



THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK Letitia James



Policy Report: FORCED ARBITRATION, LOST LEGAL PROTECTIONS



New York City Must Act to Protect Workers' Rights and Promote Fair Corporate Practices



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EXECUTIVE SUMMARY

Arbitration is widely used in employment disputes, impacting various segments of the workforce from professionals to minimum wage workers, as well as in consumer and health contracts. Arbitration can be a legitimate, cost-effective, and efficient way to resolve disputes between two parties with equal bargaining power.

Forced arbitration and nondisparagement clauses in employment contracts pose a significant threat to workers and their families. Forced arbitration, also known as mandatory arbitration, requires individuals or employees to resolve workplace disputes—such as wage disputes, sexual harassment disputes, or wrongful termination disputes—through a binding arbitration process. These requirements are also being used by corporations in consumer and public health contracts. Forced arbitration promotes a system that exploits workers by stripping them of the right to access the court system, which denies them the opportunity to have their stories heard in front of a judge and jury, and the right to appeal an unfavorable decision. Workers are also denied the right to join fellow workers in collective action lawsuits.

Employees have a lower chance of prevailing in arbitration—succeeding only about 21—percent of the time, than in court. Additionally, the losing party has the burden of paying costly arbitration fees.

Forced arbitration clauses are often hidden in long contracts or employee handbooks provided after employment begins, making many New Yorkers unaware of the rights they are signing away. Unfortunately, agreeing to all the terms of the employment contract, which includes a forced arbitration clause, is often a “condition of employment.” Even if workers are aware of the existence of an arbitration clause, they often do not have the power to negotiate the terms of the arbitration agreement.

Arbitration by definition is an opaque, private process. Allegations, outcomes, monetary (or other) awards, and any findings of bad business practices or workplace abuse made during the arbitration process are confidential. It is difficult to know exactly how many New York City employees have suffered due to the secrecy of the system, but a recent survey of companies found that more than half of private sector non-union workers (60 million people) are subject to forced arbitration nationally.

Similar to mandatory arbitration clauses, nondisparagement clauses in employment contracts create a “culture of secrecy,” shielding and protecting bad corporate actors from public accountability. Nondisparagement clauses prevent workers from speaking out against current or former employers when their rights have been violated.

FORCED ARBITRATION, LOST LEGAL PROTECTIONS



To combat the injustices arbitration and nondisparagement clauses create, New York City and State must take action to safeguard workers' rights and hold bad corporate actors accountable.

Specifically, we recommend:

1. Create a *NYC Forced Arbitration and Nondisparagement Clause Registry*: New York City should require companies to register if they require forced arbitration or nondisparagement clauses.
2. Mandate that companies that require forced arbitration and nondisparagement clauses for employment must declare this in job advertisements.
3. New York City should not do business with, or provide benefits or incentives to companies that require forced arbitration to resolve workplace disputes.
4. Enact the New York State Empowering People in Rights Enforcement (EMPIRE) Act (A7958) that promotes enforcement of Local Laws by delegating enforcement activity.
5. Enact the New York State Bill (A2842) that prohibits the State from contracting with companies that use forced arbitration clauses in their employment contracts and in certain consumer contracts.
6. Examine the feasibility of allowing representative actions on behalf of the New York City by delegating the enforcement activity of the NYC Commission on Human Rights so that workers could bring actions against their employers for discrimination claims.



PRIMER ON FORCED ARBITRATION

What is Arbitration?

There are various alternatives to resolve legal disputes outside of the traditional courtroom system. Arbitration is an alternative form of dispute resolution that allows two disputing parties to present their case in front of an arbitrator or a panel of arbitrators.¹ The arbitrator hears arguments from both parties, weighs the evidence and arguments against the rules, and decides the outcome of the case.² Arbitrations take place outside the court room with no jury or public record, and in binding arbitration, no right to appeal the decision. The arbitrator has the power to set the rules of the arbitration, such as what types of evidence is permitted,³ and are not subject to courtroom rules or rules of evidence, leaving workers vulnerable to unfair procedures and outcomes.⁴

Arbitration is widely used in employment disputes, impacting various segments of the workforce from professionals to minimum wage workers, as well as in consumer and public health contracts.^{5,6} Arbitration can be a legitimate, cost-effective, and efficient way to resolve disputes between two parties with equal bargaining power.

