

Testimony Before the Subcommittee on Health, Employment, Labor, and Pensions
Hearing on
“Closing the Courthouse Doors: The Injustice of Forced Arbitration Agreements”

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Chairman DeSaulnier, Ranking Member Allen, and all members of the subcommittee, thank you for the opportunity to testify today about the impact of forced arbitration on American workers.

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For the past 25 years, my research has focused on workplace dispute resolution, including the question of how the practice of forced arbitration is affecting the enforcement of our employment laws. From an obscure practice, drawing the attention mostly of specialists in the field like myself, forced arbitration has grown to become the predominant way in which employment law disputes are resolved in the American workplace. This change has occurred with little public oversight, but has profound implications for the rights of the American worker. In my testimony, I will describe the key findings from the growing body of research, both by myself and others, on forced arbitration of employment disputes.

1) What is forced arbitration?

Arbitration is a conflict resolution procedure where a third-party neutral decides the outcome of the dispute. Arbitration has been used successfully in many areas, including commercial, labor, international, and construction disputes. A key advantage of arbitration is that it is a private dispute resolution process under the control of the parties that allows them to avoid having to go to court to resolve their dispute. By contrast, forced arbitration is a process imposed by corporations on workers or consumers that requires them to give up their right to go to court and instead resolve any dispute with the corporation through an arbitration process that the corporation itself established.

Most workers discover that they have entered into forced arbitration after the fact. They were fired from their job and thought their rights had been violated so they went to see a lawyer. After asking some questions and reviewing documents, the lawyer explained that way back when they were hired, amidst the stack of paperwork we all sign

at the start of a job, was a document stating that the worker agreed to resolve any future employment law claims against the employer through arbitration.

The worker might believe that a private arbitration forum established by a contract drafted by the employer could not govern claims under a statute enacted by Congress or a state legislature – that they retained the right to their day in court. But in its 1991 decision in *Gilmer v. Interstate/Johnson Lane*¹ the Supreme Court held that arbitration could be used to resolve claims under employment statutes, including civil rights laws and protections against discrimination in the workplace. The worker might object that he or she was essentially forced into agreeing because the employer said signing the arbitration clause was a term and condition of employment – no signature, no job. But in its 2001 decision in *Circuit City v. Adams*² the Supreme Court enforced an arbitration clause imposed as a mandatory term and condition of employment.

This is the essence of forced arbitration, the worker is required to agree to arbitration as condition of getting or keeping a job. This forced arbitration clause can cover the vast majority of rights that the worker might have, from protections against racial discrimination and sexual harassment, to rights of returning veterans, to rights to be paid a minimum wage and overtime. If the worker objects and tries to go court, the court will order the worker to go to arbitration instead. The arbitration clause is drafted by the employer, who is effectively deciding who is administering arbitration and what the rules and procedures will be.

An example of the rules that many employers include in forced arbitration is privacy provisions that prevent the worker from disclosing what happened in arbitration. The result is that employees and public regulators may be unaware of systematic problems of discrimination or sexual harassment at a company because individual cases are kept under a veil of confidentiality in the private forum of arbitration.³ Under recent precedents of the Supreme Court⁴, the rules of forced arbitration can also include a ban on bringing a class action or collective claim. The worker is unable to pursue a class

¹ 500 U.S. 20 (1991).

² 532 U.S. 105 (2001).

³ For example, see Gretchen Carlson, Ch. 6 “Forced into Silence” in *Be Fierce: Stop Harassment and Take Your Power Back* Center Press: New York, NY.

⁴ *AT&T v. Concepcion*, 563 U.S. 333 (2011); *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018).

action in court because of the forced arbitration clause and unable to pursue a class action in arbitration because the rules drafted by the employer do not allow it. This ‘heads I win, tails you lose’ situation is the current law in America. The inability to bring a class or collective action leaves many with low value claims with no effective recourse at all since their claims are too small to make bringing a case on an individual basis feasible.⁵

In the follow sections of my testimony, I will describe what we know about how this system of forced arbitration is operating, drawing on my own research and that of other scholars in the area.

2) How widespread is forced arbitration?

