

FAIR ACT: THE FORCED ARBITRATION INJUSTICE REPEAL ACT

The 116th Congress has seen unparalleled support for a ban on forced pre-dispute arbitration clauses affecting consumer, employment, and civil rights contracts. As of the bill's Judiciary Committee markup on September 10, 2019, there were 222 bipartisan cosponsors.

What is forced pre-dispute arbitration?

- Arbitration was created by the Federal Arbitration Act (FAA) back in 1925 to allow for an alternative forum for businesses on equal footing to resolve their disputes.
- An arbitration often has between one and three “arbitrators,” who apply different rules than a courtroom setting and render a secret, unappealable decision.
- The Roberts Court expanded the FAA to include virtually no restrictions, including contracts between parties of vastly unequal negotiating weight.
- Nursing home admittance forms, cell phone and bank agreements, and employee handbooks are just a few examples of situations where one party signing the agreement has considerably less negotiating power.

Why is this a disadvantage to individuals?

- Everyday Americans who have signed a pre-dispute arbitration clause are denied their 7th Amendment right to a trial by jury. Many don't even know they've signed an arbitration clause because it was hidden in a terms and conditions update, implicit in a purchase contract, or included in an employee handbook.
- Arbitration decisions are private, not appealable, and have different evidentiary and discovery standards than a traditional courtroom.
- Often an arbitration clause will include a provision granting the company choice of arbitrator and arbitration rules applied—quite literally the judge, jury, and the law. This also creates a perverse incentive structure, where arbitrators who render “good” judgements can look forward to repeat business
- Arbitration clauses allow corporations to prevent similarly harmed consumers from forming a class. When the injury is comparatively small but widespread, class actions are often the only financially practical way for individuals to hold a larger entity accountable.

What the Forced Arbitration Injustice Repeal Act Does:

- The FAIR Act reflects the FAA's original intent by requiring that agreements to arbitrate employment, consumer, civil rights, and antitrust disputes be made after a dispute arises.
- Men and women who are sexually harassed at work, reserve servicemembers who are fired for being deployed, and consumers who have been taken advantage of would all have access to the American court system.
- It restores traditional market principles to the arbitration industry: Giving consumers a choice to arbitrate creates a market where arbitrators must compete for their business, instead of simply catering to corporations.

What the Forced Arbitration Injustice Repeal Act Does Not Do:

- It does not eliminate arbitration, but instead empowers certain individuals to arbitrate a claim after it arises. This distinction preserves arbitration as a useful tool for alternative dispute resolution among willing parties rather than a system that forces parties into arbitration before disputes arise.
- It does not end pre-dispute arbitration in business-to-business agreements. It also would not apply to collective bargaining agreements.