

Please Support HB18-1261: Colorado Arbitration Fairness Act

The Problem

- Within the last 10-20 years, arbitration has gone from an infrequently used means of alternative dispute resolution to a **widely prevalent default clause in employment and consumer contracts** to which millions of Americans and hundreds of thousands of Coloradans are subject.
- **Consumers and employees do not elect these arbitration provisions**; typically, arbitration clauses are inserted into standard contracts written by the seller/employer.
- Judges are subject to specific ethical standards and court opinions are published. **But arbitrators deciding consumer and employee rights are not subject to comparable standards** and arbitration proceedings are typically private and often subject to non-disclosure.
- **The United States and Colorado Constitutions create an independent judiciary** as a neutral forum for the redress of wrongs. **But access to the courts is increasingly being curtailed** by contractual provisions imposed by one party to a contract.

A Solution

- Create uniform ethical standards for arbitrators in consumer and employment arbitrations
- Establish disclosure requirements in consumer and employment arbitrations
- Allow remedies where ethical standards are not upheld or where disclosures not substantially met

Examples of where arbitration clauses may be found – employment

- 1992 – 2.1% of employers subject to mandatory arbitration
- 1995 – 7.6% of employers require mandatory arbitration
- 2003 – 22.7% of non-union employees in telecom sector subject to mandatory arbitration
- 2017 – 53.9% of employers require mandatory arbitration
- 2017 – 56.2% of employees subject to mandatory arbitration
- 2017 – 65.1% of employees in companies of 1,000 or more subject to mandatory arbitration
- 2017 – more than 60 million American workers are now subject to mandatory arbitration

Examples of where arbitration clauses may be found – consumer goods and services

- Air BnB
- Auto loans
- Care.com (baby-sitting services)
- Denver Post subscription
- Discover credit cards
- Eco-tech institute – technical education
- **Equifax** – credit reporting
- H&R Block - tax filing service
- Metro PCS – cell phone service
- Microsoft Office software
- Nursing homes
- Pokemon Go
- **Wells Fargo**

Summary of bill

§	What it does	Notes
701	Short Title	<ul style="list-style-type: none"> • Colorado Arbitration Fairness Act
702	Legislative Declaration	<ul style="list-style-type: none"> • "to ensure that private arbitration is fair and impartial and...accessible and affordable for all consumers and employees"
703	Definitions	<ul style="list-style-type: none"> • Consumer • Employee • evident partiality • potential partiality
704	Application	<ul style="list-style-type: none"> • Included: pre-dispute arbitration agreements in consumer or employee contracts • Not included: post-dispute arbitration; mediation; labor arbitration
705	Ethical standards for arbitrators	<ul style="list-style-type: none"> • Patterned on Code of Judicial Conduct and Rules of Professional Conduct (see table)
706	Basis for challenge	<ul style="list-style-type: none"> • Basis: potential or evident partiality of arbitrator or arbitration services provider • Remedy: e.g. court appoints an arbitrator pursuant to 13-22-211 (UAA) • NOTE - dispute continues to be resolved in arbitration
707	Required disclosures	<ul style="list-style-type: none"> • By parties to arbitration - "conflicts checklist" • By arbitration services provider • By arbitrator
708	Remedy - injunctive relief	<ul style="list-style-type: none"> • Remedy: e.g. court appoints an arbitrator pursuant to 13-22-211 (UAA) • NOTE - dispute continues to be resolved in arbitration
709	Waiver & severability	<ul style="list-style-type: none"> • Waiver of rights must be post-dispute and in writing

