The Employee Rights Advocacy®
INSTITUTE
For Law & Policy

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Via electronic submission to http://www.regulations.gov

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Re: DOL Proposed Guidance, ZRIN 1290-ZA02, and Proposed Rule, FAR Case 2014-025 Pursuant to Executive Order 13673, Fair Pay And Safe Workplaces

The Employee Rights Advocacy Institute For Law & Policy (The Institute) respectfully comments on the Department of Labor's (DOL) proposed guidance and the proposed rule to amend the Federal Acquisition Regulation (FAR) to implement Executive Order 13673, "Fair Pay and Safe Workplaces," by incorporating by reference the National Employment Lawyers Association's comments (attached). These comments specifically pertain to the proposed guidance and regulation implementing Section 6. *Complaint and Dispute Transparency* of the executive order (Section 6).

The Institute advocates for employee rights by advancing equality and justice in the American workplace. Founded in 2008 as the related public interest organization of NELA, The Institute has established itself as the nation's employee rights advocacy think tank. Through various initiatives, The Institute is ensuring that workers have meaningful access to the courts to enforce their workplace rights. Since its inception, The Institute has been combating the ubiquitous employer practice of imposing forced arbitration on workers as a condition of getting or keeping a job. In 2009, The Institute, along with NELA and Public Citizen, conducted a "National Study of Public Attitudes on Forced Arbitration" (Study), which led to the genesis of the term "forced arbitration."

The Institute appreciates the opportunity to comment on the guidance and regulation implementing Section 6 of the Fair Pay and Safe Workplaces Executive Order. We thank the DOL and FAR Council for your consideration.

Respectfully submitted,

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Executive Director

Attachment

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Re: DOL Proposed Guidance, ZRIN 1290-ZA02, and Proposed Rule, FAR Case 2014-025 Pursuant to Executive Order 13673, Fair Pay And Safe Workplaces

The National Employment Lawyers Association (NELA) respectfully submits the following comments in response to the Department of Labor's (DOL) proposed guidance published in the Federal Register on May 28, 2015, 80 Fed. Reg. 102, Part III, 30574 and the proposed rule to amend the Federal Acquisition Regulation (FAR), published in the Federal Register on May 28, 2015, Federal Acquisition Regulation for Executive Order 13673, "Fair Pay and Safe Workplaces," 80 Fed. Reg. 102, 30548 to implement Executive Order 13673, "Fair Pay and Safe Workplaces." Our comments specifically pertain to the proposed guidance and regulation implementing Section 6. *Complaint and Dispute Transparency* of the executive order (Section 6).

A. NELA's Interest In The Proposed Guidance And Regulation Implementing Section 6.

NELA is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys working on behalf of those who have faced illegal treatment in the workplace. As part of NELA's mission to protect employee rights, NELA regularly comments in support of rigorous administrative rules that further the rights of working people. For many years, one of NELA's top legislative and public policy priorities has been to ban the pernicious employer practice of pre-dispute forced arbitration, which compels employees to give up their right to go to court to challenge unlawful employer conduct as a condition of employment. Instead, employees are forced to resolve workplace disputes in private arbitration. NELA members represent employees of federal contractors and subcontractors before courts, administrative agencies, and in arbitration. Thus, the guidance and regulation implementing Section 6 are extremely relevant to them in vindicating their clients' rights under Title VII of the Civil Rights Act of 1964 and any tort related to or arising out of sexual assault or harassment.

NELA and its allies have been the catalyst for the Arbitration Fairness Act[1] (AFA) since it was first introduced in the U.S. Congress in 2007. The AFA would restore the ability of workers and consumers to seek justice through the courts when they believe their rights have been violated. NELA members have testified before Congress that forced arbitration does not provide important procedural guarantees of fairness and due process that are the hallmarks of courts of law.[2] In 2009, NELA, along with its sister organization The Employee Rights Advocacy Institute For Law & Policy[3] and Public Citizen, commissioned a "National Study of Public Attitudes on Forced Arbitration" (Study). The Study found that 59% of Americans oppose forced arbitration clauses in the fine print of employment and consumer contracts regardless of gender or political affiliation.[4] In addition, the Study revealed that the same percentage of Americans support the AFA.[5] NELA provided technical assistance to Senator Al Franken (D-MN) in 2009 regarding his amendment to the Defense Appropriations Act for Fiscal Year 2010 (Pub. L. No. 111-118), often referred to as the "Franken Amendment." The Franken Amendment prohibits DOD contractors and subcontractors receiving federal contracts of $1 million or more from forcing their employees to arbitrate claims under Title VII of the Civil Rights Act of 1964 and any tort related to or arising out of sexual assault or harassment. Modeled after the Franken Amendment, Section 6 reaches all federal contractors and subcontractors that receive $1 million or more.

