National Employment Lawyers Association

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

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.**