

117TH CONGRESS
1ST SESSION

S. 3143

To amend title 9 of the United States Code to prohibit the enforcement of predispute arbitration agreements with respect to claims of sexual assault and to ensure that fair procedures are used in arbitrations involving sexual harassment claims.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 2, 2021

Ms. ERNST introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 9 of the United States Code to prohibit the enforcement of predispute arbitration agreements with respect to claims of sexual assault and to ensure that fair procedures are used in arbitrations involving sexual harassment claims.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Resolving Sexual As-
5 sault and Harassment Disputes Act of 2021”.

1 **SEC. 2. ARBITRATION OF SEXUAL ASSAULT AND SEXUAL**
 2 **HARASSMENT CLAIMS.**

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

5 **“CHAPTER 4—ARBITRATION OF SEXUAL**
 6 **ASSAULT CLAIMS; RIGHTS IN ARBI-**
 7 **TRATION OF SEXUAL HARASSMENT**
 8 **CLAIMS**

9 **“SEC. 401. DEFINITIONS.**

10 “In this chapter—

11 “(1) the term ‘predispute arbitration agree-
 12 ment’ means any agreement to arbitrate a claim
 13 that had not yet arisen at the time of the making
 14 of the agreement;

15 “(2) the term ‘sexual assault’ means a non-
 16 consensual sexual act or sexual contact (as those
 17 terms are defined in section 2246 of title 18, or
 18 similar applicable State or Tribal law) perpetrated
 19 against an employee, including when the victim lacks
 20 capacity to consent;

21 “(3) the term ‘sexual assault claim’ means a
 22 claim or dispute by an employee alleging that he or
 23 she was the victim of a sexual assault, based on al-
 24 leged conduct that meets the definition of a sexual
 25 assault, brought by the employee against the em-

1 ployer, the employer and one or more employees, or
 2 one or more employees;

3 “(4) the term ‘sexual harassment’ means—

4 “(A)(i) an unwelcome sexual advance;

5 “(ii) a request for a sexual favor;

6 “(iii) an offensive remark about a person’s
 7 sex; or

8 “(iv) any other verbal or physical harass-
 9 ment of a sexual nature; and

10 “(B) that is so frequent or severe that it
 11 creates a hostile or offensive work environment
 12 or results in an adverse employment decision;
 13 and

14 “(5) the term ‘sexual harassment claim’ means
 15 a claim or dispute between an employee and em-
 16 ployer, or among an employee, employer, and one or
 17 more employees, arising out of allegations of conduct
 18 that constitutes sexual harassment but does not fall
 19 within the definition of a sexual assault claim.

20 **“SEC. 402. LIMIT ON VALIDITY AND ENFORCEABILITY.**

21 “(a) IN GENERAL.—Notwithstanding any other pro-
 22 vision of this title, a predispute arbitration agreement
 23 shall have no force or effect with respect to a sexual as-
 24 sault claim.

1 “(b) OTHER CLAIMS.—All claims other than those
 2 subject to subsection (a) shall be subject to the provisions
 3 of this title, provided that, for sexual harassment claims,
 4 section 403 is satisfied.

5 **“SEC. 403. RIGHTS IN ARBITRATION OF SEXUAL HARASS-**
 6 **MENT CLAIM.**

7 “(a) IN GENERAL.—Notwithstanding any other pro-
 8 vision of this title, a predispute arbitration agreement to
 9 which this chapter applies shall be valid or enforceable
 10 with respect to a sexual harassment claim if the predispute
 11 arbitration agreement—

12 “(1) allows a party to discuss publicly the claim
 13 to be arbitrated, unless both parties mutually agree
 14 otherwise after the claim has arisen, and subject to
 15 reasonable restrictions necessary to safeguard the
 16 privacy interests of third parties;

17 “(2) allows a party to report alleged violations
 18 of law to local, State, and Federal civil and criminal
 19 law enforcement authorities;

20 “(3) allows a party to discuss publicly the arbi-
 21 trator’s decision, unless the parties mutually agree
 22 otherwise after the claim has arisen;

23 “(4) allows the arbitrator to grant a party’s
 24 reasonable request to engage in third-party dis-
 25 covery, including the ability to solicit evidence from

1 other individuals or entities not parties to the arbi-
2 tration;

3 “(5) allows a party to be represented by a law-
4 yer in the arbitration proceeding;

5 “(6) provides for the appointment of an arbi-
6 trator who is impartial and obligated to disclose any
7 bias, personal or financial interest in the arbitration,
8 and past or present relationships with the parties or
9 their representatives;

10 “(7) provides for the ability of the parties to re-
11 ceive a reasoned, written decision by the arbitrator;

12 “(8) if the agreement provides for a statute of
13 limitations it is no shorter than the statute of limita-
14 tions under the law applicable to the claim;

15 “(9) allows the claimant to recover individual-
16 ized damages and other individualized relief author-
17 ized by the law applicable to the claim;

18 “(10) does not require the claimant to pay at-
19 torneys’ fees or expenses not authorized by the law
20 applicable to the claim; and

21 “(11) does not require the claimant to pay arbi-
22 tration fees greater than the filing fee for an action
23 in Federal district court established by section 1914
24 of title 28, unless the arbitrator finds that the claim-
25 ant’s claims are frivolous or brought for an improper

1 purpose (as measured by the standards of Federal
 2 Rule of Civil Procedure 11(b)) or the claimant’s liti-
 3 gation conduct is vexatious (as measured by the
 4 standards of section 1927 of title 28).

