

# DISASTER OF EPIC PROPORTIONS?

## How Workers Are Fighting Despite Mandatory Arbitration and Class Waivers

By CHRIS ZATRATZ



Chris Zatratz is a recent graduate of the City University of New York School of Law. In law school he worked with various workers' centers, labor unions, and at the National Labor Relations Board. Chris has experience working on organizing campaigns, drafting legislation, and participating in employment litigation. He believes in facilitating the organizing of workers and in supporting workers' organizations. Chris is inspired by the collective action that workers engage in on a daily basis to resist mistreatment on the job and to improve the material conditions of their fellow workers, families, and communities.

### INTRODUCTION

Employers have long sought to constrain the collective action of workers. The Supreme Court's decision in *Epic Systems v. Lewis* is just the latest iteration of this effort. But, the history of legal impediments to collective action reveals that the pretense of fairness and equal treatment eventually withers away, with even moderate figures feeling compelled to question the law's unjust treatment of workers. This article intends to show that the pretension underlying mandatory arbitration and class waivers in employment contracts has similarly been disproven. Yet, despite the blatant unfairness and overwhelming odds facing those covered by these agreements, workers continue to fight back, finding innovative ways to both call employers out on their word and enforce their rights in court.

### I

#### BRIEF HISTORY OF LEGAL IMPEDIMENTS TO COLLECTIVE ACTION

Throughout history, employers have used the law

and the legal system in various ways to impede workers from engaging in collective action. The law enacted to curb monopolies was used to declare secondary boycotts illegal.[1] The judiciary was long employed to enjoin strikes and work stoppages.[2] Today, employers achieve this end by including mandatory arbitration agreements[3] and class waivers[4] in employment contracts.

A direct line can be drawn from the legal barriers of yesteryear to current impediments to collective action. In some ways, mandatory arbitration agreements and class waivers are even more egregious. They have the effect of obstructing the power of workers to enforce their rights because workers cannot access the courtroom or join and act together.[5] In the absence of such rights or of adequate enforcement, collective action serves as a substitute for the "inadequacies of law." [6] Whether exercising collective action through legal proceedings or wholly outside of them, the ability of workers to join together is key because "[f]or workers striving to gain from their employers decent

terms and conditions of employment, there is strength in numbers." [7] For this reason, impediments to collective action foreclose any real possibility for workers to resist their exploitation in the workplace because the law is hostile and alternatives to the law (i.e., collective action) are unavailable. Therefore, understanding the history of legal impediments to collective action can inform our understanding of the struggles that workers face in the contemporary workplace.

#### The Sherman Antitrust Act

In 1890, Congress passed the Sherman Antitrust Act for the purpose of protecting trade and commerce "against unlawful restraints and monopolies." [8] Although Senator John Sherman reassured his fellow Congressmen that the antitrust law would not affect labor unions, [9] his amendment explicitly exempting labor unions did not make it into the final version of the law [10] and, upon passage, the courts were not shy to apply it to union activity. [11] Although the courts had

previously issued injunctions to restrain union activity, in *Loewe v. Lamlor* the U.S. Supreme Court held, for the first time, that the Sherman Antitrust Act applied to legitimate union activities. [12] The Court determined that the union's strike for union recognition and its secondary boycott violated the Act. [13]

In the years that followed, the "courts applied the Sherman Act more frequently to union conduct than to business monopolies." [14] Even Justice William O. Douglas criticized the judiciary's employment of the Act against unions:

"From the beginning it [the Sherman Antitrust Act] has been applied by judges hostile to its purposes, friendly to the empire builders who wanted it emasculated. . . . It is ironic that the Sherman Act was truly effective in only one respect, and that was when it was applied to labor unions. Then the courts read it with a literalness that never appeared in their other decisions." [15]

In response to judicial application of the Sherman Antitrust Act to labor unions, Congress



established the Clayton Act to explicitly exempt labor unions from antitrust law.[16] But, labor's woes continued as courts narrowly construed the Clayton Act, even going so far to find that the Act only applied to "those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective." [17] In other words, the Act only applied to labor disputes between an employer and its own employees.[18] Thus, collective action by other workers in solidarity with employees engaged in a labor dispute was vulnerable to prosecution.

### **The Norris-LaGuardia Act**

In 1932, Congress enacted the Norris-LaGuardia Act, which divested the federal courts' jurisdiction over labor disputes, precisely because the courts had enjoined strikes and ruled against workers so frequently.[19] The author of the law, Rep. Fiorello LaGuardia lamented:

"If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now." [20]

Save for public employees,[21] employers' use of federal injunctions to prohibit workers from striking has largely ended today due to the enactment of the National Labor Relations Act ("NLRA"), which provides for a right to strike.[22] But, the shift from adjudicating labor disputes in court to an administrative agency, while understandable at the time,[23] has resulted in unique challenges for workers.[24] These challenges run parallel to those posed by mandatory arbitration agreements and class waivers in employment contracts[25] as employment disputes are increasingly subject to adjudication schemes outside of the courtroom.

## **II**

### ***CURRENT LEGAL IMPEDIMENTS TO COLLECTIVE ACTION***

Today, employers prevent workers from exercising collective action not by federal injunction or by manipulating statutes, but instead by avoiding the courtroom altogether..

#### **The National Labor Relations Act**

For workplace disputes concerning concerted and union activity broadly,[26] these cases are subject to the National Labor Relations Board ("NLRB"). As a result, labor disputes largely remain out of the

purview of unfriendly courts, but the NLRA has not resulted in a friendly atmosphere for collective action at the workplace.[27] Many labor advocates argue that the collection of rights and the formal process provisioned in the NLRA further undermines collective action,[28] while purporting to protect it,[29] due to the Act's astonishingly weak remedies,[30] time consuming process,[31] and the compromise that the Act itself represents.[32] These inadequacies are exacerbated by the NLRA's absence of a private right of action[33] because if workers are not satisfied with the NLRB's handling of a case or with the remedies available in the NLRA, they are foreclosed from enforcing their rights in court. Therefore, the NLRA's shortcomings undermine collective action because engaging in it is so risky since it is virtually unprotected.