Arbitration can be voluntary or forced. Voluntary arbitration allows both sides to agree to resolve their dispute through arbitration.⁷ However, when arbitration is forced, it perpetuates the power imbalance inherent in the employee-employer relationship. Corporate employers have distinct advantages over aggrieved workers, posing many threats to workers' rights.⁸ Forced arbitration, also known as mandatory arbitration, requires individuals or employees to resolve workplace disputes—such as wage disputes, sexual harassment disputes, or wrongful termination disputes—through a binding arbitration process.⁹

IMPACT OF FORCED ARBITRATION

It is now common practice for employers to include forced arbitration clauses in employment contracts as a condition of employment.¹⁰ Over the past 10 years, there has been a surge in the use of arbitration, from large multi-national corporations to local storefronts. This has created a private justice system that benefits business interests and deprives employees of the right to access our court system.¹¹ As former U.S. Secretary of Labor Robert Reich states, the “fundamental promise of equal justice under law is facing a severe threat.”¹²

Enforcing NYC and NYS Human Rights

Forced arbitration clauses in employment contracts undermine New York Human Rights laws by allowing employers to use forced arbitration to privately resolve workplace discrimination issues, thus barring workers from seeking legal redress for their situation through the city, state, and federal courts that adjudicate anti-discrimination and anti-harassment laws.

The New York City Human Rights law was enacted based on the New York City Council’s finding and declaration that “prejudice, intolerance, bigotry, and discrimination, bias-related violence or harassment and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundation of a free democratic state.”¹³ The Law, Title 8 of the Administrative Code of the City of New York, prohibits discrimination in New York City. Individuals are protected from discrimination in many areas, based on a number of protected classes. Protected Classes under the New York City Human Rights Law are: age, alienage or citizenship status, color, disability, gender (including sexual harassment), gender identity, marital status and partnership status, national origin, pregnancy, race, religion/creed, and sexual orientation.¹⁴ Current or prior service in the uniformed services will be added as a class, effective November 19, 2017.¹⁵ Additional protections are provided in employment based on: arrest or conviction record, caregiver, credit history, unemployment, and status as a victim of domestic violence, stalking, and sex offenses.¹⁶

Workers are also protected on the state level, through of the New York State Human Rights Law,¹⁷ and on the federal level by the Civil Rights Act of 1964.¹⁸



RISE OF CORPORATE POWER

Lack of Corporate Accountability

Forced arbitration is a “private, closed door system” of justice that leads to a lack of public accountability and transparency.¹⁹ Crucial information such as the facts of the case, decisions, and settlement amounts go unpublished. This privatized system of justice poses a great danger to civil rights and sexual harassment cases, as the Center for American Progress stressed:

“When arbitration is a required mechanism from the start rather than a voluntary way to settle disputes with consumers and workers, it gives companies a free pass for low quality and abusive practices. When the risk of being held accountable is low, there is less incentive for companies to do the right thing.”²⁰

In cases where the company has an endemic problem of racial discrimination or has mishandled sexual harassment claims, arbitration settles these disputes behind closed doors and away from the public eye.²¹ Bad corporate actors are not held publicly accountable, further encouraging a company culture that exploits, harasses, and discriminates against its workers.²²

An Economic Policy Institute 2017 report found that the number of non-union private sector companies requiring forced arbitration has increased from around two percent of workers in 1992 to more than half (53.9 percent) of workers in 2017.²³ Large companies force arbitration more often. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.²⁴

Corporate Bad Actors³⁵

Some of the corporations that have used mandatory arbitration clauses include:



ii Workers in some Macy's locations are not subject to pre-dispute mandatory arbitration agreements because they are represented by a union and covered by the terms of a collective bargaining agreement. In contrast to mandatory arbitration agreements in non-union workplaces, collective bargaining agreements typically contain grievance and arbitration procedures that are determined by both their union and their employer, and workers are provided representation in these proceedings.

