NELP NATIONAL EMPLOYMENT LAW PROJECT

DATA BRIEF | UPDATED JUNE 2021

Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs

By imposing forced arbitration, employers thwarted workers' efforts to recover billions in stolen wages; wage theft losses totaled over $9.2 billion for workers who made less than $13 per hour.

By Hugh Baran & Elisabeth Campbell

Corporations are increasingly imposing forced arbitration requirements on their workers as a condition of employment, denying them the right to go before a judge and jury when their employer steals their wages, such as by failing to pay the legally required minimum wage and overtime. Black workers (59.1%) and women workers (57.6%) are the most likely to have forced arbitration requirements imposed on them by their employers.

Key Findings

- **In 2019, more than $9.27 billion** owed to U.S. workers earning less than $13 an hour (private-sector, non-union) was pocketed by employers who forced arbitration on their employees. Employer-imposed forced arbitration requirements have effectively prevented these workers from ever recovering their stolen wages.
- **17.75 million** workers in the United States 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 **over 4.6 million** workers, have experienced wage theft in the last year.
- An estimated 98% of them—over **4.5 million** workers—will never file a claim at all to recover their stolen wages, due in part to employer-imposed collective and class-action waiver that prevent workers from combining forces in court or in arbitration.
- Public agencies are overburdened and under-resourced, lacking the capacity by themselves to focus on and recover these stolen wages. NELP finds that public agencies, operating at their current capacity, could recover less than 4% of those wages—but only if they redirect all their resources to serving workers subject to forced arbitration.

The federal solution: Pass the Forced Arbitration Injustice Repeal Act

- The Forced Arbitration Injustice Repeal (FAIR) Act would eliminate the use of forced arbitration and class/collective action waivers in employment and civil rights disputes, restoring workers' right 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.
- Total compliance is highly unlikely, and there are other factors that may prevent employees from filing claims post-FAIR. But even just 20% compliance by these workers' employers—via both voluntary compliance and increased private enforcement by workers—would put $1.8 billion back in workers' pockets annually.

The state solution: Pass whistleblower enforcement laws inspired by California's Private Attorneys General Act

- States can act to address the lack of public enforcement capacity by passing whistleblower enforcement laws, inspired by California's Private Attorneys General Act (PAGA). These laws allow workers to stand in the shoes of their state's department of labor and seek civil penalties for wage theft. They also generate millions in new revenue for state agencies, allowing them to increase staffing levels and expand their capacity to root out wage theft. The Empowering People in Rights Enforcement (EmPIRE) Act in New York is an excellent model of such legislation.

Background: Forced Arbitration & 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.[1] 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.[2]
- 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.[3]
- 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.[4] 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.[5]

- Forced arbitration heavily favors employers.[6] 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.[7] For those few who do go to arbitration, their recoveries are significantly lower than if a judge and jury heard their case.[8]

Forced Arbitration's Impact on Workers

The time is now to protect workers from the devastating effects of forced arbitration. Many workers who are underpaid are also frontline and essential workers, providing 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.[9] 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.

Again, while individual workers could pursue one-by-one arbitrations, the vast majority (98%) of workers simply abandon their claims rather than proceed in arbitration. That means employers who systematically violate our employment laws can evade judicial findings of liability as well as any significant financial consequences in arbitration that would compel them to change their ways.

Justice Denied: The Case of 3d Party Logistics

Consider one example of workers affected by forced arbitration and class waivers, from before the COVID-19 pandemic: the approximately 50 drivers who delivered prescription drugs from the Portland area to hospitals and nursing homes throughout Maine.[10] 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 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.[11]

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.[12] 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,[13] 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.[14] 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.

How We Arrived at Our Findings

Estimating workers earning less than $13/hour subject to forced arbitration

As of 2019 there were 27,531,138 total private-sector non-union workers in the United States earning a wage of less than $13 per hour.[15] Based on Alexander Colvin's finding that 64.5% of private-sector non-union workers earning less than $13 per hour are subject to forced arbitration,[16] we calculate that 17,757,584 of these workers are required by their employers to be subject to forced arbitration.

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*.[17] The Economic Policy Institute and the Center for Popular Democracy project that, absent Congressional action, more than 80% of private-sector non-union workers will be subject to forced arbitration and class/collective action waivers by 2024.[18] It is therefore likely the percentage of workers earning less than $13 per hour who are subject to forced arbitration was already over 64.5% in 2019.

