



JUSTICE FOR SALE:

How Corporations Use
Forced Arbitration to Exploit
Working Families



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ACKNOWLEDGMENTS

This report was prepared by the Center for Popular Democracy. It was written by Kate Hamaji and edited by Maggie Corser and Andrew Friedman.

ABOUT THE AUTHOR



Popular Democracy in Action and its affiliates know that everyday people have the power to change the world. We upend politics as usual to forge a representative, multiracial government and society where we all thrive, no exceptions

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Executive Summary

Over the last several decades, corporations have designed a method to exploit working families by forcing them to sign away their legal rights—unwittingly and without alternative—as a condition of doing business with them. In forced arbitration, a company requires a worker or consumer to agree to resolve any potential claims against the company through a binding arbitration process. These “agreements” eliminate the right to sue in court, so that someone who experiences fraud, wage theft, or sexual harassment will face a private arbitrator rather than a judge. These pre-dispute arbitration clauses, which are often buried in the fine print of contracts, may also require individuals to waive their rights to participate in class or collective action lawsuits or to appeal an arbitrator’s decision. Most people are unaware that when they accept a job, make a purchase, or open a credit card, they could be forced into a system that is designed by and for corporations themselves—a system that results in costly fees for workers and consumers, rules in favor of businesses the overwhelming majority of the time, and erodes workers’ and consumers’ rights.

The current forced arbitration epidemic is a result of judicial developments that began in the 1980s when the U.S. Supreme Court reinterpreted a 1925 law called the Federal Arbitration Act (FAA), originally enacted so that businesses could have a quicker and less costly way to resolve disputes among themselves. Arbitration is a reasonable approach to resolving conflicts between parties with equal power. However, over time, aggressive corporate attorneys have strategized to use forced arbitration in standard employment and consumer contracts to strengthen corporate positions against workers and consumers with substantially less power. And since the 1980s, conservative Supreme Court judges have made a series of decisions that together have allowed corporations to expand forced arbitration’s reach to everyday workers and consumers, granting wealthy corporations a huge advantage over working families.

Forced arbitration, also referred to as mandatory arbitration, is prevalent in a wide variety of industries, impacting workers, consumers, the elderly, and students. Tens of millions of consumers in financial markets are subject to arbitration clauses, and virtually all for-profit schools use forced arbitration. Forced arbitration clauses are commonly used in contracts with elderly persons receiving nursing home care, though this practice is now banned among nursing homes that receive federal funding. An estimated 30 to 40 percent of all American workers are subject to forced arbitration agreements. Arbitration agreements are especially common in industries that pay low wages, such as the restaurant and retail industries.

Forced arbitration creates an unjust system that obstructs workers' and consumers' pursuit of justice and fails to hold corporations accountable to the public. Some of the primary problems include the following:

- Since arbitration is held in private, forced arbitration lacks transparency. Further, arbitration creates no precedent to inform how or whether laws are enforced.
- Forced arbitration strongly favors repeat players (i.e. corporations), as the same corporation may defend against hundreds of different claimants before the same limited number of arbitrators. These arbitrations result in favorable outcomes for corporations the majority of the time.
- Forced arbitration can be prohibitively expensive for working families, as plaintiffs may be required to share the cost and sometimes even cover the corporation's legal fees.
- Increasingly, arbitration clauses include class or collective action waivers, which means workers and consumers have no right to band together to pursue justice.
- Forced arbitration makes it virtually impossible for workers and consumers to appeal an unfair decision.
- Forced arbitration facilitates the perpetration of sexual harassment and discrimination in the workplace by preventing those who experience discrimination and harassment from having a fair day in court, preventing stories of sexual harassment and other discrimination from coming to light, and preventing groups of workers from seeking company-wide data to expose patterns of discrimination.

Corporations are the clear winners in this unjust and unbalanced system. One study found that in the credit card industry, the National Arbitration Forum ruled against consumers 94 percent of the time. According to the Economic Policy Institute, employee win rates in forced arbitration are significantly lower than in either federal court or state court. Workers in mandatory arbitration win about one fifth of the time (about 21 percent), which is 59 percent as often as they win in federal courts and 38 percent as often as they win in state courts. In other words, employees are 1.7 times more likely to win in federal courts than in arbitration and 2.6 times more likely to win in state courts than in arbitration. Median damage awards in forced employment arbitration are \$36,500, compared to \$176,400 in federal court employment discrimination cases and \$85,600 in state court non-civil rights cases.

A number of federal agencies have taken action to protect vulnerable populations from forced arbitration.ⁱ However, reform has been limited in scope and particular to specific industries (for example, nursing homes or for-profit schools that receive federal funding). While local, state, and federal agencies can bring actions against companies to vindicate workers' and consumers' rights, these agencies have limited resources. Given the number of complaints filed by consumers with state attorneys-general, including in New York, it is not possible for attorneys-general to bring court actions to all violations of consumer laws that are brought to their attention. Further, reforms at the federal level to curb forced arbitration are unlikely at this point, and the basic rights and wellbeing of

ⁱ For example, the Department of Defense, the Department of Labor, and the Centers for Medicaid and Medicare Services.

working families are still at stake. To prevent corporations from further eroding the rights of workers and consumers:

- Congress should enact the Arbitration Fairness Act, a comprehensive federal reform that protects working families against arbitration.
- The Trump administration should prevent a roll-back of existing and proposed regulations from agencies like the Consumer Financial Protection Bureau (CFPB), which are designed to protect everyday people from unfair treatment by corporations.
- In pending cases brought by worker and consumer advocates, courts should restrict the use of mandatory arbitration clauses to prevent abuses.
- States should pass laws to ensure that consumers and employees can pursue their rights in court if they choose, despite the fact that they have signed contracts mandating that disputes go to arbitration.
- Cities and states should strengthen the enforcement capacities of local and state agencies. In addition, cities and states can use their market power to require greater transparency about companies' use of forced arbitration and only do business with companies that do not use it.



