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Project Title: Arbitration in the Era of #MeToo

Background

Arbitration has long been a widely used tool in the realm of alternative dispute resolution, meaning ways to serve justice without entering a courthouse. But it's increasing presence as a clause in employment contracts to handle all future disputes has hurt the ability of employees to seek equitable relief in a court of law. It is especially troubling when it comes to sexual assault allegations. In the wake of the #MeToo movement, it is evident that arbitration clauses in employment contracts, and the non-disclosure agreements associated with them, prevented many victims from speaking out. This project is focused on how the problem of pre-dispute arbitration in employment contracts began, why arbitration is not favorable to employees and how forced arbitration can be prevented going forward.

Methods

The research for this project was conducted through reviewing associated statutes and court cases. Most notably, the Federal Arbitration Act (FAA), which was enacted in 1925. The Supreme Court decisions that were examined were *Alexander v. Gardner-Denver Corp* (1974), *Gilmer v. Interstate Johnson* (1991), *14 Penn Plaza LLC v. Pyett* (2009), *AT&T Mobility v. Concepcion* (2011), and most recently *Epic Systems Corp v. Lewis* (2018). News articles pertaining to the #MeToo movement and pre-dispute arbitration in the private sector were also referenced. The research was grounded in the theory that any crime or accusation thereof deserves to be heard in a court of law. Additionally, the research for this project was conducted last semester, in the Fall of 2018, for my senior seminar.

Results

It was found that the Supreme Court has made a series of erroneous rulings on this issue going back forty years. This has caused the protections of arbitration originally outlined in the Federal Arbitration Act to extend to employment contracts, beyond the intention of the representatives that passed that law. Additionally, the process of arbitration was found to be fundamentally unfair to the employee. Research showed that the employer is statistically favored to win most conflicts. This can be attributed to a variety of reasons including that the employee usually has very little say in choosing the arbitrator to hear the case. Also, employers that are repeat offenders tend to use the same arbitrator, suggesting improper relationships exist between many businesses and 'independent' arbitrators.

Discussion

Unless the Court is prepared to reverse years of decisions favoring arbitration, which in recent years it has shown us it is not, then the way to solve this problem is through legislation.

Since December of 2017, House and Senate democrats have introduced bills to combat pre-dispute arbitration, but none have made it very far. Additionally, these efforts can be seen as futile with the current administration, because they have signaled their support for business' instead of individuals and employees in this conflict. This reverses a longstanding Obama administration policy.

This research is significant because it shows how narrow the divide currently is between legal and political issues. It is obviously due to the polarization that currently exists in our politics. The fact that this insecurity from the state of politics is influencing the operations of our legal system is very worrying and people should take notice.

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