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Wade Henderson

February 10, 2021

The Honorable Jerrold Nadler, Chair
The Honorable Jim Jordan, Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable David Cicilline, Chair
The Honorable Ken Buck, Ranking Member
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

RE: Support the Forced Arbitration Injustice Repeal (FAIR) Act

Dear Chair Nadler, Ranking Member Jordan, Chair Cicilline, and Ranking Member Buck:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 220 organizations to promote and protect the civil and human rights of all persons in the United States, **we urge you to support the Forced Arbitration Injustice Repeal (FAIR) Act.**

The FAIR Act would prohibit corporations from forcing working people and consumers into pre-dispute forced arbitration agreements and class action waivers, which are hidden in many non-negotiable employment and consumer contracts. These agreements allow large employers, insurers, lenders, and financial services companies to consistently tip the scales in their favor at the expense of everyday working people and consumers by forcing individuals to give up their right to access the courts if they wish to begin a job, open a credit card account, obtain a loan, receive nursing home services, use a cell phone, or access other critical goods and services.

Pre-dispute forced arbitration agreements and class action waivers harm working people and consumers while allowing corporations to escape accountability for wrongdoing. Forced arbitration clauses are written to benefit corporations: they select the arbitrators, pick the rules, choose the state in which the proceeding will occur, and decide the payment terms. Private arbitration lacks guaranteed due process protections and proceedings are secret. Given this context, it is unsurprising that employees and consumers are less likely to obtain relief through arbitration and generally receive lower damage awards than in court.¹ Yet, current law allows corporations to force hundreds of millions of people to give up their right to access the courts, making it difficult, if not impossible, for everyday people to enforce the federal and state laws that were enacted to protect them from abuse and discrimination.



Faced with these hurdles, many individuals decide not to try to enforce their rights at all, leaving corporations with no incentive to follow the law or to address consumer or worker claims quickly and fairly.

In addition to making people more vulnerable to abuse by bad corporate actors, forced arbitration agreements and class action waivers are an impediment to the enjoyment of basic civil and human rights. More than half of non-union, private-sector employers require their employees to enter into forced arbitration agreements.ⁱⁱ As a result, millions of working people do not have access to the courts to enforce their rights under all types of employment and civil rights statutes, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, and more.

These employment and civil rights statutes are more important than ever for women and communities of color during the coronavirus pandemic. The pandemic has caused a national public health and economic crisis, but not everyone in America has been impacted the same way. Communities that were already marginalized by structural barriers to equal opportunities — Black and Brown people, women, immigrants, seniors, people with disabilities, and other groups — have been hardest hit by the pandemic and are otherwise particularly vulnerable to discrimination, fraud, unsafe working conditions, and abuse. This makes our nation's federal civil rights and worker protection laws even more essential to safeguard fairness, safety, and dignity.

Yet, the most vulnerable working people are also the most likely to be trapped into forced arbitration agreements that undermine the ability to enforce these very laws. Forced arbitration is much more common among the lowest-paid workforces, and industries that have disproportionate numbers of women workers and African-American workers are more prone to impose forced arbitration. Overall, a pre-pandemic study showed that 59 percent of African-American workers and 58 percent of women workers have no way to enforce their rights outside of arbitration processes that are controlled by their employers.ⁱⁱⁱ

Forced arbitration has also played a role in allowing sexual harassment and violence to fester. In recent years, thousands of individuals have been inspired by #MeToo to share their experiences and demand justice, but too often, when victims spoke up about misconduct, harassment, and sexual violence experienced at work,^{iv} or at the spa,^v or while a patient in a nursing home,^{vi} or while using app-based transportation services,^{vii} they discovered that they had unknowingly given up their right to access the courts and would be forced into secret, private arbitration proceedings. We know, however, that when individuals share their experiences, and when bad actors are held accountable, it gives others the courage to come forward and incentivizes corporations to remedy abuse and engage in prevention. Forced arbitration, however, impedes transparency by forcing victims into arbitration when their rights have been violated.

Additionally, the use of class action waivers also substantially diminishes access to justice. Of employees subject to forced arbitration, nearly half are also subject to a class action waiver, making it nearly impossible to address systemic discrimination or widespread violations of law.^{viii} Class actions have



helped to level the playing field against bad actors for thousands of women and people of color and can provide relief specifically designed to remedy large scale rights violations and change how corporations do business.^{ix} Without the availability of class actions, many individuals are unlikely to file claims to enforce their rights, preventing accountability and transparency and blocking a pathway for reform.

Given the harm of pre-dispute forced arbitration agreements and class action waivers, it is imperative that Congress act to protect access to justice in the courts. We urge you to support the FAIR Act and restore the ability of working people and consumers to choose how to enforce their rights. If you have any questions, please contact Gaylynn Burroughs, senior policy counsel, at burroughs@civilrights.org.

Sincerely,

Wade Henderson
Interim President and CEO

LaShawn Warren
Executive Vice President for Government Affairs

ⁱ Heidi Shierholz, Economic Policy Institute, Correcting the Record: Consumers Fare Better under Class Actions than Arbitration (Aug. 1, 2017), <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-underclass-actions-than-arbitration/>. Katherine V.W. Stone & Alexander J.S. Colvin, Economic Policy Institute, The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumer of Their Rights (Dec. 7, 2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf>.

ⁱⁱ Alexander J.S. Colvin, Economic Policy Institute, The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-formore-than-60-million-american-workers/>.

ⁱⁱⁱ *Id.*

^{iv} See e.g., Erin Mulvaney, New York's #MeToo Arbitration Law Faces Appeals Court Battles, Bloomberg Law (Jan. 11, 2021), <https://news.bloomberglaw.com/daily-labor-report/new-yorks-metoo-arbitration-law-faces-appeals-court-battles>.

^v See e.g., Brooks Jarosz, Fears Loom that Sexual Assault Cases Involving Massage Envy Will Remain Private, KTVU Fox 2 (Dec. 22, 2018), <https://www.ktvu.com/news/fears-loom-that-sexual-assault-cases-involving-massage-envy-will-remain-private>.

^{vi} See e.g., Haley Sweetland Edwards, An 87-Year-Old Nun Said She Was Raped in Her Nursing Home. Here's Why She Couldn't Sue., Time (Nov. 16, 2017), <https://time.com/5027063/87-year-old-nun-said-she-was-raped-in-her-nursing-home/>.

^{vii} See e.g., Yuki Noguchi, Under Pressure, Uber Drops Arbitration Requirement for Sexual Assault Victims, NPR (May 15, 2018), <https://www.npr.org/2018/05/15/611230115/under-pressure-uber-drops-arbitration-requirement-for-sexual-assault-victims>.

^{viii} Heidi Shierholz, Economic Policy Institute, Correcting the Record: Consumers Fare Better under Class Actions than Arbitration (Aug. 1, 2017), <https://www.epi.org/publication/correcting-the-record-consumers-fare-better-underclass-actions-than-arbitration/>.

^{ix} Center for Justice & Democracy, Civil Rights Class Actions: A Singularly Effective Tool to Combat Discrimination (Jan. 6, 2014), <https://centerjd.org/content/fact-sheet-civil-rights-class-actions-singularly-effectivetool-combat-discrimination>.