

111TH CONGRESS
1ST SESSION

S. _____

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

IN THE SENATE OF THE UNITED STATES

Mr. FEINGOLD (for himself, Mr. DURBIN, Mr. KERRY, Mr. WHITEHOUSE, Mr. WYDEN, and Mr. UDALL of New Mexico) introduced the following bill; which was read twice and referred to the Committee on

A BILL

To amend title 9 of the 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 “Arbitration Fairness
5 Act of 2009”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

8 (1) The Federal Arbitration Act (now enacted
9 as chapter 1 of title 9 of the United States Code)
10 was intended to apply to disputes between commer-

1 cial entities of generally similar sophistication and
2 bargaining power.

3 (2) A series of United States Supreme Court
4 decisions have changed the meaning of the Act so
5 that it now extends to disputes between parties of
6 greatly disparate economic power, such as consumer
7 disputes and employment disputes. As a result, a
8 large and rapidly growing number of corporations
9 are forcing millions of consumers and employees to
10 give up their right to have disputes resolved by a
11 judge or jury, and instead submit their claims to
12 binding arbitration.

13 (3) Most consumers and employees have little
14 or no meaningful option whether to submit their
15 claims to arbitration. Few people realize or under-
16 stand the importance of the deliberately fine print
17 that strips them of rights, and because entire indus-
18 tries are adopting these clauses, people increasingly
19 have no choice but to accept them. They must often
20 give up their rights as a condition of having a job,
21 getting necessary medical care, buying a car, open-
22 ing a bank account, getting a credit card, and the
23 like. Often times, they are not even aware that they
24 have given up their rights.

1 (4) Private arbitration companies are some-
2 times under great pressure to devise systems that
3 favor the corporate repeat players who decide wheth-
4 er those companies will receive their lucrative busi-
5 ness.

6 (5) Mandatory arbitration undermines the de-
7 velopment of public law for civil rights and consumer
8 rights because there is no meaningful judicial review
9 of arbitrators' decisions. With the knowledge that
10 their rulings will not be seriously examined by a
11 court applying current law, arbitrators enjoy near
12 complete freedom to ignore the law and even their
13 own rules.

14 (6) Mandatory arbitration is a poor system for
15 protecting civil rights and consumer rights because
16 it is not transparent. While the American civil jus-
17 tice system features publicly accountable decision
18 makers who generally issue public, written decisions,
19 arbitration often offers none of these features.

20 (7) Many corporations add to arbitration
21 clauses unfair provisions that deliberately tilt the
22 systems against individuals, including provisions
23 that strip individuals of substantive statutory rights,
24 ban class actions, and force people to arbitrate their
25 claims hundreds of miles from their homes. While

1 some courts have been protective of individuals, too
2 many courts have erroneously upheld even egre-
3 giously unfair mandatory arbitration clauses in def-
4 erence to a supposed Federal policy favoring arbitra-
5 tion over the constitutional rights of individuals.

6 **SEC. 3. ARBITRATION OF EMPLOYMENT, CONSUMER, FRAN-**
7 **CHISE, AND CIVIL RIGHTS DISPUTES.**

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

10 **“CHAPTER 4—ARBITRATION OF EMPLOY-**
11 **MENT, CONSUMER, FRANCHISE, AND**
12 **CIVIL RIGHTS DISPUTES**

“Sec.

“401. Definitions.

“402. Validity and enforceability.

13 **“§ 401. Definitions**

14 “In this chapter—

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

17 “(A) arising under—

18 “(i) the Constitution of the United
19 States or the constitution of a State; or

20 “(ii) a Federal or State statute that
21 prohibits discrimination on the basis of
22 race, sex, disability, religion, national ori-
23 gin, or any invidious basis in education,
24 employment, credit, housing, public accom-

1 modations and facilities, voting, or pro-
2 gram funded or conducted by the Federal
3 Government or State government, includ-
4 ing any statute enforced by the Civil
5 Rights Division of the Department of Jus-
6 tice and any statute enumerated in section
7 62(e) of the Internal Revenue Code of
8 1986 (relating to unlawful discrimination);
9 and

