Independent Women's LAW CENTER

November 15, 2021

The Honorable Jerrold Nadler, Chairman
The Honorable Jim Jordan, Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: H.R. 445, the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021"

Dear Chairman Nadler and Ranking Member Jordan:

Independent Women's Law Center is pleased that you are holding this important hearing on whether to allow victims of workplace sexual harassment and assault unilaterally to opt out of pre-dispute arbitration agreements.

I write today to focus this Committee's attention on two dispositive questions:

1. *Are victims of workplace sexual misconduct better off in court than in arbitration?*

2. *Are workplace sexual misconduct claims fundamentally different from other employee claims, such that they must be adjudicated in a different forum?*

If the answer to either of these questions is "no," then there is no principled reason to exempt this narrow category of claims from otherwise valid workplace arbitration agreements, and I urge you to reject any legislation that would do so.

Are victims of workplace sexual misconduct better off in court than in arbitration?

The honest answer is, no.

As members of this Committee are well aware, an individual can pursue all of the same claims and remedies in arbitration that she can pursue in court. And she is able to reap the same amount of monetary damages in arbitration as in court. The only difference between arbitration and full-blown litigation is the setting.

Studies indicate that the arbitration setting, in fact, provides many advantages for employees,[1] including:

- **Cost**: When agreed to at the outset of the employment relationship, arbitration is typically paid for by the employer, making it far less expensive for the employee than litigation in court.
- **Speed:** Claims in arbitration are resolved more quickly than those in court.
- **Flexibility**: Arbitration is less formal and less adversarial than litigation.
- **Compensation**: Employees often receive higher monetary awards in arbitration than in litigation.[2]

What are the disadvantages?

Opponents of arbitration claim that it is a "secret tribunal" that "silences" victims and protects employers from unfavorable publicity. This is false. Although arbitration proceedings are, indeed, closed to the public, employees in arbitration may still tell their stories in public. Indeed, absent separate confidentiality agreements between the parties, employees who have been victims of sexual misconduct are free to hold press conferences, give interviews, write articles, author books, and otherwise speak about their experiences.

For many victims of sexual misconduct, however, the informal private setting of arbitration is preferable to a trial, as it allows them to tell their stories in their own words, rather than face public, formal interrogation in court. Legislation that effectively eliminates arbitration, as this legislation does, would eliminate privacy in these sensitive cases.

Are sexual misconduct claims fundamentally different from other forms of workplace misconduct?

They are not.

Employee sexual misconduct claims are, at their core, claims of workplace discrimination. Thus, there is no principled reason to treat them differently from, say, claims of racial harassment or discrimination. Indeed, all employees should be treated equally when it comes to their ability to resolve legal claims against their employer. Any attempt to carve out special rules for one type of claim or one class of employee overly complicates the adjudicatory process for employers and creates an unnecessary hierarchy of victimhood among employees.

So, why not allow all claimants to choose whether to take their case to arbitration or to court after a dispute arises? The answer is simple: Doing so would effectively eliminate employment arbitration altogether.

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[1] Independent Women's Law Center, LEGAL POLICY FOCUS: ARBITRATION AGREEMENTS IN THE #METOO ERA (Oct. 2019).

[2] Nam D. Pham, Ph.D. and Mary Donovan, NDP Analytics, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 9-10 (May 2019).

Once a dispute arises, lawyers have financial incentives to encourage full-blown litigation in court—which takes longer, and, therefore, produces higher fees for them.

Moreover, it only makes economic sense for a company to agree to pay the costs of arbitration if it can rely on having all employment disputes resolved in that setting. This allows an employer to avoid the high costs of litigation and the potential for class action lawsuits and runaway juries. If, however, a company has to resolve disputes both in court *and* in arbitration, it is unlikely to agree to fund the arbitration system, as it will provide no overall savings.

The reality is that allowing sexual misconduct claimants to opt out of arbitration agreements *after* a dispute arises will, effectively, eliminate arbitration in such cases. This will benefit trial attorneys, who would rather take their chances in court, where one runaway jury can deliver a sky-high windfall. But it will be of no demonstrable benefit to the majority of victims.

Thank you for your consideration.

Sincerely,

Jennifer C. Braceras

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Director
Independent Women's Law Center