Taking "Forced" Out of Arbitration

How **forced arbitration** harms America's workers

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> **"There is a reason that arbitration is the favored venue of many businesses for deciding employment disputes, and it is not to ensure that employees are afforded the best chance to have their claims adjudicated by a judge or jury picked from the community." — United States District Judge Berle M. Schiller[1]**

Most workers who accept a new job never think they will need to take their employers to court for violating their workplace rights. But what many workers don't realize is that their employers may have already stripped them of their right to go to court to resolve disputes. Written into the fine print of employment applications, handbooks, contracts, and company emails are forced arbitration clauses that require workers to take their claims to private arbitration.

Employers are gaming America's civil justice system and depriving millions of workers access to the courts when big business violates our nation's employment and civil rights laws.

The widespread employer practice affects every segment of America's workforce, from minimum wage workers to professionals to our nation's armed servicemembers. Employers are compelling employees to give up their day in court and thus their rights under federal, state, and local worker protection laws.

HOW DOES FORCED ARBITRATION HARM WORKERS?

Congress has enacted laws representing our nation's fundamental values that everyone deserves equal treatment, fair wages, safe working conditions, and access to the courts when their rights are violated. With these statutes, Congress affirmed that workplace protections were of such national importance that they should be enforced in a court of law.

Forced arbitration is one of the most significant threats to the protection and enforcement of employee rights. It undermines the ability of workers to have their cases heard by a judge and jury, requiring them instead to pursue their claims individually in arbitration behind closed doors.

WHAT IS ARBITRATION?

There are different ways legal disputes can be resolved without going to court. Arbitration is one way where the parties in the dispute present their sides to an individual arbitrator or a group of arbitrators. It is a private out-of-court system without a judge, jury, or the right to an appeal. The arbitrator decides the rules, weighs the facts and arguments, and makes a binding decision. Arbitration is different from mediation, which is a process where the parties attempt to negotiate an agreement. If the parties are unable to resolve their dispute in mediation, they may go to court.

Arbitration can be a legitimate option for resolving workplace disputes when the employee can weigh the relative merits of going either to court or to arbitration after a problem arises. Rather than being forced into arbitration by their employers, workers should be able to decide knowingly and voluntarily to arbitrate a dispute.

WHAT IS FORCED ARBITRATION?

Requiring workers to challenge unlawful employer conduct in private arbitration is a practice known as "forced arbitration." Forced arbitration is different from voluntary arbitration because it is not the result of free and equal bargaining between workers and their employers. It is a process that benefits employers by taking away the rights of workers.

Forced arbitration requires workers to resolve disputes in private rather than in a public court. It shields employers from public accountability for their wrongdoing, preventing employees and the broader public from learning about unlawful employer activity. Unlike a court of law, private arbitration occurs in the absence of legal safeguards and other guarantees that ensure a fair process.

Many forced arbitration clauses also include "class action waivers" that prevent workers from joining together to bring their claims as a group in arbitration, even when those claims arise out of the same unlawful workplace practices. As a result, forced arbitration has contributed not only to the sharp decline in class actions by workers to enforce their rights in court, but also to ensuring that those claims cannot be raised in arbitration either. When the amount of each worker's damages is too small to justify bringing an individual claim, class action waivers allow employers to evade their responsibilities under the law.

A 2015 report by a national law firm representing employers shows that the percentage of companies using forced arbitration clauses that ban class actions more than doubled from 16% in 2012 to almost 43% in 2014.[2]

Ten reasons to take "forced" out of arbitration

1. Forced arbitration denies workers access to our country's civil justice system. Unlike voluntary arbitration where both the worker and employer knowingly agree to arbitration after a workplace dispute arises, forced arbitration is a one-sided proposition by employers that requires workers to waive the right to their day in court.

2. Forced arbitration is not voluntary. Through forced arbitration, employers compel job applicants and workers to give up their rights to go to court before a dispute arises. Employers can impose forced arbitration clauses on their workers after they have been on the job for years, and employees must comply if they want to keep their job.

