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Employee Choice Is Better Alternative To Anti-Arbitration Bill

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Arbitration has long been a staple of the American workplace — it is a relatively quick and simple means of resolving employment disputes.

In fact, some 60 million workers — approximately 55% of all nonunion, private sector employees — have agreed to adjudicate their disputes through arbitration rather than protracted and expensive litigation, according to a 2018 study conducted by the Economic Policy Institute.[1]

The proposed Forced Arbitration Injustice Repeal, or FAIR, Act will change all of that by voiding all existing and prohibiting all future predispute arbitration agreements.[2]

The FAIR Act would only permit the use of arbitration on a voluntary basis after the dispute arises, which is cold comfort for employers because, in our experience, many plaintiff-side employment lawyers prefer to have juries resolve disputes rather than a neutral retired judge or practitioner acting as an arbitrator.

The FAIR Act was passed by the U.S. House of Representatives, but not the U.S. Senate, in the last Congress. A revived version of the bill was reintroduced in the 117th Congress in February. The law would prohibit:

1. predispute arbitration agreements that force arbitration of future employment, consumer, antitrust or 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.[3]

The sudden extinction of arbitration in the employment context will have a significant impact on most employees and employers and the American economy at large. Arbitration has been a primary mechanism of dispute resolution for nearly a century, and, since the enactment of the Federal Arbitration Act in 1925, the U.S. Supreme Court has repeatedly held the FAA reflects a national policy favoring arbitration.[4]

Likelihood of Passage

As with most currently pending federal legislation, whether the FAIR Act becomes law depends on the Senate and the status of the filibuster, which mandates 60 votes for most Senate action. However, even if the filibuster remains intact, there is potential bipartisan support for the FAIR Act.

Indeed, Sen. Lindsey Graham, R-S.C., has supported limiting arbitration agreements, stating: "Arbitration has a place in society. I want to be pro-business, but everything that's good for business may not be the best answer for society."[5]

Similarly, Sens. Joe Manchin, D-W.Va., and Kyrsten Sinema, D-Ariz., may vote with the Democrats to enact some version of the FAIR Act.[6] Thus, a compromise bill that passes the Senate would most certainly be signed by the president.

Benefits of Arbitration and the Unintended Consequences of the FAIR Act

For employers and employees alike, arbitration offers the incomparable advantages of increased speed, finality, cost-efficiency, flexibility and predictability. By invalidating predispute arbitration agreements and class action waivers, the FAIR Act would eliminate these benefits.

First, litigation is costly and slow. If the FAIR Act becomes law, workers will likely experience extended litigation schedules in already overburdened courts — which will only become more clogged once 60 million workers are forced to file any and all claims they may have in court rather than arbitration.[7]

Arbitration, on the other hand, typically results in a hearing and decision within 11.6 months on average.[8] The process to confirm or vacate an arbitration award typically takes a few months, as opposed to a yearslong appellate process that often results from multimillion- dollar jury verdicts that employers have no choice but to appeal.[9] Arbitration also offers employees and employers finality by doing away with appeals unless the parties agree otherwise.[10]

Second, arbitration costs and fees are often — in some states always — borne by the employer and they pale in comparison to the hundreds of thousands of dollars in attorney fees and costs that typically accompany civil litigation.[11]

Arbitration minimizes the most costly and wasteful component of litigation — discovery — by reasonably limiting written discovery requests and depositions. A 2010 survey of Fortune 200 companies' discovery efficiency and costs in court litigation, conducted by Lawyers for Civil Justice, the Civil Justice Reform Group and the U.S. Chamber Institute for Legal Reform, showed "the ratio of pages discovered to pages entered as exhibits is as high as 100/1."[12]

Third, arbitration brings welcome predictability. Arbitrators, experienced at assessing liability and damages, tend to make reasonable awards that generally are confirmed by courts. Jury awards, on the other hand, can be arbitrary and inconsistent, and can result in multimillion-dollar single-plaintiff verdicts that bear no rational relationship to the harm suffered by the employee.[13]

Such "let's win the lottery" results often benefit plaintiffs lawyers who typically have contingency fee arrangements whereby they share in up to 50% of their clients' recovery.[14]

In general, however, arbitrations often result in better monetary outcomes for employee plaintiffs. In fact, a recent study found that employees prevailed more often, recovered more money and resolved their claims more quickly in arbitration than in litigation.[15]

Similarly, in class actions pending in court — which are often settled and rarely litigated through trial — class members often receive very little monetary compensation while millions of dollars are paid to their attorneys.[16]

Opponents of the FAIR Act point out that banning predispute arbitration agreements would likely result in more money going to the big business of the plaintiffs bar as opposed to victims of workplace discrimination. This may be one of the reasons why trial lawyers are in support of the FAIR Act.[17]

Finally, arbitration expands access to justice by providing an opportunity for employees to obtain relief without an attorney.[18]

Alternative Approach: Employees Decide Whether the Arbitration Is Confidential

Arbitration is often criticized by the plaintiffs bar as being secretive because it typically takes place in a private setting instead of a public proceeding in open court.[19] On the other hand, arbitration provides employees with a nonpublic forum that some actually may prefer.

