

Arbitration Fairness Act Would Ban Predispute Arbitration Agreements in Employment and Other Areas

H.R. 2010/S. 931 Would Ban Practice That Has Helped Reduce Delays and Expenses in Employment Litigation

Legislation has been introduced in Congress that would ban the use of predispute arbitration agreements. The so-called “Arbitration Fairness Act” (AFA; H.R. 1020 / S. 931) would not only ban the future use of predispute arbitration agreements that relate to employment disputes but would also invalidate all current predispute arbitration agreements. The AFA would also prohibit predispute arbitration agreements regarding consumer or franchise disputes. But the bill would continue to permit predispute agreements in employment disputes arising under collective bargaining agreements (CBAs).

Arbitration a Favored Public Policy for Decades Predispute arbitration agreements have been treated favorably by the courts and routinely used for over six decades in the employment context. Indeed, the law that the AFA would amend—the Federal Arbitration Act (FAA)—was enacted in 1925 to protect arbitration agreements from some state courts which were hostile to arbitration. Arbitrators—pursuant to arbitration agreements—interpret contracts or apply the law to determine the rights of the respective parties. The FAA requires that federal and state courts enforce arbitration agreements and arbitration decisions and it provides grounds for appealing decisions that are clearly contrary to law or public policy. Arbitration has long been favored because, among other benefits, it typically avoids the long delays that are associated with litigation in the courts, alleviates the caseload of the courts, reduces expenses associated with traditional litigation, and provides a more confidential forum for issues to be resolved.

Proposed Ban Ignores Existing Protocols The AFA would prohibit predispute arbitration agreements even if both parties to the agreement knowingly and willingly sign. Moreover, proponents of the AFA claim that in predispute arbitration agreements employees wind up paying higher costs and attorney’s fees, receive limited damages, and do not enjoy the same procedural safeguards as in litigation. However, most employers choose to or are required to adhere to due process protocols, which are mandatory for arbitrations with major arbitration associations such as American Arbitration Association or JAMS. These protocols include procedural and other protections such as requiring employers to pay costs and precluding statutory damages from being limited. Also, attorney’s fees must be awarded in a similar manner as if the case were brought in court. Moreover, according to one study by the National Workrights Institute, prohibiting predispute arbitration agreements will likely result in far fewer employees’ claims being heard by any tribunal, which will ultimately harm workers.¹

Senate Bill More Expansive Than House Version S. 931 would adopt a narrower exclusion for CBAs and expand the scope of prohibited predispute arbitration agreements. While both House and Senate versions would permit predispute arbitration agreements of disputes relating to CBAs, S. 931 would prohibit the enforcement of such agreements if they purported to apply to nondiscrimination or other workplace laws. This would overturning the recent U.S. Supreme Court decision in *Penn Plaza LLC v. Byett*, 556 U.S. ____ (2009), in which the Court ruled that a predispute arbitration agreement in a CBA requiring that all employment claims (including nondiscrimination laws) be brought in arbitration was valid and enforceable.

¹ Lewis Maltby, *Out of the Frying Pan, Into the Fire*, National Workrights Institute (May 2003).