MEMORANDUM

TO: Council, ABA Section of Dispute Resolution  
FROM: Larson Frisby  
SUBJECT: Federal Legislative Update  
DATE: August 1, 2020

The following is an update on the status of federal alternative dispute resolution (ADR) legislation and other related proposals and measures that may be of interest to the Council:

1. **Singapore Convention on Mediation**

On August 7, 2019, the United States and 45 other nations signed the Singapore Convention on Mediation, formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation. The treaty provides a uniform framework to enforce mediated agreements of international business disputes, and it is designed to both encourage the greater use of mediation as a cost-effective means of resolving such disputes and to facilitate international trade in general.

Prior to the Singapore Convention, a party to a mediated settlement agreement would have to bring an action against the party violating the agreement—either through litigation or arbitration—in order to enforce the mediated settlement agreement, unless that agreement had been included in a court order or an arbitral award. Under the Singapore Convention, countries that have ratified the treaty will be required to enforce the mediated settlement agreements, provided that the agreements are not already enforceable as a court judgement or an arbitral award. This streamlined enforcement regime for mediated settlement agreements was intended to function much like the New York Convention, which provides an efficient system for recognition and enforcement of international arbitral awards in over 150 countries.

The Singapore Convention was adopted by the UN General Assembly in December 2018 and was then signed by the first 46 nations last August. Since then, seven more countries have signed the treaty, bringing the total number of current signatory nations to 53. In addition, five of those nations have formally ratified the treaty. Under its terms, the Singapore Convention will enter into force on September 12, 2020, six months after ratification by the third nation (Qatar). Although the United States has signed the treaty, it has not yet been submitted to or ratified by the U.S. Senate. However, the State Department’s Advisory Committee on Private International Law discussed the status of the Singapore Convention at its annual meeting on July 28, 2020.
In February 2020, the ABA House of Delegates adopted policy supporting the Singapore Convention. ABA Resolution 104A, cosponsored by the ABA International Law and Dispute Resolution Sections, urges all nations—including the United States—to become parties to and implement the treaty and also urges the U.S. executive branch and Senate to regard the treaty as self-executing under U.S. law. On June 24, 2020, Ana Sambold, Educational Programming Officer of the ABA Dispute Resolution Section, presented an informative webinar on the Singapore Convention. The ABA will continue to monitor the status of the treaty and will submit a letter of support to the U.S. Senate at the appropriate time.

2. **Arbitration of COVID-19 Related Disputes**

Congress is also considering numerous COVID-19 relief bills that contain language prohibiting the use of pre-dispute arbitration agreements to resolve certain types of claims.

On May 15, 2020, the House approved a comprehensive COVID-19 relief and stimulus bill that would provide extensive emergency funding to federal agencies, state and local governments, and individuals, among many other provisions. H.R. 6800, known as the HEROES Act, would also extend and expand the moratorium on certain evictions and foreclosures contained in the CARES Act passed by Congress on March 27, 2020, and would impose a new, temporary moratorium on certain collections of consumer, small business, and nonprofit debt until 120 days after the end of a national disaster or emergency.

Each of those three sections of H.R. 6800 also contains language prohibiting the use of pre-dispute arbitration agreements or pre-dispute joint-action waivers to resolve disputes over the collection moratoriums. The HEROES Act would also give Treasury Department grants to certain “essential work employers” for the purpose of providing premium pay to their “essential workers.” However, the bill would also grant the workers a private right of action for alleged violations of the premium pay provisions and would prohibit courts from granting a motion to compel arbitration to resolve the dispute. Although the House passed H.R. 6800 in May, the Republican led Senate declined to consider the measure. Instead, Senate Republicans unveiled their own relief bill on July 27. The Senate bill, known as the HEALS Act, contains less extensive funding than the House bill and does not include any limitations on arbitration. House and Senate leaders are now attempting to reconcile the two very different measures.

In addition to the HEROES Act, numerous other bills have been introduced in Congress that would prohibit the use of pre-dispute arbitration agreements to resolve certain consumer or small business disputes during the COVID-19 pandemic or other national emergencies. For example:

- H.R. 7020, introduced by Rep. Janice Schakowsky (D-IL), would grant individuals a private federal right of action against any person who violates the CARES Act (P.L. 116-136) or the Families First Coronavirus Response Act (P.L. 116-127). The bill would also prohibit the use of a pre-dispute arbitration agreement or pre-dispute joint-action waiver to resolve an employment, consumer, antitrust, or civil rights dispute until 180 days after the COVID-19 national emergency is terminated. H.R. 7020 was referred to the House Judiciary Committee, but no further action has been scheduled on the bill.
H.R. 6321, introduced by House Financial Services Committee Chairwoman Maxine Waters (D-CA) would provide financial aid to individuals, businesses, and state and local governments and would prohibit creditors from seeking to collect consumer debts for the duration of the COVID-19 emergency. The bill would also allow consumers to sue creditors for alleged violations of the collection moratorium and would bar the use of pre-dispute arbitration agreements or pre-dispute joint-action waivers to resolve such disputes. H.R. 6321 was referred to the House Committees on Financial Services, Ways and Means, Education and Labor, Small Business, the Judiciary, and Agriculture, but no further action has been scheduled.

