

Written Testimony of Hugh Baran

National Employment Law Project

L.D. 1711 An Act To Enhance Enforcement of Employment Laws

*Hearing before the Committee on Labor and Housing
of the Maine Legislature*

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Hugh Baran
Senior Staff Attorney & Skadden Fellow

National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 11101

(646) 693-8231
hbaran@nelp.org

Thank you to Committee Co-Chairs Senator Craig Hickman & Representative Mike Sylvester for the opportunity to testify today. My name is Hugh Baran, and I am a Senior Staff Attorney and Skadden Fellow at the National Employment Law Project (NELP). NELP is a non-profit, non-partisan research and advocacy organization specializing in a wide range of employment policy issues. We are based in New York with offices across the country.

NELP testifies today in support of L.D. 1711, which would allow workers to file civil actions in the name of the state to enforce their existing rights under Maine's wage-and-hour, anti-discrimination, and sexual harassment laws.

Without robust public and private enforcement of Maine's wage-and-hour laws, Maine's minimum wage will be a wage floor in name only for workers in low-wage jobs across this state.

My testimony today will cover three topics: (1) how the rise of forced arbitration and class/collective action waivers has curbed workers' ability to enforce their rights before judges and juries; (2) how forced arbitration has enabled Maine employers to pocket over \$40 million owed to Maine workers in low-wage jobs subject to forced arbitration (based on the findings of our newly published report on this topic, [*Forced Arbitration Helped Employers Who Committed Wage Theft Pocket \\$40 Million Owed to Maine Workers in 2019*](#)); and (3) why Maine's public agencies cannot alone address the enforcement gap created by forced arbitration and class/collective action waivers.

Maine Needs L.D. 1711 To Combat the State's Wage Theft Crisis

By imposing forced arbitration, employers thwarted Maine workers' efforts to recover millions in stolen wages, pocketing \$40 million owed to Maine workers in 2019. L.D. 1711 can help level the playing field.

The Critical Role of Private Enforcement in Combating Wage Theft

In the eight decades since Congress enacted the Fair Labor Standards Act, private litigation has been critical in establishing a national minimum wage floor to protect employees.¹ The same has been true since Maine enacted its own minimum wage and overtime laws, as state and federal labor departments cannot enforce the law alone.²

Workers' access to the courts to enforce workplace rights has only become more important in recent decades due to the growing problem of wage theft in lower-paid service-based jobs. A 2008 study by NELP found that 68% of 4,387 workers in low-wage industries in Chicago, Los Angeles, and New York City had experienced at least one pay-related violation in the prior week.³ A 2014 report by the Economic Policy Institute (EPI) estimated that U.S. workers lose over \$50 billion annually due to wage theft.⁴ A 2017 EPI study found that workers in the 10 most-populous states lose \$8 billion annually due to minimum wage violations alone.⁵

In 2016, recognizing that the minimum wage must be at least enough to allow workers to support their families, Maine voters adopted minimum wage increases lifting the minimum wage to \$12 per hour in 2020, and indexing it to increases in the cost of living thereafter.

But employers' growing use of forced arbitration requirements and class/collective action waivers has jeopardized Maine workers' ability to exercise their rights under the state's wage and hour laws.⁶

The Rise of Employer-Imposed Forced Arbitration Requirements

Few workers are aware that they have lost the important right to bring claims before a judge and jury. But 55% of private-sector non-union employees are now subject by their employers to forced arbitration, including 64.5% of workers earning less than \$13 per hour.⁷ Corporations' unilaterally-imposed requirements deny workers the right to go before a judge and jury when their employer breaks the law, such as by failing to pay the legally required minimum wage and overtime.

Forced arbitration requirements are increasingly imposed by corporations on workers as a condition of employment. That means an employer generally can fire or refuse to hire you for refusing to be subject to a forced arbitration requirement.

59.1% of Black workers and 57.6% of women workers' employers require arbitration, making Black workers and women workers the most likely groups to be subject to forced

arbitration.⁸ Moreover, 54.3% of Hispanic workers' employers require forced arbitration, as do 55.6% of white workers' employers and 53.5% of men's employers.⁹

Forced Arbitration Is Stacked Against Employees

Forced arbitration heavily favors employers in several significant ways:

- **Repeat Player Bias:** Unlike judges, private arbitrators are in business, and they want to earn repeat business. Employers such as Darden Restaurants (the parent company for Olive Garden) are their most likely source of repeat business, whereas an individual employee is very unlikely to need the services of an arbitrator again. Because employers generally must sign off on who serves as the arbitrator in a worker's case, they can effectively veto arbitrators who are perceived as too fair-minded or pro-employee.¹⁰
- **Employer-Selected Procedural Rules:** In court, employees and employers are equally bound by the same public procedural rules. In forced arbitration, employers get to select the rules that apply when they draft the arbitration requirement. Employers can pick the arbitration provider with the rules that seem most desirable to them, and they can also impose additional procedural hurdles of their own design. Arbitration rules can, for example, sharply limit workers' right to collect necessary evidence through discovery.

