

FIGHTING BACK AGAINST FORCED ARBITRATION

THE PROBLEM

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. People who experience fraud, wage theft, sexual harassment, or another legal injury have to make their case to a private arbitrator hired by the corporate defendant, 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 have little chance of winning. An estimated 98 percent of employment cases that would otherwise be brought are abandoned because of the difficulty of prevailing in arbitration. This silencing effect results in 315,000 to 722,000 “missing” employment cases every year.¹

Today over half of American workers, tens of millions of consumers in financial markets, and virtually all students at for-profit schools are subject to forced arbitration.² And the numbers are rising.³ 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 pro-

visions, which shroud in secrecy the allegations brought against corporations, evidence of claims, and determinations reached. For cities, forced arbitration may allow unscrupulous employers to obtain government contracts 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. The majority of penalties recovered in these actions revert to the government, generating more revenue for public investigation and enforcement activities. **New York** and **Vermont** are considering similar policies to 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.

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 those clauses as well as 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).