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Written Testimony of Hugh Baran

National Employment Law Project

H.B. No. 6475
An Act Concerning Forced Arbitration Agreements

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Thank you to Committee Co-Chairs Robyn Porter & Julie Kushner 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 H.B. 6475, which would allow workers to file civil actions in the name of the state to enforce their existing rights under Connecticut's wage-and-hour, anti-discrimination, and sexual harassment laws.

In 2019, NELP testified before this Committee in support of a $15 minimum wage in Connecticut. We were excited to see that legislation pass the General Assembly, and to see Governor Lamont sign it into law—putting Connecticut at the forefront of a national movement to lift millions of Black and brown workers in low-wage industries out of poverty.

But without robust public and private enforcement of Connecticut's wage-and-hour laws, the $15 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 Connecticut employers to steal over $97 million in wages from workers in low-wage jobs subject to forced arbitration; and (3) why public agencies lack the capacity to address the enforcement gap created by forced arbitration and class/collective action waivers.

Forced Arbitration Helped Employers Keep Over $97 Million Owed to Low-Paid Connecticut Workers in 2019

By imposing forced arbitration, employers prevented Connecticut workers earning less than $13 per hour from recovering more than $97 million in stolen wages in 2019.

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 Connecticut 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]

Connecticut legislators, recognizing the growing epidemic of wage theft in this state,[6] have taken important steps to strengthen the state's private enforcement mechanisms. In 2015, legislators enacted Senate Bill 914, requiring that courts award double damages for violations of Connecticut's minimum wage and overtime laws. And in 2019, recognizing that the minimum wage must be at least enough to allow workers to support their families, Connecticut became the seventh state in the nation to adopt a $15 per hour minimum wage.

But employers' growing use of forced arbitration requirements and class/collective action waivers has jeopardized Connecticut workers' ability to exercise their rights under these new laws.[7]

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.[8] These 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.[9] 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.[10]

Forced Arbitration Is Stacked Against Employees

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 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.[11]

- **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 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.[12]

- **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, 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. 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.[13] 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*.[14]

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.[15] 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.[16]

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.[17]

How Forced Arbitration Requirements Enable Wage Theft

NELP calculates that in 2019 **over $97 million in wages** was stolen from private-sector non-union workers in Connecticut earning less than $13 an hour who are subject to forced arbitration.

We arrived at this finding as follows. First, an estimated 288,045 private-sector non-union workers in Connecticut earned a wage of less than $13 per hour in 2019.[18] 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,[19] we calculate that 185,790 of these workers are subject to forced arbitration.[20] From there, we use available data and studies from the past 12 years to estimate that an estimated 48,305 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.[21]

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.[22] With no effective access to justice, workers simply abandon their claims. Based on that finding, we calculate that 47,339 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.[23] Furthermore, in a wage theft action filed under the Fair Labor Standards Act or Connecticut's wage theft law, employees can recover both unpaid wages and an equal amount of liquidated damages. We therefore assume that the typical employee in our sample, if they filed a claim, could recover the average amount of unpaid wages and an equal amount of liquidated damages. This totals $2,050 per employee.

Accordingly, the 47,339 low wage workers in Connecticut who experience wage theft and are subject to forced arbitration, and do not file claims, are unable to recover approximately $97,045,302 through private enforcement actions in part due to the claim-suppressive effect of forced arbitration.[24]

Public Agencies Lack the Capacity to Recover These 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 2015 employed 894 wage-and-hour investigators to detect violations among a national workforce of 149 million workers, compared with 1,000 investigators for 23 million workers in 1948.[25]

The Connecticut Department of Labor is similarly under-resourced and overburdened. Total agency staffing levels have declined from 864 full-time employees in 2015 to 623 full-time employees in 2019.[26] In 2019, the Department's Wage and Workplace Standards Division employed fewer than 30 investigators to detect violations among a state workforce of 1.6 million workers, with over 97,000 employers.[27]

The Connecticut Department of Labor and Attorney General reported recovering $7,269,404 in stolen wages in 2015 and $8,960,676 in 2016, according to the Economic Policy Institute. In FY 2018, the amount of wages recovered by the Connecticut Department of Labor was a mere $4,936,684.75.[28] While the Legislature recently authorized the Department to hire three new investigators, the Department's total capacity to recover wages is a mere drop in the bucket when compared to the $97 million in wages that were stolen from workers in low-wage jobs subject to forced arbitration.

Even if the state's enforcement capacity was fully targeted at workers subject to forced arbitration, and was operating at its 2016 peak, this would represent only around 9% of all the wage theft 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: the absence of a 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 Connecticut Department of Labor 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.

Conclusion

Connecticut can act to address the state's lack of public enforcement capacity by passing H.B. 6475, the proposed whistleblower enforcement law. Inspired by California's Private Attorneys General Act (PAGA), H.B. 6475 would allow workers to stand in the shoes of the Connecticut Department of Labor and seek civil penalties for wage theft—as well as for other violations of the state's employment laws.

HB 6475 will ensure that unscrupulous low-wage employers cannot steal wages from workers with impunity. H.B. 6475 would also generate millions in new revenue for the Connecticut 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 H.B. 6475. 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* CONN. GEN. STAT. § 31-68.
[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] *See generally* UNIDAD LATINA EN ACCION, THE CONNECTICUT WAGE THEFT CRISIS: STORIES AND SOLUTIONS (2015), https://ulanewhaven.org/wp-content/uploads/2015/03/Wage-Theft-Report.pdf.
[7] 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).
[8] *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.
[9] *Id.* at 9.
[10] *Id.*
[11] *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).
[12] *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/.
[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); *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/.
[14] 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/.
[15] STONE & COLVIN at 19.
[16] *Id.*
[17] 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.
[18] Based on Economic Policy Institute analysis of 2019 Current Population Survey microdata from the U.S. Bureau of Labor Statistics (on file with author).
[19] COLVIN at 9.
[20] 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 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%.
[21] 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.publicrightsproject.org/press/enforcementgap (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.
[22] *See* Estlund, 96 N.C. L. REV. at 696.
[23] *See* U.S. DEP'T OF LAB., *Wage & 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, Connecticut'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 Connecticut average.
[24] Last year, NELP estimated this figure at $133 million in our testimony on the 2020 version of H.B. 6475. This lower figure is based on a revised estimate from the Economic Policy Institute of the number of workers earning less than $13/hour in Connecticut. The methodology used to calculate this number otherwise remains the same.
[25] *See* Marianne Levine, *Behind the minimum wage fight, a sweeping failure to enforce the law*, POLITICO (Feb. 18, 2018), https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644.
[26] *See* CONNECTICUT OFFICE OF THE STATE COMPTROLLER, OPEN PAYROLL: DEPARTMENT OF LABOR (accessed March 4, 2020), https://openpayroll.ct.gov/#!/year/2019/department/Dept.+of+Labor.
[27] *See id.* (search of records by Job Titles returning 19 results for "Wage Enforcement Agent" and 10 results for "Wage and Hour Investigator 2").
[28] Press Release, Gov. Malloy: Connecticut Labor Department Recovers $4.9 Million in Owed Wages for Workers (Aug. 31, 2018), https://portal.ct.gov/Malloy-Archive/Press-Room/Press-Releases/2018/08-2018/Gov-Malloy-Connecticut-Labor-Department-Recovers-4-Million-in-Owed-Wages-for-Workers.
[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.