II

115TH CONGRESS
2D SESSION

S. 3615

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

IN THE SENATE OF THE UNITED STATES

NOVEMBER 14, 2018

Mrs. MURRAY (for herself, Mr. BLUMENTHAL, Ms. BALDWIN, Mr. BOOKER, Mr. BROWN, Ms. CORTEZ MASTO, Mrs. GILLIBRAND, Ms. HARRIS, Ms. HASSAN, Ms. HIRONO, Mr. MARKEY, Mr. MERKLEY, Mr. REED, Mr. SANDERS, Mr. SCHATZ, Ms. WARREN, Mr. WHITEHOUSE, Mr. WYDEN, and Ms. SMITH) 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 employment disputes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Restoring Justice for Workers Act''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Millions of employees are currently forced to accept, as a condition of employment, contractual

provisions that block their access to the courts or prohibit them from joining together with other employees to seek joint, class, or collective relief for violations of their rights. This has led to widespread nonenforcement of employees' rights and has permitted significant violations of those rights to continue unabated.

(2) Most employees have little or no meaningful choice regarding whether to accept these provisions. Often, employees are not even aware that they have given up the right to seek recourse in court or have waived their right to join other employees in joint, class, or collective actions.

(3) The Federal Arbitration Act (now enacted as chapter 1 of title 9, United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power. Despite this congressional intent, the Supreme Court of the United States has interpreted the Federal Arbitration Act so that it now extends to employment disputes.

(4) The National Labor Relations Act (29 U.S.C. 151 et seq.) protects employees' right to engage in concerted activities for the purpose of mutual aid or protection. This was intended and long

understood to encompass employees' right to collectively seek relief for violations of their workplace rights. However, contrary to the plain text of the law and congressional intent, the Supreme Court of the United States, in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), decided that employees may be forced, as a condition of employment, to waive their right to collectively litigate employment actions.

(5) Forced individual dispute resolution undermines employees' rights and exacerbates the inequality of bargaining power between employees and employers because joining a joint, class, or collective action is often the only way employees can afford to seek relief for violations of their rights.

(6) Employees who are forced to submit to individual dispute resolution often seek no redress at all due to well-founded fear of retaliation.

(7) Protecting the rights of employees to individually or concertedly seek relief for violations of their labor rights through the justice system protects the public interest and safeguards commerce from injury.

SEC. 3. PURPOSES.

The purposes of this Act are to—

(1) prohibit predispute arbitration agreements that require arbitration of employment disputes;

(2) prohibit retaliation against employees for refusing to arbitrate employment disputes;

(3) provide protections to ensure that postdispute arbitration agreements are truly voluntary and with the informed consent of employees; and

(4) amend the National Labor Relations Act to prohibit agreements and practices that interfere with employees' right to collectively litigate employment disputes.

SEC. 4. PROTECTION OF CONCERTED ACTIVITY.

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

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

(2) by adding at the end the following:

''(6)(A) to enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective legal action arising from or relating to the em-

ployment of such employee in any forum that, but for such agreement, is of competent jurisdiction; or

''(B) to retaliate or threaten to retaliate against an employee for refusing to undertake or promise not to pursue, bring, join, litigate, or support any kind of joint, class, or collective legal action arising from or relating to the employment of such employee:

Provided, That any agreement that violates this paragraph or results from a violation of this paragraph shall be to such extent unenforceable and void: *Provided further*, That this paragraph shall not apply to any agreement embodied in or expressly permitted by a contract between an employer and a labor organization.''.

SEC. 5. ARBITRATION OF EMPLOYMENT DISPUTES.

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

''CHAPTER 4—ARBITRATION OF EMPLOYMENT DISPUTES

''§ 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 'employment dispute' means a dispute between an employer and an employee arising from or relating to the employment of the employee, and includes disputes that arise under common law or from the alleged violation of the Constitution of the United States, the constitution of a State, or a Federal, State, territorial, county, or municipal statute;

''(3) the term 'predispute arbitration agreement' means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement; and

''(4) the term 'postdispute arbitration agreement' means any agreement to arbitrate a dispute that arose before the time of the making of the agreement.

''§ 402. Validity and enforceability

''(a) IN GENERAL.—Notwithstanding any other chapter of this title—

''(1) no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute;

''(2) no postdispute arbitration agreement that requires arbitration of an employment dispute shall be valid or enforceable unless—

''(A) the agreement was not required by the employer, obtained by coercion or threat of adverse action, or made a condition of employment or any employment-related privilege or benefit;

''(B) each employee entering into the agreement was informed in writing using sufficiently plain language likely to be understood by the average employee of—

''(i) the right of the employee under paragraph (3) to refuse to enter the agreement without retaliation; and

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

''(C) each employee entering into the agreement entered the agreement after a waiting period of not fewer than 45 days, beginning on the date on which the employee was provided both the final text of the agreement and the disclosures required under subparagraph (B); and

''(D) each employee entering into the agreement affirmatively consented to the agreement in writing; and

''(3) no employer may retaliate or threaten to retaliate against an employee for refusing to enter into an agreement that provides for arbitration of an employment dispute.

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

''(c) CIVIL ACTION.—Any person who is injured by reason of a violation of subsection (a)(3) may bring a civil action in the appropriate district court of the United States against the employer within 2 years of the violation, or within 3 years if such violation is willful. Relief granted in such an action shall include a reasonable attorney's fee, other reasonable costs associated with maintaining the action, and any appropriate relief authorized by section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–5(g)) or by section 1977A(b) of the Revised Statutes (42 U.S.C. 1981a(b)).

''(d) APPLICABILITY.—

''(1) IN GENERAL.—This chapter applies to employers and employees engaged in activity affecting

commerce to the fullest extent permitted by the United States Constitution. An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, regardless of whether any contractual provision delegates such matters to the arbitrator and irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

''(2) COLLECTIVE BARGAINING AGREEMENTS.—Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, the constitution of a State, or a Federal or State statute, or public policy arising therefrom.''.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

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

(A) in section 1, by striking ''of seamen,'' and all that follows through ''interstate commerce'';

(B) in section 2, by inserting ''or as otherwise provided in chapter 4'' before the period at the end;

(C) in section 208—

(i) in the section heading, by striking ''**Chapter 1; residual application**'' and inserting ''**Application**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''; and

(D) in section 307—

(i) in the section heading, by striking ''**Chapter 1; residual application**'' and inserting ''**Application**''; and

(ii) by adding at the end the following: ''This chapter applies to the extent that this chapter is not in conflict with chapter 4.''.

(2) TABLE OF SECTIONS.—

(A) CHAPTER 2.—The table of sections for 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 employment 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 on or after such date, including any dispute or claim to which an agreement predating such date applies.

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