Photo: Sol Freire Figueroa, New York Communities for Change

Introduction

Over the last several decades, corporations have designed a pernicious method of manipulating the justice system against working families by forcing them to legally sign away their rights—unwittingly and without an alternative. In forced arbitration, a company requires a worker or consumer to agree to resolve any problem through a binding arbitration process, which means that a dispute must be resolved outside of court. When signing forced arbitration agreements, individuals often waive their rights to sue in court, to participate in class or collective action lawsuits, or to appeal an arbitrator's decision.¹ Forced arbitration is often perpetrated through the fine print of employment contracts, orientation materials that workers receive when beginning a new job, or the boilerplate language that consumers either skim or ignore when making purchases.²

The vast majority of workers and consumers have no idea that they are forced to sign away their rights just to conduct basic business with corporations—for example, to buy products and services from them or to work for them.³

Parties may agree to have their disputes heard and resolved by a private third party rather than in court. Arbitration can be a fair process if parties have substantially equal power and knowingly submit to the terms of agreement. But with forced arbitration, workers and consumers are at a distinct disadvantage. Workers often have limited ability to negotiate the terms of the agreement and no collective bargaining power. Jobseekers are forced to waive their rights as a condition of employment or lose a job opportunity. Even when jobseekers are fully aware of the potential ramifications of signing away their rights, many cannot afford to turn down a job when they are struggling to meet their basic needs and to provide for their families.

Forced arbitration creates an unjust system for workers and consumers as they seek redress. Employers and corporations are unaccountable to the public due to the private nature of arbitration; arbitration lacks transparency; and arbitration blocks workers from pursuing justice. It is a system that strongly favors repeat players (i.e. corporations), in which arbitrators rule in favor of corporations the majority of the time.⁴ One study found that in the credit card industry, the National Arbitration Forum rules against consumers 94 percent of the time.⁵ A study by the Economic Policy Institute found that workers win about one fifth of the time (about 21 percent) in mandatory arbitration, 59 percent as often as they win in federal court and 38 percent as often as they win in state court.⁶ In other words, employees are 1.7 times more likely to win in federal courts than in arbitration and 2.6 times more likely to win in state courts than in arbitration. Damages for forced arbitration are significantly lower for plaintiffs than in federal and state courts.⁷ Forced arbitration also facilitates the perpetration of sexual harassment and discrimination in the workplace by preventing those who experience discrimination and harassment from having a fair day in court, preventing stories of sexual harassment and other discrimination from coming to light, and preventing groups of workers from seeking company-wide data to expose patterns of discrimination.

Under forced arbitration, it is often difficult for workers and consumers to appeal an unfair decision or band together to pursue justice through a class or collective action suit.⁸ Troublingly, working families often end up paying astronomical fees which sometimes even include the other side's legal fees.⁹ Since the Federal Arbitration Act, as construed by conservative Supreme Court justices, heavily favors arbitration, unfair constraints on plaintiffs—such as denying the ability to appeal or pursue collective actions—are usually upheld by courts.

Forced arbitration often results in unremedied discrimination, wage theft, and widespread consumer fraud. While working families suffer the consequences, corporations are essentially allowed to opt out of the basic laws that govern our country.

Background

What is forced arbitration?

In forced arbitration, a company requires a worker or consumer to agree to resolve any problem through a binding arbitration process, which means that a dispute must be resolved outside of court. When signing forced arbitration agreements, individuals often waive their rights to sue in court, to participate in class or collective action lawsuits, or to appeal an arbitrator's decision.¹⁰ Because corporations often appear before the same arbitrators, the arbitrators that decide their cases rely on the corporate defendants for business and tend to rule in favor of the corporate defendants the overwhelming majority of the time.¹¹ Working families often have no recourse once a decision has been made because they have signed away the right to appeal or to participate in a class action suit.¹² In this unjust system, workers and consumers have no ability to negotiate the terms of the agreement, and often have no collective bargaining power. Most people are unaware that they ever signed these agreements, which are often deliberately hidden in the fine print of contracts.¹³

Wells Fargo Rewards Visa® Card Account Agreement¹⁴

(29) Assignment. We have the right to assign your Account to another creditor. The other creditor is then entitled to any rights we assign to them. You do not have the right to assign your Account.

(30) Governing Law. This Agreement and your Account, is governed by federal law and, to the extent applicable, the laws of the State of South Dakota, no matter where you live or use your Account.

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Arbitration

(31) Dispute Resolution Program: Arbitration Agreement.

