National Employment Lawyers Association

Ending Forced Arbitration: Practical Tips for Lobbying Congress on the FAIR Act

Lobbying for the Forced Arbitration Injustice Repeal Act (FAIR Act, H.R. 963/S. 505) is a critical part of NELA's advocacy efforts on behalf of workers. Your personal contact with lawmakers demonstrates the significance of the issue and provides an opportunity to hear—and address—their questions or concerns. Check out our Links and Resources document for useful websites, lists, and other resources.

We encourage you to call, or if possible, visit your U.S. Senator or Representative to build these important legislative relationships and make NELA's and your position clear.

Schedule A Meeting With Your Member Of Congress

Plan to reach out two or three weeks before you want to meet with your member of Congress. If you have a personal relationship with your member of Congress, their Chief of Staff, or their Legislative Director, start with the person you know! If you call an office to request a meeting, please note that college interns are often the staff tasked with answering the phones, and they will often be unfamiliar with pending legislation and generally will not be able to discuss a member's position on a particular bill.

How To Request a Meeting Via Email:

1. If you don't have a personal contact, reach out to the member's Chief of Staff.
    - List of House Chiefs of Staff
    - List of Senate Chiefs of Staff
2. Include a short introduction with your name, the fact that you are lobbying as an attorney and as a NELA member, your home zip code, and your phone number.
3. If there is something you can thank the Member for, be sure to do so! Of course, if your member is already a co-sponsor of the FAIR Act, start with thanking them for that.

4. Ask the Chief of Staff to provide the name and email address of the staffer in their office who handles Judiciary Committee matters, and in particular, the FAIR Act.
5. Email the Judiciary staffer and request a meeting to discuss the FAIR Act.

What Should I Say At My Meeting?

If you are choosing between reaching out to staff of the in-District office or in Washington, DC, you should know that the in-District staffers are typically experts in constituent services issues; reaching someone at the IRS, handling a military or Social Security issue, etc. Staff in Washington, DC are typically policy experts. Either way, the typical meeting will last 20–30 minutes. Plan your talking points with that timeframe in mind. Find out in advance of the meeting whether your member of Congress has co-sponsored the FAIR Act.

- Thank them for meeting with you, and share a little bit about NELA, yourself, and your law practice.
- **If they support the bill**, thank them, and let them know you will be checking in periodically to see how you can help.
- **If your legislator is opposed or still thinking it over**, find out what their key concerns are, and ask if there is information that you might be able to provide? It could be data or an issue brief, or it could be that they want to hear from other constituents.

- Let them know that you and NELA (and your Affiliate if true) strongly support the FAIR Act and why it's important. Talking with Congressional offices demands that you strike a balance—do provide stories or data that are compelling, and that the member or staffer can connect with ***but keep it short***.
    - FAIR Act Talking Points
- Ask questions of the staffer about their member's views and concerns. The information you get will help NELA to better strategize our advocacy.
- It's great to leave with a plan to follow up. Whether you offer to check in later after the staffer has talked to the Member of Congress to see if they will sign on as a co-sponsor, or the staffer asks for information you don't have, always look for an opportunity to follow up.

A few members of Congress and a number of staffers have deep expertise on forced arbitration, but many do not. Regardless of their level of expertise, *all*, members and staffers rely heavily on the expertise of people like you to educate themselves about emerging issues. Focus on the FAIR Act Talking Points that you think will resonate with your member. You can also share the Background Document, or The Institute publications included in the Toolkit.

Tip: Never, Ever Leave A Meeting Without Making An Ask

Before leaving a meeting with a staffer, be sure to state clearly and unambiguously what you want. You may be asking the staffer to convey our thanks to the member for their support, or you may be asking the staffer to let the member know that you want and urge them to support the legislation. Tell them what action you want them to take. **Be specific.** Emphasize the result we want with every point: "For this reason, we hope the Senator will co-sponsor the bill," or, "This is another reason the Senator should support the bill." Saying that you wanted the Member to know your thoughts about this issue is not an ask.

Follow-Up

Follow-up within one to two weeks with a thank you. Also, be sure to follow up if you offered additional information. Feel free to share the About NELA document, the Background Document or other publications included in the FAIR Act Toolkit. Other options for follow-up:

- Provide them with more information about forced arbitration as well as your clients' stories about the impact of forced arbitration. Try to share information about how this occurs in an industry or sector in their state or district.
- You can offer to have other constituents who also support the FAIR Act contact the member's office to express their support.
- If they are not currently a co-sponsor, tell them you will check back again to find out more about the member's concerns. Ask when it would be reasonable to contact them again.

