

117TH CONGRESS
2D SESSION

S. 4219

To amend the Employee Retirement Income Security Act of 1974 to provide that any mandatory predispute or coerced postdispute arbitration clause, class action waiver, representation waiver, or discretionary clause with respect to a plan is unenforceable, to prohibit any such clause or waiver from being included in a plan document or other agreement with plan participants, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 12, 2022

Ms. SMITH introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Employee Retirement Income Security Act of 1974 to provide that any mandatory predispute or coerced postdispute arbitration clause, class action waiver, representation waiver, or discretionary clause with respect to a plan is unenforceable, to prohibit any such clause or waiver from being included in a plan document or other agreement with plan participants, 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,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Employee and Retiree
3 Access to Justice Act of 2022”.

4 **SEC. 2. UNENFORCEABLE ARBITRATION CLAUSES, CLASS**
5 **ACTION WAIVERS, REPRESENTATION WAIV-**
6 **ERS, AND DISCRETIONARY CLAUSES.**

7 (a) IN GENERAL.—Section 502 of the Employee Re-
8 tirement Income Security Act of 1974 (29 U.S.C. 1132)
9 is amended by adding at the end the following:

10 “(n)(1) In any civil action brought by, or on behalf
11 of, a participant or beneficiary pursuant to this section
12 or with respect to a common law claim involving a plan
13 or plan benefit, notwithstanding any other provision of
14 law—

15 “(A) no predispute arbitration provision shall
16 be valid or enforceable if it requires arbitration of a
17 matter related to a claim brought under this section;

18 “(B) no postdispute arbitration provision shall
19 be valid or enforceable unless—

20 “(i) the provision was not required by any
21 person, obtained by coercion or threat of ad-
22 verse action, or made a condition of partici-
23 pating in a plan, receiving benefits under a
24 plan, or receiving any other employment, work,
25 or any employment-related or work-related
26 privilege or benefit;

1 “(ii) each participant or beneficiary agree-
2 ing to the provision was informed, through a
3 paper notice, in a manner reasonably calculated
4 to be understood by the average plan partici-
5 pant, of the right of the participant or bene-
6 ficiary under subparagraph (C) to refuse to
7 agree to the provision without retaliation or
8 threat of retaliation;

9 “(iii) each participant or beneficiary agree-
10 ing to the provision so agreed after a waiting
11 period of not fewer than 45 days, beginning on
12 the date on which the participant or beneficiary
13 was provided both the final text of the provision
14 and the disclosures required under clause (ii);
15 and

16 “(iv) each participant or beneficiary agree-
17 ing to the provision affirmatively consented to
18 the provision in writing;

19 “(C) no covered provision shall be valid or en-
20 forceable, if prior to a dispute to which the covered
21 provision applies, a participant or beneficiary under-
22 takes or promises not to pursue, bring, join, litigate,
23 or support any kind of individual, joint, class, rep-
24 resentative, or collective claim available under this

1 section in any forum that, but for such covered pro-
2 vision, is of competent jurisdiction;

3 “(D) no covered provision shall be valid or en-
4 forceable, if after a dispute to which the covered pro-
5 vision applies arises, a participant or beneficiary un-
6 dertakes or promises not to pursue, bring, join, liti-
7 gate, or support any kind of individual, joint, class,
8 representative, or collective claim under this section
9 in any forum that, but for such covered provision, is
10 of competent jurisdiction, unless the covered provi-
11 sion meets the requirements of subparagraph (B);
12 and

13 “(E) no covered provision related to a plan
14 other than a multiemployer plan shall be valid or en-
15 forceable that purports to confer discretionary au-
16 thority to any person with respect to benefit deter-
17 minations or interpretation of plan language, or to
18 provide a standard of review of such determinations
19 or interpretation by a reviewing court in an action
20 brought under this section that would require any-
21 thing other than de novo review of such determina-
22 tions or interpretation.

