

115TH CONGRESS  
2D SESSION

# S. 3615

To prohibit forced arbitration in employment disputes, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

NOVEMBER 14, 2018

Mrs. MURRAY (for herself, Mr. BLUMENTHAL, Ms. BALDWIN, Mr. BOOKER, Mr. BROWN, Ms. CORTEZ MASTO, Mrs. GILLIBRAND, Ms. HARRIS, Ms. HASSAN, Ms. HIRONO, Mr. MARKEY, Mr. MERKLEY, Mr. REED, Mr. SANDERS, Mr. SCHATZ, Ms. WARREN, Mr. WHITEHOUSE, Mr. WYDEN, and Ms. SMITH) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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## A BILL

To prohibit forced arbitration in employment disputes, and  
for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restoring Justice for  
5 Workers Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) Millions of employees are currently forced to  
9 accept, as a condition of employment, contractual

1 provisions that block their access to the courts or  
2 prohibit them from joining together with other em-  
3 ployees to seek joint, class, or collective relief for vio-  
4 lations of their rights. This has led to widespread  
5 nonenforcement of employees' rights and has per-  
6 mitted significant violations of those rights to con-  
7 tinue unabated.

8 (2) Most employees have little or no meaningful  
9 choice regarding whether to accept these provisions.  
10 Often, employees are not even aware that they have  
11 given up the right to seek recourse in court or have  
12 waived their right to join other employees in joint,  
13 class, or collective actions.

14 (3) The Federal Arbitration Act (now enacted  
15 as chapter 1 of title 9, United States Code) was in-  
16 tended to apply to disputes between commercial enti-  
17 ties of generally similar sophistication and bar-  
18 gaining power. Despite this congressional intent, the  
19 Supreme Court of the United States has interpreted  
20 the Federal Arbitration Act so that it now extends  
21 to employment disputes.

22 (4) The National Labor Relations Act (29  
23 U.S.C. 151 et seq.) protects employees' right to en-  
24 gage in concerted activities for the purpose of mu-  
25 tual aid or protection. This was intended and long

1 understood to encompass employees' right to collec-  
2 tively seek relief for violations of their workplace  
3 rights. However, contrary to the plain text of the  
4 law and congressional intent, the Supreme Court of  
5 the United States, in *Epic Systems Corp. v. Lewis*,  
6 138 S. Ct. 1612 (2018), decided that employees may  
7 be forced, as a condition of employment, to waive  
8 their right to collectively litigate employment actions.

9 (5) Forced individual dispute resolution under-  
10 mines employees' rights and exacerbates the inequal-  
11 ity of bargaining power between employees and em-  
12 ployers because joining a joint, class, or collective ac-  
13 tion is often the only way employees can afford to  
14 seek relief for violations of their rights.

15 (6) Employees who are forced to submit to indi-  
16 vidual dispute resolution often seek no redress at all  
17 due to well-founded fear of retaliation.

18 (7) Protecting the rights of employees to indi-  
19 vidualy or concertedly seek relief for violations of  
20 their labor rights through the justice system protects  
21 the public interest and safeguards commerce from  
22 injury.

23 **SEC. 3. PURPOSES.**

24 The purposes of this Act are to—

1           (1) prohibit predispute arbitration agreements  
2 that require arbitration of employment disputes;

3           (2) prohibit retaliation against employees for  
4 refusing to arbitrate employment disputes;

5           (3) provide protections to ensure that  
6 postdispute arbitration agreements are truly vol-  
7 untary and with the informed consent of employees;  
8 and

9           (4) amend the National Labor Relations Act to  
10 prohibit agreements and practices that interfere with  
11 employees' right to collectively litigate employment  
12 disputes.