3. Forced arbitration does not require the worker's informed consent. Because forced arbitration is imposed before any dispute arises, workers cannot knowingly consent to waive their rights—at that point, they do not even know what their rights are. It is impossible for workers to make an informed choice about what legal mechanisms they want to use when they have no actual dispute with their employer.

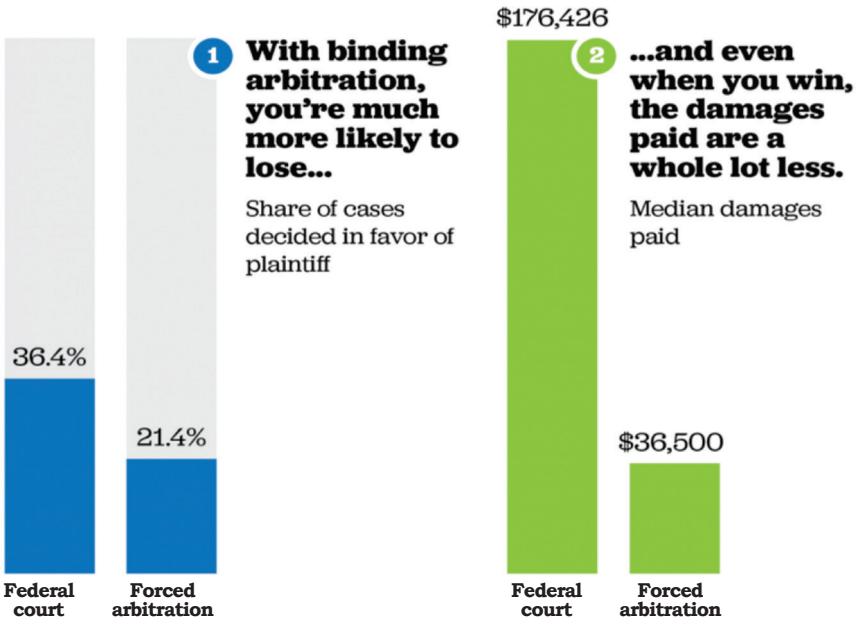
4. Forced arbitration is a result of the unequal bargaining relationship between individual workers and their employers. In union workplaces, the union and employer negotiate fair terms and conditions. Collective bargaining agreements also set forth voluntary arbitration for disputes. Non-union workers have virtually no power to negotiate, subjected instead to conditions imposed by their employers.

5. Workers lose more often, win smaller awards, and spend more money in arbitration than in court. A recent study by the Economic Policy Institute reveals that workers are much less likely to win in forced arbitration than in federal court. Workers in forced arbitration win only about a fifth of the time (21.4%), but win over one-third of the time (36.4%) in federal courts. The differences in damages awarded are even greater. The typical award in forced arbitration ($36,500) is only 21% of the median award in federal courts ($176,426).

6. Forced arbitration helps employers hide wrongdoing from their workers and the public. The confidential nature of forced arbitration hides employers' bad acts. Public court decisions not only hold the employer involved in the case accountable, but also could be applied to other employers who are violating their workers' rights in the same way. Arbitration rulings cannot be applied to other law-breaking employers—or even to the same employer—if they break the law in the same way against their employees in the future.

What's the difference between forced arbitration* and litigation in a normal court?

***Forced arbitration** is a method corporations use to circumvent the courts by requiring consumers and employees to settle complaints privately through an arbitrator.



All damage amounts are converted to 2005 dollar amounts to facilitate comparison.
Source: Katherine V. W. Stone and Alexander J. S. Colvin, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights*

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Ten reasons to take "forced" out of arbitration

7. Forced arbitration is contrary to the principles of America's public civil justice system. Forced arbitration allows employers to limit important legal protections for workers. Employers can shorten the amount of time in which workers can bring a claim and limit the type of relief workers can receive if they prove their claims in arbitration. In addition, the decisions of private arbitrators cannot be overturned on appeal, even when the arbitrator clearly misapplies the law. Because employers do not have to follow rules that exist in court, by imposing forced arbitration they can severely restrict a worker's right to obtain needed information to prove his or her case, making it more difficult for employees to collect evidence of the employer's wrongdoing.