H.R. 6332, introduced by Rep. Joyce Beatty (D-OH), would bar creditors from attempting to collect consumer debts during the COVID-19 emergency. Like the Waters bill referenced above, H.R. 6332 would also allow consumers to sue creditors for alleged violations of the collection moratorium and would prohibit the use of pre-dispute arbitration agreements or pre-dispute joint-action waivers to resolve these disputes. Although H.R. 6332 was referred to the House Financial Services Committee, no further action has been scheduled on the bill.

H.R. 6361, introduced by Rep. Ed Perlmutter (D-CO), would bar creditors from seeking to collect a debt from a small business or nonprofit organization during the COVID-19 emergency. The legislation would also allow the small business or nonprofit to sue a creditor for alleged violations and would prohibit the use of a pre-dispute arbitration agreement or pre-dispute joint-action waiver to resolve the dispute. H.R. 6361 was referred to the House Financial Services Committee, but no hearings or other action have been scheduled.

S. 3565, introduced by Sen. Sherrod Brown (D-OH), would prohibit creditors from attempting to collect debts owed by a consumer or a small business until 120 days after the COVID-19 emergency is concluded. The bill would also prohibit such collection efforts during any other major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act and until 120 days after that disaster is concluded. As with the other bills referenced above, any person who violates these prohibitions would be subject to civil liability for damages, and pre-dispute arbitration agreements and pre-dispute joint-action waivers could not be used to resolve the dispute. S. 3565 was referred to the Senate Banking, Housing, and Urban Affairs Committee, but no further action has been scheduled or is likely.

In addition, several bills are pending in Congress that would ban the use of pre-dispute arbitration agreements to resolve other COVID-19 related disputes. For example, on June 1, 2020, Sen. Elizabeth Warren (D-MA) and Rep. Pramila Jayapal (D-WA) introduced the CORE Act as S. 3855 and H.R. 7076, respectively. The legislation would establish oversight, accountability, and transparency requirements for the disbursement and supervision of COVID-19 relief funds, including new whistleblower protections for government contractors and private sector workers who witness waste, fraud, or abuse or are victims of misconduct. However, both bills also state that the whistleblower protections cannot be waived by any agreement and the legislation bars the use of pre-dispute arbitration agreements to resolve whistleblower disputes.
S. 3855 was referred to the Senate Homeland Security and Governmental Affairs Committee, and H.R. 7076 was referred to the House Committees on Oversight and Reform, the Judiciary, Financial Services, Education and Labor, Small Business, House Administration, Intelligence, Armed Services, Foreign Affairs, and Ways and Means. However, no hearings or other actions have been scheduled on either bill.

3. **Mediation of Landlord-Tenant Disputes**

Legislation to encourage mediation of landlord-tenant disputes is also pending in Congress. The Prevent Evictions Act of 2020, introduced by Sen. Margaret Hassan (D-NH) and Rep. Ted Lieu (D-CA) as S. 2486 and H.R. 6768, respectively, would create a grant program administered by the Department of Housing and Urban Development for state and tribal governments and other public or nonprofit entities to establish or administer landlord-tenant mediation programs. The bills would limit program implementation grants to $1.5 million or less and limit program expansion grants to $1 million or less, and participation in grant-funded landlord-tenant mediation would have to be free to tenants. Although S. 2486 was referred to the Senate Banking, Housing, and Urban Affairs Committee and H.R. 6768 was referred to the House Financial Services Committee, no further action has been scheduled on either measure.

4. **Nursing Home Arbitration**

Congress is considering several measures designed to ban certain types of nursing home arbitration agreements. H.R. 5326 (known as the Fairness in Nursing Home Arbitration Act) and H.R. 5216 and S. 2943 (both known as the Quality Care for Nursing Home Residents Act) would amend the Social Security Act to invalidate all mandatory pre-dispute arbitration agreements between nursing facilities or home health care services and their patients. The bills also provide that the validity or enforceability of such arbitration agreements shall be determined by the court, rather than the arbitrator. The two House bills, introduced by Reps. Linda Sanchez (D-CA) and Jan Schakowsky (D-IL), respectively, were referred to the House Energy & Commerce and Ways & Means Committees. S. 2943 was introduced by Sen. Richard Blumenthal (D-CT) and referred to the Senate Finance Committee. No further action has been scheduled on any of the measures, and none are expected to pass in the 116th Congress due to a lack of bipartisan support.

All three bills would effectively override the **final rule** published by the U.S. Department of Health and Human Services’ Centers for Medicare & Medicaid Services (CMS) in July 2019 that reversed the agency’s previous ban on pre-dispute nursing home arbitration agreements. (See Department of Health and Human Services Final Rule on Medicare and Medicaid Programs; Revision of Requirements for Long-Term Care Facilities; Arbitration Agreements; CMS-3342-F; RIN 0938-AT18; 84 Fed. Reg. 34718 (July 18, 2019)).

In addition to permitting pre-dispute arbitration agreements, the CMS rule also established several key patient protections, including a requirement that nursing homes not require any resident to sign a pre-dispute arbitration agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility. The CMS rule also requires facilities to inform the residents of these rights and requires that the agreement explicitly state the same. In addition, the rule provides that the arbitration agreement must be explained to the resident in a manner that he or she understands;
allow the resident to rescind the arbitration clause within 30 days; provide for the selection of a neutral arbitrator agreed upon by both parties and a venue convenient to both parties; and not contain language prohibiting or discouraging the resident from communicating with federal, state, or local officials, among other requirements.

