

You Can't Arbitrate That!

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Making an agreement to arbitrate an issue may be a great way to limit expense, save time, and preserve the confidential nature of the dispute. I often consider these when I draft contracts like severance agreements, non-compete agreements, and employment agreements. This has been a tool to keep information that might damage a company's reputation out of the press. However, a new federal law says that employers can't force employees to arbitrate claims about workplace sexual harassment or assault, even if they agreed in writing. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act had widespread bipartisan support.

Employees may now choose (regardless of what they signed) how to bring any sexual harassment or assault claims against a company – in court or through arbitration. They also can't be forced to waive their rights to join others in a lawsuit claiming sexual harassment or assault, regardless of what they signed.

Note that some states also have laws forbidding employers from requiring an employee who's alleged sexual harassment or assault to sign a non-disclosure agreement. This type of law is pending in a number of states, too. There's obviously a strong sentiment among lawmakers to discourage an organization's ability to keep such claims private.

For those reasons, employers should consider updating anti-harassment policies and training programs (which are legally required in some states). Employers should also review and revise employment agreements that contain mandatory arbitration clauses and/or joint-action waivers – or just lower expectations of privacy.