FORCED ARBITRATION: AN ASSAULT ON WORKERS' RIGHTS

The Arbitration Fairness Act of 2018 (AFA, S. 2591) and Arbitration Fairness Act of 2017 (AFA, H.R. 1374), introduced in the 115th Congress, would end forced arbitration by amending the Federal Arbitration Act (FAA) to provide that no pre-dispute arbitration clause is valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute. Mandatory arbitration that has been agreed to pursuant to a collective bargaining agreement would not be affected by the AFA. NELA urges Members of Congress to cosponsor and actively support enactment of the AFA in the 115th Congress.

NELA strongly supports passage of this bill. The arbitration clauses that would be made invalid and unenforceable by the AFA are forced. Some are signed by employees as a condition of employment and others are buried in fine print of onboarding documents in a workplace or employee handbooks. Some forced arbitration clauses are shared in an email, in a letter to all employees, or through a company's internal computer network. Forcing workers to choose between signing or accepting a forced arbitration clause or losing their jobs, is not a choice.

Forced arbitration as a condition of employment is increasingly the norm. Roughly 60 million workers outside the unionized workforce are currently subject to forced arbitration clauses.[i] No working person starts a new job anticipating litigation against his or her employer. No one accepts a job thinking she or he will be subject to sexual harassment or assault, racial or religious slurs or harassment. Every worker arrives on the job expecting that she or he will be paid for hours worked in a timely way. No one comes to work expecting to have to litigate a wage theft claim. But, all of these things happen to working people.

Since 1938 when the Fair Labor Standards Act was enacted, the United States Congress has recognized the need for a range of workplace protections, and enacted a number of important laws to foster safe, fair, and equitable workplaces. Passage of these statutes represented hard-fought efforts to address pervasive mistreatment of different classes of workers. Importantly, Congress saw fit to include statutory remedies that can be vindicated in a court of law by workers whose employers engage in illegal treatment. It is not overstatement to say that forced arbitration is changing the face of employment protections and therefore of employment itself. The United States Supreme Court's modern interpretation of the FAA sorely misconstrues the statute's text, ignores the legislative intent, and as a result, denies workers access to enforcement of workplace rights established by Congress. Employers are thus, effectively shielded from accountability when they engage in workplace abuse.

1. FORCED ARBITRATION SUBVERTS OUR SYSTEM OF JUSTICE AND INCREASES THE RISK OF HARM TO WORKERS BY UNDERMINING WORKPLACE PROTECTIONS ENACTED BY CONGRESS.

Employers now routinely skirt the full force of workplace protection laws by preventing workers from seeking redress in a court of law. Shielded by recent U.S. Supreme Court precedent interpreting the FAA, employers force workers to address illegal treatment in secret, binding arbitration. Employees do not have a choice; they must comply to get or keep a job. Forced arbitration clauses are often buried in the fine print of employment applications, employee manuals, pension plans, and all-staff emails. Many workers who are forced into arbitration did not sign a document containing a forced arbitration provision and many others are not aware that they have signed such a provision, yet courts generally find employees to be bound by a company's forced arbitration policy if they simply continue to work for the employer.

Forced arbitration leaves hundreds of thousands of employees without any recourse against employers who break the law. Proponents of forced arbitration say they only want a less expensive and more efficient means of resolving disputes. But forced arbitration is making disputes simply disappear – they never get filed. Some forced arbitration clauses deter the filing of claims by imposing extremely short limitation periods, high arbitrator fees, restricted access to crucial evidence, and tight limits on damages. Many clauses also prohibit collective arbitrations, which especially affects low-wage workers whose individual claims, even though legitimate, are often too small to justify the costs of an arbitral proceeding. The upshot is that forced arbitration clauses appear to "dramatically reduce[] an employee's chance of securing legal representation, as well as her chance of any kind of recovery, any kind of

hearing, or any formal complaint being filed on her behalf." In fact, *up to 722,000 otherwise valid claims of employer wrongdoing "go missing" each year because of forced arbitration*. [ii]

Forced arbitration fails to uphold the spirit of vital civil rights laws and other employee protections. Federal workplace protections, such as the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Uniformed Services Employment and Reemployment Rights Act, and the Fair Labor Standards Act, aim to eradicate discrimination, retaliation, and wage theft in the workplace. But these laws are only effective if they are enforced in a meaningful way.