B. Section 6 Embraces Important Public Policy That Federal Contractors Should Not Receive Taxpayer Dollars If They Impose Forced Arbitration On Their Employees.

Arbitration is an appropriate and effective method to resolve employment claims when it is *knowingly* and *voluntarily* agreed to by the employee *after* a dispute arises. This includes the protection of workers' substantive legal rights, such as their right to join together using voluntary arbitration or the courts to challenge discriminatory employment practices, violations of wage and hour laws, or other unlawful actions by the employer. Forced arbitration, however, is one of the most significant obstacles to the protection, enforcement, and vindication of employee rights. Section 6, and the proposed guidance and regulation implementing it, will correct recent U.S. Supreme Court jurisprudence expanding the scope and prevalence of this unfair employment practice. According to the DOL, Executive Order 13673 (EO) will affect 24,000 businesses with federal contracts employing 28 million workers. NELA believes Section 6 is an important step in

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[1] Arbitration Fairness Act of 2015, H.R. 2087 and S. 113, 114th Cong. (2015).
[2] Palefsky, Cliff, "Mandatory Binding Arbitration: Is It Fair And Voluntary?," testimony, September 15, 2009 before the House of Representatives Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *available at* http://judiciary.house.gov/_files/hearings/pdf/Palefsky090915.pdf. Last accessed on August 5, 2015.
[3] The Employee Rights Advocacy Institute For Law & Policy is NELA's related 501(c)(3) organization founded in 2008 and dedicated to advocating for employee rights by advancing equality and justice in the American workplace through innovative legal strategies, policy development, grassroots advocacy, and public education.
[4] "National Study of Public Attitudes on Forced Arbitration," April 2009, survey conducted by Lake Research Partners, *available at* http://www.employeerightsadvocacy.org/fmd/files/Forced%20Arbitration%20Study%200409.pdf. Last accessed on August 5, 2015.
[5] *Id.*

eliminating forced arbitration of employment disputes.[6] Simply stated, federal contractors should not receive taxpayer dollars if they engage in unfair employment practices, including denying workers access to our country's civil justice system when they violate our nation's labor, employment, and civil rights laws. Being a federal contractor is a privilege, not a right. With that privilege comes a responsibility for federal contractors to be held publicly accountable when they violate our nation's workplace laws. As Patricia A. Shiu, Director of the DOL's Office on Federal Contract Compliance Programs (OFCCP), said to the National Industry Liaison Group after President Obama issued Executive Order 13673, "Federal contractors and subcontractors should be model employers just as we, in the federal government, must be with our employment practices. This is the responsibility we share as employers who receive taxpayer dollars. This is also the thinking behind an Executive Order President Obama signed last week to ensure fair pay and safe workplaces by making sure that federal funds don't subsidize bad employment practices. Rewarding contractors who cut corners doesn't just hurt their employees. It hurts the overwhelming majority of you who do right by your workers."[7]

Forced arbitration arrived in the non-union workplace via a series of U.S. Supreme Court misinterpretations of the Federal Arbitration Act of 1925, which was intended to govern voluntary business-to-business arbitration agreements involving parties of equal bargaining power—not those between employers and individual employees unrepresented by unions.[8] As a result of these misguided interpretations, the use of forced arbitration in the workplace has proliferated. In 1995, the Government Accountability Office (GAO) surveyed 1,448 firms subject to reporting requirements of the OFCCP and found that 9.9 percent of respondents imposed forced arbitration clauses on their non-union employees.[9] In 2010, the most recent year for which data is available, 27 percent of non-union employees—representing about 36 million American workers—were subject to forced arbitration clauses.[10] That number is most likely much higher today in the wake of Supreme Court decisions that have upheld forced arbitration.[11]

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[6] The White House, "FACT SHEET: Fair Pay and Safe Workplaces Executive Order," (July 31, 2014) *available at* https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order. Last accessed on August 25, 2015.

[7] Patricia A. Shiu, Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor, closing remarks before the National Industry Liaison Group's 32nd Annual Conference & Exposition, *available at* http://www.dol.gov/ofccp/addresses/NILG_ClosingRemarks_Aug8-2014.html. Last accessed on August 25, 2015.

[8] "Unfortunately starting [in] 1991… the [Supreme] Court ignored its own earlier doubts about the efficacy of forced arbitration in the workplace. Since then, the Supreme Court has eagerly and aggressively expanded the FAA to favor forced arbitration of workplace disputes." Comsti, Carmen, *A Metamorphosis: How Forced Arbitration Arrived In The Workplace*, 35 BERKELEY J. EMP. & LAB. L, 5, 13 (2015) *available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1466&context=bjell.