Prior to the adoption of the final CMR rule, the ABA submitted two separate written comment letters in September 2015 and August 2017 identifying several areas in which the proposed rule should be strengthened or clarified and expressing the ABA’s opposition to mandatory nursing home arbitration. The ABA’s comment letters were prepared by the ABA Commission on Law and Aging (ABA COLA) and the ABA Governmental Affairs Office, with input from the ABA Dispute Resolution and Tort Trial & Insurance Practice Sections.

5. **Mandatory Arbitration of Sexual Harassment Claims**

Bipartisan legislation is also pending in Congress that would amend the Federal Arbitration Act to relax existing requirements for employees to arbitrate or mediate sexual discrimination disputes.

H.R. 1443, the Ending Forced Arbitration of Sexual Harassment Act, was introduced by Rep. Cheri Bustos (D-IL) in February 2019. The bill, with 10 Democratic and 5 Republican co-sponsors, would prohibit pre-dispute arbitration agreements to resolve sex discrimination disputes. The bill also provides that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement. H.R. 1443 was referred to the House Judiciary Committee, but no further action has been scheduled on the measure.

On September 12, 2019, the Senate Appropriation Committee approved S. 2474, the Department of Defense Appropriations Act for fiscal year 2020, which contains language prohibiting arbitration of certain sexual assault or harassment claims. Section 8090 of the bill states that no federal funding may be expended for any federal contract over $1 million unless the contractor or subcontractor agrees not to require their employees or independent contractors to arbitrate “any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.” The provision was later signed into law by President Trump on December 20, 2020 as Section 8093 of P.L. 116-93 (H.R. 1158, Division D), the FY2020 Consolidated Appropriations Act.

Although the ABA has not taken a position regarding H.R. 1443 or Section 8093 of the FY2020 Consolidated Appropriations Act, the ABA House of Delegates adopted a policy (Resolution 107B) at the 2019 Midyear Meeting that urges legal employers not to require employees to agree, before a dispute arises, to arbitrate claims of unlawful discrimination, harassment or retaliation based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status, genetic information, or status as a victim of domestic or sexual violence. The ABA also adopted a narrower policy (Resolution 300) in August 2018 urging legal employers not to require mandatory arbitration of sexual harassment claims.
6. **FAIR Act**

On September 20, 2019, the House approved broad legislation known as the Forced Arbitration Injustice Repeal (FAIR) Act that would invalidate all mandatory pre-dispute agreements to arbitrate consumer, employment, antitrust, or civil rights disputes. H.R. 1423, sponsored by Rep. Hank Johnson (D-GA), would ban all such arbitration agreements and all pre-dispute joint-action waivers, defined as any agreement that would prohibit or waive the right of one of the parties to participate in a joint, class, or collective action. However, any agreement to arbitrate or joint-action waiver entered into after a dispute has arisen would continue to be enforceable. The bill also provides that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement.

Unlike some previous versions of the bill introduced in recent years (which were known as the Arbitration Fairness Act), H.R. 1423 would create a new Chapter 4 to Title 9 and would make only technical and conforming changes to Chapter 1 of that Title (i.e., the Federal Arbitration Act). In addition, unlike some earlier versions of the bills, H.R. 1423 would invalidate pre-dispute agreements to arbitrate antitrust disputes but not franchise disputes.

Both H.R. 1423 and S. 610, a Senate companion bill sponsored by Sen. Richard Blumenthal (D-CT), are currently pending in the Senate Judiciary Committee, though no further action is expected on either bill during the 116th Congress, given the strong Republican opposition to the measures.

In 2010 and 2011, the ABA sent letters to the sponsors of the earlier bills expressing concerns regarding certain specific language in those bills that could have inadvertently voided existing international commercial arbitration agreements and potentially discouraged international commercial parties from engaging in commerce with U.S. parties. The ABA also provided the sponsors with proposed technical amendments designed to protect international commercial arbitration and to clarify several ambiguous definitions in the legislation. ABA representatives subsequently met with the sponsors’ senior counsels to further explain and discuss the ABA’s proposed technical amendments, and some, but not all, of the ABA’s recommendations were later incorporated into the legislation.

7. **Arbitration of Surprise Medical Bills**

Several bipartisan bills are advancing in Congress that would use arbitration to help resolve disputes between patients and out-of-network medical providers in certain circumstances.

On February 11, 2020, the House Education and Labor Committee approved H.R. 5800, known as the Ban Surprise Billing Act. The legislation, introduced by Rep. Robert Scott (D-VA), would prohibit out-of-network medical providers from sending balance bills to patients for emergency care or medical care provided at in-network facilities that exceed the in-network rate. Instead, for amounts less than or equal to $750 (or $25,000 for air ambulance services), the patient’s insurer would only be required to pay the medical provider the median in-network rate for similar services in the same geographic area, less any applicable copayments, coinsurance, or deductibles owed by
the patient for covered medical services. For amounts above $750 (or $25,000 for air ambulance services), the provider or insurer could elect to use “independent dispute resolution,” i.e., binding arbitration, to resolve the billing dispute. H.R. 5800 is similar to an agreement announced last year by the Senate Health, Education, Labor & Pensions and the House Energy & Commerce Committees, thus giving the approach greater bipartisan support in Congress.

