

Another Legislative Attempt to Curtail Mandatory Arbitration Clauses

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Businesses often include mandatory arbitration clauses in their pre-dispute dealings with customers to prevent costly consumer class actions in favor of streamlined (often individual) arbitration. The Federal Arbitration Act (“FAA”) makes such arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Relying on the FAA, the Supreme Court has defended business enforcement of such clauses against state- and judge-made exceptions. For example, the Supreme Court has held that the FAA preempts state laws that pose obstacles to its enforcement, prevents courts from invalidating an arbitration agreement on the basis of the cost to arbitrate exceeding the potential recovery, and requires courts to enforce contractual provisions that delegate to an arbitrator the determination of whether an arbitration agreement applies to a dispute. As a result, the existence and enforcement of mandatory, individual arbitration agreements have become more commonplace in consumer-facing industries.

Democratic senators are seeking to change this by introducing a bill that would narrow the FAA by prospectively barring pre-dispute arbitration agreements and class-action waivers in consumer, employment, antitrust, and civil rights disputes. In these four areas, the proposed legislation, entitled The Forced Arbitration Injustice Repeal Act of 2019 (the “FAIR Act”), S. 635, H.R. 1423, would also override agreements to have arbitrators determine arbitrability or the FAIR Act’s applicability to the dispute, opting instead for courts to determine these issues under federal law.

The FAIR Act likely faces the same opposition from Republicans that have defeated similar proposals, including the renditions of the “Arbitration Fairness Act” that were rejected from 2007 through 2018. Although the FAIR Act may garner attention in the current political climate, in large part due to its employment-related provisions, it likely faces an uphill battle in the current Republican-controlled Senate and White House. But it’s a bill that’s worth keeping an eye on. We’ll continue to post updates on any key developments.