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ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT

Lizzie Neuburger

Mandatory arbitration clauses in employment contracts are standard, limiting legal remedies available to employees who are sexual harassment and sexual assault victims and serving as a potential barrier to justice.¹ However, the rise of the 2017 #MeToo movement revealed the prevalence of sexual harassment and assault, triggering lawmakers to focus on legal reforms for these areas in the workplace.²

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (“The Act”).³ The Act was adopted to restore access to justice for victims of sexual harassment and assault who were locked out of the court system.⁴ It provides that no predispute arbitration agreement or joint action waiver is valid or enforceable with respect to a case that is filed under Federal, Tribal, or State law if it relates to a sexual harassment or assault dispute.⁵ The Act applies to any disputes arising after March 3, 2022, as well as existing

¹ Phil Mattingly & Maegan Vazquez, *Biden Signs Bill Overhauling Workplace Sexual Misconduct into Law*, CNN (Mar. 3, 2022, 6:32 PM), <https://www.cnn.com/2022/03/03/politics/biden-sexual-misconduct-bill-signing/index.html> [https://perma.cc/F84M-D4Q4]; Press Release, *EEOC Chair Applauds Passage of Ending Forced Arbitration Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 3, 2022), <https://www.eeoc.gov/newsroom/eeoc-chair-applauds-passage-ending-forced-arbitration-act> [https://perma.cc/CP53-9CML].

² Imre S. Szalai, *#MeToo’s Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J.L. & SOC. POL’Y (forthcoming Spring 2023) (manuscript at 10) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4147981 [https://perma.cc/9T7P-ZB7H]; *Signed into Law: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, MCGUIREWOODS (Mar. 14, 2022), <https://www.mcguirewoods.com/client-resources/Alerts/2022/3/ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act> [https://perma.cc/8H4Q-P2HR].

³ 42 U.S.C. § 402 (2022); David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act*, YALE L. J. F. (June 23, 2022) <https://www.yalelawjournal.org/forum/the-limits-of-the-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act> [https://perma.cc/P3YN-KH7Z].

⁴ *Id.*

⁵ See 42 U.S.C. § 402(a); *Signed into Law: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, *supra* note 2.

arbitration clauses signed before the law's enactment.⁶ Moreover, it only applies if the Federal Arbitration Act ("FAA") applies.⁷ The law's applicability is determined by the court, not an arbitrator, even if an agreement expressly gives an arbitrator such power.⁸

The Act dictates that employees cannot be compelled to arbitrate their claims, allowing victims the opportunity to bring their claims to court.⁹ Some victims will opt to have their day in court, while others may still want their claims privately resolved.¹⁰ Victims opting to litigate their claims may obtain a court decision/order, which could disclose a harasser's identity.¹¹ Forced arbitration "shield[s] perpetrators, silence[s] survivors, enable[s] employers to sweep episodes of sexual assault and harassment under the rug and it [keeps] survivors from knowing if others have experienced the same thing in the same workplace, at the hands of the same person."¹² Secrecy permits serial harassers to avoid accountability, allowing them to repeatedly abuse employees.¹³ Litigation will induce employers to address these claims given the increased likelihood that public lawsuits may result.¹⁴ The risk of public exposure encourages more transparent behavior from employers, deterring sexual harassment and assault from occurring at the outset.¹⁵ Most victims are expected to prefer litigation, where consequences for employers are more public, less

⁶ *Id.*; Tom Spiggle, *Congress Passes New Law Ending Forced Arbitration for Sexual Harassment and Assault Claims*, FORBES (FEB. 16, 2022, 9:46 AM), <https://www.forbes.com/sites/tomspiggle/2022/02/16/congress-passes-new-law-ending-forced-arbitration-for-sexual-harassment-and-assault-claims/?sh=72e8be452289> [<https://perma.cc/PCP6-447U>].

⁷ Horton, *supra* note 3.

⁸ 42 U.S.C. § 402(b); *Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021*, WSHBLAW (Mar. 7, 2022), <https://www.wshblaw.com/news-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment> [<https://perma.cc/C7TY-5MZR>]; Meghan McCaig et al., *Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act Signed into Law*, HOLLAND & KNIGHT (Mar. 16, 2022), <https://www.hklaw.com/en/insights/publications/2022/03/ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act> [<https://perma.cc/D3KP-XDZ6>].

⁹ *Signed into Law: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, *supra* note 2.

¹⁰ Mattingly & Vazquez, *supra* note 1.

¹¹ Press Release, *supra* note 1.

¹² Mattingly & Vazquez, *supra* note 1.

