

115TH CONGRESS
1ST SESSION

H. R. 4130

To amend title 9, United States Code, with respect to arbitration.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 25, 2017

Mr. O’ROURKE introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title 9, United States Code, with respect to
arbitration.

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 “Mandatory Arbitration
5 Transparency Act of 2017”.

1 **SEC. 2. VALIDITY AND ENFORCEABILITY OF PREDISPUTE**
 2 **ARBITRATION AGREEMENTS CONTAINING**
 3 **CONFIDENTIALITY CLAUSES.**

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

6 **“CHAPTER 4—PREDISPUTE ARBITRATION**
 7 **AGREEMENTS CONTAINING CON-**
 8 **FIDENTIALITY CLAUSES**

“401. Definitions.

“402. Validity and enforceability.

9 **“§ 401. Definitions**

10 “(a) In this chapter—

11 “(1) the term ‘civil rights dispute’ means a dis-
 12 pute—

13 “(A) arising under—

14 “(i) the Constitution of the United
 15 States or the constitution of a State; or

16 “(ii) a Federal or State statute that
 17 prohibits discrimination on the basis of
 18 race, sex, disability, religion, national ori-
 19 gin, or any invidious basis in education,
 20 employment, credit, housing, public accom-
 21 modations and facilities, voting, or any
 22 program funded or conducted by the Fed-
 23 eral Government or a State government,
 24 including any statute enforced by the Civil

1 Rights Division of the Department of Jus-
2 tice and any statute enumerated in section
3 62(e) of the Internal Revenue Code of
4 1986 (relating to unlawful discrimination);
5 and

6 “(B) in which at least 1 party alleging a
7 violation of the Constitution of the United
8 States, a State constitution, or a statute pro-
9 hibiting discrimination is an individual;

10 “(2) the term ‘consumer dispute’ means a dis-
11 pute between an individual who seeks or acquires
12 real or personal property, services, securities or
13 other investments, money, or credit for personal,
14 family, or household purposes and the seller or pro-
15 vider of such property, services, securities or other
16 investments, money, or credit;

17 “(3) the term ‘covered confidentiality clause’
18 means a provision of a predispute arbitration agree-
19 ment that, with respect to an employment dispute,
20 consumer dispute, or civil rights dispute, purports
21 to, or could be interpreted by a reasonable person to,
22 prohibit a party to the dispute from—

23 “(A) making a communication in a manner
24 such that the prohibition would violate a State
25 or Federal whistleblower statute; or

1 “(B) reporting or making a communica-
 2 tion, including to any relevant public official,
 3 elected official, or other State or Federal au-
 4 thority, about—

5 “(i) tortious conduct;

6 “(ii) otherwise unlawful conduct; or

7 “(iii) issues of public policy or public
 8 concern;

9 “(4) the term ‘employment dispute’ means a
 10 dispute between an employer and employee arising
 11 out of the relationship of employer and employee as
 12 defined in section 3 of the Fair Labor Standards
 13 Act of 1938 (29 U.S.C. 203); and

14 “(5) the term ‘predispute arbitration agree-
 15 ment’ means any agreement to arbitrate a dispute
 16 that had not yet arisen at the time of the making
 17 of the agreement.

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

19 “(a) IN GENERAL.—

20 “(1) PROHIBITION ON PREDISPUTE ARBITRA-
 21 TION AGREEMENTS WITH CONFIDENTIALITY
 22 CLAUSES.—Notwithstanding any other provision of
 23 this title, no predispute arbitration agreement shall
 24 be valid or enforceable if the agreement contains a
 25 covered confidentiality clause.

1 “(2) EXCEPTION.—Paragraph (1) shall not
2 apply to a predispute arbitration agreement if a
3 party to the agreement can demonstrate a confiden-
4 tiality interest that significantly outweighs the pri-
5 vate and public interest in disclosure.

6 “(b) APPLICABILITY.—

7 “(1) IN GENERAL.—An issue as to whether this
8 chapter applies to an arbitration agreement shall be
9 determined under Federal law. The applicability of
10 this chapter to an agreement to arbitrate and the
11 validity and enforceability of an agreement to which
12 this chapter applies shall be determined by a court,
13 rather than an arbitrator, irrespective of whether the
14 party resisting arbitration challenges the arbitration
15 agreement specifically or in conjunction with other
16 terms of the contract containing such agreement.