On February 12, 2020, the House Ways and Means Committee marked up and approved H.R. 5826, a competing measure known as the Consumer Protections Against Surprise Medical Bills Act. The bill, introduced by Rep. Richard Neal (D-MA), provides that when a patient receives a surprise bill for out-of-network medical care at an in-network facility or when the patient receives emergency care, providers and insurers would have 30 days to negotiate payment. If agreement cannot be reached during that time, either party could initiate a 30-day arbitration process in which both parties convey their last, best offers to an independent neutral, which would then select one of the two offers as the final payment amount. Unlike H.R. 5800, H.R. 5826 would not set a benchmark payment rate that insurance plans would pay providers for out-of-network medical services. While H.R. 5826 was approved by the House Ways and Means Committee, it is still being considered by the House Education & Labor, Energy & Commerce, and House Transportation & Infrastructure Committees.

In addition to the two main House bills, several other similar measures have been introduced in the House and the Senate. For example, the Protecting Patients from Surprise Medical Bills Act was introduced by Rep. Ross Spano (R-FL) and Sen. Rick Scott (R-FL) as H.R. 4223 and S. 1266, respectively. S. 1531, the Stopping the Outrageous Practice of Surprise Medical Bills Act, was also introduced by Sen. Bill Cassidy (R-LA). Although H.R. 4223 was referred to the House Education and Labor Committee and both S. 1266 and S. 1531 were referred to the Senate Health, Education, Labor and Pensions Committee, no further action has been scheduled on any of these three bills.

8. Arbitration and Mediation of Labor and Employment Disputes

Congress is considering numerous bills that would either prohibit mandatory arbitration of employment disputes or require the use of ADR to resolve certain types of labor and employment disputes.

a. Mediation and Arbitration of Initial Collective Bargaining Agreements

On February 6, 2020, the House approved H.R. 2474, the Protecting the Right to Organize Act, which would expand various legal rights of union members including with respect to mediation and arbitration. The bill, sponsored by Rep. Bobby Scott (D-VA), would amend the National Labor Relations Act (NLRA) to provide that if an employer and a newly-certified employee representative are unable to reach a collective bargaining agreement regarding the terms and conditions of employment within 90 days, the employer or representative may notify the Federal Mediation and Conciliation Service (FMCS) and request mediation. If the parties are unable to reach a settlement within 30 days after the mediation is requested, the FMCS must refer the dispute to a tripartite arbitration panel, with one arbitrator selected by the labor organization, one selected by the employer, and one neutral member mutually agreed to by the parties. Any arbitration decision by
the FMCS shall be binding upon the parties for a period of two years unless it is amended during that period by written consent of the parties.

In addition to these mediation and arbitration requirements, H.R. 2474 would also amend the NLRA to invalidate any pre-dispute agreement in which “an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction.” However, this prohibition shall not apply to employees represented by a labor organization and covered by a collective bargaining agreement with the employer. After passing the House, H.R. 2474 was referred to the Senate Health, Education, Labor, and Pensions Committee for further consideration.

A Senate companion bill, S. 1306, was introduced by Sen. Patty Murray (D-WA) and referred to the Senate Health, Education, Labor and Pensions Committee, but no further action has been scheduled on that measure or H.R. 2474. The legislation is unlikely to pass the Republican-led Senate, however, due to various controversial provisions expanding the power of unions. The White House also issued a Statement of Administration Policy in February strongly opposing the bills.

b. Mandatory Arbitration of Employment Disputes

The Restoring Justice for Workers Act, introduced by Rep. Jerrold Nadler (D-NY) and Sen. Patty Murray (D-WA) as H.R. 2749 and S. 1491, respectively, would amend Title 9 of the U.S. Code to invalidate pre-dispute arbitration agreements that require arbitration of employment disputes. The bills also would ban retaliation against employees for refusing to arbitrate employment disputes and would provide additional protections to ensure that post-dispute arbitration agreements are truly voluntary and made with the informed consent of employees. In addition, the bills would amend the NLRA to ban agreements and practices that interfere with employees’ right to collectively litigate employment disputes. Almost identical provisions are also contained in Section 303 of two broader employment discrimination bills, H.R. 2148 (sponsored by Rep. Katherine Clark (D-MA) and S. 1082 (sponsored by Sen. Murray).

H.R. 2749 was referred to the House Judiciary and Education & Labor Committees while H.R. 2148 was referred to those committees and to the House Administration, Oversight & Reform, and Veterans’ Affairs Committees. S. 1491 and S. 1082 were referred to the Senate Health, Education, Labor and Pensions Committee. So far, no action has been scheduled on any of the four bills.

9. Mediation of H-2A Visa Guest Worker Disputes

On December 11, 2019, the House passed H.R. 5038, the Farm Workforce Modernization Act, which would allow farmworkers who are in the country illegally to apply for permanent residency status and streamline the H-2A guest worker program. Section 204 of the bill provides that if an H-2A worker files a civil action alleging one or more violations of Section 2018 of the Immigration and Nationality Act or several other statues, a party has 60 days to file a request with the Federal Mediation & Conciliation Service (FMCS) to assist the parties in resolving the disputes. FMCS—or a private mediator, with all parties’ agreement—would then have up to 90 days to help facilitate a
resolution of the dispute. The House-passed bill, with 37 Democratic co-sponsors and 25 Republican co-sponsors, is now pending in the Senate awaiting further action.

