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Unchecked corporate power

Forced arbitration, the enforcement crisis,
and how workers are fighting back



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This report was written by Kate Hamaji, Rachel Deutsch, and Elizabeth Nicolas from the Center for Popular Democracy and Celine McNicholas, Heidi Shierholz, and Margaret Poydock from the Economic Policy Institute.

The National Employment Law Project provided analysis on historical and current funding and staffing for state-level enforcement agencies in Maine and Oregon. The Massachusetts Budget and Policy Center provided state-level historical and current enforcement agency funding data for Massachusetts. Worker stories and organizational profiles were collected by the Center for Popular Democracy.



Popular Democracy in Action

Popular Democracy in Action and its affiliates know that everyday people have the power to change the world. We upend politics as usual to forge a representative, multiracial government and society where we all thrive, no exceptions.

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About the Economic Policy Institute

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI's mission is to inform and empower individuals to seek solutions that ensure broadly shared prosperity and opportunity.

<https://www.epi.org/>



About the National Employment Law Project

The National Employment Law Project (NELP) seeks to ensure that America upholds for all workers the promise of opportunity and economic security through work. At the federal, state, and local levels, NELP fights to create good jobs, expand access to work, and strengthen protections for low-wage workers and the unemployed.

<http://www.nelp.org>

Executive summary

Working families in many states have won crucial new workplace protections, including dramatic increases to the minimum wage,¹ paid sick time, and family leave² and protections against unpredictable part-time work schedules.³ These policies are powerful tools for fighting economic inequality; they help working families put food on the table, keep a roof over their heads, and care for their children and family members. But the real-world impact of these historic policy wins depends on effective enforcement. Historically, workplace standards have been enforced through the combined efforts of public agencies and private class-action lawsuits. Today, corporate use of forced arbitration, combined with shrinking budgets for public worker protection agencies, is undermining our new, hard-won workplace standards as well as long-standing protections. **The right to be paid a livable minimum wage, to take meal and rest breaks, to safe workplaces, and to equal earning and promotion opportunities regardless of race, gender, ethnicity, or other social category—all of these important rights are at risk of being hollowed out by underenforcement.**

Elected leaders' misplaced budget priorities have left worker protection agencies severely under-resourced. Staffing has not kept up with the growing workforce nor with the increasing size and complexity of businesses. At the same time, wage and hour violations, workplace discrimination, and health and safety violations persist.⁴ Indeed, new findings show that:

- In Oregon, Washington, Maine, Massachusetts, New York, and Vermont (the states profiled in this report) the number of workers per wage and hour investigator ranges from 54,900 to 188,800.⁵
- The number of workers per federal wage and hour investigator and per officer is now 175,000—well over double the ratios that existed in the late 1970s.

Meanwhile, an increasing number of corporations are forcing their employees to sign away their right to pursue justice in court if their employer violates their workplace rights. In forced arbitration, a company requires a worker or consumer to waive their right to sue in court; instead, disputes must be resolved by a private arbitrator. Surging corporate use of forced arbitration has already blocked over half of

private-sector nonunion employees from suing when they experience discrimination, harassment, or wage theft,⁶ leaving private arbitration—a secretive, biased, and expensive alternative—as their only option. The Supreme Court's 2018 decision in *Epic Systems v. Lewis*⁷ worsened this trend. The court held that employers can require employees to give up their right to sue on both an individual or collective basis—denying workers the right to band together to seek justice and allowing employers to force all disputes into individual arbitration.⁸ We anticipate a surge in corporate use of forced arbitration following *Epic Systems*. Our analysis shows that by 2024, **more than 80 percent of private sector nonunion workers will be blocked from court by forced arbitration clauses with class- and collective-action waivers.** Soon, the vast majority of workers will have signed away their right to go to court or to join with their coworkers to vindicate their workplace rights.

Faced with narrowing options to pursue justice, workers are demanding solutions to ensure that the workplace standards they have won are enforced. Congress must override *Epic Systems* and restore the fundamental rights of working people to enforce their workplace rights. The *Restoring Justice for Workers Act* would prohibit forced arbitration and class- and collective-action waivers in labor and employment disputes,⁹ and the *Forced Arbitration Repeal Act* would eliminate forced arbitration clauses in employment, consumer, and civil rights cases.¹⁰ States can also take action; in states around the country, workers are campaigning to expand enforcement capacity through bold “whistleblower enforcement” policies. These federal and state policies empower workers to sue law-breaking employers on behalf of the state and all injured workers, including those covered by arbitration clauses. Through dynamic partnerships between workers, public agencies, and community and labor organizations, whistleblower enforcement collects penalties owed by lawbreaking employers to fully fund enforcement agencies and generate a culture of compliance with workplace protections. By enacting these federal and state policies, elected leaders can directly address the current crisis in corporate accountability and ensure that hard-won workplace victories meaningfully raise the quality of life for working people.

Introduction

In recent years, working families have won important new state-level workplace protections. These include significant minimum wage increases,¹¹ paid leave,¹² and protections against unpredictable part-time work schedules.¹³ These victories help workers put food on the table, keep a roof over their heads, and care for their children and family members. However, for these policies to deliver on their promise, they must be effectively enforced. Effective enforcement of workplace standards depends on a combination of robust public enforcement (such as state and federal Departments of Labor (DOLs), attorneys general, and district attorneys), and private lawsuits brought by workers to enforce their rights. But both public and private enforcement options are increasingly out of reach for working people. With the help of the Supreme Court,

corporate interests have immunized themselves from class-action lawsuits. As a result, working people struggle to hold corporations accountable to core labor standards, including anti-discrimination and equal pay laws, health and safety protections, and wage and hour laws, such as those guaranteeing overtime and meal breaks.

Private lawsuits filed by workers and their attorneys have become an increasingly important enforcement tool as budgets for public agencies have declined. Class actions, in which one legal team represents all the workers impacted by systemic wrongdoing, are an essential component of private enforcement. Individual lawsuits are often unrealistic for low-wage and even middle-income workers because the cost of legal representation may exceed their

MAKE THE ROAD BACKS NEW YORK WHISTLEBLOWER LAW

By Deborah Axt, co-executive director,
Make the Road New York



Make the Road New York is the largest grassroots community organization in New York offering services and organizing the immigrant community. Our 23,000 members are on the front lines of the fight for workplace justice in many industries and include carwashers, warehouse workers, delivery people, and restaurant workers. Every year the MRNY legal team helps thousands of workers to recover unpaid wages, access workers compensation benefits, and address health and safety violations.

In 2010 we designed the legislation that became the New York State Wage Theft Prevention Act, the strongest law of its kind in the U.S., and our members led the campaign that led to its enactment. We also successfully advocated for a state minimum wage increase. But these achievements aren't being meaningfully enforced. The EmPIRE Worker Protection Act will empower workers to enforce their rights and increase public enforcement capacity. From our activities representing and organizing workers, we know that violations are usually systemic, affecting multiple workers. When one whistleblower steps forward, EmPIRE would allow them to seek justice for their coworkers too, generating smarter enforcement and building power for workers.

lost wages. Class and collective actions allow workers to aggregate claims, making litigation cost-effective. To understand the role of private lawsuits in our enforcement framework, consider that in 2015 and 2016 **the top 10 private wage and hour class-action settlements exceeded the combined total wages recovered by all state and federal agencies.**¹⁴

As private lawsuits have become more important in enforcing workplace rights, corporations have devised practices to block workers from pursuing justice in court. Chief among these practices is “forced arbitration,” in which legal fine print in employment contracts prohibits workers from going to court when their employer violates their workplace rights. After successfully starving budgets for public enforcement agencies,¹⁵ corporate

By 2024, more than 80 percent of private-sector, nonunion workers will be blocked from court by forced arbitration clauses with class- and collective-action waivers.