These rules can even limit a workers' ability to proceed with a claim at all. In a recent case, DoorDash attempted to impose a new arbitration requirement on thousands of workers seeking to arbitrate their wage theft claims against the company. The procedural rules DoorDash sought would have allowed only ten cases to be heard, leaving thousands of workers without any path to justice.¹¹

- **No Right to Appeal Secret Decisions:** Even if an arbitrator's findings of fact or conclusions of law are flatly wrong, their decisions are virtually impossible to appeal. That means there is nobody who can review or reverse their decisions. Arbitrators are not even required to issue a written decision that explains how they arrived at their conclusions. And because arbitration awards are typically strictly confidential, workers cannot even shine sunlight on arbitrators' mistakes or their employers' violations.
- **No Way to Know of Findings Against or to Change Illegal Employer Practices:** Again because of the secrecy of arbitration rulings, even when a worker does prevail in a claim against her employer, other coworkers subject to the same practices, law-abiding employers, and the general public have no information about the legality of employer practices that may have been successfully challenged. This allows patterns of illegal activity to continue inside corporations, and means that illegal corporate conduct goes unchecked.

Making matters even worse, employers routinely impose class/collective action waivers as part of their forced arbitration requirements. These waivers prevent employees from banding together with their colleagues to challenge employer lawbreaking, whether in court or in arbitration. When you are fighting by yourself, it can be extremely hard to challenge

and prove the existence of systemic employer practices that result in wage theft and discrimination. Employer retaliation and worker fears are an everyday occurrence in too many workplaces where violations persist.

In 2018, the U.S. Supreme Court decided *Epic Systems Corp. v. Lewis*, blessing employers' inclusion of class/collective action waivers in forced arbitration requirements.¹² Justice Ruth Bader Ginsburg, in dissent, predicted that the "inevitable result" of the Court's decision would be "the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers." This is in part because the costs of pursuing individual claims in a stacked forum will typically outweigh any potential recovery, deterring workers and their attorneys from pursuing claims.

Faced with the reality of proceeding alone against their employer in a stacked forum, 98% of workers whose claims are subject to forced arbitration simply abandon their claims. This is the claim-suppressive effect of forced arbitration, which was detailed in Cynthia Estlund's pathbreaking 2018 article, *The Black Hole of Mandatory Arbitration*.¹³

The few employees who do go to arbitration prevail in only 21% of cases—compared with 36% in federal court cases and 57% in state court cases.¹⁴ And the very few who win recover significantly lower damages than they would if a judge and jury heard their case—16% of what they would recover for similar claims in federal court and 7% of what they would recover for similar claims in state court.¹⁵

As a result, employers are now rushing to impose forced arbitration requirements on their employees. The Economic Policy Institute and the Center for Popular Democracy project that more than 80% of private-sector non-union workers will be subject to forced arbitration and class/collective action waivers by 2024.¹⁶

How Forced Arbitration Requirements Enable Wage Theft

In a new report I co-authored with Elisabeth Campbell, NELP calculates that in 2019 **more than \$40 million** owed to over 19,400 Maine workers earning less than \$13/hour (private-sector, non-union) was pocketed by employers who forced arbitration on their workers. The full details of how we calculated these numbers can be found in our report, [*Forced Arbitration Helped Employers Who Committed Wage Theft Pocket \\$40 Million Owed to Maine Workers in 2019*](#), which is attached to this testimony.

As discussed above, faced with the prospect of having to submit their claims to forced arbitration, the vast majority of workers—98%—never file a claim at all.¹⁷ With no effective access to justice, workers simply abandon their claims. Based on that finding, we calculate that 19,471 of low-paid private-sector, non-union workers who had wages stolen and who are subject to forced arbitration will not file wage theft claims in arbitration, effectively abandoning their claims and any potential recovery.¹⁸

As further explained in our report, we conservatively conclude that the 19,471 workers in Maine who make less than \$13 an hour, who experience wage theft and are subject to forced arbitration, and who do not file claims, are unable to recover the more than \$40 million

through private enforcement actions in part due to the claim-suppressive effect of forced arbitration.¹⁹

Public Agencies Lack the Capacity to Enforce Alone

The U.S. Department of Labor (USDOL), the federal agency charged with enforcing the nation's wage-and-hour laws to root out wage theft, is extremely under-resourced, as has been well documented. For example, USDOL in 2019 employed 780 wage-and-hour investigators²⁰ to detect violations among the 143 million workers covered by the nation's wage-and-hour laws,²¹ compared with 1,000 investigators for 22.6 million workers covered by those laws in 1948.²²

The Maine Department of Labor is similarly under-resourced and overburdened. Total agency staffing levels have declined from 702 full-time employees in 1977 to 552 full-time employees in 2017.²³ The agency currently has only five investigators tasked with eradicating wage theft among tens of thousands of Maine businesses,²⁴ and the MDOL budget overall has decreased dramatically since the 1970s (adjusted for inflation) while the regulated workforce has grown.²⁵

The Maine Department of Labor and the Office of the Attorney General reported recovering \$103,187 in stolen wages in 2015 and \$218,074 in 2016, according to the Economic Policy Institute.²⁶ More recently, the MDOL has reported recovering \$363,180.47 in stolen wages for 363 workers in 2019.²⁷ The Department estimates its total stolen wages recovered for the year 2020, including cases still in process, amounts to \$423,490.48 for 488 workers.²⁸ While these recent numbers reflect an improvement on the state's 2015-16 public enforcement capacity, MDOL's total capacity to recover wages is still a drop in the bucket when compared to the nearly \$40 million that Maine workers in underpaid jobs subject to forced arbitration are prevented from recovering due to employer-imposed forced arbitration. Even if the MDOL's enforcement capacity were fully targeted at workers subject to forced arbitration, and was operating at its anticipated 2020 peak, this would represent just over 1% of the wage theft (1.06%) enabled by forced arbitration.