8. Forced arbitration stacks the deck in favor of employers that provide repeat business to arbitrators. Statistics show that many arbitrators will work for the same employers over and over again, and that the more often an arbitrator rules in favor of the same employer, the more likely the company will hire the arbitrator to resolve workplace disputes in the future. This encourages arbitrators to rule in favor of employers that can provide repeat business.

9. Employers and their lawyers write forced arbitration clauses. Complex forced arbitration clauses are often tucked into the fine print of employment applications and contracts, employee manuals, pension plans, and even emails. Workers are often unaware of the forced arbitration language and its implications for challenging workplace violations. As illustrated in the "Case Stories" in this pamphlet, employees who want their cases heard by a judge or jury must contest the validity of forced arbitration clauses in court before they even reach the substance of their claims.

10. Forced arbitration can be prohibitively expensive. Unlike filing a lawsuit in court, arbitration companies charge high fees. And unlike a judge, the arbitrator's time must be paid for—often to the tune of hundreds of dollars per hour. Arbitration clauses may require workers to pay fees that are much higher than fees to file a court claim. Also, because employers choose the place of the arbitration, it could be in a different state from where the person lives and works, causing further financial hardship for employees.

Differences between the courts and forced arbitration

The courts	Forced arbitration
The worker and employer freely decide to go to court to resolve a dispute that arises.	The employer forces the employee to resolve all potential claims in arbitration before any actual dispute exists.
The parties to the dispute do not pay the judges, and judges have no financial stake in the cases they decide.	Arbitrators rely on repeat customers, who tend to be employers, to sustain their business.
The parties can seek a higher court review if either disagrees with the lower court's decision.	Arbitrators' decisions will stand, even if the arbitrator clearly misapplies the law.
The same procedural rules apply equally to both sides.	The employer has more power than the employee to choose the arbitrator and the rules that apply.
Employer wrongdoing is made public.	Employer wrongdoing is kept secret.

How to protect yourself from forced arbitration

When you receive and sign an employment application, contract, letter, handbook, acknowledgment form, or other document from your employer, read it carefully and be sure you understand the language. When you sign such documents, often times you are stating that you "agree" and "understand" what is in the document. Protect yourself from signing away your rights: do not sign any document unless you have read and do in fact agree to all the terms.

If you believe your rights have been violated, file an administrative claim with a federal or state agency. It is unlawful for employers to prevent workers from filing a claim with a federal or state agency when they believe their rights have been violated.

Try to negotiate the terms of the forced arbitration clause to make it fairer to you. For example, ask that you and your employer mutually agree to the arbitrator, that the arbitrator must know employment law, that you are not required to pay for the arbitrator's time, that you are entitled to legal representation, that the rights you have under the law will apply in arbitration, that the arbitrator discloses any conflicts of interest, and that you will receive a written decision of the arbitration.

Do not sign a "contract" with a forced arbitration clause. In order for a valid contract to be formed, both parties must mutually agree to be bound by its terms. If you have the opportunity to do so, refuse to sign a "contract" containing a forced arbitration clause.

Opt out of a forced arbitration clause. Although most workers do not have the chance to opt out of a forced arbitration clause, if you have the opportunity to do so, take advantage of it.

Beware that even if you do not sign a forced arbitration clause, you could still be bound by one. In some cases, courts have stated that workers are bound by a forced arbitration clause even when they have not signed a document containing the clause. These courts have ruled that continued employment can serve as valid consent to forced arbitration. Thus, you could start a job, be presented with a new policy containing a forced arbitration clause, refuse to sign it, and still be bound by the clause.

THERE OUGHT TO BE A LAW

Anyone who believes that employers should not have the power to impose forced arbitration on their workers as a condition of getting or keeping a job should urge their members of Congress to support and pass laws that ban forced arbitration.