WHY WORKERS CAN'T WIN IN FORCED ARBITRATION

Corporations set the rules in arbitration and use those rules to stack the deck. Arbitration clauses may bar collective litigation, impose costly fees on workers, shorten periods for initiating a claim, limit workers' ability to collect evidence to prove their case, and prevent arbitrators from awarding the level of relief that would be available in court. In addition, employers select the arbitrator pool. Because employers are “repeat players” (who will be hiring arbitrators in the future, unlike their employees) arbitrators have a big incentive to find in their favor. As a result, businesses win in arbitration the overwhelming majority of the time—even more often than they do in federal court.¹⁶ Moreover, when workers do prevail in arbitration, they are awarded far less money than they would receive in the courts.¹⁷ This makes individual arbitration completely different from the bilateral—and *voluntary*—arbitration used in unionized workplaces to resolve disputes arising under collective bargaining agreements.¹⁸

While employer associations frame forced arbitration as “a faster and cheaper alternative to the traditional court system” that benefits all parties,¹⁹ the real purpose of forced arbitration is much simpler: to suppress legal claims and avoid accountability. With the deck stacked against them and odds of winning so low, **an estimated 98 percent of workers who would otherwise bring employment claims in court abandon their effort when the only option is arbitration.**²⁰

Low-wage employers like Chipotle have demonstrated that they never intended arbitration to be a viable alternative to class-action litigation. After being sued for systemic wage theft, Chipotle forced workers to sign arbitration clauses to prevent them from joining the suit. Then when individual workers filed for arbitration, Chipotle blocked the arbitrations from proceeding by refusing to pay its share of the fees.²¹

interests gained another victory one year ago, when the Supreme Court ruled in *Epic Systems v. Lewis* that corporations can use forced arbitration to eliminate the most basic mechanism used by workers to hold employers accountable: the class-action lawsuit.²² Not only can corporations slam the courthouse doors on workers, instead sending disputes to binding private arbitration, they can also prohibit workers from resolving their disputes collectively, even in arbitration. The Supreme Court recently doubled down on this anti-worker interpretation in *Varela v. Lamps Plus*, ruling that workers are assumed to have “consented” to individualized arbitration even if their employment contract does not clearly waive collective action.²³

A study published by the Economic Policy Institute (EPI) in 2017 and updated in 2018 estimated that forced arbitration clauses already bar 56.2 percent of nonunion private-sector workers from seeking justice in court. Forced arbitration is imposed in nearly two-thirds of low-wage workplaces.²⁴ Based on the dramatic increase in forced arbitration in recent years and the free rein granted to corporations by the *Epic Systems* decision, we project that **within five years over 80 percent of nonunion private-sector workers will be unable to sue their employers.** (See Methodological Appendix.)

The corporate assault on workers’ right to sue puts an even greater enforcement burden on public agencies. Yet at the precise moment that workers most need effective public enforcement, budgets have atrophied, resulting in a severe lack of capacity. Federal resources for the enforcement of worker protections have declined over the last several decades. At the same time, the U.S. workforce and the number of U.S. business establishments have grown.²⁵ This means that *fewer* investigators are responsible for enforcing the rights of *more* workers, across *more* workplaces.

Our collective inability to deter violations has profound negative consequences for working people. In the 10 most populous states alone, 2.4 million low-wage workers lose \$8 billion annually to minimum wage violations²⁶—one of many common types of worker abuses.

Faced with narrowing options to pursue justice, workers are demanding innovative new solutions to ensure that the workplace standards they have won are enforced.

Background: A crisis point in enforcement

Historically, workplace standards have been enforced through a combination of public and private mechanisms.²⁷ Federal and state departments of labor, attorneys general, and district attorneys enforce workplace standards and help workers to recover penalties and wages owed when employers break the law. Many core state²⁸ and federal²⁹ workplace protections also include a private right of action, empowering workers affected by violations to bring private lawsuits against corporate wrongdoers, either individually or through collective action. Today, however, as public agencies have grown severely under-resourced and private litigation has become increasingly out of reach for workers due to expansive corporate abuse of forced arbitration, workers rights are threatened by emboldened corporate wrongdoers.

Public agencies: Under-resourced and under capacity

Federal and state resources for the enforcement of worker protections have declined over the last several decades while the workforce and the number of business establishments have grown. Fewer investigators are responsible for enforcement of labor protections across a growing number of workplaces and for a growing number of workers. Scant

resources are being stretched much more thinly, which means worker protections are falling through the cracks.

An examination of enforcement data in many of the states with high shares of workers subject to forced arbitration shows a lack of resources for public enforcement of workplace protections.³⁰

State wage and hour investigators are stretched too thin

Number of workers and businesses per investigator

| State | Number of investigators | Number of workers in state | Number of businesses in state | Number of workers per investigator | Number of businesses per investigator |
|---------------|-------------------------|----------------------------|-------------------------------|------------------------------------|---------------------------------------|
| Maine | 4 | 616,707 | 53,437 | 154,177 | 13,359 |
| Massachusetts | 19 | 3,587,286 | 256,911 | 188,805 | 13,522 |
| New York | 145 | 9,459,334 | 643,954 | 65,237 | 4,441 |
| Oregon | 35 | 1,922,239 | 154,268 | 54,921 | 4,408 |
| Vermont | 3 | 312,073 | 25,615 | 104,024 | 8,538 |
| Washington | 55 | 3,372,153 | 246,264 | 61,312 | 4,478 |

Note: Number of investigators indicates number of state department of labor staff who primarily investigate wage and hour violations.
Source: EPI survey of state labor departments; employment and establishment data are from the Bureau of Labor Statistics, Quarterly Census of Employment and Wages (QCEW), using averages from Q4 of 2017 and Q1–Q3 of 2018 to calculate FY 2018 data.

SPOTLIGHT: LABOR ENFORCEMENT AGENCY STAFFS SHRINK WHILE WORKFORCES GROW IN MAINE, OREGON, AND MASSACHUSETTS

Research by the National Employment Law Project (NELP) shows that in Maine and Oregon, rapid growth of the state's workforce requires a substantial increase in enforcement capacity. Instead, the departments responsible for labor enforcement have seen decreased staffing over the last several years.



MAINE

From 1977 to 2017, the number of full-time state DOL employees decreased from 702 to 552, meaning total agency staffing **decreased by 21 percent**.³¹ Similarly, the state DOL's budget **decreased by 59 percent** from 1977 to 2017 (when adjusting for inflation).³²

At the same time, Maine's workforce continued to grow, **increasing by 61 percent** between 1977 and 2017 (growing from 387,800 to 622,700 nonfarm workers).³³ If Maine's DOL had merely kept up with the state's growing workforce, it would have 1,130 full-time employees today—and that would not accommodate the increased need due to the corporate assault on private enforcement. Instead, Maine's DOL staffing level is at less than half (49 percent) of what would have been needed just to keep up with the state's growing workforce since 1977.



OREGON

From 1995 to 2019, the total number of full-time employees of the state's Bureau of Labor and Industries (BOLI) **decreased by 34 percent** (from 159 to 105).³⁴

At the same time, Oregon's workforce continued to grow, **increasing by 33 percent** from 1995 to 2019 (from 1,456,500 to 1,933,700 nonfarm workers).³⁵ If Oregon's BOLI had kept up with the state's growing workforce, it would have 211 full-time employees today. Instead, Oregon's BOLI staffing level is at 50 percent of what would have been needed just to keep up with the state's growing workforce since 1995.