1. **Binding Arbitration.** You and Wells Fargo Bank, N.A. (the "Bank") agree that if a Dispute arises between you and the Bank, upon demand by either you or the Bank, the Dispute shall be resolved by the following arbitration process. The foregoing notwithstanding, the Bank shall not initiate an arbitration to collect a consumer debt, but reserves the right to arbitrate all other disputes with its consumer customers. A "Dispute" is any unresolved disagreement between you and the Bank. It includes any disagreement relating in any way to the Card or related services, Accounts, or matters; to your use of any of the Bank's banking locations or facilities; or to any means you may use to access the Bank. It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law, and equitable claims. A Dispute also includes any disagreements about the meaning or application of this Arbitration Agreement. This Arbitration Agreement shall survive the payment or closure of your Account. **YOU UNDERSTAND AND AGREE THAT YOU AND THE BANK ARE WAIVING THE RIGHT TO A JURY TRIAL OR TRIAL BEFORE A JUDGE IN A PUBLIC COURT.** As the sole exception to this Arbitration Agreement, you and the Bank retain the right to pursue in small claims court any Dispute that is within that court's jurisdiction. If either you or the Bank fails to submit to binding arbitration following lawful demand, the party so failing bears all costs and expenses incurred by the other in compelling arbitration.

2. **Arbitration Procedure; Severability.** Either you or the Bank may submit a Dispute to binding arbitration at any time notwithstanding that a lawsuit or other proceeding has been previously commenced. **NEITHER YOU NOR THE BANK SHALL BE ENTITLED TO JOIN OR CONSOLIDATE DISPUTES BY OR AGAINST OTHERS IN ANY ARBITRATION, OR TO INCLUDE IN ANY ARBITRATION ANY DISPUTE AS A REPRESENTATIVE OR MEMBER OF A CLASS, OR TO ACT IN ANY ARBITRATION IN THE INTEREST OF THE GENERAL PUBLIC OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.** Each arbitration, including the selection of the arbitrator(s), shall be administered by the American Arbitration Association (AAA), or such other administrator as you and the Bank may mutually agree to (the AAA or such other mutually agreeable administrator to be referred to hereinafter as the "Arbitration Administrator"), according to the Commercial Arbitration Rules and the Supplemental Procedures for Consumer Related Disputes ("AAA Rules"). To the extent that there is any variance between the AAA Rules and this Arbitration Agreement, this Arbitration Agreement shall control. Arbitrator(s) must be members of the state bar where the arbitration is held, with expertise in the substantive laws applicable to the subject matter of the Dispute. No arbitrator or other party to an arbitration proceeding may disclose the existence, content, or results thereof, except for disclosures of information by a party required in the ordinary course of its business or by applicable law or regulation. You and the Bank (the "Parties") agree that in this relationship: (1) The Parties are participating in transactions involving interstate commerce; and (2) This Arbitration Agreement and any resulting arbitration are governed by the provisions of the Federal Arbitration Act (Title 9 of the United States Code), and, to the extent any provision of that Act is inapplicable, unenforceable or invalid, the laws of the state of South Dakota.

How did forced arbitration become a tool used to exploit workers and consumers?

Arbitration is a sensible approach to resolving disputes between corporations or between parties with equal power. However, over time, aggressive attorneys, representing big banks and corporate interests, have developed the strategy of using forced arbitration in standard contracts with workers and consumers. In trying to protect corporate profits, corporate attorneys have effectively stacked the deck against working families. Even when people have tried to challenge this practice as unfair in court, pro-business, conservative judges have generally approved the use of these agreements.

As outlined in a recent report by the Economic Policy Institute, the current forced arbitration epidemic is a result of judicial developments that began in the 1980s when the U.S. Supreme Court reinterpreted a 1925 law called the Federal Arbitration Act (FAA).¹⁵ The FAA was enacted so that businesses could have a faster and less costly way to resolve disputes.¹⁶ The FAA was originally drafted with an orientation toward disputes between businesses—not in their relations with consumer and employees.¹⁷

In the 1980s, the Supreme Court dramatically expanded the range of disputes covered by the FAA and also interpreted the statute in a way that ensured that state courts would have to enforce arbitration agreements as well.¹⁸ In 1984, the Supreme Court ruled that the FAA could preempt state law, which effectively blocked states' attempts to protect workers and consumers from this unjust system. Between 1985 and 2015, there were more than two dozen Supreme Court decisions involving arbitrations, and almost all of them expanded the reach of the FAA.¹⁹

In 1991, the Supreme Court expanded the range of statutes under the FAA to include employment disputes. In *Gilmer v. Interstate/Johnson Lane Corp.*,²⁰ the Court held that an employee's allegations of age discrimination had to go through arbitration. A 2001 decision, *Circuit City Stores, Inc. v. Adams*, later confirmed that the FAA could indeed cover employment contracts. Today, corporate employers are allowed to require workers to sign arbitration agreements as a condition of employment—and can refuse to hire applicants who will not sign. While arbitration in employment used to be limited almost exclusively to unionized workplaces, where workers have greater power vis-à-vis their employers due to collective bargaining, it is now commonplace in non-union workplaces, where workers do not enjoy the same protections.²¹

Preventing class and collective action lawsuits is particularly detrimental to workers. Two Supreme Court rulings, one in 2011 and one in 2013, enabled corporations to ban participation in class action lawsuits through arbitration contracts. These decisions were the result of more than a decade of strategizing by corporations and Wall Street groups to limit the ability of workers and consumers to band together.²² Because of these rulings, workers now often have no method for joining together to seek justice when employers commit discrimination or wage theft.²³ Without the option to band their claims together, workers' and consumers' claims may not be worth enough money to justify the costs and risks of bringing a lawsuit, especially if the arbitration rules stack the deck in favor of the employer or the company.