Estimating how many of these workers experience wage theft

Based on available data and studies from the past 13 years, we estimate that at least 4,616,972 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.

This is a conservative estimate grounded in the findings of a landmark NELP study, published in 2009, that found 26% of low-wage workers surveyed in three cities were paid less than the legally required minimum wage in the previous workweek, and that 19% had unpaid or underpaid overtime violations.[19] The same report found that 68% of these 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.

Two more recent studies strengthen our conclusion that 26% represents a conservative estimate of wage theft:

- A 2017 Economic Policy Institute study of workers in the 10 most populous states found that 17% of workers in low-wage jobs experienced wage theft through minimum wage violations alone; that study did not measure the additional percentage of overtime and other wage theft violations.[20]
- In a 2019 Public Rights Project survey, 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.[21]

If anything, 26% is a very conservative estimate of wage theft among low-wage workers subject to forced arbitration. We believe the percentage is likely even higher, due to the lack of compliance incentive for these employers as a result of their decision to impose forced arbitration on their workers.

Estimating the number who do not pursue wage theft claims

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.[22] With no effective access to justice, workers simply abandon their claims.

Based on that finding, we calculate that 4,524,632 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.

Estimating the unrecovered wages of those who forgo wage theft claims

In U.S. Department of Labor Wage and Hour Division investigations conducted in FY 2019, the agency determined that employees were owed, on average, $1,025 in back wages.[23] But in a wage theft action filed under the Fair Labor Standards Act, employees can recover both unpaid wages and an equal amount of liquidated damages.[24] The Wage and Hour Division's calculations do not include liquidated damages.

We therefore assume that the typical employee in our sample would recover the full average amount of unpaid wages, and an equal amount of liquidated damages, if they filed a wage theft claim, totaling $2,050 per employee.

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.[25] In addition, actual recoveries may be higher in states and cities with higher minimum wages. On January 1, 2019, the minimum wage increased in 19 states and 21 cities. In those jurisdictions, and in others that had already raised minimum

wages, we expect that the average wage theft recovery of a low-wage worker subject to forced arbitration would be higher than in jurisdictions stuck at the $7.25 federal minimum wage. And in some jurisdictions, treble damages for wage theft claims are available, meaning a worker owed an average of $1,025 in back wages would be able to recover twice that amount as liquidated damages, for a total recovery of $3,075. For all these reasons, our estimated average recovery of $2,050 per worker is likely an underestimate.

Accordingly, the 4,524,632 workers earning less than $13 an hour who are subject to forced arbitration, and do not file claims, are unable to recover over $9.27 billion through private enforcement actions because of the claim-suppressive effect of forced arbitration.

Determining possible public enforcement agency capacity to recover 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 investigators[26] to detect violations among the 143 million workers covered by the nation's wage-and-hour laws,[27] compared with 1,000 investigators for 22.6 million workers covered by those laws in 1948.[28]

State agencies (i.e., state departments of labor) are similarly under-resourced and overburdened. For example, the New York Department of Labor employed only 115 investigators in 2018, compared with 300 investigators in 1966.[29] The average caseload per investigator doubled between 2008 and 2018, and the backlog of open cases grew by 76% over the same time period.[30] As a result, the Department recovers less than 3% of the nearly $1 billion in unpaid minimum wages stolen from New Yorkers.[31] Other state agencies face similar capacity constraints.[32]

These constraints mean that public agency wage theft recoveries are extremely low when compared with the scale of the wage theft epidemic. USDOL reported recovering $322 million in back wages for all the laws it enforces in FY 2019, of which $225 million was collected specifically for minimum wage and overtime violations.[33] State agency recoveries

vary widely but totaled $170 million in 2015 and $147.5 million in 2016, according to data collected in 2016 by the Economic Policy Institute.[34]

Assuming no increase or decrease in state or federal enforcement capacity in the years for which data is most recently available, this suggests public agencies currently have the capacity to recover between $469 million to $492 million in stolen wages annually. If that capacity were fully targeted at low-wage employers who use forced arbitration, state and federal agencies could recover $469 million to $492 million for low-wage workers subject to forced arbitration. That would represent a mere 5.06% to 5.30% of the wages stolen from these workers in 2019—and would still leave over $8.75 billion in stolen wages unrecovered.

