Testimony of Hugh Baran
Senior Staff Attorney & Skadden Fellow, National Employment Law Project

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House Bill 2205: The Just Enforcement Act
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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 range of employment policy issues.

NELP strongly supports HB 2205 to give Oregon workers the power they need to enforce their rights at work.

Every worker deserves to be paid for a fair day's work and have their rights protected no matter where they work or how much they make.

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 Oregon enacted its own minimum wage and overtime laws.

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, especially 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.[2] A 2014 report by the Economic Policy Institute (EPI) estimated that U.S. workers lose over $50 billion annually due to wage theft.[3] A 2017 EPI study found that workers in the 10 most-populous states lose $8 billion annually due to minimum wage violations alone.[4]

In Oregon, wage theft claims submitted by workers between 2006 and 2019 amounted to more than $50 million.[5] Workers most acutely affected by wage theft are more likely to be womxn, immigrants, and BIPOC workers who work in low-wage, and labor intensive industries - as well as in rural communities with high need for workers, including farm-labor, processing plants, meat packing plants, and frozen foods.

But the growing use by employers of forced arbitration requirements and class/collective action waivers has jeopardized Oregon workers' ability to enforce state labor protections, hurting workers, law-abiding employers, and the state coffers.

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.[6] These 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 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 are subject to forced arbitration by their employers, making Black workers and women workers the most likely groups to be subject to forced arbitration.[7] Moreover, 54.3% of Hispanic workers are subject to forced arbitration, as are 55.6% of white workers and 53.5% of men.[8]

Forced Arbitration Is Stacked Against Workers

Forced arbitration heavily favors employers in several significant ways:

- **Repeat Player Bias:** Unlike judges, arbitrators are in business, and they want to earn repeat business. Employers such as Darden Restaurants (the parent company for Olive Garden) are the private arbitrators' 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.[9]

- **Employer-Selected Procedural Rules:** In court, employees and employers are equally bound by the same 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 in the midst of 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.[10]

- **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.

- **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, class/collective action waivers are routinely incorporated 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 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.

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.[11] 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*. [12]

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.[13] 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.[14]

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.[15]

Public Enforcement Resources are Not Sufficient to Address the Wage Theft Crisis

Meanwhile, over the past few decades, Oregon state agencies charged with enforcing important labor protections have experienced a steady decline in funding and resources, while the size of Oregon's workforce has grown. Compounded by the COVID-19 pandemic, wildfires, and an economic crisis those agencies have been overwhelmed by complaints to which they do not have the capacity to respond.

Furthermore, a lack of outreach, accessible information and a fear of retaliation for speaking out has left Oregon's most vulnerable workers—those in agriculture, manufacturing, retail, and other low-wage industries—with little trust in the system that exists to protect them.

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.

Conclusion

The Just Enforcement Act would provide workers with a voice in their workplace and create a revenue stream for state agencies to increase enforcement capacity. Providing an avenue for workers to partner with trusted community organizations to file suits on the state's behalf would allow workers who fear speaking out alone and risking their jobs to have the community at their backs while they do so. NELP urges you to support HB 2205.

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] 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.

[3] 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.

[4] DAVID COOPER & TERESA KROEGER, ECON. POLICY INSTITUTE, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 2, 9 (2017), https://www.epi.org/files/pdf/125116.pdf.

[5] JANET BAUER, OREG. CTR. FOR PUBLIC POLICY, LACK OF TRUE PENALTIES EXACERBATES WAGE THEFT IN OREGON (2021), https://www.ocpp.org/2021/01/20/lack-true-penalties-exacerbates-wage-theft-oregon.

[6] *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.

[7] *Id.* at 9.

[8] *Id.*

[9] *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).

[10] *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/doordash-accused-of-changing-driver-rules-to-block-mass-arbitration-campaign-idUSKBN1XU2U2; *see also* Vin Gurrieri, *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/doordash-ordered-to-pay-12m-to-arbitrate-5000-labor-disputes/.

[11] *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/.

[12] 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/.

[13] STONE & COLVIN at 19.

[14] *Id.*

[15] 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.