

# The Facts On Forced Arbitration

## How Forced Arbitration Harms America's Workers

### Forced Arbitration Denies The "Little Guy" Access To Justice

For millions of employees who experience harm in the workplace, finding justice has been relegated to a secretive arbitration process that overwhelmingly favors employers.<sup>i</sup> In order to gain or keep work, job seekers and employees must often sign an arbitration clause as a condition of employment. Employers use these forced arbitration clauses in their employment contracts to protect themselves from being held accountable for injurious conduct. Lacking the bargaining power to debate with a powerful employer, workers must often agree to adjudicate workplace harms on their employer's terms. These forced arbitration provisions routinely ban meaningful discovery and disallow aggrieved workers from banding together, yielding lower damage awards.<sup>ii</sup> This uneven playing field, combined with the high cost of engaging in arbitration proceedings, leads many workers to surrender their claims.<sup>iii</sup>

The pernicious effects of forced arbitration are not spread evenly among America's workforce. Greater bargaining power grants CEOs and managers the opportunity to negotiate the terms of their employment. Unsurprisingly, thousands of those sought-after executives omit arbitration clauses in their personalized contracts.<sup>iv</sup> Highly technically skilled workers have also been able to successfully harness their collective power and use their tech-industry profile to force Silicon Valley giants like Google and Facebook into ending forced arbitration.<sup>v</sup>

However, in low-wage workplaces, where forced arbitration is most common, workers possess fewer skills and have little or no bargaining power. A far cry from C-suite employees who can choose where to work and under which terms, most victims of forced arbitration cannot afford to consider—let alone forego—employment due to fine print terms of adhesion. Unlike those in high-profile industries, who are well positioned to garner media support in their favor, lower level employees lack the advantage of the spotlight.<sup>vi</sup> To be sure, the 60 million workers subject to forced arbitration are often America's most vulnerable.<sup>vii</sup> One study found that most employees subject to forced arbitration make \$13.00 an hour or less.<sup>viii</sup> Many are first-time job seekers without the means to review the terms of their employment.<sup>ix</sup> Forced arbitration's harmful effects are also most frequently experienced by workers in industries that tend to employ historically marginalized groups.<sup>x</sup> Retail, restaurant, and health services workers are significantly more likely to be bound by private arbitration clauses, compared to those who work in the finance and insurance industries.<sup>xi</sup>

Forced arbitration makes it burdensome for low-wage workers to seek justice for harm incurred in the workplace, including wage theft and retaliation—two of the most common injustices levied on hourly employees.<sup>xii</sup> When such workers file individual claims, they often lack the adequate legal protections to mount a strong case.<sup>xiii</sup> Moreover, proving individual harm may be more difficult for those with low socio-economic standing. Individual claims greatly reduce damage awards, creating financial barriers both for the worker, and attorneys who would otherwise be willing to represent disadvantaged workers in an arbitral forum.<sup>xiv</sup> Most low-wage workers might stand a chance in seeking justice if they could join their claims with other aggrieved employees. Banding together would not only reduce barriers to adjudication; for most, it is the only way relief can be sought. Unfortunately, many forced arbitration clauses block a worker's right to assert joint, class, or collective action against employers.<sup>xv</sup> Because the deck is often stacked against employees in these situations, one study found that 98 percent of workers who would otherwise bring a claim against their employer in a public court abandon their claims when the only option is private arbitration.<sup>xvi</sup>

### Fast Facts

**25 Million**

Workers subject to forced arbitration are also prohibited from joining their claims with other aggrieved employees.

**65%**

Of those bound by forced arbitration make \$13.00 an hour or less.

**79%**

Of employment arbitration proceedings rule in favor of the employer.

**98%**

Of claims otherwise would be brought forward in a court are abandoned when arbitration is the only option.