#### **Mandatory Arbitration Agreements and Class Waivers**

For workplace disputes over everything else not subject to the NLRA – discrimination, harassment, minimum wage and overtime violations, etc. – workers can seek redress in the courts pursuant to statutes like the Fair Labor Standards Act ("FLSA") [34] and Title VII of the Civil Rights Act,[35] or via other governmental agencies, such as the Equal Employment Opportunity Commission ("EEOC") [36] and the Department of Labor ("DOL"). [37] Under the FLSA, workers can even enforce their rights in court collectively through the FLSA's collective action provision [38] or via a class action.[39] But, here employers have found solace in a workaround that shields them from the risks of civil litigation.[40] Whereas the NLRA requires workers to bring claims to an administrative agency, employers have similarly avoided litigation for employment claims by subjecting the disputes to mandatory individual arbitration.[41]

That is, to circumvent enforcement of employment rights in the courts or by administrative agencies, employers include mandatory arbitration agreements and class waivers in employment contracts; requiring employees to bring disputes individually [42] and in private.[43] This puts the burden on workers to vindicate their rights by bringing claims via individual arbitration or on underfunded governmental agencies to maintain adequate enforcement practices. There is not much optimism for the latter, as demonstrated by the top ten private wage and hour class action settlements in 2015 and 2016. These settlements alone "exceeded the combined total wages recovered by all state and federal agencies." [44]

A 2017 study found that upwards of 60.1

million workers are subject to mandatory arbitration provisions in their employment contracts, 25 million of whom are also subject to class waivers.[45] This means that up to 25 million workers cannot bring a collective or class action in court under the FLSA against their employers because the employment contract that they signed upon hiring included a mandatory arbitration provision and a class waiver. The Economic Policy Institute forecasts that come 2024, over

***Because of the costs associated with bringing employment claims individually, “the class action waiver effectively bars these claims from being brought in any forum.”***

“80 percent of private sector nonunion workers” will be subject to mandatory arbitration agreements and class waivers.[46] These workers must pursue claims against their employers through individual arbitration proceedings, thereby privatizing employment dispute resolution.[47]

Subjecting employment disputes to individual arbitration proceedings is bad for workers because the agreements themselves stifle claims. For one, “employers require [mandatory individual arbitration agreements] precisely because they know that employees are unlikely to bring individual claims.”[48] In this way, “mandatory arbitration has a tendency to suppress claims”[49] and “the great bulk of disputes that are subject to mandatory arbitration agreements . . . simply evaporate before they are even filed.”[50] When the only option is individual arbitration, “an estimated 98 percent of workers who would otherwise bring employment claims in court abandon their effort[s].”[51]

Workers are deterred from bringing claims to individual arbitration, in part, because lawyers are less likely to retain clients subject to mandatory arbitration as “arbitration claims are less likely to succeed than claims brought to court, and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages.”[52]

Secondly, while bringing disputes subject to arbitration is often cost prohibitive, the class waiver adds another layer of deterrence for the benefit of employers. Because of the costs associated with bringing employment claims individually, “the class action waiver effectively bars these claims from being brought in any forum.”[53] Thus, despite the Supreme Court’s recognition of the need for litigants to collectively bring disputes,[54] “class action waivers ultimately allow firms to insulate themselves from all liability and even scrutiny.”[55] This is because “many FLSA wage and hour claims involve incremental pay disparities over a few years,”[56] thus the inability to combine these small value claims poses no substantial threat to employers engaged in wrongdoing.

### **The Arbitration Process**

The arbitration process itself is stacked against workers. Aside from the economic obstacles facing workers bringing claims, workers are disadvantaged at arbitration because of limited discovery,[57] arbitrator bias,[58] and narrow appeals.[59]

Arbitration proceedings have limited discovery because “by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’ ”[60] But, the presumed efficiency of limited discovery harms workers because “the employer is invariably the keeper of all of the records and usually, the possessor of the most critical evidence in employment law cases.”[61] Therefore, by failing to require disclosure of all evidence relevant to the case, employees are left without much recourse if they do not possess all of the evidence needed to prove their case.

Arbitrator bias manifests as an advantage to employers because employers are “repeat player[s]” in arbitration proceedings.[62] For instance, one study found that “after 25 cases before the same arbitrator the

employee’s chance of winning dropped to only 4.5 percent.”[63] While there are many factors that contribute to arbitrator bias, one that stands out is that “arbitrators may feel pressure to rule in favor of the employer to be selected in future cases.”[64] As one arbitrator admitted, “[w]hy would an arbitrator cater to a person they will never see again?”[65] As a result, workers subject to arbitration are less likely to win and, when victorious, their award is likely to be less substantial than it would have been in court.[66]

Arbitration decisions are subject to only narrow appeals because “courts are generally required to refrain from reviewing the merits of an arbitrator’s award due to the policy favoring arbitration as a means of resolving labor disputes.”[67] Thus, even if an arbitrator misunderstands the law,[68] an arbitrator’s decision cannot be vacated unless it violated one of the extreme grounds outlined in the Federal Arbitration Act (“FAA”).[69] Given that “[e]mployee win rates in mandatory arbitration are much lower than in either federal court or state court,”[70] the inability for workers to adequately appeal arbitration decisions means that the frequent losses they face will be final.