AN ARBITRATOR SHALL PERFORM HIS OR HER DUTIES, INCLUDING ADMINISTRATIVE DUTIES, WITHOUT BIAS OR PREJUDICE	13-222-705(1)(a)	Code of Judicial Conduct - Rule 2.3(a)
AN ARBITRATOR SHALL NOT, IN THE PERFORMANCE OF HIS OR HER DUTIES, BY WORDS OR CONDUCT, MANIFEST BIAS OR PREJUDICE, OR ENGAGE IN HARASSMENT, INCLUDING BUT NOT LIMITED TO BIAS, PREJUDICE, OR HARASSMENT BASED UPON RACE, SEX, GENDER, RELIGION, NATIONAL ORIGIN, ETHNICITY, DISABILITY, AGE, SEXUAL ORIENTATION, MARITAL STATUS, SOCIOECONOMIC STATUS, OR POLITICAL AFFILIATION, AND SHALL NOT DIRECT OTHERS SUBJECT TO THE ARBITRATOR'S DIRECTION AND CONTROL TO DO SO.	13-222-705(1)(b)	Code of Judicial Conduct - Rule 2.3(b)
AN ARBITRATOR SHALL REQUIRE ATTORNEYS IN PROCEEDINGS TO REFRAIN FROM MANIFESTING BIAS OR PREJUDICE OR ENGAGING IN HARASSMENT BASED UPON ATTRIBUTES INCLUDING BUT NOT LIMITED TO RACE, SEX, GENDER, RELIGION, NATIONAL ORIGIN, ETHNICITY, DISABILITY, AGE, SEXUAL ORIENTATION, MARITAL STATUS, SOCIOECONOMIC STATUS, OR POLITICAL AFFILIATION, AGAINST PARTIES, WITNESSES, ATTORNEYS, OR OTHERS.	13-222-705(1)(c)	Code of Judicial Conduct - Rule 2.3(c)
THE RESTRICTIONS OF SUBSECTIONS (1)(b) AND (1)(c) OF THIS SECTION DO NOT PRECLUDE ARBITRATORS OR ATTORNEYS FROM MAKING LEGITIMATE REFERENCE TO THE LISTED FACTORS OR SIMILAR FACTORS WHEN THEY ARE RELEVANT TO AN ISSUE IN A PROCEEDING.	13-222-705(1)(d)	Code of Judicial Conduct - Rule 2.3(d)
AN ARBITRATOR SHALL NOT BE SWAYED BY PUBLIC CLAMOR OR FEAR OF CRITICISM.	13-222-705(2)(a)	Code of Judicial Conduct - Rule 2.4(a)
AN ARBITRATOR SHALL NOT PERMIT FAMILY, SOCIAL, POLITICAL, FINANCIAL, OR OTHER INTERESTS OR RELATIONSHIPS TO INFLUENCE THE ARBITRATOR'S CONDUCT OR JUDGMENT.	13-222-705(2)(b)	Code of Judicial Conduct - Rule 2.4(b)
AN ARBITRATOR SHALL NOT CONVEY OR PERMIT OTHERS TO CONVEY THE IMPRESSION THAT ANY PERSON OR ORGANIZATION IS IN A POSITION TO INFLUENCE THE ARBITRATOR.	13-222-705(2)(c)	Code of Judicial Conduct - Rule 2.4(c)
AN ARBITRATOR SHALL DISQUALIFY HIMSELF OR HERSELF IN ANY PROCEEDING IN WHICH THE ARBITRATOR'S IMPARTIALITY MIGHT REASONABLY BE QUESTIONED, INCLUDING BUT NOT LIMITED TO THE FOLLOWING CIRCUMSTANCES:	13-22-705(3)(a)	Code of Judicial Conduct - Rule 2.11(a)
AN ARBITRATOR SHALL KEEP INFORMED ABOUT THE ARBITRATOR'S PERSONAL AND FIDUCIARY ECONOMIC INTERESTS, AND MAKE A REASONABLE EFFORT TO KEEP INFORMED ABOUT THE PERSONAL ECONOMIC INTERESTS OF THE ARBITRATOR'S SPOUSE, DOMESTIC PARTNER, CIVIL UNION PARTNER, AND MINOR CHILDREN RESIDING IN THE ARBITRATOR'S HOUSEHOLD.	13-22-705(3)(b)	Code of Judicial Conduct - Rule 2.11(b)
AN ARBITRATOR SHALL NOT ARBITRATE A DISPUTE IF THE ARBITRATION INVOLVES A CONCURRENT CONFLICT OF INTEREST. A CONCURRENT CONFLICT OF INTEREST EXISTS IF:	13-22-705(3)(c)	Rules of Prof. Conduct - Rule 1.7(a)
AN ARBITRATOR SUBJECT TO DISQUALIFICATION MAY DISCLOSE THE BASIS OF THE ARBITRATOR'S DISQUALIFICATION AND MAY ASK THE PARTIES AND THEIR ATTORNEYS TO CONSIDER, OUTSIDE THE PRESENCE OF THE ARBITRATOR, WHETHER TO WAIVE DISQUALIFICATION. IF, FOLLOWING THE DISCLOSURE, THE PARTIES AND ATTORNEYS AGREE, WITHOUT PARTICIPATION BY THE ARBITRATOR, THAT THE ARBITRATOR SHOULD NOT BE DISQUALIFIED, THE ARBITRATOR MAY PARTICIPATE IN THE PROCEEDING. THE AGREEMENT MUST BE INCORPORATED INTO THE RECORD OF THE PROCEEDING.	13-22-705(3)(d)	Code of Judicial Conduct - Rule 2.11(c)