The first and most basic question is how widespread is forced arbitration? During the 1990s and early 2000s, surveys indicated that relatively few employers were requiring their employees to enter into arbitration clauses. However by the 2010s there were indications that forced arbitration was growing and becoming more widespread. Arbitration service providers were seeing increasing case numbers. To investigate the extent of forced arbitration, in 2017 I conducted a national survey of private-sector American business establishments, which had a response rate of 47.6%, yielding 627 responses with complete data on the variables of interest.⁶

I found that a total of 53.9 percent of all establishments in the survey were imposing forced arbitration on their employees. Adjusting for workforce size, overall 56.2 percent of employees in the establishments surveyed were subject to forced arbitration procedures. Extrapolating to the overall private-sector nonunion workforce, this corresponds to 60.1 million American workers who are now subject to forced arbitration procedures.⁷

⁵ Justice Breyer noted in his dissent in *AT&T v. Concepcion* the impracticality of expecting a consumer to bring a \$30 claim where the costs of bringing the claim far exceed the amount in dispute. The same issues arise in employment cases, particularly with wage and hour claims where the amount in dispute for any individual who was denied a break, overtime pay, or was being paid below the minimum wage, is often small relative to the costs of bringing a claim.

⁶ Colvin, Alexander J.S. 2019. “The Metastisization of Mandatory Arbitration.” *Chicago-Kent Law Review*, 94(1): 3-24. This research project was conducted in collaboration with the Economic Policy Institute (EPI) whose funding support for it I gratefully acknowledge.

⁷ This estimate is based on the Bureau of Labor Statistics report “Union Members – 2016,” (<https://www.bls.gov/news.release/pdf/union2.pdf>) released January 26, 2017, which reports an overall

Where is forced arbitration used most? It is used nationwide, by over 40% of employers in most states and by over two-thirds of employers in California, Texas, and North Carolina. Larger employers (those with over 1000 employees) are more likely to use forced arbitration (65.1% of businesses with over 1000 employees used forced arbitration). Low wages workplaces are more likely to use forced arbitration, with 64.5% of businesses paying less than \$13/hour having the practice.⁸

3) The impact of the rise of class action waivers

The most important new development in arbitration law over the past decade is the enforcement of class action waivers in arbitration clauses. Some forced arbitration clauses have included specific provisions stating that claims must be brought individually in arbitration and not on a class or collective basis. In its 2011 decision in *AT&T v. Concepcion*⁹, a majority of the Supreme Court held that a class action waiver in a cell phone arbitration clause was enforceable. Customers could be required by the arbitration clause to go to arbitration, not to court, with their claims and the arbitration clause could require that the claims be brought individually in arbitration. The result is that a class action waiver in a forced arbitration clause can effectively bar a plaintiff from bringing a class action in either the courts or in arbitration. This creates a powerful incentive for the introduction of forced arbitration clauses with class action waivers.

My research found that by 2017, 41.1% of the forced arbitration clauses that employees were subject to included class action waivers, affecting some 24.7 million workers.¹⁰ At the same time, some legal uncertainty remained about whether the forced arbitration class action waivers permitted in cell phone and other consumer contracts also applied to employment contracts. In its 2018 decision *Epic Systems v. Lewis*¹¹, the Supreme Court resolved this question in favor of enforcing class action waivers in forced

private-sector workforce of 115.417 million, among which 8.437 million are union represented private sector workers, with the remainder of 106.980 million workers being nonunion.

⁸ Colvin, Alexander J.S. 2019. "The Metastisization of Mandatory Arbitration." *Chicago-Kent Law Review*, 94(1): 3-24.

⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

¹⁰ Colvin, Alexander J.S. 2019. "The Metastisization of Mandatory Arbitration." *Chicago-Kent Law Review*, 94(1): 3-24.

¹¹ 138 S. Ct. 1612 (2018).

arbitration clauses. Following *Epic Systems*, we can expect a continued expansion of class action waivers and further incentives for corporations to impose forced arbitration on their workers.

4) What are the outcomes of forced arbitration?