(Source: "Justice for Sale", Center for Popular Democracy)

*Most of these Corporations are either headquartered in or do business in New York City



Forced Arbitration Perpetuates Sexual Harassment in the Workplace

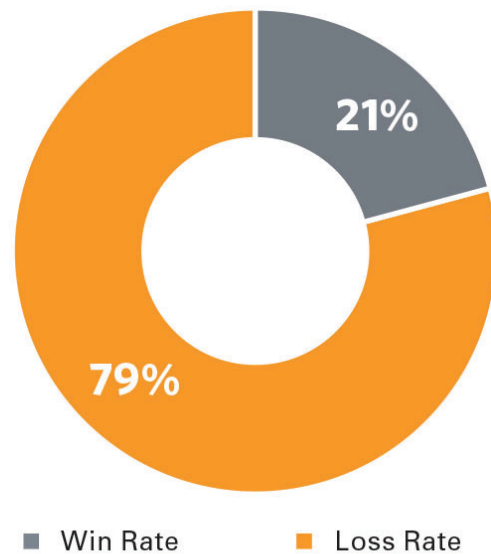
Forced arbitration clauses in employment contracts perpetuate sexual harassment in the workplace by protecting bad corporate employers from public scrutiny and accountability.²⁵ Gretchen Carlson, former Fox News television commentator, sued Roger Ailes, former CEO at Fox News, for sexual harassment and won a \$20 million settlement²⁶. An arbitration clause in Carlson's employment contract prevented her from directly suing Fox News,²⁷ but did not prevent Carlson from directly suing Ailes in open court. The lawsuit opened the door for the media to uncover Fox News' history of covering up the sexual harassment by Ailes and other major figures at the company.²⁸ Additional discrimination and retaliation employment claims have been filed against Fox, including a lawsuit by 23 current and former employees. The attorney for the employees reported that Fox denied a request to release his clients from confidentiality agreements.²⁹ Forced arbitration adds to the challenges already facing employees who struggle to come forward with discrimination and harassment complaints.

How Corporations Stack the Deck against Workers: The Repeat Player Advantage

Workers are more likely to lose in forced arbitration proceedings than in federal court.³⁰ Workers win 21 percent of the time in forced arbitration compared to 59 percent in federal court and 38 percent in state court.³¹

Forced arbitration is a biased system of justice that favors the repeat player: corporations.³² Corporations have a tendency to hire the same private arbitration companies and arbitrators. When an arbitrator rules in favor of the corporation, it increases the likelihood that the same arbitrator or arbitration company will be rehired.³³

Employee Win & Loss Rates in Arbitration



(Source: "Justice for Sale", Center for Popular Democracy)

A study performed by the Economic Policy Institute found that the first time an employer appeared in front of an arbitrator, the worker had a 17.9 percent chance of winning.³⁴ After an employer appeared in front of the same arbitrator after four cases, the worker's chances of success fell to 15.3 percent.³⁵ Finally, after 25 arbitration cases, the worker's chance of success plummeted to 4.5 percent.³⁶ The repeat player advantage works to stack the deck or the odds against the aggrieved worker, leading to the corrosion of workers' rights.³⁷



CORROSION OF WORKERS' RIGHTS

How Workers Are Forced into Arbitration

Mandatory arbitration forces workers to take their disputes outside of court and into a private system.³⁸ Workers are forced into binding arbitration clauses in two ways: (1) unknowingly, or as (2) a “condition to employment”.³⁹ First, a worker unknowingly agrees to forced arbitration when the worker signs an employment contract or when the worker receives orientation material at the start of employment, such as an employee handbook.⁴⁰ Because arbitration clauses are buried in boilerplate language in contracts and employee handbooks, workers often ignore the language or skim it.⁴¹ The forced arbitration requirement can also simply be included in an email or posted.⁴² As a result, workers are either unaware that a forced arbitration clause exists or they do not understand the legal impact of forced arbitration.⁴³

Second, it is now common for companies to require prospective employees to sign arbitration agreements as a “condition to employment.”⁴⁴ Companies can refuse to hire a prospective employee who does not sign the employment contract that contains a forced arbitration clause.⁴⁵ Consequently, the employee loses the ability to negotiate the terms of the employment contract. Companies can also impose forced arbitration clauses on workers who have been employed with the company for many years.⁴⁶ Workers are forced to comply if they want to remain employed. Ultimately, workers are left with two options: waive the right to have a day in court in exchange for employment or assert your judicial rights at the expense of unemployment. Forced arbitration perpetuates the unequal bargaining power between company-employers and individual workers.

ARBITRATION CLAUSE EXAMPLE IN EMPLOYMENT CONTRACTS

All employees hired, agree to participate in our Mandatory Arbitration Program (“MAP”) as a condition of employment. All disputes arising from application for, employment and termination (except those prohibited by law) will be resolved through binding arbitration. Arbitration is an alternative dispute resolution process administered by an independent arbitration association. Additional material on MAP is available on request.