In every aspect of the proceedings, when forced into arbitration, the deck is stacked against employees seeking to vindicate their workplace rights. Employment claims are decided by private arbitrators, who typically are hired by the employer and oversee the adjudication using rules selected by the employer. Unlike a judge and jury in a public courtroom, arbitrators charge the parties for their services. In some cases, costs must be paid up front. Moreover, unlike America's civil justice system that was developed through centuries of jurisprudence, forced arbitration does not provide important procedural guarantees of fairness and due process that are the hallmarks of courts of law. Arbitrators' decisions happen in a vacuum, with no lasting precedential impact, no public record of outcomes, and no trace left as to how arbitrators arrived at their decisions.

Forced arbitration lacks the transparency and accountability checks inherent in our public justice system. Because the practice is confidential, taking place behind closed doors, forced arbitration enables employers to shield their conduct from public scrutiny and precludes meaningful judicial review of arbitrators' rulings. The secret nature of forced arbitration, enables patterns of widespread workplace abuse, like that perpetrated by former FOX News CEO Roger Ailes, to continue with no protection for current or future employees.

2. THE FEDERAL ARBITRATION ACT WAS NEVER INTENDED TO GOVERN CONTRACTS OF EMPLOYMENT AND SHOULD BE AMENDED TO PROTECT WORKERS.

The FAA was never intended to apply to employment contracts. On the contrary, the drafters of the FAA amended the text to expressly exclude employment contracts from the scope of the statute after advocates shared their concerns that the bill, as written, would unduly hinder workers' ability to redress their workplace grievances.

In 1920, the Senate Judiciary Committee tasked the American Bar Association (ABA) with drafting a bill that would regulate contracts between merchants in interstate commerce. Upon completion, in 1923, a Subcommittee of the Senate Judiciary Committee met to discuss the new legislation, which had been introduced that very day. At the start of that meeting, Mr. Charles Bernheimer, Chairman of the Committee on Arbitration of the New York State Chamber of Commerce explained the bill's purpose: "In the interest of the preservation of commodities, particularly food stuffs and the elimination of waste in all commercial endeavors, federal arbitration bills were introduced in both houses of Congress today."[iii] As Chairman of the ABA Committee on Commerce, Trade, and Commercial Law, Mr. W.H.H. Piatt oversaw the drafting of the arbitration law. He testified to the Subcommittee and answered Senators' questions as to the bill's application. Mr. Piatt shared then-existing concerns that the bill could adversely impact workers if it were passed as drafted, remarking that some "objected to [the FAA], and criticized it on the ground that the bill in its present form would . . . *in fact compel* arbitration of the matters of agreement between [employees] and their employers."[iv]

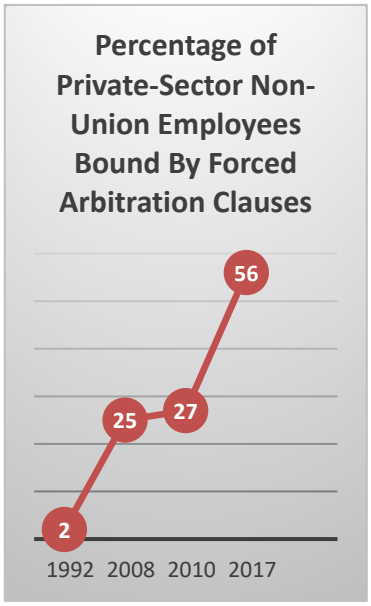
In response to concerns that the FAA would be improperly extended to employee contracts, ABA Committee Chairman Piatt stated emphatically: "It is not intended that this shall be an act referring to labor disputes at all."[v] Mr. Piatt went on to say, "It is purely an act to give the merchants the rights or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this."[vi] Commerce Secretary Herbert Hoover, in an effort to resolve the matter, suggested, "if objection appears to the inclusion of workers' contracts in the law's scheme, it might be amended by stating:

> '. . . *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce*.'"[vii]

Over the next year, Congress took Mr. Hoover's advice and so amended the legislation verbatim. With this new "exclusionary clause" in place and assurances given that the statute would not reach workplace disputes, the Federal Arbitration Act was passed and signed into law in 1925.

