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Congress Implements Restrictions on Employment Agreements That Require Arbitration of Sexual Assault or Harassment Claims

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In what one Member of Congress described as “the most significant labor legislation of this century,” Congress just passed a bill that would allow employees to avoid enforcement of any pre-dispute agreements that require employees to arbitrate sexual assault or harassment claims, which President Biden seems prepared to sign into law. While there have been several unsuccessful attempts over the years to pass such a law, this bill appears to be headed for enactment.

On Monday, February 7, the U.S. House of Representatives passed HR 4445, titled the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,” by a vote of 335 to 97, and the Senate just passed it by voice vote yesterday morning. The bill renders unenforceable with respect to sexual assault or harassment claims at the employee’s discretion any predispute arbitration agreement that requires employees to arbitrate disputes involving nonconsensual and/or unwanted sexual acts or contact, advances, physical contact that is sexual in nature, sexual attention, sexual comments and propositions for sexual activity, conditioning employment benefits on sexual activity, or retaliation for rejecting unwanted sexual attention. This limitation would cover any agreement involving such conduct regardless of whether the claims at issue arise under federal, state, local, or tribal law. For context, this bill expands upon the laws of certain states, such as New York, which bar the forced arbitration of sexual assault and harassment claims, as well as the federal Franken Amendment, which does the same for federal contractors under certain circumstances.

In addition, HR 4445 would render unenforceable, again at the employee’s discretion and with respect to the above claims, predispute joint-action waivers that bar employees from participating in joint, class, or collective actions concerning sexual assault or harassment claims brought in a judicial, arbitral, administrative, or any other forum. This limitation would apply to such waivers found in arbitration agreements, as well as to waivers found elsewhere in other employment agreements. The bill would also explicitly require courts, rather than arbitrators, to determine both the applicability of HR 4445 to a given arbitration agreement and the validity and enforceability of any agreement to which the bill applies, regardless of whether the agreement at issue delegates such authority to an arbitrator.

Significantly, the bill specifies that it will not apply retroactively to any claims that arose or accrued prior to its enactment. The bill also gives potential plaintiffs the option to pursue arbitration if they so elect.

As previewed above, in a Statement of Administration Policy issued on February 1, the White House stated that it supports the bill’s passage, and that it looked forward to “broader legislation” to address “other forced arbitration matters, including arbitration of claims regarding discrimination on the basis of race, wage theft, and unfair labor

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practices." Otherwise stated, HR 4445 will soon be law, and might well be a harbinger of other changes to come relating to arbitration agreements in other contexts.

Given its significance, it is likely that these new requirements will be litigated in the near future, which could bring some clarity regarding the precise scope of this bill. As always, Gibson Dunn attorneys are available to answer any questions you may have regarding HR 4445, including but not limited to how it might relate to your company's existing arbitration agreements.

The following Gibson Dunn lawyers contributed to this client update: Jason C. Schwartz, Katherine V.A. Smith, Joshua S. Lipshutz, Jesse A. Cripps, Theane Evangelis, Michael Holecek, Gabrielle Levin, Danielle J. Moss, Harris M. Mufson, Tiffany Phan, Hayley Fritchie, and Jacob Rierson.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment or Class Actions practice groups, or the following authors:

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