

## Forced Arbitration: A Race To The Bottom



# How America's Wealthiest, Most Powerful Companies Use Fine Print to Subvert Employee Rights

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A Supplement to *The Widespread Use of Arbitration  
Among America's Top Companies*

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## About The Institute

Founded in 2008, The Employee Rights Advocacy Institute For Law & Policy (The NELA Institute) advocates for employee rights by advancing equality and justice in the American workplace. We conduct research, develop resources, and educate advocates, judges, the media, policymakers, and the general public to promote employee rights and protect workers' access to the courts.

The NELA Institute is the related charitable public interest organization of the National Employment Lawyers Association (NELA).

Working hand in hand with NELA, The NELA Institute seeks to create a future in which workers will be paid at least a living wage in an environment free of discrimination, harassment, retaliation, and capricious employment decisions; employers will fulfill their promises to provide retirement, health, and other benefits; workers' safety will not be compromised for the sake of corporate profits and interests; and individuals will have effective legal representation to enforce their rights to a fair and just workplace, adequate remedies, and access to the courts to vindicate their workplace rights when they are violated. For more information about us, visit [www.employeeightsadvocacy.org](http://www.employeeightsadvocacy.org).

# I. Introduction

The NELA Institute released the first edition of “The Widespread Use of Arbitration Among America’s Top Companies”<sup>2</sup> in September 2017. That report shared the groundbreaking findings of Imre Szalai, Loyola University New Orleans College of Law’s Judge John D. Wessel Distinguished Professor of Social Justice. Prof. Szalai’s research demonstrated that 80 of the companies in the *Fortune* 100 have used arbitration clauses in their employment contracts since the year 2010.<sup>3</sup> Of those, 39 explicitly precluded employees from joining together in any class, collective, or joint legal action to enforce their workplace rights.<sup>4</sup>

In March 2018, The NELA Institute re-issued the report, with one new key finding: at least half of America’s *Fortune* 100 companies required employees to submit workplace

disputes to binding arbitration as a condition of employment.<sup>5</sup> This report discusses in greater depth why the prevalence of forced arbitration is so dangerous for workers and shares for the first time the finding that **at least 52 Fortune 100 companies use forced arbitration in their employment contracts.**

Part II of this report presents the “what, how, and why” of forced arbitration, explaining what it is, how it works (or doesn’t), and why ending forced arbitration should be a priority. Part III shares the methodology and analyzes the data behind our latest finding. Finally, Part IV explains some of the steps that states and the federal government can take to address the harm caused by forced arbitration.

## II. Forced Arbitration: The What, How & Why

If you have ever filled out a job application or received an employee handbook from a large corporation, there is good chance you have been bound by a forced arbitration clause. These clauses are increasingly common in the employment context, with an estimated 60 million employees bound by them today.<sup>6</sup> But what is forced arbitration, how does it work (or not work), and why should it matter?

### a. What Is Forced Arbitration?

Forced arbitration is a mechanism that allows corporations to prevent workers from holding their employers accountable in court when those companies break the law. These clauses appear in the fine print of job applications, terms of service, employee handbooks, click-through emails, and even retirement benefit plans. Imposed on workers before any wrongdoing has occurred, the scope of a forced arbitration provision can be quite expansive, covering wage disputes,<sup>7</sup> wrongful termination claims,<sup>8</sup> and allegations of age,<sup>9</sup> disability,<sup>10</sup> and race discrimination.<sup>11</sup> They can even push egregious civil law violations, like sexual assault, into a secret forum where perpetrators are more likely to avoid accountability.<sup>12</sup>

Employees bound by forced arbitration clauses have not chosen this dispute resolution process.<sup>13</sup> Companies distribute forced arbitration clauses to workers via a pre-printed form on a take-it-or-leave-it basis.<sup>14</sup> There is no opportunity for employees to negotiate the terms of a forced arbitration clause. Workers, who often have little to no bargaining power, must submit to these one-sided provisions or forego employment altogether, which few people can afford to do.

### b. How Forced Arbitration Fails Workers

Forced arbitration proceedings are often initiated when an employee sues his/her employer in a court and, in response, the defending company seeks a court order to move the dispute to private arbitration. It is common for employees, up to that

moment, to be wholly ignorant of the fact that they have waived their right to go to court.<sup>15</sup> Because the U.S. Supreme Court has interpreted the Federal Arbitration Act to encompass “a strong national policy favoring arbitration,”<sup>16</sup> once an employer invokes its forced arbitration clause, it is difficult for workers to keep their case in court. What an employee will experience once they are in the room for an arbitration proceeding can vary widely. Details of specific instances are hard to come by, as much of what happens in arbitration usually is required to remain confidential.<sup>17</sup>

Arbitration can be extremely costly for an employee. This presents special problems for employees in low-wage professions, as nearly one-third of all wage and salary workers in America are.<sup>18</sup> Arbitration firms often require both parties to submit payment before they can move forward with a claim.<sup>19</sup> Additionally, many arbitration provisions include a forum-selection clause that may require a plaintiff to travel hundreds of miles to partake in the arbitral proceeding.<sup>20</sup> For the millions of hourly employees who only earn a few hundred dollars each week, the wages lost from missing work, plus the out-of-pocket expenditures for travel and lodging, makes arbitration a financial impossibility.<sup>21</sup>

Arbitrations tend to take place in a closed-door conference room, using the rules specified in the employer-drafted arbitration provision.<sup>22</sup> The arbitrator—a privately-paid hearing officer who is not required by law to have any particular legal expertise—often is chosen from a roster of a private arbitration firm selected by the employer. Research indicates this type of employer-driven selection process creates a “repeat player” effect: employers who repeatedly use the same arbitrators and firms receive more favorable outcomes than those who are appearing before a particular arbitrator for the first time.<sup>23</sup> After 25 interactions between a given employer-arbitrator pair, an employee’s odds of winning in arbitration are whittled to just 4.5%.<sup>24</sup>

Arbitrators are required to enforce arbitration clauses as they are written.<sup>25</sup> Since employers have been empowered to dictate the terms of these clauses, they can be highly one-sided in the employer's favor.<sup>26</sup> Employers can insert constraints on discovery and the introduction of evidence into their arbitration clauses, making it difficult for employees to prove their case.<sup>27</sup> They can use their arbitration clauses to shorten the statute of limitations on likely claims in order to reduce the amount of time an employee can bring a complaint.<sup>28</sup> Employers also are able to limit their financial exposure in arbitration by inserting provisions into the clauses that prohibit victorious employees from being awarded punitive damages and other remedies.<sup>29</sup> As a result, it is unsurprising

that outcomes in employment arbitration skew heavily in favor of employers.<sup>30</sup>

And once the arbitrator has issued a decision, all parties are required to accept the outcome, even if the arbitrator misapplies the law. Because the U.S. Supreme Court affirmed in 2013 that the Federal Arbitration Act restricts judicial review of an arbitrator's decision to challenges regarding his/her interpretation of the terms of the arbitration clause, when arbitrators get the substantive law wrong, there is virtually no way to appeal.<sup>31</sup> Under the Court's ruling, "convincing a court of an arbitrator's error – even his grave error – is not enough."<sup>32</sup>

## Open Court vs Private Arbitration

**Forced arbitration can be a boon for employers, and devastating to wronged employees. Compare the lack of equity in a forced arbitral forum versus a public courtroom:**

### **In Public Courts...**

- There are rules of evidence and civil procedure to ensure fairness in the proceedings, which apply equally to both sides.
- Cases are resolved by judges and/or jurors with no financial stake in the outcome.
- The parties involved and the facts underlying the claims at issue usually become a matter of public record. Companies cannot hide their unlawful behavior or serial offenses committed by company power-players.
- Lower court decisions are subject to appeal, so unjust outcomes can be corrected.

