

Calendar No. 169

117TH CONGRESS
1ST SESSION

S. 2342

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

IN THE SENATE OF THE UNITED STATES

JULY 14, 2021

Mrs. GILLIBRAND (for herself, Mr. GRAHAM, Mr. DURBIN, Mr. WHITEHOUSE, Mrs. BLACKBURN, Mr. BLUMENTHAL, Ms. MURKOWSKI, Mrs. FEINSTEIN, Mr. COONS, Mr. KENNEDY, Mr. LEAHY, Mr. BOOKER, Mr. PADILLA, Mr. OSSOFF, Mr. HAWLEY, Ms. HIRONO, Mr. GRASSLEY, and Mrs. CAPITO) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

NOVEMBER 17, 2021

Reported by Mr. DURBIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italie*]

A BILL

To amend title 9 of the United States Code with respect to arbitration of disputes involving sexual assault and sexual harassment.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of
3 2021”.

5 **SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLV-**
6 **ING SEXUAL ASSAULT AND SEXUAL HARASS-**
7 **MENT.**

8 (a) IN GENERAL.—Title 9 of the United States Code
9 is amended by adding at the end the following:

10 **“CHAPTER 4—ARBITRATION OF DISPUTES**
11 **INVOLVING SEXUAL ASSAULT AND**
12 **SEXUAL HARASSMENT**

“Sec.

“401. Definitions.

“402. No validity or enforceability.

13 **“§ 401. Definitions**

14 “In this chapter:

15 “(1) PREDISPUTE ARBITRATION AGREEMENT.—

16 The term ‘predispute arbitration agreement’ means
17 any agreement to arbitrate a dispute that had not
18 yet arisen at the time of the making of the agree-
19 ment.

20 “(2) PREDISPUTE JOINT-ACTION WAIVER.—The
21 term ‘predispute joint-action waiver’ means an
22 agreement, whether or not part of a predispute arbi-
23 tration agreement, that would prohibit, or waive the
24 right of, one of the parties to the agreement to par-

1 participate in a joint, class, or collective action in a ju-
 2 dicial, arbitral, administrative, or other forum, con-
 3 cerning a dispute that has not yet arisen at the time
 4 of the making of the agreement.

5 “(3) SEXUAL ASSAULT DISPUTE.—The term
 6 ‘sexual assault dispute’ means a dispute involving a
 7 nonconsensual sexual act or sexual contact, as such
 8 terms are defined in section 2246 of title 18 or simi-
 9 lar applicable Tribal or State law, including when
 10 the victim lacks capacity to consent.

11 “(4) SEXUAL HARASSMENT DISPUTE.—The
 12 term ‘sexual harassment dispute’ means a dispute
 13 relating to the any of the following conduct directed
 14 at an individual or a group of individuals:

15 “(A) Unwelcome sexual advances.

16 “(B) Unwanted physical contact that is
 17 sexual in nature, including assault.

18 “(C) Unwanted sexual attention, including
 19 unwanted sexual comments and propositions for
 20 sexual activity.

21 “(D) Conditioning professional, edu-
 22 cational, consumer, health care or long-term
 23 care benefits on sexual activity.

24 “(E) Retaliation for rejecting unwanted
 25 sexual attention.

1 **“§ 402. No validity or enforceability**

2 “(a) IN GENERAL.—Except as provided in subsection
3 (e), and notwithstanding any other provision of this title,
4 no predispute arbitration agreement or predispute joint-
5 action waiver shall be valid or enforceable with respect to
6 a case which is filed under Federal, Tribal, or State law
7 and relates to a sexual assault dispute or a sexual harass-
8 ment dispute.

9 “(b) DETERMINATION OF APPLICABILITY.—An issue
10 as to whether this chapter applies with respect to a dispute
11 shall be determined under Federal law. The applicability
12 of this chapter to an agreement to arbitrate and the valid-
13 ity and enforceability of an agreement to which this chap-
14 ter applies shall be determined by a court, rather than
15 an arbitrator, irrespective of whether the party resisting
16 arbitration challenges the arbitration agreement specifi-
17 cally or in conjunction with other terms of the contract
18 containing such agreement, and irrespective of whether
19 the agreement purports to delegate such determinations
20 to an arbitrator.

21 “(c) EXCEPTION FOR COLLECTIVE BARGAINING
22 AGREEMENTS.—Nothing in this chapter shall apply to any
23 arbitration provision in a contract between an employer
24 and a labor organization or between labor organizations,
25 except that no such arbitration provision shall have the
26 effect of waiving the right of an employee to seek judicial

1 enforcement of a right arising under provision of the Con-
 2 stitution of the United States; a State constitution; or a
 3 Federal or State statute; or public policy arising there-
 4 from.”.

5 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

6 (1) IN GENERAL.—Title 9 of the United States
 7 Code is amended—

8 (A) in section 2, by inserting “or as other-
 9 wise provided in chapter 4” before the period at
 10 the end;

11 (B) in section 208—

12 (i) in the section heading, by striking
 13 **“Chapter 1; residual application”**
 14 and inserting **“Application”**; and

15 (ii) by adding at the end the fol-
 16 lowing: “This chapter applies to the extent
 17 that this chapter is not in conflict with
 18 chapter 4.”; and

19 (C) in section 307—

20 (i) in the section heading, by striking
 21 **“Chapter 1; residual application”**
 22 and inserting **“Application”**; and

23 (ii) by adding at the end the fol-
 24 lowing: “This chapter applies to the extent

1 that this chapter is not in conflict with
2 chapter 4.”.

