2021
(Rep. Bustos, D-IL, and 25 cosponsors)

The Administration supports House passage of H.R. 4445, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. This bipartisan, bicameral legislation empowers survivors of sexual assault and sexual harassment by giving them a choice to go to court instead of being forced into arbitration.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445)

- H.R. 4445 modifies the FAA as follows:
 - **Permits any person alleging sexual harassment or sexual abuse to invalidate an arbitration agreement or class/collective action waiver that otherwise would require the sexual harassment/sexual abuse claim to be arbitrated.**
 - Permits the named representative of a class or collective action bringing sexual harassment or sexual assault claims to **invalidate an arbitration agreement or class/collective action waiver** (*the named representative can invalidate agreements of other potential class/collective members*).
 - In the event that a party contests the application of H.R. 4445 to a dispute or claim, the bill provides that a court applying federal law will determine the applicability of H.R. 4445, not an arbitrator.

How did we get here?

Franken Amendment:

Prohibits government departments and agencies from using Department of Defense appropriations for any contract in excess of \$1 million unless the contractor agrees not to require its employees to sign arbitration agreements and to take any action to enforce arbitration of claims under Title VII of the Civil Rights Act of 1964 or tort claims related to or arising out of sexual assault or harassment.

The #MeToo Movement

- In recent years, the #MeToo movement placed mandatory arbitration of sexual harassment and sexual assault claims under a spotlight once again
 - Many states took action to prevent mandatory arbitration of such claims (and others), but many of those laws have been found to be preempted by the Federal Arbitration Act.
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- **California.** AB51 (enacted in 2019) prohibits employers from requiring employees to arbitrate claims arising under the CA Fair Employment and Housing Act and related employment statutes (and has been the subject of vigorous litigation and appeals).
 - **New Jersey.** Amended its anti-discrimination statute in 2019 to void “any provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment,” as against public policy. Found to be preempted by the FAA.
 - **Washington.** Employers are prohibited from requiring employees to waive their right to publicly pursue a cause of action in any contract or employment agreement for all claims under the Washington Law Against Discrimination, including discrimination, hostile work environment, and retaliation claims.
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- **New York.** In 2018, New York prohibited employers from requiring employees to arbitrate sexual harassment claims. The state amended the law in 2019 to prohibit mandatory arbitration agreements for all discrimination claims. Found to be preempted by the FAA.
 - **Maryland.** Passed a 2018 law that that “any provision in an employment contract, policy, or agreement” that waives any “substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment” is null and void.
 - **Vermont.** Prohibits employers from requiring employees to sign an agreement or waiver that prohibits, prevents, or restricts the employee or prospective employee from opposing, disclosing, reporting, or participating in an investigation of sexual harassment.

Applicability of H.R. 4445

- H.R. 4445 applies to any “**dispute or claim that arises or accrues on or after the date of enactment**” of the Act.
- If parties to an arbitration agreement are already in arbitration, that arbitration will not be affected by H.R. 4445.
- Conduct alleged to constitute sexual harassment or sexual assault that occurs after enactment cannot be subject to mandatory arbitration regardless of what agreements may already be in place.

- H.R. 4445 states:
 - “no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to **a case** which is filed under Federal, Tribal or State law and relates to the sexual assault dispute or the sexual harassment dispute”

Applicability of H.R. 4445 to Other Claims

Practical Impact of H.R. 4445 – What Now?

- If you have an arbitration program or executive agreements containing arbitration provisions what should you do now?
 - Amend?
 - Leave as is?
 - Revisit the scope and purpose of arbitration for your organization?

Are Arbitration Programs/Class Waivers Worth it in Light of H.R. 4445?

Arbitration Pros and Cons

Pros

- **Can still arbitrate a variety of employment disputes, but most importantly wage and hour claims which pose the greatest risk of class/collective action lawsuits**
- No jury trials for individual disputes
- Private, but not necessarily confidential proceedings
- Possible limitations on scope of discovery
- When paired with robust ADR makes successful union organizing less likely, can be positive way to resolve disputes efficiently
- Lower average awards (verdicts)
- Usually shorter cycle time than court
- Lower average settlements (no jury trial leverage)
- Lower total fees through hearing versus through trial

Cons

- H.R. 4445 leaves uncertainty as to how complaints alleging sexual harassment and assault claims along with others will be handled
- Must still deal with administrative and agency charges
- Arbitrators often less predictable than judges
- Easier to initiate arbitration than lawsuit – may see more claims
- Higher administrative and arbitrator fees than court
- Additional attorneys' fees incurred to compel arbitration
- Program implementation costs and resources
- Possible employee perception of takeaway
- Summary judgment is less likely (but not impossible) in arbitration
- Possible protracted legal challenge in handful of states if refuse to hire applicant who declines to sign mandatory agreement

Possible Consideration – Wage Hour Only Arbitration

- Consider a wage-hour only class action waiver/arbitration program
 - Keeps garden variety employment discrimination claims in court (no arbitration costs, predictable outcomes, summary judgment more likely)
 - Avoids political, cultural and legislative headwinds against arbitration of sexual and other harassment claims
 - Vast bulk of class/collective action experience are wage-hour cases
 - Efficient way to resolve individual claims
- Remaining downsides
 - No help against DOL lawsuits or PAGA claims (to be discussed in Part 2 of the Future of Arbitration webinar series)
 - Growing risk of “mass arbitration” as response to class action waiver (to be discussed in Part 3 of the Future of Arbitration webinar series)



Questions?

**Thank you for
attending**

