

**H. B. 3210**

(By Delegates Miley, Caputo, Manchin, Martin,  
Staggers and Stephens)

[Introduced February 21, 2011; referred to the  
Committee on Energy, Industry and Labor, Economic  
Development and Small Business then the Judiciary.]

A BILL to amend the Code of West Virginia, 1931, as amended, by  
adding thereto a new article, designated §55-10A-1, §55-10A-2,  
§55-10A-3, §55-10A-4, §55-10A-5, §55-10A-6, §55-10A-7,  
§55-10A-8, §55-10A-9 and §55-10A-10, all relating to creating  
the Consumer and Employee Arbitration Fairness Act; specifying  
certain arbitration agreements are void and unenforceable;  
requiring certain information to be disclosed; providing  
duties for arbitration service providers; requiring notice to  
Attorney General; requiring disclosure of certain information  
by arbitrators; addressing appointment of arbitrators;  
prohibiting the limiting the right to remedies; and including  
provisions permitting the vacating of an award under specified  
circumstances.

*Be it enacted by the Legislature of West Virginia:*

That the Code of West Virginia, 1931, as amended, be amended  
by adding thereto a new article, designated §55-10A-1, §55-10A-2,

1 §55-10A-3, §55-10A-4, §55-10A-5, §55-10A-6, §55-10A-7, §55-10A-8,  
2 §55-10A-9 and §55-10A-10, all to read as follows:

3 **ARTICLE 10A. CONSUMER AND EMPLOYEE ARBITRATION FAIRNESS ACT.**

4 **§55-10A-1. Title and findings.**

5 (a) This article may be known and cited as the "Consumer and  
6 Employee Arbitration Fairness Act". It is remedial in nature and  
7 shall be liberally construed to affect its purposes.

8 (b) The Legislature finds that arbitration agreements are  
9 commonly entered into in form contracts between consumers and large  
10 businesses and between employees and employers which do not  
11 adequately disclose either the benefits of the civil justice system  
12 which are being waived by the consumers and employees or the costs  
13 of the arbitration proceedings.

14 (c) The Legislature finds that arbitration agreements commonly  
15 entered into in form contracts between consumers and large  
16 businesses and employees and employers designate arbitration  
17 service providers to perform any arbitration called for under the  
18 agreement without fully disclosing to the consumers, the employees  
19 or the public relevant relationships between the arbitration  
20 service provider and the business party selecting the provider.

21 (d) The Legislature finds that arbitration service providers  
22 or the arbitrators who hear these cases are paid on a per case  
23 basis. This arrangement results in incentives or perceived  
24 incentives on the part of the arbitration service provider and the

1 arbitrator to rule in favor of the businesses selecting the  
2 arbitrator and the arbitration service provider as the business is  
3 a repeat customer while the consumer or employee likely are not.

4 (e) The Legislature finds that due process and fundamental  
5 fairness require that dispute resolution providers, such as  
6 arbitrators, taking the place of impartial judges and juries in  
7 civil disputes be fair and impartial in practice and have the  
8 appearance of fairness and impartiality. Publicly disclosed  
9 information regarding arbitration service providers and  
10 arbitrators, and their relationships with the businesses who select  
11 them, will help assure that any arbitration conducted is both fair  
12 and impartial and has the appearance of fairness and impartiality.

13 **§55-10A-2. Definitions.**

14 (a) "Consumer" means an individual who uses, purchases,  
15 acquires, attempts to purchase or acquire, or is offered or  
16 furnished goods or services, other than insurance, for personal,  
17 family or household purposes or for a "small business" which is  
18 defined as any business entity with less than \$1,000,000 of gross  
19 sales in any calendar year or fiscal year.

20 (b) "Consumer arbitration agreement" means a form or standard  
21 contract, not specifically negotiated with a consumer concerning  
22 the use of, purchase of, acquisition of, attempt to purchase or  
23 acquire, offer of or furnishing of goods or services, other than  
24 insurance, for personal, family, or household purposes, or for a

1 "small business" which is defined as any business entity with less  
2 than \$1,000,000 of gross sales in any calendar year or fiscal year.

3 (c) "Employee" means a person permitted or suffered to work in  
4 the State of West Virginia.

