Ending Mandatory Arbitration Clauses in Employment Contracts

The Seventh Amendment to the U.S. Constitution states that where the value in controversy is satisfied, "the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined."[1] Accordingly, nearly every state constitution has adopted a provision for jury trials in civil matters. In the more than two centuries since the Bill of Rights was ratified, however, the prevalence of mandatory arbitration clauses has become standard in employment contracts. An arbitration clause in an employment contract states that all dispute resolution procedures must proceed outside the courts and is often found alongside waivers to both class action suits and one's right to a jury trial. While an employer may allege that arbitration benefits both parties due to its relatively cost-effective and time-saving nature, the proponents for eliminating these clauses contend that they are unjust because they enable corporations to suppress the claims brought against them by individual actors.

Forced arbitration lacks many of the procedural safeguards afforded by the justice system.[2] Advantages serving corporate interests include discovery limitations,[3] denial of protections associated with geographic proximity of the forum,[4] formal civil procedure rules, access to counsel,[5] and, perhaps most importantly, the ability to join similar claims in a class action suit.[6] Mandatory arbitration may also increase expenses for bringing a claim due to travel

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[1] U.S. Const. amend. VII.
[2] Letter from Nat'l Ass'n of Att'ys Gen. to Cong. Leadership (Feb. 12, 2018).
[3] Katherine Palm, Note, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 478 n.172 (2006).
[4] Ziva Branstetter, *Nursing Home Policy Challenged*, TULSA WORLD (Mar. 4, 2002), https://www.tulsaworld.com/archives/nursing-home-policy-challenged/article_6131212f-481c-59c4-af51-7c2a188e37f9.html.
[5] Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 783-84 (2002).
[6] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 6 (2000).

or the selection of an expensive arbitrator.[7] The employer often handpicks the presiding arbitrator, creating a conflict of interest since the arbitrator's neutrality is compromised by the opportunity to establish a consistent mutually beneficial relationship with the company.[8] Those in favor of forced arbitration, meanwhile, vouch for its necessity on the premise that its elimination would result in a proliferation of class action suits escalating costs for both parties.[9]

The federal government has long-supported arbitration clauses due to their ability to alleviate the burden on the court system. The Federal Arbitration Act (FAA), enacted by Congress nearly a century ago and codified at 9 U.S.C. Ch. 1, allows for private dispute resolution via arbitration. The FAA applies to all contracts in both state and federal courts and is a constitutional exercise pursuant to congressional Commerce Clause powers. Section 2 states that "a written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[10] These grounds for revocation are extremely limited, including circumstances of unconscionability or duress, while state law opposing the enforcement of such clauses is preempted by the FAA. As the use of mandatory arbitration in non-unionized private-sector workplaces has increased from 2% to more than 50% in the last thirty years,[11] substantial litigation has ensued to challenge the FAA's constitutionality.

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[7] Lisa B. Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 L. & CONTEMP. PROBS. 221, 234-35 (July 31, 2004).
[8] Carrie Menkel-Meadow, *Do the ``Haves'' Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. DISP. RESOL. 19, 35-37 (1999).
[9] Alan S. Kaplinsky & Mark J. Levin, *The CFPB's Final Arbitration Rule Run Amok*, THE REGUL. REV. (Sep. 11, 2017), https://www.theregreview.org/2017/09/11/kaplinsky-levin-cfpb-arbitration-rule/.
[10] 9 U.S.C. § 2.
[11] Seema Nanda, *Mandatory Arbitration Won't Stop Us from Enforcing the Law*, U.S. DEP'T OF LAB. BLOG (Mar. 20, 2023), https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law.

According to a 2017 Economic Policy Institute report by Alexander Colvin,[12] the majority of non-union employees in the private sector have waived their Seventh Amendment rights through forced arbitration clauses.[13] As the report indicates, this trend has undermined workers' rights by precluding access to the courts for various types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA).[14] Evidence suggests that employees who work under forced arbitration clauses are not only less likely to succeed in disputes with their employers, but also less likely to bring forth claims.[15] Even if successful, the damages awarded to employees via arbitration are less than that which would have been available in court.[16] Finally, mandatory arbitration clauses in employment contracts are often paired with non-disclosure agreements, which obfuscates scrutiny of corporate misconduct.[17]

Numerous Supreme Court decisions have found in favor of employers. In *Epic Systems Corp. v. Lewis*, the Court held that the (1) FAA's saving clause did not provide a basis for refusing to enforce arbitration agreements waiving collective action procedures for claims under the FLSA and class action procedures for claims under state law; (2) the National Labor Relations Act (NLRA), despite assuring the right of workers to engage in concerted activities for the sake of collective bargaining or other mutual aid or protection, does not demonstrate congressional intention to displace the FAA and to bar class and collective action waivers; and

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[12] At the time of publication, I was enrolled in Professor Colvin's Conflict Resolution and Negotiation course at Cornell University's School of Industrial and Labor Relations, where he now serves as Dean.
[13] ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2017).
[14] *Id*. at 1.
[15] *Id*. at 3-6.
[16] *Id*.
[17] Laura Lawless Robertson, *Sexual Harassment Claims Put Non-Disclosure and Arbitration Agreements Under Scrutiny, Resulting in a Flurry of Legislative Action*, NAT'L L. REV. (Dec. 7, 2017).