## **III**

### **BRIEF HISTORY OF MANDATORY ARBITRATION AGREEMENTS AND CLASS WAIVERS**

#### **I. Mandatory Arbitration Agreements**

Congress passed the Federal Arbitration Act (“FAA”) in 1925 “in response to a perception that courts were unduly hostile to arbitration.”[71] The FAA thereby established “a liberal federal policy favoring arbitration agreements.”[72] But, “[f]or a number of years after the FAA’s passage, the Supreme Court was careful to make a distinction between consumer/individual arbitration and business-to-business arbitration.”[73] That all changed in the 1980s, when the Supreme Court reversed course and began to slowly find that arbitration clauses applied to a number of federal statutory claims.[74] The Court’s enforcement of arbitration agreements, beyond those made between businesses, culminated with its decision in *Gilmer v. Interstate/Johnson Lane Corp.*, in which it held that employment



discrimination claims under the Age Discrimination in Employment Act (“ADEA”) were not precluded from arbitration.[75] Thereafter, federal[76] and state[77] employment discrimination claims, as well as wage and hour claims,[78] were held to be covered by arbitration agreements. As a result, virtually all workplace disputes, and violations of an employee’s statutory rights, bypass the courts and are subject to arbitration proceedings if an employee signs an employment contract that contains a mandatory arbitration agreement.[79]

## II. Class Waivers

A class waiver is an agreement by a consumer or an employee “not to initiate or participate in any class action against a firm.”[80] It is important to understand class waivers in the context of mandatory arbitration agreements because “the waiver works in tandem with standard arbitration provisions to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding.”[81] Whereas a mandatory arbitration agreement precludes adjudicating a dispute in court, a class waiver prevents these disputes from including more than one aggrieved party. Class waivers originated in the late 1990s in trade journals “encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations.”[82] Plaintiffs in one case even alleged that major credit card companies conspired in the late 1990s in a series of meetings to impose class waivers on customers.[83]

Following the increased use of class waivers by corporations, courts began to invalidate them.[84] Things came to a head, however, when the Supreme Court ruled that “California’s judicial rule invalidating class action waivers as unconscionable ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in the FAA].’ ”[85] In other words, the Court held that the FAA preempted the Supreme Court of California’s precedent which found that class waivers were unconscionable. Subsequently, “a rubber-stamp effect seemed to ensue in the courts addressing the enforceability of class action waivers in arbitration agreements.”[86] This means that after *Concepcion*, lower courts felt compelled

to enforce class waivers in arbitration agreements, “even where state law would invalidate the contractual bans.”[87] But, the intersection of mandatory arbitration agreements and class waivers is even more corrosive because “the *Discover Bank* rule still invalidates class action waivers contained in contracts without arbitration agreements.”[88] That is, the class waiver’s inclusion in mandatory arbitration agreements is what protects it. As a result, “arbitration agreements have become a safe harbor for otherwise unenforceable class action waivers.”[89] What’s more, the Supreme Court held in *Lamps Plus, Inc. v. Varela* that parties subject to mandatory arbitration agreements can only pursue their claims via individual arbitration, unless the agreement explicitly provides that the parties consent to class arbitration.[90] Thus, workers “are assumed to have ‘consented’ to individualized arbitration even if their employment contract does not clearly waive collective action.”[91]

## ANALYSIS OF

### EPIC SYSTEMS V. LEWIS

The Supreme Court’s decision in *Epic Systems v. Lewis* is its latest attempt to build on its recent precedent of favoring the individual arbitration of claims. The decision itself has been described as “a vivid illustration of the declining power of workers in the U.S. political system.”[92] The issue in the case, framed by Justice Gorsuch, was reminiscent of the court’s *Lochner* era:[93]

“Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?”[94]

More narrowly, as scholars have pointed out, the issue was “whether Section 7 of the NLRA gives workers a substantive right to collective litigation, such that arbitration agreements that waive that right are unenforceable under the FAA.”[95]

Three cases were consolidated into *Epic* and in each the plaintiff employees signed an employment agreement which contained a mandatory arbitration provision and a class waiver.[96] The employees nevertheless

sued their employers in federal court in collective proceedings.[97] The respective employers moved to compel arbitration and, at least in one case, the Ninth Circuit held that the FAA’s savings clause[98] removed the obligation to enforce arbitration agreements because the agreement violated another federal law – namely, the NLRA, by “barring employees from engaging in the ‘concerted activit[y]’[99] of pursuing claims as a class or collective action.”[100]

Justice Gorsuch reasoned that the FAA’s savings clause cannot render the arbitration agreement and class waiver unenforceable because “by attacking (only) the individualized nature of the arbitration proceedings, the employees’ argument seeks to interfere with one of arbitration’s fundamental attributes.”[101] And, the plaintiffs are precluded from doing so because, under the court’s precedent, “the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by ‘interfer[ing] with fundamental attributes of arbitration.’ ”[102] Thus, because the court has said that a fundamental attribute of arbitration is its individualized nature – despite the existence of class arbitration – the plaintiffs cannot challenge the arbitration agreement on this basis, regardless if such an agreement violates the NLRA.

Justice Gorsuch further argued that mandatory individual arbitration does not violate the NLRA because the NLRA “does not express approval or disapproval of arbitration”, “does not mention class or collective action procedures”, and “does not even hint at a wish to displace the [FAA].”[103] Further, he reasoned that class action is not protected by the catchall phrase in Section 7 of the NLRA[104] because it serves “to protect things employees ‘just do’ for themselves in the course of exercising their right to free association in the workplace, rather than ‘the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.’ ”[105] Justice Gorsuch so held, despite precedent that “the ‘mutual aid or protection’ clause protects employees . . . when they seek to improve working conditions through resort to administrative and judicial forums”[106] because this “dicta” does not prescribe “what procedures an employee might be entitled to in litigation or arbitration.”[107] In other words, employees joining together are

protected when they engage in mutual aid through resort to judicial forums, but this protection does not extend to class actions.

