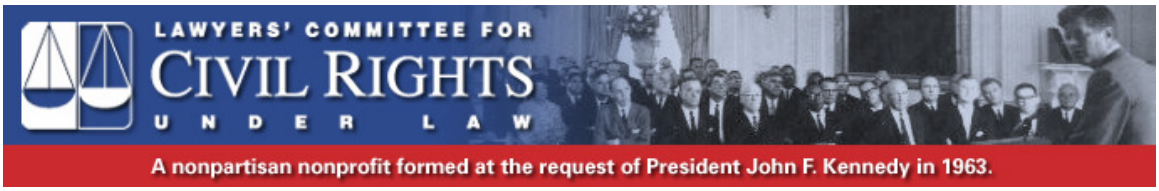

TESTIMONY OF MICHAEL FOREMAN, ESQ.
ON BEHALF OF
THE LEADERSHIP CONFERENCE
ON CIVIL RIGHTS (LCCR)

BEFORE THE
SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS
COMMITTEE ON EDUCATION AND LABOR
UNITED STATES HOUSE OF REPRESENTATIVES
110th CONGRESS, 2nd SESSION

FEBRUARY 12, 2008

REGARDING
MANDATORY ARBITRATION OF EMPLOMENT DISPUTES

Testimony of Michael Foreman
On Behalf of the Leadership Conference on Civil Rights
Before the
Committee on Education and Labor
February 12, 2008

Chairman Andrews, Ranking Member Kline and members of the Subcommittee. Thank you for convening this hearing, which in part will address the issue of mandatory arbitration of employment disputes and, ultimately, how much we as a society value the civil rights of our workers. Pre-dispute mandatory arbitration is an issue that that is not only timely, but critical as we, as a nation, continue to struggle to ensure equal employment opportunities for all. My name is Michael Foreman and I am testifying today on behalf of the Leadership Conference on Civil Rights (LCCR). The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States.[1] Founded in 1950, LCCR is the nation's oldest, largest, and most diverse civil and human rights coalition. LCCR's members are dedicated to preserving the interest of individuals in raising issues of unlawful discrimination and the interest of society in having those issues brought to light. Collectively, LCCR's members represent millions of our nation's most vulnerable workers.

In addition to serving as the Co-Chair of the Leadership Conference's Employment Task Force, I am also the Director of the Employment Discrimination Project at the Lawyers' Committee for Civil Rights Under Law, which is one of LCCR's member organizations. The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to insure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. The Lawyers' Committee seeks to ensure that the goal of civil rights legislation, to eradicate discrimination, is fully realized.

During the course of my career, I have represented employees and employers, as well as federal, state, and local governments. I have handled employment matters through all phases of their processing from the administrative filing, at trial and through appeal.[2] This hands-on experience informs my analysis of the use of mandatory arbitration for employment disputes.

My testimony will address three topics: (1) the involuntary nature of many pre-dispute arbitration agreements (2) the ways in which mandatory arbitration clauses subvert

[1] A listing of the organizations that comprise the Leadership Conference is attached as Exhibit 1.
[2] A copy of my resume is attached as Exhibit 2.

employees' substantive rights, and (3) why it is necessary to curtail the use of pre-dispute mandatory arbitration.

It is important to recognize at the outset that pre-dispute mandatory arbitration is not just an employment issue or a civil rights issue; it is an issue that cuts to the core of this country's ideals of equality and due process.

For over half of a century, our society and this Congress has struggled with issues concerning equal employment opportunity and attacked the problem of employment discrimination through significant legislation including Title VII, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act, to name a few. In keeping with our national commitment to equality, Congress created a framework for enforcing these rights though individual lawsuits, litigation by the Attorney General, and the efforts of federal agencies, like the Equal Employment Opportunity Commission, tasked with enforcing laws against employment discrimination. In doing so, Congress established a plan for combating discrimination through an open, fair process governed by the rule of law and administered by impartial judges and juries that allowed for public accountability. In fact, as recently as 1991, Congress acted to protect employees by codifying their right to a jury trial in Title VII cases. It is hard to envision a justice system that allows employers to strip employees of the very rights Congress has worked tirelessly to protect, especially through pre-dispute mandatory arbitration clauses hidden in employment applications or employee handbooks.

