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PERSPECTIVE

New law helps sexual harassment, assault victims seek justice

By John D. Winer

Most companies nationwide have implemented mandatory arbitration agreements requiring all employment-related claims to be arbitrated rather than go to a jury trial. These agreements are constitutional and enforceable under the Federal Arbitration Act. However, these secret deals have been criticized in the wake of the #MeToo movement.

A federal law signed by President Joe Biden on March 3 is changing the way sexual harassment and sexual assault cases are handled in the workplace and employment law, helping victims get their day in court. Almost all forced arbitration provisions contain confidentiality clauses that require employees to keep silent about their experience. By requiring workers to arbitrate behind closed doors, including those who have experienced workplace sexual harassment and assault, harassers can get away without accountability for their actions.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 will allow people who have been bound by arbitration clauses to take their harassers to court. The act amends the FAA to permit an employee alleging sexual harassment or assault to ban a "pre-dispute arbitration agreement" or "class-action waiver."

According to the legislation, if an employee signs an agreement to arbitrate employment-related claims and later experiences sexual assault or harassment, the employee now has the option to throw out that arbitration agreement and pursue their claims in court. It is important to note that the bill only applies to "pre-dispute" arbitration provisions and waivers and doesn't affect agreements entered after a dispute has arisen. The bill is also limited to sexual harassment and assault claims and doesn't affect other employment- related claims.

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Before passing the new law, which is effective immediately, employers and companies were able to enforce pre-dispute arbitration agreements with employees concerning sexual assault and sexual harassment claims regardless of whether employees preferred to litigate their claims in court. Victims who had signed an arbitration agreement with their employers were left with no other option but to bring their claims to a private arbitrator, who typically decided what action would be taken. Advocacy groups stressed that certain groups, including those who had suffered sexual harassment or misconduct in the workplace, had a huge disadvantage. Most of these arbitrators are often picked and paid for by the defendant employer.

Mandatory arbitration agreements are frequently used in the United States, with the Economic Policy Institute estimating that more than 55% of the American workforce is now subject to mandatory arbitration agreements. Many employees may be unaware that they have forfeited the right to sue, as companies bury these terms in the fine print of the agreements. It's not until an incident happens and they want to file a legal claim that they realize they cannot do so.

Victims' rights advocates have long claimed that arbitration of harassment and assault claims not only helps companies cover up employee misconduct but also discourages other people from coming forward with sexual harassment-related claims and keeps them in the shadows. It does nothing to stop workplace harassment from occurring again, as reported by former employees who have experienced such crimes.

Last year, the New York Times reported on the case of four former employees of the medical-device technology company Afiniti shared accounts of sexual harassment and abuse before the House Judiciary Committee, claiming they were unable to talk because they had signed contracts with "forced arbitration" clauses. The testimony came as the committee debated enforcing legislation that would eliminate forced arbitration related to these types of claims.

Not only did the new law bring a significant change to employment law in how it helped victims of sexual harassment and assault have their voice heard, but it also forced companies to improve the way they handle sexual harassment and assault claims. Our firm, which represents victims of workplace sexual harassment, has seen how these employers are the

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only ones that benefit from forced arbitration clauses and when it comes to matters of sexual harassment and assault, employees should not be the ones paying the price by being silenced.

Cases of all kinds in front of arbitrators, particularly sexual harassment cases, often result in far lower awards than cases in front of juries. This is particularly true for general damage and punitive damage awards and is why employers favor arbitration. Since most arbitrators want the repeat business of defendants, they are hesitant to make a significant arbitration award that will result in their being immediately blacklisted by defendants and defense counsel. Further, arbitrators, for the most part, are far more desensitized than jurors to emotional distress damages and are much less likely to be outraged by the conduct of a company in any one case, since they have seen horrible conduct in case after case, and thus, far less likely to make punitive damage awards.

The fact that arbitrators issue lower damage awards than jurors is well known within the litigation/mediation industry. This is not a well-kept secret. All mediators, whether or not they are in favor of arbitrations, will warn plaintiff attorneys that their cases have less value in arbitration than they are at trial.

Finally, the idea that arbitrations are more time and cost-effective than jury trials has turned out to be absolutely false. It regularly takes more time to complete an arbitration than a civil jury trial. It regularly takes longer from the date of filing for arbitration to begin rather than a trial. We have all had cases where the arbitration, itself, can drag out for over a year, and arbitrators delay making awards. We even had one case in which the arbitrator died. While we were waiting for an award, we had to do the arbitration again, including testimony and entering evidence. It is possible that we will see an influx of sexual harassment-related lawsuits in the coming months, and we look forward to seeing what other changes this legislation will bring to employment law.

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