October 9, 2015 **Delivered Electronically Via leg.unit@gov.ca.gov**

The Honorable Edmund G. Brown, Jr.
Governor of the State of California
California State Capitol, Room 1173
Sacramento, CA 95814

Re: AB 465 (Hernandez) - SUPPORT

Dear Governor Brown:

On behalf of the National Employment Lawyers Association ("NELA") and its charitable public interest organization, The Employee Rights Advocacy Institute For Law & Policy ("The Institute"), I am writing to urge you to sign into law Assembly Bill ("AB") 465 (Hernandez). This important bill will ensure that employers cannot unilaterally eliminate an employee's choice about whether to resolve his or her legal claim in court or in arbitration while not precluding arbitration if the employee voluntarily chooses to proceed in that forum. Moreover, it will guarantee that employees are not forced into signing away their rights to seek enforcement of their workplace protections in a court of law.

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. 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. Our California affiliate, the California Employment Lawyers Association, was actively involved in supporting passage of AB 465.

The Employee Rights Advocacy Institute For Law & Policy advocates for employee rights by advancing equality and justice in the American workplace. Founded by NELA in 2008, 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," which led to the genesis of the term "forced arbitration."

Forced arbitration requires employees to give up their right to go to court to challenge unlawful employer conduct as a condition of employment and instead compels them to resolve workplace disputes in private arbitration. Forced arbitration of workplace claims is anathema to our public justice system because it occurs before secret, private tribunals in the absence of accompanying legal safeguards, such as a written

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record of the proceedings, the right to appeal if the law is not applied correctly, or other guarantees that ensure a fair process that exist in a court of law.

The practice is widespread, affecting every segment of California's workforce—from minimum wage workers to our nation's servicemembers to highly compensated professionals. For example, Yoel Matute worked at a car wash in Santa Monica where he was not being paid his promised wages. Mr. Matute, who reads virtually no English, was presented with an English-only document containing a forced arbitration clause and given very little time to review it. He understood, however, that if he wanted to keep his job he needed to sign the document regardless of his understanding of its contents. "I had no idea that what I had signed was an arbitration clause," Mr. Matute told a reporter for Capital & Main.[1] "I thought it was a work application and that I needed to sign the document the way it was presented to me or I would not be permitted to work at the car wash." When Mr. Matute attempted to take his employer to court for unlawfully failing to pay him his wages, he was told that he could not do so as he was bound by the forced arbitration clause. Even though a court ruled the clause unconscionable and thus unenforceable, Mr. Matute still has not recovered the wages he is owed because he has not been able to have his day in court due to delays caused by the forced arbitration clause.

Unfortunately, Mr. Matute's story is not unique. 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 bargaining power. The FAA was never intended to apply to non-union employment relationships as its legislative history makes clear.

Arbitration can be an appropriate way to resolve disputes between parties of relatively equal bargaining power when it is *knowingly* and *voluntarily* agreed to by the parties *after a dispute arises*. The way in which arbitration is imposed on employees is quite different—it is forced upon employees as a condition of getting or keeping a job. All of this occurs before a dispute arises and before the employee can consider the relative merits of either forum for resolution of the employee's particular dispute. NELA and The Institute strongly oppose the practice of an employer making a unilateral decision to *require* that all disputes with its employees be resolved in an arbitral forum and not in a court of law.

Data shows that outcomes for employees in pre-dispute binding arbitration are inferior to those in court. In the most recent issue of the Cornell University ILR Review, Professor Alexander J. Colvin and Mark D. Gough, Ph.D. examined disposition statistics from employment arbitration cases administered over an 11-year period by the American Arbitration Association (AAA).[2] Their findings show a significant repeat employer-arbitrator pair effect; employers that use the same arbitrator on multiple occasions win more often and have lower damages awarded against them than do employers appearing before an arbitrator for the first time. In other words, employers who are repeat customers of an arbitrator generally receive more

[1] *Arbitration Clauses: More Job Seekers Are Signing on a Crooked Dotted Line*, Gary Cohn, Capital & Main, May 19, 2015. *Available at* http://capitalandmain.com/latest-news/issues/labor-and-economy/arbitration-clauses-job-seekers-signing-crooked-dotted-line/.

[2] *See, Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, Alexander J. S. Colvin and Mark D. Gough, ILR Review October 2015 68: 1019-1042. *Available at* http://ilr.sagepub.com/content/68/5/1019.abstract.

favorable treatment from that same arbitrator. Professor Colvin and Mr. Gough also found that employees subject to forced arbitration clauses win less often and receive lower damage and settlement awards in arbitration than in court. In addition, their research revealed that the mere existence of a forced arbitration clause reduces the likelihood that attorneys will accept a potential employment case for representation,[3] leaving the aggrieved employee to fend for him/herself without the benefit of legal counsel.

Passage of AB 465 is a significant step in the direction of shifting the balance of power so that workers have a meaningful choice in how their disputes are to be resolved. It will allow employees to vindicate their statutorily guaranteed rights in court as intended by the legislature. It also will ensure corporations are held publicly accountable for unlawful workplace actions.

AB 465 does not create any new substantive rights or remedies. It simply makes clear that employers doing business in California should have no special right to decide for California workers whether a court or arbitral forum is the most appropriate venue for dispute resolution. Likewise, California's workers deserve the opportunity to choose the forum for resolving disputes affecting them. No employer should be permitted to establish a "private judiciary," which benefits them solely, by unilaterally denying workers access to the courts to vindicate their rights.

For these reasons, NELA, on behalf of its members and affiliates, and The Institute strongly urge you to sign AB 465. Thank you for your consideration.

Respectfully submitted,

Terisa E. Chaw,
Executive Director

cc: Camille Wagner, Legislative Secretary
June Clark, Deputy Legislative Secretary

[3] *Mandatory Arbitration and Inequality of Justice in Employment*, Alexander J.S. Colvin, 35 BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW 1, 85, 2014. *Available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1469&context=bjell.