



Center for Justice & Democracy's
Public Policy Clinic
New York Law School
185 West Broadway
New York, NY 10013

April 2, 2021

Jenny R. Yang, Director
Office of Federal Contract Compliance Programs
US Department of Labor
909 SE 1st Ave #722
Miami, FL 33131

Dear Director Yang,

Re: New Forced Arbitration Proposal for Employment Contracts of Federal Contractors

My name is Emma Rush, and I am student at New York Law School working with the Center for Justice and Democracy to make forced arbitration agreements, as a condition of employment by a federal contractor, a relic of the past.

As you may know, while President Biden served as Vice President of the United States, President Obama tackled forced arbitration through executive action. On July 31, 2014, President Obama signed the Fair Pay and Safe Workplace Executive Order 13673 (“E.O.”).¹ The E.O. was aimed to ensure that federal contracts are given to companies with integrity that play by the rules set by federal law.² There were three main components of the executive order which required prospective and current federal contractors to 1) report labor violations, 2) provide paycheck transparency to employees, and 3) prohibit pre-dispute arbitration agreements.³

The prohibition on pre-dispute arbitration agreements was limited to those aimed at resolving claims brought under Title VII of the Civil Rights Act and harassment-related state tort claims for contracts of \$1 million or more.⁴ It also required contractors to incorporate this requirement

¹ *Executive Order – Fair Pay and Safe Workplaces*, THE WHITE HOUSE (July 31, 2014),

<https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/executive-order-fair-pay-and-safe-workplaces>

² *FACT SHEET: Fair Pay and Safe Workplaces Executive Order*, THE WHITE HOUSE (July 31, 2014),

<https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>

³ *President Obama’s Fair Pay and Safe Workplaces Executive Order in Critical Condition*, LEXISNEXIS (Dec. 28, 2016)

<https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2016/12/28/president-obama-s-fair-pay-and-safe-workplaces-executive-order-in-critical-condition.aspx>

⁴ *President Obama’s Fair Pay and Safe Workplaces Executive Order in Critical Condition*, LEXISNEXIS (Dec. 28, 2016)

into subcontracts in the same value range.⁵ In accordance with the E.O., the Federal Acquisition Regulatory (FAR) Council,⁶ charged with assisting in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activity in the Federal Government, promulgated rules to execute the order which were scheduled to go into effect on October 25, 2016.⁷ Despite President Obama's efforts, on March 6, 2017, Congress used the authority of the Congressional Review Act (CRA) to revoke the final rule promulgated by the FAR in its entirety.⁸ On March 27, 2017, President Trump, unsurprisingly, signed the Resolution into law.⁹

Because of the CRA's prohibition on promulgating a rule substantially similar to one that has been repealed, we know that the same rules cannot be adopted. We propose that President Biden issue a new executive order prohibiting pre-dispute arbitration agreements for all employment claims, not just those brought under Title VII or state sexual harassment laws. The proposed language is as follows:

Complaint and Dispute Transparency.

(a) Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate employment-related claims may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired, and services required exceeds \$1 million.

(b) Subsection (a) of this section shall not apply to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

(c) A contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall not apply with respect to:

<https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2016/12/28/president-obama-s-fair-pay-and-safe-workplaces-executive-order-in-critical-condition.aspx>

⁵ *President Obama's Fair Pay and Safe Workplaces Executive Order in Critical Condition*, LEXISNEXIS (Dec. 28, 2016)

<https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2016/12/28/president-obama-s-fair-pay-and-safe-workplaces-executive-order-in-critical-condition.aspx>

⁶ About the FAR Council, FEDERAL ACQUISITION REGULATORY COUNCIL <https://www.acquisition.gov/far-council> (last visited Mar. 14, 2021).

⁷ *Federal Acquisition Regulation; Fair Pay and Safe Workplaces*, FEDERAL REGISTRAR (Aug. 25, 2016), <https://www.federalregister.gov/documents/2016/08/25/2016-19676/federal-acquisition-regulation-fair-pay-and-safe-workplaces>

⁸ *Senate Votes to "Disapprove" Blacklisting Regulation*, THE NATIONAL LAW REVIEW (Mar. 7, 2017).

<https://www.natlawreview.com/article/senate-votes-to-disapprove-blacklisting-regulation>

⁹ Richard Arnholt, *Ding Dong the Regulation's Dead! – Trump Finalizes Statutory Repeal of the Fair Pay and Safe Workplaces Rule*, BASS BERRY & SIMS GOVCON & TRADE (Mar. 27, 2017), <https://www.bassberrygovcontrade.com/ding-dong-the-regulations-dead-trump-finalizes-statutory-repeal-of-the-fair-pay-and-safe-workplaces-rule/>

(i) employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; or
(ii) employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by this order, except that a contractor's or subcontractor's agreement under subsection (a) of this section to arbitrate certain claims only with the voluntary post-dispute consent of employees or independent contractors shall apply if the contractor or subcontractor is permitted to change the terms of the contract with the employee or independent contractor, or when the contract is renegotiated or replaced.

Forced arbitration, otherwise known as mandatory arbitration, requires an employee to submit any dispute that may arise to binding arbitration as a condition of employment.¹⁰ As a result, the employee is required to waive their right to sue, to participate in a class action lawsuit, or to appeal.¹¹ In 2014, the Department of Labor estimated that there were roughly 24,000 businesses with federal contracts employing 28 million workers.¹² President Biden has a unique opportunity here to combat the pervasive spread of forced arbitration agreements and ensure that millions of workers retain their Seventh Amendment right to access the courts.

There is broad support for the ban on forced arbitration agreements. Proponents of the ban argue that society benefits from an open legal process, which expose employment abuse and perpetrators of those violation instead of hiding them from the public's view. Forced arbitration, on the other hand, restricts the public's ability to obtain such information and keep abusive practices hidden and those companies unaccountable. Limiting forced arbitration is a fundamental component of decreasing systemic abuse by Government contractors. When employment abuse has been neutralized in the workplace it produces more efficient contracting.

I kindly ask that you consider this proposal and the positive impact that it could have for millions of workers across the country. This is an auspicious moment for President Biden to capitalize on and lead many private contractors away from unethical forced arbitration.

Respectfully,



Emma C. Rush

¹⁰ *Arbitration*, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, <https://www.consumeradvocates.org/for-consumers/arbitration#:~:text=In%20forced%20arbitration%2C%20a%20company,action%20lawsuit%2C%20or%20to%20appeal>. (last visited Mar. 13, 2021).

¹¹ *Arbitration*, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, <https://www.consumeradvocates.org/for-consumers/arbitration#:~:text=In%20forced%20arbitration%2C%20a%20company,action%20lawsuit%2C%20or%20to%20appeal>. (last visited Mar. 13, 2021).

¹² *FACT SHEET: Fair Pay and Safe Workplaces Executive Order*, THE WHITE HOUSE (July 31, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>