(Source: “Taking ‘Forced’ Out of Arbitration”, The Employee Rights Advocacy Institute For Law & Policy)

Forced Arbitration Violates Workers’ Rights to Access the Court

More than half of private sector non-union workers (60 million people) are required to follow forced arbitration and thus lose the right to have their case heard in front of a judge and jury.⁴⁷

Arbitrators are the ultimate decision makers and set the procedural rules. They are not subject to courtroom rules or rules of evidence, leaving workers vulnerable to unfair procedures and outcome.⁴⁸ Arbitrators yield a great amount of power in this private system of justice, leaving the arbitrator’s decisions unchecked especially if the decision is unfairly biased towards one party. Forced arbitration removes workers from the traditional safeguards built into our justice system,⁴⁹ creating a privatized justice system that benefits companies.⁵⁰

Once an arbitrator rules in favor of the employer, workers lose their ability to appeal the decision because arbitration rulings are final.⁵¹ Even if the arbitrator misapplies the law or rejects crucial evidence, the final decision cannot be overturned through an appeal.

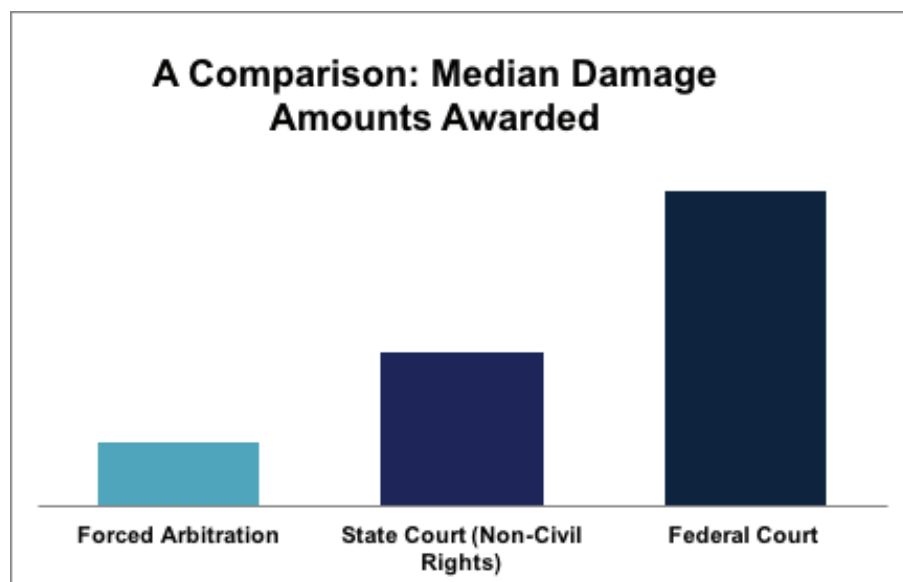
Differences between the courts and forced arbitration

The courts	Forced arbitration
The worker and employer freely decide to go to court to resolve a dispute that arises.	The employer forces the employee to resolve all potential claims in arbitration before any actual dispute exists.
The parties to the dispute do not pay the judges, and judges have no financial stake in the cases they decide.	Arbitrators rely on repeat customers, who tend to be employers, to sustain their business.
The parties can seek a higher court review if either disagrees with the lower court’s decision.	Arbitrators’ decisions will stand, even if the arbitrator clearly misapplies the law.
The same procedural rules apply equally to both sides.	The employer has more power than the employee to choose the arbitrator and the rules that apply.
Employer wrongdoing is made public.	Employer wrongdoing is kept secret.

(Source: “Taking ‘Forced’ Out of Arbitration”, The Employee Rights Advocacy Institute For Law & Policy)



Even if workers successfully win in arbitration, damage amounts are significantly lower than damages won through state or federal court.⁵² Median damages in employment arbitration amount to \$36,500 as compared to \$176,426 in federal court employment discrimination damages and \$85,560 in damages in state non-civil rights cases.⁵³ The much reduced amount does not adequately compensate workers for the lost wages, emotional turmoil and anxiety, potential ongoing retaliation, damaged reputation, loss of career, and many other challenges involved with seeking justice.