What have been the outcomes of cases brought in forced arbitration? Some early evidence from the 1990s suggested relatively similar outcomes to litigation, but subsequent research using larger samples of cases that focused specifically on forced arbitration has found much less favorable outcomes for employees in arbitration than typically seen in litigation. Whereas studies of litigation have found employee win rates ranging from 36.4% in federal courts to 57% in state courts,¹² in a study of 2,802 mandatory arbitration cases over an 11 year period from 2003-2013 Mark Gough and I found an employee win rate of only 19.1%.¹³ Average damages recovered by successful employees in those same studies averaged \$394,223 in federal court and \$575,453 in state court, but only \$135,316 in arbitration. Taking into account the chance of winning and likely damages, the mean recovery per case for employees in mandatory arbitration was only \$25,929, compared to \$143,497 in federal court and \$328,008 in state court.

The significant of these differences is confirmed by a new 2021 study by Mark Gough that controls for differences in plaintiff, attorney, and claim characteristics, providing the most robust evidence to date that these differences are real and substantial.¹⁴ Gough finds that, controlling for these factors, the employee win rate in federal court jury trials is 70.7% higher than in forced arbitration and in state court jury trials the employee win rate is 146.0% higher than in forced arbitration. Similarly, he finds that the monetary damages awarded to employees in federal court jury trials are 203.1% greater than in forced arbitration and in state court jury trials are 165.9% greater than in forced arbitration. These results show the starkly less favorable outcomes that workers obtain in forced arbitration compared to litigation.

¹² Colvin, Alexander J.S. 2011. "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies*, 8(1): 1-23.

¹³ Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actor and Outcomes" *ILR Review*, 68(5): 1019-1042.

¹⁴ Mark Gough. 2021. "A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation" *ILR Review* 74(4): 875-897.

Why have outcomes been less favorable for employees in forced arbitration? One possibility is that different types of cases are being heard in arbitration than in litigation, perhaps due to pre-hearing filtering out of some cases. Differences in pre-hearing settlement or summary judgment behavior might be a factor, though both of these practices are far more common in arbitration than often believed. Gough and I found that 63 percent of forced arbitration cases settled before a hearing, a higher rate than in some litigation studies.¹⁵ Gough's 2021 study found that summary judgement motions were brought in 48% of forced arbitration cases and controlling for this factor did not explain the difference between arbitration and litigation outcomes.¹⁶ Another possibility is that relatively small cases that wouldn't be economically viable in litigation are being filed in arbitration. However in research Kelly Pike and I conducted, we found that the median claim in mandatory arbitration was \$167,880 and three quarters of claims were over \$60,000, sometimes used as a cut-off estimate for the size of claim that would be viable to take to litigation.¹⁷ As of yet, the existing research has not provided findings that would explain away the arbitration-litigation outcome gap.

4) How is forced arbitration structurally imbalanced?

Arbitration by design gives primary responsibility for the outcomes of the procedure to the arbitrator him or herself and so another important question is who are the arbitrators in forced arbitration and how are they chosen. To investigate this question, Gough and I surveyed 481 practicing employment arbitrators to learn about their backgrounds and professional practices.¹⁸ As would be expected, the vast majority of employment arbitrators have backgrounds as practicing attorneys. They are a group with limited demographic diversity, with 74 percent being male and 92 percent non-Hispanic white. They also tend to come from management side backgrounds, with 59 percent

¹⁵ Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actor and Outcomes" *ILR Review*, 68(5): 1019-1042.

¹⁶ Mark Gough. 2021. "A Tale of Two Forums: Employment Discrimination Outcomes in Arbitration and Litigation" *ILR Review* 74(4): 875-897.

¹⁷ Colvin, Alexander J.S. and Kelly Pike. 2014. "Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?" *Ohio State Journal on Dispute Resolution*, Vol. 29, No. 1, pp. 59-83.

¹⁸ Gough, Mark D., and Alexander J.S. Colvin. 2020. "Decision-Maker and Context Effects in Employment Arbitration." *ILR Review*, 73(2): 479-497.

having represented employers at some point in their careers, versus only 36 percent who had represented employees or unions. Analyzing the outcomes of cases decided by these arbitrators, we found that those with a background representing management were significantly more likely to rule in favor of employers in cases.