5 (d) "Employer" means one or more individuals or businesses,  
6 including sole proprietorships, partnerships, associations,  
7 organizations, cooperatives, limited liability companies,  
8 corporations or unincorporated companies who suffer or permit one  
9 or more employees to work.

10 (e) "Employee arbitration agreement" means a form or standard  
11 contract, not specifically negotiated with an employee, concerning  
12 the compensation, hire, tenure, terms, conditions or privileges of  
13 employment. It does not include a collective bargaining agreement.

14 (f) "Provider" means any arbitration service provider,  
15 arbitrator or any entity providing arbitration services to a  
16 consumer or employee arbitration.

17 **§55-10A-3. Consumer and employee arbitration agreements.**

18 (a) An arbitration agreement which is oppressive or  
19 unconscionable is void and unenforceable.

20 (b) In a provider's initial notice or communication to a  
21 consumer or an employee, the provider shall clearly and  
22 conspicuously disclose, in type larger than any other provisions of  
23 the contract, the estimated expenses of any arbitration, including:

24 (1) The filing fee;

1       (2) The average daily cost for an arbitrator and hearing room;

2       (3) Any other charge that an arbitrator or provider may  
3 assess; and

4       (4) The proportion of expenses listed under this subsection  
5 borne by each party if the consumer or employee prevails and if the  
6 consumer or employee does not prevail.

7       An expense required to be disclosed under this subsection does  
8 not include attorney's fees. A business or employer required to  
9 disclose an expense under this subsection does not violate this  
10 subsection when an actual expense exceeds an estimate if the  
11 estimate was reasonable and made in good faith.

12       (c) A violation of subsection (b) of this section creates a  
13 rebuttable presumption that the arbitration agreement is  
14 unenforceable and may be considered by a court in a determination  
15 of whether the agreement is unconscionable or otherwise  
16 unenforceable under general contract law. If a provider violates  
17 subsection (b) of this section, a person or the Attorney General  
18 may request a court of competent jurisdiction to enjoin the  
19 provider in violation from violating subsection (b) of this section  
20 in the current arbitration or a subsequent arbitration. A provider  
21 found to be in violation of this section, or that conforms to this  
22 section only after an action is commenced, is liable for the court  
23 costs and reasonable attorney's fees of the party bringing the  
24 action.

1 **§55-10A-4. Details of arbitration to be in contracts.**

2 In every consumer or employment arbitration contract, the  
3 following shall be disclosed and failure to provide the information  
4 renders the arbitration void:

5 (1) The entire arbitration provision must be set forth in  
6 complete form in the contract and may not be incorporated by  
7 reference;

8 (2) The arbitration provision to be included, as required in  
9 subdivision (1) of this section, shall state the manner in which  
10 arbitration is initiated, the cost to the consumer or employee, the  
11 method of selecting an arbitrator or arbitrators, the location of  
12 the arbitration, the procedures for conducting the arbitration,  
13 including the types of discovery available to the consumer or  
14 employee and the location at which the consumer or employee may  
15 access the information required to be maintained in section six of  
16 this article.

17 **§55-10A-5. Arbitration service providers.**

18 (a) Beginning thirty days after the effective date of this  
19 article, a provider shall collect, publish at least quarterly and  
20 make available to the public in a computer-searchable format which  
21 is available on the publicly accessible web site of the provider,  
22 if any, and on paper upon request, all of the following information  
23 for each consumer or employee arbitration with which the provider  
24 was involved:

1       (1) The name of the nonconsumer or nonemployee party, if the  
2 nonconsumer or nonemployee party is a corporation or other business  
3 entity;

4       (2) The type of dispute involved, such as goods, banking,  
5 wireless communications, debt collection or employment;

6       (3) If the dispute involved employment, the amount of the  
7 employee's annual wage divided into the following ranges:

8       (A) Less than \$100,000;

9       (B) From \$100,000 to \$250,000; or

10       (C) More than \$250,000;

11       (4) Whether the consumer or employer was the prevailing party;

12       (5) The number of times a business that is a party to the  
13 arbitration had previously been a party to a mediation or  
14 arbitration in which the provider was involved;

15       (6) Whether the consumer or employee was represented by an  
16 attorney;