(Source: “The Arbitration Epidemic”, Economic Policy Institute)

Mr. Chow's Story

In 2012, Mr. Chow worked as a delivery driver for A-1 International Courier Service in New York, where he delivered computer parts to companies across the tri-state area. Because A-1 misclassified Mr. Chow as an independent contractor, he did not receive many of the benefits guaranteed to full-time employees. For example, although Mr. Chow worked long hours, he did not receive wages at the proper overtime rate for all hours worked in excess of 40 each workweek. A-1 also unlawfully took deductions from Mr. Chow's wages for many expenses such as car insurance, equipment, and vehicle maintenance, and failed to reimburse him for these expenditures. Because Mr. Chow had been misclassified by A-1 as an independent contractor, the company could avoid covering many of these expenses—which they would have to cover if Mr. Chow was an employee.

Shortly after beginning his job, Mr. Chow realized that he was unable to earn enough to get by. In addition to unlawful deductions, Mr. Chow received only an \$11 payment for the completion of a successful trip, no matter the distance he traveled to the drop-off location. Mr. Chow began

requesting that the dispatcher assign him more local trips so that he could save some money on gas and tolls. Without adequate compensation, Mr. Chow was sometimes spending more on gas than he was earning for his work. And on top of that he had other mounting bills to pay—house payments, electricity, and phone bills, for example. Ultimately, Mr. Chow found the job to be disadvantageous due in large part to the numerous deductions A-1 took from his wages.

Determined to recover his wages, Mr. Chow found an attorney who took his case, but after filing with the court, he was told he had to fight it individually in arbitration, which is where his case is currently pending (along with the cases of dozens of other A-1 drivers). Misclassification is much harder to fight through arbitration than in open court.

Because Mr. Chow had signed an arbitration agreement, there was very little he could do to claim his stolen wages. Like many workers desperate for a job, Mr. Chow signed an arbitration agreement that foreclosed his opportunity to bring his claims to court.

(Source: "Justice for Sale", Center for Popular Democracy)

Forced Arbitration Financially Burdens Workers and Working Families

Arbitration is financially risky, putting the aggrieved workers in a vulnerable position. Arbitration companies charge exorbitant fees, often costing workers between \$250 to \$700 per day for a hearing.⁵⁴ The parties must also pay additional costs such as room rental fees, arbitrator's travel expenses, administrative fees, and attorney's fees that can cost upward of thousands of dollars.⁵⁵ Additionally, forced arbitration clauses typically ban class action suits which allow workers to band together and pursue justice against their employer. Workers have less financial resources than companies; banding together with other similarly situated aggrieved workers allows them to collectively bear the financial risk.



The court system is also more financially feasible for workers because lawyers may recover attorney's fees in court proceedings depending on the state's law. Attorney's fees are more difficult to recover in arbitration.⁵⁶ Some lawyers may take a case on a contingency fee, meaning that workers only pay their attorney if they win the case.⁵⁷ Workers can also bring their dispute to small claims court without a lawyer, thus avoiding attorney and arbitration fees.⁵⁸

WHY ARE ARBITRATION CLAUSES SO POWERFUL?

A Brief History of Arbitration: The Federal Arbitration Act (FAA)

The power of employers to force workers into arbitration unknowingly or as a condition of employment comes from the Federal Arbitration Act (FAA), passed in 1925.⁵⁹ Originally the FAA only applied to a "narrow range of commercial disputes;" however, a number of Supreme Court decisions greatly expanded the power of the FAA.⁶⁰ The FAA states if an arbitration clause exists in a contract involving commercial transactions, a court is not allowed to hear the dispute and must compel the parties to arbitration.

Looming Threats to Workers' Rights and Protections

Today, the FAA applies to all types of disputes, no longer limiting it to commercial transactions.⁶¹ The FAA preempts state and local laws that attempt to limit arbitration clauses in contracts.⁶² According to the National Employment Lawyers Association (NELA), there are a wide range of workplace protection laws that are at risk because of forced arbitration including:

- Civil Rights Acts of 1964 and 1991;
- Age Discrimination in Employment Act;
- Americans with Disabilities Act Amendments Act;
- Family and Medical Leave Act;
- Fair Labor Standards Act;
- Equal Pay Act;
- Uniformed Services Employment and Reemployment Rights Act;
- National Labor Relations Act; and
- Lilly Ledbetter Fair Pay Act of 2009.⁶³

Federal Agencies Act to Restrict Forced Arbitration but Trump Administration and House Republicans Push Back