Lastly, while acknowledging “that class actions can enhance enforcement by ‘spread[ing] the costs of litigation,’”[108] Justice Gorsuch lamented that class actions can also “unfairly ‘plac[e] pressure on the defendant to settle even unmeritorious claims.’”[109] Therefore, the Court held that “a contract defense ‘conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures’ is inconsistent with the Arbitration Act and its saving clause.”[110] The plaintiffs cannot pursue their claims through class actions in court, but instead must resort to individual arbitration proceedings. The consequence of the Court’s decision is that, by including mandatory arbitration agreements and class waivers in employment contracts, “employers may ban workers from participating in any class or collective lawsuit in court” or in class arbitration.[111]

#### ANALYSIS OF POST-EPIC CASES

A number of notable cases have been decided since the court’s decision in *Epic*. In one, a subsequent interpretation of the Supreme Court’s decision outlines the likely permanency of the enforcement of mandatory individual arbitration. But, two other cases lay somewhat of a roadmap for the vindication of workers’ rights, despite the decision.

##### I. *Gaffers v. Kelly Sys. Corp.*

Deferring to *Epic*, the Sixth Circuit reversed the denial of an employer’s motion to compel individual arbitration of claims under the FLSA.[112] The Sixth Circuit framed the rule for displacing the FAA in the following way:

(1) “a federal statute does not displace the Arbitration Act unless it includes a ‘clear and manifest’ congressional intent to make individual arbitration agreements unenforceable”;<sup>[113]</sup> (2) “to clearly and manifestly make arbitration agreements unenforceable, Congress must do more than merely provide a right to engage in collective action”;<sup>[114]</sup> (3) “Congress must expressly state that an arbitration agreement poses no obstacle to pursuing a collective action.”<sup>[115]</sup>

**As displayed in  
*Garcia*, the mass  
opt-in of  
arbitration  
claims can be an  
effective way for  
workers to get  
around class  
waivers in order  
to engage in  
collective action.**

It will be interesting to see how other circuits interpret *Epic* and whether they will apply a similar rule. The Sixth Circuit’s interpretation seems to leave very little room for plaintiffs to get around individual arbitration, at least via federal employment statutes, because none expressly make individual arbitration agreements unenforceable. Therefore, the court’s synthesis outlines why the enforcement of individual arbitration agreements is likely to be permanent – namely, because making them unenforceable will take not just an act of Congress, but a very specific one.

##### II. *Correia v. NB Baker Elec., Inc.*

While federal employment law can no longer be used to challenge the enforcement of individual arbitration agreements, a California appellate court has demonstrated that it is state law which paves a way for plaintiffs to get around *Epic*. In *Correia v. NB Baker Elec., Inc.*, two plaintiffs sued their employer for violations of California wage and hour law and for civil penalties under the state’s Private Attorney General Act of 2004 (“PAGA”).<sup>[116]</sup> Although the plaintiffs were subject to mandatory arbitration agreements and class waivers, the court ruled that the waiver of the PAGA claim was unenforceable because *Epic* did not address “a claim for civil penalties brought *on behalf of the government* and the enforceability of an agreement barring a PAGA representative action in any forum.”<sup>[117]</sup>

Therefore, *Epic* did not disturb precedent in the state that waiver of PAGA actions is unenforceable<sup>[118]</sup> because under PAGA an employee is deputized to bring a claim “*on behalf of the state, not on behalf of other employees.*”<sup>[119]</sup> So, not only are class waivers unenforceable for PAGA representative actions, but arbitration agreements are as well because “the state never agreed to arbitrate the claim.”<sup>[120]</sup> Thus, a possible workaround of *Epic* is for states to pass PAGA statutes, which undermine the FAA because it is the government technically bringing a PAGA claim and not the employee who signed the mandatory arbitration agreement and class waiver.

##### III. *Garcia v. Chipotle Mexican Grill, Inc.*

Lastly, in another case following *Epic*, an employer made an astonishing admission about the true reason why they seek to subject claims to mandatory individual arbitration – namely, to suppress claims and not to make arbitration “a viable alternative to class-action litigation.”<sup>[121]</sup> In *Garcia v. Chipotle Mexican Grill, Inc.*, Chipotle was being sued by workers for unpaid wages and it sought to prohibit the plaintiffs’ attorney from representing a class of plaintiffs, who were dismissed from the case because they were subject to arbitration agreements, in their individual arbitration proceedings.<sup>[122]</sup> When the large number of plaintiffs were dismissed, they opted-in to take their claims to arbitration and Chipotle protested that “it is suffering a ‘manifest injustice’ wrought by the ‘multitude of arbitration filings.’”<sup>[123]</sup> However, the court rejected Chipotle’s pleas:

“The irony is not lost on the Court. Chipotle could have permitted its employees to raise disputes through collective actions such as those under the FLSA and realize the efficiencies inherent in collective or class procedures . . . Chipotle cannot credibly complain that too many employees, having learned of their rights from a lawful Court- authorized notice, are now asserting those rights through arbitration. Chipotle is not suffering one scintilla of injustice—it is getting exactly what it bargained for in the arbitration agreement.”<sup>[124]</sup>

This case demonstrates that employers are not actually content with individually arbitrating claims if a large number of aggrieved parties all do so at once. Chipotle’s objection to the

multitude of arbitration filings reveals that it did not actually intend arbitration to replace class action litigation, otherwise diverting all of those claims to arbitration would be exactly what Chipotle wanted. Instead, Chipotle's protest of the amount of arbitration claims displays that the true intention of mandatory individual arbitration agreements is to suppress claims. So, while the law might prevent collective action in the courtroom, it cannot prevent plaintiffs from opting-in to arbitration, en masse.

