United States Senate

WASHINGTON, DC 20510

August 11, 2016

Ms. India Johnson
President
American Arbitration Association
120 Broadway, 21st Floor
New York, NY 10271

Dear Ms. Johnson,

We write to request information on cases involving sexual harassment and other employment disputes that are heard in secret by arbitrators affiliated with your organization. We believe that the public has an important interest in this material, and we urge you to deliver it as soon as possible.

Mandatory arbitration clauses are an increasingly popular tool in the business community and are currently written into a wide variety of contracts. These clauses' tendency to discourage workers and consumers from bringing legitimate claims has been well documented. Another distressing effect of the proliferation of mandatory arbitration clauses concerns secrecy. Because arbitration – unlike civil litigation – is frequently conducted in secret, these clauses have the effect of denying the American public their right to information that may directly relate to their lives. Workers may lose the right to know when they are working in unsafe or illegal conditions. Consumers may lose the right to know when they are being exposed to dangerous products or services. The public may lose the right to know when a supposedly upstanding corporate citizen is in fact abusing the public's trust.

Not only is arbitration frequently conducted in secret, some contracts that mandate arbitration also include provisions that deny claimants the ability to speak openly and honestly about their claims. These "cover up clauses" most recently drew public attention in the context of Gretchen Carlson's sexual harassment claims against Fox News chairman and CEO Roger Ailes. As has been widely reported, Ms. Carlson's brave decision to go public with her accusations of sexual harassment and retaliation by Ailes not only forced changes at Fox News but gave Ms. Carlson's colleagues the courage to tell their own stories of abuse by Mr. Ailes and others.

However, under Mr. Ailes's interpretation of Ms. Carlson's contract, Ms. Carlson was legally obligated to keep her allegations of sexual harassment quiet while she argued them in a secret tribunal chosen by her employer. Mr. Ailes's attorneys moved to compel arbitration, attempting not only to remove the case from a court of law, but also to keep Ms. Carlson quiet.

If Ms. Carlson had followed Mr. Ailes's reading of her contract, her colleagues might never have learned that she was fighting back. They might never have followed her example; Roger Ailes might never have been exposed; and Fox News might never have been forced to change its behavior. Decades of alleged abuse – harassment that should disgust and astound any reasonable person – could have been allowed to continue.

Our legal system should encourage people to come forward to seek justice, not be complicit in forcing people to stay silent. Requiring a completely secret and silent process serves the interests of companies that wish to avoid the consequences of their actions. Workplace harassment and abuse is a scourge, occurring far too often and reported far too infrequently. According to an EEOC study released this year, roughly 75% of people who have experienced workplace harassment never reported it to management. Despite that fact, in FY2015 alone the EEOC received approximately 28,000 workplace harassment complaints, nearly half of which were on the basis of sex. As we have seen in countless cases of sexual abuse and harassment, fear is a powerful weapon that perpetrators use against their victims. Cover up clauses compound the problem by adding another layer of difficulty to seeking justice. We should do all we can to help victims come forward and tell their stories. Our system should respect the bravery that accompanies such an act.

One byproduct of the arbitration system's secrecy is a lack of knowledge on the scope of the problem. The public does not currently know how many people might be facing sexual harassment without the ability to tell their colleagues or friends. We write in the hope that you will be able to provide some much-needed data. We would like to know, for the past five years:

- How many employment lawsuits were referred to binding arbitration through your organization?

- How many sexual harassment lawsuits were referred to binding arbitration through your organization?

- How many sexual harassment and employment cases referred to arbitration involved binding arbitration agreements containing secrecy clauses similar to the one contained in Ms. Carlson's contract?

- What percentage of binding arbitration agreements that appear before members of your organization, regardless of the cause of action, contain secrecy clauses like the one contained in Ms. Carlson's contract?

- Does your organization make any effort to encourage parties that use its arbitration services to allow free and open discussion regarding the claims to be considered and any wrongdoing revealed by those claims, particularly when such discussion would be helpful to the public?

This information will be extremely helpful in obtaining a firmer grasp on the effectiveness of the increased use of binding secret arbitration clauses in sexual harassment and other employment cases. We appreciate your attention to this matter and look forward to your response.

Sincerely,

RICHARD BLUMENTHAL
United States Senate

RICHARD J. DURBIN
United States Senate

AL FRANKEN
United States Senate