There has been federal administrative action to restrict the applicability of forced arbitration clauses. In 2016, the Obama Administration issued a rule that prevented nursing homes that receive Medicare and Medicaid from forcing patients to sign mandatory arbitration clauses prior to admission.⁶⁴ The rule aimed to provide victims of elder abuse, sexual harassment, wrongful death, and other claims the option of filing in court rather than forced into private arbitration as their only recourse. However, the Trump Administration has proposed a revision to the rule that rescinds the ban on forced arbitration agreements but claims it will increase transparency by making sure the mandatory arbitration agreements are written in plain understandable terms and in the language that the senior or their representative can understand, and that the terms be explained to them.⁶⁵

In July 2017, the Consumer Financial Protection Bureau (CFPB) issued a new rule preventing banks and financial institutions from inserting mandatory arbitration language into consumer contracts.⁶⁶ Companies would be banned “from using mandatory arbitration clauses to deny groups of people their day in court.”⁶⁷ However, the mostly Republican members of the U.S. House of Representatives moved quickly to pass a legislative veto of the CFPB rule.⁶⁸ The U.S. Senate is apparently planning to pass a legislative veto as well if it can garner the sufficient votes.⁶⁹

National Labor Relations Act (NLRA) Protection of Concerted Activity under Threat

The Supreme Court has held that arbitration clauses in contracts may prohibit class action suits, even if a class action lawsuit is the only economically viable way for plaintiffs to bring a case to court.⁷⁰

The next big Supreme Court battle that involves the legality of arbitration clauses will be heard in October 2017 when the Court will hear three consolidated cases: National Labor Relation Board v. Murphy Oil USA, Inc., Epic Systems Corp v. Lewis, and Ernst & Young LLP v. Morris.^{71,72,73} In all three cases, aggrieved workers are trying to pursue class or collective action lawsuits for back wages or other types of damages. The aggrieved workers are asserting their right, under the National Labor Relations Act (NLRA), to engage in “concerted activity”, here, a class action.⁷⁴

The question that the Supreme Court must answer is whether companies can use arbitration clauses, a power given to employers under the FAA, to prevent workers from banding together in a class action lawsuit, given the NLRA’s protections of concerted activity. It is an important question with an answer that can potentially further undermine workers’ rights.



In June 2017, the Trump Administration filed an amicus brief in support of the corporations in these cases.⁷⁵ This is a reversal from the Obama Administration’s position that placed its support behind workers and the NLRB, and now places the U.S. Solicitor General in opposition to the NLRB.⁷⁶

A Supreme Court ruling against the right to concerted activity would deprive workers of rights they have gained through multiple laws enacted by a number of different Congresses including the National Labor Relations Act (NLRA) and Norris LaGuardia Act that “aimed to reduce industrial strife resulting from court injunctions that enforced one-sided employment contracts imposed on individual workers.”⁷⁷

Nondisparagement Clauses

Like forced arbitration clauses, nondisparagement agreements are included in employment contracts. According to the New York Times, the use of nondisparagement clauses, prevalent in settlement agreements, are increasingly used in employee contracts.⁷⁸ Nondisparagement clauses may prevent employees, who have been victims of their company’s misconduct and illegal acts, from speaking out against the company. If employees violate nondisparagement clauses, they are subject to expensive litigation as a violation of the contract.

In addition, nondisparagement clauses create a “culture of secrecy” and shields corporate wrongdoing. The New York Times reports that tech companies have increased the use of nondisparagement clauses, often having an adverse effect on women when they are sexually harassed in the workplace.⁷⁹ Similar to the problems with mandatory arbitration clauses, nondisparagement clauses not only prevent workers from publicly speaking up about their experiences at a company but they shield companies from public scrutiny. Companies lack accountability when there is no public scrutiny that challenges corporate culture and history of sexism or discrimination. Additionally prospective employees do not have public knowledge of the company’s culture.

RECOMMENDATIONS

It is crucial for New York City and State to take affirmative steps to protect workers' rights and ensure that all parties have access to a fair and open judicial process for adjudicating violations of labor, human rights, and other laws. The City and State also should ensure that residents are able to seek redress under New York City and State laws, including the New York City Human Rights Law and New York State Human Rights Law.

Create a NYC Forced Arbitration and Nondisparagement Clause Registry: New York City Should Require Companies to register if they use Forced Arbitration and Nondisparagement Clauses.

