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Sexual Harassment Complainants Guaranteed Their Day in Court – Employers Beware the Implications

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Since the onset of the #MeToo movement, allegations of sexual harassment in the workplace are frequently spotlighted in the news and on social media. Still, many claims between employers and employees are resolved outside of the public eye, through mandatory arbitration. New legislation passed this month by the U.S. House and Senate, pending President Biden's signature, will likely impact the #MeToo movement in a way that many employers have not yet experienced. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, prohibits the forced arbitration of sexual assault and harassment claims and opens the door for such claims to be brought in court, regardless of whether the complainant is otherwise bound by a mandatory arbitration provision. While the bill is not limited to the employment context, and more broadly applies to all victims of sexual assault and/or harassment, the bill is certain to impact employers in a significant way.

Historically, employees who agreed to mandatory arbitration of disputes as a condition of employment could be compelled to bring their claims for sexual harassment through the private arbitration process, which generally allows for the proceeding to remain confidential. As such, mandatory arbitration has long

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served as a tool to help shield employers from negative exposure associated with such claims. Now, with the passing of H.R. 4445, employees will have the option of either filing a civil lawsuit or pursuing their claims through the arbitration process, even if they have otherwise agreed to participate in mandatory arbitration. Notably, H.R. 4445 will apply retroactively, meaning that as regards claims for sexual harassment, any existing mandatory arbitration provisions will be voidable once the bill becomes law.

Employers who have traditionally relied on arbitration should be aware of the impact the bill may have on their business, should employees regularly elect to pursue their claims in a civil lawsuit. For instance, if an employer becomes the subject of multiple sexual harassment lawsuits by multiple employees, that information and the details of those lawsuits will be accessible to the public and could result in negative exposure for the company.

Employers should take care to ensure that their anti-harassment policies are up to date and that they respond promptly and thoroughly to any allegations of sexual harassment in the workplace. While such allegations should always be taken seriously, it is important for employers to consider the implications of H.R. 4445 and how public exposure of allegations could affect their business. Should you need any guidance on your current sexual harassment policy or the implementation of same, contact your Akerman attorney.
