

115TH CONGRESS
1ST SESSION

S. 647

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

IN THE SENATE OF THE UNITED STATES

MARCH 15, 2017

Mr. BLUMENTHAL (for himself, Mr. BROWN, Mr. MARKEY, Mr. FRANKEN, Mrs. MURRAY, Mr. MERKLEY, and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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”.

6 **SEC. 2. VALIDITY AND ENFORCEABILITY OF PREDISPUTE**
7 **ARBITRATION AGREEMENTS CONTAINING**
8 **CONFIDENTIALITY CLAUSES.**

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

1 **“CHAPTER 4—PREDISPUTE ARBITRATION**
 2 **AGREEMENTS CONTAINING CON-**
 3 **FIDENTIALITY CLAUSES**

“401. Definitions.

“402. Validity and enforceability.

4 **“§ 401. Definitions**

5 “(a) In this chapter—

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

8 “(A) arising under—

9 “(i) the Constitution of the United
 10 States or the constitution of a State; or

11 “(ii) a Federal or State statute that
 12 prohibits discrimination on the basis of
 13 race, sex, disability, religion, national ori-
 14 gin, or any invidious basis in education,
 15 employment, credit, housing, public accom-
 16 modations and facilities, voting, or any
 17 program funded or conducted by the Fed-
 18 eral Government or a State government,
 19 including any statute enforced by the Civil
 20 Rights Division of the Department of Jus-
 21 tice and any statute enumerated in section
 22 62(e) of the Internal Revenue Code of
 23 1986 (relating to unlawful discrimination);
 24 and

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

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

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

18 “(A) making a communication in a manner
19 such that the prohibition would violate a State
20 or Federal whistleblower statute; or

21 “(B) reporting or making a communica-
22 tion, including to any relevant public official,
23 elected official, or other State or Federal au-
24 thority, about—

25 “(i) tortious conduct;

1 “(ii) otherwise unlawful conduct; or

2 “(iii) issues of public policy or public
3 concern;

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

9 “(5) the term ‘predispute arbitration agree-
10 ment’ means any agreement to arbitrate a dispute
11 that had not yet arisen at the time of the making
12 of the agreement.

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

14 “(a) IN GENERAL.—

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

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

1 “(b) APPLICABILITY.—

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

12 “(2) COLLECTIVE BARGAINING AGREEMENTS.—

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

22 (b) TECHNICAL AND CONFORMING AMENDMENT.—

23 The table of chapters for title 9, United States Code, is
 24 amended by adding at the end the following:

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

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

2 (a) DEFINITION.—In this section—

3 (1) the term “Commission” means the Federal
4 Trade Commission; and

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

9 (b) PROHIBITION.—

10 (1) IN GENERAL.—It shall be unlawful for a
11 person to knowingly offer to another person for rati-
12 fication a predispute arbitration agreement that con-
13 tains a covered confidentiality clause.

14 (2) EXCEPTIONS.—

15 (A) CONFIDENTIALITY INTEREST.—Para-
16 graph (1) shall not apply to a person that offers
17 a predispute arbitration agreement with a cov-
18 ered confidentiality clause if the person can
19 demonstrate a confidentiality interest that sig-
20 nificantly outweighs the private and public in-
21 terest in disclosure.

22 (B) COLLECTIVE BARGAINING AGREE-
23 MENTS.—Paragraph (1) shall not apply with re-
24 spect to any arbitration provision in a contract
25 between an employer and a labor organization
26 or between labor organizations, if the arbitra-

tion provision does not waive the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

(c) ENFORCEMENT BY FEDERAL TRADE COMMISSION.—

(1) TREATMENT AS UNFAIR OR DECEPTIVE ACT OR PRACTICE.—A violation of subsection (b) by a person with respect to which the Commission is empowered under section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of that Act (15 U.S.C. 57a(a)(1)(B)).

(2) POWERS OF COMMISSION.—

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

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

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

10 (d) CIVIL ACTION.—

11 (1) PRIVATE RIGHT OF ACTION.—Any person
 12 aggrieved by a violation of subsection (b) may bring
 13 a civil action in an appropriate district court of the
 14 United States.

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

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

19 (B) punitive damages;

20 (C) reasonable attorney's fees and other
 21 litigation costs reasonably incurred; and

22 (D) any other preliminary and equitable
 23 relief that the court determines appropriate, in-
 24 cluding injunctive relief.

1 **SEC. 4. EFFECTIVE DATE.**

2 (a) IN GENERAL.—This Act, and the amendments
3 made by this Act, shall take effect on the date of enact-
4 ment of this Act.

5 (b) APPLICABILITY.—

6 (1) VALIDITY AND ENFORCEABILITY.—Chapter
7 4 of title 9, United States Code, as added by section
8 2, shall apply with respect to any dispute or claim
9 that arises on or after the date of enactment of this
10 Act.

11 (2) UNFAIR OR DECEPTIVE ACT OR PRAC-
12 TICE.—Section 3 shall apply with respect to any
13 predispute arbitration agreement offered for ratifica-
14 tion on or after the date of enactment of this Act.

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