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

1 State constitution, or a Federal or State statute, or
 2 public policy arising therefrom.”.

3 (b) TECHNICAL AND CONFORMING AMENDMENT.—
 4 The table of chapters for title 9, United States Code, is
 5 amended by adding at the end the following:

**“4. Predispute arbitration agreements containing con-
 fidentiality clauses 401”.**

6 **SEC. 3. UNFAIR OR DECEPTIVE ACT OR PRACTICE.**

7 (a) DEFINITION.—In this section—

8 (1) the term “Commission” means the Federal
 9 Trade Commission; and

10 (2) the terms “covered confidentiality clause”
 11 and “predispute arbitration agreement” have the
 12 meanings given those terms in section 401 of title 9,
 13 United States Code, as added by section 2.

14 (b) PROHIBITION.—

15 (1) IN GENERAL.—It shall be unlawful for a
 16 person to knowingly offer to another person for rati-
 17 fication a predispute arbitration agreement that con-
 18 tains a covered confidentiality clause.

19 (2) EXCEPTIONS.—

20 (A) CONFIDENTIALITY INTEREST.—Para-
 21 graph (1) shall not apply to a person that offers
 22 a predispute arbitration agreement with a cov-
 23 ered confidentiality clause if the person can
 24 demonstrate a confidentiality interest that sig-

1 significantly outweighs the private and public in-
2 terest in disclosure.

3 (B) COLLECTIVE BARGAINING AGREE-
4 MENTS.—Paragraph (1) shall not apply with re-
5 spect to any arbitration provision in a contract
6 between an employer and a labor organization
7 or between labor organizations, if the arbitra-
8 tion provision does not waive the right of an
9 employee to seek judicial enforcement of a right
10 arising under a provision of the Constitution of
11 the United States, a State constitution, or a
12 Federal or State statute, or public policy aris-
13 ing therefrom.

14 (c) ENFORCEMENT BY FEDERAL TRADE COMMIS-
15 SION.—

16 (1) TREATMENT AS UNFAIR OR DECEPTIVE ACT
17 OR PRACTICE.—A violation of subsection (b) by a
18 person with respect to which the Commission is em-
19 powered under section 5(a)(2) of the Federal Trade
20 Commission Act (15 U.S.C. 45(a)(2)) shall be treat-
21 ed as a violation of a rule defining an unfair or de-
22 ceptive act or practice prescribed under section
23 18(a)(1)(B) of that Act (15 U.S.C. 57a(a)(1)(B)).

24 (2) POWERS OF COMMISSION.—

1 (A) IN GENERAL.—The Commission shall
2 enforce this section in the same manner, by the
3 same means, and with the same jurisdiction,
4 powers, and duties as though all applicable
5 terms and provisions of the Federal Trade
6 Commission Act (15 U.S.C. 41 et seq.) were in-
7 corporated into and made a part of this section.

8 (B) PRIVILEGES AND IMMUNITIES.—Any
9 person who violates subsection (b) shall be sub-
10 ject to the penalties and entitled to the privi-
11 leges and immunities provided in the Federal
12 Trade Commission Act (15 U.S.C. 41 et seq.).

13 (3) RULEMAKING.—The Commission shall pro-
14 mulgate standards and rules to carry out this sec-
15 tion in accordance with section 553 of title 5, United
16 States Code.

17 (d) CIVIL ACTION.—

18 (1) PRIVATE RIGHT OF ACTION.—Any person
19 aggrieved by a violation of subsection (b) may bring
20 a civil action in an appropriate district court of the
21 United States.

22 (2) REMEDIES.—In an action under paragraph
23 (1), the court may award—

24 (A) actual damages, but not less than liq-
25 uidated damages in an amount equal to \$1,000;

- 1 (B) punitive damages;
- 2 (C) reasonable attorney's fees and other
- 3 litigation costs reasonably incurred; and
- 4 (D) any other preliminary and equitable
- 5 relief that the court determines appropriate, in-
- 6 cluding injunctive relief.

7 **SEC. 4. EFFECTIVE DATE.**

8 (a) IN GENERAL.—This Act, and the amendments

9 made by this Act, shall take effect on the date of enact-

10 ment of this Act.

11 (b) APPLICABILITY.—

12 (1) VALIDITY AND ENFORCEABILITY.—Chapter

13 4 of title 9, United States Code, as added by section

14 2, shall apply with respect to any dispute or claim

15 that arises on or after the date of enactment of this

16 Act.

17 (2) UNFAIR OR DECEPTIVE ACT OR PRAC-

18 TICE.—Section 3 shall apply with respect to any

19 predispute arbitration agreement offered for ratifica-

20 tion on or after the date of enactment of this Act.

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