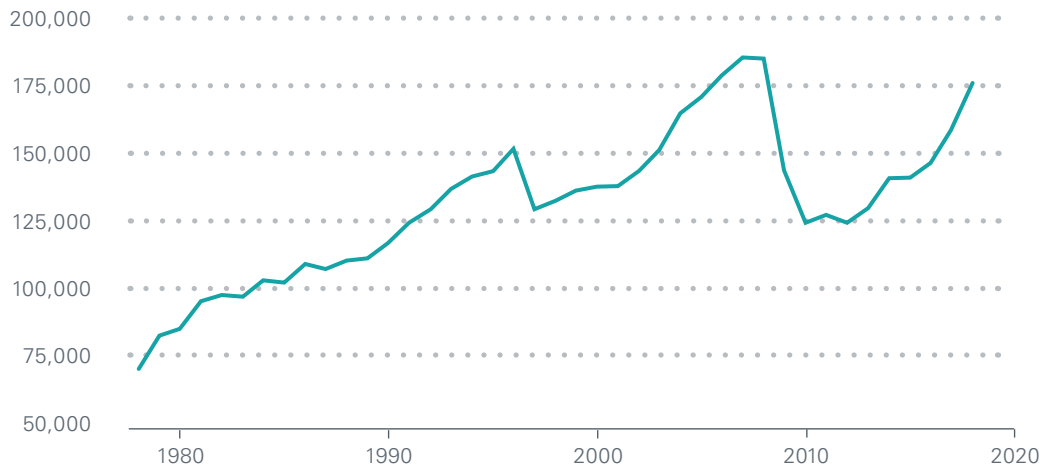
MASSACHUSETTS

Research from the Massachusetts Budget and Policy Center (MassBudget) shows that state funding for the Massachusetts Attorney General's Fair Labor Division (FLD) per nonfarm Massachusetts job **decreased by 24.5 percent** between 2001 and 2019 (adjusting for inflation).³⁶ Although policymakers have proposed to increase the FLD's budget in 2020, under each version of the proposed budget the funding per worker would still be lower than in 2001, when adjusting for inflation.³⁷

Federal resources for the enforcement of worker protections have also declined while the U.S. workforce has grown. The figure below shows the number of workers per federal wage and hour investigator each year from 1978 to 2018. In 1978, there were just over 69,000 workers for every wage and hour investigator, but that figure more than doubled to 175,000 by 2018.

Federal wage and hour (WHD) investigators are now responsible for far more workers than their counterparts were 40 years ago

Employment per WHD investigator, 1978–2018

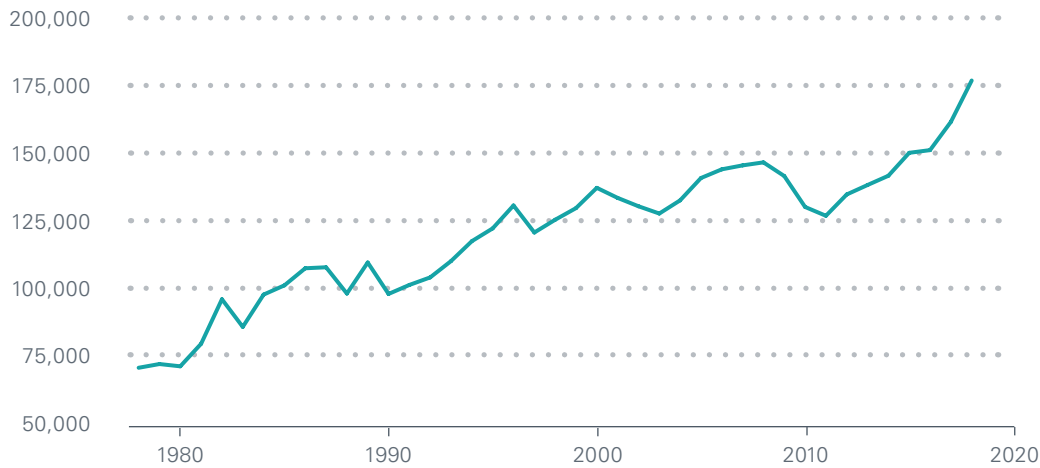


Source: EPI calculations from the Wage and Hour Division of the U.S. Department of Labor’s data on investigators on board from 1978–2017 and Quarterly Census of Employment and Wages (QCEW) data on the total number of employees covered by unemployment insurance programs in the U.S. from 1978–2017. At the time of writing, full-year 2018 data were not available, so the 2018 number of covered workers is imputed as the 2017 QCEW value multiplied by the ratio of the 2018 annual average of all employees in the Current Employment Statistics (CES) survey to the 2017 CES annual average.

The following figure similarly shows the number of workers per federal Occupational Safety and Health Administration (OSHA) compliance officer each year from 1978 to 2018. It shows that in 1978, there were just over 60,000 workers for every OSHA compliance officer, but that number almost tripled to nearly 180,000 by 2018.

Occupational Safety and Health Administration (OSHA) compliance officers are now responsible for far more workers than 40 years ago

Employment per OSHA compliance officer, 1978–2018



Source: EPI calculations from AFL-CIO’s “Death on the Job: The Toll of Neglect, 2019” data on OSHA compliance officers from 1978–2018 and Quarterly Census of Employment and Wages (QCEW) data on the total number of employees covered by unemployment insurance programs in the U.S. from 1978–2017. At the time of writing, full-year 2018 data were not available, so the 2018 number of covered workers is imputed as the 2017 QCEW value multiplied by the ratio of the 2018 annual average of all employees in the Current Employment Statistics (CES) survey to the 2017 CES annual average.

Indeed, in just the last seven years, the total budget for key enforcement agencies in U.S. DOL—the Wage and Hour Division, the Occupational Safety and Health Division, the Mine Safety and Health Division, and the Office of the Solicitor—*declined* slightly (from \$1,294.3 million in 2012 to \$1,284.7 million in 2019)³⁸ even though the number of workers increased by around 13 percent over that period.

As federal enforcement budgets have shrunk, wage theft continues to harm a significant percentage of the low-wage workforce. Recent data show that although workers have won important victories to raise the minimum wage in cities and states across the country,³⁹ rampant minimum wage violations threaten to undermine these gains and harm the millions of workers still laboring for low wages.⁴⁰ In the 10 most populous states alone, 2.4 million workers lose \$8 billion annually to minimum wage violations.⁴¹ Employers steal from nearly *one in five* low-wage workers by paying them less than the required minimum wage; these workers are more likely to be women, people of color, and immigrants.⁴² The magnitude of minimum wage violations alone, just one form of wage theft among many, under-

scores the current inability of our under-resourced public enforcement agencies to successfully deter and punish wage theft.

Anti-discrimination and health and safety laws also remain woefully underenforced. Less than one percent of employees who believed they experienced discrimination filed a charge with the federal Equal Employment Opportunity Commission (EEOC): of those charges only 15 percent led to filing a lawsuit and only 6 percent of lawsuits filed made it to trial.⁴³ Due to insufficient resources and restrictions from Congress, OSHA routinely reduces the fines it imposes in informal settlement agreements for a number of violations, including violations involving the death of a worker,⁴⁴ and OSHA rarely imposes criminal penalties.⁴⁵ These reduced consequences threaten to undermine the deterrent value of penalties and has left workers across the country more vulnerable to health and safety abuses.⁴⁶ Based on fiscal year 2015 staffing levels, it would take federal and state OSHAs 114 years to inspect all eight million workplaces within OSHA's jurisdiction.⁴⁷

Carlos Jiménez's story



In 2013, Carlos Jiménez experienced wage theft while performing construction work for a local business in Queens, New York. After unsuccessfully confronting his employer, he filed a complaint with the New York Department of Labor (DOL). The agency investigated his case when he resubmitted his claim with the help of Make the Road New York (MRNY). Over a year later, in July 2015, the DOL determined Carlos was owed over \$10,000, but Carlos' employer refused to pay. Over the next three years, the DOL issued warnings and then a "final determination to comply." Five years after filing his initial claim, Carlos is still waiting for the wages he is owed.

Carlos's story illustrates why agencies need sufficient staff to resolve investigations quickly and, if necessary, use additional legal tools to collect back wages and penalties from employers that fraudulently transfer and hide assets to avoid repaying stolen wages.⁴⁸

Source: Make the Road New York

Only a tiny fraction of discrimination claims make it to trial

Visual representation of the percentage of discrimination cases that result in lawsuits



Amy’s story*

Amy worked as a nail technician at a salon in suburban Seattle, Washington, where she observed a range of wage theft and health and safety violations, as well as potential sexual harassment. Amy is an immigrant from Vietnam, legally authorized to work in the U.S. Most of her coworkers were also immigrants from Vietnam; many were not authorized to work. Amy worked 10 to 11 hours per day, seven days a week and was only paid \$90 per day—below the minimum wage. Amy was never paid overtime despite working more than 40 hours each week. Many of her coworkers, who were more easily exploited due to their immigration status, were paid no wages and only received tips. None of the workers received rest breaks and their workplace had inadequate ventilation. Amy also witnessed her manager inappropriately touching her coworkers.