While one can debate whether permitting binding arbitration for any civil rights claim is good public policy, we are not here to resolve that issue. The current question before this subcommittee is not whether there can be binding arbitration but ***when*** binding arbitration is appropriate. We support alternative dispute resolution agreements, including binding arbitration agreements, that are adopted knowingly and voluntarily after a dispute has emerged. What we oppose, and what Section 421-424 of H.R. 5129 (Civil Rights Act of 2008) prohibits, are binding mandatory arbitration clauses that employees are forced to submit to long before any dispute has arisen.

Many Employees Have No Choice In Whether To Submit Their Civil Rights Claims To Pre-Dispute Mandatory Arbitration

Seeing a way to minimize the costs associated with violating civil rights laws, employers are increasingly turning to pre-dispute mandatory arbitration. In 1979, only 1 percent of employers used arbitration for employment disputes.[3] According to most recent estimates, around 15% to 25% of employers nationally have adopted mandatory employment arbitration procedures.[4] The stark reality is that all too often, the employees

[3] See the attached timeline documenting the increase in the use of mandatory arbitration prepared by the National Employment Lawyers Association, attached as Exhibit 3.

[4] *See* Alexander Colvin *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007) Describing it as a conservative estimate, Professor

have no choice but to surrender their rights and accept mandatory arbitration. Many employees do not have the luxury of choosing when, and under what conditions to sign arbitration agreements, because employers often make such agreements a job requirement. Employees who refuse to sign a mandatory arbitration agreement could lose their current jobs or be denied a new position.

In formulating good public policy we must not divorce ourselves from the reality of life for many Americans; if a blue-collar worker refuses to sign a job application containing a pre-dispute mandatory arbitration clause, or a separate arbitration agreement included in a stack of documents piled before them on their first day of the job, do you honestly think the employee would get the job?[5] We all know what would happen, the employer would just go on to the next applicant who signed the arbitration agreement, regardless of whether that worker knew he or she was agreeing to submit his or her civil rights claims to mandatory arbitration or what that really meant.

For many employees, the only real choices they face are ones like:

- Passing up a paycheck that would help put food on the table or signing a job application stating that one's signature constitutes an agreement to binding arbitration of any dispute;

- Risking foreclosure from unpaid mortgage bills or agreeing to submit their supposedly federally guaranteed civil rights to mandatory arbitration; or

- Giving up the chance to finally get health care benefits or signing away their right to a jury trial

These employees do not really have a choice at all.

Employees also have no way of knowing when a provision of an arbitration agreement is actually prohibited by law. Most often, employees will simply submit to the terms of the contract without realizing that they could challenge the legality of certain unfair or impermissible conditions.

Having had no choice but to accept mandatory arbitration, many employees are stuck trying to enforce their federally protected civil rights in a system selected and dominated by their employer. These are the workers the Leadership Conference and the Lawyers' Committee represent. It is their ability to choose that Section 421-424 of H.R. 5129 is designed to protect.

Colvin extrapolates the 25% figure from his 2003 finding that 23% of the non-union telecommunications workforce was covered by mandatory arbitration programs.

[5] This assumes that the applicant is actually aware of the pre-dispute mandatory arbitration requirement. Even if some employees would object to unfair and burdensome pre-dispute mandatory arbitration clauses, such clauses are often deeply buried in the small print of lengthy employment contracts, and can be so unclear that most employees do not truly understand the consequences of signing the agreement.

In Practice, Pre-Dispute Mandatory Arbitration Agreements Supplant Employees' Substantive Rights

While the Supreme Court has noted that mandatory arbitration agreements should only alter the forum in which employment disputes are resolved, not the substance of employees' civil rights, this distinction is not borne out in practice. In reality, by stripping away procedural rights, the underlying substantive right is undermined or even eviscerated. Mandatory arbitration agreements often lack the safeguards, accountability, and impartiality of the system Congress created, allowing employers to bypass some of the most important protections built into anti-discrimination legislation such as the Civil Rights Act of 1964 and the Civil Rights Act of 1991.

