ENDING FORCED ARBITRATION OF SEXUAL HARASSMENT ACT OF 2017 (S. 2203/H.R. 4734)
Senator Kirsten Gillibrand (D-NY) & Representative Cheri Bustos (D-IL)

BACKGROUND

On December 6, 2017, Senator Kirsten Gillibrand introduced The Ending Forced Arbitration of Sexual Harassment Act of 2017 (S. 2203). On December 26, 2017, Representative Cheri Bustos introduced an identical companion bill, H.R. 4734, in the House. Significantly, both are bipartisan bills.

These bills would amend the Federal Arbitration Act by providing that "no pre-dispute arbitration agreement shall be valid or enforceable if it requires an employee, as defined, to arbitrate a sex discrimination dispute." The bills also establish that any dispute about the applicability or enforceability of agreements subject to the prohibition against pre-dispute arbitration shall be determined by a court, not an arbitrator. NELA and our allies worked with Representative Bustos and Senator Gillibrand prior to introduction of the bills. They did not adopt our central recommendation, described later in this document.

TALKING POINTS

NELA fiercely opposes forced arbitration in the American workplace. We also are determined to end sexual harassment at work, a particularly damaging and pervasive form of sex discrimination. We applaud these Senator Gillibrand and Congresswoman Bustos and the bills' cosponsors for this important effort at addressing the relationship between forced arbitration and the secrecy inherent in arbitral proceedings and widespread illegal harassment in America's workplaces.

This bill's strengths include:

- Addressing the relationship between forced arbitration clauses and sexual harassment that is enabled by secrecy. To end widespread harassment in a company or industry, openness is critical. The opportunity for those who face harassment to talk to colleagues, share stories, and (often) learn that they are not alone, provides the strength and support necessary to speak up.
- Guaranteeing that survivors of sex discrimination at work will not be silenced by having their claims forced into arbitration.
- Requiring that any determination about whether an arbitration clause is applicable or enforceable under this bill should always be made by a judge, not an arbitrator.

The secrecy inherent in arbitration contributes to toxic workplace cultures of harassment and discrimination. Importantly, our members report that wherever sexual harassment is rampant, other forms of harassment are also likely occurring. For example, after dozens of women exposed a culture of sexual harassment at FOX News, 13 current and former employees revealed that they had suffered years of racial harassment at the hands of the company's longtime comptroller. Moreover, among the clients of our members, it is rare that a claimant pursues a workplace discrimination claim without also facing retaliation.

NELA advocates for strengthening the Senate and House bills by broadening them to:

- Establish the same prohibition against forced arbitration for all employees who experience *workplace harassment* based on unlawful discrimination in addition to sexual harassment, and providing all such employees access to a public judicial forum.[1]
- Make explicit that retaliation claims linked to any protected claim cannot be forced into arbitration.

NELA urges expanding and strengthening S. 2203/ H.R. 4734 as described above.

[1] An expansion of this type would exclude all claims brought under federal anti-discrimination statutes – such as the ADA, the ADEA, and all of Title VII – from being forced into arbitration.

National Office • 2201 Broadway, Suite 310 • Oakland, California • 94612 • TEL 415.296.7629
Washington DC Office • 1828 L Street, NW, Suite 600 • Washington DC • 20036 • TEL 202.898.2880
email: nelahq@nelahq.org • www.nela.org • FAX 866.593.7521