## POST-EPIC STRATEGIES

### I. Mass Opt-In of Arbitration Claims

As displayed in *Garcia*, the mass opt-in of arbitration claims can be an effective way for workers to get around class waivers in order to engage in collective action. Apart from the award that each plaintiff might receive, companies would be subject to large attorney's fees for handling each claim. Also, if they use the American Arbitration Association's rules which require employers to pay all fees, "employers can be hit with hundreds of thousands of dollars in fees for multiple arbitration proceedings."<sup>[125]</sup> Additionally, "employers facing multiple individual claims also have to consider whether it is worth the cost of paying arbitrators' and experts' fees in 10, 20, 100 or a 1,000 cases when the fees can typically range from \$1,000 to \$5,000 per day."<sup>[126]</sup> Finally, the harmful effect of collateral estoppel on employers can be twofold. On one hand, a claimant's loss would not affect the ability of other claimants to win because "collateral estoppel binds only the parties to a particular proceeding, one individual case result cannot bind another claimant who was not a party in the earlier proceeding."<sup>[127]</sup> However, since the employer will be a party in every proceeding, the employer would be bound by a claimant's win "if the same issues were litigated in subsequent cases."<sup>[128]</sup>

Thus, there are financial and procedural factors that can work against an employer in individual arbitration, once aggregated. The one caveat to this approach is that employers like Uber and Chipotle have prevented the mass

## Using public pressure has been successful elsewhere as well. "In November 2018, 20,000 Google employees across the globe walked out in protest over [the] company's policies around equity and transparency in the workplace."

opt-in of arbitration claims from proceeding by refusing to pay their share of the filing fee.<sup>[129]</sup> If the employer fails to pay then the employee must front the cost, file suit to compel payment, or seek a default award from the arbitrator and pursue the claims in court.<sup>[130]</sup>

### II. Public Pressure

When actually litigating or arbitrating a claim is unavailable, workers and their allies can resort to collective action as it was originally intended.

For example, a group at Harvard Law School named the Pipeline Parity Project has been organizing against law firms that require employees to sign mandatory arbitration agreements, and they've been successful.<sup>[131]</sup> By using social media, protesting at offices, and developing an open letter to the National Association for Law Placement, the group has convinced a number of law firms to drop forced arbitration for associates and all employees.<sup>[132]</sup>

Using public pressure has been successful elsewhere as well. "In November 2018, 20,000 Google employees across the globe walked out in protest over [the] company's policies around equity and transparency in the workplace."<sup>[133]</sup> In response, "Microsoft and Facebook have done away with forced arbitration of sexual harassment claims, and Google has gone even further, recently nixing its arbitration mandate altogether due to pressure from workers."<sup>[134]</sup> Yet still, Google has not demanded its suppliers to end their use of mandatory arbitration.<sup>[135]</sup> Public pressure, nonetheless, seems like a viable tactic for workers who have less access to

resources for engaging in mass arbitration opt-ins or for lobbying legislation.

### III. Legislation

Incremental legislation cannot completely solve the problems posed by *Epic*.<sup>[136]</sup> For that, legislation would have to explicitly undermine the FAA. But, as California has demonstrated, "states can . . . take action to address the untenable burden forced arbitration imposes on their enforcement agencies."<sup>[137]</sup>

### Whistleblower Enforcement Model

The whistleblower enforcement model "expands public enforcement capacity by reimagining the way workers, community organizations, and public agencies can work together to hold corporate wrongdoers accountable, while generating revenue to fund enforcement."<sup>[138]</sup> California's whistleblower enforcement law works in the following way:

"PAGA authorizes an aggrieved employee to bring a civil action to recover specified civil penalties that would otherwise be assessed and collected by the Labor and Workforce Development Agency on behalf of the employee and other current or former employees for the violation of certain provisions of the California Labor Code affecting employees."<sup>[139]</sup>

The purpose of PAGA is to "augment the enforcement abilities of the Labor Commissioner by creating an alternative 'private attorney general' system for labor law enforcement."<sup>[140]</sup> Essentially, employees are deputized by the state to bring civil actions against their employers.<sup>[141]</sup> Since the action is technically on behalf of the state, "a successful PAGA claimant is entitled to collect 25 percent of the civil penalties for the employees, with the remainder going to the government."<sup>[142]</sup> Further, as discussed regarding *Correia*, "[a] PAGA claim is a class action in disguise that avoids some of the pitfalls of class actions normally encountered by plaintiffs."<sup>[143]</sup>

The success of PAGA should not be understated. According to some practitioners, "PAGA has had a dramatic impact on compliance with workplace protections, despite the fact



that approximately 67 percent of the state's employees labor under forced arbitration clauses, a higher share than the national average.”[144] Thus, states that enact their own PAGA statutes[145] could circumvent federal policy favoring arbitration, and benefit workers, by enabling them to pursue their claims in court and recover some award despite signing mandatory arbitration agreements and class waivers.

### Preemption of the FAA

Two proposed pieces of federal legislation would do well to prevent workers from being compelled to pursue claims against their employers via individual arbitration by preempting the FAA's application to employment, consumer, antitrust, and civil rights claims.

