August 22, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51

The undersigned employment organizations and labor unions are writing to express our strong support for the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposed rule on mandatory arbitration. As evidenced by the Bureau's comprehensive study, forced arbitration bars individuals challenging abusive practices from accessing the court system, instead subjecting them to private adjudication that inherently favors the more powerful party. We commend the Bureau's proposed rule for restoring consumers' right to join together in class actions and returning crucial transparency to individual arbitration with public reporting requirements.

While the Bureau's authority to act on arbitration is limited to consumer finance contracts, forced arbitration is also ubiquitous in labor and employment, and consumers face additional harm from arbitration in their capacity as workers. Based on self-reported survey data collected by Fulbright & Jaworski LLP in 2010, 27% of U.S. companies impose forced arbitration clauses on their employees.[1] As employees, consumers are often faced with the choice of signing away their right to a day in court and protections under established fair pay, anti-discrimination, and other workplace laws or forgoing employment altogether.

One of the most harmful provisions of these arbitration clauses are class action bans, which prevent workers and consumers from joining together in class action lawsuits. This restriction bars consumers and workers from one of the most effective vehicles to seek recovery against powerful interests. A report by a national law firm representing employers found that 43% of companies using forced arbitration clauses also ban class actions – more than double the previous count of 16% in 2012.[2] When workers and consumers are locked out of class actions, very few choose to pursue their claims individually in private arbitration. As a result, systemic harms are never addressed or made public.

Class action bans serve as a central tool to avoid accountability for labor law violations, wage fraud, and discrimination in the developing "gig economy," which forces workers to fight for

[1]*See* Fulbright & Jaworski LLP, Fulbright Litigation Trends, *Fulbright's Seventh Annual Litigation Trends Survey Report* at 43 (2010). At the time of the survey this meant that an estimated 36 million of America's non-unionized workers were bound by forced arbitration clauses, prohibiting them from accessing the court system and from acting in concert with coworkers.

[2]Carlton Fields Jorden Burt, *The 2015 Class Action Survey* at 26, *available at* http://classactionsurvey.com/pdf/2015-class-action-survey.pdf.

basic protections and often misclassifies them as independent contractors. In a recent Maryland case, Uber drivers attempted to form a class action suit against the company to challenge this classification, but were barred from suing due to their employment agreements' arbitration clause.[3] It is imperative that corporations not be allowed to use forced arbitration clauses to avoid critical questions about the denial of basic employment protections.

Further, many workers are unaware that they are signing away their legal rights when they enter a take-it-or-leave-it employment contract. But essential statutory rights, such as the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Lilly Ledbetter Fair Pay Act of 2009 are virtually unenforceable in these private, unreported arbitrations mandated by fine print. This enormous legal discrepancy leaves millions of workers vulnerable to discrimination, harassment, wage theft, and many other forms of otherwise illegal treatment as a condition of their employment.

Just as the CFPB study found that banks and lenders are ten times more likely to prevail in arbitration as consumers, forced arbitration favors the interests of employers over workers. Forced arbitration lacks traditional legal safeguards required in court, including robust opportunity for discovery, an impartial trier of fact, and clear standards of evidence. Individuals who take their cases to arbitration and win, receive less in recovery on average than cases that go to trial. The Economic Policy Institute found that employees recovered an average of $176,426 in federal court discrimination cases, compared to just $36,500 in mandatory arbitration.[4] The same report found that employees were 70% more likely to win in federal court over arbitration. In addition, private arbitration can cost workers significantly more than the court system.[5]

Because arbitrations are private and non-public, employers – as well as banks and lenders – can continue to violate the laws even when individuals win at arbitration, creating a vastly inefficient system that rewards violators. The reporting requirements in the CFPB's proposed rule would help return much-needed accountability to this often secret process in the financial industry.[6]

The CFPB is not the first federal agency to address the harm caused by class action bans and forced arbitration. In *In re D. R. Horton, Inc.*, the National Labor Relations Board held that these bans violated Sections 7 and 8 of the National Labor Relations Act ("NLRA").[7] The U.S. Court of Appeals for the Seventh Circuit recently affirmed this position in *Lewis v. Epic Systems Corporation*, holding that class action bans violating the NRLA could not be enforced under the Federal Arbitration Act.[8] The Equal Employment Opportunity Commission has long recognized the danger of forced arbitration in employment, with policy statements dating back almost

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[3] *Varon v. Uber Technologies, Inc.*, No. MJG-15-3650, 2016 WL 1752835 (D. Md. May 3, 2016).
[4] Katherine V. W. Stone and Alexander J. S. Colvin, The Economic Policy Institute, *The arbitration epidemic: Mandatory arbitration deprives workers and consumers of their rights* at 20, *available at* http://www.epi.org/files/2015/arbitration-epidemic.pdf.
[5] *See* Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. Miami Bus. L. Rev. 40, 46 (2014).
[6] For additional narratives demonstrating the need for such accountability, *see* Maureen Sherry, *A Colleague Drank My Breast Milk and Other Wall Street Tales*, New York Times, Jan. 23, 2016, http://www.nytimes.com/2016/01/24/opinion/a-colleague-drank-my-breast-milk-and-other-wall-street-tales.html.
[7] *In re D.R. Horton*, 357 NLRB No. 184, 2012, NLRB LEXIS 11, at *1, 32 (Jan. 3, 2012).
[8] *Lewis v. Epic Systems Corporation*, 2016 WL 3029464, *10 (7th Cir. 2016).

twenty years opposing it.[9] In its 2016 policy statement, the EEOC details how forced arbitration thwarts equal opportunity and workers' rights, noting the practice "shields…employment practices from public scrutiny" and "impede[s] the development of the law."[10]

Because of the very serious threat posed by forced arbitration, strong and sensible regulation of this practice is crucial in order to best protect the rights of workers and consumers. While we commend the CFPB on its proposed rule to restore consumer rights and establish crucial reporting requirements, we urge the Bureau to go further by prohibiting forced arbitration in individual cases as well. Consumers and workers should never be forced to trade in their rights in order to participate in the marketplace – nor should they be tricked into it. The revelation that fewer than 7 percent of consumers covered by arbitration clauses realize their ability to sue in court is restricted is ample evidence to expand the rule to cover all forms of forced arbitration.

With this proposed rule, the Bureau joins the chorus of government agencies and courts working to restore the rights of consumers and workers. We thank the CFPB for its illuminating and comprehensive work on this matter of pressing public interest, and urge the Bureau to act on the full scope of its congressionally delegated authority in the final rule.

Thank you for your time and consideration.

Sincerely,

American Council of the Blind
American Federation of State, County and Municipal Employees (AFSCME)
Centro Legal de la Raza
Chicago Jobs Council
Daily Kos
Economic Policy Institute
Equal Justice Center (Texas)
Empire Justice Center's Workers' Rights Project
Government Accountability Project
Homeowners Against Deficient Dwellings
Institute for Agriculture and Trade Policy
Metropolitan Tenants Organization
National Employment Law Project
NELA/NY (New York Affiliate of National Employment Lawyers Association)
Northwest Workers' Justice Project
Occupational Safety & Health Law Project
Service Employees International Union (SEIU)
SafeWork Washington
Workplace Fairness
Worksafe

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[9] EEOC, *EEOC Notice Number 915.002*, July 10, 1997, https://www.eeoc.gov/policy/docs/mandarb.html.
[10] EEOC, *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, July 7, 2016, https://www.eeoc.gov/eeoc/systemic/review/.