Report Back To NELA

Let us know how your meeting went. Keeping track of our lobbying efforts is key to making progress on issues important to workers' rights. Report the outcome of your meeting using our online form or by sending an email to advocacy@nelahq.org.

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

The National Employment Lawyers Association (NELA) empowers workers' rights attorneys through legal training, promoting a fair judiciary, and advocating for laws and policies that level the playing field for workers.

- NELA is the country's largest professional membership organization of lawyers who exclusively or primarily represent workers in cases involving employment discrimination, illegal workplace harassment, wrongful termination, wage theft, and other employment-related matters.
- NELA and its 69 circuit, state, and local Affiliates have more than 4,000 members nationwide. NELA members represent employees in diverse sectors—agriculture, schools, factories, executive offices, military service, tech, health care, and many others. Our members' direct contact with thousands of working people underlies NELA's unique and informed perspective on the issues that affect all kinds of workers every day.
- NELA works closely with coalition allies and independently to advance worker protections through federal legislation and public policy.
- NELA provides subject matter expertise and technical assistance on all areas of employment law. We participate in drafting legislation and issue briefings, submit comments on proposed rule-making and regulations, file or sign on to *amicus curiae* briefs, provide educational programs for employee rights advocates, and respond to media inquiries on employment-related issues.
- NELA members and their clients understand the profound impact of the federal judiciary on the lives of working people. Through its Judicial Nominations Program, NELA advocates for independent and fair-minded federal judges who are committed to equal justice under law for all.

THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY

Advancing Equality & Justice in the American Workplace

Since 2008, The Employee Rights Advocacy Institute For Law & Policy (The Institute) has served as NELA's charitable public education and policy organization.

- The Institute supports the development and publication of research to protect workers' access to the courts, promote employee rights, and influence the broad, macro conversations that shape employment law.
- The Institute provides valuable legal insight to policymakers, the media, advocates, and employees by writing on topics relevant to workers.
- The Institute contributes to building pro-worker precedent in the courts by signing on as *amicus curie* in cases related to the protection and expansion of workers' rights.

National Office • 1800 Sutter Street, Suite 210 • Concord, California 94520 • TEL 415.296.7629

Washington DC Office • C/O AFL-CIO 815 Black Lives Matter Plaza NW • Washington, DC 20006 • TEL 202.898.2880

email: nelahq@nelahq.org • www.nela.org • FAX 866.593.7521

Legislative Action Team Talking Points: The FAIR Act

The Bill: The Forced Arbitration Injustice Repeal Act of 2021 (FAIR Act, S. 505/H.R. 963), will 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.

Voters Support Ending Forced Arbitration:

- **An overwhelming number of voters support legislation to end forced arbitration in both the employment and consumer contexts, with 87% of Republicans, 83% of Democrats, and 80% of Independents surveyed in favor.** (Hart Research Associates, *National Survey On Required Arbitration*, February 28, 2019, *available at* http://www.takejusticeback.com/sites/default/files/Survey%20on%20Forced%20Arbitration%20February%202019.pdf)

Talking Points:

- Forced arbitration takes advantage of the inherently unequal bargaining power between individual employees and their employers. These clauses are not negotiable by employees—workers must accept or lose their ability to earn a paycheck.

- Forced arbitration clauses are frequently buried in the fine print of employment applications, employee manuals, pension plans, and even emails. A large number of employees who are bound by forced arbitration clauses are unaware of the rights they inadvertently gave up until they seek redress for illegal mistreatment in their workplace.

- Proponents of forced arbitration say they only want a less expensive and more efficient means of resolving disputes, but forced arbitration has led to widespread claim suppression.

  One comprehensive study shows[1] that forced arbitration clauses lead to as many as 722,000 claims of employer wrongdoing going unpursued annually because employees find the arbitration process so unfair and so daunting that they never file a claim.

- Forced arbitration undermines the federal laws that Congress worked hard to pass: laws such as the Civil Rights Act of 1964 and the Fair Labor Standards Act. These laws are only meaningful if they can be enforced – but the claim

[1] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 689 (2018).

suppression that results from forced arbitration effectively shields employers from being held accountable when they violate federal laws.

- The FAIR Act ***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 has none of those characteristics. It is not knowingly agreed upon; it is not governed by the safeguards that are present in a courtroom; and employees have no opportunity to negotiate whether or not they are bound by a forced arbitration clause.

