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# Extend the Ending Forced Arbitration Act to Statutory Employment Claims

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The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 is bipartisan and historic work. The Act prohibits enforcement of predispute arbitration waivers in sexual harassment lawsuits. While historic, the Act does not go far enough. Mandatory arbitration of other statutory employment claims remains problematic, and Congress should extend the Act's reach to ban pre-dispute arbitration clauses for all statutory employment disputes. Doing so would require little additional drafting to current legislation, yet dramatically empower working Americans, especially those most vulnerable to workplace discrimination.

Passage of two pending bills could be a first step towards the goal of expanding the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act to protect workers' rights. The Ending Forced Arbitration of Race Discrimination Act will prohibit predispute arbitration waivers of any race discrimination claims, and the Protecting Older Americans Act will prohibit predispute arbitration waivers in workplace age discrimination cases.

## The Problem: Mandatory Arbitration of Other Statutory Employment Claims

The widespread adoption of mandatory arbitration clauses is enabled by the unequal power imbalance between employers and employees. Clauses mandating arbitration of employment disputes are normally not negotiated, let alone at arm's length. Instead, the employer normally unilaterally imposes arbitration on employees who must accept the provision to keep their job, and who, as noted by Jean Sternlight, likely are not even aware of the provision.

Just as protections short of providing workers a right to elect arbitration or litigation post-dispute have failed to adequately protect workers from sexual harassment, they have failed to adequately protect workers' rights to be free of myriad legal violations—ranging from discrimination to unpaid wages to denials of family medical leave. The best empirical evidence suggests that when employers mandate arbitration, workers with viable claims are less likely to win than in court, and when they do win, the awards are lower, as found by Alexander Colvin when examining the outcomes of employment arbitration. In another study examining the *Black Hole of Mandatory Arbitration,* Cynthia Estlund concludes that "the cumulative effect of" the Supreme Court's rulings "given the dominant power of employers to tweak and tilt the arbitration process to their liking, have made arbitration so inhospitable to claimants that [workers] routinely give up their claims."

## Extending the Act is Imperative

Extending the already-passed Act is a relatively simple way to address the problem of mandatory arbitration of statutory employment claims and would enable Congress to tout many critical impacts. The expansion would:

- **Alleviate Systemic Oppression and Marginalization of Classes of Workers**

Many statutory employment law claims, like sexual harassment claims, are intended to alleviate systemic oppression and prohibit marginalization of classes of workers. Extending the Act to address employment claims brought under the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family Medical Leave Act, among others, will further Congress's intent that these claims eliminate systemic barriers and create equal employment opportunity.

- **Deter Violations**

Employment law statutes aim to reduce or eliminate conduct that harms both individuals and classes of workers. Because arbitration awards are generally lower than those in litigation and because class actions are less likely to be brought in arbitration, prohibiting predispute arbitration agreements should increase deterrence of other statutory employment violations as with sexual harassment. Litigation is high-risk for employers because of the costs and the potential for loss and substantial damages. This risk incentivizes employers to avoid violating employees' rights.

- **Increase Transparency**

Increased transparency can reduce harm and enhance deterrence. One often-emphasized rationale for the Act is the importance of transparency around employer conduct. This rationale applies equally to other types of violations of workplace rights, whether harassing a Black worker or refusing to promote a woman because she is pregnant. Workers with the ability to share information are less likely to feel marginalized and more likely to file a statutory claim. When survivors share their stories with others – including prospective employees, unions, and the media – employers are more likely to acknowledge the extent of the problem and to feel more pressure to stop the unlawful conduct.

- **Address Informational Asymmetry**

One way arbitration creates efficiency is by limiting the scope of discovery. Yet, in many employment cases, to an even greater extent than in some sexual harassment cases, access to information held only by the employer is needed to prove a statutory violation. The employer holds records about decision-making that explain why specific actions were taken, what employment policies were followed, and whether similar instances were treated the same or differently and why. Enabling a worker to elect post-dispute to proceed in litigation permits them to select litigation in cases where they need extensive discovery.

- **Address the Repeat-Player Effect**

Employment disputes, unlike commercial disputes, involve only one party—the employer—who utilizes arbitration repeatedly. A system designed by employers where they are more familiar with the arbitrators and arbitration process extends the inequality of economic status into the dispute resolution system itself.

- **Address Intersectionality and Conserve Resources**

Employers sometimes harass or discriminate against an employee based on a combination of factors such as race, gender, and age, or target a group of employees for harassment and wage or leave violations because of their low socio-economic status and gender, as explained by Jamillah Bowman Williams' research. Removing only sexual harassment from arbitration makes it more difficult for claimants with intersectional claims to bring all their employment claims in one forum.

## Workers and Employers Can Still Use Arbitration When It Does Work

Extending the Act to statutory employment claims leaves in place the option to agree to arbitration post-dispute. That way, workers are not forced to arbitrate, but when arbitration can benefit both a worker and their employer because of speed, lower cost, confidentiality, or other reasons, they can still use it.

Passing the current Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act was an important bipartisan step toward protecting vulnerable workers. However, much work remains to truly empower employees and eliminate systemic barriers across the workplace.

Congress must expand the Act's reach before this legislative session concludes. Specifically, existing prohibitions on mandatory pre-dispute arbitration clauses should extend to all statutory employment lawsuits.

**Read more in Ariana R. Levinson "Expanding the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act to Protect Workers' Rights," in "The Federal Arbitration Act: Successes, Failures, and a Roadmap for Reform," Richard A. Bales & Jill I. Gross editors, Cambridge University Press, forthcoming 2024.**