17       (7) The dates the provider received the demand for  
18 arbitration, the arbitrator was appointed and the disposition of  
19 the arbitration was rendered;

20       (8) The type of disposition of the arbitration, including  
21 withdrawal, abandonment, settlement, award after hearing, award  
22 without hearing, default or dismissal without hearing;

23       (9) The amount of the claim and the amount of any award or  
24 relief granted;

1       (10) The name of the arbitrator, the amount of the  
2 arbitrator's fee for the arbitration and the percentage of the  
3 arbitrator's fee allocated to each party; and

4       (11) Whether the provider has, or within the preceding year  
5 had, a financial interest in a party or the legal representation of  
6 a party in the arbitration, or whether a party or legal  
7 representative of a party in the arbitration has, or within the  
8 preceding year had, a financial interest in the provider.

9       Once the information is published and made available, it must  
10 remain available for at least five years. If the information  
11 required by this subsection is available in a computer-searchable  
12 format and downloadable for free on the provider's publicly  
13 accessible website, the provider may charge a requestor a  
14 reasonable amount for the actual cost of copying the information on  
15 paper. If the information required by this subsection is not  
16 available for free on the provider's publicly accessible website,  
17 the provider may not charge a requestor for the information in  
18 paper form.

19       (b) A provider that provides arbitration services in this  
20 state shall notify the Consumer Protection Division of the Office  
21 of the Attorney General of this state, in writing, of any website  
22 upon which the information required under subsection (a) of this  
23 section is posted. The provider shall inform the Consumer  
24 Protection Division of the Office of the Attorney General if it



1 discontinues the use of any website previously reported. The  
2 Attorney General shall include the links to the providers websites  
3 on the Attorney General's publicly accessible website.

4 **§55-10A-6. Disclosure by arbitrators.**

5 (a) (1) Beginning thirty days after the effective date of this  
6 article, a person who has been proposed, nominated, or appointed as  
7 a neutral arbitrator pursuant to a consumer or employee arbitration  
8 agreement, other than one contained in a collective bargaining  
9 agreement, shall comply with the requirements of this section.

10 (2) A person who has been proposed, nominated, or appointed as  
11 a neutral arbitrator for an arbitration proceeding shall disclose  
12 to each party all matters that could cause a person aware of the  
13 facts underlying a potential conflict of interest to have a  
14 reasonable doubt that the person would be able to act as a neutral  
15 or impartial arbitrator.

16 (3) In addition to any matters disclosed pursuant to  
17 subdivision (2) of this subsection, the person proposed, nominated,  
18 or appointed shall disclose:

19 (A) The existence, regarding the person, of any ground  
20 specified in Canon 3 of the Code of Judicial Conduct for  
21 disqualification of a judge;

22 (B) Whether the person has been employed by a party to the  
23 arbitration proceeding within the last five years; and

24 (C) The names of the parties to arbitration proceedings,

1 within the last five years, other than the pending proceeding, in  
2 which the person served or is serving as a party arbitrator for any  
3 party to that proceeding or who has been an attorney for a party to  
4 the pending arbitration; and

5 (D) Beginning thirty days after the effective date of this  
6 article, the names of the parties to all current arbitration  
7 proceedings and those prior arbitration proceedings, other than the  
8 pending proceeding, within the last five years in which the person  
9 served or is serving as a party selected arbitrator, and not a  
10 neutral arbitrator, for any party to that proceeding, or who has  
11 been an attorney for a party to the arbitration.

12 (b) The information to be disclosed pursuant to paragraph (C),  
13 subdivision (3), subsection (a) of this section includes:

14 (1) The names of the parties to all prior or current  
15 arbitration proceedings, other than the pending proceeding, within  
16 the last five years in which the person served or is serving as a  
17 neutral arbitrator and the results of each of those proceedings  
18 that were arbitrated to conclusion;

19 (2) The date of the arbitration award;

20 (3) The identification of the prevailing party;

21 (4) The identification of the person and the party who  
22 selected the person to serve as a neutral arbitrator, if any;

23 (5) The names of the parties' attorneys;

24 (6) The amount of monetary damages awarded, if any; and

1 (7) Any attorney-client relationship the person has or has had  
2 with a party or an attorney for a party to the arbitration  
3 proceeding within the last five years.

