



August 26, 2015

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General Services Administration, Regulatory Secretariat
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Washington, DC 20405.

ATTN: Ms. Tiffany Jones
U.S. Department of Labor
Room S-2312
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Washington, D.C. 20210

Via: <http://www.regulations.gov>.

Re: FAR Case 2014-025; DOL-2015-0002

**Comments to the FAR Proposed Rule and DOL Guidance for Executive Order 13673,
Fair Pay and Safe Workplaces**

The undersigned public interest organizations and Fair Arbitration Now, a network of more than 70 consumer, labor, legal and community organizations, are pleased to submit the below comments on the Department of Labor's Guidance and the proposed rule by the Department of Defense, General Services Administration and National Aeronautics and Space Administration that implements Executive Order 13673, "Fair Pay and Safe Workplaces." When President Barack Obama issued the executive order a year ago, our organizations applauded the move.¹

Specifically, we commended Section 6 of the executive order, which commanded companies with federal contracts of \$1 million or more to permit their workers to resolve civil claims in court for discrimination under Title VII of the Civil Rights Act of 1964, and tort claims related to sexual assault or harassment, for discrimination under Title VII of the Civil Rights Act of 1964 and tort claims related to sexual assault or harassment in court, instead of in predispute binding mandatory arbitration (or "forced arbitration"). Under the executive order, forced arbitration clauses in federal contractors' agreements with employees and independent contractors are unenforceable for disputes arising out of these claims. The executive order ensured that any agreement to arbitrate these claims would be

¹ *Reactions to Fair Pay and Safe Workplaces Executive Order*, FAIR ARBITRATION NOW, July 31, 2014, <http://bit.ly/1DZ7bQ9>.

voluntary and chosen by *both* worker and employer after a dispute arises. These comments will focus on the proposed rule implementing the arbitration requirements.

Our organizations have long opposed the use of forced arbitration against consumers and non-bargaining employees. We have observed how eliminating access to court has denied individuals the ability to seek appropriate remedies for harm they suffered, and has shielded companies from accountability for harm they cause.

The Impact of Forced Arbitration and Class Action Bans in the Workplace

Forced arbitration clauses in employment contracts strip victims of workplace discrimination and harassment of their constitutional right to have their claims heard by an impartial judge and jury. Currently, employers are allowed to make acceptance of a forced arbitration clause a condition of hiring or continued employment. In addition, employers increasingly are using forced arbitration clauses to restrict workers' ability to band together in class actions to seek justice for wrongful employer conduct.

Forced arbitration clauses and class action bans undermine the enforcement of civil rights laws because under this private, secret system, the arbitrator is dependent on the repeat business of employers, which leads to bias in the employers' favor. Forced arbitration also hinders the development of legal precedent because in arbitration, the arbitrator is not required to apply the law in cases, and any decision by the arbitrator is generally not publicly available for court or other arbitrators to follow or consider. The discovery process, which is often critical in uncovering systemic discrimination or other employer misconduct, is often restricted or nonexistent in private arbitration. Further, arbitration decisions are rarely appealable.

Employees' mere access to court provides an incentive for employers to comply with civil rights, worker safety and other employment laws. Employers consider the financial and societal costs of workplace violations. Employment class actions, for example, have uncovered and cracked down on widespread racial and gender discrimination² and have compensated workers deprived of statutory rights such as overtime pay required by wage and hour laws.³ However, employers' increasing use of forced arbitration in contracts with employees gradually has removed that incentive and employer risk. With forced arbitration, it has become more economical for some employers to ignore widespread civil rights and employment law violations than to correct them. And employers inclined to disregard worker protections are able to do so with less and less accountability.

Forced arbitration clauses and class action bans interfere with employees' ability to enforce critical laws. Numerous federal antidiscrimination statutes specifically grant individuals the right to pursue remedies for violations of their provisions. These include Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Family and Medical

² See, e.g., *McReynolds v. Sodexo Marriott Services, Inc.*, 1:01-cv-00510-ESH (D.D.C. 2005), <http://www.clearinghouse.net/detail.php?id=10624>.

³ See, e.g., Ricardo Lopez, *Workers reach \$21-million settlement against Wal-Mart, warehouses*, LOS ANGELES TIMES (May 14, 2014), <http://lat.ms/1NlsU86>.

Leave Act.⁴ In these statutes, Congress recognized that private actions are needed to ensure proper enforcement and compliance and to further the public interest.