13 **SEC. 4. PROTECTION OF CONCERTED ACTIVITY.**

14           Section 8(a) of the National Labor Relations Act (29  
15 U.S.C. 158(a)) is amended—

16           (1) in paragraph (5), by striking the period at  
17 the end and inserting “; and”; and

18           (2) by adding at the end the following:

19           “(6)(A) to enter into or attempt to enforce any  
20 agreement, express or implied, whereby prior to a  
21 dispute to which the agreement applies, an employee  
22 undertakes or promises not to pursue, bring, join,  
23 litigate, or support any kind of joint, class, or collec-  
24 tive legal action arising from or relating to the em-

1       employment of such employee in any forum that, but  
2       for such agreement, is of competent jurisdiction; or

3               “(B) to retaliate or threaten to retaliate against  
4       an employee for refusing to undertake or promise  
5       not to pursue, bring, join, litigate, or support any  
6       kind of joint, class, or collective legal action arising  
7       from or relating to the employment of such em-  
8       ployee:

9       *Provided*, That any agreement that violates this  
10      paragraph or results from a violation of this para-  
11      graph shall be to such extent unenforceable and  
12      void: *Provided further*, That this paragraph shall not  
13      apply to any agreement embodied in or expressly  
14      permitted by a contract between an employer and a  
15      labor organization.”.

16 **SEC. 5. ARBITRATION OF EMPLOYMENT DISPUTES.**

17       (a) IN GENERAL.—Title 9 of the United States Code  
18      is amended by adding at the end the following:

19                       **“CHAPTER 4—ARBITRATION OF**  
20                       **EMPLOYMENT DISPUTES**

“Sec.

“401. Definitions.

“402. Validity and enforceability.

21 **“§ 401. Definitions**

22       “In this chapter—

23               “(1) the terms ‘commerce’, ‘employee’, and ‘em-  
24      ployer’ have the meanings given the terms in section

1 3 of the Fair Labor Standards Act of 1938 (29  
2 U.S.C. 203);

3 “(2) the term ‘employment dispute’ means a  
4 dispute between an employer and an employee arising from or relating to the employment of the employee, and includes disputes that arise under common law or from the alleged violation of the Constitution of the United States, the constitution of a State, or a Federal, State, territorial, county, or municipal statute;

11 “(3) the term ‘predispute arbitration agreement’ means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement; and

15 “(4) the term ‘postdispute arbitration agreement’ means any agreement to arbitrate a dispute that arose before the time of the making of the agreement.

19 **“§ 402. Validity and enforceability**

20 “(a) IN GENERAL.—Notwithstanding any other chapter of this title—

22 “(1) no predispute arbitration agreement shall  
23 be valid or enforceable if it requires arbitration of an  
24 employment dispute;

1           “(2) no postdispute arbitration agreement that  
2           requires arbitration of an employment dispute shall  
3           be valid or enforceable unless—

4                   “(A) the agreement was not required by  
5                   the employer, obtained by coercion or threat of  
6                   adverse action, or made a condition of employ-  
7                   ment or any employment-related privilege or  
8                   benefit;

9                   “(B) each employee entering into the  
10                  agreement was informed in writing using suffi-  
11                  ciently plain language likely to be understood by  
12                  the average employee of—

13                   “(i) the right of the employee under  
14                   paragraph (3) to refuse to enter the agree-  
15                   ment without retaliation; and

16                   “(ii) the protections under section  
17                   8(a)(6) of the National Labor Relations  
18                   Act (29 U.S.C. 158(a)(6));

19                   “(C) each employee entering into the  
20                   agreement entered the agreement after a wait-  
21                   ing period of not fewer than 45 days, beginning  
22                   on the date on which the employee was provided  
23                   both the final text of the agreement and the  
24                   disclosures required under subparagraph (B);  
25                   and

1           “(D) each employee entering into the  
2           agreement affirmatively consented to the agree-  
3           ment in writing; and

4           “(3) no employer may retaliate or threaten to  
5           retaliate against an employee for refusing to enter  
6           into an agreement that provides for arbitration of an  
7           employment dispute.

