SolidarityLaw

TESTIMONY OF MAINE EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF LD 1711, AN ACT TO ENHANCE ENFORCEMENT OF EMPLOYMENT LAWS

My name is Jeffrey Neil Young. I am an attorney with Solidarity Law and practice in Cumberland. I serve as an executive Board member of the National Employment Lawyers Association (NELA) and as vice-president of the Maine Employment Lawyers Association (MELA). NELA is the largest organization of civil rights lawyers in the country with about 4,000 national and affiliate attorney members. MELA is the largest organization of civil rights lawyers in Maine with about 75 member attorneys who represent employees in labor and employment matters across the state as at least 2/3 of their practice. I have been practicing labor and employment law for almost 40 years, the last 30 years here in Maine.

MELA urges this Committee to enact LD 1711, An Act to Enhance Enforcement of Employment Laws. The Committee has heard me testify regarding a number of bills this session; I've appreciated the opportunity to do so and even moreso the careful consideration the Committee takes with its work. This likely is the last bill I will be testifying about this session, and I want the Committee to know that in my view it is the single most important labor and employment bill to come before it this session.

Why do I say that? I say that because all of us—workers, Mainers, Americans-- are losing our rights through the increasing use of forced arbitration agreements. Congress, this Legislature, city councils—all our representatives--enact laws in the hope of improving people's lives. But those laws are not worth the paper they are written on—or the cloud they are stored on—if they cannot be enforced.

And that's precisely the problem that forced arbitration presents. Forced arbitration—which was virtually unknown 30 years ago—is pernicious because it serves not just to repress claims, but to suppress claims altogether. It does that by requiring employees to bring their claims privately and individually rather than publicly and as a group. As an attorney, if someone comes to me and is owed $1000, it generally isn't going to make economic sense for me to pursue a single individual's claim. And if 50 individuals come to me with the same claim, but I have to bring 50 separate cases in arbitration, it still probably isn't going to make sense. But if there are 50 individuals, and they can band together in a class action in court, now it begins to make sense.

Solidarity Law, PLLC 9 Longmeadow Road, Cumberland Foreside, Maine 04110 207.844.4243 jyoung@solidarity.law

Claim suppression is not the only evil. All of us benefit from having claims tried in a public tribunal, not in a private closed door secret proceeding. When claims are tried in a court of law, the public learns if someone has erred, has stolen workers' wages, has discriminated on the basis of race or sex or disability. Not only is the wrongdoer revealed for all to see, but the public shaming has a deterrent effect on would-be wrongdoers. That deterrent effect is lost when employees are forced to arbitrate their disputes.

This Committee repeatedly has asked for statistical evidence to support its taking action. I have attached that statistical evidence as Exhibit A—225 companies doing business in Maine which I've been able to identify as using forced arbitration. And those are the ones I've been able to identify; undoubtedly there are hundreds if not thousands more.

The situation only promises to get worse, not better. It is estimated that in 3-5 years, some 80% of US employers will be using forced arbitration agreements. This assault is unique to the United States. Three years ago, I spoke in Buenos Aires at an international labor and employment law conference attended by lawyers from 21 industrialized countries around the world, including most of Europe and Latin America; the concept of forced arbitration of employment disputes was, to make a bad pun, totally foreign to them.

I want to be clear that MELA is not opposed to arbitration altogether. In many instances, arbitration can be an effective and expeditious means to resolve disputes. But arbitration should be voluntary and agreed upon when a dispute arises, not forced upon an employee at the outset of employment when she is being asked to sign all types of forms and paperwork.

LD 1711 is an innovative approach to provide the Maine Department of Labor with additional funds to enforce Maine's many labor laws at NO additional cost to Maine taxpayers. There should be no fiscal note with LD 1711 because between 70-80% of the fines collected for labor law violations will go to the State which can use the money in turn to hire more investigators to ensure compliance with the law. Any start-up costs should be mostly, if not entirely, defrayed by the $75 filing fee.

Right now, the Maine DOL employs only 5 investigators, and all they can do is respond to complaints. There are insufficient resources to engage in proactive audits to insure corporate accountability and compliance, for example, with Maine's wage and hour, workers' compensation, and health and safety laws.