Those employees who do not wish to air their personal stories in public or who want to keep their employment disputes private while they are trying to find or are just starting a new job with another employer may not wish to go public with their claims. Sexual harassment and assault victims also may prefer to bring their claims in a forum where their privacy is protected, but the court system provides such individuals limited options.[20]

The secrecy concern can be easily solved by the arbitration agreement itself by granting the employee unfettered discretion to decide whether the arbitration will be confidential or public. This solution gives parties their "day in court" with access to discovery, a neutral fact-finder and a prompt resolution.

Further, the parties are able to mutually select an ideal finder of fact for their dispute — presumably one with subject-specific expertise and often decades of prior experience on the bench.

Giving the employee the right to choose whether the proceeding is confidential overcomes one of the arguments against arbitration that is often advanced by trial lawyers and opponents of arbitration, which is that private, nonpublic arbitration proceedings protect guilty employers and supervisors — giving them some imagined license to harass and discriminate at will the next time around.[21]

Of course, the truth is that very few employers or supervisors who have been through a full- blown litigation or arbitration proceeding will welcome such an experience again anytime soon.

In today's climate in which the adjudication of disputes is expensive, unpredictable and continually slowed by packed court dockets, it is no wonder parties opt for the arbitration process. The FAIR Act, if enacted, would make it far more difficult for employers and employees to reach swift and economical resolution of their disputes.

And by giving employees the option of having a nonconfidential arbitration proceeding, the criticism of arbitration as a secretive proceeding that unfairly benefits employers disappears.

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[1] Alexander J.S. Colvin, The growing use of mandatory arbitration, Econ. Pol'y Inst. (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf.

[2] Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. § 402(a) (2021). The FAIR Act would only allow pre-dispute arbitration agreements in matters that do not involve employment, consumer rights, anti-trust, or civil rights.

[3] Id. at § 2.

[4] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). The United States Supreme Court recently stated that arbitration offers the "promise of quicker, more informal, and often cheaper resolutions for everyone involved." Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

[5] Arbitration in America: Hearing Before the S. Judiciary Comm. (Apr. 2, 2019), available at https://www.judiciary.senate.gov/meetings/arbitration-in-america at 21:48-21:57.

[6] According to Senator Manchin's website, he "opposed the Trump Administration's efforts to allow big banks to force customers into arbitration agreements without their consent." LEGISLATION, Joe Manchin, https://www.manchin.senate.gov/about/bipartisanship/legislation?latest=129 (last visited Apr. 20, 2021). Senator Sinema expressed similar sentiments when she was in the House of Representatives. Tracking Congress In The Age Of Trump, FiveThirtyEight, https://projects.fivethirtyeight.com/congress-trump-score/kyrsten- sinema/ (last visited Apr. 20, 2021).

[7] In 2019, the caseload clearance rate for civil unlimited jurisdiction cases in California Superior Courts reached a 10-year low of 80%. This means the number of cases filed exceeded the number of cases disposed of through a final settlement or determination in a given year, adding to the number of pending cases and court backlog. That same year, 10% of cases had not been disposed of after 24 months. 2020 Court Statistics Report, Statewide Caseload Trends, Judicial Council of California, at 80-81.

[8] American Arbitration Association, Measuring the Costs of Delays in Dispute Resolution, https://go.adr.org/impactsofdelay.html (last visited Apr. 20, 2021).

[9] In California, recent single-plaintiff verdicts have been astoundingly high. See, e.g., Juarez v. AutoZone Stores, Inc., No. 08-cv-00417-WVG (S.D. Cal. Nov. 17, 2014) (verdict of $185,872,720 including $250,000 in emotional distress damages and $185,000,000 in punitive damages for discrimination and harassment based on pregnancy and gender, as well as retaliation); Ramirez v. Jack in the Box, Inc., No. BC593619 (Los Angeles Super. Ct. 2019) (verdict of $15,392,801 including $5,000,000 in emotional distress damages and $10,000,000 in punitive damages for employee who alleged disability and age discrimination (she had been called "grandma") and retaliation for reporting a sexually inappropriate work environment because the manager (a 31-year old woman) was dating two much younger subordinates.