Many of the decisions that have enabled corporate greed and eroded workers' rights have been driven by individuals who are aligned with corporate interests. For example, U.S. Supreme Court Chief Justice John Roberts has repeatedly ruled in favor of upholding arbitration agreements. As a private

lawyer, Roberts represented Discover Bank, which unsuccessfully petitioned the Supreme Court to hear a case involving class action bans. The bank later received a favorable decision from the Court after Roberts was appointed Chief Justice.²⁴

Alexandria's Story

In the summer of 2016, Alexandria began working as a cleaner for Handy, a tech company that dispatches cleaners—whom the company classifies as independent contractors—for cleaning jobs. Over the course of the three months that she used the Handy platform, Alexandria was routinely sent on jobs that were unreasonably big assignments given the allotted time. For example, she was once assigned a four-hour job that actually took her 12 hours to complete. In these cases, it would be up to Alexandria to negotiate the extra hours of pay needed to adequately finish the job. Handy didn't get involved in this process, even though they handled the dispatching and payment. When her clients did not want to pay for additional hours, it left Alexandria in a bind because she could not finish the job in the quoted amount of time. This could jeopardize her client ratings, and thus her ability to continue receiving jobs.

On one occasion, Alexandria was given a considerable job to clean an apartment that, as Alexandria described, looked like it “belonged to a hoarder.” The job involved cleaning two refrigerators—which were both extremely dirty—and scrubbing layers of dirt from the floor. It took her 10 hours to clean. However, after she was done, the client was dissatisfied. He complained that the floors were not as spotless as they should be and that there was still dirt on the top of the refrigerator. In the end, the client did not pay Alexandria for the full number of hours she had spent getting the apartment to the condition that satisfied him, and Handy did nothing to properly compensate her for these hours.

In addition to failing to pay Alexandria for all of her work, Handy required that Alexandria pay expenses out of pocket because she was classified as an independent contractor. For instance, she had to purchase her own vacuum cleaner and pay for its maintenance. Alexandria also had to purchase her uniform and cleaning supplies, which Handy encourages contractors to buy directly from them.

Alexandria eventually deactivated her account because she felt the company was not treating her fairly. Even after she deactivated her Handy account, Alexandria continued to struggle with the company. For example, Handy tried to charge deductions from her credit card because she did not “show up” to recurring appointments they scheduled for her—even though she had deactivated her account. Alexandria quickly removed her card from the system so they could no longer make deductions.

Unfortunately, because she signed a forced arbitration agreement, there was very little Alexandria could do to recover her wages or to try to address Handy's policy of classifying cleaners as independent contractors. As a condition of employment, Alexandria signed an agreement that waived her right to bring or participate in a class or collective action against Handy. This waiver makes it very difficult, if not impossible, to pursue claims against the company because Alexandria's claims alone are not worth enough money to cover arbitration costs. Claims on behalf of a class of affected workers, on the other hand, when added up, would be large enough to make Handy take notice and answer for these practices. Misclassification is much harder to fight through arbitration than in open court.

Alexandria contacted a law firm that represents workers in wage theft cases about potential wage theft claims against Handy. The law firm discovered that Handy had required Alexandria to sign an arbitration agreement that waived her right to bring or participate in a class or collective action, and concluded that even if Alexandria were able to challenge the class waiver, doing so would add considerable litigation risk, in addition to the risks inherent in any lawsuit. Pursuing her claims on an individual basis would not be economically viable, the law firm concluded, because the cost of litigation would quickly overwhelm her potential recovery. As a result, based on its investigation, the law firm determined that it would not offer to represent her in her wage theft claims.



Who is impacted?

Forced arbitration is pervasive across a wide variety of industries, impacting workers, consumers, the elderly, and students. Some examples of the types of companies that commonly use arbitration clauses include corporate employers, cable and satellite companies, cell phone companies, credit card issuers, online services, and investment services.²⁵

Virtually all for-profit schools (98 percent in 2013–2014) use forced arbitration, which takes advantage of those seeking higher education or new career opportunities.²⁶ In the recent case of Trump University, defrauded students were able to sue to partially recoup their losses because they had not signed a mandatory arbitration agreement.²⁷ Though forced arbitration was banned in nursing homes accepting Medicaid and Medicare by a rule issued by the Center for Medicare and Medicaid Services, the rule is currently being challenged in court, leaving its fate uncertain.²⁸ CFPB research indicates that tens of millions of consumers in financial markets are subject to arbitration clauses. For example, in the checking account market, banks representing 44 percent of insured deposits have arbitration clauses.²⁹ A whopping 99 percent of storefront payday loan businesses—disproportionately located in low-income communities—use forced arbitration.³⁰ The CFPB study also found that less than seven percent of consumers were aware that they had signed away their rights.³¹

Forced arbitration also disproportionately impacts low-wage workers. In sectors that tend to pay lower wages, such as the retail and restaurant industries, arbitration clauses are especially common.³² According to a 2014 estimate by the Alliance for Justice, 30 to 40 percent of all American workers are subject to forced arbitration agreements.³³ The Economic Policy Institute estimates that approximately 25 percent of workers in non-union workplaces are under arbitration agreements.³⁴

Attorneys who represent workers say that number has been increasing rapidly, as more and more companies realize how much money they can save by limiting workers' rights. "We have seen a huge number of low-road employers—big and small companies—sneak forced arbitration provisions into job applications and employment agreements," says Justin M. Swartz, a partner at Outten & Golden LLP, a firm that represents workers and employees. "Then they violate their workers' basic employment rights and use these 'get out of jail free cards' to close the courtroom doors."

