

ANDERSON KILL

Employment Law Insider Alert

The Expansion of Federal and New York State Sexual Harassment and Assault Rights for Employees



By **Bennett Pine** and
Jamie O'Neill

Key points:

Federal law signed in March 2022 bars enforcement of mandatory predispute arbitration clauses in sexual harassment or assault claims.

The law bans enforcement of mandatory arbitration provisions but not their continued inclusion in employment contracts.

New York enacts a package of new laws enhancing the rights and protections of NYS employees with sexual harassment claims and establishing a hotline for complaints of workplace sexual harassment.

In March 2022, President Joseph Biden signed into law [H.R. 4445](#), the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the “Act”) which, at its core, restricts employers from forcing workplace sexual harassment or assault claims into arbitration. That same month, New York Governor Kathy Hochul also signed into law legislation aiming at expanding the rights of employees dealing with sexual assault or harassment.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act: Explained

The Act amends the Federal Arbitration Act (“FAA”), which provides the legislative framework for the enforcement of arbitration agreements in the United States. The FAA provides that an agreement or contract to submit disputes to arbitration (opting for a private dispute resolution procedure instead of going to court) is generally valid, irrevocable, and enforceable. In forced arbitration, an employee who has signed an employment contract containing a mandatory arbitration provision, who is in a dispute with their employer, cannot take their case to court and instead must go through the dispute resolution process of arbitration



– the principal characteristic of which is that the process is “private.”

Mandatory arbitration provisions have been under fire since the beginning of the #MeToo movement, with activists arguing that such clauses silence victims and prevent them from publicly airing their experiences with their employers. Instead of being able to go to the public forum of the court, employees in disputes with their employers over alleged sexual harassment or assault would be forced to privately resolve the issue.

The Act recently signed by President Biden bars the enforcement of predispute mandatory arbitration provisions from cases alleging claims of sexual assault and/or sexual harassment. This carve-out

applies to two types of agreements – predispute arbitration agreements and predispute joint-action waivers – to the extent that they govern sexual assault and sexual harassment disputes.

- A predispute arbitration agreement is an agreement to arbitrate that is entered into before a sexual assault or sexual harassment dispute arises. They can be standalone agreements or provisions within broader agreements, and can be signed at the beginning of or during employment.
- A predispute joint-action waiver is an agreement that is made before a dispute arises, pursuant to which one of the parties (typically the employee) waives the right to participate in, or is prohibited from participating in, any joint, class, or collective action involving a sexual assault or sexual harassment dispute.

Specifically, the Act does not invalidate existing predispute agreements. Rather, it gives employees alleging sexual assault or sexual harassment the option to invalidate them and it bars employers from enforcing them. Additionally, the Act only applies to predispute agreements and waivers, so if an employer and an employee enter into an agreement to arbitrate after the claim is alleged (“arises”), that agreement can still be enforced. Finally, the Act only applies to claims and disputes that arise or accrue on or after March 3, 2022. Employers may continue to enforce existing predispute agreements that arose or accrued prior to that date.

It is of note that the Act provides that “no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable *with respect to a case* which is filed under federal, state, or tribal law and relates to the sexual assault dispute or the sexual harassment dispute.” Thus, it could be argued

by employees that “a case” means that all claims, even ones unrelated to sexual harassment/sexual assault are precluded from mandatory arbitration.

Finally, employers are not required to amend or replace existing predispute arbitration agreements, nor are they required to remove sexual assault or sexual harassment claims from their agreements going forward. Employees can still elect to use these arbitration processes that they agreed to – as some individuals are likely to want to preserve their privacy or achieve a faster resolution of their claims.

Recent New York State Sexual Harassment Rights Legislation

Also in March of 2022, New York Governor Kathy Hochul signed into law a package of legislation aimed at addressing workplace harassment and discrimination. Such legislation includes:

- Bill S.812B/A.2035B (“**S.812B**”): establishes a toll-free confidential hotline for complaints of workplace sexual harassment.
- Bill S.3395B/A.2483B (“**S.3395B**”): includes the State and all public employers as subject to the provisions of the Human Rights Law.
- Bill S.5870/A.7101 (“**S.5780**”): prohibits the release of personnel files as a retaliatory action against employees.

The New York Human Rights Law (“NYHRL”) prohibits discrimination on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability in employment, housing, education, credit, and access to public accommodations. The New York State Division of Human Rights (“DHR”) was created to enforce this law and has the power to prosecute unlawful discriminatory practices and investigate individual complaints.

The New York package of legislation “is largely seen as a rebuke of former Governor Andrew Cuomo.”

This package of legislation is largely seen as a rebuke of former Governor Andrew Cuomo, who resigned following sexual harassment allegations by approximately a dozen former state employees and who is accused of leaking the personnel file of Lindsey Boylan, a former staffer, who publicly accused Cuomo of sexually harassing her, in an effort to discredit her.

S.812B requires that the DHR establish a toll-free confidential hotline for complaints of workplace sexual harassment. The hotline will connect complainants with pro bono attorneys who will “help make them aware of their legal rights and advise them on the specifics of their individualized cases.” The DHR, in conjunction with pro bono legal service organizations, will recruit pro bono attorneys who are experienced with providing assistance in sexual harassment matters. Additionally, employers must include information regarding this new hotline in any materials that employers provide to employees regarding sexual harassment. This hotline is predicted to be up and running on or about July 14, 2022.

S.3395B clarifies that New York State is considered an “employer” of anyone serving in the executive, judiciary, and legislative branches (including the staff of elected officials or judges) and is subject to the provisions of the NYHRL – thus closing a loophole that the definition of “employer” did not include New York State itself and other municipalities/political subdivisions. This legislation ensures that the State will not be able to avoid responsibility for harassment of public employees and that anti-harassment regulations protect both private and public employees.

S.5870 establishes that the release of personnel records to discredit victims of workplace discrimination counts as “retaliatory action” under the NYHRL.

Specifically, it amends New York Executive Law Article 15, Section 296’s definition of “retaliation.” It is now an unlawful discriminatory practice to retaliate or discriminate against someone because they have opposed a discriminatory practice, for filing a complaint, or for testifying or assisting in any proceeding. Following the signing of the legislation, the release of personnel records count as retaliation except where it is necessary to comply with an investigation – meaning an employer may disclose such files if it is in the course of commencing or responding to any civil action, criminal action, or other judicial or administrative proceeding. The legislation also provides additional recourse to victims of unlawful retaliation by allowing them to file a complaint directly with the Attorney General who can commence proceedings in state Supreme Court against the employer.

Such expanding protections on both the federal and state levels are a positive step forward in increasing transparency and accessibility for sexual harassment and sexual assault claims. ▲

BENNETT PINE is a shareholder in Anderson Kill’s New York and Newark offices and is chair of the firm’s employment & labor group. Mr. Pine has broad-based labor and employment law experience and regularly plays a hands-on role offering preventative maintenance advice and counseling to employers in the full range of legal issues affecting the workplace.

bpine@andersonkill.com
(212) 278-1288 (NY)
(973) 642-5006 (Newark)

JAMIE O’NEILL is a student at the Fordham University School of Law and a Summer Associate at Anderson Kill.

joneill@andersonkill.com
(212) 278-1042

***We are
interested in
your feedback
on topics for
future articles
and seminars.
Please email
us.***

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY, Denver, CO, Los Angeles, CA, Newark, NJ, Philadelphia, PA, Stamford, CT, and Washington, D.C.

This publication was prepared by Anderson Kill P.C. to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the authors with any questions. © 2022 Anderson Kill P.C.