Even federal courts applying the law in cases before them have shown concern regarding the restrictions on individuals' claims. In a 2013 case, a restaurant employee sought a class action against the employer corporation alleging untipped work and subminimum wages in apparent violation of the federal Fair Labor Standards Act and the state's minimum wage act. The employment contract contained an arbitration clause and a ban on participation in class actions. The trial court enforced the arbitration provision, but also stated that the result was "unappetizing," and that the state of the law was "lamentable" but compelled the court to deny the employee's access to court.⁵

Further, many cases of widespread violations remain undiscovered for long periods of time because of forced arbitration. For example, in 2014, the head of a national clothing retailer was fired for misconduct in the workplace. During a 10-year span he had been accused of sexual harassment by multiple women, but due to the secrecy of forced arbitration, the misconduct was not discovered for a long time.⁶ The retailer's employees were subject to forced arbitration clauses in their employment contracts, but a few sued in court in an attempt to nullify the provisions. A commentator observed the effect of forced arbitration on employees, and the economic impact on companies and their governing boards: "The board can use these provisions to hide a pattern of bad conduct. Either employees will be deterred from bringing claims or, if they do, the claims will be buried in the silence of arbitration... [I]t will be the investors holding the bag when these bad practices inevitably do come to light."⁷

Executive Order's Section 6 Will Improve Accountability for Workplace Violations

In 2013, a Senate report concluded that "[m]any of the most flagrant violators of federal workplace safety and wage laws are also recipients of large federal contracts."⁸ The report identified instances of federal contractors paying penalties to resolve allegations of engaging in racially discriminatory hiring practices.⁹

Federal defense contractors are already familiar with the EO's arbitration requirements, which first benefited their employees under Section 8116 of the FY 2010 Defense Appropriations Act. Indeed, the EO's arbitration mandate is modeled after this section, which was added to the defense funding law as an amendment introduced by Sen. Al Franken (D-Minn.). The "Franken Amendment," as the section is often called, prohibits the use of federal funds for federal contracts over \$1 million, when the contractors use forced arbitration against their employees for civil claims related to discrimination, sexual assault

⁴ 42 U.S.C. §2000e-5(f); 29 U.S.C. § 216(b); 42 U.S.C. § 12117(a); 29 U.S.C. §626(c); 29 U.S.C § 2617(a)(2).

⁵ *Porreca v. Rose Grp.*, CIV.A. 13-1674, 2013 WL 6498392 (E.D. Pa. Dec. 11, 2013).

⁶ Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, NEW YORK TIMES, July 15, 2014, <http://nyti.ms/1NlnMkk>.

⁷ *Id.*

⁸ U.S. Senate Health, Education, Labor and Pensions Committee, *Federal Contractors Frequently Put Large-Scale Drug Compounding and the Workers' Lives and Livelihoods at Risk Ongoing Risk to Public Health*, Majority Committee Staff Report, at 1, December 11, 2013, <http://1.usa.gov/1Leob4l>.

⁹ *Id.* at 22.

and harassment.¹⁰ The Department of Defense has implemented the Franken Amendment, and contractors are obligated to comply.

As this proposed rule states, the executive order is “designed to improve contractor compliance with labor laws and increase efficiency and cost savings in Federal contracting...Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable and satisfactory delivery of goods and services to the Federal Government.” In turn, employers are more inclined to adhere to labor laws with the promise of vigorous private and public enforcement of those laws.

While the proposed rule notes that new arbitration requirements may not be applied to worker contracts entered into before this rule is implemented, we urge that the final rule be applied to any employee contract or independent contract terms that are renewed, modified, or renegotiated after the federal contracting clause with its new arbitration requirements is finalized.

Finally, while we strongly support the executive order’s (and proposed rule’s) mandate on forced arbitration, we note that it covers a limited set of employee claims. There remain numerous other workplace violations, including wage and disability claims, that could remain subject to forced arbitration. In our view, companies doing business with the federal government should be prohibited from restricting their employees’ enforcement of laws in all instances. The potential of full accountability for all disputes would further improve efficiency and cost savings in federal contracting. Nevertheless, the protections under the proposed rule are a significant step forward in restoring employment rights and improving accountability for workplace violations.

If you have any questions or concerns, please contact Christine Hines, Public Citizen, chines@citizen.org, (202) 454-5135 or David Seligman, National Consumer Law Center, dseligman@nclc.org, (617) 542-8010, ext. 317.

Alliance for Justice
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Consumer Action
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National Association of Consumer Advocates
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National Consumers League
Public Citizen
National Employment Lawyers Association
Workplace Fairness

¹⁰ 48 C.F.R. 252.222-7006.