Amy approached Seattle’s Fair Work Center (FWC) because she wanted to bring a suit on behalf of herself and her coworkers, who feared losing their visas if they spoke up. Amy is considering filing an individual lawsuit, but since she did not personally suffer the worst abuses in her workplace, her suit has little hope of driving systemic change in her workplace or in the salon industry more broadly. The Worker Protection Act, Washington’s whistleblower enforcement bill, would allow workers like Amy to seek penalties for all the violations against herself and her coworkers, including ones the she did not experience directly.

*This name has been changed to protect the worker’s identity.

Source: Fair Work Center

Private enforcement: The forced arbitration epidemic

Forced arbitration clauses rob workers of their right to take their employer to court for all types of employment-related claims, including under laws prohibiting employment discrimination and sexual harassment, protecting employees with disabilities, allowing workers to take maternity and medical leaves, and guaranteeing minimum wages and overtime. Whether the employment right is protected by Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, or comparable state laws, if the worker has signed an arbitration clause, that worker loses access to the courts. If a worker tries to sue, the court will generally rule that the Federal Arbitration Act compels the worker to submit the dispute through the arbitration procedure designated in the contract.

In the workplace, forced arbitration clauses are often buried in the fine print of job applications or deep in new-hire paperwork. Typically, workers are required to sign away their right to sue as a condition of employment. Some arbitration clauses provide a narrow window for employees to opt out—but employees often don't realize what they are signing or how it might affect them.

A study published by EPI using data collected in 2017 found that more than half (56.2 percent) of private-sector nonunion employees were subject to forced arbitration procedures.⁴⁹ Given the size of the U.S. workforce, this means that 60.1 million workers no longer have access to the courts to protect their employment rights.⁵⁰

Large corporations are more likely than small businesses to force their employees into arbitration. Forced arbitration is more common in low-wage workplaces; an estimated 64.5 percent of low-wage employers bar their workers from suing.⁵¹ Forced arbitration is also more common in industries that disproportionately employ women workers and Black workers.⁵²

Mike Swisher's story

Mike Swisher worked at an Applebee's in Bend, Oregon, to pay his bills while attending college. Mike experienced and witnessed illegal pay practices while working there. His managers regularly forced him and his



coworkers to work off the clock and falsified the total number of hours that they worked.

Although Mike feared that his hours would be cut if he spoke up, he confronted management. Unfortunately, nothing changed. Mike contacted Oregon's Bureau of Labor and Industries (BOLI). BOLI told Mike that he would have to calculate the wages he was owed in order to file a claim. Mike didn't know exactly how many hours he had worked off the clock, and was disappointed to hear that BOLI would not investigate wages stolen from his coworkers unless they each filed a separate claim. Mike approached the Northwest Workers' Justice Project (NWJP) for free legal assistance. That's when he discovered that he had signed an arbitration clause that contained a ban on class actions. He did not understand the arbitration clause when he signed it and believed it was part of the paperwork required for the job. NWJP told Mike that the class-action ban made it impossible to seek justice for himself and for his coworkers who were injured by Applebee's practices. Mike has not been able to recover any of the wages which he is owed, and Applebee's has not yet been held accountable for systemic wage theft. Mike is now advocating to pass a whistleblower enforcement policy in Oregon.

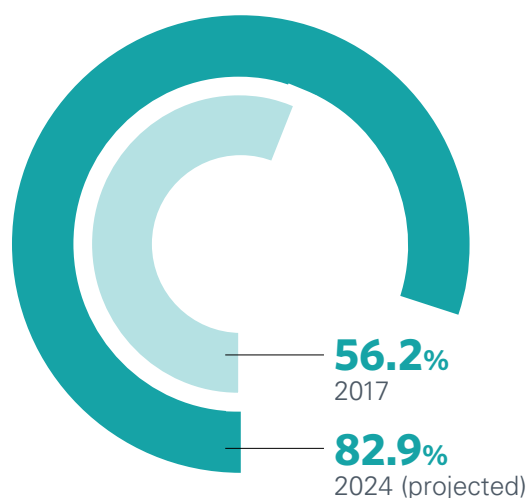
Source: Northwest Workers' Justice Project

That was the landscape *before* the Supreme Court handed employers a decisive victory in the 2018 decision [Epic Systems v. Lewis](#). The court, by a 5–4 majority, ruled that employers may ban workers from participating in any class or collective lawsuit in court and also can prevent workers from joining their claims together in arbitration.⁵³ Because litigation is often cost-effective only when many workers bring claims together, this decision ensures that forced arbitration will block workers’ access to justice unless policymakers act.⁵⁴

Corporations substantially expanded their use of forced arbitration in the five years following the Supreme Court’s previous landmark forced arbitration case, *AT&T Mobility LLC v. Concepcion*,⁵⁵ suggesting that *Epic Systems* would trigger a further increase in the use of class-action waivers and greater numbers of employers overall adopting forced arbitration.⁵⁶ **We project that by 2024—five years from now—more than 80 percent of private-sector nonunion workers will have signed away their right to go to court or join with their coworkers to vindicate their workplace rights.** (See Methodological Appendix.) Very soon, only a tiny minority of workers will be able to sue their employers.

The number of workers who have lost their right to fight in court is growing every year.

Percentage of private-sector nonunion workers signing forced arbitration clauses



Claudio Brandao’s story

Claudio, an immigrant from Cape Verde living in Roxbury, Massachusetts, worked as a cleaner for Jan-Pro Franchising International, a commercial cleaning company. Jan-Pro uses a deceptive “franchise” model to sell cleaning jobs to workers, whom Jan-Pro



calls “independent contractors.” Based on Jan-Pro’s assertions, Claudio was led to believe that buying a janitorial “franchise” would let him operate his own cleaning business and become a successful, independent businessman. He scraped together thousands of dollars to pay Jan-Pro’s initial franchise fees. Instead, Claudio found himself simply working as a low-paid janitor, with his job assignments, hours, and locations of work all tightly controlled by Jan-Pro. Claudio wore a Jan-Pro uniform and was required to follow Jan-Pro’s detailed rules.

In similar scenarios, courts in Massachusetts have found the janitorial franchise model to be illegal, finding that janitorial “franchisees” like Claudio are, by law, employees and not independent contractors. As employees, Claudio and others are entitled to receive the minimum wage and overtime pay, and could not be charged thousands of dollars to work in low-paid cleaning jobs. Claudio is now the named plaintiff in a class-action lawsuit, trying to obtain justice for himself and hundreds of others similarly exploited. However, as part of his lengthy “franchise agreement,” Claudio had unknowingly signed an arbitration clause. Claudio’s case against Jan-Pro has been tied up for years in litigation and arbitration, which has included a dispute about whether he can be forced to pay exorbitant arbitration fees.

Source: Shannon Liss-Riordan, Lichten & Liss-Riordan, P.C.

The impact:

A green light for exploitative employers

Corporations are driven to maximize profits. Companies have an economic incentive to invest in compliance only when the expected penalty—adjusted for the likelihood of being caught and punished—exceeds the profits to be gained from cutting corners and cheating workers.⁵⁷ Today, corporations have little reason to fear any penalty for violating workers' rights. In *Epic Systems*, the Supreme Court allowed corporations to design a legal regime in which workers cannot directly hold them accountable. This anti-worker decision leaves public agencies functionally responsible for all enforcement. Given that public agencies are under-resourced and lack the capacity to investigate and enforce all workplace protections, corporations are likely to play fast and loose with the rules, confident that violations will not be caught.

To create a culture of compliance with workplace protections, policymakers must rewrite enforcement rules to ensure that corporations expect to be held accountable for violations. Congress should correct the Supreme Court's grievous error in *Epic Systems* by restoring workers' access to courts and to collective legal action. Meanwhile, states are not waiting for Congress to act. Instead, they are advancing policies to increase public enforcement capacity by enlisting whistleblowing workers and advocates in rooting out violations.

Bob Curtis's story

Bob Curtis worked as a driver for 3rd Party Logistics (3PL), delivering medications to nursing facilities in rural Maine. He and a coworker filed a class-action suit against 3PL for misclassifying the drivers as independent contractors in order to deny the workers overtime pay and compensate them less than minimum wage. But 3PL had required the drivers to sign forced arbitration clauses that restricted such claims to individual arbitration.