23 “(2) In this subsection—

24 “(A) the term ‘covered provision’ means any
25 document, instrument, or agreement related to a

1 plan or plan benefit, regardless of whether such pro-
2 vision appears in a plan document or in a separate
3 agreement;

4 “(B) the term ‘predispute arbitration provision’
5 means a covered provision that requires a partici-
6 pant or beneficiary to arbitrate a dispute related to
7 the plan or an amendment to the plan that had not
8 yet arisen at the time such provision took effect;

9 “(C) the term ‘postdispute arbitration provi-
10 sion’ means a covered provision that requires a par-
11 ticipant or beneficiary to arbitrate a dispute related
12 to the plan or an amendment to the plan that arose
13 before the time such provision took effect; and

14 “(D) the term ‘retaliation’ means any action in
15 violation of section 510.

16 “(3)(A) Any dispute as to whether a covered provi-
17 sion that requires a participant or beneficiary to arbitrate
18 a dispute related to a plan is valid and enforceable shall
19 be determined by a court, rather than an arbitrator, re-
20 gardless of whether any contractual provision purports to
21 delegate such determinations to the arbitrator and irre-
22 spective of whether the party resisting arbitration chal-
23 lenges the arbitration agreement specifically or in conjunc-
24 tion with other terms of the contract containing such
25 agreement.

1 “(B) For purposes of this subsection, a dispute shall
 2 be considered to arise only when a plaintiff has actual
 3 knowledge (within the meaning of such term in section
 4 413) of a breach or violation giving rise to a claim under
 5 this section.”.

6 (b) REGULATIONS.—The Secretary of Labor may
 7 promulgate such regulations as may be necessary to carry
 8 out the amendment made by subsection (a), including pro-
 9 viding for the form and content of notices required pursu-
 10 ant to such amendment.

11 **SEC. 3. PROHIBITION ON MANDATORY ARBITRATION**
 12 **CLAUSES, CLASS ACTION WAIVERS, REP-**
 13 **RESENTATION WAIVERS, AND DISCRE-**
 14 **TIONARY CLAUSES.**

15 Section 402 of the Employee Retirement Income Se-
 16 curity Act of 1974 (29 U.S.C. 1102) is amended by adding
 17 at the end the following:

18 “(d)(1) No covered person may—

19 “(A) require participants or beneficiaries to
 20 agree to a predispute arbitration provision as a con-
 21 dition for participation in, or receipt of benefits
 22 under, a plan;

23 “(B) agree to a postdispute arbitration provi-
 24 sion with a participant or beneficiary with respect to
 25 a plan or plan benefit unless the conditions of

1 clauses (i) through (iv) of section 502(n)(1)(B) are
 2 satisfied with respect to such provision; or

3 “(C) agree to any other covered provision with
 4 respect to a plan or plan benefit under any cir-
 5 cumstances under which such provision would not be
 6 valid and enforceable under subparagraphs (C)
 7 through (E) section 502(n)(1).

8 “(2) In this subsection—

9 “(A) the term ‘covered person’ means—

10 “(i) a plan;

11 “(ii) a plan sponsor;

12 “(iii) an employer; or

13 “(iv) a person engaged by a plan for pur-
 14 poses of administering or operating the plan;
 15 and

16 “(B) the terms ‘covered provision’, ‘predispute
 17 arbitration provision’ and ‘postdispute arbitration
 18 provision’ have the meanings given such terms in
 19 section 502(n)(2).”.

20 **SEC. 4. EFFECTIVE DATE.**

21 (a) IN GENERAL.—The amendments made by sec-
 22 tions 2 and 3 shall take effect on the date of enactment
 23 of this Act and shall apply with respect to any dispute
 24 or claim that arises or accrues on or after such date, in-
 25 cluding any dispute or claim to which a provision pre-

1 dating such date applies, regardless of whether plan docu-
2 ments have been updated in accordance with such amend-
3 ments.

4 (b) ENFORCEMENT WITH RESPECT TO PLAN DOCU-
5 MENT UPDATES.—Notwithstanding subsection (a), no
6 person shall be deemed to be in violation of such amend-
7 ments on account of plan documents that have not been
8 updated in accordance with such amendments until after
9 the beginning of the first plan year that begins on or after
10 the date that is 1 year after the date of enactment of this
11 Act, provided that such person acts in accordance with
12 such amendments during the period in which the plan doc-
13 uments have not been updated.

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