### **In Private Arbitration...**

- The employer gets to choose the rules governing the proceeding.
- Cases are decided by a for-profit judge selected from an arbitration company's roster, chosen and often paid by the defendant-employer.
- With no public record required, egregious violations by corporate employers may stay hidden from public view. The details of employer wrongdoing, including the names of bad actors and the extent of the unlawful activity remain largely unknown.
- There is virtually no way to appeal, forcing workers to accept even clearly-wrong decisions.

# FORCED ARBITRATION CAN BURY WIDESPREAD SEXUAL HARASSMENT & RACE DISCRIMINATION IN THE WORKPLACE

Civil rights laws like Title VII of the Civil Rights Act of 1964 were designed to protect historically marginalized workers, and create ways to deter and eliminate discriminatory conduct at work. While progress has been made, workplace discrimination still is far too common. In fiscal year (FY) 2017, more than 45 percent of all charges filed with the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing many workplace laws, alleged race, color, or national origin discrimination—totaling more than 40,000 violations.<sup>33</sup> More than 25,000 claims of sex-based harassment were filed with the agency that same year, and 32,000 workers alleged they experienced retaliation for filing Title VII claims.<sup>34</sup> In addition, it's estimated that 70% of employees who experience harassment at work never report it.<sup>35</sup> Forced arbitration policies, like those employed at FOX News, enable widespread workplace harassment to go unchecked, and for serial abusers to act with impunity.

## Sexual Harassment and Race Discrimination at FOX News

Gretchen Carlson, already famous from her years as an anchor on FOX News, recently became the catalyst in exposing widespread workplace harassment at FOX News. From fellow anchors Steve Doocy<sup>36</sup> and Bill O'Reilly<sup>37</sup> to company CEO Roger Ailes, Carlson's brave exposure of the toxic corporate culture at FOX demonstrates how forced arbitration helps keep even endemic workplace harassment a secret.

Carlson allegedly experienced multiple forms of sex discrimination at FOX, from pay discrimination to lewd and demeaning comments, to unwanted sexual propositions. When she refused advances from the man leading the company, Ailes retaliated by firing her. Because Carlson's contract with the network included a forced arbitration clause, had she sued Fox News alone, her story likely would have remained hidden in confidential proceedings, leaving Ailes and others at the network free to keep harassing other employees with impunity.



Instead, she sued Roger Ailes directly. This allowed Gretchen to pursue her claims out in the open and to bring his appalling behavior to light. As a result of the shocking nature of her allegations and the harsh public scrutiny that followed, Fox News fired Ailes. Ultimately, Gretchen settled her claims, but retained the right to publicly speak about some of her experiences. Since Gretchen's story became public, dozens of other women have come forward with their own stories of the sexual violence and intimidation they experienced from Roger Ailes and other prominent men at Fox News.<sup>38</sup>

Not long after the news of rampant sexual harassment at FOX broke, stories of other unlawful discriminatory treatment began to emerge. According to complaints filed by former Fox News employees in April 2017, "While Fox executives were busy either participating in or looking the other way at the barrage of sexist, demeaning conduct hurled at its female employees, these same executives allowed . . . repugnant racial discrimination to go unchecked as well."<sup>39</sup>

According to the complaints, racial animus manifested at FOX News in numerous ways. Racial stereotyping about people of color was reportedly commonplace, epithets expressing racial animosity frequently occurred, and employees of color suffered discriminatory adverse employment actions, including being denied permanent positions with insurance benefits and being refused scheduled salary increases that were granted to white employees.<sup>40</sup> Shockingly, employees with dark skin were allegedly also required to use a special door to access the second floor, where the most powerful executives' offices were located.<sup>41</sup>

Allegedly, the pervasive race discrimination was well-known at the company for nearly a decade, yet the leadership at FOX turned a blind eye and did nothing. But Gretchen Carlson's clever maneuver around her forced arbitration clause opened the door for those employees to be made whole. On May 15, 21<sup>st</sup> Century Fox settled the employees' race discrimination claims for \$10 million.<sup>42</sup>

### **c. Why Employees, Advocates & Policymakers Should Work To End Forced Arbitration**

#### **Forced Arbitration Undermines The Rule Of Law**

Forced arbitration undermines the rule of law in multiple ways. In addition to being imposed in secret, arbitrators' decisions have no precedential effect in future cases, even ones decided by the same arbitrator. Moreover, there are no safeguards in place to prevent an arbitrator from incorrectly, ambiguously, or inconsistently applying substantive laws.

The American workplace became a safer, more equitable environment over the course of the last century because Congress has passed a variety of laws protecting employees.<sup>43</sup> Preserving the gains workers have made toward ending discrimination and harassment at work, ensuring equal pay, protecting wages, and advancing other workplace rights hinges on fair, consistent, public enforcement of those laws. Arbitration decisions are non-precedential, and arbitrators are not even required to rule on similar claims in a consistent manner. Two cases brought by employees forced into individual arbitration against the same employer using the same evidence could result in widely different outcomes. This arises, in part, from the fact that each employee for a given company forced into individual arbitration generally must approach the proceedings from scratch, even if the facts or law overlap greatly. Should the employee-plaintiffs learn of their disparate outcomes, there isn't a lot they can do because, as indicated above, courts lack the power to correct arbitrators' decisions.<sup>44</sup>

In 1985, former U.S. Supreme Court Justice John Paul Stevens warned us of the danger posed by empowering arbitrators to rule on complex civil claims, writing "[T]he informal procedures which make arbitration so desirable in the context of contractual disputes are inadequate to develop a record for appellate review of statutory questions. Such review is essential on matters of statutory interpretation in

order to assure consistent application of important public rights."<sup>45</sup>

In May 2018, U.S. Supreme Court Justice Ruth Bader Ginsburg revisited the issue, expressing concern that "individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. As a result, arbitrators may render conflicting awards in cases involving similarly situated employees- even employees working for the same employer. . . . With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked."<sup>46</sup>

#### **Courts Are Specially Equipped To Resolve Employment Claims**

Any credible dispute resolution forum must be equipped with the tools to resolve claims equitably. The procedural and evidentiary rules applicable in court are essential to resolving many employment cases, which can be legally and factually complex, and applying them requires expertise that far too often is lacking among arbitrators.

Justice Stevens acknowledged the danger of stripping courts of their role in interpreting and applying these laws when he wrote, "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts. . . . Because the arbitrator is required to effectuate the intent of the parties, rather than enforce the statute, he may issue a ruling that is inimical to the public policies underlying the [law], thus depriving an employee of protected statutory rights."<sup>47</sup>

#### **Forced Arbitration Leads To Massive Claim Suppression**

Enforcing our workplace laws relies on private lawsuits brought by employees. When the cost and structure of forced arbitration effectively prevents large numbers of meritorious cases

from ever being brought, it is inevitable that substantial amounts of unlawful activity will proceed unaddressed.