- Forced arbitration in the workplace is endemic to the private sector workforce, affecting every segment of the workforce from minimum wage workers to highly compensated professionals. In 2018, 56.2% of nonunion private-sector employees were subject to forced arbitration procedures, up from just 2% in 1991.[2] One report predicts that 80% of non-unionized workers in the United States will be subject to forced arbitration by 2024.[3]

- Congress has already passed several 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.

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[2] https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/

[3] https://files.epi.org/uploads/Unchecked-Corporate-Power-web.pdf

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Links and Resources: Bill Text; Co-Sponsors; Committee Membership; Publications

House of Representatives:

The FAIR Act is being considered in the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law.

Here is the list of the members of the full House Judiciary Committee.
Here is the list of the members of the House Subcommittee on Antitrust, Commercial and Administrative Law.

- FAIR Act, House Bill text: H.R. 963
- Current FAIR Act co-sponsors in the House of Representatives

Senate:

The FAIR Act is being considered in the Senate Judiciary Committee.

Here is the list of the members of the Senate Judiciary Committee.

- FAIR Act, Senate Bill S. 505
- Current FAIR Act co-sponsors in the Senate

The Institute Publications On Forced Arbitration

- *Forced Arbitration: A Race to the Bottom* by Elizabeth Colman
- *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies* by Professor Imre S. Szalai.
- *Taking "Forced" Out of Arbitration: How Forced Arbitration Harms America's Workers*, published by The Employee Rights Advocacy Institute for Law & Policy (The Institute).
- The Institute and NELA submitted testimony into the record of the introduction of the bill.

Other Publications On Forced Arbitration and Race

- NELA Calls on JAMS to Review Bias Cases of Arbitrator Who Sent Racist Rant
- The huge diversity issue hiding in companies' forced arbitration agreement
- Corporations, Congress Must Examine Arbitration and Racism

Procedural History:
The Forced Arbitration Injustice Repeal Act (FAIR Act, S. 505/H.R. 963)

NELA strongly supports the Forced Arbitration Injustice Repeal Act of 2021 (FAIR Act, S.505/ H.R. 963), which would end forced arbitration by amending the Federal Arbitration Act (FAA). It would 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 FAIR Act. The bill also prohibits agreements and practices, whether part of or separate from a forced arbitration clause, that interfere with the right of individuals, workers, and small businesses to participate in joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.

This document details, in reverse chronological order, the procedural history of the FAIR Act in the 117th Congress. The list of cosponsors of this bill, as with all bills, changes as Members of Congress decide to sign on as cosponsors. **We are providing links to the most up-to-date lists of cosponsors of the FAIR Act. The current cosponsors of the House bill can be seen here, and cosponsors of the Senate bill can be seen here. (You will want to know if your Member of Congress has signed on as a cosponsor before you talk to their staffer. Please note that this list is in *date order* of when a member signed on. Thus, you must scroll through the entire list to see if your member is a cosponsor.)**

March 1, 2021
Senator Richard Blumenthal (D-CT), reintroduced the FAIR Act in the Senate of the 117th Congress on March 1, 2021. The bill currently has the support 39 cosponsors in the Senate. Upon reintroduction, the Senate Bill was referred to the U.S. Senate Judiciary Committee.

February 11, 2021
Representative Hank Johnson (D-GA), reintroduced the FAIR Act in the House of Representatives of the 117th Congress on February 11, 2021. The bill currently has the support of 196 cosponsors in the House. NELA submitted testimony for the record of the introduction. Upon reintroduction, the bill was referred to the U.S. House Committee on the Judiciary.

September 20, 2019
The U.S. House of Representatives passed the FAIR Act with a final vote of 225-186. The identical Senate bill died in committee.

May 16, 2019
The U.S. House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law, held a hearing on forced arbitration and the FAIR Act. Ahead of the hearing, NELA submitted a letter in support of the FAIR Act to the Subcommittee Chairman, Representative David Cicilline, and the Ranking Member, Representative F. James Sensenbrenner. Justice Denied: Forced Arbitration and the Erosion of our Legal System.

February 28, 2019
Authored by Senator Richard Blumenthal (D-CT) and Representative Hank Johnson (D-GA), the FAIR Act was introduced in the 116th Congress on February 28, 2019 with the support of 155 cosponsors in the House and 33 cosponsors in the Senate. Upon introduction, the identical bills were referred to the U.S. House Committee on the Judiciary and the U.S. Senate Judiciary Committee.