¹³ Press Release, *supra* note 1.

¹⁴ Spiggle, *supra* note 6.

¹⁵ Mattingly & Vazquez, *supra* note 1; Press Release, *supra* note 1.

predictable and potentially more costly.¹⁶ For victims, arbitration is expensive and does not allow appeals.¹⁷ Even when given the choice, some victims may still resort to arbitration in order to retain confidentiality while engaging in a speedier process.¹⁸ This is conceivably because victims do not want to publicly relive traumatic events during litigation.¹⁹ Arbitrators tend to resolve disputes faster than courts do, lowering the amount of time and resources incurred by both parties.²⁰ Not to mention, many courts are congested, so trials often do not occur until years after an action is commenced.²¹

The Act's broad language may pose problems for employers. If an employee brings a sexual misconduct claim attached to an unrelated claim, how should the matter proceed? It entirely depends on how the court interprets the law.²² The Act stipulates that arbitration clauses and joint action waivers cannot be enforced for sexual misconduct "cases", not "claims", inviting different interpretations on how to address lawsuits with multiple claims.²³ Employers must prepare to argue for severing unrelated claims from sexual harassment or assault claims before moving to compel arbitrations.²⁴ Meanwhile, victims filing suit will likely argue that the Act's use of the word "case" renders the Act applicable to all claims in the case.²⁵ If this argument succeeds,

¹⁶ *Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021*, *supra* note 8.

¹⁷ Mattingly & Vazquez, *supra* note 1.

¹⁸ Samuel Estreicher et al., *Open Questions After Enactment of the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act*, N.Y. L.J. (June 2, 2022, 12:00 PM), <https://www.law.com/newyorklawjournal/2022/06/02/open-questions-after-enactment-of-the-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act/> [https://perma.cc/XA7V-MX6G].

¹⁹ *Id.*

²⁰ Nicholas J. Pappas, *Pros & Cons of Arbitration After Recent FAA Amendments*, N.Y. L.J. (Apr. 5, 2022, 12:00 PM), <https://www.law.com/newyorklawjournal/2022/04/05/pros-and-cons-of-arbitration-after-recent-faa-amendments/> [https://perma.cc/CX8L-ABYQ].

²¹ *Id.*

²² Francis Boustany, *ANALYSIS: #MeToo Law Changes Arbitration Landscape for Employers (CORRECTED)*, BLOOMBERG (Mar. 31, 2022, 5:00 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-metoo-law-changes-arbitration-landscape-for-employers> [https://perma.cc/G8RE-DRV7].

²³ *Id.*; See 42 U.S.C. § 402(a).

²⁴ *Signed into Law: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, *supra* note 2.

²⁵ McCaig et al., *supra* note 8.

employers may face many more lawsuits and potentially on a broader range of claims.²⁶ Employers must also revise their arbitration agreements to indicate how claims exempted under the Act will be handled, ensuring that their language comports with the Act. If employers neglect to exclude cases related to sexual harassment and assault claims,²⁷ employees could theoretically begin arbitration, but at the eleventh hour, evade arbitration and commence a judicial action equipped with information gathered in the terminated arbitration process.²⁸

Overall, the Act's benefits to victims outweigh the risks to employers. While victims have the option to litigate their claims, the decision to arbitrate is always available. The fact that potential litigation will lead to greater publicity of these claims should only motivate businesses to strive for change by taking additional measures to prevent sexual misconduct. The Act does not affect otherwise valid arbitration agreements for claims that are unrelated to sexual harassment and sexual assault. Employers can also implement procedures for offering employees the opportunity to opt into arbitration after their claims accrue; these types of agreements remain valid even for sexual harassment and sexual assault claims.²⁹ This law only applies to sexual misconduct claims, not discrimination based on any other category.³⁰ However, this could be the catalyst for broader legislative action, eventually limiting mandatory arbitration in other areas like race and gender discrimination, wage theft, and unfair labor practices.³¹ To the extent that exclusions apply to "any case" that "relates to" such claims, the exceptions could swallow the rule, rendering predispute agreements and class action waivers old news.³²

²⁶ Boustany, *supra* note 22.

²⁷ Pappas, *supra* note 20.

²⁸ *Id.*

²⁹ Estreicher et al., *supra* note 18.

³⁰ Allen Smith, J.D., *Arbitration Remains an Option in Sexual-Harassment Cases*, SHRM (Apr. 18, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/arbitration-option-harassment-cases.aspx> [<https://perma.cc/SC33-ZCZ4>].

³¹ Estreicher et al., *supra* note 18.

³² Estreicher et al., *supra* note 18.