	C.R.S. § 13-22-212	HB 18-1261
Before arbitrator's appointment	Arbitrator must make a "reasonable inquiry" § 13-22-212(1).	C.R.S. § 13-22-212 (1) does not apply. § 13-22-212(7) [P16, L 13-16]. Instead, parties must provide arbitrator and arbitration services provider with an arbitration conflicts checklist describing the issues, parties, parties' agents, parties' counsel, insurers and any other matters of which the parties believe the arbitrator should reasonably be made aware. §13-22-707(1)(a)(I)-(III) [P10, L11- P11, L20].
		<p>Arbitration services provider must disclose:</p> <ul style="list-style-type: none"> • past, present, or expected financial or professional relationship or affiliation between the provider and a party or attorneys in the arbitration. §13-22-707(1)(b)(I) [P12, L19 – P13, L 9]. • Any agreements the services provider has with any parties, their counsel, their liability insurers and their attorneys. §13-22-707(1)(b)(II) [P13, L10 – L17]. • Any solicitation made to a party or attorney or negotiations to designate the services provider as the services provider for a party. § 13-22-707(1)(b)(III) [P13, L18-24]. •
	Arbitrator must disclose "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator." § 13-22-212 (1).	<p>C.R.S. § 13-22-212 (1) does not apply. § 13-22-212(7) [P16, L 13-16]. Instead, arbitrator must disclose:</p> <ul style="list-style-type: none"> • His or her occupation or business and if an attorney, the general nature of the practice and the types of clients served. • Any business, pecuniary, social, familial, legal, or other significant relationship with any persons subject to the arbitration, their counsel, and any insurer that might provide coverage for an award. • Any pecuniary or financial interest in the issues in or outcome of the arbitration. • Any circumstances that might give the appearance of potential partiality in light of the matters described in the arbitration conflicts checklist. • A list of all arbitrations the arbitrator has participated in the past five years as an arbitrator and to the extent possible, in consideration of

	Arbitrator must disclose “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator.” § 13-22-212 (1).	C.R.S. § 13-22-212 (1) does not apply. § 13-22-212(7) [P16, L 13-16]. Instead, arbitrator must disclose: <ul style="list-style-type: none"> • His or her occupation or business and if an attorney, the general nature of the practice and the types of clients served. • Any business, pecuniary, social, familial, legal, or other significant relationship with any persons subject to the arbitration, their counsel, and any insurer that might provide coverage for an award. • Any pecuniary or financial interest in the issues in or outcome of the arbitration. • Any circumstances that might give the appearance of potential partiality in light of the matters described in the arbitration conflicts checklist. • A list of all arbitrations the arbitrator has participated in the past five years as an arbitrator and to the extent possible, in consideration of reasonable privacy concerns and confidentiality agreements, the parties’ names, their attorneys and copies of decisions and awards. § 13-22-707(1)(c) [P13, L 25- P14, L27]
After arbitration award	Party may object to arbitrator based on disclosure, the objection may be a ground for vacation an award after the arbitration ends. § 13-22-212 (3).	C.R.S. § 13-22-212 (3) does not apply. § 13-22-212(7) [P16, L 13-16].
	If arbitrator fails to disclose a fact	C.R.S. § 13-22-212 (4) does not apply. § 13-22-212(7) [P16, L 13-16].

¹ HB 1261 authorizes disqualification on grounds of evident partiality, which means that a party need not complete a full arbitration hearing before an evidently partial arbitrator before the party can seek to have an impartial arbitrator appointed to resolve the dispute. § 13-22-706(2) & (3). [P9, L27 – P10, L9].



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February 12, 2018

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RE: Mandatory Arbitration of Sexual Harassment Disputes

Dear Congressional Leadership:

As the duly-elected and appointed Attorneys General and chief legal officers of our respective States, District of Columbia, and territories, we ask for your support and leadership in enacting needed legislation to protect the victims of sexual harassment in the workplace. Specifically, we seek to ensure these victims' access to the courts, so that they may pursue justice and obtain appropriate relief free from the impediment of arbitration requirements.

Access to the judicial system, whether federal or state, is a fundamental right of all Americans. That right should extend fully to persons who have been subjected to sexual harassment in the workplace. Yet, many employers require their employees, as a condition of employment, to sign arbitration agreements mandating that sexual harassment claims be resolved through arbitration instead of judicial proceedings.

These arbitration requirements often are set forth in clauses found within the "fine print" of lengthy employment contracts. Moreover, these clauses typically are presented in boilerplate "take-it-or-leave-it" fashion by the employers. As a consequence, many employees will not even recognize that they are bound by arbitration clauses until they have been sexually harassed and attempt to bring suit.

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While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.

Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.

We applaud Microsoft Corporation for recently announcing that it will discontinue arbitration requirements with respect to sexual harassment claims and for supporting legislation to ensure that victims of sexual harassment be accorded the right of access to our judicial system. As Microsoft's President and Chief Legal Officer has fairly noted, "[b]ecause the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard."

Congress today has both opportunity and cause to champion the rights of victims of sexual harassment in the workplace by enacting legislation to free them from the injustice of forced arbitration and secrecy when it comes to seeking redress for egregious misconduct condemned by all concerned Americans. We are aware that the Senate and the House are considering legislation to address this issue. Whatever form the final version may take, we strongly support appropriately-tailored legislation to ensure that sexual harassment victims have a right to their day in court.


Sincerely,



Pamela Jo Bondi
Florida Attorney General



Steve Marshall
Alabama Attorney General



Josh Stein
North Carolina Attorney General



Jahna Lindemuth
Alaska Attorney General