Capitol Hill Law Student Lobby Day

Support S.2203 — End Forced Arbitration of Sexual Harassment Disputes

According to the Equal Employment Opportunity Commission (EEOC), **at least 25% and as much as 85% of American women say they have experienced sexual harassment in the workplace.** Yet, the most common responses by such victims are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action – including filing a formal legal complaint.

In part, this is due to the **rampant use of forced arbitration clauses in employment contracts**, which require workplace disputes, including sexual harassment cases, to be settled by a private arbitrator instead of a public court of law. Forced arbitration of sexual harassment disputes creates disadvantages for the victims and diminishes their ability to obtain relief, as well as perpetuates sexual harassment in the workplace.

S.2203, the Ending Forced Arbitration of Sexual Harassment Act, would empower victims and help end sexual harassment in the workplace.

The bill would amend Title 9 of the U.S. Code to prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of a sex discrimination dispute, defined as any employment dispute arising from cognizable sex discrimination claims under Title VII of the Civil Rights Act of 1964.

The prohibition does not apply to an arbitration provision in a contract between an employer and a labor organization or between labor organizations. It would not make employment arbitration agreements altogether unenforceable. The bill would only require litigation of sex discrimination disputes, while leaving unaffected all other arbitration-eligible claims.

Forced Arbitration is Contrary to Justice

According to the Economic Policy Institute, **more than 56% of American workers — about 60 million — are subject to forced arbitration.**

Contract clauses mandating forced arbitration are often buried so deep in the fine print that employees are usually **unaware that they have signed away their right** to bring their case to public court. Moreover, employee arbitration agreements have inextricable advantages in favor of the employer. A Cornell University study found that **employees are less likely to win arbitration cases** than cases that go to trial. And when employees do prevail in arbitration, **payouts are much smaller** than the damages plaintiffs might receive in court — so small that lawyers are often reluctant to take the cases.

Beyond that, even victorious employees are often prohibited from discussing their case**. In the sexual harassment context, this creates a "veil of secrecy" that protects serial harassers** by keeping other potential victims in the dark, and minimizing pressure on companies to fire predators.

The EEOC has taken the position that agreements that mandate forced arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles of discrimination law.

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Status of the Bill

S.2203 was introduced by Senator Kirsten Gillibrand (D-NY) in 2017, and **is a bipartisan bill** with both Democratic and Republican co-sponsors. It was referred to the Senate Committee on Health, Education, Labor, and Pensions, where it awaits a public hearing, markup, and meaningful action.

National, Bipartisan Support for S.2203

On February 12, 2018**, the bipartisan Attorneys General of all 50 states, the District of Columbia and five U.S. territories wrote a joint letter in support of S.2203**. In it, the AGs asserted that "access to the judicial system, whether federal or state, is a fundamental right of all Americans," and this "right should extend fully to persons who have been subjected to sexual harassment in the workplace."

The AGs acknowledged that arbitration can have benefits in some contexts, but argued that these benefits do not extend to sexual harassment claims. They believe that **"victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process."** Furthermore, the AGs assert that ending mandatory arbitration of sexual harassment claims would "help to put a stop to the culture of silence that protects perpetrators at the cost of their victims," and allow victims to seek public, meaningful relief.

More Negatives of Forced Arbitration and its Effect on Sexual Harassment Claims

Arbitration tends to favor businesses, as judges and juries of the public have been replaced by private arbitrators who commonly consider the companies to be their clients. At a minimum, **employers have greater bargaining power when deciding the terms of an employment contract and arbitration agreement**. This means employers are likely to choose arbitrators they know by experience have track records in their favor, while the employee is likely to be at an informational and bargaining disadvantage.

In 1994, the Dunlop Commission on the Future of Worker-Management Relations found **that arbitration, as a mechanism for enforcing public values, was of "dubious merit,**" and strongly recommended that binding arbitration agreements not be enforceable as a condition of employment.

In the context of sexual harassment, a 2007 Chicago-wide survey put **median sexual-harassment settlements at roughly $30,000.** By contrast, a 2006 national study at Columbia University found that **employees who take their sexual harassment cases to trial win on average $217,000.**

Recent Developments in the Private Sector

The #MeToo movement and current wave of sexual harassment claims have toppled perpetrators in business, entertainment, media, and politics. Now, these movements are also creating permanent changes in workplace policies to combat sexual harassment.

For example, **Microsoft announced in December 2017 that it endorses S.2203** and would change its own internal policies to waive and eliminate forced arbitration agreements with any of its employees who make sexual harassment claims.