This phenomenon is particularly striking when viewed through the eyes of a low-wage worker. It is estimated that over \$15 billion is stolen from workers each year through minimum wage violations alone.<sup>48</sup> Filing a claim in arbitration could cost a worker thousands of dollars.<sup>49</sup> For employees earning the federal minimum wage—a paltry \$240 per week for 40 hours of work—individual arbitration is a luxury many workers just can't afford.<sup>50</sup> For those workers, being forced into individual arbitration amounts to claim suppression.

Unfortunately, because of forced arbitration, the suppression of employee claims is occurring at an alarming rate. Based on a survey of the number of civil litigations filed in federal and state courts, New York University Law Professor Cynthia Estlund recently found that hundreds of thousands of expected employment claims forced into arbitration are never filed; instead, they go unheard in any forum.<sup>51</sup> Estlund's research revealed that between 315,000 and 722,000 employment claims disappear into a "black hole of mandatory arbitration" each year.<sup>52</sup> Prof. Estlund's research strongly supports the conclusion that companies are using forced arbitration as a tool to avoid the law.

### **Class Bans In Forced Arbitration Isolate Victims Of Employer Wrongdoing**

In recent years, employers have launched a potentially devastating attack on workers' ability to band together for their mutual aid and protection. By inserting class, collective, and joint action waivers into their forced arbitration clauses, employers guarantee that wronged employees will be deprived of the necessary financial and emotional support that comes from bringing similar claims as a group.

Collective action waivers give unscrupulous employers a license to steal and engage in other widespread violations in the workplace. When an employer fails to pay its workers all they are owed, often the only way to be made whole is for

## **CLASS BANS MEAN LOW-WAGE WORKERS DENIED ACCESS TO JUSTICE**

When low-wage workers suffer unlawful treatment like wage theft at work, banding together with other employees to share the financial and emotional burden is often the only way for them to be made whole. Class action bans in forced arbitration clauses deny low-wage workers their only practical means to redress their grievances, which gives unscrupulous employers a de facto license to steal.

Sheila Hobson worked as an Assistant Manager at an Alabama gas station. Paid a meager hourly wage, Ms. Hobson needed every dime she earned to get by. Every day, Sheila worked hard to finish her long checklist of required duties. To complete everything, Sheila would frequently have to come in early and stay well beyond her scheduled 8-hour shift. On her way to and from the station, she was required to around to competing gas station to survey and record their fuel prices—a task for which she claims she was never paid.

Despite putting in the extra time, she was instructed by her supervisors not to record all hours worked. The company demanded her extra labor, but didn't want to pay her overtime wages. Instead, the company, Murphy Oil, USA, required Sheila and the other Assistant Managers work for free if they couldn't get the impossibly long list of chores done in the eight hours allotted. Sheila and the other assistant managers decided to use the law to challenge the company's policy. They banded together in a class action to demand payment for all hours worked, as required under the Fair Labor Standards Act. In response, the company invoked its forced arbitration policy, which included a ban on class and collective action, to deprive the gas station managers of their day in court.

Sheila and her peers fought the class ban all the way to the U.S. Supreme Court. In May 2018, the Court ruled against them. Because of this decision, it is expected that class bans will now become standard practice in low-wage industries like restaurants and home health care, leaving hourly employees with little recourse when suffering unlawful violations in the workplace.

employees to band together in a joint, class, or collective action. When the U.S. Supreme Court was confronted with the argument that financial constraints make pursuing individual arbitrations impractical for small-dollar claims, Justice Antonin Scalia, in the majority opinion, held that plaintiffs are not entitled to an *affordable* procedural path to vindicate their claims.<sup>53</sup> As dissenting Justice Elena Kagan pointed out, under Justice Scalia's reasoning, if a plaintiff is too financially limited to be able to take on a giant corporate defendant alone, that's "too darn bad."<sup>54</sup> But going it alone is now the only way many employees can even make the attempt.

In *Epic Systems, Inc. v. Lewis, et al*, employees challenged the legality of collective action bans in employment arbitration clauses. Decided in May 2018, the U.S. Supreme Court upheld the use of the collective action bans in forced

arbitration clauses, even where the employee never signed the clause or was never provided any opportunity to negotiate its terms.

Prof. Szalai found that 39 *Fortune* 100 companies explicitly bar employees from coming together to enforce their workplace rights.<sup>55</sup> In 2017, the Economic Policy Institute found that nearly 25 million private sector, non-union employees were subject to class action bans.<sup>56</sup> With the *Epic Systems* ruling, the number of employees cut off from joining with their co-workers is certain to rise. In the words of Justice Ginsburg, "the inevitable result of [this] decision will be the under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers."<sup>57</sup>

### III. Forced Arbitration Among The *Fortune* 100

The NELA Institute’s updated findings demonstrate that at least 52 of America’s *Fortune* 100 use forced arbitration. Arbitration can be an efficient and beneficial dispute resolution process for both employers and employees when it is voluntarily agreed to after a dispute has arisen. *Forced* arbitration has neither of those characteristics, and can be disastrous for employees in the many ways described above. Just how many forced arbitration clauses are in effect across the United States is hard to determine, but several well-researched estimates paint a grim picture for America’s workforce.

#### a. The Prevalence of Forced Arbitration In The American Workplace

Because of the secret nature of forced arbitration, it is difficult to know just how many workers are affected. In 2017, the Economic Policy Institute estimated that over 60 million employees are bound by forced arbitration clauses. Prof. Szalai, in *The Widespread Use Of Arbitration Among America’s Top Companies*, examined the *Fortune* 100 and found that 80 percent used arbitration in some form, and at least half appeared to impose forced arbitration on a portion of their workforce. This report confirms that **at least 52 of America’s wealthiest companies, which collectively employ over 10 million people, use forced arbitration in their employment contracts.**

Because of their prominence, the policies these companies choose to impose on their workers can affect entire industries. Large companies that impose forced arbitration on employees, especially those with class bans, get a competitive advantage over every company that plays by the rules.<sup>58</sup> If underpaying workers with impunity becomes the norm, the market rate for every worker in that field becomes depressed, and those employers who do play by the rules will suffer a disadvantage in the marketplace as big corporate competitors undercut prices. This incentivizes

unlawful behavior among employers and creates a race to the bottom in the workplace.

#### b. Methodology & Definitions

The Appendix to “The Widespread Use of Arbitration Among America’s Top Companies” listed publicly accessible documents in support of its conclusion. This updated report sorts each arbitration contract identified in the Appendix into one of five categories: 1) Forced; 2) Forced with an opt-out; 3) Not Forced; 4) Negotiated; and 5) Unknown. To determine the appropriate category for each arbitration clause, I reviewed the source material Prof. Szalai provided for each company. I looked for information that indicated whether the clause was incorporated into a contract offered on a take-it-or-leave-it basis, such as a job application or employee handbook, whether the worker’s job was dependent on accepting the arbitration clause, and/or if there was an opportunity for the employee to negotiate or opt-out of the contract.



#### “Forced”

An arbitration clause in an employment contract is categorized as “forced” if it was drafted and presented by an employer who required potential or current employees, as a non-negotiable term or condition of employment, to waive their right to resolve an employment disputes in court prior to any such a dispute arising. While some employment contracts provide a window of time for an employee to choose not to be bound by a term or condition, called an “opt-out”, unambiguously “forced” arbitration clauses do not

give employees any choice. Of the cases reviewed, forced arbitration clauses were the most common type presented to employees.

