CIVIL JUSTICE & NATIONAL ADVOCACY

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MEMORANDUM IN SUPPORT OF LEGISLATION BANNING FORCED ARBITRATION CLAUSES AND CLASS ACTION WAIVERS FOR WORKERS

Recent Supreme Court decision creates urgent need for Congress to pass the Restoring Justice For Workers Act and the Fair Act

Introduction

When Congress enacted the National Labor Relations Act (NLRA) in the 1930s, it became illegal for employers to interfere in any way with employees' rights to engage in "concerted activities" for their "mutual aid or protection."[1] However, in the 2018 case *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court gutted an important part of that law, ruling that concerted *legal* activity, such as class action lawsuits, is not covered by the NLRA's protections, and that the NLRA is superseded by the earlier 1925 Federal Arbitration Act.[2] That case upheld the validity of class action waivers in employment contracts, affecting millions of employment agreements.[3]

Immediately after this ruling, a bill called the "Restoring Justice For Workers Act" was introduced to restore workers' legal rights under the NLRA, establishing new rights and protections to workers who are victims of illegal wage theft, discrimination and harassment. The bill would allow them to join with others in class action lawsuits, and would limit employers' ability to insert forced arbitration clauses and class action waivers in employment contracts .[4] This legislation is expected to be reintroduced shortly.

In addition, both Houses have introduced the FAIR Act (S.610/H.R.1423), which would broadly ban use of forced arbitration clauses and class action waivers in employment contract by amending the 1925 Federal Arbitration Act, which the current U.S. Supreme Court now regularly cites to in order to uphold class actions waivers.[5]

Both would remedy a terrible injustice for workers and we strongly urge your support.

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[1] 29 U.S.C. § 157. *See, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).
[2] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).
[3] https://www.nytimes.com/2017/10/02/us/politics/supreme-court-workplace-arbitration.html
[4] H.R. 7109, 115th Congress.
[5] 9 U.S.C. Ch. 1. See, *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (June 20, 2013).*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Why Are Class Actions Important to Workers and Why Are Bill Opponents Wrong.

Wage theft and employment discrimination are both widespread and growing problems in America's work places.[6] Although state and federal laws make such practices illegal, it is extremely difficult and expensive for aggrieved workers to sue employers individually, particularly when the violations are widespread. Class actions allow workers to join with others with similar complaints, gaining access to the courts where an employer may have profited by cheating or discriminating against large numbers of workers. Class actions also make the litigation process more efficient, as this device allows the filing of one case instead of many different lawsuits where the same kinds of issues are presented.

However, a growing number of companies are inserting forced arbitration clauses and class action waivers into their non-negotiable employment contracts.[7] The practice has gotten worse since the *Epic Systems* decision.[8] When a case is thrown out of court and into private arbitration because of one of these clauses, the claims usually disappear, allowing employers to completely escape any legal accountability for violating the law. The *Wall Street Journal* reported, for example, that as more companies use forced arbitration clauses and class action waivers, "many employees are walking away from harassment, wrongful-termination and discrimination claims rather than taking them to a privately run tribunal, according to experts and new research." Often, workers simply drop the claims.[9]

In the occasional situation where the worker is able to arbitrate their claim individually, they often find themselves in a private, rigged system, where the employer sets the rules, selects the arbitrator, and may charge the worker excessive arbitration fees. As the court noted in a recent California case, "But for the class action settlement, the majority of employees would likely have recovered nothing since 99 of them 'had signed arbitration agreements waiving their rights to arbitrate wage disputes on a class-wide basis,' forcing them 'to file and win individual arbitration – a step that few employees would be willing to take against their employer'– in order to obtain justice."[10]

In addition, since the forced arbitration process is secret, it allows companies to cover-up employment violations. It is one reason why employees at some major tech companies, including Google, Lyft, Uber, and Microsoft,[11] have been able to successfully pressure individual

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[6] https://aflcio.org/what-unions-do/social-economic-justice/wage-theft; https://www.vox.com/policy-and-politics/2019/2/28/18241973/workplace-discrimination-cpi-investigation-eeoc

[7] Alexander J.S. Colvin, Economic Policy Institute, The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers., September 27, 2017 , available at, https://www.epi.org/files/pdf/135056.pdf, last accessed 3.2.2019

[8] https://classactionsurvey.com/wp-content/uploads/2019/04/2019_Class_Action_Survey.pdf

[9] https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201

[10] *Lee v. JPMorgan Chase & Co.*, (2015), Case No. 8:13-cv-00511 (C.D. Cal.). *See*, "First Class Relief 2017: How Class Actions Benefit Those Who Are Injured, Defrauded and Violated", Center for Justice and Democracy (November 2017)