There is also a serious information gap that must be overcome by any agency looking to target enforcement at employers using forced arbitration, because there is no comprehensive public or private database tracking whether a given set of employees is subject to forced arbitration.²⁹ Without such information, it would be difficult for the MDOL or the Maine Attorney General to fully target enforcement efforts at employers that use forced arbitration.

For all these reasons, the state's public agencies cannot be expected to replace the role that workers and their attorneys have historically played in private enforcement of wage-and-hour law. Underenforcement means that unscrupulous employers have little incentive to comply with wage theft protection laws. This hurts workers, law-abiding employers, and Maine's economy.

Conclusion

Maine can act to address the state's lack of public enforcement capacity by passing L.D. 1711, the proposed whistleblower enforcement law. Inspired by California's Private Attorneys

General Act (PAGA), L.D. 1711 would allow workers to stand in the shoes of the Maine Department of Labor and seek civil penalties for wage theft, as well as injunctive and declaratory relief. L.D. 1711 would also allow workers to stand in the shoes of the Maine Human Rights Commission and seek civil penalties, injunctive, and declaratory relief for violations of Maine’s employment discrimination laws.

L.D. 1711 will ensure that unscrupulous low-wage employers cannot steal wages from workers with impunity. L.D. 1711 would also generate significant new revenue for the Maine Department of Labor, allowing the agency to increase staffing levels and expand its capacity to root out wage theft.

NELP is proud to support passage of L.D. 1711. We commend the Committee for its consideration of this important legislation.

Endnotes

¹ See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1150 & n.42 (2012) (discussing critical role of private enforcement in statutory design of the Fair Labor Standards Act).

² See 26 ME. REV. STAT. § 664.

³ ANNETTE BERNHARDT ET AL., NATIONAL EMPLOYMENT LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES, at 20–21 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

⁴ BRADY MEIXELL & ROSS EISENBREY, ECON. POLICY INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2 (2014), <https://www.epi.org/files/2014/wage-theft.pdf>.

⁵ DAVID COOPER & TERESA KROEGER, ECONOMIC POLICY INSTITUTE, EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR 2, 9 (2017), <https://www.epi.org/files/pdf/125116.pdf>.

⁶ In using the term “arbitration requirement,” I follow NELP and other colleagues’ practice of rejecting the more common term “arbitration agreement,” which belies the reality that for workers in low-paying jobs, the provisions in such contracts are not bilateral but instead employer-dictated and required as a condition of employment. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1636 n.2 (2018) (Ginsburg, J., dissenting).

⁷ See ALEXANDER J.S. COLVIN, ECONOMIC POLICY INSTITUTE, THE GROWING USE OF MANDATORY ARBITRATION, at 9 (2018), <https://www.epi.org/files/pdf/144131.pdf>.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECONOMIC POLICY INSTITUTE, THE ARBITRATION EPIDEMIC 22–23 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> (collecting evidence of the “repeat player” advantage employers have in arbitration).

¹¹ See Alison Frankel, *DoorDash accused of changing driver rules to block mass arbitration campaign*, REUTERS (Nov. 20, 2019), <https://www.reuters.com/article/legal-us-ot-massarb/door-dash-accused-of-changing-driver-rules-to-block-mass-arbitration-campaign-idUSKBN1XU2U2>; see also Vin Gurreri, *Gibson Dunn Helped Craft Arbitration Provider’s Rules*, LAW360 (Feb. 28, 2020), <https://www.law360.com/legalethics/articles/1248227/gibson-dunn-helped-craft-arbitration-provider-s-rules>; Nicholas Iovino, *DoorDash Ordered to Pay \$9.5M to Arbitrate 5,000 Labor Disputes*, COURTHOUSE NEWS (Feb. 10, 2020), <https://www.courthousenews.com/door-dash-ordered-to-pay-12m-to-arbitrate-5000-labor-disputes/>.

¹² *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1622–23, 1624–28 (2018) (holding that the Federal Arbitration Act requires courts to enforce class/collective action waivers incorporated into forced arbitration requirements, and that Section 7 of the National Labor Relations Act does not protect workers’ right to engage in collective litigation); see also Celidh Gao, National Employment Law Project, *The Supreme Court’s Decision in Epic Systems—What You Need to Know* (June 5, 2018), <https://www.nelp.org/blog/supreme-courts-decision-epic-systems-need-know/>.

¹³ Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018), <https://scholarship.law.unc.edu/nclr/vol96/iss3/3/>.

¹⁴ STONE & COLVIN at 19.

¹⁵ *Id.*

¹⁶ KATE HAMAJI ET AL., CENTER FOR POPULAR DEMOCRACY & ECONOMIC POLICY INSTITUTE, UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK (2019), <https://populardemocracy.org/unchecked-corporate-power>.

¹⁷ See Estlund, 96 N.C. L. REV. at 696.

¹⁸ For full details of how we calculated these numbers, see pages 5–6 of our report.

¹⁹ For full details of how we calculated these numbers, see pages 5–6 of our report.

²⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: TRACKING ADDITIONAL COMPLAINT DATA COULD IMPROVE DOL’S ENFORCEMENT 13 (2020), <https://www.gao.gov/assets/gao-21-13.pdf>.