10 “(B) in which at least 1 party alleging a
11 violation of the Constitution of the United
12 States, a State constitution, or a statute pro-
13 hibiting discrimination is an individual;

14 “(2) the term ‘consumer dispute’ means a dis-
15 pute between a person other than an organization
16 who seeks or acquires real or personal property,
17 services (including services relating to securities and
18 other investments), money, or credit for personal,
19 family, or household purposes and the seller or pro-
20 vider of such property, services, money, or credit;

21 “(3) the term ‘employment dispute’ means a
22 dispute between an employer and employee arising
23 out of the relationship of employer and employee as
24 defined in section 3 of the Fair Labor Standards
25 Act of 1938 (29 U.S.C. 203);

1 “(4) the term ‘franchise dispute’ means a dis-
2 pute between a franchisee with a principal place of
3 business in the United States and a franchisor aris-
4 ing out of or relating to contract or agreement by
5 which—

6 “(A) a franchisee is granted the right to
7 engage in the business of offering, selling, or
8 distributing goods or services under a mar-
9 keting plan or system prescribed in substantial
10 part by a franchisor;

11 “(B) the operation of the franchisee’s busi-
12 ness pursuant to such plan or system is sub-
13 stantially associated with the franchisor’s trade-
14 mark, service mark, trade name, logotype, ad-
15 vertising, or other commercial symbol desig-
16 nating the franchisor or its affiliate; and

17 “(C) the franchisee is required to pay, di-
18 rectly or indirectly, a franchise fee; and

19 “(5) the term ‘predispute arbitration agree-
20 ment’ means any agreement to arbitrate a dispute
21 that had not yet arisen at the time of the making
22 of the agreement.

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

24 “(a) IN GENERAL.—Notwithstanding any other pro-
25 vision of this title, no predispute arbitration agreement

1 shall be valid or enforceable if it requires arbitration of
2 an employment, consumer, franchise, or civil rights dis-
3 pute.

4 “(b) APPLICABILITY.—

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

16 “(2) COLLECTIVE BARGAINING AGREEMENTS.—

17 Nothing in this chapter shall apply to any arbitra-
18 tion provision in a contract between an employer and
19 a labor organization or between labor organizations,
20 except that no such arbitration provision shall have
21 the effect of waiving the right of an employee to
22 seek judicial enforcement of a right arising under a
23 provision of the Constitution of the United States, a
24 State constitution, or a Federal or State statute, or
25 public policy arising therefrom.”

1 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

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

4 (A) in section 1, by striking “of seamen,”
5 and all that follows through “interstate com-
6 merce”;

7 (B) in section 2, by inserting “or as other-
8 wise provided in chapter 4” before the period at
9 the end;

10 (C) in section 208—

11 (i) in the section heading, by striking
12 **“Chapter 1; residual application”**
13 and inserting **“Application”**; and

14 (ii) by adding at the end the fol-
15 lowing: “This chapter applies to the extent
16 that this chapter is not in conflict with
17 chapter 4.”; and

18 (D) in section 307—

19 (i) in the section heading, by striking
20 **“Chapter 1; residual application”**
21 and inserting **“Application”**; and

22 (ii) by adding at the end the fol-
23 lowing: “This chapter applies to the extent
24 that this chapter is not in conflict with
25 chapter 4.”.

1 (2) TABLE OF SECTIONS.—

2 (A) CHAPTER 2.—The table of sections for
3 chapter 2 of title 9, United States Code, is
4 amended by striking the item relating to section
5 208 and inserting the following:

“208. Application.”.

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

“307. Application.”.

10 (3) TABLE OF CHAPTERS.—The table of chap-
11 ters for title 9, United States Code, is amended by
12 adding at the end the following:

“4. Arbitration of employment, consumer, franchise, and civil rights dis-
putes 401”.

13 **SEC. 4. EFFECTIVE DATE.**

14 This Act, and the amendments made by this Act,
15 shall take effect on the date of enactment of this Act and
16 shall apply with respect to any dispute or claim that arises
17 on or after such date.