3. THE U.S. SUPREME COURT HAS GROSSLY MISINTERPRETED THE FAA AND IS CURRENTLY POISED TO DECIMATE EMPLOYEES' ABILITY TO ENFORCE THEIR FUNDAMENTAL RIGHTS

For over 70 years, the FAA was enforced as designed, with its scope limited to commercial contracts. It wasn't until the 1991 case *Gilmer v. Interstate Johnson/Lane Corp.* that the reach of the FAA began to be extended to employment claims.[viii] In *Gilmer*, the Court's narrow ruling found that a financial sector employee's securities registration application could require private arbitration of a claim brought under the Age Discrimination in Employment Act of 1967. For the next ten years, the *Gilmer* ruling remained an isolated case, appearing to some to be an exception to the Section 1 exclusionary clause. Overwhelmingly, neither employers nor employees believed that a contract requiring workers to surrender their constitutional right to go to court as a condition of employment would be enforceable under the FAA.



Then, in 2001, in a devastating blow to employee rights, the U.S. Supreme Court ruled in *Circuit City Stores, Inc. v. Adams* that the FAA applied to all employment contracts except for those involving transportation workers.[ix] To reach this decision, the Court relied on arcane rules of grammar to find the portion of the exclusionary clause which reads "any other class of worker" really meant "any other class of *transportation* worker." The Court took the very provision meant to protect employees, turned it on its head, and gave it the exact opposite effect to that intended by Congress. As a result, over the past two decades we have seen workers' access to justice shrink.

In the last 20 years, forced arbitration of employment disputes has become pandemic, affecting every segment of the American workforce from minimum wage workers to highly compensated professionals who, in order to get or keep a job, must give up their constitutional right to go to court when they believe they have been illegally treated in the workplace. In 1992, only 2 percent of employers used forced arbitration clauses in their employment documents.[x] By 2008, that number was 25%.[xi] In 2010, 27% of employees – 36 million people making up roughly one third of America's total non-union workforce – were bound by a forced arbitration clause.[xii] Now, according to a 2017 report, *over 60 million employees are required to forgo their constitutional right to go take their employer to court – regardless of the severity of employer misconduct - if they want to get or keep their job*.[xiii]

In 2013, the Supreme Court ruled in *American Express Co. v. Italian Colors Restaurant* that class action bans in forced arbitration clauses in commercial contracts are enforceable even when pursuit of individual claims for wrongdoing are not economically viable. [xiv] The *Italian Colors* ruling opened the floodgates for employers looking to silo claims and silence workers. Over the last five years, employers have started conditioning employment not only on whether a worker will surrender their Seventh Amendment constitutional rights, but also have required employees to sacrifice their right to band together with coworkers in class, collective, and joint legal actions. A 2017 review of America's *Fortune* 100 companies found that *80 percent of America's wealthiest, most powerful corporations have used arbitration clauses in their employment contracts since 2010 and approximately half of those contain a ban on class or collective actions*.[xv]

The effective result of workplace class and collective action bans is widespread claim suppression, as very few employees can afford to pursue individual arbitration. Indeed, for low wage workers, class action bans are particularly devastating, as collective legal action is often the only way they can afford to hold employers accountable when treated wrongfully in the workplace.[xvi] Additionally, the threat of a class legal action is a powerful tool to deter many companies from breaking employment laws or to persuade violators to begin complying with workplace protections. Workers all across the nation with little other bargaining power must retain this mechanism so they may continue to organize their workplaces, fight for better working conditions, and have an effective means to vindicate their workplace rights.