### **“Forced With An Opt-Out”**

The second most common type of arbitration clause was presented to the employee in a form contract that contained an “opt-out” provision, whereby the employee was given a limited time to decline to be bound by the arbitration provision. Whether this is a true “forced” arbitration clause is debatable. On the one hand, employers are providing a process through which an employee may retain their right to go to court. On the other hand, the opt-out periods tend to be very short (between 10 days and 3 months), are themselves buried in fine print that an employee is unlikely to read, and can require multiple steps on the part of the employee that, if done incorrectly, will render the employee’s choice to opt-out invalid. These are categorized as “Forced, with an opt-out.”

### **“Not Forced”**

An arbitration contract is categorized as “not forced” if the record shows that an employee had to take affirmative steps to be bound and signing the contract had no effect on the worker’s offer of or continued employment.

### **“Negotiated”**

There is no evidence any of the arbitration clauses at issue were negotiated, by any reasonable definition.

### **“Unknown”**

In some instances, the circumstances surrounding how an identified arbitration clause came about are unclear. In one case, a company’s use of an arbitration provision is mentioned only in passing as a point tangential to the issue before the court, with no further evidence of the arbitration clause existing in any subsequent public records.<sup>59</sup> Executive employment contracts are another example where, absent clarification from the parties involved, it is unknown whether the arbitration provisions were a negotiated term. In such cases, the provision is categorized as “unknown.”

## **c. Results**

Overall, of the 80 arbitration clauses Prof. Szalai identified, **52 were forced and 30 of those contained collective action bans.** As Table 1 shows, 5 of the arbitration clauses were forced with an opt-out (all of which contained a class ban), 1 was unambiguously not forced, and 23 were unknown. None of the documents reviewed substantiated a finding that any of the arbitration clauses were negotiated. Given that 15 of the arbitration clauses were integrated into executive contracts, it is likely that at least some were negotiated. However, we cannot know for sure how many because that information is not publicly available.

### **The Types Of Workers Forced Into Arbitration**

The “forced” arbitration clauses were further examined to identify which types of workers were bound by them, and whether those arbitration clauses also required the employee to waive their right to bring or join class, collective, or joint legal actions for their mutual benefit. The results of this review are expressed in Table 2.

### **Executives**

Four executive contracts were categorized as “forced.” This group is likely the smallest because executives are in a much better position to negotiate the terms of their contracts. The only unambiguously non-negotiable executive contracts discovered were within general severance agreements or other benefits documents.<sup>60</sup>

### **Affiliated Employees**

The second largest category of workers bound by forced arbitration was “affiliated” employees.<sup>61</sup> These individuals perform work for the *Fortune* 100 company indirectly, such as for one of the company’s subsidiaries, through a staffing agency, or as a worker who is classified by the company as an independent contractor. Out of the 52 companies identified, 12 imposed forced arbitration provisions on their affiliated workers, 7 of which also banned them from joining together in collective legal action.

### Direct Employees

By far the largest category, 36 *Fortune* 100 companies<sup>62</sup> required at least some portion of the workers they employ directly to be bound by a

forced arbitration provision. Of those, 22 also prevented those employees from joining any class, collective, or joint action against the employer.

Table 1: Distribution of Arbitration Clauses Among <i>Fortune</i> 100 Companies By Type & Presence of Class and Collective Action Bans					
Arbitration Clause is...	Forced	Forced, w/opt-out	Not Forced	Negotiated	Unknown
Class Ban	30	5	0	0	5
No Class Ban	22	0	1	0	18
<b>Total</b>	<b>52</b>	<b>5</b>	<b>1</b>	<b>0</b>	<b>23</b>

Table 2: Forced Arbitration Clauses Among <i>Fortune</i> 100 Companies, By Type of Employee & Presence of Class and Collective Action Ban				
Arbitration Clause with...	Forced	Forced, Direct Employee	Forced, Affiliated	Forced, Executive
Class Ban	30	22	7	1
No Class Ban	22	14	5	3
<b>Total</b>	<b>52</b>	<b>36</b>	<b>12</b>	<b>4</b>

## IV. State & Federal Legislative Solutions

The Federal Arbitration Act (FAA)<sup>63</sup> was passed in 1925 to create a cheaper, faster way for businesses of equal bargaining power to resolve commercial contract disputes.<sup>64</sup> It was never intended to govern employment disputes.<sup>65</sup> However, since the early 1980's, the U.S. Supreme Court has gradually transformed this early 20th century law into a 21st century super-statute.<sup>66</sup> As one employee rights advocate recently observed, today "arbitration is second only to God in its power and might in our civilization."<sup>67</sup> This Part discusses some of the steps that state and federal legislatures have taken and could take to address forced arbitration.

### **a. Individual States Could Consider Choice-Of-Forum, Contract Formation & Private Attorneys General Legislation**

States cannot ban forced arbitration outright. U.S. Supreme Court precedent preempts "any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements."<sup>68</sup> While preemption makes it difficult for states to maneuver around the FAA, they can still enact measures to protect their citizens from certain problematic aspects of forced arbitration. They might also consider passing laws allowing workers to bring representative claims to enforce the law.

### **Choice-of-Venue & Choice-of-Law Provisions**

As mentioned in Part II of this report, employers have broad discretion to insert provisions into their arbitration clauses that stack the deck in their own favor. Employers can insert clauses that require workers to travel out-of-state in order to adjudicate their claims, which can inflate the costs borne by workers and deter others from pursuing claims at all. They also could use forced arbitration to require all claims be adjudicated under the laws of a particular state, allowing companies to shop around for the most employer-friendly laws, regardless of where the claims arise.<sup>69</sup>

To prevent employers from hailing its citizens into a foreign jurisdiction or denying them the benefit its state employment laws, California passed a law in 2016 making it unlawful for employers to condition an offer of employment on a worker agreeing to litigate or arbitrate out of state.<sup>70</sup> That same law renders forced arbitration agreements requiring claims to be adjudicated under another state's laws to be voidable at the discretion of the employee.<sup>71</sup> Because the law does not single out the arbitral forum, it is not preempted by the FAA.

This type of procedural work-around is not a substitute for ending forced arbitration, but it will at least spare employees a potentially cumbersome and costly journey across the country to enforce their workplace rights. The law also ensures that forced arbitration cannot be used to deny California workers their rights under their state's laws. For other states with strong employee protections, this type of measure could be a useful tool.

### **Laws Forbidding The Formation Of Certain Contract Provisions**

Recently, two states have pursued a creative way to limit an employer's ability to require arbitration as a condition of employment. The State of Washington passed a law in March 2018 which makes it unlawful for employers to condition a job offer on the waiver of the employee's right to publicly pursue a cause of action for workplace discrimination in a judicial or administrative forum.<sup>72</sup> California has a similar bill making its way through its state legislature, which would prohibit an employer from requiring any current or prospective employee to waive any "right, forum, or procedure" for a violation of the state's employment laws as a condition of employment.<sup>73</sup>

Both the Washington and California legislation target the fact that forced arbitration conditions the hiring of an applicant on her waiving of her rights. Lawmakers in both states are hopeful that these laws will not be preempted, because the bills

address behavior that occurs before any contract is formed (and the FAA's applicability is limited expressly to "contracts").