[11] https://abcnews.go.com/Business/google-drops-forced-arbitration-sexual-harassment-assault-cases/story?id=59084593

companies to ban these clauses in sexual harassment cases, and beyond.[12] Gretchen Carlson, who was sexually harassed by Roger Ailes and Steve Doocy while at Fox News,[13] had to sue Ailes directly because of the forced arbitration agreement she was required to sign with her employer, the network.[14] She said, "Forced arbitration is a harasser's best friend … It keeps harassment complaints and settlements secret. It allows harassers to stay in their jobs, even as victims are pushed out or fired. It silences other victims who may have stepped forward if they'd known."[15] Legislation is the only way all workers can be fully protected.[16]

The Impact of the *Epic Systems* Decision

The impact of this decision has been two-fold: first, it undermines the purpose of the NLRA; second, it harms workers themselves.

When the decision was issued last June, Supreme Court Justice Ruth Bader Ginsburg delivered one of the strongest dissents of her career, delivering her opinion directly from the bench and stating, "Nothing compels the destructive result the court reaches today, … adding in her written opinion that the majority was "egregiously wrong," retrenching on 80 years of federal labor law that sought "to place employers and employees on more equal footing."[17]

Indeed, the decision undermines the entire purpose of the NLRA, which was to place workers and employers on a more level playing field. A single worker might not have enough power to effectuate workplace change and advocate for better terms and conditions of employment, but a group of workers represented by an advocate on their behalf does. Collective bargaining is at the heart of the NLRA and labor law for this very reason. As Justice Ginsburg stated, "the Court today … ignores the destructive consequences of diminishing the right of employees 'to band together in confronting an employer.'"[18]

Another purpose of the NLRA is to provide efficient resolution of disputes between employers and workers. Forcing large numbers of workers to resolve disputes individually instead of as a class is the height of inefficiency. When Uber successfully got a wage theft class action dismissed on behalf of about 12,500 drivers, thousands of drivers responded by filing individual arbitration claims, which Uber now says the company cannot handle.[19]

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[12] https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees *See*, https://sites.google.com/view/endforcedarbitration

[13] http://fortune.com/2016/09/06/fox-gretchen-carlson-settlement-apology/

[14] https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/

[15] https://www.gillibrand.senate.gov/news/press/release/standing-with-gretchen-carlson-senators-gillibrand-and-graham-and-representative-bustos-announce-bipartisan-legislation-to-help-prevent-sexual-harassment-in-the-workplace-void-forced-arbitration-agreements-that-prevent-sexual-harassment-survivors-from-getting-the-justice-they-deserve

[16] Notably, legislation has also be introduced to end the use of forced arbitration in sexual harassment cases. *See*, H. R. 1443, and the broader S.1082

[17] https://www.cnn.com/2018/05/21/politics/ruth-bader-ginsburg-gloves-off/index.html

[18] *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[19] https://www.reuters.com/article/legal-us-otc-uber/forced-into-arbitration-12500-drivers-claim-uber-wont-pay-fees-to-launch-cases-idUSKBN1O52C6

As far as the workers themselves, the impact of Epic Systems was immediate. According to a recent survey, the percentage of companies that include forced arbitration clauses and class action waivers in employment contracts increased from 37.2 percent in 2017 to nearly 48.9 percent in 2018.[20] In an analysis by the *National Law Journal*, "about 63% of decisions citing *Epic*—across all case types—broke in favor of the defendant…"[21] These cases were predominantly class actions "centered on wage and hour claims."[22]

Why Do We Need the Restoring Justice For Workers Act Do and What Would it Do?

Sponsors of last year's legislation noted in the bill's findings:

> The National Labor Relations Act … was intended and long understood to encompass employees' right to collectively seek relief for violations of their workplace rights. However, contrary to the plain text of the law and congressional intent, the Supreme Court of the United States, in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), decided that employees may be forced, as a condition of employment, to waive their right to collectively litigate employment actions.

To remedy this situation, last year's bill, a version of which House Judiciary Chair Jerrold Nadler has said would be introduced shortly,[23] would amend the National Labor Relations Act in the following ways:

- The bill would ban pre-dispute forced arbitration clauses and class action waivers in employment contracts by defining them as unfair labor practices under Section 8(a) of the NLRA,[24] thus establishing new rights with which an employer may not interfere.[25] It would also prohibit unions from coercing or retaliating against employees who choose not to join class actions (Section 8(b) of the NLRA).[26]

- The bill would also permit arbitration of employment disputes if they are agreed to post-dispute, but with certain qualifications including a 45-day waiting period for the worker, to provide ample time to consult an attorney, discuss the agreement with other workers or their union representative, or research the matter on their own.

Notably, the bill defines "employment dispute" broadly, protecting independent contractors as well as employees.