A troubling finding is evidence of a repeat player advantage to employers. Large employers are likely to do better in arbitration by virtue of their greater resources, ability to hire better legal counsel, more developed human resource policies, and more sophisticated internal grievance procedures that filter out meritorious claims before they get to arbitration. However as more regular participants in the mandatory arbitration system, some employers may gain an advantage by accumulating information on the decision-making tendencies of particular arbitrators or the types of evidence and arguments that tend to appeal to specific arbitrators. There is also a danger that some arbitrators may exhibit a tendency to favor employers who could be the source of selection for future cases, despite the clear ethical violation of doing so.¹⁹ In our research on arbitrator decision-making, Mark Gough and I found that even after we controlled for the number of cases an employer had in arbitration, i.e. the first type of large employer advantage, that employers tend to win more often and have lower damages awarded against them the more cases they had before the same arbitrator.²⁰ This finding of a repeat employer-arbitrator pairing effect indicates that there is a structural imbalance against workers in forced arbitration.

5) How does forced arbitration affect access to justice?

At one point, there was hope that the relative simplicity of arbitration would allow employees to effectively bring cases without representation by legal counsel. In practice,

¹⁹ The danger of the repeat player advantage that employers hold in forced arbitration is illustrated in comments made in a NY Times story: “Victoria Pynchon, an arbitrator in Los Angeles, said plaintiffs had an inherent disadvantage. ‘Why would an arbitrator cater to a person they will never see again?’ she said.” ... “Some of the chumminess is subtler, as in the case of the arbitrator who went to a basketball game with the company’s lawyers the night before the proceedings began. (The company won.) Or that of the man overseeing an insurance case brought by Stephen R. Syson in Santa Barbara, Calif. During a break in proceedings, a dismayed Mr. Syson said he watched the arbitrator and defense lawyer return in matching silver sports cars after going to lunch together. (He lost.)” NY Times, “In Arbitration, ‘A Privatization of the Justice System’”, Nov. 1, 2015.

²⁰ Colvin, Alexander J.S. and Mark Gough. 2015. “Individual Employment Rights Arbitration in the United States: Actors and Outcomes.” *ILR Review*, Vol. 68(5): 1019-1042.

however, it has turned out that most employees use lawyers to bring cases in arbitration, just like in court. Among cases administered by the American Arbitration Association, only 21 percent of the employees were self-represented.²¹ Employees who do bring cases to arbitration without legal representation tend to do much worse than those with legal representation. In our study, Gough and I found that the odds of an employee winning decrease by 46% if he or she is self-represented and the size of their average damage award is 47% lower. Self-represented employee plaintiffs are also less likely to obtain a settlement of the case before a hearing. These findings indicate that forced arbitration has not provided a forum that allows self-represented employees to pursue cases with a reasonable prospect of success.

The reality is that the vast majority of workers need to have representation to get access to justice when their legal rights are violated. How does forced arbitration affect the likelihood of getting legal representation? Most workers are unable to pay the high hourly fees that attorneys charge. For most regular Americans, a contingency fee arrangement where the attorney gets a percentage of the damages if the case is successful is the only practical way to obtain legal representation in employment cases.²² The problem is that if in forced arbitration the average case only produces \$25,929 in damages, compared to \$143,497 in federal courts and \$328,008 in state courts, then plaintiff attorneys will not be earning enough through a contingency fee in most forced arbitration cases to justify taking on those cases.

The result of the less favorable outcomes for employees and reduced ability and willingness of plaintiff attorneys to accept cases where the employee is subject to forced arbitration is that far fewer cases are being filed. Research by Cynthia Estlund finds that cases are being brought in forced arbitration at only 1-2% the rate they are being brought in court.²³ If cases are not being brought, this means that our employment laws are going unenforced for much of the workforce that is subject to forced arbitration.

²¹ Colvin, Alexander J.S. and Mark Gough. 2015. "Individual Employment Rights Arbitration in the United States: Actors and Outcomes." *ILR Review*, Vol. 68(5): 1019-1042.

²² In a survey of practicing plaintiff attorneys, Mark Gough and I found that 90% of the time they were using contingency fees in the employment cases they bring.

²³ Estlund, Cynthia. 2018. "The Black Hole of Mandatory Arbitration", *North Carolina Law Review*, 96(3), 679-709

6) Where can ADR be used effectively?

The problems with forced arbitration should not lead us to turn away from all forms of alternative dispute resolution (ADR). At its best, ADR can provide more accessible and consensual methods of dispute resolution that serve the interests of all parties. In contrast to forced arbitration, where do we see ADR working well?