During the Trump administration, USDOL deprioritized workers subject to forced arbitration. In an August 2018 memorandum, then-Solicitor of Labor Kate O'Scannlain instructed attorneys in her office to inform senior political appointees before commencing enforcement actions to recover wages of workers subject to forced arbitration[35]—despite the fact that the U.S. Supreme Court recognized back in 2002, in *E.E.O.C. v. Waffle House, Inc.*, that arbitration clauses do not restrict federal agencies from pursuing enforcement actions as they are not parties to them.[36] O'Scannlain subsequently observed that she believed the agency's resources were better concentrated elsewhere.[37] Her memorandum and comments indicate that the Trump USDOL was more interested in protecting employers' right to use forced arbitration than in targeting them with public enforcement actions.[38]

New leadership at USDOL has been emphatically rejecting the Trump administration's approach and deference to employer demands in many meaningful ways. And the U.S. Court of Appeals for the Ninth Circuit recently reaffirmed the *Waffle House* ruling, holding that forced arbitration clauses do not restrict USDOL's authority to pursue wage theft enforcement actions.[39]

But there remains a serious information gap that must be overcome by any agency looking to target enforcement at employers using forced arbitration: the absence of a comprehensive public or private database tracking whether a given set of employees is subject to forced arbitration.[40] Without such information, fully prioritizing employers that use forced arbitration would be difficult for agencies to practically implement.

For all these reasons, our 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 the economy.

Estimated compliance scenarios if FAIR Act passed

Scholars have persuasively shown that the threat of legal accountability for violations of employment law can dramatically affect employer compliance with such laws. Frank Dobbin, for example, documented the massive shift in corporate compliance with the anti-discrimination protections of Title VII of the Civil Rights Act of 1964 in response to the real threat of legal exposure for employers—resulting in the development of our current corporate framework of equal opportunity compliance.[41]

The Forced Arbitration Injustice Repeal Act would restore the rights of workers in low-wage jobs to hold their employers accountable for wage theft and other violations. This new liability would likely result in both increased voluntary compliance and workers' increased ability to enforce wage-and-hour law before a judge and jury.

But it is not uncommon for there to be some lag time associated with such compliance.[42] The following table estimates additional wages that would be recovered by private-sector non-union workers earning less than $13 per hour, at increasing employer compliance levels over time:

Effect of Increased Employer Compliance After FAIR Passed	
Level of Employer Compliance	**Wages That Would Not Be Pocketed by Employers Who Impose Forced Arbitration on Low-Wage Workers & Steal Their Wages, or That Could be Recovered Through Private Enforcement**
20%	$1.85 billion
40%	$3.71 billion
60%	$5.65 billion
80%	$7.42 billion
100%	$9.27 billion
Source: Calculations by the author.	

State-Level Impacts

The table below breaks down the amount that was pocketed by employers who forced arbitration on their employees by state, based on the methodology outlined above.

State	Number of Low-Paid Workers Subject to Forced Arbitration	Number Who Experience Wage Theft & Abandon Claims	Amount Pocketed That Will Not Be Recovered
Alabama	300,422	76,547	$156,922,285
Alaska	29,227	7,447	$15,266,193
Arizona	414,385	105,585	$216,450,112
Arkansas	205,415	52,340	$107,296,731
California	1,628,856	415,033	$850,816,741
Colorado	237,914	60,621	$124,272,199
Connecticut	185,790	47,339	$97,045,302
Delaware	57,189	14,572	$29,871,868
District of Columbia	18,013	4,590	$9,408,667
Florida	1,331,854	339,357	$695,680,867
Georgia	654,483	166,762	$341,862,655
Hawaii	62,723	15,982	$32,762,509
Idaho	128,064	32,631	$66,892,900
Illinois	674,839	171,949	$352,495,637