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[20] https://classactionsurvey.com/wp-content/uploads/2019/04/2019_Class_Action_Survey.pdf
[21] "'Epic' Impact: How a Major SCOTUS Decision in Favor of Arbitration is Shaping the Landscape for Workplace Lawsuits'"https://www.law.com/nationallawjournal/2019/03/01/march-2019-issue-398-31685/?download=NLJ0319.pdf (February 28, 2019)
[22] *Id.*
[23] https://nadler.house.gov/news/documentsingle.aspx?DocumentID=392823
[24] National Labor Relations Act 29 U.S.C. § 158.
[25] National Labor Relations Act 29 U.S.C. § 157.
[26] National Labor Relations Act 29 U.S.C. § 158.

Bill Supporters

When *Epic Systems* was before the Supreme Court, an important brief was filed on behalf of a number of "international labor unions with a combined membership of approximately 13.5 million working men and women throughout the United States and Canada," including: the American Federation of Teachers; American Federation of State, County and Municipal Employees; Communications Workers of America; International Association of Machinists; International Brotherhood of Teamsters; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; National Education Association; Service Employees International Union; United Food and Commercial Workers International Union; and United Steelworkers International Union.[27] Many states also weighed-in on the side of workers including California, Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia and Washington plus the District of Columbia.[28] We can expect many if not all of these entities to support the Restoring Justice for Workers Act.

It should also be noted that both employers and workers can find reasons to support the bill because it is balanced. The bill prohibits not only class action waivers, but also unions from coercing or retaliating against workers who choose not to join them. Even dissenting employees will still be afforded the protections and benefits of being a member of their union irrespective of their being a member of a class in a suit. This proposal is consistent with the purpose of the NLRA, i.e., to protect workers from unfair duress and undue influence by both employers and unions.

For more information, please contact student Marisa Powell Marisa.Powell@law.nyls.edu or Adjunct Professor and Executive Director of the Center for Justice & Democracy at ßNew York Law School, joanned@centerjd.org.

[27] http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-ten-national-labor-unions.pdf
[28] http://www.scotusblog.com/wp-content/uploads/2017/08/16-285-16-300-bsac-16-307-tsac-Maryland.pdf

APPENDIX: VICTIM STORIES

Charles Walton – Jenkintown, Pennsylvania

In 2011 Charles Walton applied to work as a server at an Applebee's in Jenkintown, Pennsylvania. After three rounds of interviews, Charles was offered the job and was instructed to attend an orientation. At the orientation, Charles' new manager presented him with a stack of forms to sign. He was told by the manager that if he did not sign the paperwork, he could not be hired. Charles badly needed the job, so he signed every document in the stack.

Charles' job at Applebee's quickly became a nightmare. As a tipped employee, Charles received less than the hourly minimum wage on the expectation that he would receive tips to offset the difference between his hourly wage and the minimum wage. However, Charles' manager required that tipped employees arrive early for their shifts perform untipped work, such as cleaning, dishwashing, and restocking the kitchen. Despite having no ability to earn tips for these services, Charles and other similarly situated employees were paid less than minimum wage for these tasks.

Two years later, no longer able to withstand these conditions, Charles attempted to bring a class action to recover his unpaid wages and overtime. It was then that Charles discovered he signed an arbitration agreement years before when he completed paperwork at his orientation. A Pennsylvania judge, bound by *Epic Systems*, dismissed the case and compelled arbitration.[29] He then brought his case in arbitration but lost. Neither Charles nor any other employee wronged by Applebee's received any of the compensation or overtime they were owed.

Leah Turner - Parker, Colorado

In 2010, Leah Turner was hired by a Colorado Chipotle as a kitchen manager. While Leah was enthusiastic about the position and her potential to rise through the ranks, her manager was obsessed with keeping labor costs low. From Leah's first day of work and continuing every day thereafter, she and her fellow employees were forced to clock out and keep working, and were constantly shorted hours in their paychecks. Leah estimates that over the years she worked at Chipotle, she was likely not compensated for thousands of hours of labor. Leah brought suit against Chipotle and nearly 10,000 Chipotle employees across the country who faced experiences similar to Leah's joined her as a class. Chipotle, however, argued that thousands of these employees were barred from joining the class because they had signed arbitration agreements when they started work. The Colorado District Court agreed, and nearly 3,000 wronged employees were dismissed from the action.[30] The only recourse for these workers was to individually arbitrate their claims. While Leah and the remaining members of the class continue to fight for their owed wages, the workers excluded from the class, who suffered in a substantially similar way, will receive nothing from the suit and must put their faith in an arbitration process that is rigged against them.

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[29] https://www.govinfo.gov/content/pkg/USCOURTS-paed-2_13-cv-01674/pdf/USCOURTS-paed-2_13-cv-01674-0.pdf

[30] https://big.assets.huffingtonpost.com/athena/files/2018/08/10/5b6d9b98e4b0ae32af97940e.pdf