

ARBITRATION FAIRNESS ACT (S. 2591/ H.R. 1374)

To restore fairness and access to the justice system, the Arbitration Fairness Act (“AFA”) of 2018 (S. 2591) and the Arbitration Fairness Act of 2017 (H.R. 1374) were introduced in the 115th Congress. **The AFA 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.**

NELA urges Congress to enact the AFA because:

- **Forced arbitration as a condition of employment takes advantage of the inherently unequal bargaining power between individual employees and their employers.** Employers write forced arbitration clauses that are not negotiable by employees. Such clauses are often buried in the fine print of employment applications, employee manuals, pension plans, and even emails. Typically, employees are unaware of the forced arbitration clause and do not fully understand its implications. By requiring arbitration of all future disputes, regardless of their egregiousness, employers effectively strong-arm their employees in a way that is unethical and immoral. Under the AFA it would also be unlawful.
- **Forced arbitration was devised by defense lawyers to make it easier and cheaper for their corporate clients to evade workers’ claims of discrimination, wage theft, and other wrongdoing.** Proponents of forced arbitration say they only want a less expensive and more efficient means of resolving disputes. But what forced arbitration actually accomplishes is widespread *claim suppression*. According to a recent study, forced arbitration causes up to 722,000 complaints of employer wrongdoing to “go missing” each year as employees find the process so daunting that they simply never file a claim.
- **Forced arbitration undermines federal employee protections enacted by Congress,** 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 (USERRA), and the Fair Labor Standards Act, which require employers to treat their workers with basic dignity, fairness, non-discrimination, and without retaliation. These requirements are only meaningful if they can be enforced – but the claim suppression that results from forced arbitration effectively shields employers from being held accountable when they violate the law.
- **The AFA does not ban voluntary arbitration.** NELA supports arbitration when it is voluntarily and knowingly agreed upon by the employee *post-dispute* and governed by adequate safeguards of fairness and due process, or pursuant to a collective bargaining agreement negotiated between employers and unions.
- **Forced arbitration in the workplace is becoming endemic, with every segment of the workforce from minimum wage workers to our nation’s service members to highly compensated professionals affected.** In 2010, 27 percent of U.S. employers reported that they required arbitration of employment disputes—covering over 36 million employees, or one-third of the non-union workforce. In 2017, that number nearly doubled, with over 60 million employees *denied access to a public courtroom* when treated illegally at work. A 2017 report found that 80% of *America’s top companies use arbitration clauses in their employment contracts*, over half of those clauses are forced on employees, and nearly half of them also banned workers from joining in collective legal action – a move that shields perpetrators of pervasive workplace violations.
- **The Arbitration Fairness Act would undo the damage caused by the United States Supreme Court’s gross misinterpretation of the FAA,** which was enacted to regulate voluntary arbitration agreements between merchants with equal bargaining power, not to strong-arm employees.
- **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.** The time has come for Congress to outlaw forced arbitration for *all* of America’s workers.