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Restoring Workers' and Consumers' Rights through the FAIR Act

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***Author**: Catherine Rowland, Legislative Affairs Director (catherine@progressivecaucuscenter.org)*

Over the past 30 years, American companies—with the help of numerous Supreme Court decisions—have come to rely more and more on "forced arbitration" clauses in contracts with their workers and customers. These clauses prevent individuals who believe a company has violated their rights from seeking justice through the court system. Workers and consumers may not even know that in the course of accepting a job or signing up for a service with a company, they have signed away any future ability to sue if they are the victim of discrimination, wage theft, fraud, or another injury inflicted upon them by the company in question. Corporations and other proponents of forced arbitration argue that avoiding the court system allows for disputes to be settled more quickly and cheaply. Assessing the validity of such claims is difficult, as arbitration cases are not subject to the same reporting requirements as the courts. However, considerable evidence suggests that forced arbitration harms workers and consumers alike.

This issue has taken on new urgency during the COVID-19 pandemic. Between 2018 and 2020, use of the practice to settle employment disputes jumped by about 66 percent. In 2019, the House of Representatives passed the bipartisan Forced Arbitration Injustice Repeal (FAIR) Act, introduced by Congressman Henry C. "Hank" Johnson, Jr. This bill would prohibit the use of forced arbitration clauses in employment, consumer, antitrust, and civil rights disputes, while still letting workers and consumers choose to settle their claims through arbitration voluntarily. Although the bill stalled in the Senate during the 116th Congress, the issue of forced arbitration is again gaining momentum. On March 3, 2022, President Biden signed legislation into law that bans forced arbitration in sexual assault and sexual harassment cases.

"Results Are Secret": Why Corporations Use Forced Arbitration

Forced arbitration clauses appear in all manner of employment and consumer contracts, such as those required to sign up for credit cards or cable service, or to live

in a residential care center, or to purchase furniture. Companies insert these clauses because, evidence suggests, arbitration tends to result in outcomes more favorable to their interests than the courts. The Economic Policy Institute (EPI) found, "on average, employees and consumers win less often and receive much lower damages in arbitration than they do in court." In 2015, the median payout for arbitration cases was $36,500—less than half the amount for disputes adjudicated in state courts ($86,000) and one-fifth the amount for those adjudicated in federal courts ($176,000).

Few workers and consumers can hope to collect even these comparatively meager damages. According to the American Association for Justice, 577 individuals won monetary awards via forced arbitration in 2020, a "win rate" of just over 4 percent. In cases involving disputes between employers and workers, a mere 1.6 percent won monetary awards.

The benefits of forced arbitration for companies are not only limited to less frequent and lower payouts for claimants. According to the ACLU:

> *"...arbitration also lacks critical procedural safeguards — for example, permitting access to evidence from the other side that can be the key to proving your claims – particularly in discrimination cases, which often hinge on how the employer has treated other employees. The arbitrators may or may not be lawyers, and may or may not be trained in resolving discrimination cases. Results are secret, helping companies evade public accountability. The outcome is binding, and there is generally no right to an appeal."*

Forced arbitration clauses also tend to preclude workers and consumers from banding together in a class action lawsuit. This prevents people from seeking justice collectively in response to a pervasive problem—for example, a faulty product that has caused injuries—they might not have the means to address through an individual lawsuit. It also shields the company in question from accountability and the negative media attention a class action lawsuit might generate, as arbitration proceedings happen behind closed doors and reporting on their outcomes is limited-to-nonexistent. Only California, Maryland, and New Jersey impose narrow reporting requirements on arbitrators.

Furthermore, forced arbitration proceedings typically allow only for compensatory damages—that is, damages meant to compensate the party injured by the guilty party—and do not allow for punitive damages, which are meant to punish the guilty party and discourage further wrongdoing. Such punitive damages can be significant both in the compensation for those who have been injured, but also in deterring future misconduct and reckless behavior. For example, in 2021, Johnson & Johnson

(J&J) was ordered to pay $500 million in compensatory damages and $1.62 billion in punitive damages to consumers claiming the company's talcum products, including its well-known baby powder, contained cancer-causing asbestos. Memos dating back to the 1960s showed J&J knew its products contained the carcinogenic asbestos, and multiple claimants died before the trial even began. J&J ultimately pulled talc-based baby powder from shelves in North America.