Bob and his coworkers also sued a second company, Contractor Management Services (CMS). Under an agreement with 3PL, CMS was charging the workers \$30 per week to process their paychecks and \$5.50 a week for insurance. Bob and the drivers claimed that CMS was a joint employer with 3PL. But CMS has also imposed an arbitration clause on Bob and his coworkers. Although the drivers worked in Maine, the CMS arbitration clause required them to arbitrate their claims individually in Phoenix, Arizona.

At first, the federal district court refused to enforce the arbitration provisions, finding that they violated the drivers' rights to engage in concerted activity under the National Labor Relations Act. After the Supreme Court issued its *Epic Systems* decision, however, the court was forced to vacate its decision and compelled arbitration.

Because of the high cost of individual arbitration and challenges of arbitrating separately against allegedly joint employers, the law firm representing Bob and the drivers could not afford to continue with the suit. As a result, Bob and his fellow drivers have been left without a remedy—they have not received their unpaid wages and the issue of misclassification goes unresolved.

Source: Jeffrey Neil Young, attorney representing Bob Curtis

Fighting forced arbitration at the federal level

Congress must overturn the Supreme Court's *Epic Systems* decision and ensure that workers can resolve workplace disputes in court, collectively if necessary. In 2007, the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Company*, severely restricting the time period for workers to enforce their right to a workplace free of discrimination. Justice Ginsburg stated in her dissent that "the ball is in Congress' court." Congress responded in 2009 by passing the *Lily Ledbetter Fair Pay Act*, overturning the Supreme Court's decision and ensuring that workers have a reasonable time in which to enforce their rights.

Ten years later, Congress must act again to restore workers' rights that were eviscerated by a Supreme Court dominated by corporate interests. The *Restoring Justice for Workers Act*, introduced by Sen. Patty Murray (D-Wash.), Rep. Jerrold Nadler (D-N.Y.) and Rep. Bobby Scott (D-N.Y.), would overturn *Epic Systems* and ban forced arbitration and class- and collective-action waivers in labor and em-

ployment disputes.⁵⁸ In addition, the *Forced Arbitration Injustice Repeal Act*, introduced by Sen. Richard Blumenthal (D-Conn.) and Rep. Hank Johnson (D-Ga.), would eliminate forced arbitration clauses in employment, consumer, and civil rights cases.⁵⁹

Recently, several tech companies have announced that they will no longer use forced arbitration clauses.⁶⁰ Most, however, ceded the use of forced arbitration only for *individual* claims of sexual harassment and, in some cases, discrimination. Related claims, such as retaliation and wage theft, would still have to be arbitrated.⁶¹ For many women, particularly in low-wage jobs, challenging workplace sexual harassment and assault remains largely impossible unless companies allow class and collective actions. Moreover, these announcements are not binding on the company, so they could reverse course once media attention has faded. Federal legislation is therefore required to protect workers from forced arbitration.

GOOGLE WORKERS CALL FOR A CHANGE

By Tanuja Gupta and Vicki Tardif, Googlers for Ending Forced Arbitration



In November 2018, 20,000 Google employees across the globe walked out in protest over our company's policies around equity and transparency in the workplace. In response, a handful of tech companies attempted to separate harassment from discrimination by making arbitration optional for only individual cases of sexual harassment and assault. The change yielded a win in the headlines, but provided no meaningful gains for worker equity.



Google eventually capitulated,⁶² but it has yet to lead. Google has not demanded the suppliers of its temporary workforce change their terms. We estimate 52 percent of our Google workforce remains bound by some form of forced arbitration by the suppliers of these workers.

We can wait for a company-by-company change or we can fix this at the level of the law. We're not stopping until the 60 million plus workers affected by forced arbitration across the U.S. have the same rights as we do.

Reimagining State Enforcement: The whistleblower enforcement model

Federal law prevents states from banning or even regulating forced arbitration.⁶³ The preemptive power of the Federal Arbitration Act is so strong that courts have even overturned state laws requiring that arbitration clauses be emphasized so that people realize what they're signing.⁶⁴

Only the federal government can prohibit or limit forced arbitration. States can, however, take action to address the untenable burden forced arbitration imposes on their enforcement agencies. Dramatically underfunded state DOLs now face additional burdens as the only force standing between exploitative employers and the majority of working people. Unwilling to allow workplace protections to be hollowed out by fine-print clauses in employment contracts, workers and advocates are campaigning for a creative policy solution known as “whistleblower enforcement.” This innovative policy expands public enforcement capacity by reimagining the way workers, community organizations, and public agencies can work together to hold corporate wrongdoers accountable, while generating revenue to fund enforcement.

Bills introduced in six states⁶⁵ in 2019 would authorize workers to initiate enforcement actions on behalf of a public agency for violations of labor law. This is how the process would typically work:

- First, a worker files a complaint with the state enforcement agency.
- The agency can investigate the claims before a suit is filed in court and can decide to resolve the claim through administrative mechanisms.
- If the agency opts to not resolve the claim or does not respond to the complaint, the whistleblower may bring a lawsuit to collect penalties on behalf of the states and all affected workers. Whistleblowers who fear retaliation can authorize a union or nonprofit organization to represent them.
- If a judge finds that the company broke the law and imposes a penalty, most of the penalty revenues go to the agency, with a portion going to the whistleblowers and the other workers injured by the violations.

The whistleblower enforcement process: How it works



These policies encourage whistleblowers—those with inside knowledge of corporate wrongdoing—to bring evidence of illegality to light and hold companies accountable. Modern whistleblower enforcement policy is grounded in the following four core principles:

1. Whistleblowers play a key role in cost-effective enforcement.

The whistleblower enforcement approach is based on *qui tam*, from a Latin phrase that translates to “he who sues in this matter for the king as well as for himself.” *Qui tam* actions have been used since the Roman Empire to enforce a variety of legal protections. Since 1863, the U.S. has enlisted whistleblowers in rooting out fraud against the government by allowing them to sue in the government’s name to enforce the federal False Claims Acts (FCA).⁶⁶ The policy has bipartisan appeal: in 1986, Sen. Chuck Grassley (R-Iowa) sponsored an amendment to the FCA, signed by President Ronald Reagan, to expand whistleblowers’ role in FCA enforcement.⁶⁷ Whistleblower FCA suits bring in significant revenue for the government, with a portion reserved for the whistleblower as an incentive. In 2017 alone, the [U.S. Department of Justice collected](#) \$3.7 billion in [FCA cases](#) from perpetrators of fraud, of which 92 percent came from cases brought by whistleblowers.⁶⁸ Many states also include *qui tam* enforcement in their FCAs.⁶⁹

Since 2004, California has used the *qui tam* model to enforce workplace rights through its Private Attorneys General Act (PAGA).⁷⁰ Today’s whistleblower bills build on PAGA’s success and have been shaped by its implemen-

tation. Under this legislation, workers are able to litigate a suit with support from worker organizations and private counsel, subject to state oversight. The state can resolve the case through agency action before any case is filed in court; monitor litigation and intervene in the lawsuit; advise the court on proposed settlements; and disqualify whistleblower attorneys who have mishandled past actions. Prelitigation review of whistleblower enforcement notices allow state agencies to identify cases that are appropriate for administrative resolution or advance the agency’s strategic enforcement priorities. For example, the California DOL recently recovered \$1 million on behalf of 239 restaurant workers who suffered wage and hour violations after the case came to the agency’s attention via a PAGA notice.⁷¹

Qui tam’s enduring effectiveness is due to its unique capacity to harness the knowledge, effort, and courage of private actors to serve the state’s interest—and their own. Whistleblower enforcement has proven highly efficient; empirical analysis of over 4,000 *qui tam* suits shows that *qui tam* attorneys are better at screening meritorious cases and that their expertise minimizes enforcement costs.⁷²