Corporate Bad Actors³⁵

Some of the corporations that have used mandatory arbitration clauses include:



ii Workers in some Macy's locations are not subject to pre-dispute mandatory arbitration agreements because they are represented by a union and covered by the terms of a collective bargaining agreement. In contrast to mandatory arbitration agreements in non-union workplaces, collective bargaining agreements typically contain grievance and arbitration procedures that are determined by both their union and their employer, and workers are provided representation in these proceedings.

Forced Arbitration at Wells Fargo

When Jesse began working as a bank worker at Wells Fargo in 2013, he immediately became aware of an intense companywide pressure to make sales. He noted that the new employee training involved very little emphasis on procedures and policies but a heavy focus on making sales and recruiting new clients.

For example, bank workers were instructed to aggressively pursue new account opportunities—even if it meant convincing an existing customer to open multiple accounts with Wells Fargo—that would collect more fees. For example, bank workers were instructed to advise clients with businesses to open multiple unnecessary and potentially costly accounts with Wells Fargo (i.e. different accounts for payroll, insurance, accidental damage, etc.), which meant that clients were more likely to overdraft and incur monthly fees. Jesse found it difficult to keep quiet and began making complaints to his manager, but his concerns were repeatedly dismissed.

Later, he approached management about concerns that his colleagues were opening 10–15 accounts per day, which seemed impossible given that each account took approximately 30–40 minutes to open. His concerns were again dismissed. However, one day an irate customer came into the branch because Wells Fargo had opened up multiple unauthorized debit cards in her name. Jesse brought it to his manager, who did not take action and told him to mind his own business or risk termination. Jesse then called the Wells Fargo ethics line, but the person on the ethics line said that there was no possible way the unauthorized openings could have taken place.

Soon after, management accused Jesse of falsifying records. Jesse was terminated a week later, allegedly for falsifying company records—although Jesse knew that he was terminated for making noise and calling attention to the bank’s malpractice.

When Jesse sought to bring claims against Wells Fargo for wrongful termination, he learned that he had agreed to arbitrate any dispute that arose out of his employment when he signed an agreement at the time of hire. Because of this agreement, Jesse could not take his case to court. He began a lengthy and expensive arbitration process in 2015 and settled in 2016 for \$10,000 and an agreement to clear his name—after being encouraged to settle by the arbitrator. The arbitrator repeatedly warned that if he lost, he would be on the hook for the escalating legal costs for Wells Fargo. At one point the arbitrator estimated the costs at \$200,000. Jesse mostly wanted to clear his name, so he thought it was best to settle.

Jesse has been unable to obtain another job at a bank, even though he is highly qualified. While he has received several initial job offers at other banks, after his background checks were completed, the offers were retracted each time. Jesse has not had trouble getting a job in other fields—for example he passed a more rigorous background check to get a job as a nurse. He believes that he has been placed on a blacklist as a result of bringing attention to the company’s practices.³⁶

The Erosion of Workers’ Rights

Forced arbitration poses a direct threat to workers’ rights and the progressive gains made by community and labor groups through decades of organizing. Because they are unable to access the courts, forced arbitration makes it impossible for workers to sue for discrimination based on race, age, gender, or disability—making laws like the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act, far less effective.³⁷ Forced arbitration also erodes access to hard-won rights like minimum wages and overtime pay, rest breaks, and family leave.

Even when there is strong evidence that a corporation flouts the law, workers are blocked from pursuing justice for the following reasons:

- **Forced arbitration lacks transparency and creates a system that is unaccountable to the public.** Forced arbitration creates a private, closed door system, lacking public accountability and transparency.³⁸ Because there are generally no published opinions for most arbitrations,³⁹ there can be no legal precedent set for future rulings.
- **Forced arbitration creates a biased system that rules in favor of repeat players.** The same corporations repeatedly end up in arbitration filings. In 2010 and 2011, corporate repeat players constituted 80 percent of filings.⁴⁰ These repeat players create an unjust system that continues to work to their advantage. For instance, since corporations hire the companies that ultimately select the arbitrators, it is in the arbitrator's best interest to rule in favor of the corporation if they want to be rehired. According to the Alliance for Justice, some arbitrators have even been blacklisted by potential future clients for having ruled in favor of the consumer.⁴¹
- **Forced arbitration results in unreasonably high costs to workers and consumers.** A study by Public Citizen found that the cost of initiating an arbitration is almost always higher than the cost of filing a lawsuit. Public Citizen's comparison of court fees to the fees charged by the primary arbitration provider organizations shows that costs can be up to 5,000 percent higher in arbitration than in court.⁴² While corporate employers likely have the funds to finance the arbitration process, workers and consumers can be deterred by moving forward with arbitration on the basis of high costs.