5 “(b) CONSIDERATIONS.—In determining whether an
 6 arbitration agreement satisfies the standard set forth in
 7 subsection (a)(4), a court shall consider—

8 “(1) a claimant’s ability to obtain relevant evi-
 9 dence;

10 “(2) privacy interests of the claimant and third
 11 parties; and

12 “(3) whether the potential burdens that third-
 13 party discovery might impose are proportionate to
 14 the needs of the case.

15 “(c) RULE OF CONSTRUCTION.—A predispute arbi-
 16 tration agreement complies with subsection (a) if the
 17 agreement does not prohibit the conduct, the agreement
 18 affirmatively permits the conduct, or the rules of the arbi-
 19 tral forum selected in the agreement satisfy the require-
 20 ment.

21 **“SEC. 404. ATTORNEYS’ FEES FOR SEXUAL ASSAULT AND**
 22 **HARASSMENT CLAIMS.**

23 “(a) FEE DISTRIBUTION TIMING.—If the plaintiff in
 24 a civil action or arbitration proceeding is seeking monetary
 25 relief with respect to a sexual assault claim or a sexual

1 harassment claim, there shall be a final determination, in-
 2 cluding exhaustion of appeals, of any monetary relief to
 3 be paid to the plaintiff, and payment to the plaintiff, be-
 4 fore the determination or payment of costs or attorneys’
 5 fees to the attorney for the plaintiff.

6 “(b) FEE DETERMINATIONS BASED ON MONETARY
 7 RELIEF.—Unless otherwise specified by Federal statute,
 8 if a judgment or settlement agreement in a civil action
 9 or arbitration proceeding provides monetary relief to the
 10 plaintiff with respect to a sexual assault claim or a sexual
 11 harassment claim, the portion of any attorneys’ fees paid
 12 to the attorney for the plaintiff that is attributable to the
 13 monetary relief with respect to that claim—

14 “(1) shall not exceed a reasonable percentage of
 15 the amount of monetary relief directly distributed to
 16 and received by the plaintiff with respect to the
 17 claim; and

18 “(2) in any event, shall not exceed the total
 19 amount of monetary relief directly distributed to and
 20 received by the plaintiff with respect to the claim.

21 “(c) FEE DETERMINATIONS BASED ON EQUITABLE
 22 RELIEF.—Unless otherwise specified by Federal statute,
 23 if a judgment or settlement agreement in a civil action
 24 or arbitration proceeding provides for equitable relief with
 25 respect to a sexual assault claim or a sexual harassment

1 claim, the portion of any attorneys' fees paid to the attor-
2 ney for the plaintiff that is attributable to the equitable
3 relief with respect to the claim shall not exceed a reason-
4 able percentage of the value of the equitable relief, includ-
5 ing any injunctive relief.

6 **“SEC. 405. STUDY.**

7 “Two years after the date of enactment of this chap-
8 ter, the Comptroller General of the United States shall
9 conduct a study of, and shall provide a report to the rel-
10 evant congressional committees, including the Committee
11 on the Judiciary of the Senate and the Committee on the
12 Judiciary of the House of Representatives, the use of arbi-
13 tration agreements in connection with this chapter. The
14 study shall examine the total number of claims, the length
15 of time to resolve a claim, party success rates, awards and
16 settlement amounts, attorney's fees, and the validity of ar-
17 bitration clauses challenged according to section 406. The
18 study shall examine both arbitration proceedings and set-
19 tlement agreements, to the extent possible, pursuant to
20 this chapter and compare the outcomes, the duration, and
21 award and settlement amounts with other employment
22 cases in the judicial system.

23 **“SEC. 406. APPLICABILITY.**

24 “An issue as to whether this chapter applies with re-
25 spect to a sexual assault claim or a sexual harassment

1 claim shall be determined under Federal law. The applica-
 2 bility of this chapter to a predispute agreement to arbi-
 3 trate such claims and the validity and enforceability of a
 4 predispute agreement to which this chapter applies shall
 5 be determined by a court, rather than an arbitrator, irre-
 6 spective of whether the party resisting arbitration chal-
 7 lenges the predispute arbitration agreement specifically or
 8 in conjunction with other terms of the contract containing
 9 such agreement, and irrespective of whether the agree-
 10 ment purports to delegate such determinations to an arbi-
 11 trator. In the instance when a court finds a predispute
 12 arbitration agreement invalid in accordance with this
 13 chapter, the employee or employees shall be awarded a
 14 reasonable attorney’s fee, including litigation expenses,
 15 and costs for challenging the predispute arbitration agree-
 16 ment.”.

17 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

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

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

23 (B) in section 208—

24 (i) in the section heading, by striking

25 **“CHAPTER 1; RESIDUAL APPLI-**

CATION” and inserting **“APPLICATION”**; and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”; and

(C) in section 307—

(i) in the section heading, by striking **“CHAPTER 1; RESIDUAL APPLICATION”** and inserting **“APPLICATION”**; and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with chapter 4.”.

(2) TABLE OF SECTIONS.—

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

“208. Application.”.

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

“307. Application.”.

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

**“4. Arbitration of sexual assault claims; rights in arbi-
 tration of sexual harassment claims 401”.**

4 **SEC. 3. PROSPECTIVE EFFECT.**

5 This Act, and the amendments made by this Act,
 6 shall take effect on the date of enactment of this Act and
 7 shall apply with respect to any predispute arbitration
 8 agreement that is entered into or amended on or after
 9 such date.

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