National Employment Lawyers Association

Lobby Day Talking Points: The FAIR Act

The Bill: The Forced Arbitration Injustice Repeal (FAIR) Act of 2021, (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.

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 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

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

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.

[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