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- ²¹ *Id.* at 1 & n.1. This represents the number of workers U.S. GAO estimates are covered by the Fair Labor Standards Act's protections.
- ²² See Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPECTIVES ON POLITICS 324, 325 & n.8 (2016), <https://faculty.wcas.northwestern.edu/~djg249/galvin-wage-theft.pdf>.
- ²³ See CENTER FOR POPULAR DEMOCRACY, *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back* 6 (2019), <https://www.populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.
- ²⁴ See Testimony of Michael Roland, Maine Dep't of Lab., to the Committee on Lab. & Housing of the Maine Legislature on LD 616, at 2:11:10–2:13:00 (Mar. 15, 2021) (stating that MDOL currently has 5 wage & hour inspectors and that this is “not nearly enough” for the Department to be effective), <https://youtu.be/NV2J5eZdQUo?t=7870>.
- ²⁵ CENTER FOR POPULAR DEMOCRACY, *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back* 6 (2019), <https://www.populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.
- ²⁶ CELINE McNICHOLAS ET AL., ECONOMIC POLICY INSTITUTE, *TWO BILLION DOLLARS IN STOLEN WAGES WERE RECOVERED FOR WORKERS IN 2015 AND 2016—AND THAT’S JUST A DROP IN THE BUCKET* 4, App’x Tbl. A2 (2017).
- ²⁷ MAINE DEP’T OF LABOR, *2021 ANNUAL REPORT ON WAGE AND HOUR COMPLAINTS AND VIOLATIONS* 4 tbl. 1 (Feb. 2021) (on file with authors).
- ²⁸ *Id.*
- ²⁹ There are a few databases that capture whether an employer has ever used forced arbitration for employee disputes. See, e.g., *Does your company require employees to sign arbitration agreements?*, VOX (2018), <https://apps.voxmedia.com/at/vox-forced-arbitration/>. But such data sets only reflect past arbitrations; they do not indicate whether a given employee or set of employees are subject to forced arbitration.

Forced Arbitration Helped Employers Who Committed Wage Theft Pocket \$40 Million Owed to Maine Workers in 2019

By imposing forced arbitration, employers thwarted Maine workers' efforts to recover millions in stolen wages; wage theft losses totaled over \$40 million for workers who made less than \$13 per hour.

By Hugh Baran and Elisabeth Campbell

*C*orporations are increasingly imposing forced arbitration requirements on their workers as a condition of employment, denying workers the right to go before a judge and jury when their employer breaks the law by failing to pay the legally required minimum wage and overtime. In Maine, the solution is clear: The legislature must pass a whistleblower enforcement bill to ensure that workers can rely on the protections of Maine's employment laws, regardless of employer efforts to impose forced arbitration.

Key Findings

- **More than \$40 million** owed to Maine workers earning less than \$13 an hour (private-sector, non-union) was pocketed by employers who forced arbitration on their employees in 2019. Companies' forced arbitration requirements have effectively prevented these workers from ever recovering their stolen wages.
- **At least 225 employers** doing business in Maine unilaterally impose forced arbitration requirements on their workers, including Best Buy, Comcast, Dollar Tree, Dominos, DoorDash, Olive Garden, Uber, and Lyft.¹
- **More than 76,000 workers** in Maine earning less than \$13 per hour (private-sector, non-union) were subject to forced arbitration in 2019.
- Using available data, we estimate that 26% of them, or close to **20,000 workers, experienced wage theft** in 2019.
- An estimated 98% of them—over **19,400 workers—will never file a claim** to recover their stolen wages, due in part to employer-imposed collective and class-action waivers that prevent workers from combining forces in court or arbitration.
- The incidence of wage theft and other workplace violations increases during periods of high unemployment,² making this a particularly important time to strengthen workers' ability to enforce their rights.
- The state's public agencies, including the Maine Department of Labor (MDOL), are overburdened and under-resourced, lacking the capacity to recover these stolen wages. The MDOL, operating at its current capacity, could recover just a tiny fraction of the wages stolen each year from Maine workers subject to forced arbitration.

Maine should pass a whistleblower enforcement bill to increase state agencies' capacity to enforce Maine's employment laws

- Maine can act to address the lack of public enforcement capacity by passing a whistleblower enforcement bill like the one introduced during the last legislative session.³ Inspired by California's successful Private Attorney General Act, Maine's proposed version would allow workers to stand in the shoes of state enforcement agencies and seek civil penalties for wage theft and other employment violations such as sexual harassment and race discrimination. Because the whistleblowers are standing in the shoes of the state, some of the money recovered would generate significant new revenue for the MDOL and the Maine Human Rights Commission, allowing them to increase staffing levels and expand capacity to root out violations of workers' rights.

Congress should pass the Forced Arbitration Injustice Repeal Act

- The Forced Arbitration Injustice Repeal (FAIR) Act⁴ would eliminate corporate use of forced arbitration and class/collective action waivers in employment and civil rights disputes, restoring workers' right to come together and to bring their claims before a judge and jury. Restoring this right would likely generate increased compliance with federal and state wage-and-hour laws.

Background: Forced Arbitration and Class/Collective Action Waivers

- Few workers are aware that they have lost the important right to bring claims before a judge and jury. But nationwide, 56% of all private-sector non-union employees are now subject to forced arbitration by their employers, including 64.5% of workers earning less than \$13 per hour.⁵ These employer-imposed requirements deny workers the right to go before a judge and jury when their employer steals their wages.
- Forced arbitration requirements are increasingly imposed by corporations on workers as a condition of employment. That means an employer generally can fire or refuse to hire you for declining to give up your rights.
- Employers also routinely incorporate class/collective action waivers into forced arbitration requirements. These waivers prevent employees from banding together with their colleagues to challenge employer lawbreaking, whether in court or in arbitration. When workers are on their own, fears of employer retaliation and worse keeps them quiet, and they are less likely to come forward.⁶
- 59.1% of Black workers and 57.6% of women workers have arbitration requirements imposed upon them by their employers, making Black workers and women workers the most likely groups to be subject to forced arbitration. Moreover, 54.3% of Hispanic workers' have forced arbitration imposed on them, as do 55.6% of white workers and 53.5% of workers who are men.⁷
- Employers are rushing to impose forced arbitration requirements on their workers, including in some cases as a condition to return to work after a pandemic-induced furlough.⁸ By 2024 it is projected that, absent Congressional action, 80% of all private-sector non-union workers' employers will require forced arbitration and class/collective action waivers as a condition of employment.⁹