### **Private Attorneys General Legislation**

Two related problems with forced arbitration are: 1) it prevents employees from being compensated for harm they have suffered at work; and 2) it allows unscrupulous employers to break the law with impunity. California's "Labor Code Private Attorneys General Act" (PAGA), passed in 2004, has had some success in addressing both of those issues.<sup>74</sup>

PAGA allows aggrieved employees "to sue as a proxy or agent of California's state labor law enforcement agencies in collecting civil penalties for Labor Code violations."<sup>75</sup> Unlike in a traditional private lawsuit, workers pursuing a PAGA representative claim are not seeking damages; they are collecting penalties for labor violations, as provided for under state law.<sup>76</sup> Employees who successfully prosecute a PAGA claim on behalf of the state receive 25% of the collected penalties, while the other 75% goes to the state's labor law enforcement agency.<sup>77</sup> California's Labor Code includes an extensive list of penalties, which can add up quickly for the worst offenders.

In 2015, basing its decision in U.S. Supreme Court precedent, the California Supreme Court held that PAGA imbues workers with a non-waivable right to participate in representative actions.<sup>78</sup> Other courts have been unpersuaded by employers' attempts to prevent workers bound by individual forced arbitration clauses from bringing PAGA claims outside of arbitration, though, as of this writing, a petition asking the U.S. Supreme Court to overrule this holding is pending.<sup>79</sup> Furthermore, while forced arbitration clauses bind employees who are parties to a contract, PAGA claims are brought (in part) on behalf of the state government. Since the state is not a party to any private employment contract, employees bound by arbitration clauses are not precluded from pursuing PAGA claims.<sup>80</sup>

It is important to acknowledge that PAGA is an effective tool for employees, in part, because California has some of the most employee-friendly labor provisions in America. If other states are

considering embracing a PAGA-type law, then they must also consider the content of their own state labor codes and the types of claims an employee could theoretically enforce.<sup>81</sup>

### **b. Congress Could Create Exceptions To The Federal Arbitration Act Or Amend It To Outlaw Forced Arbitration Completely**

The only way to end forced arbitration in the workplace is through federal legislation.<sup>82</sup> Bills that have been introduced in recent years have embodied different approaches to reign in the problem. Some have offered a piecemeal approach that carves out exceptions by industry, type of claim, or both. Others have proposed amending the FAA to prohibit the use of forced arbitration in all employment contracts.

### **Industry & Claim Specific Legislation Limiting The Use of Forced Arbitration**

As forced arbitration clauses started to become more common in the American workplace,<sup>83</sup> bipartisan efforts to curb the use of forced arbitration in particularized industries began to emerge. For example, in 2007, Republican Senator Chuck Grassley introduced the Fair Contracts for Growers Act to protect agricultural workers,<sup>84</sup> expressing the need that "arbitration be voluntarily agreed upon by both parties to settle disputes at the time a dispute arises, not when the contract is signed."<sup>85</sup>

In 2010, with the support of both Democrats and Republicans, Congress used the defense department appropriations bill to prohibit employers with federal defense contracts worth more than \$1 million from forcing employees to arbitrate sexual harassment claims.<sup>86</sup> President Barack Obama went further in protecting employees working for government contractors when he issued his Fair Pay and Safe Workplaces Executive Order (EO) in 2014.<sup>87</sup> Among other things, the Fair Pay and Safe Workplaces EO prevented federal contractors that provided supplies or services in excess of \$1 million from requiring any employee from arbitrating claims arising from any type of claim arising from Title VII of the Civil Rights Act of 1964 or any tort claims related to sexual assault or harassment as a condition of employment.<sup>88</sup> Unfortunately, the EO

was revoked by Congress in the first year of the Trump Administration.<sup>89</sup>

In 2016, the bipartisan Justice for Service Members Act (JSMA) was introduced to protect military service members and veterans whose employment and reemployment rights have been violated from having their claims forced into arbitration. The JSMA would render any agreement to arbitrate a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) unenforceable unless everyone involved agrees to arbitrate after a complaint on the specific claim has been filed.<sup>90</sup>

Members of congress have also introduced legislation to protect workers' ability to bring specific types of claims in court. In the wake of widespread revelations involving harassment and assault perpetrated by prominent media, entertainment, and political figures, Senator Kirsten Gillibrand (D-NY) and Representative Cheri Bustos (D-IL) introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017 (S. 2203/H.R. 4734) to carve out an exception to the FAA for claims of sexual harassment and discrimination. Earlier that year, the Restoring Statutory Rights and Interests of States Act of 2017 (RSRA) was introduced to amend the FAA by making it unlawful for employers to force employees to arbitrate claims involving violations of a federal or state statutes or constitutions, except when arbitration is knowingly and voluntarily agreed to after a dispute arises.<sup>91</sup>

Because it has the potential to reopen the courthouse doors for many employees, excluding

specific industries or types of claims from forced arbitration's reach may be very appealing. However, this approach also risks leaving out many categories of workers, including many who have traditionally been marginalized in the workplace.

### **Amending The Federal Arbitration Act To Protect America's Workers**

The Arbitration Fairness Act (AFA) represents the most straightforward, comprehensive way to end forced arbitration. It would amend the FAA to exclude all non-union contracts of employment. Legislation to do so has been introduced in every session of congress since 2007.<sup>92</sup> The 2018 version of the AFA, introduced by Sen. Richard Blumenthal and Rep. Hank Johnson, "prohibits a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute."<sup>93</sup> The bill currently is supported by over 100 co-sponsors in the U.S. House and Senate.

Over the last decade, returning the FAA to its original, intended purpose has remained a policy priority for employee and consumer rights advocates.<sup>94</sup> A national study found that once voters heard a brief description of forced employment arbitration, they overwhelmingly opposed it, with more than four in ten strongly opposed.<sup>95</sup> In fact, likely voters support ending forced arbitration in the workplace by a margin of more than two to one, including majorities of Democrats, Independents, and Republicans.<sup>96</sup> If passed, the AFA would protect all workers from forced arbitration, and help restore the balance of power between workers and employers.

## **V. Conclusion**

Over the last thirty years, an increasing number of employers have silenced workers who have experienced unlawful treatment at work by denying access to courts. Unscrupulous employers know they have nothing to fear when they cheat employees or engage in widespread discrimination or abuse: absent meaningful

enforcement mechanisms, they will suffer no consequences for their harmful acts. To reinforce the rule of law, and to restore basic fairness and access to justice among America's workers, forced arbitration in the American workplace must end.

