National Employment Lawyers Association
Advocates for Employee Rights

June 16, 2012

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

RE: Docket No. CFPB-2012-0017, Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements

Dear Ms. Jackson:

On behalf of the National Employment Lawyers Association (NELA), I respectfully submit to the Consumer Financial Protection Bureau (CFPB) our suggestions for the appropriate scope and sources of data for the Bureau's study of, and report to Congress on, the use of pre-dispute arbitration agreements in connection with the offering or providing of consumer financial products or services.

NELA is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are dedicated to working on behalf of those who have been illegally treated in the workplace. We are at the forefront of legislative and public policy efforts to ban the pervasive employer practice of pre-dispute forced arbitration in the workplace.

Since the Bureau's request for information as mandated under Section 1028(a) of the Dodd-Frank Act (12 U.S.C. 5518(a)) precludes public comment on: a) whether it should, by regulation, prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements with respect to consumer financial products or services; or b) whether any such regulation would serve to protect consumers or otherwise be in the public interest, our comments will focus on statistics and other lessons learned in employment arbitrations that are equally applicable in the consumer context that should inform the Bureau's decision making.

National Office • 417 Montgomery Street, Fourth Floor • San Francisco, California • 94104 • TEL 415.296.7629
Washington DC Office • 1828 L Street, NW, Suite 600 • Washington DC • 20036 • TEL 202.898.2880
email: nelahq@nelahq.org • www.nela.org • FAX 866.593.7521

As a fundamental concept, no system of justice can succeed without the confidence of its participants. The mere act of having a stronger party create the rules, select a provider, and force them on a weaker party is inconsistent with the principles of neutrality and fairness demanded by our nation's civil justice system regardless of any statistics. Among other things, forced arbitration creates an unlevel playing field for workers because arbitrators typically are hired by employers, and many work repeatedly for the same employers — or "repeat players." This results in an inherent conflict of interest on the part of the arbitrator whose livelihood depends on such business.

The impact of the unlevel playing field favoring the "repeat player" in forced arbitrations has been well-documented in numerous scholarly articles and, indeed, the studies consistently demonstrate a profound, one-sided advantage for employers. For example, in Alexander J. S. Colvin's 2011 article, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," published in the *Journal of Empirical Legal Studies*, the author found that outside of the collective bargaining context employers attain more favorable outcomes in arbitration both in terms of win rates as well as the amount of the awards they pay when they lose.[1] Factors contributing to the "repeat player effect" — as it has been coined by legal theorists — include having more information to gain an advantage in the arbitrator selection process, as well as undue influence over arbitrators who may be apt to rule in favor of the repeat player in order to be selected for future arbitrations. The study analyzed 3,945 arbitration cases, of which 1,213 were decided by an award after a hearing, filed and reaching disposition between January 1, 2003 and December 31, 2007. This article contains the most authoritative statistical analysis on the subject to date.

Similarly, in David S. Schwartz's article, "Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration," Wisc. L.R. 33, 73-81, 122-23 (1997), the author's statistical analysis demonstrates dramatic advantages for employers as compared to results in a court of law. Professor Schwartz has just written a compelling new article, "Claim Suppressing Arbitration — the New Rules," 87 Ind. L. J. (2012), illustrating that forced arbitration has led to the suppression of legitimate claims. Consistent with this hypothesis are comments made by management lawyers explicitly asserting that the costs and disadvantages of forced arbitrations *do* lead to fewer claims. These attorneys unabashedly base their assertions on the fact that in arbitration employers will win more and pay less in damage awards when they lose, be far more likely to avoid an assessment of punitive damages, and even possibly succeed in discouraging the employee from pursuing a claim altogether given the costs and obstacles imposed by arbitration.[2] The U.S. Equal Employment Opportunity Commission (EEOC) has issued an extensive policy statement on

[1] Also known as the "repeat player" effect. See Bingham, Lisa (1997), "Employment Arbitration: The Repeat Player Effect," *Employee Rights and Employment Policy Journal* 1: 189–220.

[2] *BNA Employment Discrimination Report*, 1996, Vol. 6, p. 875, summarizing comments by Paul Cane, a management employment law attorney, in a speech before a conference sponsored by the Labor and Employment Law Section of the State Bar of California.

forced arbitration, and has identified the structural biases that favor large institutions and repeat players.[3]

Finally, although it is tougher to document the statistics, it has been the experience of NELA members that the existence of a pre-dispute forced arbitration clause actually makes it harder for employees to find lawyers willing to take their cases on contingency arrangements (generally the only way they can afford to obtain counsel). This is because of the reduced chance of success, and the smaller recoveries workers receive when they are forced to arbitrate their claims.

We look forward to the Bureau's work in this area with the understanding that consumers — much like employees —may not realize that they have waived their right to a trial because of a pre-dispute forced arbitration clause, and even those sophisticated enough to recognize the ramifications of such a provision, do so with little or no recourse to our nation's public civil justice system. If you have any questions, please contact me directly at egutierrrez@nelahq.org or (202) 898-2880, ext. 115.

Sincerely,

Eric M. Gutiérrez
Legislative & Public Policy Director

[3] EEOC, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, (July 10, 1997); http://www.eeoc.gov/policy/docs/mandarb.html.