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CFPB Issues Arbitration Study: Employee Rights Advocates Urge Congress To Act To Protect Workers

The National Employment Lawyers Association (NELA) and The Employee Rights Advocacy Institute For Law & Policy (The Institute) commend the Consumer Financial Protection Bureau's (CFPB) comprehensive study released on March 10, 2015 finding that forced arbitration clauses and class action waivers greatly restrict consumers' ability to obtain relief in disputes with financial service providers. "Although the Bureau's report focuses on consumer arbitration, the report's themes and concerns resonate in the context of employment arbitration as well," stated Imre Szalai, a member of The Institute's Board of Directors and an Assistant Professor of Law at Loyola University of New Orleans College of Law. As leading voices advocating for equality and justice in the American workplace, NELA and The Institute are encouraged by the CFPB's study, which was submitted to Congress. The data-rich study supports our position that forced arbitration threatens workers' access to America's civil justice system. Forced arbitration virtually eliminates the important role of courts in meaningfully redressing statutory rights when employers violate the law. NELA and The Institute urge Congress to heed the lessons from the CFPB study by enacting legislation to make it unlawful for employers to impose forced arbitration on employees except when knowingly and voluntarily agreed upon after a dispute arises or pursuant to a collective bargaining agreement. It is critical that employees have actual knowledge of arbitration provisions in advance and meaningful ability to opt out without penalty.

The evidence and data compiled in the CFPB study indicating that forced arbitration clauses and class action waivers are harmful to consumers also holds true for America's workers. The study found that such arbitration clauses act as barriers to class actions, which are often the only way consumers can effectively vindicate their rights in a dispute with a large corporation. The same applies to employees who have wage theft or pay discrimination claims and need to band together to obtain justice. As Professor Szalai noted, "The Bureau's report shows how consumers who are bound by an arbitration clause cannot get the benefits of class action relief, and employees who are bound by an arbitration clause are also deprived of these benefits." The CFPB study found that "Over 90 percent of the arbitration agreements studied expressly prohibited class arbitrations." In 2010, 27 percent of U.S. employers reported that they required arbitration of employment disputes—covering over 36 million employees, or one-third of the non-union workforce. This percentage is likely higher today and continues to grow in the wake of court rulings that have misinterpreted the Federal Arbitration Act, which was enacted in 1925 to regulate *voluntary* arbitration agreements between commercial parties with equal bargaining power.

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Importantly, the CFPB study also found that individuals were largely unaware that they were even subject to forced arbitration clauses and deprived of significant rights. The factsheet published by the CFPB along with its study found that "Over three quarters of those who said they understood what arbitration is acknowledged they did not know whether their credit card agreement contained an arbitration clause." And regardless of whether consumers knew what arbitration was, they were overwhelmingly unaware of the implications of these clauses. Professor Szalai commented that this was often the case for employees as well and that, "In the employment context, a lack of meaningful consent to arbitrate is a serious problem." Forced arbitration clauses are often buried in the fine print of employment applications, employee manuals, pension plans, and even emails. Even if employees do not sign a document containing a forced arbitration provision (or are not aware that they have signed one), courts generally find employees to be bound by it if they continue to work for the employer or are notified of the forced arbitration provision after they begin their employment.

As Professor Szalai simply stated, "The clear message from the CFPB study is that the current system of arbitration cannot continue." NELA and The Institute implore Congress to seize this moment and take steps to prohibit forced arbitration of employment disputes.