

Forced Arbitration

A Corporate Attack on Our Justice System

Working families have won important victories on a range of workplace rights and consumer protections, including a higher minimum wage, paid leave, and protections against predatory loans – but they are meaningless unless they're enforced. Traditionally, workers and consumers could file lawsuits to combat corporate wrongdoing, but **most of us have lost our right to go to court**. That's because powerful corporations are increasingly using **forced arbitration** to block whistleblowers from filing lawsuits, leaving the burden of policing bad corporate behavior to underfunded public agencies.¹

The Problem: Justice Denied in the Fine Print

What Is Forced Arbitration? Forced arbitration clauses strip our **right to challenge corporate wrongdoing in court**. They're buried deep in most contracts we encounter, from job applications to credit card accounts. When you sign a contract with a forced arbitration clause, your only option to address illegal acts is private arbitration, where companies choose the arbitrator. There is **no judge, no jury, no public record, and no appeal**.



How Does Forced Arbitration Hurt Working Families?

Arbitration silences victims of fraud and abuse by squelching

98% of covered legal claims.² **Sixty million Americans – over half the workforce – have lost the right to sue their employers**, with low-wage workers, women and African-American workers disproportionately affected.³ Companies are getting bolder about flouting the law, knowing they won't be held accountable.



How Does Forced Arbitration Hurt Women?

Public allegations of sexual harassment or unequal pay often give

other women the courage to step forward.⁴ But many corporations require employees who report gender discrimination to resolve complaints in private arbitrations and forbid them from disclosing their experiences. **Forced arbitration protects perpetrators and keeps systemic abuse a secret**.

A series of Supreme Court decisions has made it easier for corporations to strip our rights away:

- 1991** The Court rules that companies can force employees into arbitration.
- 1996** The Court rules that companies can bury arbitration clauses in the fine print of contracts. Today, 93% of people who sign forced arbitration clauses don't realize that they are losing their right to sue.
- 2008** The Court rules that an arbitrator's decision can almost never be appealed for review by a judge.
- 2018** The Court just approved arbitration clauses that **prohibit employees from joining together to fight workplace violations**, making it almost impossible for employees to fight wage theft, harassment or discrimination.

Forced Arbitration Language: Amazon.com

Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.

There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages), and must follow the terms of these Conditions of Use as a court would.

We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. If for any reason a claim proceeds in court rather than in arbitration we each waive any right to a jury trial.



Kristin's Story: Discrimination and Harassment at Kay's Jewelers

Kristin Henry was paid two-thirds what a male coworker earned, and was repeatedly passed over for promotions while less experienced male colleagues advanced. Days after reporting to HR that a manager groped her at a company event, Kristin was fired. Along with coworkers who experienced similar abuse, Kristen's claims were shunted into arbitration in 2008; a decade later, the women have not found justice.

Under Trump, It's Only Getting Worse

The Obama administration introduced rules to let consumers challenge financial fraud in court, protect nursing home residents' right to sue over abuse, prohibit federal contractors from using arbitration to suppress claims of sexual harassment and discrimination, and forbid federally-funded colleges from blocking access to courts. **Under Trump, all of these rules have been reversed, indefinitely postponed, or abolished by Congress.**

The Solution: Fighting Back with State and Local Policies

The Center for Popular Democracy is working with grassroots organizing groups to win state laws that preserve our right to hold corporations accountable when they break the law.

Modeled on the False Claims Act and California's successful Private Attorney Generals Act (PAGA), the legislation lets all workers or consumers who have been harmed by a company's unlawful practices join together to bring a public enforcement action. **The law is a win-win: workers and consumers expose company-wide violations, and the state collects millions in civil penalties from lawbreakers.** Because the action is filed on behalf of the state to promote compliance with its laws, courts have ruled that the right to seek penalties can't be waived in arbitration.⁵

In addition to legislation, states and cities can also refuse to award contracts or tax breaks to companies that use forced arbitration to hide bad business practices.

CPD affiliate Rights & Democracy is leading a campaign in Vermont to expand public enforcement of workplace rights, consumer protections, and rights of nursing home residents. In New York, a coalition led by Make the Road NY is advocating for expanded enforcement of consumer and employment laws. Campaign planning for 2019 is underway in three additional states.



Wells Fargo suppressed complaints about fake accounts for years by pushing customers and whistleblowing bank employees into arbitration. After the scandal finally came to light, Wells Fargo agreed to pay customers \$142 million. If consumers and employees had been able to challenge the bank in open court and bring claims collectively, Wells Fargo would have been forced to halt its fraud years ago.

Percent of Consumer Contracts with Forced Arbitration Clauses⁶



How PAGA Works: A Case Study

In California, bank tellers brought a PAGA suit against Bank of America for forcing them to stand throughout their shifts. Before PAGA, the longstanding legal right to suitable seating was rarely enforced. Tellers won a \$15 million settlement that included commitments from Bank of America to ensure access to seats going forward.

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1. See Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *New York Times*, Oct. 31, 2015; Jessica Silver-Greenberg and Michael Corkery, "In Arbitration, a Privatization of the Justice System," *New York Times*, Nov. 1, 2015.
2. Cynthia Estlund, "The Black Hole of Mandatory Arbitration," *North Carolina Law Review*, Vol. 96, 2018; NYU School of Law, Public Law Research Paper No. 18-07.
3. Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," Economic Policy Institute, April 6, 2018; Consumer Fin. Protection Bureau, Arbitration Study: Report to Congress, March 2015, §1.4
4. Anna North. "How Harvey Weinstein's first accusers paved the way for more." *Vox*. Oct. 12, 2017.
5. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2015).
6. Colvin, "The Growing Use of Mandatory Arbitration."