[9] GOVERNMENT ACCOUNTING OFFICE, GAO/HEHS, 95-150, EMPLOYMENT DISCRIMINATION, MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, 7, (1995) *available at* http://www.gao.gov/archive/1995/he95150.pdf.

[10] FULBRIGHT & JAWORSKI LLP, FULBRIGHT LITIGATION TRENDS, FULBRIGHT'S SEVENTH ANNUAL LITIGATION TRENDS SURVEY REPORT 43 (2010).

[11] "In 2010, 27 percent of U.S. employers reported that they required forced 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 (FAA), which was enacted in 1925 to regulate voluntary arbitration agreements between commercial parties with equal

Forced arbitration of workplace claims is anathema to our public justice system because it occurs in secret, private tribunals in the absence of accompanying legal safeguards, such as a written record of the arbitration proceedings, the right to appeal the arbitrator's decision if the law is not applied correctly, and other guarantees that ensure a fair process that exist in a court of law. Claims brought in arbitration are usually decided by an arbitrator chosen and compensated by the employer. Moreover, forced arbitration suppresses employee claims because attorneys generally prefer to file actions in court rather than in arbitration, plaintiffs' attorneys believe that forced arbitration is inferior to court, and workers who are unrepresented by counsel may not be competent to file or present a claim on their own behalf.[12] The private and confidential nature of forced arbitration prevents the development of the law and other corrective measures that can be taken by the courts and Congress to ensure that our country's workplace laws are enforced as Congress intended.

A 2015 report by a national management firm shows that the percentage of employers using forced arbitration and class action bans more than doubled from 21% in 2011 to almost 46% in 2014.[13] Such actions are often the only way in which workers can effectively vindicate their rights in disputes against large and well-resourced employers.[14] One study revealed that in arbitration proceedings between an individual and an employer, the employer won in 93.8% of cases[15] and that, on average, judges and juries in both federal and state court gave employees awards that were significantly larger than those received in arbitration.[16] As one federal judge lamented in a forced arbitration wage and hour case, "there is a reason that arbitration is the favored venue of many businesses for deciding employment disputes, and it is not to ensure that employees are afforded the best chance to have their claims adjudicated by a judge or jury picked from the community."[17]

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bargaining power." National Employment Lawyers Association, *ADVOCACY: Forced Arbitration, available at* https://www.nela.org/index.cfm?pg=mandarbitration. Last accessed on August 6, 2015.

[12] *Id* at 7.

[13] Carlton Fields Jordan Burt, "2015 Class Action Survey, Best Practices in Reducing Cost and Managing Risk in Class Action Litigation," *available at* http://classactionsurvey.com. Last accessed on August 25, 2015.

[14] "'Arbitration claims can be brought on a class basis unless waived. When waivers ban class and collective actions, workers frequently must abandon their claims because individual damages are too small to be economically feasible to pursue. If workers are forced to be atomized and alone, they won't be able to find a lawyer to pursue the case, so the cases will just disappear,' said Paul Bland, director of Public Justice." "More Companies Block Employees From Filing Suits," Lauren Weber, Wall St. J., March 31, 2015, *available at* http://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287. Last accessed on August 5, 2015.

[15] Public Citizen, "The Arbitration Trap," at 15-16, September 2007, *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf.

[16] Alexander J.S. Colvin & Kelly Pike, *The Impact of Case and Arbitrator Characteristics On Employment Arbitration Outcomes*, National Academy of Arbitrators Annual Meeting (2012); Eisenberg, Theodore & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58(4) Dispute Resolution J. 44 (2003).

[17] *Porreca v. Rose Grp.*, CIV.A. 13-1674, 2013 WL 6498392 (E.D. Pa. December 11, 2013).

C. Specific Comments Supporting Proposed Guidance And Regulation Implementing Section 6.

NELA commends President Obama for issuing Executive Order 13673 and the DOL and FAR Council for promulgating the proposed guidance and regulation, respectively, to assist federal agencies and the contracting community in complying with the EO. As stated above, our comments relate to Section 6. We hope that they will remain integral to the final guidance and regulation.

1. The Limitation On Forced Arbitration Builds On Existing Law.

Assertions by business interests that President Obama does not have the authority to limit the use of forced arbitration in the workplace by federal contractors are incorrect. The EO does not restrict employers from electing to utilize forced arbitration to resolve employment claims in contravention of the FAA. The EO simply renders those who choose to require forced arbitration of Section 6 claims ineligible to bid on government contracts. Moreover, the EO and its implementing guidance and regulation are merely an extension of legislative and regulatory actions to rein in the use of forced arbitration throughout the federal government. As mentioned above, the "Franken Amendment" to the Defense Appropriations Act imposed a restriction on the ability of certain DOD contractors and subcontractors to force their employees to arbitrate disputes arising under Title VII or sexual assault and harassment-related tort claims.[18] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 created the Consumer Financial Protection Bureau (CFPB) and empowered it to study the practice of forced arbitration clauses in certain consumer financial products.[19] The CFPB issued its exhaustive study on the use of forced arbitration this March and found, among other things, that most consumers are not even aware they are subject to these clauses.[20] CFPB Director Richard Cordray recently stated publicly that the CFPB intends to move forward with issuing a rule to limit the use of forced arbitration clauses. [21] In addition to the DOD and the CFPB, federal agencies restricting the use of forced arbitration clauses include the Centers for Medicare and Medicaid,[22] the Federal Communications Commission,[23] and the Securities Exchange Commission.[24]

