

Consumer and Employee Dispute Resolution Fairness Act (SB20-093)

Testimony to the Senate Judiciary Committee

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Thank you for the opportunity to testify today.

I'm Rich Jones and I am here today representing the Bell Policy Center. The Bell Policy Center provides policymakers, advocates, and the public with reliable resources to create a practical policy agenda that promotes economic mobility for every Coloradan.

The Bell Policy Center supports SB20-093, the Consumer and Employee Dispute Resolution Fairness Act. It will level the playing field and make the current dispute resolution process fairer for workers and consumers. It establishes ethics standards and limits conflicts of interest for arbitrators, increases transparency around the arbitration process, and declares specific contractual terms unenforceable and void as against public policy when they are included in standard form contracts in Colorado.

Forced arbitration contracts require consumers and workers to give up their right to go to court and force them to use an arbitration process to resolve disputes. They also typically prohibit consumers or employees from banding together into a class action, rather they must bring their claims individually. These contracts, written by the corporation or employer, often give them the unilateral authority to pick the arbitrator and the site of the arbitration. As a result, the arbitration process tends to be a secretive, biased and expensive alternative to the court system and is stacked against consumers and workers.

These contracts often are presented as part of the fine print in contracts for the purchase of goods or services. For example, forced arbitration provisions are found in contracts for car and student loans, credit cards, child care services, and nursing home services, among others. According to a recent study, more than 60 percent of all online sales in the U.S. are covered by consumer arbitration agreements.¹

Forced arbitration clauses are often found in the fine print of job applications or presented as part of the paperwork given to new hires. These clauses prohibit workers from taking their employers to court for all types of employment related claims such as workplace discrimination, sexual harassment, not paying minimum wages, or offering overtime pay.

The number of employers using these clauses has grown dramatically in recent years. According to research by the Economic Policy Institute (EPI), in 2017, 53.9 percent of nonunion, private sector employers had forced arbitration clauses in their employment contracts. Thirty-nine percent added them since 2012 when the U.S. Supreme Court ruled they were broadly enforceable in *AT&T Mobility LLC v. Concepcion*.² Given the growth rate in the number of employers using these clauses, EPI projects more than 80 percent of nonunion, private sector workers will be covered by forced arbitration clauses by 2024.³

Almost two-thirds (64.5 percent) of workers in low-wage jobs — those making less than \$13.00 per hour — in 2017 were subject to forced arbitration clauses compared to 54.5 percent of those making \$22.50 or more per hour.⁴

Workers and consumers are harmed by forced arbitration. Analysis of data comparing workers subject to forced arbitration and those who have access to the courts, shows forced arbitration dissuades many from filing claims in the first place. When the likelihood of winning a claim and the amount of the awards are considered, workers do better under litigation than forced arbitration. According to a detailed analysis of research studies going back 20 years, EPI determined “workers win much more frequently in court than in arbitration, and when they win, they win a lot more money.”⁵

The rules of forced arbitration are set by federal law and states have limited power to affect them. However, states can act to make the process fairer and more transparent.

We urge you to support SB20-093 because it will improve the dispute resolution process in Colorado by:

1. Setting ethical standards and limits around conflicts of interest for arbitrators.
2. Requiring arbitration services to publicly present data on arbitration proceedings to make the process more transparent. Three states do this now.
3. Declaring terms that dissuade people from filing claims as unenforceable against public policy in their standard form contracts.

We thank Senator Foote and Senator Fenberg for bringing the bill to you today.

I am happy to answer any questions you may have.

¹ The Prevalence of Consumer Arbitration Agreements by America’s Top Companies, Imre Stephen Szalai, UC Davis Law Review Online, Vol. 52, February 2019, <https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf>

² Unchecked corporate power, Economic Policy Institute, May 2019, <https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf>

³ Ibid

⁴ The growing use of mandatory arbitration, Economic Policy Institute, April 6, 2018, <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>

⁵ The Chamber Speaks: Forced Arbitration is Actually Good for Workers!, American Prospect, June 5, 2019, <https://prospect.org/justice/chamber-speaks-forced-arbitration-actually-good-workers/>