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New Federal Bill Seeks to Limit Use of Arbitration Agreements

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Earlier this month, U.S. Senator Patrick Leahy (D-Vt.) introduced a bill, titled "Restoring Statutory Rights and Interests of the States Act of 2016," that would limit the use of arbitration agreements in civil rights cases, employment disputes, and other lawsuits.

The Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.* provides for judicial reinforcement of private dispute resolution through arbitration. In other words, if two parties agree in a contract to use arbitration to resolve any disputes that may arise, one party cannot later force the other party into court to resolve the dispute. Rather, he or she must submit to private arbitration as per the terms of the contract.

The Supreme Court has also consistently upheld and indeed favored arbitration under the FAA. However, the proposed bill would amend the FAA in three main aspects: (1) making the FAA inapplicable for claims involving individuals and small businesses "arising from the alleged violation of a Federal or State statute, the Constitution of the United States, or a constitution of a state;" (2) allowing federal and state courts to invalidate arbitration agreements that were "unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of contract law or public policy;" and (3) requiring a court to determine whether the FAA applies to arbitration agreements, rather than having an arbitrator make this initial determination.

"There is a valid role for arbitration when parties choose it willingly, after a dispute arises, as an alternative to court," said Senator Leahy. "But arbitration should not be forced upon consumers and workers through take-it-or-leave-it contracts they have no real choice but to accept." "When Americans sign cell phone agreements, rent an apartment or accept a contract for a job, most of us focus on the service we are about to receive or that we are about to provide. What Americans do not realize—until it is too late—is that too often we are also signing away crucial legal rights," Senator Leahy said. "Legal fine print tips the scales against us. It is forcing consumers into private arbitration, denying us of our Constitutional right to protect ourselves in court."

The bill was co-sponsored by Senator Al Franken (D-Minn.). In a statement regarding the bill, Senator Franken said, "Our legislation is common-sense reform that will help to restore Americans' right to challenge unfair practices by corporations, and it needs to be passed into law." "When Americans' rights are infringed, they deserve their day in court," Franken said. "Sadly, when big corporations insulate themselves from liability through 'forced arbitration' clauses — which are slipped into things like credit card agreements and employment agreements — they stack the deck against Americans who are trying to exercise that fundamental right." Additional co-sponsors of the bill include Senators Richard Blumenthal from Connecticut, Dick Durbin from

Illinois, and Sheldon Whitehouse from Rhode Island.

Interestingly, these senators are not alone in pushing to curtail the use of arbitration agreements by large corporations. In October 2015, the Consumer Financial Protection Bureau ("CFPB"), an independent agency of the federal government that is responsible for consumer protection in the financial sector, convened its Small Business Regulatory Enforcement Fairness Act ("SBREFA") panel to review proposals for regulating the use of arbitration agreements in certain consumer financial services contracts. The SBREFA panel is expected to issue a set of proposed regulations this year. Additionally, the National Labor Relations Board ("NLRB") recently held that Samsung violated the National Labor Relations Act ("NLRA") by providing an arbitration agreement that mandated employees to waive their rights to collective or class actions against Samsung. Specifically, the NLRB ruled 3-0 that Samsung violated the NLRA when Samsung filed a motion to compel mediation or arbitration and demanded its employees to withdraw a putative class action in Florida federal court.

Employers are advised to follow developments in the legislature and government agencies to curtail the use of arbitration agreements. Employers should also monitor decisions issued from federal agencies such as the NLRB and stay current with laws involving arbitration agreements in order to ensure compliance with both state and federal law.

If your institution has questions or concerns regarding employment or litigation-related issues, please contact James G. Ryan at jryan@cullenanddykman.com or at 516-357-3750.

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