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S. 1491

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

IN THE SENATE OF THE UNITED STATES

MAY 15, 2019

Mrs. MURRAY (for herself, Ms. BALDWIN, Mr. BLUMENTHAL, Mr. BOOKER, Mr. BROWN, Mr. CASEY, Ms. CORTEZ MASTO, Mr. DURBIN, Mrs. GILLIBRAND, Ms. HARRIS, Mr. KING, Ms. KLOBUCHAR, Mr. MARKEY, Mr. MERKLEY, Mr. REED, Mr. SANDERS, Mrs. SHAHEEN, and Ms. WARREN) 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 work 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 workers are currently forced to
9 accept, as a condition of employment or work, con-

1 tractual provisions that block their access to the
2 courts or prohibit them from joining together with
3 other workers to seek joint, class, or collective relief
4 for violations of their rights. This has led to wide-
5 spread nonenforcement of workers' rights and has
6 permitted significant violations of those rights to
7 continue unabated.

8 (2) Most workers have little or no meaningful
9 choice regarding whether to accept these provisions.
10 Often, workers 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 workers 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 clarify the ability of commercial entities of
17 generally similar sophistication and bargaining
18 power to voluntarily agree to use arbitration to re-
19 solve disputes between them. Despite this congres-
20 sional intent, the Supreme Court of the United
21 States has interpreted the Federal Arbitration Act
22 so that it now extends to work disputes.

23 (4) The National Labor Relations Act (29
24 U.S.C. 151 et seq.) protects employees' right to en-
25 gage in concerted activities for the purpose of mu-

1 tual aid or protection. This was intended and long
2 understood to encompass employees' right to collec-
3 tively seek relief for violations of their workplace
4 rights. However, contrary to the plain text of the
5 law and congressional intent, the Supreme Court of
6 the United States, in Epic Systems Corp. v. Lewis,
7 138 S. Ct. 1612 (2018), decided that employees may
8 be forced, as a condition of employment, to waive
9 their right to act collectively with regard to employ-
10 ment actions.

11 (5) Forced individual dispute resolution under-
12 mines workers' rights and exacerbates the inequality
13 of bargaining power between workers and employers
14 because joining a joint, class, or collective action is
15 often the only way workers can afford to seek relief
16 for violations of their rights.

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

20 (7) Protecting the rights of workers to individ-
21 ually or concertedly seek relief for violations of their
22 labor rights through appropriate forums protects the
23 public interest and safeguards commerce from in-
24 jury.

1 **SEC. 3. PURPOSES.**

2 The purposes of this Act are to—

3 (1) prohibit predispute arbitration agreements
4 that require arbitration of work disputes;

5 (2) prohibit retaliation against workers for re-
6 fusing to arbitrate work disputes;

7 (3) provide protections to ensure that postdis-
8 pute arbitration agreements are truly voluntary and
9 with the informed consent of workers; and

10 (4) amend the National Labor Relations Act to
11 prohibit agreements and practices that interfere with
12 employees' right to engage in concerted activity re-
13 garding work disputes.

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

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

17 (1) in paragraph (5), by striking the period at
18 the end and inserting ''; and''; and

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

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

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

3 "(B) to coerce such an employee into under-
4 taking or promising not to pursue, bring, join, liti-
5 gate, or support any kind of joint, class, or collective
6 claim arising from or relating to the employment of
7 such employee; or

8 "(C) to retaliate or threaten to retaliate against
9 an employee for refusing to undertake or promise
10 not to pursue, bring, join, litigate, or support any
11 kind of joint, class, or collective claim arising from
12 or relating to the employment of such employee:
13 *Provided*, That any agreement that violates this
14 paragraph or results from a violation of this para-
15 graph shall be to such extent unenforceable and
16 void: *Provided further*, That this paragraph shall not
17 apply to any agreement embodied in or expressly
18 permitted by a contract between an employer and a
19 labor organization.".

