

112TH CONGRESS  
1ST SESSION

# S. 1186

To amend chapter 1 of title 9, United States Code, to establish fair procedures for arbitration clauses in contracts.

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IN THE SENATE OF THE UNITED STATES

JUNE 13, 2011

Mr. SESSIONS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To amend chapter 1 of title 9, United States Code, to establish fair procedures for arbitration clauses in contracts.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair Arbitration Act  
5 of 2011”.

6 **SEC. 2. ELECTION OF ARBITRATION.**

7 (a) IN GENERAL.—Chapter 1 of title 9, United  
8 States Code, is amended by adding at the end the fol-  
9 lowing:

1 **“§ 17. Election of arbitration**

2 “(a) FAIR DISCLOSURE.—In order to be binding on  
3 the parties, a contract containing an arbitration clause  
4 shall—

5 “(1) have a printed heading in bold, capital let-  
6 ters entitled ‘**ARBITRATION CLAUSE**’, which head-  
7 ing shall be printed in letters not smaller than ½  
8 inch in height;

9 “(2) explicitly state whether participation with-  
10 in the arbitration program is mandatory or optional;

11 “(3) identify a source that a consumer or em-  
12 ployee can contact for additional information regard-  
13 ing—

14 “(A) costs and fees of the arbitration pro-  
15 gram; and

16 “(B) all forms and procedures necessary  
17 for effective participation in the arbitration pro-  
18 gram; and

19 “(4) provide notice that all parties retain the  
20 right to resolve a dispute in a small claims court, as  
21 provided in subsection (b)(12).

22 “(b) PROCEDURAL RIGHTS.—

23 “(1) IN GENERAL.—If a contract provides for  
24 the use of arbitration to resolve a dispute arising out  
25 of or relating to the contract, each party to the con-  
26 tract shall be afforded the rights described in this

1 subsection, in addition to any rights provided by the  
2 contract.

3 “(2) COMPETENCE AND NEUTRALITY OF ARBI-  
4 TRATOR AND ADMINISTRATIVE PROCESS.—

5 “(A) IN GENERAL.—Each party to the dis-  
6 pute (referred to in this section as a ‘party’)  
7 shall be entitled to a competent, neutral arbi-  
8 trator and an independent, neutral administra-  
9 tion of the dispute.

10 “(B) ARBITRATOR.—Each party shall have  
11 a vote in the selection of the arbitrator, who—

12 “(i) unless otherwise agreed by the  
13 parties, shall be a member in good stand-  
14 ing of the bar of the highest court of the  
15 State in which the hearing is to be held;

16 “(ii) shall comply with the Code of  
17 Ethics for Arbitrators in Commercial Dis-  
18 putes of the American Bar Association and  
19 the American Arbitration Association and  
20 any applicable code of ethics of any bar of  
21 which the arbitrator is a member;

22 “(iii) shall have no—

23 “(I) personal or financial interest  
24 in the results of the proceedings in  
25 which the arbitrator is appointed; or

1                   “(II) relation to the underlying  
2                   dispute or to the parties or their  
3                   counsel that may create an appear-  
4                   ance of bias; and

5                   “(iv) prior to accepting appointment,  
6                   shall disclose all information that might be  
7                   relevant to neutrality (including service as  
8                   an arbitrator or mediator in any past or  
9                   pending case involving any of the parties  
10                  or their representatives) or that may pre-  
11                  vent a prompt hearing.

12                  “(C) ADMINISTRATION.—The arbitration  
13                  shall be administered by an independent, neu-  
14                  tral alternative dispute resolution organization  
15                  to ensure fairness and neutrality and prevent ex  
16                  parte communication between parties and the  
17                  arbitrator. The arbitrator shall have reasonable  
18                  discretion to conduct the proceeding in consid-  
19                  eration of the specific type of industry involved.

20                  “(3) APPLICABLE LAW.—In resolving a dispute,  
21                  the arbitrator—

22                         “(A) shall be governed by the same sub-  
23                         stantive law that would apply under conflict of  
24                         laws principles applicable in a court of the  
25                         State in which the party that is not drafter of

1 the contract resided at the time the contract  
2 was entered into; and

3 “(B) shall be empowered to grant whatever  
4 relief would be available in court under law or  
5 equity.

