Forced Arbitration Clauses in the #MeToo Era

People from all walks of life – from hotel housekeepers to famous actresses – are stepping forward to confront sexual harassment and violence. Yet too often, forced arbitration clauses buried in everyday contracts help companies cover up sexual harassment and violence. These forced arbitration clauses prevent survivors from fighting back.

98% of victims of workplace abuse abandon their claims when access to court is blocked.[1]

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America's leading companies use forced arbitration to silence over 29 million working women.[2]

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Companies do not face accountability for tolerating sexual harassment, unequal pay, and other workplace violations.

What is Forced Arbitration?

Forced arbitration clauses are buried in the fine print of many employment contracts and **strip away our right to challenge wrongdoing in court**. In private arbitration, companies often choose and pay the arbitrator. There is no judge, no jury, no public record, and no meaningful chance to appeal the arbitrator's decision - even if the arbitrator gets the facts wrong or ignores the law.

Forced Arbitration Covers Up Wrongdoing

Public allegations of sexual harassment give other survivors the courage to step forward. In arbitration, survivors' stories remain secret, and they are often forbidden by non-disclosure clauses from sharing their experiences. And it's not just sexual harassment: those who speak up about discrimination, wage theft, and hazardous workplaces are silenced by forced arbitration. All of our workplace rights must be upheld for women—and all working people—to thrive.

Kristin's Story: Discrimination and Harassment at Kay 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, Kristin's claims were shunted into arbitration in 2008; a decade later, the women have not found justice.

"Amid all the questions about where #MeToo goes next, there's at least one answer that everyone should support: We need to end the practice of forced arbitration, a legal loophole companies use to cover up their illegal treatment of employees."

— Susan Fowler, former Uber engineer

Women Standing Together to Demand Change

We're stronger together – but the Supreme Court recently ruled that companies can force employees to go up against huge corporations by themselves.[3] Not only is it intimidating to arbitrate or sue alone, it's often economically impossible.

In response to criticism of their practices, Uber, Google, and other tech companies have announced that they will no longer require arbitration for individual claims of sexual assault or sexual harassment. But not only do these tech giants still block lawsuits alleging all other workplace violations (such as racial discrimination, wage theft or retaliation), **they also forbid their employees from joining together, even to challenge sexual harassment and assault.**

Women Call on States and Cities to Confront Forced Arbitration

Attorneys General from all 50 states have called on Congress to ban forced arbitration of sexual harassment claims. But the Trump administration's disdain for survivors of sexual violence makes it critical for state and local governments to step up.

Federal law limits cities and states from regulating arbitration clauses, but **states can increase their enforcement capacity and preserve our right to fight together in court.** States like New York and Vermont have introduced **whistleblower legislation,** modeled on the False Claims Act and California's successful Private Attorneys General Act, that lets employees who have been harmed by a company's unlawful practices sue in the name of the state.

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. These representative actions also allow women and all workers to stand together when confronting their employer.

States and cities can also **require companies that bid on public contracts to disclose their use of forced arbitration** and refuse to award contracts to companies that abuse these clauses to hide bad business practices.

For policy support contact **Rachel Deutsch**, Supervising Attorney for Worker Justice rdeutsch@populardemocracy.org, or **Andrea Johnson**, Senior Counsel for State Policy ajohnson@nwlc.org.

1. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, NYU School of Law, Public Law Research Paper No. 18-07, Jan. 2018.
2. Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," Economic Policy Institute, April 6, 2018.
3. *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018).
4. *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).