Arbitration fees can cost workers between \$250 and \$700 per day.⁴³ Apart from filing fees, workers and consumers may be charged an hourly or per diem rate, room rental fees, administrative fees, and even the arbitrator's travel expenses, amounting to thousands of dollars on top of attorneys' fees.⁴⁴ In some cases, arbitration agreements require that the losing party pay all the arbitration fees, including the corporation's attorney fees.⁴⁵ Though litigation can also be expensive, there are no required fees beyond the initial filing fee and plaintiffs do not pay directly for the judge's salary.⁴⁶ Independent contractors are especially likely to have to front a significant share of arbitration fees and costs⁴⁷—even if their employer has improperly classified them as independent contractors rather than employees, as many gig economy companies, such as Uber or Handy, have done.

There are a number of additional financial risks associated with forced arbitration. First, class actions—which often yield greater returns than individual lawsuits—are commonly banned in forced arbitration clauses⁴⁸ so workers and consumers have a much smaller chance of recouping their losses. Second, some statutes allow for the recovery of “attorneys’ fees” in litigation, but these fees are generally much harder to recover in arbitration.⁴⁹ Third, small claims court may allow workers and consumers to resolve small claims without a lawyer at all, which may be much more affordable than arbitration. Finally, lawyers sometimes take cases to court through contingency fees, in which the attorney is only paid if he or she wins. Attorneys are often reluctant to bring consumer claims through contingency fee arrangements because, among other things, the amounts at issue are often small.⁵⁰

- **Forced arbitration makes it very difficult for workers and consumers to appeal.** As discussed above, after an arbitrator rules in favor of the corporation, it is very difficult for workers and consumers to appeal⁵¹ since federal policy weighs heavily in favor of arbitration.
- **Increasingly, forced arbitration clauses include class/collective action waivers, eroding workers' and consumers' collective power.** Without the ability to join a class or collective action suit, workers and consumers have no ability to band together to pursue justice when an employer commits wage theft or discrimination. This is especially detrimental to low-wage workers who have significantly fewer resources than wealthy corporations and cannot afford to take on these fights alone. A report by a national law firm representing employers shows that the percentage of companies using forced arbitration clauses that ban class actions more than doubled from 16 percent in 2012 to almost 43 percent in 2014.⁵²
- **Forced arbitration limits the ability to collect evidence.** In forced arbitration, the formal rules of evidence are relaxed.⁵³ The arbitrator is granted significant liberty in determining how much evidence a worker can present and how much evidence a corporation is allowed to withhold.⁵⁴
- **Forced arbitration facilitates the perpetration of sexual harassment and discrimination in the workplace.** According to a 2016 study by the Equal Employment Opportunity Commission, at least 25 percent of women (but up to 85 percent depending on the respondent's definition) report having experienced sexual harassment in the workplace.⁵⁵ Arbitration clauses prevent those who experience discrimination and harassment from having a fair day in court. Because arbitration contracts shield employers from the cost of harassment and discrimination, those who perpetrate sexual harassment and discrimination are not deterred. In addition, payouts are generally much smaller in arbitration than in court. A national study by a researcher at Columbia University found that employees whose sexual harassment cases go to trial win an average of \$217,000.⁵⁶

One particularly high profile example is that of Fox News television commentator, Gretchen Carlson, who sued Roger Ailes at Fox News for sexual harassment. Carlson took care to name Roger Ailes in the lawsuit so that her claims were not forced into arbitration. Because she had signed an arbitration agreement with Fox News, she was able to sue Ailes himself, even though she had signed away her right to sue Fox News. The public only learned about that case and the ensuing scandal, which brought other women forward, because Carlson was able to sue in open court.⁵⁷ Similarly, a class of Jared and Kay Jewelers employees were forced to bring claims for widespread sexual harassment in arbitration in 2008. Fortunately, their lawyers recently obtained permission to release the women's declarations about harassment and abuse publicly. However in many similar cases private arbitrations proceed behind closed doors which prevents publicizing information on widespread misconduct that would be important for customers and employees to know.⁵⁸

Mr. Chow's Story

In 2012, Mr. Chow worked as a delivery driver for A-1 International Courier Service in New York, where he delivered computer parts to companies across the tri-state area. Because A-1 misclassified Mr. Chow as an independent contractor, he did not receive many of the benefits guaranteed to full-time employees. For example, although Mr. Chow worked long hours, he did not receive wages at the proper overtime rate for all hours worked in excess of 40 each workweek. A-1 also unlawfully took deductions from Mr. Chow's wages for many expenses such as car insurance, equipment, and vehicle maintenance, and failed to reimburse him for these expenditures. Because Mr. Chow had been misclassified by A-1 as an independent contractor, the company could avoid covering many of these expenses—which they would have to cover if Mr. Chow was an employee.

Shortly after beginning his job, Mr. Chow realized that he was unable to earn enough to get by. In addition to unlawful deductions, Mr. Chow received only an \$11 payment for the completion of a successful trip, no matter the distance he traveled to the drop-off location. Mr. Chow began

requesting that the dispatcher assign him more local trips so that he could save some money on gas and tolls. Without adequate compensation, Mr. Chow was sometimes spending more on gas than he was earning for his work. And on top of that he had other mounting bills to pay—house payments, electricity, and phone bills, for example. Ultimately, Mr. Chow found the job to be disadvantageous due in large part to the numerous deductions A-1 took from his wages.

