



OPENING STATEMENT

House Committee on Education and Labor

Chairman Robert C. "Bobby" Scott

Opening Statement of Chairman Mark DeSaulnier (CA-11)

Subcommittee on Health, Employment, Labor, and Pensions Hearing
Closing the Door to the Courtroom: The Injustice of Forced Arbitration
Zoom

Thursday, November 4, 2021 | 10:15 a.m.

Today, we meet to discuss employers' use of forced arbitration agreements and collective action waivers and how these arrangements affect workers' ability to secure fair treatment.

On their first day of work, employees flip through a stack of papers or click a series of modules and sign the terms and conditions of their contract. Even before their first day, employees often skim through a dense job application. More often than not, these documents include an arbitration clause, hidden in the fine print, which states that the employee cannot take the employer to court. Instead, the employee must bring their claims to a closed-door meeting with an arbitrator who may not even have a law degree, and the employee will have no right to appeal the result.

Workers who carefully review these agreements are forced to choose between signing or walking away from their job. But most of the time, employees sign these clauses and do not realize it until they have experienced workplace violations and seek justice.

Unfortunately, over the last three decades, employers – some employers – have increasingly used forced arbitration clauses to circumvent workers' right to due process. In 1990, 2.1 percent of non-union employees had an arbitration clause in their employment contract. 2.1 percent in 1990. As of 2018, nearly 60 percent of all non-unionized private sector employees were covered by forced arbitration agreements. Once again, 1990 2.1 percent, 2018, 28 years later, 60 percent. That's 60 million American workers locked out of the courtroom and forced to go through a process that is often rigged against them. While proponents of forced arbitration describe it as more efficient than litigating in court, we will hear from our witnesses today on how it is not efficient, and oftentimes less efficient than normal litigation.

When workers do enter the arbitration process, they rarely emerge victorious. Research shows that employees have an overall win rate of around 19 percent, and when an arbitrator is paired repeatedly with the same employer, that win rate reduces to nearly 11 percent. In contrast, employees are more than 30 percent likely to win when they go to federal court.

As a result, arbitration has become a tool for employers, some employers, to evade accountability for violating their workers' rights.

In the ten most populous states, workers have \$8 billion stolen from them in minimum wage violations every year. This amounts to \$3,300 in losses per worker every year. The federal minimum wage is inadequate as it is, and without protections, workers are left with even less while their employers line their pockets and duck litigation.

Forced arbitration also makes it difficult for workers to seek justice when they experience discrimination. Arbitrations are private, allowing employers to be shielded from the court of public opinion. Additionally, the ordinary rules of discovery and evidence common to the courtroom rarely apply, so employers can control the evidence that is brought into the room. These unfair practices allow employers to hide abuse, while stacking the cards against workers who experience discrimination.

In recent years, the Supreme Court has only worsened the problem. In 2018, the Court's conservative majority ruled in *Epic Systems Corp. v Lewis* that an employer can even require employees to give up their right to join a joint, class, or collective action. This leaves employees to try their case as individuals and prevents them from proving that their experience is one of many. Ultimately, this prevents employers from being held accountable.

But as Justice Ginsburg wrote in her dissent, "Congressional correction of the FAA over workers' rights to act in concert is urgently in order." That's why today's hearing will focus on the *Restoring Justice for Workers Act* introduced by Chairs Nadler and Scott.

- First, this legislation re-opens the courthouse doors for workers by prohibiting the use of forced arbitration clauses in employment contracts prior to a dispute;
- Second, it reverses the Supreme Court's decision in *Epic* to ensure workers can band together to hold unscrupulous employers accountable;
- And finally, it ensures that, after an employment dispute arises, employers cannot obtain arbitration agreements by threat or coercion.

I'd like to congratulate my colleagues on the Judiciary Committee for their efforts to advance the *Forced Arbitration Injustice Repeal Act*, or the *FAIR Act*, which ends forced arbitration in employment and many other contexts. That legislation is crucial for empowering workers' rights under the statutes this Committee oversees. The *Restoring Justice for Workers Act* builds on the *FAIR Act* by including essential provisions like making collective action waivers an unfair labor practice under the *National Labor Relations Act*, and by preventing forced post-dispute arbitration.

If workers are shut out of the court room, they are not protected under the law. That is an outcome we cannot accept. I want to thank our witnesses for joining us today. And I now yield to the distinguished Ranking Member, Mr. Allen, for the purposes of him making his opening statement.