The Restoring Justice for Workers Act[146] would make an arbitration agreement invalid and unenforceable “if it requires arbitration of an employment dispute.”[147] Additionally, the Act would amend Section 8(a) of the NLRA to include, under protected concerted activity, the ability of employees to bring class and collective legal action.[148] The Act, thereby, “would overturn *Epic Systems* and ban forced arbitration and class- and collective-action waivers in labor and employment disputes.”[149]

The Forced Arbitration Injustice Repeal Act[150] would make an arbitration agreement or joint-action waiver invalid and unenforceable “with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”[151] The Act, thus, would prevent employees and consumers from waiving their right to bring class or collective actions and would “eliminate forced arbitration clauses” in other than business-to-business disputes.[152]

## IV

### CONCLUSION

Even when viewing the Supreme Court's decision in *Epic* in the greater historical context of legal impediments to worker collective action, the decision stands out as somewhat of a death blow. Some 25 million workers are now precluded from adjudicating claims against their employers in court on account of their signing mandatory arbitration agreements and class waivers. That number will surely rise, providing employers with virtual impunity to violate the rights of workers. But, workers nonetheless have tools at their disposal. Through mass opt-ins, workers can take their claims to arbitration en masse and overwhelm employers. Public pressure can be applied to embarrass or force employers into dropping their mandatory arbitration and class waiver policies. Lastly, legislation in the mold of California's PAGA can be implemented in state's all over the country to circumvent precisely what *Epic* presumes to stand for. Regardless of the path that workers take, if previous obstacles to collective action are a guide, it is collective action itself which will be the impetus for change. The law always follows.



[1] See 6 A.L.R. 909 (Decision in *Loewe v. Lawlor* prohibited secondary boycotts and held union members liable for damages due to the boycott, under the Sherman Antitrust Act).

[2] See Michael H. Leroy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the*

*Taft-Hartley Act and the Moribund Right to Strike*, 43 Ariz. L. Rev. 63, 63–64 (2001) (“employers had relied on judges to issue injunctions against strikers and their leaders, enforceable by fines and imprisonment, even when the only strike activities were peaceful work stoppages”).

[3] See Michael H. Leroy, Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 Ohio St. J. on Disp. Resol. 249, 305 (2003) (“Mandatory arbitration quickly spread in the 1990s . . . to a wide variety of workplaces, including those with Spanish-speaking, low-wage, poorly educated, and minor workers”).

[4] See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 693 (2018) (“employees covered by MAAs are usually precluded from pursuing their claims as a group”).

[5] See Stephanie Greene & Christine Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements-#timesup on Workers' Rights*, 15 Stan. J. Civ. Rts. & Civ. Liberties 43, 77 (2019) (After *Epic*, employees cannot “act jointly in court or in arbitration”).

[6] Michael M. Oswald, *Law and the Questions and Answers of Workplace Mobilization*, 40 Harbinger 129, 133 n. 12 (2016) (“Modern campaigns frequently use, and tell workers that they will use, collective action as a substitute for the inadequacies of law”). See Hearings on S. 2926, 73 Cong., 2d Sess. (1934), reprinted in *Legislative History of the National Labor Relations Act, 1935*, at 970 (statement of Cornelia Bryce Pinchot) (“The workers say they know they cannot get help from Washington, so that they will have to resort to direct action. That means unrest”), [https://babel.hathitrust.org/cgi/pt?id=](https://babel.hathitrust.org/cgi/pt?id=mdp.39015014754413;view=1up;seq=1,archived%20at%20https://perma.cc/67Y6-YR25)

[mdp.39015014754413;view=1up;](https://babel.hathitrust.org/cgi/pt?id=mdp.39015014754413;view=1up;seq=1,archived%20at%20https://perma.cc/67Y6-YR25)

[seq=1, archived at https://perma.cc/67Y6-YR25.](https://babel.hathitrust.org/cgi/pt?id=mdp.39015014754413;view=1up;seq=1,archived%20at%20https://perma.cc/67Y6-YR25)

[7] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

[8] 15 U.S.C.A. § 12(a).

[9] Joseph L. Greenslade, *Labor Unions and the Sherman Act: Rethinking Labor's Nonstatutory Exemption*, 22 Loy. L.A. L. Rev. 151, 216, n. 40 (1988) (quoting 21 CONG. REC. 2562 (1890)) (statement of Senator John Sherman) (“combinations of workingmen to promote their interests promote their welfare, and increase their pay . . . are not affected in the slightest degree, nor can they be included in the words or intent of the bill”).

[10] *Id.* at 157 (“However, the Sherman Act, in its final version, did not contain an express labor exemption”).

[11] Although, the court was hesitant in applying the Sherman Antitrust Act to business monopolies. See *United States v. E.C. Knight, Co.*, 156 U.S. 1 (1895) (holding “it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt . . . to monopolize commerce”).

[12] See 208 U.S. 274, 294 (1908) (holding that the labor union was a “combination” that “falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes”); see also 22 Loy. L.A. L. Rev. at 164.

[13] See 22 Loy. L.A. L. Rev. at 163.

[14] *Id.* at 216, n. 76.

[15] William O. Douglas, *An Almanac of Liberty*, Doubleday & Company, at 189 (1954).

[16] See 15 U.S.C.A. § 17 (“Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof”).

[17] *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 472 (1921).

[18] 22 Loy. L.A. L. Rev. at 167.

[19] See 43 Ariz. L. Rev. at 64; See also 29 U.S.C. §§ 101-115 (1994).

[20] *Id.* at 64, n. 5 (quoting 75 Cong. Rec. 5478 (1932)).

[21] See 37 A.L.R.3d 1147 (“As a general rule, public employees, even in the absence of express statutory prohibition, are denied the right to strike or to engage in a work stoppage against a public employer”).

[22] See 29 U.S.C. § 163 (1994) (“Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right”).

[23] See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1552 (2002) (“The original choice of administrative enforcement is understandable. In 1935, the courts were the last places to which New Dealers and union activists would have turned for the enforcement of labor rights”).

[24] See *infra* notes 28-35.

[25] See *infra* notes 48-69.

[26] See *N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 (1984) (“the activities of employees who have joined together in order to achieve common goals.”).

[27] See Benjamin I. Sachs, *Labor Law Renewal*, 1 Harv. L. & Pol’y Rev. 375, 400, n. 3 & 11 (2007) (“one in five employees who takes an active role in organizing campaigns is discharged for doing so”), (“many employers insist on NLRB elections because they are a tool for killing an organizing drive”).

