

FEBRUARY 24, 2022 | DISCRIMINATION, HARASSMENT & RETALIATION

Congress Bans Private Arbitration for Sexual Assault and Harassment Cases

On February 10, 2022, the Senate passed legislation ending the use of forced arbitration in lawsuits involving sexual assault and harassment claims. The bill – the [Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act](#) – passed the Senate by a voice vote just days after it passed the House by a vote of 335 to 97. The legislation is now before President Biden, and it is expected that he will sign the bill soon.



This law has been in dispute along partisan lines for nearly a decade, as Republican lawmakers had traditionally opposed the legislation. However, the #MeToo movement, which included claims against some members of Congress in the past, paved the way for lawmakers to find common ground and resolve the partisan gridlock.

The law will take effect immediately upon President Biden's signature, and it will apply to any and all claims of sexual assault or harassment, as defined under federal, state, or tribal law, that arise or accrue after its enactment. Employers that currently use arbitration clauses to manage sexual assault and harassment claims should take steps to review and amend their practices accordingly and prepare for the potential that current and past allegations of sexual misconduct will become public.

Employers will be prohibited from implementing policies or contracts that funnel assault and harassment cases into private arbitration – meaning claimants have the right to file lawsuits in federal, state, or tribal court, which is open to the public. The law also prohibits employers from using joint-action waivers prohibiting class actions. Therefore, parties are now able to collectively file class action lawsuits alleging widespread sexual assault and/or harassment.

The law raises several new considerations for employers about how to manage claims of sexual assault or harassment. The public nature of filing claims in court elevates the risk of reputational harm for employers, as well as increases liability risk due to the potential for a proceeding before a jury. Due to the elimination of private arbitration for these claims and the increased risks, plaintiffs now have more leverage in settlement negotiations.

As discussed in further detail below, to eliminate these risks, employers should carefully analyze their workplace culture to ensure that it promotes a collegial environment and take steps to implement and enforce policies that strictly prohibit workplace harassment and assault. Existing employment contracts should be reviewed to determine whether any revisions need to be made, and employers should take steps to revise their standard

employment contracts moving forward. Finally, employers should review their employment and sexual harassment policies to ensure they are taking steps to prevent claims by providing training to leadership, management, supervisors, and employees on these issues.

Management, Leadership, and Workplace Culture

The importance of organizational culture in combatting sexual harassment cannot be understated, and it is imperative that employers foster a collegial environment that strictly enforces policies against workplace harassment. The cornerstone to a positive workplace environment for all employees is a company's culture. The more congenial and inclusive a company's work environment, the more productive its employees. A positive workplace culture is most effectively established through a top-down approach, as the behavior and actions of a company's leadership should reflect the ideals of the company and serve as a guidepost for employees to follow. Fostering strong leadership can translate their influence into employee productivity and enable employees' success. Management should be trained to immediately respond to complaints when they are received, and should be cautioned against any appearance of retaliatory behavior in response.

Implement Effective Workplace Policies

Creating a positive workplace culture that is led and staffed by like-minded individuals can be further reinforced by strong policies and employee training. The content of discrimination and harassment policies should clearly explain the kinds of conduct that are prohibited, and explicitly announce that the company does not permit and will not tolerate harassment or discrimination based on sex, race, color, religion, national origin, age, disability, citizenship, familial status, pregnancy, veteran status, genetic information and/or any other legally protected status provided under applicable state and local law. To further explain how the policy operates, employers should include definitions and examples of harassment, an explanation of an employee's right to a workplace free of discrimination and harassment, a clear statement that the company has zero tolerance for such conduct, and an anti-retaliation provision related to reports of discrimination or harassment.

These policies should also clearly explain the complaint procedure and an employee's duty to report harassment to the appropriate supervisor, management representative, Human Resource Officer, or whoever is responsible for handling employee complaints. The reporting procedure should encourage employees to report complaints promptly, and there should be no obstacles to the reporting process. It is imperative that employers delineate clear instructions on how to report alleged discrimination or harassment, provide several ways in which employees can make a report of harassment (e.g., if your harasser is your supervisor, contact Human Resources directly to complain), and reassure employees that the company will investigate the complaint diligently.

Harassment Training and Enforcing Harassment Policies

Finally, management and employee education on issues of harassment is essential to fostering a desirable workplace culture. Placing a policy in a handbook is a necessary first step to disseminate anti-discrimination and harassment policies and limit the potential liability, but policies are only effective to the extent that they are followed by employees and enforced by the employer. Therefore, it is equally important to provide appropriate training to employees and supervisors on the company's discrimination and harassment policies and the reporting procedures.

Training should include a detailed review of the employer's anti-discrimination and harassment policy, the company's expectations and workplace culture, and the procedures to report complaints of discrimination or harassment. Leadership, management, and employees need to understand their role in monitoring workplace behavior, upholding company values and workplace culture, and the avenues to address any instance of harassment or improper workplace conduct.

The best written harassment policy and complaint procedure is only effective if it is enforced and followed. Employers must ensure that the policies and procedures set forth in the employee handbook are consistently enforced throughout the company. Documenting an investigation, outcome, and any corrective action is important to demonstrate that the policy is followed, which can help mitigate potential liability in a civil lawsuit. If the conclusion of the investigation is that harassing and/or discriminating conduct occurred, appropriate discipline should be applied to the offending party that aligns with the company policy.

Conclusion

The #MeToo movement has drastically altered the employment landscape and highlighted the reality that sexual harassment is still a major problem in the modern-day workplace, and Congress has now taken steps to address this issue. Employers need to provide employees the appropriate channels to report harassment, free of retaliation, and make a strong commitment to upholding a zero-tolerance policy. Taking preventative measures to avoid exposure for claims of discrimination and harassment, including the development of zero-tolerance policies, education, and enforcement, is a prudent investment, especially when compared to the the costs of defending sexual harassment lawsuits in a public forum and the potential economic and reputational damage that could occur.