6 “(4) REPRESENTATION.—Each party shall have  
7 the right to be represented by an attorney, or other  
8 representative as permitted by State law, at their  
9 own expense.

10 “(5) HEARING.—

11 “(A) IN GENERAL.—Each party shall be  
12 entitled to a fair arbitration hearing (referred  
13 to in this section as a ‘hearing’) with adequate  
14 notice and an opportunity to be heard.

15 “(B) ELECTRONIC OR TELEPHONIC  
16 MEANS.—Subject to subparagraph (C), in order  
17 to reduce cost, the arbitrator may hold a hear-  
18 ing by electronic or telephonic means or by a  
19 submission of documents.

20 “(C) FACE-TO-FACE MEETING.—Each  
21 party shall have the right to require a face-to-  
22 face hearing, which hearing shall be held at a  
23 location that is reasonably convenient for the  
24 party who did not draft the contract unless in  
25 the interest of fairness the arbitrator deter-

1 mines otherwise, in which case the arbitrator  
2 shall use the process described in section 1391  
3 of title 28, to determine the venue for the hear-  
4 ing.

5 “(6) EVIDENCE.—With respect to any hear-  
6 ing—

7 “(A) each party shall have the right to  
8 present evidence at the hearing and, for this  
9 purpose, each party shall grant access to all in-  
10 formation reasonably relevant to the dispute to  
11 the other parties, subject to any applicable  
12 privilege or other limitation on discovery under  
13 applicable State law;

14 “(B) consistent with the expedited nature  
15 of arbitration, relevant and necessary pre-  
16 hearing depositions shall be available to each  
17 party at the direction of the arbitrator; and

18 “(C) the arbitrator shall—

19 “(i) make reasonable efforts to main-  
20 tain the privacy of the hearing to the ex-  
21 tent permitted by applicable State law; and

22 “(ii) consider appropriate claims of  
23 privilege and confidentiality in addressing  
24 evidentiary issues.

1           “(7) CROSS EXAMINATION.—Each party shall  
2           have the right to cross examine witnesses presented  
3           by the other parties at a hearing.

4           “(8) RECORD OF PROCEEDING.—Any party  
5           seeking a stenographic record of a hearing shall  
6           make arrangements directly with a stenographer and  
7           shall notify the other parties of these arrangements  
8           not less than 3 days before the date of the hearing.  
9           The requesting party shall pay the costs of obtaining  
10          the record. If the transcript is agreed by the parties,  
11          or determined by the arbitrator to be the official  
12          record of the proceeding, it shall be provided to the  
13          arbitrator and made available to the other parties  
14          for inspection, at a date, time, and place determined  
15          by the arbitrator.

16          “(9) TIMELY RESOLUTION.—

17                 “(A) IN GENERAL.—Upon submission of a  
18                 complaint by the claimant, the respondent shall  
19                 have not more than 30 days to file an answer.

20                 “(B) EVIDENCE.—After the answer is filed  
21                 by the respondent, the arbitrator shall direct  
22                 each party to file documents and to provide evi-  
23                 dence in a timely manner so that the hearing  
24                 may be held not later than 90 days after the  
25                 date of the filing of the answer.

1           “(C) EXTENSIONS.—In extraordinary cir-  
2           cumstances (including multiparty, multidistrict,  
3           or complex litigation) the arbitrator may grant  
4           a limited extension of the time limits under this  
5           paragraph, or the parties may agree to such an  
6           extension.

7           “(D) DECISION.—The arbitrator shall no-  
8           tify each party of its decision not later than 30  
9           days after the hearing.

10          “(10) WRITTEN DECISION.—The arbitrator  
11          shall provide each party with a written explanation  
12          of the factual and legal basis for the decision. This  
13          written decision shall describe the application of an  
14          identified contract term, statute, or legal precedent.  
15          The decision of the arbitrator shall be subject to re-  
16          view only as provided in subsection (c)(2) of this sec-  
17          tion and sections 10, 11, and 16 of this title.