(3) the Court would not grant *Chevron* deference to National Labor Relations Board's (NLRB) interpretation of federal statutes as barring class and collective action waivers by employees.[18] In the wake of decisions like *Epic Systems*, the Forced Arbitration Injustice Repeal (FAIR) Act was introduced to Congress in February 2019 to largely end arbitration agreements in both consumer and employee contracts. The FAIR Act sought to modify the FAA to promote access to justice by prohibiting (1) the use of forced arbitration clauses in certain consumer, employment, antitrust, and civil rights disputes; and (2) agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.[19]

Opponents to the Act stated that it would invalidate provisions in countless contracts that require pre-dispute, mandatory binding arbitration disputes between the parties, or that prohibit or waive the right of one of the parties to the agreement to participate in class actions. Regarding the Act as the latest iteration of the former "Arbitration Fairness Act,"[20] congressional detractors perceived the legislation as undermining freedom of contract and overlooking those with relevant claims to class actions or expensive individual proceedings to resolve their claims. Forgoing the alternative of more specific reforms that on a bipartisan basis could maintain and ameliorate the arbitration process, they suggest that the FAIR Act would eliminate the availability of arbitration while doing comparably little to diminish the misuse of class action suits which led to the initial adoption of arbitration clauses. Although the Act ultimately did not pass the Senate during the 116th Congress, it passed the House with support from all House Democrats.

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[18] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[19] H.R. REP, NO. 116-204 (2019), https://www.congress.gov/congressional-report/116th-congress/house-report/204.
[20] Arbitration Fairness Act of 2011, H.R.1873, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/house-bill/1873/text.

In April 2023, Congressman Hank Johnson (GA-04) and Senator Richard Blumenthal (D-CT), announced that they re-introduced the FAIR Act. Rep. Johnson made the announcement in a speech from the House floor, with more than 80 cosponsors, while Sen. Blumenthal introduced the Senate companion bill with 37 cosponsors. Rep. Johnson stated that "Forced arbitration is an underhanded maneuver that corporations use to trick consumers, workers and small businesses out of their right to go to court and seek damages from a jury of their peers."[21] Sen. Blumenthal went even further, claiming that "Forced arbitration is unfair and un-American… workers forced into a rigged arbitration system have lost one of the most powerful tools they have to hold employers accountable for gambling with their safety: access to justice."[22]

This second iteration of the Act seeks to (1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and (2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.[23] § 402 of the Act states that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable"[24] regarding any employment, consumer antitrust, or civil rights dispute. Per § 402(2), this legislation would not apply to any arbitration provision in a contract between an employer and labor organization(s), except where it requires an employee to waive the right to seek judicial enforcement. If successful, this proposed legislation would amend Title 9 of the United States Code (delineating the role of arbitration in federal law) as an additional chapter.

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[21] Press Release, Rep. Johnson & Sen. Blumenthal Re-Introduce Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers (April 28, 2023), https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-blumenthal-re-introduce-legislation-end-forced.
[22] *Id*.
[23] Forced Arbitration Injustice Repeal Act, S.505, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/505/text.
[24] *Id*.

In 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA), which excludes complaints of this nature from arbitration clauses and bans class action waivers. Additionally, a May 2023 article entitled "The time to ban forced arbitration is now"[25] references a 2019 survey of voters by Hart Research, which found bipartisan support against mandatory arbitration. When told about the FAIR Act, 87% of Republican voters and 83% of Democratic voters stated that they would support the bill.[26] Given its broad and diverse support, there is reason for optimism that the current trend favors the protection of workers' rights, and the FAIR Act may ultimately prevail. Ending forced arbitration in employment contracts would both reinforce the Seventh Amendment and represent a major feat for Congress in an era of unprecedented partisanship.

[25] Paul Bland, *The time to ban forced arbitration is now*, THE HILL (Mar. 5, 2023, 3:00 PM), https://thehill.com/opinion/judiciary/3986551-the-time-to-ban-forced-arbitration-is-now/.
[26] Guy Molyneux, *National Survey on Required Arbitration*, HART RSCH. ASSOC. (Jan. 29, 2019), https://www.publicjustice.net/wp-content/uploads/2023/04/M12598-Arbitration-Survey-002-FINAL1.pdf.