Meanwhile, the House is also considering separate legislation that would encourage the greater use of mediation to resolve disputes between agricultural guest workers and their employers. H.R. 6083, sponsored by Rep. Ted Yoho (R-FL), would create a non-immigrant H–2C work visa program for agricultural workers and would also require employers to use an electronic employment eligibility verification system to confirm the legal immigration status of all new employees. Section 104 of the bill would encourage mediation by prohibiting non-immigrant guest workers from suing their employers for damages until at least 90 days after they have requested assistance from the Federal Mediation and Conciliation Service and mediation has been attempted. H.R. 6083 was referred to the House Committees on the Judiciary, Education and Labor, Ways and Means, and Energy and Commerce, but no further action has been scheduled.

10. **Mandatory Arbitration for Servicemembers**

Congress is also considering legislation that would make it more difficult to enforce mandatory arbitration agreements against U.S. servicemembers with respect to their employment and reemployment rights.

H.R. 2750 and S. 2459, known as the Justice for Servicemembers Act, would invalidate any pre-dispute agreement to arbitrate employer-employee disputes arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA) or the Servicemembers Civil Relief Act. The legislation, introduced Rep. David Cicilline (D-RI) and Sen. Lisa Murkowski (R-AK), would also ban any pre-dispute agreement to prohibit, or waive the right of, a party to participate in a joint, class, or collection action suit or proceeding. However, any agreement to arbitrate or joint-action waiver entered into after a dispute has arisen would continue to be enforceable. The bills also provide that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement. H.R. 2750 was referred to the House Judiciary and Veterans’ Affairs Committees and S. 2459 was referred to the Senate Veterans’ Affairs Committee, but no hearings or other action has been scheduled on either bill.

Although the ABA has not formally endorsed this legislation, the ABA House of Delegates adopted a policy in August 2011 ([Resolution 120](#)) supporting various amendments to USERRA, including making unenforceable any clause of any agreement between an employer and an employee that requires arbitration of a dispute under the Act. Therefore, the ABA generally supports the substance of H.R. 2750 and S. 2459.

11. **Arbitration of College Enrollment Disputes**

Congress is also considering legislation known as the Court Legal Access and Student Support (CLASS) Act that would invalidate all mandatory pre-dispute agreements to arbitrate controversies involving enrollment agreements between a student and a college. H.R. 1430 and S. 608, introduced by Rep. Maxine Waters (D-CA) and Sen. Richard Durbin (D-IL), respectively, state that Chapter 1
of Title 9 of the U.S. Code relating to enforcement of arbitration agreements shall not apply to enrollment agreements between students and institutions of higher education. The bills also would amend Section 487(a) of the Higher Education Act of 1965, 20 U.S.C. § 1094(a), to prohibit such institutions that participate in federal student aid programs from requiring a student to agree to any restriction on the student’s ability to pursue an individual or group claim against it in court. The legislation would take effect one year after the date of enactment. Although H.R. 1430 was referred to the House Education & Labor and House Judiciary Committees, and S. 608 was referred to the Senate Health, Education, Labor, and Pensions Committee, no hearings or markups have been scheduled on the bills to date.

12. **Arbitration of Student Loan Disputes**

Several bills have been introduced in the House and Senate that would prohibit all mandatory pre-dispute agreements to arbitrate disputes involving postsecondary education loans.

On December 11, 2019, the House Financial Services Committee approved H.R. 5294, the Student Borrower Protections Act. The bill, sponsored by Rep. Alma Adams (D-NC), would establish a “postsecondary education loan borrower bill of rights,” including a ban on mandatory pre-dispute arbitration agreements and class action waivers in connection with such educational loans. Although H.R. 5294 was approved by the House Financial Services Committee, the bill is still pending in the House Education and Labor Committee. Similar language banning these types of mandatory arbitration agreements and class action waivers is also included in S. 1354, a broad student loan reform bill introduced by Sen. Richard Durbin (D-IL).

Congress is also considering several other narrower bills that would limit the use of arbitration to resolve educational loan disputes but without the extensive borrower bill of rights provisions of H.R. 5294 and S. 1354. For example, H.R. 4544 (introduced by Rep. Madeleine Dean (D-PA)) and H.R. 3764 (introduced by Rep. Mary Gay Scanlon (D-PA)) would prohibit all mandatory pre-dispute agreements to arbitrate private education loan disputes and all pre-dispute “joint action waivers,” defined as agreements prohibiting or waiving a party’s right to participate in a joint, class, or collective action. H.R. 3764 also provides that the validity and enforceability of such arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement.

H.R. 4544 was referred to the House Financial Services Committee, H.R. 3764 was referred to the House Judiciary Committee, and S. 1354 was referred to the Senate Health, Education, Labor and Pensions Committee, but no further action has been scheduled on any of these three measures.

13. **Mandatory Arbitration of Data Breaches**

At the beginning of the 116th Congress, Rep. Ted Lieu (D-CA) introduced legislation aimed at ending mandatory arbitration of disputes involving data breaches. H.R. 327 would prohibit entities from requiring, as part of their customer agreements or other similar agreements, that an individual agree to arbitrate disputes related to a computer security breach. The bill would allow victims to bring a private right of action in court for violations, and it also provides for enforcement by the
Federal Trade Commission and states. S. 2968, a broader data privacy bill introduced by Sen. Maria Cantwell (D-WA), also contains language prohibiting mandatory pre-dispute arbitration agreements to resolve privacy or data security disputes or whistleblower disputes. H.R. 327 was referred to the House Energy and Commerce Committee and S. 2968 was referred to the Senate Commerce, Science, and Transportation Committee, but no further action has been scheduled on either bill.