18          “(11) EXPENSES.—The arbitrator or inde-  
19          pendent arbitration administration organization, as  
20          applicable, shall have the authority to—

21                 “(A) provide for reimbursement of arbitra-  
22                 tion fees to the claimant, in whole or in part,  
23                 as part of the remedy in accordance with appli-  
24                 cable law or in the interests of justice; and



1           “(B) waive, defer, or reduce any fee or  
2 charge due from the claimant in the event of  
3 extreme hardship.

4           “(12) SMALL CLAIMS OPT OUT.—

5           “(A) IN GENERAL.—Each party shall have  
6 the right to opt out of binding arbitration and  
7 to proceed in any small claims court with juris-  
8 diction over the claim. For purposes of this  
9 paragraph, no court with jurisdiction to hear  
10 claims in excess of \$50,000 shall be considered  
11 a small claims court.

12           “(B) EXCEPTION.—If a complaint in small  
13 claims court is amended to exceed the lesser of  
14 the jurisdictional amount of that court or a  
15 claim for \$50,000 in total damages, the small  
16 claims court exemption of this paragraph shall  
17 not apply and the parties shall proceed by arbi-  
18 tration.

19           “(c) DENIAL OF RIGHTS.—

20           “(1) DENIAL OF RIGHTS BY PARTY MIS-  
21 CONDUCT.—

22           “(A) IN GENERAL.—At any time during an  
23 arbitration proceeding, any party may file a  
24 motion with the arbitrator asserting that an-

1 other party has deprived the movant of a right  
2 granted by this section and seeking relief.

3 “(B) AWARD BY ARBITRATOR.—If the ar-  
4 bitrator determines that the movant has been  
5 deprived of a right granted by this section by  
6 another party, the arbitrator shall award the  
7 movant a monetary amount, which shall not ex-  
8 ceed the reasonable expenses incurred by the  
9 movant in filing the motion, including attor-  
10 neys’ fees, unless the arbitrator finds that—

11 “(i) the motion was filed without the  
12 movant first making a good faith effort to  
13 obtain discovery or the realization of an-  
14 other right granted by this section;

15 “(ii) the opposing party’s nondislo-  
16 sure, failure to respond, response, or objec-  
17 tion was substantially justified; or

18 “(iii) the circumstances otherwise  
19 make an award of expenses unjust.

20 “(2) DENIAL OF RIGHTS BY ARBITRATOR.—

21 “(A) IN GENERAL.—A losing party in an  
22 arbitration proceeding may file a petition in the  
23 United States district court in the State in  
24 which the party that did not draft the contract  
25 resided at the time the contract was entered

1 into to assert that the arbitrator violated a  
2 right granted to the party by this section and  
3 to seek relief.

4 “(B) REVIEW.—A United States district  
5 court may grant a petition filed under subpara-  
6 graph (A) if the court finds clear and con-  
7 vincing evidence that an action or omission of  
8 the arbitrator resulted in a deprivation of a  
9 right of the petitioner under this section that  
10 was not harmless. If such a finding is made,  
11 the court shall order a rehearing before a new  
12 arbitrator selected in the same manner as the  
13 original arbitrator as the exclusive judicial rem-  
14 edy provided by this section.

15 “(d) LIMITATION ON CLAIMS.—Except as otherwise  
16 expressly provided in this section, nothing in this section  
17 may be construed to be the basis for any claim in law  
18 or equity.

19 “(e) DEFINITIONS.—In this section—

20 “(1) the term ‘contract’ means a contract evi-  
21 dencing a transaction involving commerce; and

22 “(2) the term ‘State’ includes the District of  
23 Columbia, the Commonwealth of Puerto Rico,  
24 Guam, the Commonwealth of the Northern Mariana  
25 Islands, and the Virgin Islands.”.

1           (b) TECHNICAL AND CONFORMING AMENDMENT.—  
2 The table of sections at the beginning of chapter 1 of title  
3 9, United States Code, is amended by adding at the end  
4 the following:

“17. Election of arbitration.”.

5           (c) EFFECTIVE DATE.—The amendments made by  
6 this section shall apply to any contract (as that term is  
7 defined in section 17 of title 9, United States Code, as  
8 added by this Act) entered into after the date that is 6  
9 months after the date of enactment of this Act.

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