- Forced arbitration heavily favors employers.¹⁰ Faced with the reality of proceeding alone against their employer in a stacked forum, 98% of workers whose claims are subject to forced arbitration abandon or never bring their claims.¹¹ For those few who do go to arbitration, their recoveries are significantly lower than if a judge heard their case.¹²

Forced Arbitration's Impact on Mainers

The time is now to protect Maine workers from the devastating effects of forced arbitration. Many Maine workers who are underpaid are also frontline and essential workers, providing Mainers with essential services during the pandemic. High rates of unemployment increase the power imbalance between workers and their employers, leading to higher rates of wage theft and other workplace violations during recessions.¹³ For example, grocery store workers in Maine have complained of inadequate virus precautions in their workplaces, but many fear retaliation if they raise their concerns.¹⁴ The claim-suppressive effects of forced arbitration mean that employers who impose these requirements on their workers have very little incentive to comply with the law, ultimately exacerbating the power imbalance created by high unemployment. Sysco, a giant food delivery conglomerate with distribution systems throughout Maine, is just one example of an employer whose frontline Maine workers are subject to forced arbitration.¹⁵

Justice Denied: The Case of 3d Party Logistics

Consider another example of frontline workers from before the pandemic: that of approximately 50 drivers who delivered prescription drugs from the Portland area to hospitals and nursing homes throughout Maine.¹⁶ The drivers worked for a New York company called 3d Party Logistics (3PL) which paid the drivers per delivery rather than per hour, allegedly resulting in a failure of many drivers to receive overtime payments they were entitled to by law as employees. The drivers used their own cars, putting thousands of miles on their vehicles for which 3PL never compensated them. 3PL also required the workers to pay an Arizona company, Contractor Management Services (CMS), \$30 every week to cut their paychecks; a \$28/month fee to communicate with 3PL; and other fees that employers are not permitted to deduct from employees' paychecks. A few of the workers, including a Mainer named Robert Lowell, decided to sue on behalf of themselves and all of the other Maine 3PL drivers in order to try to recover the approximately *half a million dollars* they had allegedly lost through wage theft and illegal deductions.¹⁷

There was just one problem. Buried in the stack of paperwork that both 3PL and CMS had made the workers sign before they could begin work were two forced arbitration clauses and two class-action waivers—one of each from each company. Under these arbitration clauses, the cost of pursuing dozens of individual arbitrations, as opposed to a single court case, would likely equal or exceed what the workers would win in arbitration.¹⁸ A lengthy, expensive battle ensued in which the workers argued in federal court that the arbitration clauses were unfair and that they violated their federal right to advocate collectively to improve their working conditions. A federal judge agreed, but ultimately a divided Supreme Court, in a similar case,¹⁹ ruled that employers could force workers to arbitrate their claims individually. As a result, the federal judge subsequently determined that the Maine drivers were required to arbitrate individually against each company in two different states,

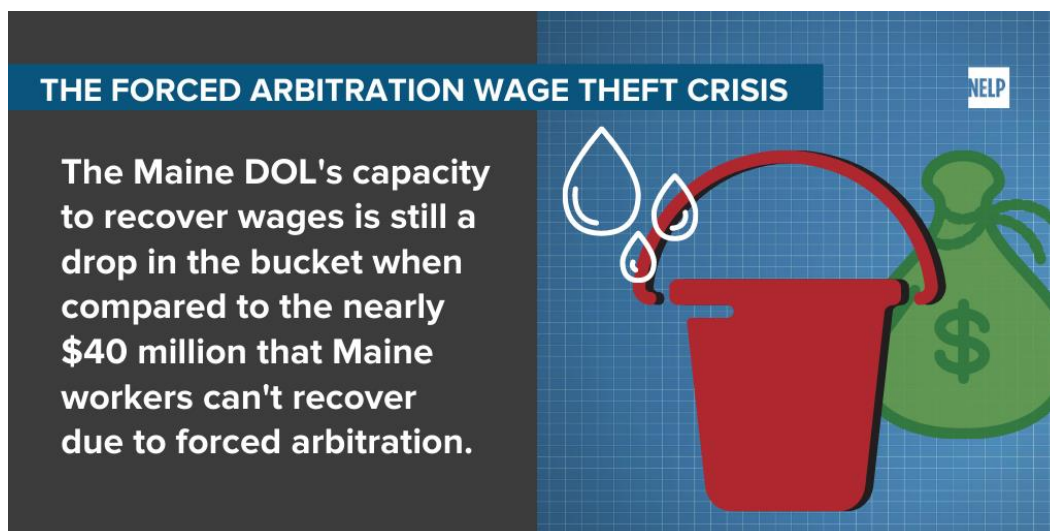
including against CMS in Arizona.²⁰ To this day, none of the 3PL workers have had their day in court (or in arbitration), nor have they recovered a single dollar of the approximately \$500,000 they believe they are owed.

