RESTORING STATUTORY RIGHTS AND INTERESTS OF THE STATES ACT OF 2017

Forced arbitration of workplace claims is anathema to our public justice system. Unlike America's civil justice system that was developed through centuries of jurisprudence, forced arbitration does not provide important procedural guarantees of fairness and due process that are the hallmarks of courts of law. Absent rigorous review for errors afforded in courts through published decisions and the appellate process, forced arbitration lacks public accountability and transparency. Courts have limited authority to vacate an arbitrator's decision, which typically is final and binding. Forced arbitration affects every segment of the American workforce including minimum wage workers, our nation's servicemembers, and highly compensated professionals who, in order to get or keep a job, must give up their rights to go to court when they believe they have been illegally treated in the workplace.

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. There is every reason to believe that this percentage is higher today and still growing in the wake of U.S. Supreme 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 bargaining power. Statutes such as the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Lilly Ledbetter Fair Pay Act, the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Whistleblower Protection Act, and the Fair Labor Standards Act aim to eradicate discrimination, retaliation, and wage theft in the workplace. Forced arbitration threatens the role of courts as a means for workers to redress their statutory rights when their employers violate the law by denying them access to America's civil justice system. It also undermines Congress' legislative power by rendering the laws it passes unenforceable in court.

To restore fairness and access to the justice system for workers, and to ensure that the laws passed by Congress are enforceable in court, Senator Patrick J. Leahy (D-VT) and Representative David N. Cicilline (D-RI) introduced the Restoring Statutory Rights and Interests of the States Act of 2017 (RSRA, S. 550/H.R.1396) in the 115th Congress. The RSRA would amend the FAA by making it unlawful for employers to force employees to arbitrate claims involving violations of a federal or state statute, the U.S. Constitution, or a state constitution, except in circumstances when arbitration is knowingly and voluntarily agreed to after a dispute arises or pursuant to a collective bargaining agreement. The RSRA also would establish that a court, rather than an arbitrator, shall determine whether or not a forced arbitration clause is enforceable. Finally, the RSRA would establish that the FAA does not preempt state legislation regulating rights or remedies with respect to forced arbitration.

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The RSRA does not ban voluntary arbitration. NELA strongly supports arbitration when it is voluntarily and knowingly agreed to by the employee post-dispute. We also support arbitration pursuant to a collective bargaining agreement negotiated between employers and unions, and other forms of alternative dispute resolution, such as mediation.

NELA has supported the Arbitration Fairness Act (AFA, S. 537/H.R. 1374) since it was first introduced in Congress. We endorse the RSRA as well. The RSRA and AFA are complementary approaches to address the injustices of forced arbitration. We urge Members of Congress to pass both the RSRA and the AFA.

NELA urges Congress to enact the RSRA and the AFA because:

- **Forced arbitration denies America's workers access to the courts by requiring them to give up their rights to resolve their claims in court when they believe they have been illegally treated in the workplace.** Employers often impose forced arbitration on employees *as a condition of employment*, which means employees will be fired or not hired if they do not forgo the ability to resolve employment claims in a court of law.

- **Forced arbitration as a condition of employment takes advantage of the inherently unequal bargaining power between individual employees and their employers.** Employers write forced arbitration clauses that are not negotiable by employees. Such clauses are often buried in the fine print of employment applications, employee manuals, pension plans, and even emails. Typically, employees are unaware of the forced arbitration clause and do not fully understand its implications.

- **The United States Supreme Court has distorted and misconstrued the purpose of the Federal Arbitration Act,** which was enacted to regulate voluntary arbitration agreements between commercial parties with equal bargaining power. Forced arbitration is imposed by employers on employees. It is not voluntary and there is no informed consent by the employee. In addition, it is virtually impossible for an employee to evaluate and make an informed choice about the appropriateness of a resolution mechanism prior to the existence of an actual employment dispute.

- **Congress has already passed laws, with bipartisan support, to ban forced arbitration for disputes involving auto dealers, poultry and livestock producers, and certain employees of federal contractors.** The time has come for Congress to outlaw forced arbitration for America's workers.