One of the most glaring ways in which mandatory arbitration agreements strip employees of their substantive rights is by denying them their day in court before an impartial judge and a jury of their peers. Mandatory arbitration forces employees to forego the traditional court system and present their claims before arbitrators who are not required to know or follow established civil rights and employment law. Private arbitrators, who are selected by the employer, also depend on the employer for repeat business, and thus have an incentive to rule in favor of the employer. In fact, despite the clear conflict of interest that arises, employers sometimes finance the arbitration. In such cases, the arbitrator may feel obliged to rule in favor of the party that is paying the bill.

Tellingly, by way of examples, between January 1, 2003 and March 31, 2007, AAA's public records show that AAA held 62 arbitrations for Pfizer, of which 29 reached a decision. Of these 29 cases, the arbitrator found for the employer 28 times – a decision rate of 97 percent for the employer. Similarly, Halliburton's win rate was 32 out of 39 cases that went to decision – an 82 percent win rate for the employer.[6]

Employees' rights are diminished by mandatory arbitration in many ways, including but not limited to:

- Limitation or prohibition of pre-trial discovery, thus impeding employees' ability to use depositions and discovery requests to obtain information that would support their claims. As the employee has the burden of proof, this limitation is particularly troublesome. This lack of discovery benefits the party with greater access to evidence and witnesses. Since employers generally have control over relevant documents and the employees involved, arbitration's limited discovery provides a distinct advantage to employers.

- No right to trial before a jury of one's peers, which is protected by legislation such as the Civil Rights Act of 1991 and the Age Discrimination in Employment Act.

[6] *See Hearing on H.R.. 3010, The Arbitration Fairness Act of 2007Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (Testimony of Ms. Cathy Ventrell-Monsees, Esq.).

- Stringent filing requirements, giving parties less time to prepare and reducing the statutory limitations period that would otherwise be available for filing a lawsuit.

- Limited right to appeal arbitration decisions. Courts are only permitted to overturn such decisions under extreme circumstances. Significantly, the existence of clear errors of law or fact in an arbitrator's decision does not provide grounds for appeal.

- Limited range of remedies available. Arbitrators cannot order injunctive relief, and very rarely award compensatory or punitive damages. Even when awarding damages, arbitrators often award only back pay.

- Uncertain ability to bring class actions suits, even when this particular type of action would be most efficient in addressing the discrimination.

Arbitration is also often private and confidential, so employers are spared from the public awareness that otherwise would provide a strong incentive to proactively address discrimination and harassment.

Pre-dispute mandatory arbitration is simply not an effective way to enforce our civil rights laws, hold violators accountable, and prevent discrimination from occurring again in the future. To the contrary, allowing arbitrators to bypass important civil rights legislation in making their decisions weakens our system's ability to protect employees from discrimination in the workplace. ***It is one thing to permit employees to willingly and knowingly agree to resolve an existing dispute through arbitration.*** It is quite another to allow vulnerable employees to be forced by their circumstances to rely on mandatory arbitration to enforce their civil rights and maintain our nation's commitment to equality.

Why the Arbitration Provision in H.R. 5129 is Necessary

Primarily because of a competing public policy favoring arbitration of disputes evident in the Federal Arbitration Act, the Supreme Court in its recent analysis of pre-dispute mandatory arbitration,[7] has been unwilling to conclude that mandatory arbitration frustrates the purpose of civil rights laws ensuring equal employment opportunity, absent an explicit statement from Congress on the issue. Further, as previously mentioned, the Court has repeatedly noted that binding arbitration should not impact the substantive right, just the forum.

[7] *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (concluding that a mandatory arbitration agreement between an employee and an employer does not bar the EEOC from pursuing victim-specific relief in an enforcement action under the Americans with Disabilities Act); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that the Federal Arbitration Act exempts only transportation workers, not all employment contracts, and therefore the binding arbitration provision contained an a retail employee's job application was enforceable); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991) (enforcing a pre-dispute, binding, mandatory arbitration agreement in an age discrimination case, even though the Age Discrimination in Employment Act explicitly codifies the right to a trial before a judge and jury).