Public Agencies Lack Capacity to Recover Stolen Wages

The U.S. Department of Labor (USDOL), the federal agency charged with enforcing the nation's wage-and-hour laws to root out wage theft, is extremely under-resourced, as has been well documented. For example, USDOL in 2019 employed 780 wage-and-hour investigators²¹ to detect violations among the 143 million workers covered by the nation's wage-and-hour laws,²² compared with 1,000 investigators for 22.6 million workers covered by those laws in 1948.²³

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The Maine Department of Labor and the Office of the Attorney General reported recovering \$103,187 in stolen wages in 2015 and \$218,074 in 2016, according to the Economic Policy Institute.²⁷ More recently, the MDOL has reported recovering \$363,180.47 in stolen wages for 363 workers in 2019.²⁸ The Department estimates its total stolen wages recovered for the year 2020, including cases still in process, amounts to \$423,490.48 for 488 workers.²⁹ While these recent numbers reflect an improvement on the state's 2015-16 public enforcement capacity, MDOL's total capacity to recover wages is still a drop in the bucket when compared to the nearly \$40 million that Maine workers in underpaid jobs subject to forced arbitration are prevented from recovering due to employer-imposed forced arbitration. Even if the MDOL's enforcement capacity were fully targeted at workers subject to forced arbitration, and was operating at its anticipated 2020 peak, this would represent just over 1% of the wage theft (1.06%) enabled by forced arbitration.



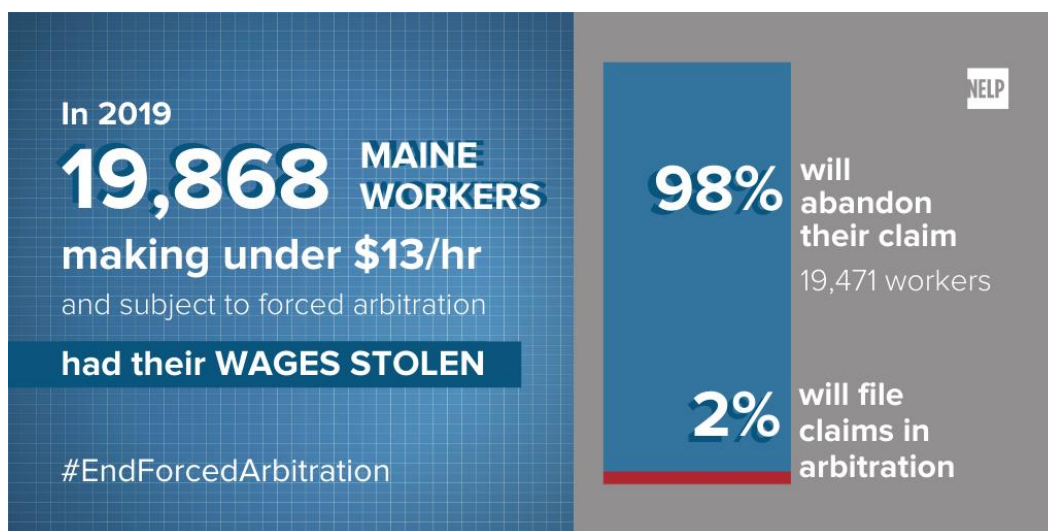
There is also a serious information gap that must be overcome by any agency looking to target enforcement at employers using forced arbitration, because there is no comprehensive public or private database tracking whether a given set of employees is subject to forced arbitration.³⁰ Without such information, it would be difficult for the MDOL or the Maine Attorney General to fully target enforcement efforts at employers that use forced arbitration.

For all these reasons, the state's public agencies cannot be expected to replace the role that workers and their attorneys have historically played in private enforcement of wage-and-hour law. Underenforcement means that unscrupulous employers have little incentive to comply with wage theft protection laws. This hurts workers, law-abiding employers, and Maine's economy.

Methodology: Finding More Than \$40 Million Owed to Maine Workers

An estimated 118,476 total private-sector non-union workers in Maine earned a wage of less than \$13 per hour in 2019.³¹ Based on Cornell professor Alexander Colvin's finding that 64.5% of private-sector non-union workers paid less than \$13 per hour are subject to forced arbitration,³² we calculate that 76,417 of these workers are required by their employers to submit to arbitration.³³ From there, we use available data and studies from the past 12 years to estimate that an estimated 19,868 of these workers (26%) have experienced wage theft in the last year and would likely have a claim for wage theft under federal or state law.³⁴

The claim-suppressive effect of forced arbitration was detailed in Cynthia Estlund's pathbreaking 2018 article, *The Black Hole of Mandatory Arbitration*. Estlund found that, faced with the prospect of having to submit their claims to forced arbitration, the vast majority of workers—98%—never file a claim at all.³⁵ With no effective access to justice, workers simply abandon their claims. Based on that finding, we calculate that 19,471 of the private-sector non-union workers earning less than \$13 per hour who are subject to forced arbitration will not file wage theft claims in arbitration, effectively abandoning their claims and any potential recovery.



Next, we rely on U.S. Department of Labor, Wage and Hour Division investigations conducted in FY 2019 in which the agency determined that employees were owed, on average, \$1,025 in back wages.³⁶ Furthermore, in a typical wage theft action for unpaid minimum or overtime wages filed under the Fair Labor Standards Act or the state equivalent, employees can recover both unpaid wages and liquidated damages in an amount equal to the amount of unpaid wages.³⁷ Maine law also provides that some plaintiffs are entitled to damages totaling *three times* the amount of unpaid wages.³⁸ We therefore assume that the average recovery for employees in our sample would be somewhere between \$2,050 and \$3,075.