# Endnotes

- <sup>1</sup> Elizabeth Colman is the Paul H. Tobias Attorney Fellow at The Employee Rights Advocacy Institute For Law & Policy. She would like to thank Loyola Law Professor Imre Szalai and 2018 Summer Law Fellow Engram Wilkinson for their thoughtful insights and invaluable contributions to this report.
- <sup>2</sup> PROFESSOR IMRE S. SZALAI, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES (The Employee Rights Advocacy Institute For Law & Policy, March 2018), available at <http://employeeightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf>.
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.*
- <sup>6</sup> ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION (Economic Policy Institute, 2017), available at <http://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>.
- <sup>7</sup> See, e.g., *Sanchez v. Gen. Elec. Co.*, 2016 WL 3959161 (S.D. Tex. July 22, 2016); *Gold v. New York Life Ins. Co.*, 2017 WL 3026906 (N.Y. App. Div. July 18, 2017); *Maestre v. Am. Express Co.*, 2014 WL 12605504 (S.D. Fla. Nov. 18, 2014).
- <sup>8</sup> See, e.g., *Adams v. Energy Transfer Partners*, 2017 WL 2349028 (S.D. Tex. Apr. 3, 2017); *Hayes v. Travelers Indem. Co.*, 2012 WL 5285775 (E.D. Mo. Oct. 25, 2012); *Dugan v. Best Buy Co. Inc.*, 2017 WL 3442807 (N.J. Super. Ct. App. Div. Aug. 11, 2017).
- <sup>9</sup> See, e.g., *Grant v. Morgan Stanley Smith Barney LLC*, 2017 WL 1044484 (S.D. Fla. Mar. 20, 2017); *Hayden v. Cisco Sys., Inc.*, 2014 WL 4364900 (D. Conn. Sept. 2, 2014); *Garcia-Clara v. AIG Ins. Co. Puerto Rico*, 2016 WL 1261058 (D.P.R. Mar. 30, 2016).
- <sup>10</sup> See, e.g., *Forsyth v. HP Inc.*, 2016 WL 9113665 (N.D. Cal. Nov. 14, 2016) (motion to compel); *Rodgers-Glass v. Conroe Hosp. Corp.*, 2015 WL 4190598 (S.D. Tex. July 10, 2015).
- <sup>11</sup> See, e.g., *Gragston v. Coca-Cola Refreshments*, 2015 WL 4999260 (S.D. Ohio July 27, 2015); *White v. SoftLayer Techs., Inc.*, 2015 WL 5052365 (N.D. Tex. Aug. 27, 2015); *Duffy v. Facebook, Inc.*, 2017 WL 1739109 (N.D. Cal. May 4, 2017).
- <sup>12</sup> See, e.g., *James v. Turner Indus.*, 2014 WL 3726615 (M.D. La. June 30, 2014). NB: This is not intended to suggest that forced arbitration is used as a shield to protect unlawful actors from criminal liability.
- <sup>13</sup> See, e.g., *Pfizer, Inc., 07-CA-176035, 10-CA-175850, 2 (Locke, ALJ) (Jan. 10, 2017)* ("the Respondent provided each employee with a copy of a document and informed the employee that if he or she continued to work for the Respondent, the employee would be deemed to have agreed to its terms.").
- <sup>14</sup> *Id.*
- <sup>15</sup> Megan Leonhardt, *Getting Screwed at Work? The Sneaky Way You May Have Given Up Your Right To Sue*, TIME MAGAZINE (Sept. 27, 2017), <http://time.com/money/4958168/big-companies-mandatory-arbitration-cant-sue/>.
- <sup>16</sup> *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 24 (1983)(asserting for the first time that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").
- <sup>17</sup> Colvin & Gough, *infra* note 22.
- <sup>18</sup> Vincent A. Fusaro & H. Luke Shaefer, "How Should We Define "Low-Wage" Work? An Analysis Using The Current Population Survey," *Monthly Labor Review*, U.S. Bureau of Labor Statistics, October 2016, <https://doi.org/10.21916/mlr.2016.44> (finding that when "low-wage" is defined as 125% of the federal poverty threshold for a family of three, which equals \$13.50 per hour (2013 dollars), 36,000,000 wage and salary workers age 18-64, or 29.54%, are properly identified as "low-wage workers"). The terms of a forced arbitration clause may require employees to spend anywhere from \$200 to more than \$7,000 just to file a claim. See American Arbitration Association (AAA) fee schedules (providing that under the [AAA Employment Rules](#), fees may not exceed \$200, but disputes governed by the [AAA Commercial Rules](#) may be subject to an [initial filing fee for an undetermined monetary claim](#) of as much as \$7,000). However, some courts have found cost-sharing provisions in arbitration clauses to be unconscionable, and therefore, unenforceable. See, *Shankle v. B-G Maint. Mgmt. of Co., Inc.*, 163 F.3d 1230 (10th Cir.1999)(holding an arbitration clause unenforceable where the plaintiff was required to pay one-half the costs of arbitration because such a requirement effectively limited access to a forum for resolution of claims).
- <sup>19</sup> *Id.* See also, JAMS Employment Arbitration Rules & Procedures, [https://www.jamsadr.com/files/uploads/documents/jams-jams\\_employment\\_arbitration\\_rules-2014.pdf](https://www.jamsadr.com/files/uploads/documents/jams-jams_employment_arbitration_rules-2014.pdf)
- <sup>20</sup> See, e.g., *Alpert v. Alphagraphics Franchising, Inc.*, 731 F. Supp. 685 - Dist. Court, D. New Jersey 1990 (requiring New Jersey plaintiff to arbitrate claim in Arizona); and *Doctor's Associates, Inc. v. Stuart*, 85 F. 3d 975 - Court of Appeals, 2nd Circuit 1996 (requiring Illinois plaintiff to arbitrate in Connecticut).
- <sup>21</sup> The State of California has addressed this type of injustice by prohibiting employers from requiring employees to adjudicate state law claims outside of the state as a condition of employment. Cal. Lab. Code 925. This statute is discussed in more detail in the recommendations section of this report.
- <sup>22</sup> *Volt Inf. Sciences v. Stanford Univ.*, 489 U.S. 468 (1989)(holding that parties may specify by contract the rules under which the arbitration will be conducted, and that the Federal Arbitration Act mandates all contracts with arbitration agreements be enforced according to the terms of the agreement).
- <sup>23</sup> Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights In Arbitration Outcomes*, 68(5) IRL Review, 1019 (2015) (analyzing 11 years of publicly available arbitration data, and finding each repeat pairing between a given employer and arbitrator decreases the likelihood that the employee will win by 6.2%).
- <sup>24</sup> *Id.*
- <sup>25</sup> *Volt, supra*, note 21.
- <sup>26</sup> See, e.g., *Samaan v. General Dynamics Land Systems, Inc.*, 2014 WL 4829536 (E.D. Mich. Sept. 29, 2014)(where the plaintiff employee, on appeal averred "[that the hearing] lasted ten minutes total. Oral arguments briefly focused on Samaan's claim . . . Each party spoke for approximately five minutes. The arbitrator spent the next thirty minutes focused on two subjects. First, he insisted Samaan "must settle" because the arbitrator could not or wished not to conduct a trial. Second, the arbitrator reflected on his own career disappointment when he was circuit judge in Wayne County, Michigan. . . during the brief oral arguments, the arbitrator declared that he had already reviewed General Dynamics' Briefs and the accompanying documents that were submitted in paper format. However, the arbitrator stated that he had not had a chance to review Samaan's briefs and documents that were submitted because they had been submitted electronically. Shortly thereafter, the arbitrator stated that the case was too legally "complicated" for him.").
- <sup>27</sup> See, e.g., *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663, 672 (Cal. Ct. App. 2004)(finding an arbitration provision limiting discovery to a single deposition and document request was not impermissible).
- <sup>28</sup> *Order of United Commercial Travelers Am. v. Wolfe*, 331 U.S. 586, 608 (1947)(providing "it is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.").
- <sup>29</sup> *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 n. 1 (5th Cir.2002). See also *Kinnebrew v. Gulf Ins. Co., C.A. No. 3:94-CV-1517-R*, 1994 WL 803508, at \*1 (N.D. Tex. Nov.28, 1994) (denying employee's claim that denial of punitive damages and allowing reinstatement "only if money damages are insufficient as a remedy" invalidated the arbitration agreement); *Pony Express Courier Corp. v. Morris*, 921 SW 2d 817 (Tex. Ct. App., 1996)(holding an arbitration clause that limited an employee's award to "the lesser of (i) any actual lost wages, (ii) an amount not to exceed six months' wages, or (iii) in an appropriate case, reinstatement" was enforceable).
- <sup>30</sup> Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, Economic Policy Institute (2015)(finding that plaintiffs won 36.4% of the time in federal court versus 21.4% of the time in arbitration, and the median damages awarded to plaintiffs in federal court were \$176,426 compared to \$36,500 in forced arbitration).
- <sup>31</sup> *Oxford Health Plans, LLC v. Sutter* 133 S. Ct. 2064, 2070 (2013).
- <sup>32</sup> *Id.*
- <sup>33</sup> EEOC, CHARGE STATISTICS (CHARGES FILED WITH EEOC) FY 1997 THROUGH 2017, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (acknowledging that "because individuals often file charges claiming multiple types of discrimination, the number of total charges [may] be less than the total [] listed.").
- <sup>34</sup> *Id.*
- <sup>35</sup> U.S. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm)

<sup>36</sup> Complaint at 3, *Carlson v. Ailes*, No. 2:16-cv-04138-JLL-JAD (D. N.J., filed July 18, 2016).

