The Facts On Forced Arbitration
How Forced Arbitration Harms America's Workers

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Forced Arbitration Erodes Civil Rights Protections & Enables Workplace Discrimination

Civil rights statutes governing employment make it illegal for employers to discriminate against workers because of their race, color, or national origin.[i] These laws were intended to address systemic racial inequality in the workplace by empowering employees to publicly expose discriminatory behavior in open court.[ii] Unfortunately, because of forced arbitration, a worker's ability to challenge an employer's discriminatory behavior in the public eye is at risk of disappearing.[iii]

Workers are often forced into arbitration when an employer requires its employees to surrender their right to take the company to court in order to get or keep their job. Workers bound by forced arbitration must resolve their claims of workplace harassment either through a secret binding arbitration proceeding or not at all. For-profit arbitration companies tend to facilitate these legal actions and are routinely selected and paid by the defending employer.[iv] Privately-paid judges called "arbitrators"—the overwhelming majority of whom are white and male[v]—oversee the arbitration proceedings and make key decisions on a variety of topics, including the collection and admission of evidence. The rules governing an arbitration proceeding are, in an overwhelming majority of cases, chosen by the employer. These one-sided rules commonly impose strict confidentiality requirements on plaintiffs which keep unlawful behavior out of the public eye.[vi] Under this inscrutable system, it is incredibly difficult for survivors of workplace discrimination to prove their case or appeal even blatantly incorrect decisions.

To make matters worse, employers often incorporate class, collective, and joint action bans into their forced arbitration clauses. These clauses destroy workers' ability to have any meaningful access to justice when they experience discrimination at work.[vii] Forbidding employees from banding together to share the financial and emotional cost of moving forward with a claim means that, in order to pursue a remedy, each aggrieved employee must bring a separate, individual claim in secret arbitration proceedings. Under this individual arbitration system, two or more employees who have experienced the same race-based harassment from the same offender who present the exact same evidence might have wildly different results—and because of the confidential nature of arbitration no one would ever know.

Indeed, in its policy statement on forced arbitration, the Equal Employment Opportunity Commission (EEOC)—the federal agency tasked with enforcing our nation's antidiscrimination laws—observed that **class and collective action bans** in forced arbitration clauses "may, in fact, **protect systemic discriminators** by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader—and more accurate—view of an employer's conduct."[viii] In short, **segregating employees' civil rights claims emboldens perpetrators of workplace bigotry to indulge their worst inclinations.**

Fast Facts

26%

Of African Americans and 15% of Hispanics surveyed reported being treated unfairly at their place of work within the last 30 days because of their racial or ethnic background.

27%

Of African Americans and 20% of Hispanics surveyed reported being denied a job they were qualified for because of their race or ethnicity.

45%

Of all charges filed with the EEOC in FY 2017, or 40,067 charges total, alleged race, color, or national origin discrimination.

59.1%

Of African American workers, and 54.3% of Hispanic workers are subject to forced arbitration of employment disputes.

The EEOC concluded that that the use of forced arbitration to resolve employment discrimination disputes is **"antithetical to the notions of fairness and justice" and "harms both the individual civil rights claimant and the public interest in eradicating discrimination."**[ix]

Uncovering and exposing instances of workplace discrimination is vital in the fight to end this country's long, dark chapter of racial inequality. As long as this nation continues to embrace a broad, unfettered policy favoring forced arbitration, workplace harassment and discrimination will continue to go unchecked.

To create a safer and more just workplace and world, ending forced arbitration must become a policy priority. Congress should pass legislation to end forced arbitration in the American workplace today!

Endnotes

i *See*, e.g., Title VII of the Civil Rights Act of 1964 (expressly identifying race, national origin, and color as protected classes, and interpreted to include ethnicity. EEOC, "Employment Discrimination Based on Religion, Ethnicity, or Country of Origin," https://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm). *See* also, 42 U.S.C. 1981 and 42 U.S.C. 1983.

ii *See* 42 U.S.C. 1981(a)("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

iii *See generally*, Cynthia Estlund, *The Black Hole Of Mandatory Arbitration*, 101 N.C. L. REV. 96, 113 (2018) (finding that forced arbitration causes as many at 722,000 employment claims to go missing each year, where "missing claims" are defined as those which we would expect to enter the arbitration process, based on the general rate of employment litigation and the number of employees covered by forced arbitration clauses, but that are never actually filed.).

iv THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, TAKING "FORCED" OUT OF ARBITRATION (2016), *available at* http://employeerightsadvocacy.org/takingforcedoutofarbitration/.

v The two largest arbitration organizations in the U.S, the American Arbitration Association(AAA) and JAMS, self-report a stunning lack of diversity among their rosters of arbitrators, with the AAA confirming that only 24% of their roster of arbitrators and mediators combined are women and/or minorities, see https://www.adr.org/RosterDiversity (last visited February 5, 2018), and JAMS identifying their universe of ADR panelists is comprised of 22% women and 9% persons of color (*see* https://www.jamsadr.com/diversity/ (last visited February 5, 2018)(despite JAMS celebrating a support staff comprised of 40% persons of color and 75% female, according to their own website, the actual ADR panelists tasked with hearing cases and rendering decisions in employment arbitration remains a largely homogeneous group)

vi Samuel Estreicher & Steven C. Bennett, *The Confidentiality of Arbitration Proceedings*, 240 N.Y.L.J. 31 (Aug. 13, 2008), *available at* http://www.jonesday.com/files/Publication/3c7c5ff7-ec4a-4b01-979a-6960d29c663f/Presentation/PublicationAttachment/58f159e4-8b12-4012-9532-241147d2b4c9/EstreicherBennett_NYLJ_081308.pdf.

vii 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. In *Epic Systems, Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the U.S. Supreme Court held the bans do not violate the National Labor Relations Act, and that the Federal Arbitration Act of 1925 requires that class and collective action bans in forced arbitration clauses must be enforced.

viii EEOC Notice, Number 915.002, July 10, 1997, available at https://www.eeoc.gov/policy/docs/mandarb.html.

ix *Id.*

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