Our estimated 19,471 Maine workers each recovering only the very low end of our average range, or \$2,050, would together recover \$39,915,757. Our average recovery is, in fact, somewhere between \$2,050 and \$3,075. We thus conservatively conclude that the 19,471 workers in Maine who make less than \$13 an hour, who experience wage theft and are subject to forced arbitration, and who do not file claims, are unable to recover the more than \$40 million through private enforcement actions in part due to the claim-suppressive effect of forced arbitration.



Endnotes

¹ Jeffrey Young, *Maine Businesses Using Forced Arbitration in Employment* (2020) (on file with authors).

² JANICE FINE ET AL., WASHINGTON CENTER FOR EQUITABLE GROWTH, MAINTAINING EFFECTIVE U.S. LABOR STANDARDS ENFORCEMENT THROUGH THE CORONAVIRUS RECESSION, at 2 (2020), <https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/>.

³ L.D. 1693, 129th Leg., Reg. Sess. (Me. 2020), http://legislature.maine.gov/legis/bills/bills_129th/billtexts/SP055801.asp

⁴ Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. (1st Sess. 2021).

⁵ See ALEXANDER J.S. COLVIN, ECONOMIC POLICY INSTITUTE, THE GROWING USE OF MANDATORY ARBITRATION, at 9 (2018), <https://www.epi.org/files/pdf/144131.pdf>.

⁶ See LAURA HUIZAR, NATIONAL EMPLOYMENT LAW PROJECT, EXPOSING WAGE THEFT WITHOUT FEAR: STATES MUST PROTECT WORKERS FROM RETALIATION (2019), <https://s27147.pcdn.co/wp-content/uploads/Retal-Report-6-26-19.pdf>.

⁷ Colvin, note 5, at 9.

⁸ Dave Jamieson, *These Furloughed Workers Must Sign Arbitration Agreements to Get Their Jobs Back*, HUFFPOST, July 22, 2020, https://www.huffpost.com/entry/workers-furloughed-coronavirus-arbitration-agreements_n_5f187c8ac5b6296fbf3cbd08.

⁹ KATE HAMAJI ET AL., CENTER FOR POPULAR DEMOCRACY & ECONOMIC POLICY INSTITUTE, UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK (2019), <https://populardemocracy.org/unchecked-corporate-power>.

¹⁰ See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECONOMIC POLICY INSTITUTE, THE ARBITRATION EPIDEMIC 19–21 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> (collecting studies showing that employee win rates in forced arbitration are much lower than in federal or state court); *id.* at 22–23 (collecting evidence of the “repeat player” advantage employers have in arbitration); AMERICAN ASSOCIATION FOR JUSTICE, THE TRUTH ABOUT FORCED ARBITRATION 27–28 (2019), <https://facesofforcedarbitration.com/wp-content/uploads/2019/09/Forced-Arbitration-Report-2019.pdf> (examining data from

two largest arbitration providers and finding that only 2.5% of employment cases resulted in an employee award that was not outweighed by an even larger employer award); *see also* HAMAJI at 3 (explaining that forced arbitration requirements can “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.”).

¹¹ Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 696 (2018),

<https://scholarship.law.unc.edu/nclr/vol96/iss3/3/>.

¹² KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, *THE ARBITRATION EPIDEMIC* 19 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf>.

¹³ *See* FINE at 2, 7–13.

¹⁴ Ellie Ousfar, *Maine’s grocery stores change for COVID-19, but some employees want more protection*, NEWS CENTER Maine, June 26, 2020, <https://www.newscentermaine.com/article/news/health/coronavirus/maines-grocery-stores-change-for-covid-19-but-some-employees-want-more-protection/97-a8f8226a-eac4-4d89-afb7-95c75ae67bb6>.

¹⁵ Jeffrey Young, *Maine Businesses Using Forced Arbitration in Employment* (2020) (on file with authors).

¹⁶ *Curtis v. Contract Mgmt. Servs.*, No. 1:15-cv-00487-NT, 2016 WL 5477568 (D. Me. Sept. 29, 2016). Unless otherwise noted, the facts described in this section are based on this decision.

¹⁷ Based on conversation with Plaintiffs’ counsel (notes on file with authors).

¹⁸ For example, one worker (allegedly owed, for instance, \$10,000) would have to pursue two arbitrations in two different states. That would require two arbitration filing fees; dozens of hours spent traveling; multiple plane tickets for the workers, their attorneys and any witnesses; days spent missing work in order to travel and appear at the arbitration proceedings; and dozens of attorney hours preparing for and appearing at each arbitration. These costs would, in all likelihood, amount to more than \$10,000—and, of course, there is no guarantee that the worker would be awarded \$10,000—or their attorney’s fees and costs—by the arbitrator.

¹⁹ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1622–23, 1624–28 (2018) (holding that the Federal Arbitration Act requires courts to enforce class/collective action waivers incorporated into forced arbitration requirements, and that Section 7 of the National Labor Relations Act does not protect workers’ right to engage in collective litigation).

²⁰ *Curtis v. Contractor Mgmt. Servs., LLC*, No. 1:15-cv-00487-NT, 2018 WL 6071999, at *8–11 (D. Me. Nov. 20, 2018).

²¹ U.S. GOV’T ACCOUNTABILITY OFFICE, *FAIR LABOR STANDARDS ACT: TRACKING ADDITIONAL COMPLAINT DATA COULD IMPROVE DOL’S ENFORCEMENT* 13 (2020), <https://www.gao.gov/assets/gao-21-13.pdf>.

²² *Id.* at 1 & n.1. This represents the number of workers U.S. GAO estimates are covered by the Fair Labor Standards Act’s protections.