WHISTLEBLOWERS HELP HOLD CORPORATIONS ACCOUNTABLE

By Myriam Gilles, professor of law at Cardozo School of Law



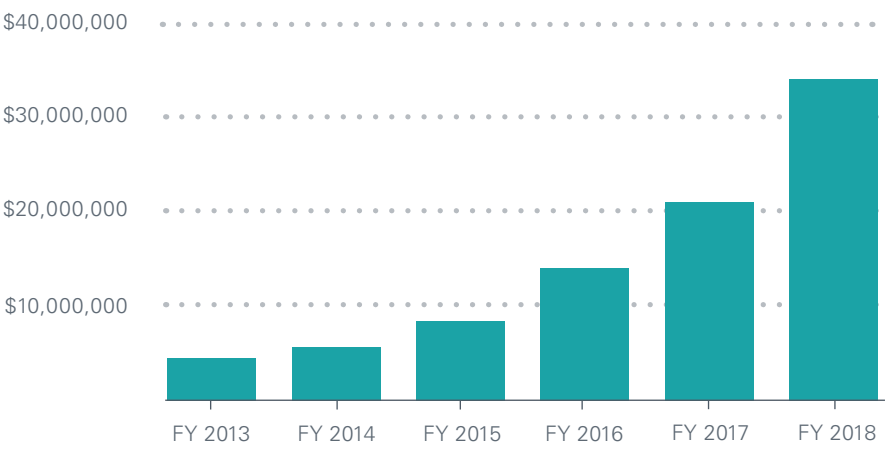
Forced arbitration provisions drastically curtail the ability of working people to hold corporate wrongdoers accountable. To make matters worse, the Supreme Court’s interpretation of federal law preempts states from banning or even regulating arbitration. However, public agencies are not affected by arbitration clauses. Courts have ruled that actions brought by whistleblowers on behalf of the state and all affected workers can proceed, even if the whistleblower is bound by an arbitration clause with a class-action waiver.

2. Corporate wrongdoers should fund enforcement capacity.

Allocating sufficient resources for labor rights enforcement through the traditional budgeting process is important. But the whistleblower enforcement model expands public enforcement capacity by levying penalties on companies that profit from illegally exploiting workers—money that is currently left in lawbreakers’ coffers by agencies too underfunded to collect it. The California DOL’s revenue from PAGA litigation has increased steadily over time, more than doubling in the last three years, with over \$34 million in fiscal year 2018. Requiring lawbreaking employers to pay significant fines is also essential to deterring future violations.

PAGA revenue has funded a wide variety of enforcement programs, including the creation of 13 staff positions devoted to cracking down on companies that fraudulently misclassify employees as independent contractors to avoid minimum wage, unemployment insurance, and other basic obligations to workers; a comprehensive bilingual media campaign about workers’ rights under California’s Heat Illness Prevention regulations; and a program to disqualify employers that violate state prevailing wage laws from bidding on public contracts.⁷³

California:
state share
of PAGA
penalties⁷⁴



Source: Data is provided by Mark Janatpour, Deputy Labor Commissioner, California, by email of February 20, 2019, to Michael Rubin, Altshuler Berzon, in response to Public Records Act request. Available upon request.

SPOTLIGHT: IN CALIFORNIA, PAGA CREATES A CULTURE OF COMPLIANCE

As noted earlier, California’s Private Attorneys General Act (PAGA) allows employees who have been harmed by unlawful labor practices to initiate public enforcement actions on behalf of the state. PAGA arose in 2004 as a solution to California’s anemic response to widespread worker exploitation and the urgent need to expand enforcement capacity. By authorizing workers to bring lawsuits on behalf of the state, PAGA responded to the severe understaffing of enforcement agencies tasked with enforcing the California Labor Code.

According to attorneys who practice in this field, PAGA has had a dramatic impact on compliance with workplace protections,⁷⁵ despite the fact that approximately 67 percent of the state’s employees labor under forced arbitration clauses, a higher share than the national average.⁷⁶ Over the past five years, while PAGA revenue has increased, California’s job growth has been stronger than the national average.⁷⁷ Better enforcement also ensures that low-wage workers who are at risk for wage theft and other forms of labor violations are able to spend more of their income in their communities, giving a boost to the local economy.⁷⁸

3. Representative actions address systemic violations.

When a worker experiences wage theft or unsafe conditions, it is often due to a widespread practice, such as requiring workers to continue working after clocking out, failing to provide safety equipment, or using promotional practices that disadvantage women. However, following *Epic Systems* and *Lamps Plus*, we expect all forced arbitration clauses to prevent workers from banding together to address systemic violations. Resource constraints limit many agencies to seeking redress for individual workers

who file a complaint (rather than conducting “wall-to-wall” investigations), even if the worker informs the agency that wrongdoing was widespread.

The whistleblower enforcement model allows a worker to file a representative action on behalf of all the company’s workers, just as the agency is authorized to do. Because the lawsuits seek penalties rather than back pay, class certification is not necessary in order to seek justice for all.

ENFORCEMENT IS CRITICAL TO IMPROVING WORKERS’ WAGES AND WORKING CONDITIONS

By Rachel Lauter, executive director of Working Washington and Fair Work Center in Washington



Working Washington is building a powerful workers’ movement to dramatically improve wages and working conditions and change the conversation about wealth, inequality, and the value of work. We are currently driving campaigns to raise the overtime threshold so that workers who labor for long hours are fairly compensated; to win scheduling protections for hourly workers in retail and food service; and to force gig economy companies like Instacart to create a minimum pay for its workers, provide greater transparency in how its workers are being paid, and ensure that tips are included on top of workers’ pay.

Fair Work Center (FWC) is a hub for workers to understand and exercise their legal rights, improve working conditions, and connect with community resources. FWC conducts know-your-rights workshops, provides free legal services to address workplace violations, and assists workers in pursuing claims through city, state, and federal enforcement agencies. Working Washington and Fair Work Center have now aligned to become a new voice for workers in Washington.

Washington state has some of the strongest worker protections in the country. But our laws are only as strong as our ability to enforce them. The state’s Department of Labor and Industries (L&I) is not sufficiently resourced to monitor all workplaces and deter violations across the state.

At the same time, workers like Mia, who is pushing Instacart to let her keep the tips she’s earned, or April, who works at Olive Garden and is urging lawmakers to enact a fair workweek law so she can rely on stable work hours, are covered by forced arbitration clauses. Even if we win new standards to improve their industries, these workers will face major barriers to enforcing their rights. In addition, strong enforcement ensures our recent wins on minimum wage, paid family leave, and paid sick leave become a reality for workers.

Fortunately, the Worker Protection Act would allow workers like Mia and April to partner with L&I to expand enforcement capacity. As a representative organization, Fair Work Center would be able to bring public enforcement actions on behalf of vulnerable workers to address workplace-wide violations. Our constant engagement with low-wage workers through community outreach, education, and organizing affords us a unique perspective that allows us to co-enforce Seattle’s workplace standards as a community outreach partner to government agencies. We know the value of this model and believe it should be expanded statewide.

4. Strategic partnerships between community groups and public agencies leverage the strengths of worker organizations to curtail worker exploitation.

Revenue generated by whistleblower enforcement can support formalized partnerships between public enforcement agencies and community-based organizations. Worker centers, unions, and organizations rooted in vulnerable communities can engage low-wage workers, those working in the informal or fissured economy, and workers confronted with the legacy of systemic racism.⁷⁹ Organizations connected to immigrant or ethnic communities have linguistic competency, understand cultural barriers that impede workers from contacting enforcement agencies, and can address fears that discourage undocumented workers from reporting violations.⁸⁰

These organizations provide a valuable conduit between enforcement agencies and workers who are among the most vulnerable to exploitation, but who, without focused

outreach and support, may be the least likely to file formal complaints. Studies show that workers are often uninformed of new workplace rights;⁸¹ because most enforcement systems are complaint-driven, outreach to ensure that workers are aware of their workplace rights and how to report violations is critical. Workers themselves are the most effective messengers for educating their peers.⁸²

Through formal partnerships with enforcement agencies in several cities, these organizations spread awareness of workplace rights; help workers detect and report violations; and identify patterns in high-violation industries.⁸³ State whistleblower enforcement bills expand on this promising model by designating a portion of the agency's revenue from whistleblower enforcement to contract with trusted community organizations to assist workers to enforce their rights.

