



Legislative Affairs
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2021-2022 Legislative Memorandum

**Subject: Empowering People in Rights Enforcement
“EmPIRE” Worker Protection Act
A.5876-A (Joyner) / S.12-A (Hoylman)**

Position: SUPPORT

New Yorkers deserve real access to justice when they have been harmed. Access to the courts to seek meaningful redress of grievances is a fundamental right and a cornerstone of our democracy.¹ “In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”²

Over the past decade, New York has enacted several truly historic pieces of legislation such that New Yorkers now find themselves protected by some of the most progressive labor laws in the nation – including increases to the minimum wage, paid family leave, paid sick time, workplace protections against airborne infectious disease, expanded rights for domestic workers and farmworkers, and enhanced protections against sexual harassment.

These laws are rendered meaningless, however, without robust enforcement. Lack of enforcement means not only that individual rights cannot be vindicated, but also that employers are free to violate the law because they know they will not be held accountable. Unfortunately, in New York there exist two current obstacles to meaningful enforcement of labor law: the increased use of forced arbitration and nondisclosure agreements in employment contracts, and insufficient resources allocated to the NYS Department of Labor (DOL).

The EmPIRE Worker Protection Act (A.5876-A / S.12-A) would significantly increase the state’s capacity to enforce labor standards and critical workers’ rights protections by creating a mechanism that allows private individuals to bring whistleblower lawsuits on behalf of the State.

To ensure meaningful enforcement of crucial labor laws and safeguard recent legislative accomplishments, the New York Civil Liberties Union calls on the state legislature to pass the EmPIRE Worker Protection Act.

¹ *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

² *Id.*

Forced arbitration, collective action waivers and non-disclosure agreements (NDAs) compromise enforcement of labor protections.

If you've worked in corporate America, you have likely signed a forced arbitration agreement: a promise that, if any disputes arise between you and your employer, you won't sue. Hidden in the fine print of a contract, which you may not even remember signing, is language that says you've agreed to give up your right to go to court, or your right to take collective action with your co-workers against your employer, or even your right to disclose your employer's unlawful acts.

It is estimated that fifty-five percent of New York employers use forced arbitration clauses in their employment contracts.³ Moreover, mandatory arbitration is particularly common in low-wage industries like food service,⁴ airport facilities,⁵ hospitality and retail.⁶ These industries employ immigrants, people of color and women at a disproportional rate. Nationwide, it is estimated that, by 2024, forced arbitration will be in place in over eighty percent of workplaces, covering more than eighty-five million workers.⁷

At first glance, arbitration seems like an inexpensive, efficient, and worker-friendly way to resolve a dispute – but the reality is often quite different. Several features of arbitration can make it virtually impossible for workers to successfully recover for their injuries. Proving claims is more difficult in arbitration than in litigation: arbitration often limits both the documents that employers must provide and the number of witnesses claimants may call. Arbitration agreements may also severely narrow statutes of limitations, effectively barring lawsuits from their inception. Arbitration is frequently cost-prohibitive, requiring employees who have claims to front costs for hefty private arbitrator fees and other expenses; recovery of attorneys' fees is unavailable. Outcomes are generally binding, with no right to appeal and no opportunity for review or reconsideration. Finally, and perhaps most worrisome, the

³ Alexander Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (April 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

⁴ Levi Sumagaysay, *Google, other Tech Cafeteria Workers asked to Sign Mandatory Arbitration Agreements*, Mercury News (Jan. 28, 2019), <https://www.mercurynews.com/2019/01/24/google-other-tech-cafeteria-workers-asked-to-sign-mandatory-arbitration-agreements/>.

⁵ Juliana Feliciano Reyes, *Philly Airport Workers are being Forced to Sign Away Their Rights to take their Employer to Court*, Inquirer (Sept. 17, 2019), <https://www.inquirer.com/news/forced-arbitration-agreements-otg-unite-here-20190917.html>.

⁶ Daphne Howland, *Lowe's Reportedly Compels Managers to Sign Arbitration Agreements*, Retail Dive (May 30, 2018), <https://www.retaildive.com/news/lowes-reportedly-compels-managers-to-sign-arbitration-agreements/524560/>.

⁷ Center for Popular Democracy, *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and how Workers are Fighting Back* (May 2019), <https://populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf>.

nonpublic nature of arbitration gives rise to secrecy in proceedings, which helps wrongdoers evade public accountability.