Indiana	408,900	104,188	$213,584,675
Iowa	227,350	57,929	$118,753,770
Kansas	172,566	43,970	$90,138,328
Kentucky	263,852	67,229	$137,820,434
Louisiana	276,277	70,395	$144,310,648
Maine	76,417	19,471	$39,915,757
Maryland	310,468	79,107	$162,169,968
Massachusetts	301,928	76,931	$157,709,265
Michigan	567,060	144,487	$296,198,070
Minnesota	264,545	67,406	$138,182,366
Mississippi	195,662	49,855	$102,201,898
Missouri	358,536	91,355	$187,277,938
Montana	63,829	16,264	$33,340,369
Nebraska	122,034	31,094	$63,743,293
Nevada	172,510	43,955	$90,108,751
New Hampshire	74,494	18,981	$38,911,020
New Jersey	427,032	108,808	$223,056,118
New Mexico	131,094	33,403	$68,475,673
New York	754,291	192,193	$393,996,458
North Carolina	650,893	165,848	$339,987,698
North Dakota	36,685	9,347	$19,161,848
Ohio	697,213	177,650	$364,182,165
Oklahoma	234,931	59,860	$122,713,947
Oregon	178,080	45,375	$93,018,269
Pennsylvania	769,347	196,030	$401,860,959
Rhode Island	50,949	12,982	$26,612,806
South Carolina	302,530	77,085	$158,023,493
South Dakota	49,345	12,573	$25,774,997
Tennessee	407,018	103,708	$212,601,850
Texas	1,901,056	484,389	$992,997,725
Utah	179,467	45,728	$93,742,715
Vermont	27,829	7,091	$14,535,985
Virginia	438,627	111,762	$229,112,195
Washington	245,699	62,604	$128,338,479
West Virginia	117,054	29,825	$61,142,000
Wisconsin	344,265	87,719	$179,823,607
Wyoming	28,576	7,281	$14,926,190

Acknowledgments

NELP would like to thank Heidi Shierholz of the Economic Policy Institute for her assistance in developing the methodology used in this data brief, and for her feedback and comments on earlier drafts. NELP also thanks Rachel Deutsch of the Center for Popular Democracy and Jennifer Bennet of Public Justice for reviewing and providing feedback on earlier drafts.

Endnotes

[1] *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.
[2] *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.
[3] COLVIN at 9.
[4] 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.
[5] 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.
[6] *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 form awarding the level of relief that would be available in court.").
[7] 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/.
[8] KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC 19 (2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf.
[9] *See* JANICE FINE ET AL., WASHINGTON CENTER FOR EQUITABLE GROWTH, MAINTAINING EFFECTIVE U.S. LABOR STANDARDS ENFORCEMENT THROUGH THE CORONAVIRUS RECESSION, at 2, 7–13 (2020), https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/.
[10] *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.
[11] Based on conversation with Plaintiffs' counsel (notes on file with authors).
[12] 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.
[13] *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).
[14] *Curtis v. Contractor Mgmt. Servs., LLC*, No. 1:15-cv-00487-NT, 2018 WL 6071999, at *8–11 (D. Me. Nov. 20, 2018).
[15] Based on an updated Economic Policy Institute analysis of 2019 Current Population Survey microdata from the U.S. Bureau of Labor Statistics, on file with the author. The previously-published version of this report was based on an estimate that was too high as a result of a data error. This updated number is accordingly the basis of the revised calculations in this report; all methodology used in determining the amount of stolen wages that employers pocketed from workers subject to forced arbitration, however, remains the same.
[16] COLVIN at 9.
[17] *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/.
[18] HAMAJI at 4, 22.
[19] 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.
[20] 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.
[21] Jenny Montoya Tansey, Public Rights Project, Voices from the Corporate Enforcement Gap 9 (2019), https://www.publicrightsproject.org/press/enforcementgap.
[22] 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/.
[23] *See* U.S. DEPARTMENT OF LABOR, *Wage and Hour Division Data for Fiscal Year 2019*, https://www.dol.gov/agencies/whd/data.
[24] 29 U.S.C. § 216(b); *see, e.g., Avitia v. Metro. Club of Chi., Inc.*, 49 F.3d 1219, 1223 (7th Cir. 1995) ("Double damages are the norm, single the exception.").
[25] COOPER & KROEGER at 10, tbl. 1.
[26] 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.