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[18] Sec. 8116(a)(1), Defense Appropriations Act, 2010 (Pub. L. No. 111-118), 123 STAT. 3454.
[19] Sec. 1028(a), Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203), 124 STAT. 1376.
[20] "Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1028(a)," 2015, *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.
[21] "We have determined at this point having digested our own study and gotten a great deal of feedback from industry and others on it that we will be moving ahead with rulemaking in this area." Comment before Senate Banking Committee, July 15, 2015, *available at* https://www.politicopro.com/go/?wbid=57383 (Subscription required).
[22] Medicare and Medicaid Programs: Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42168 (July 16, 2015).
[23] Federal Communications Commission: In the Matter of Protecting and Promoting the Open Internet, March 12, 2015 at 266-277.
[24] GOVERNMENT ACCOUNTABILITY OFFICE, SECURITIES REGULATION: OPPORTUNITIES EXIST TO IMPROVE SEC'S OVERSIGHT OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY, 2012, *available at* http://gao.gov/assets/600/591222.pdf.

2. Needed Clarification In The Proposed Guidance And Regulation.

There are several clarifications that the DOL and FAR Council can and should make to give the guidance and regulation the fullest possible effect.

First, the regulation should specify that the prohibition on forced arbitration applies to *all* employees and independent contractors of the covered federal contractor's workforce, wherever they are located, and not only to employees or independent contractors who are performing work directly on the federal contract.

Second, the proposed regulation provides that the forced arbitration prohibition does not apply to federal contracts entered into before the bid under the new rules, unless the contractor is permitted to change the contract with the worker, or when the contract is renegotiated or replaced. In the case of contracts that are the result of a genuine contract negotiation, the FAR regulation should make clear that the expiration of any term of a contract that is subsequently revised or simply renewed should be considered "renegotiated" or "replaced."

Third, in the case where an employee may have multiple workplace claims arising out of the same set of facts against a federal contractor, if any of the employment claims are covered by Section 6, the employee should not be compelled to arbitrate *any* of the related claims and should have the right to go to court. For example, if a female worker over the age of 40 has overlapping claims of both sex discrimination under Title VII of the Civil Rights Act of 1964 (which is covered by Section 6) and age discrimination under the Age Discrimination in Employment Act (ADEA), which is not covered by Section 6, she should be able to pursue both claims in a single action in court and should not be required to resolve the ADEA claim in private arbitration and litigate the Title VII claim in court.

Finally, in order to increase transparency the final regulation should require bidding contractors to report their use of forced arbitration under circumstances not prohibited by the EO. This is important for documenting federal contractors' use of forced arbitration of other workplace claims and gathering data on the pervasiveness of the practice by them. As previously stated, forced arbitration suppresses workers' ability to bring claims against their employers. Having hard and verifiable data about federal contractors' use of forced arbitration may shed more light on the extent to which the practice suppresses workers' claims and hinders the ability of relevant enforcement agencies to identify violations of workplace laws.

D. Conclusion.

The White House factsheet on the Fair Pay and Safe Workplaces Executive Order refers to Section 6 as "Give Employees a Day in Court." While NELA applauds President Obama for shielding employees of federal contractors from the injustices of forced arbitration of claims arising out of Title VII of the Civil Rights Act and torts related to sexual assault or harassment, we urge the President to expand Section 6's prohibition to the panoply of America's worker protection laws. These include, but are not limited to, the ADEA, Americans with Disabilities

Act, Employee Retirement Income Security Act, Equal Pay Act, Fair Labor Standards Act, Family and Medical Leave Act, Uniformed Services Employment and Reemployment Rights Act, and the Lilly Ledbetter Fair Pay Act, the first bill the President signed into law. In sum, all of our nation's employees who work for federal contractors should be given their day in court to challenge violations of their workplace rights.

NELA appreciates the opportunity to comment on the guidance and regulation implementing Section 6 of the Fair Pay and Safe Workplaces Executive Order. We thank the DOL and FAR Council for your consideration.

Respectfully submitted,

Terisa E. Chaw
Executive Director