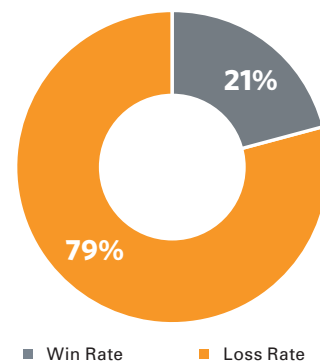
Determined to recover his wages, Mr. Chow found an attorney who took his case, but after filing with the court, he was told he had to fight it individually in arbitration, which is where his case is currently pending (along with the cases of dozens of other A-1 drivers). Misclassification is much harder to fight through arbitration than in open court.

Because Mr. Chow had signed an arbitration agreement, there was very little he could do to claim his stolen wages. Like many workers desperate for a job, Mr. Chow signed an arbitration agreement that foreclosed his opportunity to bring his claims to court.

With forced arbitration, it is abundantly clear that corporations win and working families lose. According to the Economic Policy Institute, employees are awarded far less through arbitration than through proceeding either in federal or state court. As noted above, workers win about one fifth of the time (about 21 percent) in mandatory arbitration, 59 percent as often as they win in federal court and 38 percent as often as they win in state court.⁵⁹ In other words, employees are 1.7 times more likely to win in federal courts than in arbitration and 2.6 times more likely to win in state courts than in arbitration. Moreover, damages in forced arbitration cases are significantly lower.

Median damages in forced employment arbitration are \$36,500, compared to \$176,400 in federal court employment discrimination cases and \$85,600 in state court non-civil rights cases.⁶⁰ These numbers only capture the people whose cases actually go to arbitration in the first place. Many more who think their employers broke the law, but are daunted by the costs and risks of going to arbitration or who can't find a lawyer willing to take on the risk of arbitration, are forced to suffer in silence.

Employee Win & Loss Rates in Arbitration



A Widely Acknowledged Epidemic

It is widely acknowledged that forced arbitration represents a vast curtailment of people's rights under the law. In the past several years, a number of protections have been enacted that seek to defend vulnerable populations by restricting the use of forced arbitration.

- The U.S. Department of Defense has taken steps to protect service members, who are often away from home for extended periods of time and have difficulty exercising their rights while overseas. In July 2015, the Department of Defense banned arbitration clauses in loans made to service members under the Military Lending Act, an act that limits the interest rates that lenders can charge on certain types of loans to help keep military families out of debt.⁶¹
- In May 2016, the CFPB proposed a rule that would prohibit financial companies from using class action bans in consumer contracts. This rule, which would apply primarily to new contracts, would mean that consumers could once again leverage class action suits in dealing with financial products and services.⁶²
- In April 2016, the U.S. Department of Labor released the “fiduciary rule” which aims to protect savers and retirees. The rule contains a contract for financial advisors and their clients which prohibits class action bans when clients receive advice about retirement funds. However, it still does not ban forced arbitration for individual disputes.⁶³ In February 2017, President Trump signed an Executive order that gives the Secretary of Labor the power to rescind or revise the fiduciary rule.⁶⁴
- In September 2016, the Centers for Medicaid and Medicare Services released a rule on nursing homes that receive federal funding through Medicaid and Medicare. The rule bans pre-dispute binding arbitration in nursing home contracts that require patients and families to resolve disputes through arbitration.⁶⁵ This will help to ensure that vulnerable elderly individuals are not exploited when seeking care through assisted living. Prior to the announcement of this rule, it was estimated that 90 percent of nursing homes then included forced arbitration clauses in contracts with their clients, preying upon the vulnerability of the elderly and their families.⁶⁶ As noted, this rule has been challenged in court, and it is also open to challenge by the new administration in Washington.
- The U.S. Department of Education proposed a rule in June of 2016 that aims to protect students at for-profit schools by granting consumers the right to sue institutions of higher education. The proposed rule would prohibit forced arbitration and class action bans for students who take out federal loans to attend schools that receive federal funding.⁶⁷
- The National Labor Relations Board (NLRB) has made efforts to limit the use of class action bans in employment agreements. The NLRB has argued that class action waivers interfere with a core tenet of labor law—an employee's right to engage in concerted activity to improve wages and working conditions. However, several Court of Appeals have issued different decisions on this issue; the Seventh and Ninth Circuits have ruled favorably, while the Second, Fifth, Eighth, and Eleventh circuits have upheld class action waivers.⁶⁸ Even if the courts upheld that that NLRB's reasoning prevails, it would only protect workers' abilities to bring claims together. Employers could still force groups of workers into arbitration, where they face hired judges, no right to appeal, and limited evidence, and where employers' violations are shielded from public scrutiny.