The prevalence of forced arbitration of workplace claims is a result of U.S. Supreme Court decisions that have expanded the reach of the Federal Arbitration Act (FAA) to the workplace, which was not intended by Congress. Congress passed the FAA in 1925 to ensure that the courts enforce voluntary business-to-business arbitration agreements. The FAA was never intended to apply to the employment relationship where workers do not have equal bargaining power with their employers. But in the 1990s, a majority of the Supreme Court began misconstruing the FAA and applying it to workplace disputes. Emboldened by the Supreme Court decisions, employers are closing the courthouse doors to workers to challenge employer wrongdoing.

As it becomes increasingly more difficult for workers to hold their employers accountable in a court of law, workers need federal legislation that would amend the Federal Arbitration Act. It must be made unlawful for employers to impose arbitration on workers; arbitration is valid only when workers knowingly and voluntarily agree to it after a dispute arises or because of a collective bargaining agreement. Ending forced arbitration in the workplace can be a reality. Congress has already passed laws, with bipartisan support, to ban forced arbitration of disputes involving auto dealers, poultry and livestock producers, and certain employees of federal defense contractors. The time has come for Congress to outlaw forced arbitration for all of America's workers.

Forced arbitration: it could happen to you

case stories

BEWARE OF FORCED ARBITRATION CLAUSES LIKE THIS:

> "The parties understand and agree (I) that each of them is waiving rights to seek remedies in court, including the right to a jury trial; (II) that pre-arbitration discovery in arbitration proceedings is generally more limited than and different from court proceedings; (III) that the arbitrator's award is not required to include factual findings or legal reasoning; (IV) either party's right to appeal or to seek modification of rulings by the arbitrator is strictly limited; and (V) the parties have agreed to a six (6) month period to file any claims against the other."

COLLEGE STUDENT CHALLENGES EMPLOYER'S ONE-SIDED ARBITRATION CLAUSE

Martha Carbajal's case highlights the occurrence of a "blatantly one-sided" arbitration clause in an employment contract that was ruled unenforceable by the courts.

While a student in college, Carbajal worked as an intern running crews and soliciting business for house painting services for CW Painting Inc., based in Irvine, California. The company required its workers to sign an employment contract that included a forced arbitration clause barring them from taking workplace disputes to court but retaining its own right to go to court. Despite the forced arbitration clause, Carbajal filed a class action in court alleging the company failed to pay her and other workers the minimum wage and that it violated other wage and hour laws. She also challenged the validity of the forced arbitration clause.

Both the trial and appeals courts found that the forced arbitration clause was unenforceable because it was too one-sided in favor of the employer. The appeals court also found the clause unfair because it required workers to sign the arbitration "agreement" as a condition of employment and did not identify the rules that would apply to the forced arbitration proceedings. Furthermore, the clause barred Carbajal from collecting attorneys' fees that would be awarded to her under the law were she to win her case. The appeals court's decision finally allowed Carbajal to move forward with her proposed class action in court, but only after almost three years of Carbajal's fight against the forced arbitration clause. For every worker who successfully challenges forced arbitration, there are many other workers who are deterred from doing so because forced arbitration stacks the deck against them.

Carbajal's lawyer explained, "This case exemplifies the widespread scenario in which an employer writes a mandatory pre-employment arbitration clause that is one-sided and designed to give the company an advantage in arbitration and, more importantly, kill potential class actions that challenge their employment or compensation policies and/or practices."

HUSBAND WHO PROTECTS WIFE FROM UNLAWFUL WORKPLACE HARASSMENT DENIED DAY IN COURT

Michael Ashbey lost his day in court when his employer required him to sign a form acknowledging receipt of a company policy manual that included a forced arbitration clause.

Ashbey worked for Archstone Property Management for 14 years. After his wife, also an Archstone employee, complained that a fellow employee was sexually harassing her, the company fired her. Standing up for his wife, Ashbey defended his wife's allegations of sexual harassment. Archstone then terminated Ashbey.

Ashbey filed a lawsuit against Archstone, alleging that following his wife's firing, the company engaged in retaliatory conduct towards him by first altering his employment conditions and then wrongfully firing him.