Although the workforce in Maine has expanded significantly over the last 40 years by 61%, from 387,800 to 622,700 non-farmworkers,[1] personnel at the MDOL

---

[1] Maine State **Annual** Report 2016-2017, https://www.maine.gov/budget/sites/maine.gov.budget/files/inline-files/2016-

has declined by 21%, from 702 employees to 552 employees.[2] To exacerbate things even more, the MDOL's budget has decreased by 59% during the same period when adjusted for inflation.[3] Had the MDOL merely kept up with our growing workforce, it would have 1130 full-time employees-or more than double its current workforce! And of course, this doesn't take into account the numerous labor and employment protections which have been enacted during 1977-2020.

Let me spend a moment talking more specifically about how this bill would work. In essence, the bill encourages employees to act as whistleblowers and private attorney generals to enforce labor and employment laws. There is a long tradition in this country dating back at least to the Civil War of employees blowing the whistle on employers that are cheating the government out of revenue. Those claims included profiteers selling Joshua Chamberlain and the Union army uniforms at exorbitant costs and providing rancid meat. As a result, in 1863 Congress passed the Lincoln Law, or False Claims Act, awarding whistleblowers bringing suit in the name of the government a percentage of the money recovered for overcharging the government. Perhaps the most recent example familiar to everyone was the caseof employees blowing the whistle on unscrupulous contractors charging the government exorbitant amounts for toilet seats.

LD 1711 would allow employees and advocacy groups (like their union representatives, MEJP, ILAP, and the like) to notify the Maine Department of Labor in writing of alleged violations of Maine's labor laws. The MDOL and the Attorney General's office would then have an exclusive period of 180 days to investigate the claim and bring a public enforcement action. If the State does not do so, then the whistleblower(s) or their representatives can file suit in behalf of the State.

2017AnnualReportGrayscale.pdf, 172; Maine State Government Annual Report 1976-2017, http://lldc.mainelegislature.org/Open/Rpts/ik2835 b87a 1977.pdf, 516.
[2] Maine State Annual Report 2016-2017, https://www.maine.gov/budget/sites/maine.gov.budget/files/inline-files/2016-2017AnnualReportGrayscale.pdf, 172; Maine State Government Annual Report 1976-2017, pg. 516, http://lldc.mainelegislature.org/Open/Rpts/ik2835 b87a 1977.pdf, 516.
[3] Maine State Annual Report 2016-2017, https://www.maine.gov/budget/sites/maine.gov.budget/files/inline-files/2016-2017AnnualReportGrayscale.pdf, 172; Maine State Government Annual Report 1976-2017, pg. 516, http://lldc.mainelegislatme.org/Open/Rpts/ik2835 b87a 1977.pdf, 516.

Once suit is filed, the State can intervene as a matter of right within 30 days and upon good cause at any later date. If the State intervenes, it then assumes primary responsibility for the action with reasonable compensation, including attorneys' fees and costs, to be paid to the whistleblower. If the State does not intervene, then the relator's counsel manages the litigation. Any settlement must be approvedby the court as fair, adequate, reasonable, and in the interest of the public.

If the matter is settled or goes to trial and the whistleblower (or State) prevails, then the court is to assess penalties as set forth by statute or, if no statutory provision exists, of $250 per person for each 2-week period. 70% of the penalties goto the State if it has not filed suit or intervened; 80% if has done so. The whistleblower is entitled to 20-30% of the recovery.

California has a mechanism, the Private Attorney General's Act (PAGA), similar, albeit not identical to LD 1711. In 2018, California recovered over $34 million in penalties to help fund its Labor Department.

How does LD 1711 relate to forced arbitration? Because the whistleblower is acting in the name of the State, s/he is not bound by any agreement to arbitrate the penalty claims.

MELA recognizes that LD 1711 is a complicated bill that requires careful consideration. However, in these times of fiscal restraint, innovative measures need to be taken to protect both the taxpayer's purse and working people's rights. LD 1711 presents just such a creative mechanism that will cost the taxpayers nothing, bring in needed dollars to help end the enforcement crisis, while at the same time promote corporate responsibility.