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# No more arbitration for sexual harassment

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Arbitration is an alternative method for resolving legal disputes: instead of a judge and a jury in court, the parties select a private Arbitrator, who makes a binding and final decision about the dispute.

While arbitration began as a process used to resolve business disputes between companies, corporations have begun inserting arbitration clauses in the fine print of most consumer contracts[1] (for example, the terms and conditions you click through when shopping online for a product or service), effectively denying individuals the right to a day in court when challenging illegal practices.

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Companies have also started adding these clauses to employment contracts and agreements.[2] Arbitration between a corporation and a person is commonly referred to as "forced arbitration," because individual buyers and employment applicants have no real bargaining power: even if you catch and understand the arbitration clause in your contract, are you prepared to go without phone service (for example) or a job if you don't agree to it?

Arbitration is not a uniform process, the rules governing the process are up to the arbitrator, there is no requirement to create a record of the proceeding, and there is no appeal process. Arbitrators are usually paid for their services by the corporation (who will hire them again if they are pleased with the outcome).

Because of the troublesome secretive nature of arbitration proceedings (court proceedings are open to the public) and the slant in favor of employers baked into the arbitration system, employee advocates have long sought to limit or eliminate entirely the forced arbitration of employment discrimination and retaliation claims.

The Ending Forced Arbitration of Sexual Assault and Harassment Act, which bars the forced arbitration of disputes involving workplace sexual harassment or sexual assault, is an important step forward for employee rights. On February 10, 2022, Congress passed the bipartisan legislation. President Biden signed the bill into law on March 3.

Arbitration is statistically less favorable to employees than court; employees are more likely to lose in arbitration than in court, and even when they do prevail in arbitration, their damages are likely to be significantly lower.[3]

Additionally, the secretive, non-public nature of arbitration proceedings hinders the ability to identify serial harassers and employers with a pattern of tolerating discrimination, a symptom of the process that came under increased scrutiny with respect to sexual harassment claims because of the Me Too movement. Gretchen Carlson, whose lawsuit against Fox News and Roger Ailes brought attention[4] to precisely these problems with forced arbitration, was present at the press conference celebrating the passage of the Act.

The law has some retroactive effect, applying to arbitration agreements entered into prior to the passage of the law, as long as the dispute at issue arose after the law's enactment. The text of the law itself does not invalidate entire agreements simply because they contain a provision regarding arbitration of sexual harassment claims, but the question of whether an entire agreement is void due to a single unenforceable provision will be decided as a matter of state contract law.

The bill grants employees bringing claims concerning sexual harassment or sexual assault the right to pursue their claims in court, whether individually or on behalf of a class, even if they signed a contract with an arbitration clause. The prohibition on arbitration applies to any "case which ... relates to the sexual assault dispute or the sexual harassment dispute."

The law dictates that courts — not arbitrators — will decide whether a case is related to sexual harassment or sexual assault and therefore comes under the protection of the act, notwithstanding

any language in the arbitration agreement that delegates to arbitrators the power to decide if a claim is subject to arbitration.

It remains to be seen how courts will interpret the scope of what constitutes a non-arbitrable case that "relates" to a sexual assault or sexual harassment issue. Undoubtedly employers will seek to keep the scope of what is excluded from arbitration as narrow as possible.

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However, the text of the bill leaves open the possibility that if an employee files a lawsuit regarding workplace sexual assault or sexual harassment, related claims arising out of the same or overlapping facts that are part of the same lawsuit will also be excluded from arbitration.

For example, an employee who files a complaint alleging both that she was sexually harassed and then retaliated against for reporting or opposing the sexual harassment may be able to pursue both the sex-discrimination and the retaliation claims in court because they are related, even if the employer's arbitration provisions would otherwise cover retaliation claims.

Despite the limited nature of the Act and the questions that remain regarding its scope, passage of the Act was largely celebrated[5] by champions of employee rights, although a desire to eliminate forced arbitration of any and all employment disputes endures.

## Notes

[1] https://nyti.ms/3MBJJ0K

[2] https://nyti.ms/3xioXe4

[3] https://bit.ly/3J2ywnM

[4] https://nym.ag/3wciq7F

[5] https://bit.ly/3MFme6P

## About the author

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