3 ~~(2) TABLE OF SECTIONS.—~~

4 ~~(A) CHAPTER 2.—~~The table of sections for
5 chapter 2 of title 9, United States Code, is
6 amended by striking the item relating to section
7 208 and inserting the following:

“208. Application.”.

8 ~~(B) CHAPTER 3.—~~The table of sections for
9 chapter 3 of title 9, United States Code, is
10 amended by striking the item relating to section
11 307 and inserting the following:

“307. Application.”.

12 ~~(3) TABLE OF CHAPTERS.—~~The table of chap-
13 ters for title 9, United States Code, is amended by
14 adding at the end the following:

**“4. Arbitration of disputes involving sexual assault and
sexual harassment 401”.**

15 **SEC. 3. APPLICABILITY.**

16 This Act, and the amendments made by this Act,
17 shall apply with respect to any dispute or claim that arises
18 or accrues on or after the date of enactment of this Act.

19 **SECTION 1. SHORT TITLE.**

20 *This Act may be cited as the “Ending Forced Arbitra-*
21 *tion of Sexual Assault and Sexual Harassment Act of*
22 *2021”.*

1 **SEC. 2. PREDISPUTE ARBITRATION OF DISPUTES INVOLV-**
 2 **ING SEXUAL ASSAULT AND SEXUAL HARASS-**
 3 **MENT.**

4 (a) *IN GENERAL.*—Title 9 of the United States Code
 5 is amended by adding at the end the following:

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“Sec.

“401. Definitions.

“402. No validity or enforceability.

9 **“§ 401. Definitions**

10 “*In this chapter:*

11 “(1) *PREDISPUTE ARBITRATION AGREEMENT.*—
 12 *The term ‘predispute arbitration agreement’ means*
 13 *any agreement to arbitrate a dispute that has not yet*
 14 *arisen at the time of the making of the agreement.*

15 “(2) *PREDISPUTE JOINT-ACTION WAIVER.*—*The*
 16 *term ‘predispute joint-action waiver’ means an agree-*
 17 *ment, whether or not part of a predispute arbitration*
 18 *agreement, that would prohibit, or waive the right of,*
 19 *one of the parties to the agreement to participate in*
 20 *a joint, class, or collective action in a judicial, arbi-*
 21 *trал, administrative, or other forum, concerning a dis-*
 22 *pute that has not yet arisen at the time of the making*
 23 *of the agreement.*

1 “(3) *SEXUAL ASSAULT DISPUTE*.—The term ‘sex-
 2 ual assault dispute’ means a dispute involving a non-
 3 consensual sexual act or sexual contact, as such terms
 4 are defined in section 2246 of title 18 or similar ap-
 5 plicable Tribal or State law, including when the vic-
 6 tim lacks capacity to consent.

7 “(4) *SEXUAL HARASSMENT DISPUTE*.—The term
 8 ‘sexual harassment dispute’ means a dispute relating
 9 to any of the following conduct directed at an indi-
 10 vidual or a group of individuals:

11 “(A) Unwelcome sexual advances.

12 “(B) Unwanted physical contact that is sex-
 13 ual in nature, including assault.

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 15 unwanted sexual comments and propositions for
 16 sexual activity.

17 “(D) Conditioning professional, edu-
 18 cational, consumer, health care, or long-term
 19 care benefits on sexual activity.

20 “(E) Retaliation for rejecting unwanted sex-
 21 ual attention.

22 **“§ 402. No validity or enforceability**

23 “(a) *IN GENERAL*.—Notwithstanding any other provi-
 24 sion of this title, at the election of the person alleging con-
 25 duct constituting a sexual assault dispute or sexual harass-

1 *ment dispute, or the named representative of a class or in*
 2 *a collective action alleging such conduct, no predispute ar-*
 3 *bitration agreement or predispute joint-action waiver shall*
 4 *be valid or enforceable with respect to a case which is filed*
 5 *under Federal, Tribal, or State law and relates to the sexual*
 6 *assault dispute or the sexual harassment dispute.*

7 “(b) *DETERMINATION OF APPLICABILITY.*—An issue as
 8 *to whether this chapter applies with respect to a dispute*
 9 *shall be determined under Federal law. The applicability*
 10 *of this chapter to an agreement to arbitrate and the validity*
 11 *and enforceability of an agreement to which this chapter*
 12 *applies shall be determined by a court, rather than an arbi-*
 13 *trator, irrespective of whether the party resisting arbitra-*
 14 *tion challenges the arbitration agreement specifically or in*
 15 *conjunction with other terms of the contract containing*
 16 *such agreement, and irrespective of whether the agreement*
 17 *purports to delegate such determinations to an arbitrator.”.*

18 (b) *TECHNICAL AND CONFORMING AMENDMENTS.*—

19 (1) *IN GENERAL.*—Title 9 of the United States
 20 *Code is amended—*

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 23 *the end;*

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1 (i) in the section heading, by striking

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6 chapter is not in conflict with chapter 4.”;

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21 chapter 3 of title 9, United States Code, is

22 amended by striking the item relating to section

23 307 and inserting the following:

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1 (3) *TABLE OF CHAPTERS.*—*The table of chapters*
 2 *for title 9, United States Code, is amended by adding*
 3 *at the end the following:*

“4. Arbitration of disputes involving sexual assault and
 sexual harassment 401”.

4 **SEC. 3. APPLICABILITY.**

5 *This Act, and the amendments made by this Act, shall*
 6 *apply with respect to any dispute or claim that arises or*
 7 *accrues on or after the date of enactment of this Act.*

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