4 (c) In order to preserve confidentiality, it is sufficient for  
5 the purposes of paragraphs (C) and (D), subdivision (3), subsection  
6 (a) of this section, for the person to identify any party who is  
7 not a party to the pending arbitration proceeding as "claimant" or  
8 "respondent" if that party is or was an individual or a small  
9 business as defined in this article.

10 (d) The person proposed, nominated, or appointed as a neutral  
11 arbitrator shall make the disclosures required by this section in  
12 writing to all parties by serving a disclosure upon the parties  
13 within ten days of any notice of the person's proposal, nomination,  
14 or appointment, which ever first occurs. The disclosure shall be  
15 served in accordance with Rule 5 of the West Virginia Rules of  
16 Civil Procedure.

17 **§55-10A-7. Appointment of arbitrators; conflict of interest**  
18 **provisions applicable.**

19 Except as provided in this article, if the arbitration  
20 agreement provides a method of appointment of arbitrators, then  
21 this method must be followed. If a method is not provided, the  
22 agreed method fails or for any reason cannot be followed, or an  
23 appointed arbitrator fails or is unable to act and a successor has  
24 not been appointed, then the circuit court, upon application of a

1 party, shall appoint one or more arbitrators. An arbitrator so  
2 appointed has all of the powers of one specifically named in the  
3 agreement. A neutral arbitrator appointed by the circuit court  
4 shall comply with the disclosure provisions of this article.

5 **§55-10A-8. Vacating an award.**

6 (a) Upon the application of a party, the circuit court shall  
7 vacate an award if:

8 (1) The award was procured by corruption, fraud, or other  
9 undue means;

10 (2) There was evident partiality by an arbitrator appointed as  
11 a neutral arbitrator or corruption in any of the arbitrators or  
12 misconduct prejudicing the rights of any party;

13 (3) The arbitrators exceeded their powers;

14 (4) The arbitrators refused to postpone the hearing upon  
15 sufficient cause being shown or refused to hear evidence material  
16 to the controversy or otherwise conducted the hearing, contrary to  
17 the provisions of the law, in a manner that substantially  
18 prejudiced the rights of any party;

19 (5) There was no arbitration agreement and the party preserved  
20 the party's objection to the proceeding being held in the absence  
21 of an agreement, regardless of whether the party then participated  
22 in the proceeding; or

23 (6) A neutral arbitrator failed to make a material disclosure  
24 required by this article.

1       (b) The fact that the relief could not or would not be granted  
2 by a court of law or equity is not grounds for vacating or refusing  
3 to confirm the award.

4       (c) An application for vacation of an award under this section  
5 shall be made within ninety days after delivery of a copy of the  
6 award to the applicant, except that, if it is predicated upon  
7 corruption, fraud, or other undue means, then the application shall  
8 be made within ninety days after the grounds for the vacation are  
9 known or should have been known by the party.

10       (d) In vacating the award on grounds other than those stated  
11 in subsection (a) of this section, the court may order a rehearing  
12 before new arbitrators are chosen, as provided in the agreement or,  
13 if the agreement does not provide a method of selection, then by  
14 the court in accordance with this article or, if the award is  
15 vacated on grounds set forth in subdivisions (3) or (4), subsection  
16 (a) of this section, the court may order a rehearing before the  
17 arbitrators who made the award or their successors.

18       (e) If the application to vacate is denied and a motion to  
19 modify or correct the award is not pending, the court shall confirm  
20 the award.

21 **§55-10A-9. No limitation of legal remedies.**

22       No consumer or employee arbitration agreement may attempt to  
23 limit or otherwise restrict an individual's right to all remedies  
24 available under the common law or statutes of this state, nor may

1 it attempt to restrict a consumer's or employee's right to  
2 participate in a class action method of recovery.

3 **§55-10A-10. Severability.**

4 Any provision of this article found to be unlawful does not  
5 prevent any other provisions from being enforced as each section is  
6 severable.

NOTE: The purpose of this bill is to create the Consumer and Employee Arbitration Fairness Act.

This article is new; therefore, it has been completely underscored.