

# On The Hill

NELA's Washington Report



February 2012

## Forced Arbitration Almost Comes To Wall Street

In support of the Arbitration Fairness Act (AFA), NELA has argued among other things, that forced arbitration clauses have become so pervasive in the employment context that employers routinely embed them in employment agreements, manuals, and even emails as a means of compelling employees to agree to arbitration even before a workplace dispute arises in order to get or keep a job. In *AT&T Mobility v. Concepcion*, the Supreme Court effectively allowed corporations to craft consumer contracts requiring class action arbitration. With such a precedent, it's no surprise that the latest to be hit by forced arbitration clauses have been investors. The Carlyle Group, one of the nation's largest private equity firms based in Washington, DC attempted to amend its regulatory filing with the Securities and Exchange Commission (SEC) to prohibit its shareholders from filing class action lawsuits and instead requiring them to use private arbitration.

The aggressive move on the part of the giant investment firm prompted Senators Al Franken (D-MN), Richard Blumenthal (D-CT), and Robert Menendez (D-NJ) — all sponsors of the AFA — to send a letter to Mary L. Schapiro, the SEC Chair, urging the Commission to block the offering unless the clause was removed. After consultations with the SEC, investors, and other interested parties, the company dropped the forced arbitration clause.

Senators Franken and Blumenthal as well as Representative Henry C. "Hank" Johnson (D-GA) introduced the Arbitration Fairness Act of 2011 (AFA) in the 112th Congress. The AFA would make unlawful forced arbitration clauses in employment and consumer contracts. NELA is at the forefront of advocating for the passage of the AFA.

To read the letter members of Congress sent to the SEC Chair, click here:  
[www.nela.org/NELA/docDownload/34738](http://www.nela.org/NELA/docDownload/34738).

## NELA Submits Comments On EEOC's Draft Strategic Plan For FY 2012-2016

On February 1, 2012, NELA submitted comments to the U.S. Equal Employment Opportunity Commission (EEOC) regarding its Draft Strategic Plan for Fiscal Years 2012 -2016. The Strategic Plan will serve as a framework for the Commission in achieving its mission by focusing on strategic law enforcement, education, and outreach, and efficiently serving the public. The Plan directs the agency's work and lays the foundation for the development of more detailed annual plans, budgets, and related program performance information in the future.

NELA's comments focused on issues that have been previously identified by NELA members. With respect to private sector employees, the issues encompass document sharing among charging parties, including requests for the respondent statement of position, verification of charge, and the investigation file. Our comments also addressed "several amendments to the Federal Sector regulations that would streamline the charging process and provide federal employees greater access to the Federal Sector EEO Complaint Process." In addition, we pointed

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out the nexus between document access and the Plan's proposed use of innovative technology to facilitate responsive interactions and streamline agency processes.

To read NELA's comments, click here: [www.nela.org/NELA/docDownload/34739](http://www.nela.org/NELA/docDownload/34739).

### **NELA Releases Report On "Judicial Hostility To Workers' Rights: The Case For Professional Diversity On The Federal Bench"**

On February 1, 2012, NELA released its report on the importance of the federal judiciary and workers' rights. "Judicial Hostility To Workers' Rights: The Case For Professional Diversity On The Federal Bench" takes a unique look at another type of diversity that is equally as important and sorely lacking on the federal bench — professional diversity — and the role it plays in the plight of America's workers. The report's core message is timely, considering President Obama's commitment to diversifying the bench and seeking a broad range of life experiences in nominees. The report defines professional diversity to include lawyers who have had experience representing individuals in labor, employment, or civil rights cases, as a legal services or public interest lawyer, or defending the rights of the most disenfranchised members of our society.

"The federal judiciary remains overwhelmingly homogenous in terms of professional diversity, and consists of those who were prosecutors, corporate lawyers, state court judges (and, for appellate judges, federal district court judges), and law professors. Preserving the credibility of the federal judiciary requires taking concrete steps to level the playing field for all litigants that come before our nation's courts," the report explains.

The report closes with a plea to the White House: "We urge the Obama Administration to stay true to its promise of making judicial nominations a priority and to continue its efforts to nominate individuals with professionally diverse backgrounds."

In his January 24, 2012 State of the Union Address, President Obama made reference to partisan politics and the judicial nominations process:

"Some of what's broken has to do with the way Congress does its business these days ... Neither party has been blameless in these tactics. Now both parties should put an end to it. For starters, I ask the Senate to pass a rule that all judicial and public service nominations receive a simple up or down vote within 90 days."