14. **Settlements Under the Endangered Species Act**

Legislation has also been introduced in the 116th Congress that would amend the Endangered Species Act to establish a procedure for approving settlements in certain types of federal lawsuits. S. 1426, introduced by Sen. John Cornyn (R-TX), would require the Secretary of the Interior to publish any complaint filed against the Department that alleges a failure to perform an act or duty related to an endangered or threatened species. The bill also would provide all affected parties—including businesses and state and local governments—with a reasonable opportunity to intervene in the suit. If the court grants a motion to intervene, it would be required to refer the matter to mediation or a magistrate judge to facilitate settlement discussions. The legislation would also allow the court to award litigation costs—such as attorneys’ fees and expert witness fees—to any appropriate party as part of a final order, but such costs could not be awarded if the case is resolved by a consent decree or settlement agreement. The court would also be prohibited from approving a consent decree unless each state and county containing the relevant species is given notice and either approves of the settlement or fails to respond within 45 days. Although S. 1426 was referred to the Senate Environment and Public Works Committee, no further action has been scheduled.

15. **Safety Over Arbitration Act**

Early in the 116th Congress, Sen. Sheldon Whitehouse (D-RI) introduced legislation that would ban pre-dispute arbitration agreements that have the potential to harm the health and safety of the public. S. 620, also known as the Safety Over Arbitration Act, would invalidate any arbitration agreement to resolve a future claim or controversy alleging facts relevant to a public health or safety hazard. However, any such agreements to arbitrate that are entered into after a dispute has arisen would continue to be enforceable. The bill also provides that if the parties proceed with the arbitration, the arbitrator must provide the parties with a written explanation of the factual and legal basis for any award or other outcome, and the explanation “shall not be made under seal by the arbitrator or a court.” Although S. 620 was referred to the Senate Judiciary Committee, there has been no further action on the measure.

16. **Restoring Statutory Rights and Interests of the States Act**

Sen. Patrick Leahy (D-VT) reintroduced legislation during the 116th Congress that would amend the Federal Arbitration Act (FAA) to prohibit pre-dispute agreements to arbitrate claims brought by individuals or small businesses for alleged violations of a federal or state statute, the U.S. Constitution, or a state constitution. S. 635, also known as the Restoring Statutory Rights and Interests of the States Act, also would invalidate agreements to arbitrate that are prohibited by a federal or state statute, or the finding of a federal or state court, on grounds that the agreements are unconscionable, invalid because there was no meeting of the minds, or otherwise unenforceable as a matter of public policy. In addition, the legislation would authorize the courts, rather than
arbitrators, to determine whether the FAA applies to an agreement to arbitrate, irrespective of whether the party resisting arbitration challenges the agreement to arbitrate specifically or in conjunction with other terms of the contract containing the agreement. S. 635 was referred to the Senate Judiciary Committee, but no further action has been scheduled on the measure.

17. **Arbitration of Consumer Financial Disputes**

At the beginning of the 116th Congress, Senate Banking, Housing, and Urban Affairs Ranking Member Sherrod Brown (D-OH), introduced somewhat narrower legislation designed to invalidate pre-dispute consumer arbitration agreements. S. 630, known as the Arbitration Fairness for Consumers Act, would amend the Consumer Financial Protection Act of 2010 to prohibit pre-dispute arbitration agreements and pre-dispute joint-action waivers with respect to disputes over a consumer financial product or service. The bill also provides that the validity and enforceability of arbitration agreements shall be determined by a court, rather than an arbitrator, regardless of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the overall contract containing the arbitration agreement. S. 630 was referred to the Senate Banking, Housing, and Urban Affairs Committee, but no further action has been scheduled on the measure.

18. **Arbitration of Securities Disputes**

S. 2992 and H.R. 5336, known as the Investor Choice Act and introduced by Sen. Jeff Merkley (D-OR) and Rep. Bill Foster (D-IL), respectively, would prohibit the use of pre-dispute arbitration agreements to resolve securities or investment disputes. To accomplish this, the bills would amend the Securities Exchange Act of 1934 and the Investment Advisors Act of 1940 to prohibit mandatory pre-dispute arbitration agreements between securities brokers, dealers, or investment advisors and their customers or clients. The bills also prohibit such brokers, dealers, or advisors from entering into agreements that restrict the ability of their customers or clients to select a forum for resolution of the dispute or to participate in class actions suits. Although S. 2992 and H.R. 5336 were referred to the Senate Banking, Housing, and Urban Affairs Committee and the House Financial Services Committee, respectively, no further action has been scheduled on either bill. While both bills have attracted numerous Democratic cosponsors, the bills have received no Republican support and thus are unlikely to advance in the 116th Congress.

19. **Arbitration of Amtrak Passenger Disputes**

Congress is also considering legislation to eliminate mandatory arbitration of many rail disputes. In March 2020, Senator Richard Blumenthal (D-CT) and Rep. Conor Lamb (D-PA) introduced the Ending Passenger Rail Forced Arbitration Act as S. 3400 and H.R. 6101, respectively. The bills would ban the use of pre-dispute arbitration agreements and pre-dispute joint-action waivers to resolve consumer and civil rights disputes between the National Railroad Passenger Corporation (also known as Amtrak) and its customers. However, the prohibition on these arbitration agreements and joint-action waivers would not apply to any dispute subject to the Railway Labor Act, 45 U.S.C. 151 et. seq.
S. 3400 was referred to the Senate Commerce, Science, and Transportation Committee, and H.R. 6101 was referred to the House Transportation and Infrastructure Committee, but no hearings or other action has been scheduled on either bill.