Binding arbitration and nondisparagement clauses are frequently buried in employment contracts or located in employee handbooks after the employee has started employment. Oftentimes, employees are blindsided by the existence of the clauses until a workplace dispute, such as wage theft or wrongful termination, arises. As a result, the employee unknowingly waives the right to be heard in front of a judge and jury. Forced arbitration also deprives employees of the ability to appeal an unfavorable decision and the option of banding together with fellow employees to sue the employer—and places them into a disadvantaged forum. The City registry will be publicly accessible and will create transparency between employer and potential employees, safeguarding and empowering workers' rights.

Mandate That Companies That Require Forced Arbitration and Nondisparagement Clauses for Employment Declare It in Job Advertisements.

Similar to the NYC Registry, prospective employees can learn about a company's use of forced arbitration or nondisparagement clauses prior to engaging with the company. This will increase transparency and give job seekers the opportunity to fully assess employment options and factor in these forced clauses when deciding upon which company to work for.

New York City Should Not Do Business with Companies That Require Forced Arbitration.

New York City should only contract and work with companies that engage in fair employment practices. New York City workers should be able to fully avail themselves of their rights and protections under City laws such as the NYC Human Rights Law. Refusing to contract with companies that use forced arbitration to resolve workplace disputes advances New York City's interest in protecting workers' rights. Just as importantly, it advances the City's interest in contracting only with "responsible bidders." Forced arbitration can temporarily conceal systemic rot in companies that eventually boils over and leads to catastrophic disruption. Forced arbitration policies create an unjustifiable level of risk when the City must be able to rely on contractors to deliver as promised. Additionally, the City's procurement rules explicitly state that agencies must consider whether a satisfactory record of business integrity is met when determining whether a bidder is sufficiently responsible.⁸⁰ A company's decision shows not only irresponsible risk, but demonstrates a clear lack of ethics in dealing with its workers. Consequently, it is



only logical to consider the practice in determining whether a bidder is suitably responsible.

In 2016, the Obama Administration issued a rule that prevented nursing homes that receive Medicare and Medicaid from forcing patients to agree to mandatory arbitration clauses prior to admission. Similarly, companies that receive City benefits or incentives should agree to not use forced arbitration—this promotes nondiscriminatory business practices, the fair treatment of workers, and workers accessing their legal protections.

Enact the Empowering People in Rights Enforcement (EMPIRE) Act (A7958) That Promotes Enforcement of Local Laws by Delegating Enforcement Activity to Private Attorneys General.

By passing and enforcing the EMPIRE Act (sponsored by Assemblywoman Latoya Joyner), New York State can increase its enforcement capacity by delegating New York State’s enforcement power to individuals. Aggrieved employees can act on the State’s behalf to initiate public enforcement when labor laws are violated. The lawsuit is brought under the State’s name; therefore the claim cannot be brought into arbitration.

Enact the NY State Bill (A2842) That Prohibits the State from Contracting with Companies That Use Mandatory Arbitration Clauses in Certain Consumer and Employment Contracts.

New York State Assembly Bill A2842 (sponsored by Assemblyman Jeffrey Dinowitz) prohibits state agencies from entering into contracts with entities which enforce mandatory arbitration clauses in consumer and employment contracts, safeguarding workers’ rights statewide.

Examine the Feasibility of Allowing Representative Actions on Behalf of the City of New York.

Similar to the State EMPIRE Act, New York City should explore the option of increasing the City’s enforcement capacity by delegating the authority of the NYC Commission on Human Rights to allow representative actions on behalf of the City. Workers could then bring actions against their employers for discrimination claims on behalf of New York City.

CONCLUSION

Voluntary arbitration can be a legitimate, cost-effective, and efficient way to resolve disputes between two parties with equal bargaining power. However, forced arbitration and nondisparagement clauses pose a significant threat to workers' rights and promote a system that strips workers of their right to access the court system. This is particularly detrimental when workers are deprived of the option to band together to file class action lawsuits.

The City must act expediently to safeguard workers and to hold employers accountable for their actions. The policy recommendations put forth by the Public Advocate's Office are the first of many important steps needed to protect workers and their families and to combat the injustices forced arbitration and nondisparagement clauses create.



ACKNOWLEDGEMENTS

Writing and research for this policy report was conducted by Jennifer Rubin, Legal and Policy Intern and Bich Ha Pham, Director of Policy. Additional support was provided by Jennifer Levy, General Counsel for Litigation; Molly Thomas-Jensen, Deputy Council; and Anna Brower, Communications Director.

END NOTES

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October 2017