These rulings have exacerbated rather than resolved the problems raised by mandatory arbitration agreements. Many lower courts give deference to arbitration agreements in virtually every type of employment case and ignore the fact that mandatory arbitration has a substantial impact beyond merely changing the forum.

Indeed, some courts have enforced mandatory arbitration agreements even when employees have expressly refused to sign them. Ms. Fonza Luke, of Alabama, worked loyally as a nurse for a hospital for almost 30 years. Despite her decades of committed service, she was asked to sign a document agreeing to use of mandatory arbitration program for any dispute arising in her workplace. Although she explicitly refused to sign the agreement, a court forced her arbitrate her discrimination claims.[8]

Judicial decisions upholding mandatory arbitration in employment cases highlight the importance of Congress resolving the issue through legislation like Section 421-424 of H.R. 5129. In light of Congress's approval of arbitration generally, as reflected in the Federal Arbitration Act, courts are understandably uncomfortable concluding that arbitration of employment discrimination claims is unlawful without more evidence of congressional intent.[9] Speculation regarding Congress's intent regarding mandatory arbitration of employment claims has created substantial confusion in the lower courts. Some courts have enforced mandatory arbitration clauses and upheld them as binding.[10] Others have struck them down, concluding that such clauses significantly alter employees' substantive rights.[11]

Conclusion: Congress Must Take Positive Action

Through its decisions, the Supreme Court has virtually invited Congress to specifically express its intent with regard to the permissibility of pre-dispute mandatory arbitration of

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[8] *See S. 1782, The Arbitration Fairness Act of 2007: Hearing on S. 1742 Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (Testimony of Ms. Fonza Luke).

[9] *See Circuit City*, 532 U.S. at 119 (Concluding that the FAA's text cannot be interpreted to exempt all employment contracts and Court cannot simply create such an exemption); *Barker v. Halliburton Co.*, 2008 U.S. Dist. LEXIS 6741 at *21 (S.D. Tex. 2008) ("Therefore, absent some showing that Congress expressly exempted one of Barker's types of claims from arbitration, the presumption under the Federal Arbitration Act is that arbitration must be compelled.").

[10] *See, e.g., EEOC v. Woodmen of the World Life Ins. Society*, 479 F.3d 561 (8th Cir. 2007); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006); *Caley v. Gulf Stream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005). In fact, the only circuit that has addressed the issue of mandatory arbitration of USERRA claims has enforced the arbitration agreement despite explicit language in USERRA indicating that it supersedes any contract or agreement that reduces, limits, or eliminates any rights under the Act or creates additional prerequisites to exercising USERRA rights. *See Garrett*, 449 F.3d at 677-678; 38 U.S.C. § 4302(b).

[11] *See, e.g., Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) (holding that a mandatory arbitration agreement was unconscionable under California law in part because it contained provisions that required employees to "waive potential recovery for substantive statutory rights in an arbitral forum"); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (striking down several provisions of a pre-dispute mandatory arbitration clause as invalid because threatened to alter substantive rights); *McMullen v. Meijer Inc.*, 355 F.3d 485 (6th Cir. 2004) (striking down a provision in a mandatory arbitration agreement which granted employer unilateral control over the pool of potential arbitrators, because such a provision inherently lacked neutrality and prevented the employee from effectively vindicating her statutory rights).

employment claims.[12] Section 421-424 of H.R. 5129 answers the Court's request by reinforcing the protections Congress intended our nation's workers to enjoy.

The Leadership Conference urges Congress support the H.R. 5129's arbitration provision. With nearly a quarter of America's non-union workforce currently being subjected to the separate and extremely unequal system of mandatory arbitration, Congress should take positive steps to ensure that our civil rights and employment laws protect all American workers.

Again, thank you Chairman Andrews, Ranking Member Kline, and members of the Subcommittee for the opportunity to speak with you today.

[12] *See Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105, 119 (2001) (explaining that the Court has no basis to adopt "*by judicial decision rather than amendatory legislation*, an expansive construction of the FAA's exclusion provision" that would exempt all employment contracts) (internal citations omitted) (emphasis added); *Gilmer*, 500 U.S. at 26 ("Although all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.").