20. **Arbitration of Whistleblower Disputes**

Congress is considering legislation known as the Whistleblower Programs Improvement Act that would expand incentives and protections for whistleblowers reporting fraud to the Commodity Futures Trading Commission (CFTC), including limits on arbitration. S. 2529, introduced by Sen. Charles Grassley (R-IA), would invalidate any pre-dispute agreement to arbitrate disputes arising under the CFTC whistleblower program. But while the House companion bill introduced by Rep. Cindy Axe (D-IA), H.R. 4816, contains most of the same whistleblower incentives and protections as S. 2529, the House bill does not include any prohibitions on pre-dispute arbitration agreements. S. 2529 was referred to the Senate Agriculture, Nutrition, and Forestry Committee and H.R. 4816 was referred to the House Agriculture and Oversight & Reform Committees, but no further action has been scheduled on either bill.

In July 2019, President Trump signed related bipartisan legislation known as the Taxpayer First Act into law that reforms the Internal Revenue Service (IRS) in many different ways, including stronger protections for employees and other whistleblowers who provide information to the government about possible tax evasion by companies and other employers. P.L. 116-25 (H.R. 3151 and S. 928), sponsored by Rep. John Lewis (D-GA) and Sen. Charles Grassley (R-IA), also contains language invalidating any pre-dispute agreement to arbitrate disputes relating to the discharge or other acts of retaliation against an employee whistleblower.

21. **Ombudsman Legislation**

During the 116th Congress, numerous bills have been introduced that would establish or reform ombudsman positions in certain federal agencies. For example:

- H.R. 6300, sponsored by Rep. Suzanne Bonamici (D-OR), would require state long-term care ombudsmen to have continuing direct access (or other access through the use of technology) to nursing home residents to provide services during any portion of the COVID-19 public health emergency declared under the Public Service Act. Similar language is also included in H.R. 6379, a broad COVID-19 relief bill sponsored by Rep. Nita Lowey (D-NY). H.R. 6300 was referred to the House Education and Labor Committee, and H.R. 6379 was referred to the House Committees on Appropriations, Budget, and Ways and Means, but no further action has been scheduled on either bill.

- H.R. 5986, sponsored by Rep. Raul Grijalva (D-AZ), would create the Interagency Working Group on Environmental Justice Compliance and Enforcement and would direct the Environmental Protection Agency’s Administrator to establish a position of Environmental Justice Ombudsman. The bill was referred to the House Committees on Energy and Commerce, Natural Resources, the Judiciary, Transportation and Infrastructure, Agriculture, and Education and Labor, but no further action has been scheduled.
• H.R. 6009, sponsored by Rep. Ed Perlmutter (D-CO), would extend the **Office of Ombudsman under the Energy Employees Occupational Illness Compensation Program Act of 2000**. The legislation was referred to the House Committees on the Judiciary and Education & Labor, but no hearings or other action has been scheduled.

• S. 3078, cosponsored by Sens. Charles Grassley (R-IA) and Ron Wyden (D-OR), would amend Section 1808 of the Social Security Act to direct the Secretary of Health and Human Services (HHS) to appoint a **Medicare Reviews and Appeals Ombudsman** within the Centers for Medicare and Medicaid Services to identify, investigate, and assist in the resolution of complaints and inquiries regarding Medicare audits and the Medicare appeals process from service providers, suppliers, and beneficiaries. S. 3078 was referred to the Senate Finance Committee, but no further action has been scheduled on the bill.

• S. 3, introduced by Sen. Benjamin Cardin (D-MD), would amend the Patient Protection and Affordable Care Act to create a public health insurance option and establish an **Office of the Ombudsman for the Public Health Insurance Option** within the Department of Health and Human Services. The new ombudsman would have duties regarding the public health insurance option that are similar to the duties of the Medicare Beneficiary Ombudsman under Section 1808(c)(2) of the Social Security Act. S. 3 was referred to the Senate Finance Committee, but no further action has been scheduled on the measure.

• H.R. 4978, introduced by Rep. Anna Eshoo (D-CA), would create a new United States Digital Privacy Agency to protect the privacy of consumers’ personal information and would also create a new **Ombudsman within the new privacy agency**. The bill would also prohibit pre-dispute arbitration agreements to resolve claims to enforce the new rights created by the legislation. H.R. 4978 was referred to the House Energy & Commerce and Judiciary Committees, but no further action has been scheduled.

• H.R. 4729, introduced by Rep. Jackie Speier (D-CA), would create an Office of Crime Victims’ Rights within the Justice Department, headed by the **Crime Victims’ Rights Ombudsman**, for the purpose of (1) receiving, coordinating investigations of, and adjudicating complaints relating to, a violation of a crime victim’s rights and (2) serving as a central resource for information and contact in the Justice Department for crime victims. H.R. 4729 was referred to the House Judiciary Committee, but no further action has been scheduled on the bill.

