



May 15, 2018

The Honorable David N. Cicilline  
Chairman  
Subcommittee on Antitrust, Commercial Subcommittee and Administrative Law  
U.S. House Committee on the Judiciary  
2138 Rayburn Building  
Washington, DC 20515

The Honorable F. James Sensenbrenner  
Ranking Member  
Subcommittee on Antitrust, Commercial Subcommittee on Antitrust, Commercial and  
Administrative Law and Administrative Law  
U.S. House Committee on the Judiciary U.S. House Committee on the Judiciary  
2142 Rayburn House Office Building  
Washington, DC 20515

**RE: Letter in Support of the Forced Arbitration Injustice Repeal Act**

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

On behalf of the National Employment Lawyers Association (NELA), and its 4,000 circuit, state, and local affiliate members across the country, we write to express our strong support for the House Judiciary Committee, Subcommittee on Antitrust, Commercial Subcommittee on Antitrust, Commercial and Administrative Law and Administrative Law hearing tomorrow, Justice Denied, Forced Arbitration and the Erosion of our Legal System, and for passage of the FAIR Act.

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Our members litigate daily in every circuit, affording NELA a unique perspective on how employment cases actually play out on the ground and the profound impact of forced arbitration on the lives and on access to justice for working people.

We are writing to you today to voice our strong support of the Subcommittee's hearing to explore how forced arbitration erodes our legal system and curtails everyday people's access to justice. For more than two decades, NELA has called on Congress to end the insidious corporate practice of forcing workers and consumers to address disputes in secret, one-sided arbitration proceedings.

## **I. Forced Arbitration Harms Workers**

Forced arbitration clauses are usually hidden in the fine print of “take-it-or-leave-it” agreements. These clauses deprive people of their right to seek justice in court before an impartial judge or jury. They are ubiquitous in employment contracts, and may be buried in job applications, the fine print of employee handbooks, or buried in a company’s updated policies, only available online via the corporation’s intranet. Corporations that place forced arbitration clauses in their standard contracts with private-sector non-union employees shield themselves from accountability for illegal practices and other wrongdoing. The contracts typically designate:

- Who will serve as the arbitration provider. The arbitration provider all too often relies on the company for repeat business and therefore has a financial incentive to rule in favor of the company;
- The arbitration rules. Typically, the rules by which arbitration is conducted provide none of the legal safeguards that protect individuals who use the courts, including their ability to obtain key evidence necessary to prove one’s case;
- The state in which the arbitration is to occur, which is always at the company’s convenience, not the harmed individual who may have to travel far to get there, and
- The payment terms, which might include exorbitant filing fees, as well as continuous fees for procedures such as motions and written findings, and “loser pays” rules that are prohibitive for many individuals.

The proceedings are secret and final with few rights to appeal. Studies have shown that those forced into arbitration are less likely to win, receive smaller awards, and are otherwise severely disadvantaged.<sup>1</sup>

## **II. Forced Arbitration Clauses Are Everywhere and Are Not Voluntary**

Since arbitration clauses are usually contained in non-negotiable contracts, employees are presented with a legal fiction that they actually have a “choice” when signing away their rights when in fact refusing to sign means forgoing employment altogether. As a result, according to the Economic Policy Institute, 60.1 million workers, more than half of non-union, private-sector employees, have signed away their right to go to court if harmed by their employer.<sup>2</sup> Among America’s *Fortune* 100—the wealthiest, most-powerful companies in the nation—52 use forced arbitration in their employment contracts, setting a disturbing example that one way to get ahead is to ensure employees are unable to vindicate their workplace rights.<sup>3</sup>

## **III. Forced Arbitration Clauses Allow Corporations and Employers to Evade Accountability for Illegal Misconduct**

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<sup>1</sup> Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration, Economic Policy Institute (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Elizabeth Colman, Forced Arbitration: A Race To The Bottom, The Employee Rights Advocacy Institute For Law & Policy (June 2018), [http://employeerightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report\\_Forced-Arbitration\\_A-Race-To-The-Bottom.pdf](http://employeerightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report_Forced-Arbitration_A-Race-To-The-Bottom.pdf).