Finally, forced arbitration clauses often afford companies the power to choose the arbitration firm that will handle their case. Even when the company cannot choose the arbitrator, they usually pay the arbitrator's fee. This allows them to seek out firms that might be more favorable to their interests. Moreover, as reported in *The American Prospect*, "there is a significant incentive for these arbitration firms to side with the corporations, as they have a higher chance of being hired again in the event of another arbitration case." Cases adjudicated in the courts do not allow companies this kind of discretion.

A Growing Trend in the Workplace

Forced arbitration clauses became increasingly common in the wake of Supreme Court cases that greenlit their expanded use, starting with the 1991 *Gilmer v. Interstate/Johnson Lane* decision, which upheld the use of forced arbitration in employment disputes. Following this and other employer-friendly Supreme Court rulings, employers' use of forced arbitration clauses to tie workers' hands expanded. According to EPI:

> *"These mandatory employment arbitration agreements bar access to the courts for all types of legal claims, including employment discrimination and sexual harassment claims based on Title VII of the Civil Rights Act, protections for employees with disabilities under the Americans with Disabilities Act, rights to maternity and medical leaves based on the Family and Medical Leave Act, and entitlements to minimum wages and overtime under the Fair Labor Standards Act."*

The use of forced arbitration clauses for workers has expanded not only in scope, but in number. EPI found that approximately 54 percent of nonunion, private-sector employers have forced arbitration procedures; that figure grows to 65 percent for companies with 1,000 or more workers. The percentage of workers covered by these forced arbitration agreements is similarly high: EPI's report found that 56.2 percent of nonunion private-sector workers are subject to a forced arbitration agreement. Another report from EPI and the Center for Popular Democracy (CPD) predicted that this would grow to 80 percent of nonunion private-sector workers by 2024. This would almost certainly result in more corporations pocketing billions more dollars

that belong to workers: the National Employment Law Project (NELP) found that in 2019, employers used forced arbitration to prevent private-sector, nonunion workers making under $13 an hour from recovering $9.2 billion in stolen wages.

Thirty percent of employers who use forced arbitration clauses also bar their workers from entering into class action lawsuits. In 2018, the Supreme Court ruled in *Epic Systems v. Lewis* that employers may, through forced arbitration clauses, keep workers who have experienced discrimination, wage theft, or other harms at the hands of their employers from demanding justice collectively. In the wake of this decision, EPI and CPD forecasted "a surge in corporate use of forced arbitration" and estimated "by 2024, more than 80 percent of private sector nonunion workers will be blocked from court by forced arbitration clauses with class- and collective-action waivers."

While forced arbitration in workplace disputes has become more common, its use has impacted some workers more than others. According to the ACLU, "these kinds of agreements are prevalent in female dominated industries – 57.6 percent of female workers are subject to the practice – as well as in low-wage fields and industries dominated by women of color." One such industry is direct care, where the workforce is disproportionately comprised of women and people of color; nearly 9-in-10 direct care workers are women, and more than 6-in-10 are people of color. These workers have faced tremendous risks during the COVID-19 pandemic but, because of forced arbitration, the public may never fully understand how the pandemic impacted those workers' lives. One Google employee with Googlers for Ending Forced Arbitration noted:

> *"We are inspired by the stories of sacrifice and charity during this pandemic, but forced arbitration means we may never know how many people gave their lives because they did not have adequate PPE or were forced to work while ill. Instead the stories will be locked under NDA [nondisclosure agreements] or never allowed to be told at all."*

Restoring Workers' and Consumers' Rights through the FAIR Act

On September 20, 2019, the House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act with some bipartisan support. This bill, introduced by Congressman Henry C. "Hank" Johnson, Jr. in the House and Senator Richard Blumenthal in the Senate, would prohibit the use of forced arbitration clauses in employment, consumer, antitrust, and civil rights disputes, while still permitting workers and consumers to settle their claims through arbitration if they so choose. The Senate failed to act on the bill. However, the bill was reintroduced in the current Congress and was approved by the House Judiciary Committee on November 3, 2021.

Ending forced arbitration has robust bipartisan support among the public, with 83 percent of Democrats and 87 percent of Republicans opposed to the practice. Moreover, there is broad consensus even within Congress that forced arbitration can be inappropriate: in February, both the House and Senate passed H.R. 4445, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which President Biden signed into law on March 3. This legislation would prevent survivors of sexual harassment and assault from being locked into forced arbitration and invalidate forced arbitration clauses that prevent sexual assault and sexual harassment survivors from seeking justice and public accountability. By passing the FAIR Act, Congress could build on this momentum, advance an overwhelmingly popular policy, and restore the rights of consumers and workers alike to seek justice when they are injured by corporations.

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