Like mandatory arbitration, collective or class action waivers and NDAs create roadblocks to meaningful recovery and undermine employer accountability. Low-wage workers rely on collective or class action lawsuits in order to pay legal fees and gather the evidence needed to show patterns of abuse or discrimination. When they are forced to waive access to collective action as a condition of employment, workers face often insurmountable odds against righting employer wrongs. And, like private arbitration, NDAs that prohibit workers from publicizing their experiences, victories, and recoveries all but ensure that employers will be insulated from scrutiny – and the same type of abuse will most likely happen again.

With the deck stacked against them, it's no wonder that employees are less likely to pursue discrimination cases in arbitration – and when they do enter arbitration, they are less likely to win. A recent examination of thirty years of sexual harassment claims brought before Wall Street's arbitration body, the Financial Industry Regulatory Authority, found that in thirty years, only seventeen women on Wall Street had won sexual harassment claims in industry arbitration.⁸ Taken together with an under-resourced state DOL and an ever-present fear of retaliation, it should come as no surprise when employers act as though they can violate the law without recourse.

Recent attempts to preclude the enforceability of employment contracts limiting access to court have been unsuccessful.

Attempts to prohibit the use of forced arbitration agreements and collective action waivers have been unsuccessful. In 2018, the United States Supreme Court, in the *Epic Systems* case, approved the continued use of individual arbitration agreements as conditions of employment. In that case, the worker who brought the claim argued that his right to collective legal action was guaranteed by the National Labor Relations Act (NLRA) and was thus violated by the arbitration agreement; but the Court held that the Federal Arbitration Act (FAA) preempts the NLRA in such circumstances.⁹

Similarly, in June of 2019, the United States District Court for the Southern District of New York held that the FAA also preempts legislation prohibiting mandatory arbitration of sexual harassment claims.¹⁰ At issue was an important provision of New York's recently enacted Sexual Harassment Law¹¹ nullifying existing mandatory arbitration agreements in sexual harassment cases. Thwarting the will of the New York legislature and Governor Cuomo, the court held that New York could not prohibit mandatory arbitration in sexual harassment cases.

⁸ Susan Antilla, *In 30 Years, Only 17 Women Won Sexual Harassment Claims Before Wall Street's Oversight Body*, Type Investigations (April 18, 2018), <http://susanantilla.com/in-30-years-only-17-women-won-sexual-harassment-claims-before-wall-streets-oversight-boday/>.

⁹ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

¹⁰ *Latif v. Morgan Stanley & Co*, 2019 WL 2610985 (S.D.N.Y. June 26, 2019).

¹¹ N.Y. Executive Law § 290 et seq.

The EmPIRE Worker Protection Act will empower New Yorkers to combat wage theft, equal pay violations, sexual harassment, unsafe working conditions, and other forms of employee exploitation that undermine New York's labor laws.

The EmPIRE Worker Protection Act creates a mechanism – similar to the long established *qui tam* court action – that allows workers and labor organizations to file claims against their employers in court and on behalf of the State. It also allows workers to designate representative labor and nonprofit workers' rights organizations to file claims, meaning vulnerable workers will be able to rely on trusted organizations to represent them in the same way that the Commissioner of Labor would.

EmPIRE also encourages robust private enforcement of state labor law, by awarding private actors who enforce civil penalties a share of financial recovery. Private plaintiffs would be awarded forty percent of all civil penalties where DOL did not intervene. The remaining sixty percent of penalties would be distributed to DOL to fund public enforcement efforts. This incentivizes private actors to play an active role in labor law enforcement on their own behalf, and, in so doing, generate revenue for the State. It is estimated that EmPIRE would generate nearly \$18 million annually for DOL.¹²

Conclusion

By passing the EmPIRE Worker Protection Act, New York can reaffirm its position as a leader in workers' rights and make real the promises of the \$15 minimum wage, paid family leave, paid sick time, workplace protections against airborne infectious disease, expanded rights for domestic workers and farmworkers, and enhanced protections against sexual harassment for all New Yorkers.

The NYCLU urges lawmakers to support and swiftly pass the EmPIRE Worker Protection Act, A.5876-A / S.12-A.

¹² Make The Road NY, *Coming Up Short: The State of Wage Theft Enforcement in New York* (April 2019), https://maketheroadny.org/wp-content/uploads/2019/04/Coming-Up-Short_-The-State-of-Wage-Theft-Enforcement-in-NY-4_8_19.pdf.