Archstone asked the court to force Ashbey into arbitration on the basis that he had signed a form acknowledging receipt of a 100-page company policy manual that included a forced arbitration clause. At the time, the company offered no time for Ashbey to review the manual; nor did it inform him that he would be waiving his right to go to court by signing the form.

Ashbey asserted he did not knowingly and voluntarily waive his right to go to court.

The court denied the company's request on the

Forced arbitration: it could happen to you

grounds that the acknowledgment form did not require Ashbey to arbitrate his claims. It also found that Ashbey did not knowingly waive his right to his day in court. Archstone sought review of the decision by a higher court, which determined that Ashbey "knowingly waived his right to a judicial forum." The judge asserted that Ashbey had the relevant language "at his fingertips" to know that he had waived his right to go to court when he signed the acknowledgment form.

FORCED ARBITRATION TAKES AWAY U.S. SERVICEMEMBER'S WORKPLACE RIGHTS

America's servicemembers should never have to choose between protecting our country and keeping a civilian job. But that is what happened to Rodney Bodine.

Bodine was a member of the U.S. Army Reserve when Cook's Pest Control in Alabama hired him to work in sales. At the time of his hiring, Bodine signed an employment contract that contained a forced arbitration clause.

From the beginning, Bodine's supervisor and colleagues subjected him to discrimination and harassment because he was a member of the country's armed services. During his second year at Cook's, Bodine informed his supervisor of the Army Reserve's order for him to report for annual training. The company fired him three months later.

To protect servicemembers from discrimination and retaliation in civilian employment because of their military duties, Congress passed the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994. Bodine brought his case to court alleging discrimination, harassment, retaliation, and emotional distress under USERRA.

The trial court recognized that parts of Cook's forced arbitration clause unlawfully limited Bodine's USERRA rights and refused to enforce them. Yet the court still ordered Bodine to arbitrate his case. Bodine appealed the trial court's order.

Despite USERRA's workplace protections for servicemembers, the forced arbitration clause denied Bodine's right to have his dispute heard in court. It also shortened the time in which he could file a claim, potentially made him responsible for his employer's attorney's fees and costs, and tried to limit his right to appeal.

Forced arbitration: what employers say and what the reality is

What employers say	The reality
Arbitration is merely a less formal version of court and easier for the less legally sophisticated.	Less formality actually means fewer protections to ensure fairness for the less powerful.
Arbitration is a cheaper alternative to bringing a case to court.	Arbitration can be expensive for workers, who may have to pay thousands of dollars just to bring their claims. For those who can't afford the fees, a forced arbitration clause is a "get out of jail free" card for their employer.
Employees are free to bring the same claims in arbitration that they would bring in court.	Employers can alter the rules in arbitration to prevent workers from proving their claims.
Arbitration is a more efficient alternative to lengthy court proceedings.	Workers should be free to choose whether they are willing to sacrifice justice for speed *after* a dispute arises, not *before*.
Arbitration is overall a better mechanism for resolving workplace disputes.	If that were true, employers would not need to force arbitration on their employees as a condition of getting or keeping a job.

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ABOUT THE INSTITUTE

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RESOURCES

The Employee Rights Advocacy Institute For Law & Policy
www.employeerightsadvocacy.org

National Employment Lawyers Association
www.nela.org

Alliance for Justice
www.afj.org

American Association for Justice
www.justice.org

Economic Policy Institute
www.epi.org

Fair Arbitration Now Coalition
www.fairarbitrationnow.org

Legal Aid Society–Employment Law Center
www.las-elc.org

National Association of Consumer Advocates
www.naca.net

Public Citizen
www.citizen.org

Public Justice
www.publicjustice.net

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Citations

1. *Porreca v. Rose Grp.*, 2013 U.S. Dist. LEXIS 173587 at *22 (E.D. Pa. Dec. 11, 2013) (Schiller, J.).

2. The 2015 Carlton Fields Jorden Burt Class Action Survey at 26, available at classactionsurvey.com/pdf/2015-class-action-survey.pdf.