WHISTLEBLOWER LAW WILL HELP LATINX WORKERS

Reyna Lopez, executive director of Pinos y Campesinos Unidos del Noroeste (PCUN) in Oregon



PCUN has always played a role in helping farmworkers enforce their rights. We've organized workers for 40 years and our base of membership has expanded to Latinx workers in other industries, from cannery workers to chain store workers. We know that working environments can become exploitative when employers are left to their own devices and without systems in place for workers to stand up for themselves.

In addition to rampant wage theft, farmworkers routinely experience unsafe working conditions, from sexual assault in the fields to exposure to harmful pesticides. Many farmworkers are reluctant to pursue claims due to intimidation and fear of retaliation and harassment. In recent years, the increasingly hostile policies and rhetoric targeting immigrant communities has deepened this fear, preventing workers from filing formal complaints about employer misconduct. Historically, PCUN has provided crucial support to farmworker communities faced with immigration-related threats and language and cultural discrimination.

Second-generation Latinx workers often work in fast food, chain restaurants, and retail outlets, and also experience workplace violations. But most have signed away their constitutional right to sue their employers, because some of the largest corporations in the country require employees to sign forced arbitration clauses.

Organizations like PCUN end up being the first responders when abuse happens in the workplace. We need the ability to enforce Oregon's workplace protections by passing the Oregon Corporate Accountability Act (OCAA) which is modeled after California's PAGA and other *qui tam* legislation. PCUN interfaces with workers constantly, so we are effective in our worker advocacy and we have the skills to deal with worker's rights issues in a culturally responsive way. OCAA will strengthen and expand the work we do every day on behalf of Oregon's most vulnerable workers.

COMMUNITY ENFORCEMENT: A PROVEN TRACK RECORD

San Francisco's Office of Labor Standards Enforcement (OLSE) enforces citywide worker protection ordinances.⁸⁴ Since 2009, the OLSE has contracted with the Workers' Rights Community Collaborative (WRCC), a group of worker centers, legal-aid organizations, and community-based organizations rooted in ethnic or linguistic communities.⁸⁵ These organizations educate workers about their legal rights, consult with workers with potential claims, urge employers to resolve violations, and refer complaints to OLSE.⁸⁶ Approximately one-third of the complaints received by OLSE—and 85 percent of cases that result in recovery for workers—originate with these community groups.⁸⁷

In Seattle, the Office of Labor Standards (OLS) contracts with a range of community-based organizations to conduct door-to-door outreach, hold community education events and trainings, counsel individual workers, and resolve complaints or refer them to OLS.⁸⁸ Community organizations have been able to educate workers, especially new Americans, about their rights:

“Overtime pay is commonly misunderstood. We have one case right now with a woman who initially came to us because she hadn't been paid three consecutive paychecks. However, once I spoke with her for a while, we realized that she also had not known what rights she had for overtime. We calculated that the business owed her an additional \$11,000 for unpaid overtime in the previous year, though she never even realized that abuse was happening.”

— Casa Latina⁸⁹

“In early October 2017, the Chinese Information and Services Center (CISC) hosted a presentation for about 20 immigrant youth. After the presentation, a girl approached a staff member and asked, ‘Teacher, can you explain a little more about wage theft?’ After further explanation, the girl said, ‘My dad's employer didn't pay him for time he spent on job-related transportation. We were upset that my dad was not treated by his employer fairly. We are new to the country and there are many things we don't know.’”

— Chinese Information and Services Center⁹⁰

“Our community partners help OLS to fulfill its mission by training workers from many different communities on labor standards and by providing feedback on our proposed initiatives. Their industry-specific knowledge of business structure and violation patterns has helped us to develop strategic enforcement priorities. Notably, almost a quarter of our 2019 budget is invested in these community outreach grants.”

— Martin S. Garfinkel, director of Seattle Office of Labor Standards

Workers demanding action

Across the country, coalitions composed of community organizations, unions, immigrant rights groups, and legal aid providers are calling on elected leaders to enact whistleblower enforcement policies based on the model described above.

New York: EmPIRE (Empowering People in Rights Enforcement) Worker Protection Act

The legislature is currently considering the [EmPIRE Worker Protection Act](#), S1848/A2265, introduced by Sen. Brad Hoylman and Assemblymember Latoya Joyner.⁹¹ Coalition members include Make the Road New York, Legal Aid Society, Worker Justice Center of New York, Citizen Action NY, New York Communities for Change, and many others.

Washington: Worker Protection Act

In Washington, State Rep. Drew Hansen introduced [HB 1965](#).⁹² Coalition members include Working Washington, the Fair Work Center, the AFL-CIO and many of its affiliate unions, and the Washington State Association for Justice.

Maine: Whistleblower Enforcement Act

In Maine, Sen. Troy Jackson is working to introduce the [Whistleblower Enforcement Act, LR 1343](#). Coalition members include the Maine People's Alliance, the Maine AFL-CIO and Maine Employment Lawyers Association.

Vermont: Private Attorneys General Act (VT PAGA)

Sen. Alison Clarkson and Rep. Selene Colburn introduced the [VT PAGA](#) H.483/S.139H⁹³ in a campaign led by Rights and Democracy (RAD).

Massachusetts: An Act to Prevent Wage Theft, Promote Employer Accountability and Enhance Public Enforcement

In Massachusetts, Sen. Sal DiDomenico and Rep. Daniel Donahue introduced An Act to Prevent Wage Theft, Promote Employer Accountability, and Enhance Public Enforcement, [S. 1066/H. 1610](#), which includes whistleblower enforcement and other measures to fight wage theft.⁹⁴ Coalition members include Massachusetts AFL-CIO and affiliated labor unions, the Immigrant Worker Center Collaborative and affiliated worker centers, Greater Boston Legal Services, and Community Labor United.

Oregon: Oregon Corporate Accountability Act (OCAA)

Sen. Kathleen Taylor and Reps. Jennifer Williamson and Andrea Salinas introduced [OCAA, SB 750](#).⁹⁵ Coalition members include United Food and Commercial Workers, Working Families Party (WFP), AFL-CIO, the Northwest Worker Justice Project (NWJP), Pineros y Campesinos Unidos del Noroeste (PCUN), Main Street Alliance, UFCW Local 555, and the Oregon Trial Lawyers Association.

Conclusion

Workers today are confronted with a severe crisis in corporate accountability. Corporate wrongdoers increasingly use forced arbitration as a “get out of jail free” card to strip working people of the right to sue over wage theft, discrimination, or sexual harassment. Instead of a trial in court, workers are left to try their luck in private arbitration, a system rigged by employers.

Within five years, an estimated 80 percent of all private-sector nonunion workers will have lost the right to sue, up from 56.2 percent in 2017. As access to court continues to narrow following *Epic Systems*, the need for robust public enforcement is more important than ever. Yet public enforcement agencies at the state and federal levels lack the resources needed to respond to existing demand, much less to step up enforcement to fill the void left by forced arbitration. But in the face of this enforcement crisis, workers and advocates are fighting back.

Policy recommendations

- Congress should negate the Supreme Court’s disastrous arbitration rulings by passing the *Restoring Justice for Workers Act* to ban forced arbitration and collective action waivers in labor and employment disputes, and the *Forced Arbitration Injustice Repeal Act* to eliminate forced arbitration in employment and consumer cases.⁹⁶
- States should adopt whistleblower enforcement bills to collect penalties from corporate wrongdoers to deter wage theft, discrimination, and harassment, dramatically expanding enforcement capacity to meet increased need. The policies should include:
 - authority for whistleblowers to bring representative actions on behalf of their coworkers and the state;
 - mechanisms for the state agency to oversee whistleblower actions; and
 - allocation of penalty revenues to the state agency, with a portion earmarked for community outreach and education grants.

Through the courage of workers demanding change, and the leadership of their elected representatives, we can restore access to courts, empower workers to hold lawbreaking employers accountable, and make hard-won workplace standards meaningful to families across the country.

Appendix: Methodology for projections of the incidence of forced arbitration

In 2017, EPI published a report by Alexander Colvin using data from a nationally representative survey of nonunion private-sector employers regarding their use of forced arbitration. Prior to this study, there was one major governmental effort to investigate the extent of forced arbitration—a Government Accountability Office survey which found, using data collected in 1994, that 7.6 percent of establishments had adopted forced arbitration.⁹⁷ These two surveys together show that the use of forced arbitration clauses grew from 7.6 percent to 53.9 percent over the 23 years between 1994 and 2017. In percentage-point terms, this is an increase of 46.3 percentage points, or roughly 2 percentage points per year on average. In percent terms, this is an increase of 609.2 percent, or 8.9 percent per year on average.

