

FIGHTING BACK AGAINST FORCED ARBITRATION

THE PROBLEM

Modern government grows out of a nineteenth century. Forced arbitration refers to the growing practice by large corporations of requiring workers or consumers to resolve any potential claims against the company through a binding arbitration process. These “agreements,” which are often buried in the fine print of form contracts, eliminate the right to sue in court, so that someone who experiences fraud, wage theft, sexual harassment, or another legal injury will have to face a private arbitrator rather than a judge. Forced arbitration clauses typically also preclude participation in class or collective action lawsuits, prohibit appealing an arbitrator’s decision, and saddle plaintiffs with excessive arbitration costs.

Arbitration can be a cost-effective dispute resolution mechanism for two parties with equal or similar bargaining power. But when companies unilaterally set the terms by including arbitration in take-it-or-leave-it contracts, working people lose. Corporations are repeat players, leading arbitrators to rule against workers and consumers at much higher rates than courts.^{1,2}

Today an estimated 30 to 40 percent of American workers, tens of millions of consumers in financial markets, and virtually all students at for-profit schools are subject to forced arbitration.³ And the numbers are rising.⁴ This weakening of private enforcement mechanisms shifts the responsibility of ensuring compliance with local consumer and employee protection laws to over-burdened and under-resourced public agencies. Without private litigation to supplement public investigations, employment discrimination, sexual harassment, wage theft, and consumer fraud remain unexposed and undeterred.

Forced arbitration not only prevents workers and consumers from seeking justice and emboldening corporations to pursue predatory practices, it undermines government transparency and accountability. Forced arbitration clauses typically include confidentiality provisions, which shroud in secrecy the allegations

brought against corporations, evidence of claims, and determinations reached. For cities, forced arbitration may impede procurement and contracting processes by obscuring a potential contractor’s compliance history. Cities often prefer to award contracts to companies that meet certain quality standards, but by burying evidence that a company has stiffed suppliers, cheated workers, or defrauded customers, forced arbitration may allow law-breaking companies to maintain eligibility for municipal contracts. Forced arbitration therefore prevents cities from acting as informed participants and responsibly managing the funds entrusted to them.

THE SOLUTION

PROMOTE ENFORCEMENT OF LOCAL LAWS BY DELEGATING ENFORCEMENT AUTHORITY: Limited resources for local enforcement agencies does not have to mean limited enforcement of local consumer and employment protection laws. To increase enforcement capacity, municipal agencies can delegate their enforcement powers to individual residents. Those individuals can then act on behalf of the city to bring suit against violators on behalf of all similarly situated people (e.g., all workers at the same company). Because the claim is brought in the city’s name, it cannot be forced into arbitration.

In 2004 California enacted the Private Attorneys General Act (PAGA) which authorized aggrieved employees to file lawsuits to recover civil penalties on behalf of the State of California for Labor Code violations. This delegation of power has proven a powerful tool in enforcing labor laws. This year New York considered the Empowering People in Rights Enforcement (EMPIRE) Act, which would authorize aggrieved employees or representative organizations to initiate public enforcement action for violations of labor law or consumer protection statutes, on behalf of the state. In general, the majority of penalties recovered in these actions revert to the government, generating more revenue for public investigation and enforcement activities.

These types of policies increase the city’s ability to protect its marketplace, ensure the strength of important local laws, and deter unlawful abusive practices.

ASSERT MARKET POWER AND REQUIRE TRANSPARENCY OF GOVERNMENT CONTRACTORS: Cities can protect their interest in effective and responsible marketplace participation by refusing to contract with businesses that use forced arbitration. Contracting only with corporations that allow workers and consumers access to court allows cities to make informed choices based upon past corporate practice. This policy would ensure that local dollars are spent to procure quality goods and reliable services from entities that do not engage in patterns of undesirable or unlawful conduct.

Alternatively, cities can require contractors that use forced arbitration to disclose data about claims that result in arbitration. Relevant data could include types of claims, counter claims, decisions and any award ultimately issued by the arbitrator. Access to this type of information will allow cities to identify favorable or unfavorable practices when considering contracting for a service.

LANDSCAPE AND RESOURCES

For more information on forced arbitration, see The Center for Popular Democracy’s report, **Justice for Sale: How Corporations use Forced Arbitration to Exploit Working Families** or contact Rachel Deutsch (rdeutsch@populardemocracy.org).

NOTES

- 1 “The Arbitration Trap: How Credit Card Companies Ensnare Consumers,” Public Citizen, September 2007, <http://www.citizen.org/documents/ArbitrationTrap.pdf>, 4.
- 2 Katherine V.W. Stone and Alexander J.S. Colvin, “The arbitration epidemic,” Economic Policy Institute, December 7, 2015, 19.
- 3 “Lost in the Fine Print,” video, Alliance for Justice, 2014.
- 4 “Justice for Sale: How Corporations Use Forced Arbitration to Exploit Working Families,” The Center for Popular Democracy, May 2017, 8.