<sup>37</sup> Paul Farhi, *Bill O'Reilly's Fox News Career Comes To A Swift End Amid Growing Sexual Harassment Claims*, THE WASHINGTON POST (April 19, 2017), available at [https://www.washingtonpost.com/lifestyle/style/bill-oreilly-is-officially-out-at-fox-news/2017/04/19/74ebdc94-2476-11e7-a1b3-faff0034e2de\\_story.html?utm\\_term=.b338ddd28b3d](https://www.washingtonpost.com/lifestyle/style/bill-oreilly-is-officially-out-at-fox-news/2017/04/19/74ebdc94-2476-11e7-a1b3-faff0034e2de_story.html?utm_term=.b338ddd28b3d).

<sup>38</sup> Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers*, Vox.com (May 21, 2018), <https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court>.

<sup>39</sup> Amended Comp. at 4, *Brown, et al v. Twenty-First Century Fox, et al*, Index No. 22446/2017E, filed Apr.4, 2017 (N.Y. Sup. Ct.).

<sup>40</sup> *Id.* at 3.

<sup>41</sup> Amended Comp. at 12, *Blanco v. Twenty-first Century Fox, et al*, No. 17-cv-03017 (ALC), filed May 22, 2017 (S.D.N.Y.).

<sup>42</sup> David Folkenflik, *Fox News Pays \$10 Million To Settle Racial, Gender Bias Suits*, NATIONAL PUBLIC RADIO, May 16, 2018, [https://www.npr.org/sections/thetwo-way/2018/05/16/611504340/fox-news-pays-10-million-to-settle-racial-gender-bias-suits?mc\\_cid=6831a7bbc1&mc\\_eid=d4940338ac](https://www.npr.org/sections/thetwo-way/2018/05/16/611504340/fox-news-pays-10-million-to-settle-racial-gender-bias-suits?mc_cid=6831a7bbc1&mc_eid=d4940338ac).

<sup>43</sup> *E.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. 201 et seq.; Title VII of the Civil Rights Act of 1964, Pub. Law 88-352; Occupational Safety and Health Act, 29 U.S.C. 651, et seq.

<sup>44</sup> *Oxford Health Plans, LLC, supra*, note 30.

<sup>45</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 648 (1985)(Stevens, J. dissenting).

<sup>46</sup> *Epic Systems, Corp. v. Lewis*, No. 16-205, slip op. at 29 (U.S., May 21, 2018)(Ginsberg, J. dissenting).

<sup>47</sup> *Mitsubishi Motors Corp.*, *supra* note 45.

<sup>48</sup> DAVID COOPER & TERISA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR (Economic Policy Institute, 2017), available at <http://www.epi.org/files/pdf/125116.pdf>.

<sup>49</sup> THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, *The Facts on Forced Arbitration: Forced Arbitration Gives Dishonest Employers A License to Steal*, at <http://employeeightsadvocacy.org/wp-content/uploads/2017/12/The-Institute-Faces-of-Forced-Arbitration-Wage-Theft-Fact-Sheet.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C.L. Rev. 102, 120 (finding, "All in all, the available evidence suggests that the overwhelming majority of claims that would have been litigated but for the presence of a [force arbitration clause] are simply dropped without being filed in any forum at all.")

<sup>52</sup> *Id.*

<sup>53</sup> *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013).

<sup>54</sup> *Id.*, at 2313 (Kagan, J. dissenting).

<sup>55</sup> Szalai, *supra* note 1. Prof. Szalai only counted the arbitration clauses that explicitly required individual arbitration as having a "class ban." However, the U.S. Supreme Court has indicated that arbitration clauses that do not mention class proceedings in any forum may still preclude an employee from participating in a class action in arbitration specifically because the company *did not* agree to it. See *Stolt-Nielson v. AnimalFeeds Internat'l Corp.*, 559 U.S. 662 (2010).

<sup>56</sup> Colvin, *supra* note 5.

<sup>57</sup> *Epic Systems, supra* note 35, at 26 (Ginsberg, J. dissenting).

<sup>58</sup> Amicus Brief for Main Street Alliance at 14, *Epic Systems, supra* note 35 ("Allowing employers to force their workers to waive access to [collective actions] proceedings would unfairly benefit corporate wrongdoers, disadvantage responsible firms, and threaten the viability of law-abiding business.")

<sup>59</sup> For example, we only became aware of Facebook's use of an arbitration clause in their employment contract because the company declared its intent to invoke the provision in a footnote in a Motion to Transfer Venue. *Duffy v Facebook, Inc.*, 2017 WL 1739109, n. 3 (N.D. Cal. May 4, 2017)(" In their joint case management conference statement, Defendants noted their intent to compel Duffy's dispute to arbitration. (Dkt. No. 21 at 3.)")

<sup>60</sup> Centene, Phillips 66, Microsoft, and Verizon. Records on file with the NELA Institute.

<sup>61</sup> Exxon Mobile, General Motors, Ford Motors, Verizon, Johnson & Johnson, New York Life Insurance, United Healthgroup, Prudential Financial, Dow Chemical, Nationwide, Allstate, Nike. Records on file with the NELA Institute.

<sup>62</sup> Walmart, Costco, Anthem, State Farm Insurance Company, Valero Energy, Target, PepsiCo, UPS, Intel, Albertsons Cos., HCA Holdings, Energy Transfer Equity, Wells Fargo, Bank of America, Berkshire Hathaway, General Electric, Kroger, Chevron, Fannie Mae, J.P. Morgan Chase, Home Depot, Citigroup, Comcast, IBM, Lowe's, Sysco, Hewlett Packard Enterprise, HP, Coca-Cola, Cigna, Best Buy, American Express, General Dynamics, Charter Communications, Pfizer, AIG. Records on file with the NELA Institute.

<sup>63</sup> 9 U.S.C. 1, et seq.

<sup>64</sup> *Forced Arbitration: An Assault on Workers' Rights*, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION 2 (Apr. 12, 2018), available at <http://www.nela.org/NELA/docDownload/35806>.

<sup>65</sup> Hearing Before A Subcommittee of the Committee on the Judiciary, U. S. Senate, 67<sup>th</sup> Cong., 4<sup>th</sup> Sess., on S. 4213, *A Bill Relating to Sales and Contracts to Sell in Interstate Commerce and Foreign Commerce*; and S. 4214, *A Bill To Make Valid and Enforceable Written Provisions Or Agreements For Arbitration of Disputes Arising Out of Contract, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations*, at 2, January 31, 1923 (Washington Government Printing Office, 1923)(where the drafter of the bill testified, "It is not intended that this shall be an act referring to labor disputes at all. It is purely an act to give the merchants the rights or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this.").