The Forced Arbitration Injustice Repeal Act: Ending The Assault On Workers' Rights

The Forced Arbitration Injustice Repeal Act (FAIR Act, S. 505/H.R. 963), introduced in the 117th Congress, will end forced arbitration by amending the Federal Arbitration Act (FAA). The bill provides that no pre-dispute arbitration clause is valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute. Mandatory arbitration agreed to under a collective bargaining agreement would not be affected by the FAIR Act. The bill also prohibits interference with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to employment, consumer, antitrust, or civil rights disputes. This long-overdue legislation is critical to working people in all sectors of the economy. If passed, it will protect workers who face wage theft, discrimination, harassment, or other illegal treatment in the workplace. **NELA strongly supports the passage of the FAIR Act.**

In 1992, only 2 percent of employers used forced arbitration clauses in their employment documents. By 2008, that number was 25%. Now, according to a 2017 report, more than 60 percent of the non-unionized workforce is bound by a forced arbitration clause, and that number is still on the rise. Recent projections indicate that **by the year 2024, more than 80% of all non-union private-sector employees will be under a forced arbitration clause.**

In all aspects of the proceedings, the deck is stacked against every employee bound by forced arbitration clauses. A forced arbitration clause means that private arbitrators decide employment claims. The employer unilaterally chooses the arbitrator. The arbitrator makes the final decision in the case and establishes the procedural rules for the arbitration. Procedural rules and decisions about timeframes, admissibility of evidence, and access to records often make the difference between winning and losing a case. The secret nature of forced arbitration enables employers to abuse their workers with impunity. The abuse perpetrated by former FOX News CEO Roger Ailes is just one example of the kind of mistreatment that can continue under forced arbitration.

When employers impose a forced arbitration clause, the employee does not choose; they must comply to get or keep their job. Corporate employers present forced arbitration clauses to job applicants and employees on a take-it-or-leave-it basis. Some employers force workers to agree to the arbitration clause as a condition of employment; other employers bury the clauses in the fine print of onboarding documents in a workplace or employee handbooks. Often, the worker isn't aware they "agreed" to arbitration until there is a dispute. Despite the lack of consent on the part of the employee, Supreme Court precedent has led lower courts to find that a worker who challenges the forced arbitration clause has "agreed" to enter into this arrangement simply by continuing to work for the employer.

This scheme of corporate circumvention of the law was purposefully designed, by defense counsel, to limit the liability of their corporate clients. Today's U.S Supreme Court has upheld and affirmed this approach—to the detriment of workers.

1. Forced Arbitration Clauses Allow Corporations To Evade Accountability For Illegal Misconduct

Since 1938, when the Fair Labor Standards Act was enacted, the United States Congress has recognized the need for a range of employee protections and enacted important laws to foster safe, fair, and equitable workplaces. Federal workplace protections, such as the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Uniformed Services Employment and Reemployment Rights Act, aim to eradicate workplace discrimination, retaliation, and wage theft. These statutes represent hard-fought efforts to address the pervasive mistreatment of different groups of workers. They have a broad social purpose, as well as providing remedies for individual workers.

Up to 722,000 otherwise valid claims of employer wrongdoing "go missing" each year because of forced arbitration. Data show that forced arbitration results in massive claim suppression, changing the course of the law on important issues. Claims are suppressed in part because the process of arbitrating claims is less fair, among other reasons, because important procedural rules, including rules of evidence, are not required to be adhered to. For the plaintiff, arbitration can be more costly than the process in a court of law. For example, some forced arbitration clauses deter the filing of claims by imposing extremely narrow time frames to file a complaint, limiting the employee's access to crucial evidence, restricting the damages that the employee can seek, or requiring high arbitrator fees.

Many forced arbitration clauses also prohibit collective action. Collective action bans make it impossible for low-wage workers to hold lawbreaking employers accountable because an individual's claims are often too small to justify the costs of an arbitral proceeding. Class action litigation to address widespread wrongdoing, and even the possibility of such litigation, is a powerful tool that keeps companies from breaking employment laws and persuades violators to begin complying with workplace protections. Workers all across the nation must have their class action rights restored, so they can continue to organize their workplaces, fight for better working conditions, and have an effective means to vindicate their workplace rights.

2. The U.S. Supreme Court's Gross Misinterpretation Of The FAA Has Decimated Workers' Ability To Enforce Their Fundamental Rights

Congress never intended for The Federal Arbitration Act 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.

The United States Supreme Court's modern interpretation of the FAA misconstrues the statute's text and ignores the legislative intent. The result: workers are denied access to meaningful enforcement of the workplace rights established by Congress. Relying on Supreme Court precedent, employers now routinely force workers to address illegal treatment in secret, binding arbitration. Arbitration *can* be an appropriate way to resolve employment disputes—but only when the parties knowingly and voluntarily agree upon it *after a dispute arises.* Employers should never be permitted to force their workers into a secretive system that lacks the neutrality and fairness of due process in a court proceeding.

