

The Facts On Forced Arbitration

How Forced Arbitration Harms America's Workers

Forced Arbitration Silences Sexually Harassed Workers and Leaves Employees Exposed

Companies use forced arbitration to prevent workers from exercising their right to take their employer to court when they are sexually harassed. Sexual harassment is a type of sex discrimination that occurs when an employee experiences unwelcome or offensive sex-based conduct, which could include lewd jokes or comments, undue attention, unwelcome touching, physical threats, or even physical assault.

When bound by a forced arbitration clause, an employee who suffers sexual harassment in the workplace has no choice but to resolve the matter through a secret proceeding, where the deck is stacked against them. Arbitrators, who are like privately-paid judges, are often picked and paid for by the offending company. Arbitrators are not required to have any legal expertise with the type of claims they are being paid to resolve, even though sexual harassment claims can be incredibly complex. Since the rules that allow workers to collect and present evidence in court may not apply in arbitration, workers don't always get a fair chance to prove their case. And once the arbitrator has rendered a decision, it is nearly impossible for even clearly wrong decisions to be reversed by a court.

In recent years, workplace sexual harassment has risen in the public consciousness. The #MeToo movement has made it clear that nearly every woman in America (and many men) has experienced sexual harassment, often at work.ⁱ More than 12,000 claims of sex-based harassment are filed each year with the Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing anti-discrimination laws.ⁱⁱ And yet it is estimated that 70% of individuals who experience sexual harassment at work do not report it to a manager or supervisor. Employees are reluctant to report sexual harassment for a variety of reasons. Some fear they won't be believed, or that they will be blamed. Others are afraid that nothing will be done, or that they will suffer retaliation for speaking up.

Employees who have gathered the courage to try to expose a workplace predator should not have their voices suppressed in secret, confidential proceedings. Nearly all forced arbitration provisions contain confidentiality clauses that require workers to keep silent about their experience. While open court proceedings allow for public scrutiny, which can keep workers safe and insulated from retaliation, arbitration lacks transparency, which means that even when a victim comes forward, their colleagues are still vulnerable to being abused in the same way. By requiring workers to arbitrate behind closed doors, cases of sexual harassment remain secret, and serial harassers can escape accountability.

Unfortunately, rather than make it easier to hold serial offenders accountable, many companies include class and collective action bans into their arbitration clauses, which makes it even harder for sexual harassment complaints to ever reach the light of day. **A recent study has shown that at least 39 of America's Fortune 100 companies have required workers to surrender their right to bring class actions, which are essential in combatting systemic workplace abuses.**ⁱⁱⁱ When multiple employees have been subjected to sexual harassment—whether by one repeat offender or because a company has failed to address a toxic corporate culture—requiring workers' claims to be decided in individual arbitration strips employees of the protection that comes with banding together in a collective action. Instead, employees who speak up risk retaliation, which might include vicious personal

Fast Facts

70%

Of individuals who experience sexual harassment at work never report it to a manager or supervisor.^{iv}

75%

Of employees who spoke up about workplace mistreatment experienced some form of retaliation.^v

12,860

Charges of sex-based harassment were filed with the EEOC in 2016.^{vi}

98%

Private-sector nonunion employees are subject to forced arbitration.^{vii}

attacks, termination of their employment, or black-balling by potential future employers. According to one study, 75% of employees who spoke up about workplace mistreatment experienced some form of retaliation.^{viii} Understandably, countless workers choose to abandon valid claims, rather than face the personal and professional consequences of going it alone. By isolating workers who have been sexually harassed in the workplace, forced arbitration creates a safe-haven for offenders, enabling them to strike again.

The time has come to shine a light on workplace sexual harassment and drive offenders out of the shadows. So long as courts embrace forced arbitration clauses and endorse class and collective action bans, pervasive workplace sexual harassment will continue to go unchecked. To create a safer and more just workplace, ending forced arbitration must become a policy priority. Tell Congress to end forced arbitration in the American workplace today.



Endnotes

i Sofie Gilbert, *The Movement of #MeToo*, THE ATLANTIC, Oct. 16, 2017, <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/>.

ii Enforcement & Litigation Statistics, Charges Alleging Sex-Based Harassment FY 2010-2016, U.S. EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

iii PROFESSOR IMRE S. SZALAI, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES (The Employee Rights Advocacy Institute For Law & Policy, September 2017), available at <http://employeerightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf>.

iv U.S. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

v *Id.*

vi *Id.*

vii Enforcement & Litigation Statistics, *supra*, endnote ii.

viii ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION (Economic Policy Institute, 2017), available at <http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.