



CLIENT ALERT

January 2018

MANDATORY ARBITRATION AGREEMENTS UNDER FIRE (AGAIN): Congress Considers Bill Preventing Forced Arbitration for Sexual Harassment Claims

As we reported in our October 20, 2017 Alert, *Under Fire: Supreme Court to Review Mandatory Employee Class Action Waivers*,¹ mandatory employment arbitration agreements have been the target of significant reform efforts. Currently, the United States Supreme Court is considering the enforceability of arbitration agreements that bar collective or class action suits of work-related claims.² Now, Congress is considering a bill that would outlaw mandatory arbitration agreements that prevent employees from bringing sexual harassment and gender bias claims in court.

Mandatory employment arbitration agreements have been legally enforceable for several decades now.³ Generally, these agreements bar employees from bringing work-related claims, such as a hostile work environment claim resulting from sexual harassment, against employers in court.⁴ Instead, the claims must be arbitrated according to procedures outlined in the

agreements. Employment is typically conditioned on an employee's willingness to sign the agreement.

Mandatory employment arbitration agreements have increasingly become the norm across the United States, with over 55% of employees being subject to such agreements.⁵ In addition to concerns regarding class/collective action rights, employee advocates are now focusing on protections relating to sexual harassment in the workplace.

In 2017, we saw a barrage of sexual harassment allegations against high-profile individuals such as Harvey Weinstein, Matt Lauer, and Sen. Al Franken. The scores of women who have spoken out about their experiences have sparked efforts to expose and reform the cultural standards on appropriate conduct, especially in the workplace. Their efforts have already been met with signs of success: the sexual assault

¹ <http://www.rubinfortunato.com/article/fire-supreme-court-review-mandatory-employee-class-action-waivers/>.

² See *NLRB v. Murphy Oil USA, Inc.* (No. 16-307); *Epic Systems Corporation v. Lewis* (No. 16-285); *Ernst and Young LLP v. Morris* (No. 16-300).

³ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

⁴ Some industries already have rules in place to preserve an employee's right to go to court with certain claims. For example, people associated with

the Financial Industry Regulatory Authority are governed by Rule 13201, which states: "A claim alleging employment discrimination, including sexual harassment, in violation of a statute, is not required to be arbitrated under the Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose."

⁵ See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, *ECON. POL'Y J.*, September 27, 2017, at 1.

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whistleblowers have collectively been named TIME Magazine's Person of the Year, and an entire movement aimed at reform called the #MeToo campaign encourages victims to share their stories.

Now, efforts are being made to affect long-term change through legislation. On December 6, 2017, a bipartisan group of legislators introduced a bill that would prevent employers from enforcing mandatory arbitration agreements for claims of sexual harassment or gender bias in the workplace. The bill, cited as the "Ending Forced Arbitration of Sexual Harassment Act of 2017," is sponsored by Rep. Cheri Bustos (D-Ill.), Sen. Kristen Gillibrand (D-N.Y.), and Sen. Kamala Harris (D-Calif.), with co-sponsorship support from Sen. Lindsey Graham (R-S.C.), Rep. Walter Jones (R-N.C.), and Rep. Elise Stefanik (R-N.Y.).⁶

Former Fox News anchor Gretchen Carlson also has been a strong advocate for the bill. Carlson, who was subject to a mandatory arbitration agreement with Fox News, was able to circumvent her agreement and bring sexual harassment charges in court. She ultimately agreed to a settlement, but has since been outspoken about her belief,

⁶ Similar legislative efforts have been proposed at the state level as well. New York Governor Andrew Cuomo recently announced that he will propose legislation to "prevent public dollars from being used to settle sexual harassment claims against individuals, void forced arbitration policies in employee contracts, and mandate that any companies that do business with the state disclose the number of sexual harassment adjudications and nondisclosure agreements they have executed." See Governor Cuomo Unveils 18th Proposal of 2018 State of the State: Combat Sexual Harassment in the Workplace, [https://www.governor.ny.gov/news/governor-cuomo-unveils-18th-proposal-2018-state-state-combat-](https://www.governor.ny.gov/news/governor-cuomo-unveils-18th-proposal-2018-state-state-combat-sexual-harassment-workplace)

largely based on her own experience, that arbitration agreements serve to protect abusers and silence victims.

As another example of the potential harms caused by arbitration agreements, Rep. Bustos has cited an ongoing dispute involving Sterling Jewelers, Inc. (the parent company of Kay Jewelers and Jared the Galleria of Jewelry) and nearly 70,000 of Sterling's current and former employees. Though the employees did not specifically allege sexual harassment, numerous employees have made declarations rife with examples of highly inappropriate sexual conduct, including "a hot tub orgy, groping at company events and women being recruited to go out to party with managers as if the store workers were hired entertainment."⁷ The problem that this case highlights, according to Bustos, is that the employees were "forced into a secret arbitration process and that meant that their stories would never see the light of day...."⁸ Additionally, the employees were prevented, at least originally, from bringing their claims on a class/collective basis, drawing even more attention to the current litigation before the Supreme Court.⁹ The employees were eventually certified to bring their claims as a class in federal court in 2016, but

[sexual-harassment-workplace](https://www.law360.com/articles/896358/mall-jewelry-giant-ensnared-in-massive-sex-bias-pay-row) (last visited Jan. 3, 2018).

⁷ Kat Greene, Mall Jewelry Giant Ensnared in Massive Sex Bias Pay Row, Law360, Feb. 27, 2017, <https://www.law360.com/articles/896358/mall-jewelry-giant-ensnared-in-massive-sex-bias-pay-row>.

⁸ Vin Gurrieri, New Bill Would Carve Sex Harassment From Arbitration Pacts, Law360, Dec. 6, 2017, https://www.law360.com/employment/articles/992051/new-bill-would-carve-sex-harassment-from-arbitration-pacts?nl_pk=b6ae1052-b7c1-4e1f-b4b5-8f05f23a249b&utm_source=newsletter&utm_medium=email&utm_campaign=employment.

⁹ See supra note 2 and accompanying text.

only after *eight years* of proceeding through arbitration and appeals.¹⁰

Though the proposed bill is in its early stages, it has strong bipartisan support and has been endorsed by Microsoft Corporation, one of the largest corporate employers in the United States. In fact, Microsoft, the first Fortune 100 company to endorse the bill, already has announced that it will be ending its own arbitration requirements for sexual harassment claims. In doing so, Microsoft perhaps sets the stage for other employers to drop their current practice even if the bill does not pass.

Should Congress adopt the bill, it would jeopardize millions of arbitration agreements that require arbitration for sexual harassment claims. Of course, these agreements are already in jeopardy, pending the Supreme Court's decision on whether the agreements violate federal labor law. While the legality of these agreements is currently still intact, the courts and now Congress are considering substantial revisions that would greatly alter the current preference towards arbitration. Accordingly, employers and employees alike should be aware of and pay close attention to these developments, as their rights regarding work-related disputes may quickly change.

¹⁰ See Jock v. Sterling Jewelers Inc., 188 F. Supp. 3d 320 (S.D.N.Y. 2016).