

The Facts On Forced Arbitration

How Forced Arbitration Harms America's Workers

Forced Arbitration Gives Dishonest Employers A License To Steal

Forced arbitration occurs in the workplace when an employer requires its workers, in order to get or keep a job, to surrender their right to take the company to court. Most forced arbitration clauses stop an employee from suing when their employer engages in wage theft. Wage theft occurs when an employer pays their workers less than the agreed-upon wage rate, charges illegal fees, won't pay for all hours worked, or refuses to pay earned overtime wages. When bound by a forced arbitration clause, employees have no choice but to resolve their wage disputes through a private proceeding, where the deck is stacked against them. Arbitrators, who are like privately-paid judges, are often picked and paid for by the defending company. 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.

Forced arbitration is especially insidious in the way it gives companies a free pass to steal from our nation's most vulnerable workers. Wage theft is rampant among low-paid employees, such as those who grow and serve our food, care for our children, and nurse our sick and elderly family members. In fiscal year 2016, claims for wage theft filed with the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) led to over \$200 million being paid to over 300,000 employees in back wages for minimum wage and overtime violations.ⁱ Yet despite a massive need for increased enforcement, the DOL has only 1,000 employees tasked with investigating and enforcing federal wage and hour laws for more than 135 million workers in over seven million businesses nationwide—the same number employed in 1948.ⁱⁱ

With so few agents available to enforce federal wage laws, it falls to private citizens to remedy wage theft. Yet the high cost of forced arbitration blocks many claims from moving forward. Depending on the terms of the forced arbitration clause, it may cost anywhere from \$200 to more than \$7,000 just to file a claim.ⁱⁱⁱ An employee who works 40 hours per week for the federal minimum wage only earns \$240 per week.^{iv} Nearly half of America's adults cannot afford a \$400 expense without going into debt.^v When workers need every penny they earn just to make ends meet, arbitration becomes a luxury many employees in America simply can't afford, allowing wage theft to go on with impunity.

To make matters worse, employers have begun inserting class and collective action bans into their forced arbitration provisions. A recent study has shown that 80 of America's Fortune 100 companies have used arbitration in their employment contracts, and of those, nearly half require workers to surrender their right to join together in bringing a legal action against their employer.^{vi} When an individual lawsuit costs far more than the amount of wages owed, a class action often is the only realistic avenue for holding an employer accountable. For example, imagine a company illegally charges its employees a \$30 "paycheck processing fee." The cost of hiring a lawyer and filing a claim in arbitration just isn't worth it for one employee alone. But if that same illegal fee has been charged to numerous employees, everyone affected can share the emotional burden and financial expense required to expose the employer's wrongdoing. To avoid accountability, many companies now force workers to waive their right to participate in class and collective actions, restricting workers to one impractical option to pursue justice: individual secret arbitration.

Fast Facts

17%

Of low-wage workers are victims of wage theft because their employers pay them less than the prevailing minimum wage.^{vii}

54%

Approximate percentage of nonunion private-sector American workers who are subject to forced arbitration clauses.^{viii}

\$1,100

The maximum federal civil penalty an employer has to pay per wage theft violation, even if repeated or willful.^{ix}

\$15 Billion

Is estimated to be stolen from workers each year solely through minimum wage violations.^x

Making each employee to go it alone effectively destroys workers' ability to hold abusive employers accountable, leaving most workers with no effective way to vindicate their workplace rights and employers with no fear of legal consequences. As Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit observed, "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."^{xi}

So long as courts and congresses embrace forced arbitration clauses and endorse class and collective action bans, unscrupulous employers will have an implicit license to steal. To restore basic fairness and access to justice for America's workforce, ending forced arbitration must become a policy priority. Tell Congress to end forced arbitration in the workplace today.



Endnotes

- i Wage & Hour Division Enforcement Database, FY 2016, U.S. DEPT. OF LABOR, <https://www.dol.gov/whd/data/datatables.htm#panel5> (last viewed November 17, 2017)(Some employees are duplicated due to multiple violations).
- ii U.S. DEPT. OF LABOR, WORKING FOR YOU: U.S. DEPARTMENT OF LABOR 2006 – 2016 (2017), available at <https://www.dol.gov/sites/default/files/WorkingForYou-2009-2016.pdf>. See also DAVID COOPER & TERISA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR (Economic Policy Institute, 2017), available at <http://www.epi.org/files/pdf/125116.pdf>.
- iii Fees are based on those assessed by the American Arbitration Association (AAA), a private company that administers approximately half of all arbitrations in the United States. Filing fees for employees under the AAA Employment Rules may not exceed \$200. However, disputes governed by the AAA Commercial Rules may be subject to an initial filing fee for an undetermined monetary claim of as much as \$7,000.
- iv 29 U.S.C. 206
- v U. S. FED. RESERVE, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015 (2016), available at <https://www.federalreserve.gov/2015-report-economic-well-being-us-households-201605.pdf>.
- vi 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://employeeightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf>.
- vii *Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).
- viii COOPER & KROEGER, *supra*, note ii
- ix 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/>.
- x 29 U.S.C. 201, et seq.
- xi Cooper & Kroeger, *supra*, note ii