THE ARBITRATION FAIRNESS ACT OF 2017

Senator Al Franken

The ability of ordinary Americans to seek justice in our courts, even against the most powerful corporate interests, is a fundamental element of our civil justice system. However, the growing use of forced arbitration provisions in consumer and employment contracts has eroded this essential function. Forced arbitration thwarts the ability of workers and consumers to hold corporations accountable for wrongdoing, even in the most egregious cases.

Background

- In 1925, Congress passed the Federal Arbitration Act (FAA). The legislative history of the FAA makes clear that Congress intended to target commercial arbitration agreements between two companies of generally comparable bargaining power. Over the years, the Supreme Court has slowly broadened the reach of the FAA, ignoring evidence that the FAA was never intended to apply to consumer or employment disputes, or supersede all other federal laws protecting consumers, workers, and small businesses.
- Because of the deference the Court has granted to the FAA, lower courts are forced to honor arbitration clauses, even when they largely foreclose the opportunity to vindicate rights guaranteed by state or federal law.

Problems with Private Arbitration

- Arbitration frequently lacks the procedural processes that allow plaintiffs to prove their case, doesn't allow for judicial review, lacks meaningful transparency, impairs the development of important federal laws, and is plagued by "repeat-player bias."
- Proponents of private arbitration claim that arbitration is faster and cheaper than litigation. In instances where private arbitration is a superior alternative, consumers, workers, and small businesses will *choose* it—but they shouldn't be forced to agree to it in advance, when signing a contract.

What the Arbitration Fairness Act Does

- The Arbitration Fairness Act restores the original intent of the FAA by clarifying the scope of its application. The Arbitration Fairness Act amends the FAA by adding a new chapter that invalidates agreements that require the arbitration of employment, consumer, antitrust, or civil rights disputes *made before the dispute arises*.
- It restores the rights of workers and consumers to seek justice in our courts. It ensures transparency in civil litigation. And it protects the integrity of the Civil Rights Act, the Equal Pay Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, among others.
- The Arbitration Fairness Act does <u>not</u> restrict the use of agreements when two parties choose to arbitrate after a dispute arises, and it does <u>not</u> "ban arbitration."

The Supreme Court has used the auspices of the FAA to protect class action bans that limit consumer rights (*AT&T v. Concepcion*) and enforce arbitration agreements even if they make it impossible for a plaintiff to vindicate effectively her rights under a federal statute (*American Express v. Italian Colors*). Arbitration can be a suitable alternative to litigation if the consent to arbitration is truly voluntary and occurs after the dispute arises, but corporations should not be able to insulate themselves from liability by forcing workers and consumers to preemptively give up their rights. Please contact Leslie Hylton at <u>Leslie_Hylton@judiciary-dem.senate.gov</u> or 4-5204 if you'd like to cosponsor the Arbitration Fairness Act.