[28] See *id.* at 377 (“the NLRA’s failings have left the traditional legal channel for collective action blocked”).

[29] See *id.* at 389-90 (“Although the [NLRA] promises that workers, should they choose to do so, may organize and interact collectively with their employers, the statute’s deeply inadequate remedial regime has rendered protections for associational and collective activity ineffectual and produced ‘a culture of near-impunity . . . in much of U.S. labor law and practice’”).

[30] See 102 Colum. L. Rev. at 1554 (“The weakness of the Act’s remedies in the face of employer resistance has proven to be the Achilles’ heel of employee rights”).

[31] See 1 Harv. L. & Pol’y Rev. at 390 (“because the statute centralizes all enforcement power in the NLRB and denies

workers a private right of action, the Board’s weak remedies and time consuming procedures are the only game in town”).

[32] See Staughton Lynd & Daniel Gross, *Solidarity Unionism at Starbucks: The IWW Uses Section 7*, WorkingUSA: The Journal of Labor and Society, Vol. 10, at 348 (September 2007) (“From the very beginning, the Wagner Act . . . had two contradictory objectives . . . to protect workers when they acted together . . . [and] labor peace”), [https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1743-](https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1743-4580.2007.00166.x)

4580.2007.00166.x, archived at <https://perma.cc/S2YL-QKRW>.

[33] See *supra* note 32.

[34] For the private right of action in the Fair Labor Standards Act (“FLSA”), see 29 U.S.C.A. § 216(b) (“An action to recover . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated”).

[35] For the private right of action in Title VII, see 42 U.S.C.A. § 2000e-5(f)(1) (“[EEOC] shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge”).

[36] *Surrell v. California Water Serv. Co.*, 518 F.3d 1097, 1104 (9th Cir. 2008) (citing 42 U.S.C. § 2000e-5(e)(1)) (“A person seeking relief under Title VII must first file a charge with the EEOC within 180 days of the alleged unlawful employment practice”).

[37] See 29 U.S.C.A. § 216(c) (“The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages”).

[38] See *Epic Sys. Corp.*, 138 S. Ct. at 1636 n.4 (Ginsburg, J., dissenting) (“The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U.S.C. § 216(b). In particular, it authorizes ‘one or more employees’ to maintain an action ‘in behalf of himself or themselves and other employees similarly situated.’ *Ibid.* ‘Similarly situated’ employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.*”).

[39] See *id.* at n.3 (Ginsburg, J., dissenting). (“Rule 23 establishes an opt-out class-action procedure, pursuant to which ‘[o]ne or more members of a class’ may bring an action on behalf of the entire class if specified prerequisites are met”).

[40] See Alexander J.S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 Chi.-Kent L. Rev. 3, 20 (2019) (“the Supreme Court’s shifting doctrines around arbitration presented employers with the opportunity to reduce their exposure to litigation in the courts through the adoption of mandatory arbitration for their workforces”).

[41] See *id.* at 3 (“Mandatory arbitration is a controversial practice in which a business requires employees or consumers to agree to arbitrate legal disputes with the business rather than going to court”).

[42] See 15 Stan. J. Civ. Rts. & Civ. Liberties at 47 (“Slightly more than 30 percent of [mandatory arbitration] agreements



require employees to arbitrate individually rather than as a group and thereby to waive any rights to a class action lawsuit or class arbitration”).

[43] *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1082 (1999) (“[arbitration] proceedings take place in private”).

[44] Economic Policy Institute and the Center for Popular Democracy, *Unchecked corporate power: Forced arbitration, the enforcement crisis, and how workers are fighting back*, 14 (May 2019),

<https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf>, archive at <https://perma.cc/W5AF-MRGR>.

[45] See Alexander J.S. Colvin, *The growing use of mandatory arbitration*, Economic Policy Institute (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/>,

archived at <https://perma.cc/P68A-J597>.

[46] *Supra* note 46 at 1.

[47] Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U.C. Davis L. Rev. 921, 923 (2015) (“Over the past two terms, the Supreme Court effectively privatized consumer and employment dispute resolution”).

[48] 15 Stan. J. Civ. Rts. & Civ. Liberties at 49.

[49] See *supra* note 47.

[50] 96 N.C. L. Rev. at 682.

[51] *Supra* note 46 at 3.

[52] See *supra* note 47.

[53] Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in A Post-Concepcion Era*, 56 St. Louis U. L.J. 1203, 1224 (2012).

[54] *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device”).

[55] Christopher R. Leslie, *The Arbitration Bootstrap*, 94 Tex. L. Rev. 265, 277 (2015).

[56] 96 N.C. L. Rev. at 695.

[57] See Sara Lingafelter, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in A Judicial Forum*, 28 Seattle U. L. Rev. 803, 814 (2005)

[58] See *id.* at 814-15.

[59] See *id.* at 810-12.

[60] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

[61] David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 26 (2003).

[62] *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 115 (2000) (“[v]arious studies show that arbitration is advantageous to employers . . . because it reduces the size of the award that an employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system”).

[63] Katherine V.W. Stone and Alexander J.S. Colvin, *The arbitration epidemic*, Economic Policy Institute (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>, archived at <https://perma.cc/4VZP-55KG>.

[64] See *supra* note 65.

[65] Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* New York Times (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/i>

*n-arbitration-a-privatization-of-the-justice-system.html*, archived at <https://perma.cc/2EET-FM7Q>.

[66] See *supra* note 65 (“Differences in damages awarded are even greater, with the median or typical award in mandatory arbitration being only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts”).

[67] *Storer Broad. Co. v. Am. Fed’n of Television & Radio Artists, Cleveland Local, AFL-CIO*, 600 F.2d 45, 47 (6th Cir. 1979).