Mediation, where a third-party neutral helps the parties negotiate the resolution of a dispute, is an ADR procedure with a strong track-record of success in producing good outcomes that satisfy the interests of both parties.²⁴ Organizations should also be encouraged to adopt in-house grievance procedures and conflict management systems that provide workers with the ability to voice concerns and enhance workplace due process.²⁵ However, unlike forced arbitration these ADR procedures do not bar workers from having their day in court if their rights are violated.

Arbitration itself works well in settings where it is truly voluntary and bilateral in nature. For example, the long-standing system of labor arbitration through which workplace disputes are resolved in unionized workplaces has been one of the great successes of American labor relations because it is a genuinely bilateral system established and maintained by both employers and unions.²⁶ Similarly arbitration has been used effectively in public sector collective bargaining in many states as an alternative to strikes for resolving disputes over the negotiation of a new contract.

Research also finds that arbitration works well where it is chosen on a voluntary basis by the parties after a dispute has arisen.²⁷ The problem with forced arbitration is that it is unilaterally developed and imposed by one party before any dispute has arisen, in a context without meaningful negotiation. Reforms to ban the practice of forced arbitration should preserve the beneficial use of arbitration in the collective bargaining context and where it is agreed to as a voluntary, post-dispute procedure.

²⁴ Lisa B. Bingham. 2004. "Employment Dispute Resolution: The Case for Mediation" *Conflict Resolution Quarterly*, 22(1): 145-174.

²⁵ David B. Lipsky, Ronald L. Seeber, and Richard D. Fincher. 2003. *Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals*. Jossey-Bass: San Francisco, CA.

²⁶ Harry C. Katz, Thomas A. Kochan, and Alexander J.S. Colvin, *An Introduction to U.S. Collective Bargaining and Industrial Relations*, 5th Ed. ILR Press: Ithaca, NY (2017), Ch. 12.

²⁷ J. Ryan Lamare and David B. Lipsky. 2019. "Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry" *ILR Review*, 72(1): 158-184.

7) What would be the impact of the *Restoring Justice for Workers Act*?

The provisions of H.R 4841 – *Restoring Justice for Workers Act* would directly address the pernicious effects of forced arbitration on workplace disputes through ensuring that no pre-dispute arbitration agreements are valid or enforceable. It also addresses one of the problematic features of the *Epic Systems* decision by restoring workers rights under the *National Labor Relations Act* to engage in concerted activity by filing joint, class, or collective claims.

It is important that the *Restoring Justice for Workers Act* preserves the beneficial use of arbitration in the collective bargaining and voluntary post-dispute contexts. In the collective bargaining context, labor and management have jointly established the highly effective system of labor arbitration for resolving disputes in unionized workplaces and this system should be protected and supported. Post-dispute arbitration can also be an effective tool, so long as it is truly voluntary and entered into by informed parties. The provisions of the *Restoring Justice for Workers Act* recognize this by ensuring that post-dispute agreements are clearly described in plain language, workers have adequate time to consider entering into them, and are not subject to retaliation for declining to agree to arbitration. With these basic protections in place, voluntary post-dispute arbitration can be a valuable tool to enhance the resolution of work disputes.

Conclusion

Looking across the research on forced arbitration yields the following conclusions:

- Forced arbitration has become a widespread practice, affecting most private sector nonunion workers.
- Class action waivers are a growing feature of forced arbitration, cutting off worker access to class actions and collective claims.
- Employees do worse in forced arbitration than in litigation, winning fewer cases and recovering less damages.

- Employees are at a structural disadvantage in forced arbitration procedures with rules designed by corporations, most arbitrators coming from employer side backgrounds, and repeat player advantages favoring companies.
- Forced arbitration reduces access to justice, suppresses claims, and undermines enforcement of our employment laws.
- The *Restoring Justice for Workers Act* would eliminate forced arbitration and restore the ability of workers to bring class or collective claims, while preserving the beneficial use of arbitration in the collective bargaining context and where there is a genuinely voluntary post-dispute agreement.

In order to achieve the promise of ADR procedures like arbitration and mediation, it is necessary that they be truly voluntary, bilateral processes agreed to and run equally by both parties to disputes. The current system of forced arbitration imposed on workers by corporations undermines employment rights and should be eliminated.

Thank you for your time.