20 (b) CONFORMING AMENDMENT.—Section 10(b) of
21 the National Labor Relations Act (29 U.S.C. 160(b)) is
22 amended by striking "discharge" and inserting "dis-
23 charge, or unless the person aggrieved thereby is an em-
24 ployee alleging a violation of section 8(a)(6) whose charge
25 involves a postdispute arbitration agreement that meets

the requirements under section 402(a)(2) of title 9, United States Code, or an agreement described in section 402(a)(4) of such title that meets the requirements under subparagraphs (A) through (D) of section 402(a)(2) of such title, in which event the six-month period shall be computed from the day the waiting period described in subparagraph (C) of such section ends''.

SEC. 5. ARBITRATION OF WORK DISPUTES.

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

"CHAPTER 4—ARBITRATION OF WORK DISPUTES

''Sec.
''401. Definitions.
''402. Validity and enforceability.

"§ 401. Definitions

''In this chapter—

''(1) the terms 'commerce', 'employee', and 'employer' have the meanings given the terms in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203);

''(2) the term 'covered entity' means—

''(A) an employer; or

''(B) an individual or entity that is not acting as an employer and engages the services of a worker;

1 "(3) the term 'predispute arbitration agree-
2 ment' means any agreement to arbitrate a dispute
3 that had not yet arisen at the time of the making
4 of the agreement;
5 "(4) the term 'postdispute arbitration agree-
6 ment' means any agreement to arbitrate a dispute
7 that arose before the time of the making of the
8 agreement;
9 "(5) the term 'worker' means—
10 "(A) an employee; or
11 "(B) an individual who is engaged by a
12 covered entity to perform services or work as an
13 independent contractor (regardless of the label
14 or classification assigned or used by the covered
15 entity); and
16 "(6) the term 'work dispute'—
17 "(A) means a dispute between one or more
18 workers (or their authorized representatives)
19 and a covered entity arising out of or related to
20 the work relationship or prospective work rela-
21 tionship between the workers and the covered
22 entity; and
23 "(B) includes, but is not limited to—
24 "(i) a dispute regarding the terms of,
25 payment for, advertising of, recruitment of,

1 referring of, arranging for, or discipline or
2 discharge in connection with such work;
3 "(ii) a dispute arising under any law
4 referred to or described in section 62(e) of
5 the Internal Revenue Code of 1986, includ-
6 ing any part of such a law not explicitly
7 referenced in such section that relates to
8 protecting individuals on a basis that is
9 protected under a law referred to or de-
10 scribed in such section; and
11 "(iii) a dispute in which an individual
12 or individuals seek certification—
13 "(I) as a class under rule 23 of
14 the Federal Rules of Civil Procedure;
15 "(II) as a collective action under
16 section 16(b) of the Fair Labor
17 Standards Act of 1938 (29 U.S.C.
18 216(b)); or
19 "(III) under a comparable rule or
20 provision of State law.
21 **"§ 402. Validity and enforceability**
22 "(a) IN GENERAL.—Notwithstanding any other chap-
23 ter of this title—

1 “(1) no predispute arbitration agreement shall
2 be valid or enforceable if it requires arbitration of a
3 work dispute;

4 “(2) no postdispute arbitration agreement that
5 requires arbitration of a work dispute shall be valid
6 or enforceable unless—

7 “(A) the agreement was not required by
8 the covered entity, obtained by coercion or
9 threat of adverse action, or made a condition of
10 employment, work, or any employment-related
11 or work-related privilege or benefit;

12 “(B) each worker entering into the agree-
13 ment was informed in writing using sufficiently
14 plain language likely to be understood by the
15 average worker of—

16 “(i) the right of the worker under
17 paragraph (3) to refuse to enter the agree-
18 ment without retaliation; and

19 “(ii) the protections under section
20 8(a)(6) of the National Labor Relations
21 Act (29 U.S.C. 158(a)(6));

22 “(C) each worker entering into the agree-
23 ment entered the agreement after a waiting pe-
24 riod of not fewer than 45 days, beginning on
25 the date on which the worker was provided both