To forecast the future expansion of forced arbitration in the wake of *Epic Systems*, we project the incidence of forced arbitration going forward in two different ways—using a growth rate of 2 percentage points per year and a growth rate of 8.9 percent per year—and take the average of the two resulting projections. We took this hybrid approach because we don’t have conclusive data to indicate whether the spread of forced arbitration has grown linearly, i.e. at a gradual, steady pace of two *percentage points* each year between 1994 and 2017, or has grown exponentially, i.e. slowly at first and escalating over time (consistent with a growth rate of 8.9 *percent* each year). However, two pieces of additional information suggest that the true underlying growth rate may be closer to 8.9 percent per year than to 2 percentage points per year.

First, we note a 2003 survey that found that 14.1 percent of telecommunications firms used forced arbitration.⁹⁸ Assuming that the economywide incidence rates in 1994 and 2017 described above also roughly apply to the telecommunications industry, a 14.1 percent prevalence rate in 2003 is much more consistent with a growth rate of 8.9 percent per year than the more conservative hybrid approach we used.

Second, the 2017 survey commissioned by EPI asked employers how recently they had adopted forced arbitration policies. The survey found that 39.5 percent of employers using these clauses had adopted them within the previous five years, likely triggered by the Supreme Court’s 2011 opinion on forced arbitration in *Concepcion*. This adoption rate suggests that the incidence of forced arbitration was at most 32.6 percent in

2012,⁹⁹ which is much more consistent with a growth rate of 8.9 percent per year than the more conservative hybrid approach we used.

These two data points suggest that forced arbitration may spread even faster than our model projects. If forced arbitration is actually growing at a rate of 8.9 percent per year, more than 80 percent of private-sector, nonunion businesses would adopt forced arbitration just *three* years from now.

The 2017 survey commissioned by EPI showed that 53.9 percent of nonunion private-sector employers had forced arbitration procedures, but that due to the fact that large establishments were more likely to adopt forced arbitration, the share of *workers* subject to these clauses was even higher, at 56.2 percent. This employer-size effect may diminish as the overall incidence of forced arbitration rises. However, we project that the percentage of workers covered by forced arbitration clauses will remain at least as high as the percentage of businesses using this practice.

The 2017 survey commissioned by EPI showed that just 30.1 percent of employers who imposed forced arbitration included class- and collective-action waivers in their procedures. It is likely that the lack of class- and collective-action waivers within many arbitration clauses was due to uncertainty about their legality. Following *Epic Systems*, in which the court found that such waivers are lawful, and *Lamps Plus*, under which individualized arbitration is presumed, we expect that in the future, virtually all forced arbitration clauses will either explicitly or implicitly prohibit collective legal action.

Finally, as noted above, some companies have recently announced changes to their arbitration policies. If this kind of action becomes more prevalent (and more comprehensive than the recent announcements, which, with the exception of Google’s, have been limited in scope), it could slow growth of forced arbitration across the economy. However, a look into the potential impact of such a slowdown actually underscores the need for policy change. Even if the future expansion of forced arbitration is *half* as fast as we project here—which would represent a remarkable slowdown of the pace of increase—forced arbitration would still cover more than two-thirds of the non-unionized private-sector workforce within five years.

Endnotes

- 1 National Employment Law Project, [Raises from Coast to Coast in 2019](#), December 2018.
- 2 Family Values at Work, [“Timeline of Paid Sick Days and Paid Leave Wins”](#) (web page), accessed April 18, 2019.
- 3 Fair Workweek Initiative, [“Winning a Fair Workweek”](#) (web page), accessed April 18, 2019.
- 4 David Cooper and Teresa Kroeger, [Employers Steal Billions from Workers’ Paychecks Each Year](#), Economic Policy Institute, May 2017; American Bar Foundation, [Employment Civil Rights Law Falls Short in Practice, Reinforcing the Very Harms It Aims to Redress](#) (fact sheet), May 2017; Martha T. McCluskey et al., [OSHA’s Discount on Danger](#), Center for Progressive Reform, June 2016.
- 5 EPI surveyed state Department of Labor (DOL) equivalents, asking for the total number of full-time employees that were enforcing labor and employment standards, broken down by investigator, supervisor, and other staff.
- 6 Alexander J.S. Colvin, [The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More than 60 million American Workers](#), Economic Policy Institute, April 2018.
- 7 Celine McNicholas, [“In Epic Systems Corp. Decision, the Supreme Court Deals a Significant Blow to Workers’ Fundamental Rights”](#) (statement), May 21, 2018.
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- 10 [H.R. 1423](#), 116th Congress, (2019–2020).
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- 15 Gordon Lafer, [The Legislative Attack on American Wages and Labor Standards, 2011–2012](#), Economic Policy Institute, October 2013, 29.
- 16 In arbitration, employees win only about a fifth of the time (21.4 percent), whereas they win more than a third (36.4 percent) of the time in federal courts. See Katherine V.W. Stone and Alexander J.S. Colvin, [The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights](#), Economic Policy Institute, December 7, 2015.
- 17 Median damages in forced employment arbitration are \$36,500, compared with \$176,400 in federal court employment discrimination cases and \$85,600 in state court noncivil rights cases. See Katherine V.W. Stone and Alexander J.S. Colvin, [The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights](#), Economic Policy Institute, December 7, 2015.
- 18 Unions and employers negotiate the arbitration process and the arbitrator pool, and both parties are repeat players, which eliminates the incentive for favoring employers. Employees are represented at no cost by their unions. See Alexander J.S. Colvin, [The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More than 60 million American Workers](#), Economic Policy Institute, April 2018.
- 19 Spencer Reeves and Amy Kiose Anderson, [“Supreme Court Preserves Lawsuit Alternatives”](#) (blog post), American Legislative Exchange Council (ALEC) website, June 28, 2018.
- 20 Cynthia L. Estlund, “The Black Hole of Mandatory Arbitration,” North Carolina Law Review vol. 96 (2018); SSRN: <https://ssrn.com/abstract=3111826>.
- 21 In most instances, the workers subject to arbitration clauses with class-action waivers would have been unlikely to obtain counsel to represent them in an individual arbitration. Here, the lawyers representing the workers in the class action had already developed their litigation theory and evidence, making arbitration relatively cost effective. See Dave Jamieson, [“Chipotle’s Mandatory Arbitration Agreements Are Backfiring Spectacularly,”](#) Huffington Post, December 21, 2018.
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- 24 Alexander J.S. Colvin, [The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More than 60 million American Workers](#), Economic Policy Institute, April 2018.
- 25 See Quarterly Census of Employment and Wages (QCEW) data from the Bureau of Labor Statistics on the number of employees and number of establishments covered by unemployment insurance programs in the U.S.
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- 29 See Fair Labor Standards Act, 29 U.S.C.A. § 216; see also Civil Rights Act, 42 U.S.C.A. § 2000e-5(f).
- 30 EPI surveyed state Department of Labor (DOL) equivalents, asking for the total number of full-time employees that were enforcing labor and employment standards, broken down by investigator, supervisor, and other staff. The data reflects investigators for FY 2018, except in Vermont, where the data reflects investigators as of July 2018. The investigator data does not include OSHA enforcement. For New York, where there is concurrent enforcement authority with the state’s Attorney General Office and state DOL, EPI only surveyed the state’s Department of Labor equivalent. For Massachusetts, EPI surveyed the Attorney General’s office, which holds authority of enforcing the state’s labor and employment laws. In some states there may be subcategories of employees within the “investigator” category, which are not specified here. For example, in Washington, the state Department of Labor and Industries (L&I)

- have field investigators, a subset of the total investigator staff.
- 31 Department of Administrative and Financial Services, Bureau of the Budget, [Maine State Government Annual Report 2016–2017](#), 162; Department of Administrative and Financial Services, Bureau of the Budget, [Maine State Government Annual Report 1976–1977](#), 513.
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