• S. 719, introduced by Sen. Richard Durbin (D-IL), would create a **Civil Rights Ombudsman within the Bureau of Prisons** to review, investigate, and attempt to remedy any civil rights complaints by inmates. The ombudsman also would be required to refer all prison staff misconduct and possible violations of law to the Bureau of Prisons and the Department of Justice, recommend improvements to the Bureau of Prisons’ solitary confinement and civil rights policies, and make periodic reports to the House and Senate Judiciary Committees. S. 719 was referred to the Senate Judiciary Committee, but there has been no further action on the bill to date.
• H.R. 2034 and S. 992, known as the Dignity Act and introduced by Rep. Pramila Jayapal (D-WA) and Sen. Cory Booker (D-CT), respectively, would require the Attorney General to designate an ombudsman within the federal penal system to oversee and monitor prisoner transportation, use of segregated housing, strip searches of prisoners, and alleged civil rights violations. The bills were referred to the House and Senate Judiciary Committees, respectively, but no further action has been scheduled.

• S. 720, introduced by Sen. Tom Udall (D-NM), would amend the Higher Education Act to require the Student Loan Ombudsman of the Department of Education and the Department’s contractors and vendors to provide student loan data to the Director or to the Ombudsman of the Consumer Financial Protection Bureau. A House companion bill, H.R. 2833, was also introduced by Rep. Katie Porter (D-CA). S. 720 was referred to the Senate Health, Education, Labor and Pensions Committee, and H.R. 2833 was referred to the House Education & Labor and Financial Services Committees, but no further action has been scheduled on either bill.

• H.R. 4596 and H.R. 4627, introduced by Reps. Ilhan Omar (D-MN) and Mary Gay Scanlon (D-PA), respectively, would amend the Higher Education Act to establish the Office of the Borrower Advocate to replace the current Student Loan Ombudsman in an effort to improve service to students and other participants in the federal student financial assistance programs. Similar language is also contained in H.R. 4674, a much broader education reform bill introduced by Rep. Robert Scott (D-VA). All three bills were referred to the House Education and Labor Committee, and although the committee approved H.R. 4674 on October 30, 2019, no further action has been scheduled on the two narrower bills.

• S. 2691, introduced by Sen. Tom Udall (D-NM), would create an Ombudsman for Border and Immigration Enforcement Related Concerns in the Department of Homeland Security (DHS) to assist individuals, including aliens, in resolving complaints regarding U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, or their respective subcontractors or cooperating entities. Similar language is also contained in H.R. 2203 and H.R. 3524, much broader immigration reform bills introduced by Reps. Veronica Escobar (D-TX) and Zoe Lofgren (D-CA), respectively. The House approved H.R. 2203 on September 25, 2019. S. 2691 was referred to the Senate Homeland Security and Governmental Affairs Committee, and H.R. 3524 was referred to the House Homeland Security, Judiciary, Ways & Means, and six other House committees, but there has been no further action on either of these bills.

• Section 105 of H.R. 3931, the FY 2020 Department of Homeland Security Appropriations bill, would create an Immigration Detention Ombudsman within DHS to receive, investigate, and resolve complaints from individuals affected by potential misconduct, excessive force, or violations of law or detention standards by DHS officers or other personnel. Although H.R. 3931 was approved by the House Appropriations Committee on July 24, 2019 and referred to the full House for further consideration, the bill was not enacted and House and Senate appropriators are now focused on FY 2021 funding bills.
S. 1409 and H.R. 2673, introduced by Sen. Jeanne Shaheen (D-NH) and Rep. Andy Kim (D-NJ), would expand the ability of the Small Business Administration’s (SBA) Office of the National Ombudsman to help small businesses meet regulatory requirements and would authorize the SBA National Ombudsman to develop additional outreach initiatives to promote greater awareness of its services. H.R. 2142, a related measure introduced by Rep. Antonio Delgado (D-NY), would amend the Small Business Act to require the SBA Ombudsman to create a centralized website for compliance guides. S. 1409 was referred to the Senate Small Business and Entrepreneurship Committee, and H.R. 2673 was referred to the House Small Business Committee. Meanwhile, the House approved H.R. 2142 on July 15, 2019, and the bill is now pending in the Senate Small Business and Entrepreneurship Committee.

H.R. 3060, introduced by Rep. Sheila Jackson Lee (D-TX), would establish an Office of Disaster Response Ombudsman and an Office of Disaster Recovery Ombudsman within FEMA to examine and resolve complaints arising from disaster response or disaster assistance provided to individuals, organizations, or state or local governments receiving federal government funding. H.R. 3060 was referred to the House Homeland Security, Education & Labor, Energy & Commerce, Financial Services, Judiciary, Small Business, and Transportation & Infrastructure Committees, but no further action has been scheduled on the measure.

The ABA has previously adopted several resolutions favoring the greater use of “ombuds” both in the public and private sectors. In August 2001 and February 2004, the ABA House of Delegates approved resolutions encouraging the greater use of “ombuds” to resolve complaints and endorsing general standards for the establishment and operation of ombudsman offices. The ABA also previously adopted other resolutions in 1971, 1989 and 1995, recommending that the federal government experiment with the creation of several different types of ombudsman programs.

At the ABA’s 2017 Annual Meeting, the House of Delegates adopted Resolution 103, sponsored by the Section of Dispute Resolution, which encourages the greater use and development of ombuds programs that comply with generally recognized standards of practice.

Copies of the legislation described above or any other federal legislation involving ADR issues can be obtained directly from the U.S. Congress web site at https://www.congress.gov/, or by contacting Larson Frisby in the American Bar Association’s Governmental Affairs Office at (202) 662-1098 or larson.frisby@americanbar.org.