1 the final text of the agreement and the disclo-
2 sures required under subparagraph (B); and
3 ''(D) each worker entering into the agree-
4 ment affirmatively consented to the agreement
5 in writing;
6 ''(3) no agreement shall be valid or enforceable,
7 whereby prior to a work dispute to which the agree-
8 ment applies, a worker undertakes or promises not
9 to pursue, bring, join, litigate, or support any kind
10 of joint, class, or collective claim arising from or re-
11 lating to a work dispute in any forum that, but for
12 such agreement, is of competent jurisdiction;
13 ''(4) no agreement shall be valid or enforceable,
14 whereby after a work dispute to which the agree-
15 ment applies arises, a worker undertakes or prom-
16 ises not to pursue, bring, join, litigate, or support
17 any kind of joint, class, or collective claim arising
18 from or relating to a work dispute in any forum
19 that, but for such agreement, is of competent juris-
20 diction, unless the agreement meets the require-
21 ments of paragraph (2) of this subsection; and
22 ''(5) no covered entity may retaliate or threaten
23 to retaliate against a worker for refusing to enter
24 into an agreement that provides for arbitration of a
25 work dispute.

1 "(b) STATUTE OF LIMITATIONS.—During the waiting
2 period described in subsection (a)(2)(C), the statute of
3 limitations for any claims that arise from or form the basis
4 for the applicable work dispute shall be tolled.

5 "(c) CIVIL ACTION.—Any person who is injured by
6 reason of a violation of subsection (a)(5) may bring a civil
7 action in the appropriate district court of the United
8 States against the covered entity within 2 years of the vio-
9 lation, or within 3 years if such violation is willful. Relief
10 granted in such an action shall include a reasonable attor-
11 ney's fee, other reasonable costs associated with maintain-
12 ing the action, and any appropriate relief authorized by
13 section 706(g) of the Civil Rights Act of 1964 (42 U.S.C.
14 2000e–5(g)) or by section 1977A(b) of the Revised Stat-
15 utes (42 U.S.C. 1981a(b)).

16 "(d) APPLICABILITY.—

17 "(1) IN GENERAL.—This chapter applies to cov-
18 ered entities and workers engaged in activity affect-
19 ing commerce to the fullest extent permitted by the
20 Constitution of the United States, including the
21 work of persons engaged in domestic service in
22 households, as described in section 2(a) of the Fair
23 Labor Standards Act of 1938 (29 U.S.C. 202(a)).
24 An issue as to whether this chapter applies to an ar-
25 bitration agreement shall be determined under Fed-

1 eral law. The applicability of this chapter to an
2 agreement to arbitrate and the validity and enforce-
3 ability of an agreement to which this chapter applies
4 shall be determined by a court, rather than an arbi-
5 trator, regardless of whether any contractual provi-
6 sion purports to delegate such determinations to the
7 arbitrator and irrespective of whether the party re-
8 sisting arbitration challenges the arbitration agree-
9 ment specifically or in conjunction with other terms
10 of the contract containing such agreement.

11 "(2) COLLECTIVE BARGAINING AGREEMENTS.—
12 Nothing in this chapter shall apply to any arbitra-
13 tion provision in a contract between a covered entity
14 and a labor organization, except that no such arbi-
15 tration provision shall have the effect of waiving the
16 right of a worker to seek judicial enforcement of a
17 right arising under a provision of the Constitution of
18 the United States, the constitution of a State, or a
19 Federal or State statute, or public policy arising
20 therefrom.".

21 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

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

1 (A) in section 1, by striking "of seamen,"
2 and all that follows through "interstate com-
3 merce";
4 (B) in section 2, by inserting "or as other-
5 wise provided in chapter 4" before the period at
6 the end;
7 (C) in section 208—
8 (i) in the section heading, by striking
9 "**Chapter 1; residual application**"
10 and inserting "**Application**"; and
11 (ii) by adding at the end the fol-
12 lowing: "This chapter applies to the extent
13 that this chapter is not in conflict with
14 chapter 4."; and
15 (D) in section 307—
16 (i) in the section heading, by striking
17 "**Chapter 1; residual application**"
18 and inserting "**Application**"; and
19 (ii) by adding at the end the fol-
20 lowing: "This chapter applies to the extent
21 that this chapter is not in conflict with
22 chapter 4.".
23 (2) TABLE OF SECTIONS.—
24 (A) CHAPTER 2.—The table of sections for
25 chapter 2 of title 9, United States Code, is

amended by striking the item relating to section 208 and inserting the following:

"208. Application.".

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

"307. Application.".

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

"4. Arbitration of work disputes .... 401.".

SEC. 6. EFFECTIVE DATE.

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