A trio of FAA cases currently pending at the Supreme Court puts the effective vindication of workplace rights in jeopardy.[xvii] Soon, America's highest court will render a decision on whether employers can legally require employees to resolve all disputes in *individual* arbitration as a condition of employment. The Court heard oral argument in *Murphy Oil, et al.* on October 2017 and is expected to issue its opinion no later than June 2018. Although the National Labor Relations Board has repeatedly and consistently ruled that class action bans in forced arbitration clauses violate the National Labor Relations Act, employers in those cases have asked the Court to allow employers to use the fine print in their employee handbooks, *inter alia*, to force workers to go it alone when they experience wage theft, race discrimination, sexual harassment, and other employer wrongdoing.

4. TO PROTECT AMERICA'S WORKFORCE AND RESTORE EMPLOYEES' ACCESS TO JUSTICE, CONGRESS MUST PASS THE ARBITRATION FAIRNESS ACT.

Forced arbitration threatens the role of courts as a means for workers to redress their statutory rights when employers violate the law. Arbitration can be an appropriate way to resolve employment disputes when it is knowingly and voluntarily agreed upon by the parties after a dispute arises, but employers should never be permitted to force their workers into a system that silences their voice and denies employees an opportunity to meaningfully vindicate their workplace rights.

Only Congress can rectify this injustice. Because the FAA has been perverted by recent U.S. Supreme Court rulings, the federal legislature is the only governing body empowered to restore the workers' access to the courts. District and appellate court judges, bound by Supreme Court precedent, must sign off on forced arbitration clauses even when they believe plaintiffs' civil and employment rights are being undermined. For example, in an order upholding a forced arbitration provision located in a company's electronic Terms of Service, the Honorable Jed S. Rakoff, a U.S. District Court judge of the Southern District of New York, decried that "while appellate courts still pay lip service to the 'precious right' of trial by jury, and sometimes add that it is a right that cannot readily be waived, in actuality federal district courts are now obliged to enforce what everyone recognizes is a totally coerced waiver of both the right to a jury and the right of access to the courts. . . . This being the law, this judge must enforce it - even if it is based on nothing but factual and legal fictions.[xviii]

Congress has already passed laws, with bipartisan support, to ban forced arbitration for disputes involving auto dealers, poultry and livestock producers, and certain employees of federal contractors. Representatives and Senators must step in to provide a clear congressional command that our nation's laws protecting employees' rights are not optional and cannot be avoided through fine print propagated by powerful employers. The time has come for Congress to pass the Arbitration Fairness Act and reaffirm, for the sake of all of America's workers, that mandatory pre-dispute arbitration clauses in employment contracts should never be enforceable under the FAA.

Voters and advocates overwhelmingly support ending forced arbitration in the American workplace. A national study by NELA's public interest organization, The Employee Rights Advocacy Institute For Law & Policy, found that likely voters support the AFA by a margin of more than two to one, including majorities of Democrats, Independents, and Republicans. In fact, once voters hear a brief description of forced arbitration, they shift toward overwhelming opposition, *with more than four in ten strongly opposed*. Voters are most concerned that forced arbitration clauses are written into the fine print of job applications, employee handbooks, or other terms of employment.

NELA and many other workers, civil rights, and consumer groups in the Fair Arbitration Now coalition are working for passage of the AFA. **NELA urges Members of Congress to cosponsor and actively support enactment of the Arbitration Fairness Act in the 115th Congress.**

ORGANIZATIONS IN SUPPORT OF THE ARBITRATION FAIRNESS ACT:

Alliance for Justice
Alzheimer's Foundation of America
American Association for Justice
American Association of University Women
Americans for Democratic Action
Americans for Fairness in Lending
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County and Municipal Employees (AFSCME)
Americans for Financial Reform
Arizona Consumers Council
Arizona PIRG
Asian American Justice Center
Black Leadership Forum
Campaign for Contract Agriculture Reform
Center for Justice & Democracy
Center for Medicare Advocacy
Center for Responsible Lending
Citizen Works
Coalition of Franchisee Associations
Communication Workers of America
Community Action Partnership
Consumer Action
Consumer Federation of America
Consumer Watchdog
Consumers for Auto Reliability and Safety
Consumers Union
Demos
Disability Rights Education and Defense Fund
Drum Major Institute for Public Policy
Empire Justice Center
The Employee Rights Advocacy Institute For Law & Policy
Florida Alliance for Consumer Protection
Give Me Back My Rights Coalition