²³ *See* DANIEL J. GALVIN, *Detering Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSPECTIVES ON POLITICS 324, 325 & n.8 (2016), <https://faculty.wcas.northwestern.edu/~djg249/galvin-wage-theft.pdf>.

²⁴ *See* CENTER FOR POPULAR DEMOCRACY, *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back* 6 (2019), <https://www.populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.

²⁵ *See* Testimony of Michael Roland, Maine Dep’t of Lab., to the Committee on Lab. & Housing of the Maine Legislature on LD 616, at 2:11:10–2:13:00 (Mar. 15, 2021) (stating that MDOL currently has 5 wage & hour inspectors and that this is “not nearly enough” for the Department to be effective), <https://youtu.be/NV2J5eZdQUo?t=7870>.

²⁶ CENTER FOR POPULAR DEMOCRACY, *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back* 6 (2019), <https://www.populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.

²⁷ CELINE McNICHOLAS ET AL., *ECONOMIC POLICY INSTITUTE, TWO BILLION DOLLARS IN STOLEN WAGES WERE RECOVERED FOR WORKERS IN 2015 AND 2016—AND THAT’S JUST A DROP IN THE BUCKET* 4, App’x Tbl. A2 (2017).

²⁸ MAINE DEP’T OF LABOR, *2021 ANNUAL REPORT ON WAGE AND HOUR COMPLAINTS AND VIOLATIONS* 4 tbl. 1 (Feb. 2021) (on file with authors).

²⁹ *Id.*

³⁰ There are a few databases that capture whether an employer has ever used forced arbitration for employee disputes. *See, e.g., Does your company require employees to sign arbitration agreements?*, VOX (2018), <https://apps.voxmedia.com/at/vox-forced-arbitration/>. But such data sets only reflect past arbitrations; they do not indicate whether a given employee or set of employees are subject to forced arbitration.

³¹ Based on Economic Policy Institute analysis of 2019 Current Population Survey microdata from the U.S. Bureau of Labor Statistics (on file with authors).

³² COLVIN at 9.

³³ This number is a conservative estimate, as the number of workers subject to forced arbitration has grown since the Supreme Court’s 2018 decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1622–23, 1624–28 (2018) (holding that the Federal Arbitration Act requires courts to enforce class/collective action waivers incorporated into forced arbitration requirements, and that Section 7 of the National Labor Relations Act does not protect workers’ right to engage in collective litigation); *see also* Celidh Gao, National Employment Law Project, *The Supreme Court’s Decision in Epic Systems—What You Need to Know* (June 5, 2018), <https://www.nelp.org/blog/supreme-courts-decision-epic-systems-need-know/>.

The Economic Policy Institute and the Center for Popular Democracy project that more than 80% of private-sector non-union workers will be subject to forced arbitration and class/collective action waivers by 2024. *See* Hamaji, n. 6 at 4, 22. It is therefore likely the percentage of workers earning less than \$13 per hour who are subject to forced arbitration is now well over 64.5%.

³⁴ This is also a conservative estimate based on a groundbreaking 2009 NELP study. ANNETTE BERNHARDT ET AL., NATIONAL EMPLOYMENT LAW PROJECT, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES*, at 20–21 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf> (finding 26% of low-wage workers surveyed in three cities were paid less than the legally required minimum wage in the previous workweek; 19% had unpaid or underpaid overtime violations; and 68% of workers experienced at least one pay-related violation in the previous week, including off-the-clock violations, meal break violations, improper paystubs, and improper deductions). *See also* DAVID COOPER & TERESA KROEGER, ECONOMIC POLICY INSTITUTE, *EMPLOYERS STEAL BILLIONS FROM WORKERS’ PAYCHECKS EACH YEAR* 2, 9 (2017), <https://www.epi.org/files/pdf/125116.pdf> (finding that 17% of workers in low-wage jobs in the 10 most populous states experienced minimum wage violations *alone*); Jenny Montoya Tansey, Public Rights Project, *Voices from the Corporate Enforcement Gap* 9 (2019), <https://www.publicrightspoint.org/press/enforce-mentgap> (finding 39% of respondents reported that they had experienced wage theft, including being required to work off the clock, having tips stolen, being paid below minimum wage, and not being paid overtime). Notably, these studies looked at wage theft generally, not just for those workers subject to forced arbitration. Given the lack of compliance incentive for employers who used forced arbitration, wage theft is likely higher among such employees than in the general population.

³⁵ Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 696 (2018),

<https://scholarship.law.unc.edu/nclr/vol96/iss3/3/>.

³⁶ *See* U.S. DEPARTMENT OF LABOR, *Wage and Hour Division Data for Fiscal Year 2019*, <https://www.dol.gov/agencies/whd/data>. This number again reflects a conservative estimate. A 2017 Economic Policy Institute report found that the average annual lost wages due to minimum wage violations alone, in the 10 most populous states, was \$3,300. COOPER & KROEGER at 10, tbl. 1. Furthermore, Maine’s minimum wage is higher than the national average, so a nationwide sampling of wage theft cases is likely to produce a lower average than the true Maine average.

³⁷ 29 U.S.C. § 216(b); 26 ME. REV. STAT. § 670.

³⁸ 26 M.R.S.A. § 626-A (“Upon a judgment being rendered in favor of any employee or employees, in any action brought to recover unpaid wages... such judgment includes, in addition to the unpaid wages or health benefits adjudged to be due... an additional amount equal to twice the amount of unpaid wages as liquidated damages.”).