

Democratic Party control could ban mandatory arbitration, UI expert says

November 17 2008

Democratic Party control in Washington could restore lawsuits as an option for workers and consumers now forced to settle disputes through mandatory arbitration that gives employers and businesses an unfair edge, a University of Illinois labor law expert says.

Michael LeRoy predicts a bill sponsored by Democrats that would bar companies from imposing arbitration will likely be approved next year when Democrats take over the White House and add to their majorities in Congress.

The measure, introduced last year but stalled by the prospect of a Bush administration veto, would halt a shift that has grown since a 1991 U.S. Supreme Court ruling allowing firms to require arbitration rather than courts to resolve disputes, he said.

"The bottom line is you shouldn't be forced into arbitration," LeRoy said. "It doesn't seem like a hallmark of a democratic society to say that as a condition of an important economic relationship such as employment that you must forego a constitutional right."

LeRoy says his research shows that arbitration as the only outlet to settle disputes is flawed, giving companies an unfair advantage in cases that can range from workplace sexual harassment or unjust dismissal claims to customers who challenge credit-card bills.

One study found that state appellate courts confirmed 86.7 percent of

employer wins in job-related disputes, compared with just 56.4 percent of cases in which arbitrators sided with employees.

The lopsided results suggest a double standard, LeRoy said, likely stemming from corporate-friendly state laws that have led to "snowballing futility" for the estimated 20 percent of U.S. workers whose only legal resource is arbitration.

Another study found that federal courts overturned only 4 percent of arbitrator rulings in employment discrimination cases, compared with 13 percent of similar cases decided by courts rather than arbitrators.

"I doubt that judges are three times more error prone than private arbitrators," said LeRoy, a professor of law and labor and employment relations. "The problem is that the standard for reviewing mistakes by judges and juries is much broader than the test for reviewing an arbitrator's ruling."

He says his research also revealed other areas where arbitration favors companies, such as contracts that ban punitive damages or lawyers' fees when employees or consumers prevail.

"Attorney fees can be in the hundreds of thousands of dollars," LeRoy said. "I can point to a case from my research where a woman won \$90,000 and had to pay more than that for an attorney. So what did she get by challenging the action?"

Arbitration would remain an option to settle disputes, but would be voluntary rather than mandatory under the proposed Arbitration Fairness Act, sponsored by Sen. Russ Feingold, D-Wis., and Rep. Hank Johnson, D-Ga.

Workers and consumers could opt for court or arbitration, deciding

based on the facts of the dispute at hand rather than accepting a blanket contract when they hire in or sign up for a credit card, bank account or another service, LeRoy said.

Arbitration might be the best option for some disputes, such as low-stakes claims or a potentially embarrassing sexual harassment case that both sides prefer to shield from the public eye, he said. In other cases, he said, courts are a better outlet, offering potentially heftier awards and a chance for a hearing by jury instead of a lone arbitrator.

"The bill that's pending is not anti-arbitration," LeRoy said. "What's happening with mandatory arbitration is it's become an indiscriminate use of an otherwise very good resolution process."

The bill generally has been backed by Democrats and opposed by Republicans, who fear lawsuits that could make U.S. corporations less competitive in a global economy.

But he says the measure could muster more bipartisan support in the wake of a financial meltdown that has put the nation's credit industry under increased scrutiny.

"The idea that a credit-card issuer can mandate its own private justice system that is shielded from public view is going to be difficult for any politician to defend these days," LeRoy said. "It would be hard to say, 'Let's keep that system alive,' especially when the government is using taxpayer money to bail out financial institutions that are issuing the credit cards."

Source: University of Illinois at Urbana-Champaign

Citation: Democratic Party control could ban mandatory arbitration, UI expert says (2008, November 17) retrieved 24 April 2024 from <https://phys.org/news/2008-11-democratic-party-mandatory-ui-expert.html>

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