In the 1984 Supreme Court case *Southland Corp. v. Keating*, the majority held that the FAA preempted state laws on arbitration. Justice O'Connor's dissent stated the Act was unambiguous; it was merely procedural and

applied only to federal law. Justice O'Connor concluded by calling the majority opinion an "exercise in judicial revisionism."

It wasn't until the 1991 case *Gilmer v. Interstate Johnson/Lane Corp.* that the reach of the FAA began to extend to employment claims. In *Gilmer*, the Court's majority concluded that a statutory text or history must show the intention to preclude arbitration; if there is no documented legislative intent to preclude arbitration, the employee may waive their right to sue through a mandatory arbitration clause.

In 2001, in another 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 those involving transportation workers.**

In 2013, the Supreme Court ruled in *American Express Co. v. Italian Colors Restaurant* that **class action bans in commercial contracts are enforceable even when the pursuit of individual claims for wrongdoing is not economically viable.**

Unfortunately, in 2018, the Supreme Court put the effective vindication of workplace rights in jeopardy when it ruled in *Epic Systems v. Lewis* that **employers can require workers to sign class-action waivers as a condition of employment.**

3. To Protect America's Workforce and Restore Workers' Access To Justice, Congress Must Pass The Forced Arbitration Injustice Repeal (FAIR) Act.

Only Congress can rectify this injustice. Because the Supreme Court has contorted the FAA and expanded it beyond its original legislative intent, the federal legislature is the only governing body empowered to restore 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 undermined.

Ending forced arbitration is a bipartisan issue with broad bipartisan support. A national survey conducted in February 2019 found that 84% of voters supported ending forced arbitration in consumer and employment contracts. Among those asked, 87% of Republicans, 83% of Democrats, and 80% of Independents supported legislation prohibiting companies from requiring the arbitration of consumer or employment disputes and preserving consumers' and employees' choice to take their claims to court.

With bipartisan support, Congress has already passed laws 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 now to protect all workers in the United States.

NELA and many other workers, civil rights, and consumer groups in the Fair Arbitration Now coalition are working to pass the FAIR Act. **NELA urges members of Congress to cosponsor and actively support the enactment of the Forced Arbitration Injustice Repeal Act in the 117th Congress.**

Digital Advocacy:
Hashtags, Handles, and Messaging

Your voice has power! Digital advocacy is a great way to amply our priority issues and connect with your members of Congress. Use the hashtags and sample messages below—or write your own message—and post on social media. Tag @NELA_HQ and your elected officials on Twitter, Facebook.

Follow NELA: Twitter @NELA_HQ | Facebook: /NELAHQ

Hashtags: #FAIRAct #EndForcedArbitration #FairNotForced #forcedarbitration #essentialworkers

- Workers have no power to negotiate the terms of take-it-or-leave-it #forcedarbitration clauses. Congress must pass the #FAIRAct to give workers a fighting chance.
- Low-income workers have billons of dollars collectively stolen from them each year by employers who use #forcedarbitration and class-action waivers to silence employee claims. Pass the #FAIRAct today to #EndForcedArbitration.
- The #FAIRAct restores the rights of survivors of sexual harassment, members of the military wrongfully terminated, and seniors in nursing homes to hold corporate wrongdoers accountable in open court, in front of an impartial judge. It's time to #EndForcedArbitration
- Protect #essentialworkers Restore their workplace rights. #EndForcedArbitration now by passing the #FairAct
- Forced arbitration proceedings are conducted in secret. Systemic fraud, discrimination, and harassment are kept hidden by forced arbitration. The #FAIRAct would restore the rights of people to band together to take on corporate bad actors. #FairNotForced #EndForcedArbitration.
- 80 Fortune 100 companies force arbitration. Nearly half go even further by banning employees from taking collective legal action. These companies harm workers. #EndForcedArbitration #FairNotForced
- Congress must pass the #FAIRAct to restore our right to join together to take on corporate wrongdoers in court. #EndForcedArbitration
- By 2024, 80% of non-unionized workers in the United States will be covered by a forced arbitration clause. #EndForcedArbitration now to protect workers from abuse. Pass the #FairAct.
- One fundamental principle of our democracy: everyone gets their day in court. The #FairAct would stop companies from depriving people of an impartial judge and jury and forcing them into a biased, secret forum. #EndForcedArbitration