NELA advocates for independent and fair-minded federal judges who are committed to equal justice under law for all Americans, and who do not place the interests of employers over the rights of employees.

"Judicial Hostility To Workers' Rights: The Case For Professional Diversity On The Federal Bench" can be found at [www.nela.org/judicialdiversity](http://www.nela.org/judicialdiversity).

### **NELA Representatives Participate In ABA Section Of Labor And Employment Law's Government Liaison Meeting**

On January 22-24, 2012, the ABA Section of Labor and Employment Law held a meeting with the federal agencies responsible for enforcing our nation's worker protection laws. Officials from the EEOC, U.S. Department of Labor (DOL), including its Office of Federal Contract Compliance Programs (OFCCP), and the U.S. Department of Justice's Civil Rights Division met with the employment bar, both plaintiffs and management attorneys, to highlight the work of their agencies as well as provide updates on their respective investigations, enforcement activities, and priorities.

Joining me at this meeting were several NELA members including Daniel B. Kohrman, NELA Vice President of Public Policy, and NELA Executive Board Member James M. Finberg.

### **NELA To Submit Comments To OFCCP On Proposed Revised Regulations Under Section 503 Of The Rehabilitation Act Of 1973**

NELA will be submitting comments to the Office of Federal Contract Compliance Programs (OFCCP) regarding proposed regulations under Section 503 of the Rehabilitation Act with respect to the law's mandate that federal contractors "take affirmative action to employ and advance in employment" individuals with disabilities.

Our comments will center on modifications to the proposed pre-offer invitation to self-identify, the setting of a national utilization goal for employees with disabilities, the proposal to take discouraged workers into account in

calculating the utilization goal, the adoption of a sub-goal for people with particularly severe disabilities, and individual disclosure upon request when a worker's disability poses a "direct threat" determination.

NELA extends our gratitude to Kathryn S. Piscitelli, NELA's USERRA Advisor, for her invaluable expertise in drafting the comments, as well as to NELA Vice President of Public Policy Daniel B. Kohrman and NELA Executive Board Member Brian East (who also chairs NELA's Disability Rights Practice Group) for their contributions. Our comments will be posted on NELANet.

#### **House Of Representatives Considers The Federal Consent Decree Act**

On September 23, 2011, Representative Jim Cooper (D-TN) introduced the Federal Consent Decree Fairness Act (H.R. 3041) that would eviscerate a crucial means of resolving meritorious claims against state and local governments. In addition, the proposed legislation would impose grossly unfair burdens on the federal government, the federal courts, and beneficiaries of a wide array of federal protections in areas such as environmental, consumer, health care, and civil rights laws.

NELA members were called upon by the Leadership Conference on Civil and Human Rights (LCCHR) Employment Task Force to submit positive examples of consent decrees entered in their individual practices. On February 3, 2012, the House Judiciary Committee, Subcommittee on Courts, Commercial and Administrative Law, held a hearing on the Federal Consent Decree Fairness Act.

#### **Matthew Kent To Join NELA As 2012 Peggy Browning Fellow**

Matthew Kent, a second year law student at the University of Maryland Francis Carey School of Law, has been selected as NELA's 2012 Peggy Browning Fellow and will work in NELA's Washington, DC office this summer. The fellowship is made possible by an anonymous donor.

Matthew is currently an intern with the House Committee on Homeland Security. His previous legal and legislative experiences include internships with Rice Consulting, a political campaign and organizational fundraising firm as well as the Congressional offices of Senator Charles Schumer (D-NY) and former Representative Frank Kratovil (D-MD). Matthew submitted an article for publication in the University of Maryland Law's Journal of Race, Religion, Gender and Class, entitled, "The Common Culture of Discrimination: Wal-Mart v. Dukes, Procedural Landmines and Anti-Class Action Attitudes."

The Peggy Browning Fellowship Program provides stipends to law students who dedicate their summer to advancing the cause of employee rights by working for labor unions, worker centers, the U.S. Department of Labor, union-side law firms and other nonprofit organizations. It is a ten-week summer fellowship available to first and second year law students intended to encourage them to consider labor and employment law as a viable career choice.

Sincerely,

Eric M. Gutierrez,



Legislative & Public Policy Director

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