Government Accountability Project
Homeowners Against Deficient Dwellings
Home Owners for Better Building
Impact Fund
International Brotherhood of Teamsters (IBT)
Japanese American Citizens League
Laborers' International Union of North America (LiUNA)
Lambda Legal
Lawyers Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
Legal Services of Southern Piedmont
The Long Term Care Community Coalition
Mid Minnesota Legal Assistance
National Association of Consumer Advocates
National Association of Human Rights Workers
National Association of State Long-Term Care Ombudsman Programs
The National Consumer Voice for Quality Long-Term Care
National Community Reinvestment Coalition
National Consumer Law Center (On behalf of its low income clients)
National Consumers League
National Contract Poultry Growers Association
National Council of La Raza
National Employment Law Project
National Employment Lawyers Association
National Fair Housing Alliance
National Partnership for Women & Families
Justice in Aging
National Women's Law Center
National Women's Health Network
Neighborhood Economic Development Advocacy Project (NEDAP)
Organization of Competitive Markets
Policyholders of America
Progressive States Network
Public Citizen
Public Justice Center
Rural Advancement Foundation International – USA
Service Employees International Union (SEIU)
Take Back Your Rights PAC
Texas Watch
U.S. Public Interest Research Group
United Policyholders
Virginia Citizens Consumer Council
Virginia Poverty Law Center
Women Employed
Workplace Fairness

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[i] ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION (Economic Policy Institute 2017), available at http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

[ii] Cynthia Estlund, *The Black Hole Of Mandatory Arbitration, 101* N.C. L. REV. 96, 113 (2018) (identifying as "missing" those claims we would expect to enter the arbitration process, based on the general rate of employment litigation and the number of employees covered by forced arbitration clauses, but that are never actually filed).

[iii] Hearing Before A Subcommittee Of the Committee on the Judiciary, U. S. Senate, 67th Cong., 4th Sess., on S. 4213, *A Bill Relating to Sales and Contracts to Sell in Interstate Commerce and Foreign Commerce*; and S. 4214, *A Bill To Make Valid and Enforceable Written Provisions Or Agreements For Arbitration of Disputes Arising Out of Contract, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations*, at 2, January 31, 1923 (Washington Government Printing Office, 1923).

[iv] *Id.*, at 9.

[v] *Id.*

[vi] *Id.*

[vii] *Id.*, at 14 (letter to Senator Thomas Sterling, member of the Senate Judiciary Committee, from Secretary of Commerce Herbert Hoover, dated January 31, 1923, printed in the record).

[viii] *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991).

[ix] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001)

[x] COLVIN, *note i.*

[xi] Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 7 (2015), *available at* http://scholarship.law.berkeley.edu/bjell/vol35/iss1/2.

[xii] *Id.*

[xiii] Colvin, *supra*, note viii.

[xiv] *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

[xv] PROFESSOR IMRE S. SZALAI, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES (The Employee Rights Advocacy Institute For Law & Policy, September 2017), *available at* http://employeerightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf.

[xvi] *See* FORCED ARBITRATION GIVES DISHONEST EMPLOYERS A LICENSE TO STEAL, The Employee Rights Advocacy Institute For Law & Policy, *available at http://employeerightsadvocacy.org/wp-content/uploads/2017/12/The-Institute-Faces-of-Forced-Arbitration-Wage-Theft-Fact-Sheet.pdf* (last visited March 8, 2018).

[xvii] *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015)(*cert.* granted, No. 16-307), *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016)(*cert.* granted, No. 16-285), *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016)(*cert*. granted, No. 16-300)(cases consolidated and argued Oct. 2, 2017).

[xviii] *See Meyer v. Kalanick*, No. 15-9796, 2018 U.S. Dist. ___ (S.D.N.Y., March 5, 2018).