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Senate Approves Bill Outlawing Mandatory Arbitration for Sex Harassment Claims

In a surprising move by what has otherwise been a polarized Congress, the U.S. Senate approved the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (the "Bill"). As indicated by the title, the Bill (once signed into law) will end what has been a standard practice of employers and employees agreeing to arbitrate sexual harassment or sexual assault arising from conduct in the workplace. The Bill gives ***the employee the choice*** to go to court for these specific claims despite the existence of an overarching agreement to arbitrate all claims.

The Role of Arbitration in Workplace Disputes. Mandatory arbitration of employment claims has become a popular dispute resolution vehicle for America's workplaces. Employers will typically include an arbitration agreement in the employee's new hire packet requiring the employee to arbitrate any claims arising out of their employment. Generally, courts favor arbitration and are inclined to enforce mutual agreements between employees and employers. Many private sector employers prefer arbitration and have utilized arbitration services to facilitate and adjudicate disputes with their current and former employees. In recent years, however, legislators on each end of the aisle have been attuned to the societal focus on mistreatment tied to sex and the desire for a growing number of their constituents to bring to light certain egregious practices.

What the Senate's Bill Says. The Bill looks to further the goal of having juries, rather than arbitrators, decide sexual harassment claims by putting an end to mandatory pre-dispute arbitration agreements related to sexual assault or sexual harassment. In doing so, the Bill prohibits the blanket coverage many arbitrations agreements have that include "all claims" arising from an employee's employment.

What Does this Mean for Employers? Broadly, the Bill is a chipping away at existing arbitration agreements, although narrowly as it pertains to claims of sexual assault and sexual harassment. It, however, does not prohibit *employees* from choosing to arbitrate their claims for sexual assault and sexual harassment.

Instead, it provides employees the choice and prohibits employers and employees from contracting out of that choice. Once signed into law, employers would be wise to examine their existing arbitration agreements. Should you have any questions about how the Bill affects your existing arbitration programs or future ones you are looking to implement, please contact any of Bell Nunnally's Labor, Employment and Benefits Group.

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