Forced arbitration clauses allow employers to cheat workers out of the paycheck they earned, violate other workplace rights, and discriminate against working people with no accountability. These clauses allow companies to hide systemic harassment and discrimination, including sexual harassment. The addition of class action bans in forced arbitration contracts, virtually guarantee that isolated employees will drop valid claims for lack of resources. Indeed, recent research by New York University Law Professor Cynthia Estlund found that as many as 722,000 employment claims are never filed because of the effect of forced arbitration.<sup>4</sup> In sum, forcing employees into arbitration has played a significant role in hiding systemic wrongdoing and allowing corporate wrongdoers to evade accountability for bad acts.

#### **IV. Congress Must Act Promptly**

Congress must rein in the overly expansive interpretation that courts have given to the Federal Arbitration Act. Forced arbitration weakens federal and state laws that are intended to protect employees by removing individuals' ability to enforce those laws in court. In 2011, the U.S. Supreme Court dealt a devastating blow to consumers and employees, ruling that companies could ban individuals from joining together to enforce their rights.<sup>5</sup> In 2018, the Court held that workers may be forced, as a condition of employment, to waive their right to act collectively to enforce their legal rights.<sup>6</sup> And just last month in *Lamps Plus Inc. v. Varela*, the Court dealt another blow to protecting access to the courts for those who have been harmed.<sup>7</sup>

**Forced arbitration is a system that was intentionally developed by corporate America to avoid accountability and circumvent laws that were enacted to protect working people.** Workers who are forced to address disputes in private arbitration are denied fundamental fairness, due process, and transparency that are part of any court proceeding, while employers avoid liability as well as public accountability. Congress has enacted legislation to protect workers from wage theft, workplace harassment, and discrimination on the job but forced arbitration clauses prevent harmed employees from access to a court that has the power to enforce those laws. Until Congress acts to correct the legal fiction—that workers with little bargaining power have consented to the deprivation of their rights in exchange for a job—these clauses will continue to endanger individuals, the workplace, and the rule of law.

In February, Representative Hank Thompson and Senator Richard Blumenthal introduced the Forced Arbitration Injustice Repeal (FAIR) Act (H.R. 1423/S.R. 610). This important legislation would prevent corporations from forcing workers, consumers, and small businesses to resolve disputes in private, company-controlled arbitration systems, even when that company has engaged in illegal misconduct. The bill would specifically cover cases involving consumer, civil rights, employment, or antitrust violations, and it would ensure that federal and state laws enacted to protect legal rights in those cases are properly enforced.

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<sup>4</sup> Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679 (2018), <https://scholarship.law.unc.edu/nclr/vol96/iss3/3>.

<sup>5</sup> AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

<sup>6</sup> Epic Systems Corp. v. Lewis, 584 U.S. \_\_\_\_ (2018).

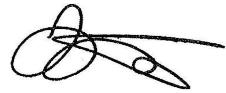
<sup>7</sup> 587 U.S. \_\_\_\_ (2019)(holding that “an ambiguous agreement” does not provide the “necessary ‘contractual basis’” for concluding that the parties agreed to submit to class arbitration). *Lamps Plus* at 6.

The FAIR Act does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily post-dispute. It would allow workers, consumers, and small businesses to choose arbitration in the aftermath of being harmed if there is agreement between the parties that arbitration would be beneficial for each. Nor would the FAIR Act affect collective bargaining agreements that require arbitration between unions and employers. Rather, the FAIR Act's sole aim is to end the practice of forcing consumers, workers, and small businesses into secretive, one-sided arbitration proceedings that tie the hands of individuals who have been wronged, long before they are harmed.

We strongly support the FAIR Act, which would re-open the courthouse doors and restore workers' access to America's civil justice system. According to a national survey, 84 percent of the public supports federal legislation that ends the practice of forcing consumers and workers into arbitration. Republicans support the legislation more than Democrats (87% to 83%).<sup>8</sup> The FAIR Act is long overdue for your constituents—America's workers.

NELA urges you to swiftly pass the FAIR Act through the subcommittee so that all of your colleagues in the House of Representatives have an opportunity to be on record supporting everyday people's access to justice.

Sincerely,



James H. Kaster  
NELA President



Terry O'Neill  
NELA Executive Director

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<sup>8</sup> Guy Molyneux & Geoff Garin, Nat'l Survey on Required Arbitration, HART RESEARCH ASSOC. (Feb. 28, 2019), <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.