However, reform has been limited in scope and particular to specific industries. While local, state, and federal agencies can bring actions against companies to vindicate workers' and consumers' rights, these agencies have limited resources. Given the number of complaints filed by consumers with state attorneys-general, including in New York, it is not possible for attorneys-general to bring court actions to all violations of consumer laws that are brought to their attention.⁶⁹ Finally, despite promises to enhance workers' and consumers' security, The Trump administration has already begun to repeal important worker protections, such as the Fair Pay and Safe Workplaces Executive Order of July 2014, which prohibited the use of forced arbitration for certain violations.⁷⁰

Danny's Story

In November 2015, Danny started working at Macy's in Douglaston, New York as a sales associate in the shoe department. He excelled at his job, consistently hitting above 100 percent of his sales goals and going above and beyond what was required of him to ensure that his department ran efficiently and safely. Danny was consistently recognized by his managers for his hard work and talent. He received several commendations over a six month period, including recognition for his energy, sense of urgency, helpfulness, and passion. In a few short months he was given increasing flexibility and responsibility.

Danny was thrilled about his new position. However, not long after, he received a call from Macy's directing him to immediately clock out from work and await further instructions. Danny later received notification that because Macy's had conducted a background check revealing a prior conviction, he was being terminated. He was terminated despite the fact that he had already worked for Macy's for over six months, had successfully performed his job duties and responsibilities, and had received only glowing reviews.

This was crushing news for Danny, whose conviction was more than seven years old at the time of his employment and unrelated to his suitability for employment at Macy's. With the income from this job, Danny had done everything in his power to gain stability and repair his life, including reconnecting with his family, including his teenage daughter, and working to secure his financial future. In addition,

Danny had been giving back to his community by volunteering at a local soup kitchen. The loss of this job was a blow not only to his financial stability but to his sense of identity and optimism for his future.

Danny's lawyers believe Macy's discriminates against applicants and employees based on their conviction histories—a practice which has a disparate impact on Black and Brown workers who are disproportionately represented in the criminal justice system. However, because he signed a forced arbitration agreement at the time of hire, Danny is foreclosed from prosecuting his claim in court. While Macy's urged employees to quickly sign the forced arbitration agreement without question, they did take the time to warn workers not to join a union. Without knowing much about the benefits of a union, Danny heeded their advice and opted not to join—a decision he now regrets since unionized workers have greater power vis-à-vis their employers due to collective bargaining.

Today, Danny is involved with the Fortune Society, a community organization that supports people in their successful reentry from incarceration. Because of the support and resources he has access to, Danny will pursue further training as he continues his quest for a meaningful and sustainable job. However, not everyone has the resources and support to continue the fight—recidivism is high because many people struggle to find work once they have been incarcerated. Danny says, it "feels like I've been sentenced for life."

Solutions

Over the last several decades, corporations have found ways to manipulate the justice system in their favor by forcing workers and consumers to legally sign away their rights. Forced arbitration often results in unremedied discrimination and sexual harassment, wage theft, and widespread consumer fraud. It enables corporations to opt out of the justice system and stack the deck against working families without consequence. To prevent profit-driven corporations from further eroding the rights of workers and consumers:

- **Congress must enact comprehensive federal reform that protects working families.** A number of federal agencies have made commendable reforms that limit the use of forced arbitration for certain vulnerable populations, but comprehensive reform is needed to protect all working families. Congress has made several attempts to address the forced arbitration epidemic. In 2009, 2011, and 2013, and 2015, the Arbitration Fairness Act was introduced, which would make arbitration agreements unenforceable when applied to employment, consumer, antitrust, and civil rights disputes. The act would also give the courts—not arbitrators—the power to determine the validity and enforceability of an arbitration agreement.⁷¹
- **The Trump administration should immediately stop the roll back of regulations which protect workers and consumers by curtailing forced arbitration agreements.** Despite promises to enhance workers' security, The Trump administration has already begun to repeal important worker protections, such as the Fair Pay and Safe Workplaces Executive Order of July 2014, which prohibited the use of forced arbitration for certain violations.⁷²
- **In pending cases brought by worker and consumer advocates, courts should restrict the use of mandatory arbitration clauses to prevent abuses.** Since the 1980's, the Supreme Court has made a series of detrimental decisions that have enabled corporations to twist and reinterpret the Federal Arbitration Act in ways its initial drafters never intended. All of our courts, including trial and appeals courts, should strongly scrutinize mandatory arbitration clauses. These courts have a duty to stand up for working families, instead of continuing to strengthen an unjust and unbalanced system that upholds corporate power.
- **States should pass laws to ensure that workers and consumers can pursue their rights in court if they choose.** State laws could ensure that workers and consumers can pursue their rights in court despite the fact that they have signed contracts mandating that disputes go to arbitration.
- **Cities and states should strengthen protections.** Cities and states should use their market power to refuse to do business with corporations that use forced arbitration agreements and should require businesses to disclose whether they require these agreements. Cities and states have the opportunity to lead by example by only contracting with responsible businesses that agree to give workers and consumers a fair day in court. Additionally, cities and states should enhance the enforcement capacities of agencies tasked with protecting workers' and consumers' rights.

Appendix A: Methodology

This brief highlights and synthesizes existing research on the impacts of forced arbitration including but not limited to research by the Economic Policy Institute, the Alliance for Justice, the Center for American Progress, and Public Citizen. While many studies focus primarily on the consumer impact of forced arbitration, this brief lifts up the impact of forced arbitration on both workers and consumers. In order to do so, the brief includes interviews with workers to show how working families have been directly impacted by forced arbitration.

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