Legislators on Capitol Hill have taken up the topic of forced arbitration, and the debate it has sparked suggests there is concern among those in power. Speaking before the Senate Committee on the Judiciary, Kevin Ziober, a Navy reservist harmed by forced arbitration, declared: "Forced arbitration takes away the rights of all Americans—women and men, people of all racial, ethnic, and religious backgrounds, people with disabilities, service members and veterans...Republicans, Democrats, and Independents."<sup>xvii</sup> Senator Lindsey Graham (R-SC) noted that while arbitration is good for business, it is not always the best option for individuals.<sup>xviii</sup> Senator Dick Durbin (D-IL) echoed similar concerns: "You have almost no place to turn, and these arbitration clauses make it certain you're going to lose any effort to contest it."<sup>xix</sup>

Support from select members of Congress is a crucial first step, but ending forced arbitration in the workplace will require broad bipartisan support—something we already have amongst voters on both sides of the aisle. In a February 2019



poll, 84% of voters indicated support for federal legislation that would end arbitration requirements in consumer and employee contracts, while 67% said they would prefer to bring their claims against a company in a public court rather than through private arbitration.<sup>xx</sup>

Forced arbitration takes away the constitutional right to a day in court from everyday workers. Upholding protections for those who are least likely to be aware of their rights is especially critical when unscrupulous corporations are set on closing the courthouse doors in the face of society's most vulnerable individuals.

It is time for Congress to follow the will of the people and put an end to forced arbitration in the workplace.

## Endnotes

- i Kate Hamaji, *Justice for Sale: How Corporations Use Forced Arbitration to Exploit Working Families*, The Center for Popular Democracy (2017), [https://populardemocracy.org/sites/default/files/Forced-Arbitration\\_web%20%283%29\\_0.pdf](https://populardemocracy.org/sites/default/files/Forced-Arbitration_web%20%283%29_0.pdf).
- ii Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.
- iii Elizabeth Colman, *Forced Arbitration: A Race to the Bottom*, The Employee Rights Advocacy Institute for Law & Policy (2018), [http://employeeightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report\\_Forced-Arbitration\\_A-Race-To-The-Bottom.pdf](http://employeeightsadvocacy.org/wp-content/uploads/2018/08/NELA-Institute-Report_Forced-Arbitration_A-Race-To-The-Bottom.pdf).
- iv Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. Miami Bus. L. Rev. 39 (2014).
- v Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?* (2019), Scholarly Works, 1178.
- vi Sternlight, *supra*, note 4 at 202.
- vii Alexander J.S. Colvin, *The Growing use of Mandatory Arbitration*, Economic Policy Institute (2018), <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/>.
- viii *Id.*
- ix Kimberly Kalmanson & Randi M. Cohen, *The Real Cost of Mandatory Arbitration*, New York Law Journal (2018), <https://www.law.com/newyorklawjournal/2018/11/23/the-real-cost-of-mandatory-arbitration/>.
- x Colvin, *supra*, note 7 (finding that women and African-American workers are most likely to be subject to private arbitration, with Hispanic workers closely following).
- xi *Id.* (finding that employees in the finance and insurance industry are 48% likely to be subject to arbitration, while health and hospitality workers were more likely to be subject to private arbitration by a margin of 12 and 6 percent, respectively).
- xii Bernhardt et. al, *Broken Laws, Unprotected Workers; Violations of Employment and Labor Laws in American Cities*, National Employment Law Project (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.
- xiii Sternlight, *supra*, note 4 at 184.
- xiv *Id.* at 185.
- xv See, e.g. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Upholding the use of collective action bans in employment contracts containing forced arbitration clauses); See also Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233 (finding that 78 Fortune 100 companies include class action waivers in their clauses); see also, Colvin, *supra*, note 7 (noting that 25 million workers have lost the right to joint legal action).
- xvi Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679 (2018).
- xvii Hearing on Arbitration in America Before the S. Comm. on the Judiciary, 116th Cong. (2019).
- xviii *Id.*
- xix *Id.*
- xx Guy Molyneux & Geoff Garin, *National Survey on Required Arbitration*, Hart Research Associates (2019), <https://www.justice.org/sites/default/files/2.28.19%20Hart%20poll%20memo.pdf>.