[27] *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.
[28] *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.
[29] MAKE THE ROAD NEW YORK & CENTER FOR POPULAR DEMOCRACY, COMING UP SHORT: THE STATE OF WAGE THEFT ENFORCEMENT IN NEW YORK 14 (2019), https://maketheroadny.org/wp-content/uploads/2019/04/Coming-Up-Short_-The-State-of-Wage-Theft-Enforcement-in-NY-4_8_19.pdf.
[30] *Id.*
[31] *Id.* at 13.
[32] *See* HAMAJI at 5–8 (describing overburdened state labor enforcement agencies in Maine, New York, Massachusetts, Vermont, Oregon, and Washington).
[33] *Compare* U.S. DEPARTMENT OF LABOR, *Wage and Hour Division Data for Fiscal Year 2019—All Acts*, https://www.dol.gov/agencies/whd/data/charts/all-acts ($322,490,774 recovered in back wages for all statutes DOL enforced in FY 2019), *with* U.S. DEPARTMENT OF LABOR, *Wage and Hour Division Data for Fiscal Year 2019—Fair Labor Standards Act*, https://www.dol.gov/agencies/whd/data/charts/fair-labor-standards-act ($39,509,834 recovered for minimum wage violations in FY 2019 and $186,258,969 recovered for overtime violations in FY 2019).
[34] 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).
[35] *See* Memorandum from United States Solicitor of Labor Kate S. O'Scannlain to Deputy Solicitors, Regional Solicitors, and Associate Solicitors, at 2 (Aug. 10, 2018), *available at* https://www.uschamber.com/sites/default/files/coe.pdf
[36] *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297-98, 294 (2002).
[37] *See* Jaclyn Diaz, *Warren Wants Clarity on Labor Solicitor's Arbitration Pacts Talk*, BLOOMBERG LAW (Mar. 27, 2019), https://news.bloomberglaw.com/daily-labor-report/warren-wants-clarity-on-labor-solicitors-arbitration-pacts-talk-1 (noting that at a February 2019 Practicing Law Institute event in New York City O'Scannlain clarified that while USDOL "continue[s] to have the authority to bring our enforcement matters even if an arbitration agreement exists," the existence of an arbitration agreement is "something I care about knowing because we do have limited enforcement resources and I ant to make sure we are using our limited resources in the most efficient and effective way. If there are other avenues for people to pursue, I want to know that.").
[38] *See* Zachary Clopton & David Noll, *Trump Labor Officials Are Secretly Using Forced Arbitration to Get Corporations Off the Hook*, SLATE (May 10, 2019), https://slate.com/news-and-politics/2019/05/trump-labor-officials-forced-arbitration.html. A similar dynamic is at play with respect to the Equal Employment Opportunity Commission, which recently rescinded 1997 guidance on forced arbitration. *See* Press Release, *On EEOC's Decision to Rescind Policy Against Forced Arbitration in Bias Cases* (Dec. 17, 2019),
[39] *Walsh v. Ariz. Logistics d/b/a Diligent Delivery Systems*, No. 20-15765, 2021 WL 1972613, at *3-4 (9th Cir. 2021) (applying *Waffle House*'s reasoning to find an employer's forced arbitration clause did not bind the U.S. Department of Labor).
[40] 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.
[41] *See* FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY 75–100 (2008).
[42] *See, e.g.*, Annette Bernhardt, et al., *Employers Gone Rogue: Explaining Industry Variation in Violations of Workplace Laws*, 66 IND. & LAB. RELATIONS REV. 808, 809–12 (2013) (explaining various factors that may contribute to employers' decisions not to comply with minimum wage laws in different industries, despite the fact that employers are generally all subject to the same minimum wage and overtime standards, regardless of industry); M.H. Ross, *The Operation of the Wage and Hour Law in North Carolina and the South*, 30 N.C. L. REV. 248, 256–69 (1952) (explaining that USDOL found 59% of all investigated establishments in North Carolina in violation of basic FLSA provisions, and 27% in violation of statutory minimum wage, in first full year of data after 1949 FLSA amendments were enacted, and indicating this may be related to the low rate of private litigation to enforce the Act's protections compared to other states); Orley Ashenfelter & Robert Smith, *Compliance with the Minimum Wage Law*, 87 J. POL. ECON. 333, 343 (1979) (finding that minimum wage compliance stood at 69% for country as a whole in 1973, seven years after 1966 amendments to the FLSA).