<sup>66</sup> For a complete history of the transformation of the Federal Arbitration Act from a limited commercial law governing merchants' contracts into a super-statute, see IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (Carolina Acad. Press, 2013).

<sup>67</sup> Braden Campbell, *"Tesla Race Bias Case Not Going To Arbitration,"* Law360.com, June 4, 2018, available at <https://www.bryanschwarzlaw.com/0605182> (quoting plaintiff's attorney Bryan Schwartz in response to rare success in defeating defendant-employer's motion to compel arbitration).

<sup>68</sup> *Kindred Nursing Centers Ltd. P'Ship v. Clark*, 581 U.S. 4(2017).

<sup>69</sup> Cal. Sen. Rules Comm. Analysis SB 1241, 2015-2016 Sess., 5 (08/29/16) (explaining that the purpose of the bill is to "ensure that California employees cannot be forced to litigate or arbitrate their California-based claims outside of California, under out-of-state laws, as a condition of an employment contract" because employers are increasingly imposing choice-of-law and forum selection provisions on California workers to "ensure disputes are decided in a forum that is most favorable to the employer.")

<sup>70</sup> Cal. Lab. Code 925. In support of the legislation, the bill's author, Sen. Wieckowski, expounded, "A worker who lives and works in California should *never* be forced to travel to a different state to exercise rights she has under California law" (Cal. Sen. Rules Comm. Analysis SB 1241, 2015-2016 Sess., 5 (08/29/16)(emphasis in the original).

<sup>71</sup> Cal. Lab. Code 925.

<sup>72</sup> SSB 6313, 65<sup>th</sup> Leg. Reg. Sess. (Wash. 2018).

<sup>73</sup> Cal. Assembly Bill 3080, 2017-2018 Sess. (Cal. 2018).

<sup>74</sup> The Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698-2699.5. PAGA is a complicated and developing area of California law worthy of an entire report of its own. My intent is only to provide a cursory description to raise awareness of the potential PAGA provides in re-opening the courthouse doors to workers.

<sup>75</sup> Anthony Zaller, *New Court Decisions Change the Landscape of Private Attorneys General Act Representative Actions* (CALIFORNIA EMPLOYMENT LAW REPORT, Aug. 18, 2017), <https://www.californiaemploymentlawreport.com/2017/08/new-court-decisions-change-landscape-private-attorneys-general-act-representative-actions/>.

<sup>76</sup> The Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698-2699.5.

<sup>77</sup> Cal. Lab. Code §2699(i)(providing" Except as provided in subdivision (j), civil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency for enforcement of labor laws, including the administration of this part, and for education of employers and employees about their rights and responsibilities under this code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes; and 25 percent to the aggrieved employees.")

<sup>78</sup> *Iskanian v. CLS Transportation L.A.*, 135 S. Ct. 1155 (2015) (where the appellate court relied on the U.S. Supreme Court holding in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), that "the FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty's choice of judicial forum.")

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<sup>79</sup> See *Five Star Senior Living Inc., v. Mandviwala*, No. 17-1357 (U.S., cert. filed Mar. 26, 2018).

<sup>80</sup> *Iskanian*, *supra* note 77.

<sup>81</sup> Currently, two states are considering legislation modeled after PAGA. In New York, the Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act has been introduced in both chambers of the legislature. N. Y. Assembly Bill A7958, 2017-2018 Leg. Sess. (N.Y. 2017), NY Sen. Bill S6426, 2017-2018 Leg. Sess. (N.Y. 2017). As of this writing, neither house has moved on the bill since they were referred to their respective Labor Committees in May 2017. In January 2018, a bill was introduced in the Vermont Assembly and referred to the chamber's Committee on General, Housing, and Military Affairs, and would empower individuals to recover civil penalties for both employment and consumer claims. Vt. Assembly Bill H. 789, 2017-2018 Sess. (Vt. 2018).

<sup>82</sup> The U.S. Supreme Court itself has repeatedly acknowledged that the power to end forced arbitration lies with Congress, including most recently, in *Epic Systems*, when Justice Gorsuch acknowledged, "Congress is of course always free to amend this judgment." *Epic Systems*, *supra* note 35, at 25.

<sup>83</sup> National Employment Lawyers Association, *Forced Arbitration: An Assault on Workers' Rights*, *supra* note 83 (explaining that from 1991 to 2017 the percentage of private-sector non-union employees bound by forced arbitration clauses rose from 2% to 56%), available at <https://www.nela.org/index.cfm?pg=mandarbitration>.

<sup>84</sup> Fair Contracts for Growers Act of 2007, S. 221, 110<sup>th</sup> Cong. (2007)(co-sponsored by Senators Russell Feingold (D-WI) & Charles Grassley (R-IA)).

<sup>85</sup> 153 Cong. Rec. S291 (daily ed. Jan. 3, 2007)(statement of Sen. Grassley).

<sup>86</sup> H.R. 3326, 111<sup>th</sup> Cong. § 8816 (2010)(as enacted in 48 C.F.R. § 222.7401 (2010)).

<sup>87</sup> Executive Order 13673, [79 FR 45309](https://www.federalregister.gov/documents/2015/05/20/2015-10663).

<sup>88</sup> *Id.*

<sup>89</sup> Under the Congressional Review Act, Congress passed, and the President signed, [Public Law 115-11](https://www.gpo.gov/fdsys/pkg/FR-2017-11-06/pdf/2017-23588.pdf), a resolution of disapproval of the rule implementing the Fair Pay and Safe Workspaces EO. See Guidance For Executive Order 13673, "Fair Pay and Safe Workspaces," U.S. DOL, FR Doc. 2017-23588 Filed 11-3-17; 8:45 am, available at <https://www.gpo.gov/fdsys/pkg/FR-2017-11-06/pdf/2017-23588.pdf>.

<sup>90</sup> Justice For Servicemembers Act of 2016, H.R. 5426/ S. 3042, 114<sup>th</sup> Cong. (2015-2016).

<sup>91</sup> Restoring Statutory Rights and Interests of the States Act of 2017, [H.R. 1396/ S. 550, 115<sup>th</sup> Cong. \(2017\)](https://www.congress.gov/bills/115/1396).

<sup>92</sup> H.R. 3010/ S. 1782, 110<sup>th</sup> Cong. (2007); H.R. 1020/ S. 931, 111<sup>th</sup> Cong. (2009); H.R. 1873/ S. 987, 112<sup>th</sup> Cong. (2011); H.R. 4734/ S. 878, 113<sup>th</sup> Cong. (2013); H.R. 2087/ S. 1133, 114<sup>th</sup> Cong. (2015); H.R. 1374/S. 537, 115<sup>th</sup> Cong. (2017); S.2591, 115<sup>th</sup> Cong. (2018)(reintroduced in the Senate after S. 537 author resigned).

<sup>93</sup> H.R. 1374, 115<sup>th</sup> Cong. (2017); S.2591, 115<sup>th</sup> Cong. (2018).

<sup>94</sup> See, e.g., Fair Arbitration Now coalition list of more than 75 advocacy organization in support of ending forced arbitration at <https://www.fairarbitrationnow.org/coalition/>.

<sup>95</sup> The Employee Rights Advocacy Institute For Law & Policy & Public Citizen, "National Study of Public Attitudes on Forced Arbitration" (Lake Research Partners, Apr. 2009).

<sup>96</sup> *Id.*