[10] Conna A. Weiner, Getting the Arbitration You Want: Appeals? Really?, A.B.A. (June 8, 2018), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2018/getting-the-arbitration-you-want-appeals-really/.

[11] See e.g., Hooked Media Group, Inc. v. Apple Inc., 55 Cal.App.5th 323, 338-39 (2020).

[12] See Litigation Cost Survey of Major Companies, Presentation to Committee of Rules of Practice and Procedure Judicial Conference of the United States, May 10-11, 2010, at 3, https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies__0 .

[13] See, e.g., Rael v. Sybron Dental Specialties, No. B292599, 2021 WL 631463, at *1 (Cal. Ct. App. Feb. 18, 2021) (reversed and remanded 2018 case where jury awarded $31 million: $28 million in punitive damages and $3 million in emotional distress damages and just $5,282 in lost wages. The plaintiff – who quit – was a materials buyer for a dental supply company who alleged age discrimination involving comments such as "you are outdated," "we need younger workers here," and "you are part of the old culture").

[14] Patrick Kitchin, How Much Does an Employment Attorney Cost?, Kitchin Legal, https://www.kitchinlegal.com/employment-attorney-cost/ (last visited Apr. 23, 2021).

[15] FAIRER, FASTER, BETTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION, U.S. Chamber Inst. for Legal Reform (May 15, 2019), https://instituteforlegalreform.com/research/fairer-faster-better-an-empirical-assessment-of-employment-arbitration/. This study is consistent with earlier empirical analyses of employment arbitration. See, e.g., Theodore Eisenberg & Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, 58 Disp. Resol. 44, 45-50 (Nov. 2003/Jan. 2004), https://scholarship.law.cornell.edu/facpub/358/.

[16] See e.g., Laffitte v. Robert Half Int'l. Inc., 1 Cal. 5th 480, 487 (2016) (confirming settlement agreement awarding $6,333,333 in attorneys' fees and an average of $4,300 per class member because the fee award was "within a historical range of 20 to 50 percent of a common fund and is also within the range provided in contingent fee agreements signed by the named plaintiffs"); Valliere, et al., v. Tesoro Refining & Marketing Co., et al., No. 4:17- cv-00123-JST, Dkt. No. 127 at *4 and 19 (N.D. Cal. Dec. 16, 2020) (confirming settlement agreement in wage and hour class action awarding $3,812,500 in attorneys' fees and an average of $7,239.37 per class member).

[17] Among others, the California Employment Lawyers Association and the National Employment Lawyers Association, whose membership is comprised largely of plaintiffs' lawyers, are supporting organizations of the FAIR Act. Rep. Johnson Re-Introduces Legislation to End Forced Arbitration & Restore Accountability for Consumers, Workers, Hank Johnson Congressman for Georgia's 4th District (Feb. 11, 2021), https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-re- introduces-legislation-end-forced-arbitration-restore.

[18] A study found employees who pursued their arbitrations pro se won at the same rate as those with representation. Elizabeth Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 Ohio St. J. on Disp. Resol. 777, 794 (2003), https://kb.osu.edu/handle/1811/77065.

[19] Press Releases: House Judiciary Passes FAIR Act, Legislation to End Forced Arbitration, House Committee on the Judiciary (Sept. 10,

2019), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2107.

[20] While California courts will, in some cases, allow a plaintiff to pursue an action under a pseudonym—commonly when the action involves a "legitimate privacy concern"—the strict procedural requirements for anonymity require plaintiffs to initially assert their claims as a Doe plaintiff, or otherwise risk the court denying their request to proceed under a pseudonym. See Starbucks Corp. v. Superior Court, 168 Cal. App. 4th 1436, 1454 n.7 (2008); Compare Doe v. Brown, 177 Cal. App. 4th 408, 426 n.3 (2009) (allowing the use of a pseudonym after "the parties entered into a stipulation, approved by the trial court, to substitute the pseudonym Jane Doe for Doe's legal name in the case title"). Under the applicable California rules, a "protected person" filing as a Doe is available only on a limited basis. Cal. Civ. Proc. Code § 367.3; Cal. Gov. Code § 6205. Thus, the Doe pseudonym is not readily usable by anyone who chooses, for example, in a straightforward harassment lawsuit. In addition, seeking to file pleadings and other court documents under seal in a public proceeding requires compliance with complicated and not easily satisfied procedural rules. See, e.g., Cal. Rules of Court 2.550 and 551.

[21] Hope Reese, Gretchen Carlson on how forced arbitration allows companies to protect harassers, Vox (May 21, 2018), https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me- too-sexual-harassment-supreme-court.

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