8           “(b) STATUTE OF LIMITATIONS.—During the waiting  
9           period described in subsection (a)(2)(C), the statute of  
10          limitations for any claims that arise from or form the basis  
11          for the applicable employment dispute shall be tolled.

12          “(c) CIVIL ACTION.—Any person who is injured by  
13          reason of a violation of subsection (a)(3) may bring a civil  
14          action in the appropriate district court of the United  
15          States against the employer within 2 years of the violation,  
16          or within 3 years if such violation is willful. Relief granted  
17          in such an action shall include a reasonable attorney’s fee,  
18          other reasonable costs associated with maintaining the ac-  
19          tion, and any appropriate relief authorized by section  
20          706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–  
21          5(g)) or by section 1977A(b) of the Revised Statutes (42  
22          U.S.C. 1981a(b)).

23          “(d) APPLICABILITY.—

24                  “(1) IN GENERAL.—This chapter applies to em-  
25          ployers and employees engaged in activity affecting



1 commerce to the fullest extent permitted by the  
2 United States Constitution. An issue as to whether  
3 this chapter applies to an arbitration agreement  
4 shall be determined under Federal law. The applica-  
5 bility of this chapter to an agreement to arbitrate  
6 and the validity and enforceability of an agreement  
7 to which this chapter applies shall be determined by  
8 a court, rather than an arbitrator, regardless of  
9 whether any contractual provision delegates such  
10 matters to the arbitrator and irrespective of whether  
11 the party resisting arbitration challenges the arbitra-  
12 tion agreement specifically or in conjunction with  
13 other terms of the contract containing such agree-  
14 ment.

15 “(2) COLLECTIVE BARGAINING AGREEMENTS.—  
16 Nothing in this chapter shall apply to any arbitra-  
17 tion provision in a contract between an employer and  
18 a labor organization, except that no such arbitration  
19 provision shall have the effect of waiving the right  
20 of an employee to seek judicial enforcement of a  
21 right arising under a provision of the Constitution of  
22 the United States, the constitution of a State, or a  
23 Federal or State statute, or public policy arising  
24 therefrom.”.

25 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

1 (1) IN GENERAL.—Title 9 of the United States  
2 Code is amended—

3 (A) in section 1, by striking “of seamen,”  
4 and all that follows through “interstate com-  
5 merce”;

6 (B) in section 2, by inserting “or as other-  
7 wise provided in chapter 4” before the period at  
8 the end;

9 (C) in section 208—

10 (i) in the section heading, by striking  
11 **“Chapter 1; residual application”**  
12 and inserting **“Application”**; and

13 (ii) by adding at the end the fol-  
14 lowing: “This chapter applies to the extent  
15 that this chapter is not in conflict with  
16 chapter 4.”; and

17 (D) in section 307—

18 (i) in the section heading, by striking  
19 **“Chapter 1; residual application”**  
20 and inserting **“Application”**; and

21 (ii) by adding at the end the fol-  
22 lowing: “This chapter applies to the extent  
23 that this chapter is not in conflict with  
24 chapter 4.”.

25 (2) TABLE OF SECTIONS.—

1 (A) CHAPTER 2.—The table of sections for  
2 chapter 2 of title 9, United States Code, is  
3 amended by striking the item relating to section  
4 208 and inserting the following:

“208. Application.”.

5 (B) CHAPTER 3.—The table of sections for  
6 chapter 3 of title 9, United States Code, is  
7 amended by striking the item relating to section  
8 307 and inserting the following:

“307. Application.”.

9 (3) TABLE OF CHAPTERS.—The table of chap-  
10 ters for title 9, United States Code, is amended by  
11 adding at the end the following:

“4. Arbitration of employment disputes ..... 401.”.

12 **SEC. 6. EFFECTIVE DATE.**

13 This Act, and the amendments made by this Act,  
14 shall take effect on the date of enactment of this Act and  
15 shall apply with respect to any dispute or claim that arises  
16 on or after such date, including any dispute or claim to  
17 which an agreement predating such date applies.

