



GOVERNMENT

ACCOUNTABILITY

PROJECT

STATEMENT OF THOMAS DEVINE ON COMPULSORY ARBITRATIONS

As Legal Director of the Government Accountability Project since 1980, I have developed an in-depth expertise on the significance of arbitration provisions that could cancel rights in 39 whistleblower laws that I have helped to draft or enact. The reason is simple. The proceeding would be controlled by the institution that normally is the defendant in a legitimate due process proceeding. In compulsory arbitrations the institutional defendant instead would set the rules and procedures for the forum, which would be presided by an arbitrator who is working for it. In other words, the normal defendant would control the outcome.

As a result, modern whistleblower statutes consistently have not permitted either Nondisclosure Agreements or mandatory arbitration clauses to cancel statutory free speech rights or procedures to seek remedies. For example, that provision exists in whistleblower laws for government contractors [10 U.S.C. § 2409(b)(7) and 41 U.S.C. § 4712(b)(7)]; Consumer Financial Protection Act, [12 U.S.C. § 5567(d)]; Federal Railroad Safety Act, [49 U.S.C. §20109(h)]; National Transit Systems Security Act (NTSSA), [6 U.S.C. § 1142(g)]; Pipeline Safety Improvement Act (PSIA), [49 U.S.C. §60129(e)]; Sarbanes Oxley Act, [18 U.S.C. §1514A(e)]; Surface Transportation Assistance Act, [49 U.S.C. §31105(g)]; and Taxpayer First Act (TFA), [26 U.S.C. § 7623(d)(5)]

The reason for this legislative public policy mandate is simple. If mandatory arbitrations controlled by an employer are the channel to enforce rights, those rights are merely a time-consuming, recourse-draining honor system. Under this structure, the employee's only right is asking an employer to change its institutional mind.

Respectfully submitted,

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Date

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