[68] See *San Martine Compania De Navegacion, S. A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 800 (9th Cir. 1961) (The FAA does not “authorize [an award’s] setting aside on the grounds of erroneous finding of fact or of misinterpretation of law”).

[69] See 9 U.S.C.A. § 10(a) (“(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”).

[70] See *supra* note 65.

[71] *Epic Sys. Corp.*, 138 S. Ct. at 1621.

[72] *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

[73] Andrea Doneff, *Is Green Tree v. Randolph Still Good Law? How the Supreme Court’s Emphasis on Contract Language in Arbitration Clauses Will Impact the Use of Public Policy to Allow Parties to Vindicate Their Rights*, 39 Ohio N.U. L. Rev. 63, 69 (2012) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (holding that the Securities Act prohibited a waiver of a judicial remedy by an arbitration agreement because the underlying purpose of the Act was to protect investors), overruled by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989)).

[74] See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 214 (1985) (holding that when a complaint raises both federal securities claims and pendent state claims, a court may not deny a motion to compel arbitration of the state-law claims if

the parties agreed to arbitrate their disputes); *see also Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding that arbitration clauses could cover civil RICO claims because “[t]he Arbitration Act . . . mandates enforcement of agreements to arbitrate statutory claims”).

[75] 500 U.S. 20, 35 (1991).

[76] *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 886 (4th Cir. 1996) (holding that summary judgment of Title VII and Americans with Disabilities Act (ADA) claims was correct because the plaintiff failed to submit her claims to mandatory arbitration as required in a collective bargaining agreement).

[77] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that state employment discrimination claims are covered by the FAA).

[78] *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 507 (4th Cir. 2002) (holding that claims under the FLSA, and state wage and hour laws, were covered by arbitration agreements).

[79] *See* 94 Chi.-Kent L. Rev. at 4 (“If an employment right protected by a federal or state statute has been violated and the affected worker has signed a mandatory arbitration agreement, that worker does not have access to the courts and instead must handle the claim through the arbitration procedure designated in the agreement”).

[80] 94 Tex. L. Rev. at 276.

[81] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 375 (2005).

[82] *Id.* at 396.

[83] *See id.* at 398 (citing Complaint at ¶¶97–117, *Ross v. Bank of Am. N.A. (U.S.A.)*, No. 05 Civ. 7116, 2006 WL 2685082 (S.D.N.Y. 2006)).

[84] *See Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161 (2005) (holding that class waivers “in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable”), *abrogated by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *see also In re Am. Express Merchants' Litig.*, 634 F.3d 187, 197–98 (2d Cir. 2011) (holding class waiver unenforceable because “the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws”), *adhered to on reh'g sub nom. In re Am. Exp. Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom. Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

[85] Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. Kan. L. Rev. 767, 769 (2012) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)).

[86] *Id.* at 782.

[87] *Id.*

[88] 94 Tex. L. Rev. at 280.

[89] *Id.* (citing Myriam Gilles, Anthony Sebok, *Crowd-Classing Individual Arbitrations in A Post-Class Action Era*, 63 DePaul L. Rev. 447, 459 (2014) (“class action waivers embedded in arbitration clauses are enforceable even where

proving the violation of a federal statute in an individual arbitration would prove too costly to pursue”). *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

[90] 139 S. Ct. 1407, 1419 (2019) (“Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis”).

[91] *Supra* note 46 at 4.

[92] *Federal Arbitration Act and National Labor Relations Act-Arbitration and Collective Actions-Collective Arbitration Waivers-Epic Systems Corp. v. Lewis*, 132 Harv. L. Rev. 427 (2018).

[93] Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 Cornell L. Rev. 527, 530 (2015) (describing the court’s “efforts in the late-nineteenth and early-twentieth centuries to protect the unenumerated right of contract”).

[94] *Epic Sys. Corp.*, 138 S. Ct. at 1619.

[95] 132 Harv. L. Rev. at 428.

[96] *See Epic Sys. Corp.*, 138 S. Ct. at 1619–20.

[97] *See id.* at 1620.

[98] 9 U.S.C.A. § 2.

[99] 29 U.S.C.A. § 157

[100] *Epic Sys. Corp.*, 138 S. Ct. at 1620.

[101] *Id.* at 1622.

[102] *Id.* (quoting *Concepcion*, 563 U.S. at 344).

[103] *Id.* at 1624.

[104] *See* 29 U.S.C.A. § 157 (other concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

[105] *Epic Sys. Corp.*, 138 S. Ct. at 1625 (quoting *Nat'l Labor Relations Bd. v. Alternative Entm't, Inc.*, 858 F.3d 393, 415 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part), *abrogated by Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)).

[106] *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 565–66 (1978).

[107] *Epic Sys. Corp.*, 138 S. Ct. at 1629.

[108] *Id.* at 1632 (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1637 (Ginsburg, J., dissenting)).

[109] *Id.* at 1632 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n. 3 (2010) (Ginsburg, J., dissenting)).

[110] *Id.* at 1631 (quoting *Concepcion*, 563 U.S. at 336).

[111] *Supra* note 46 at 11.

[112] *See Gaffers v. Kelly Servs., Inc.*, 900 F.3d 293, 296 (6th Cir. 2018).

[113] *Id.* at 295 (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1624).

[114] *Id.* at 295 (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1627).

[115] *Id.* at 295–96 (quoting *Epic Sys. Corp.*, 138 S. Ct. at 1626).

[116] *Correia v. NB Baker Elec., Inc.*, 32 Cal. App. 5th 602, 608 (Ct. App. 2019) (citing Cal. Lab. Code § 2699).

- [117] *Id.* at 609 (emphasis in original).
- [118] *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014) (“an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy”).
- [119] *Correia*, 32 Cal. App. 5th at 620 (citing *Iskanian*, 59 Cal. 4th at 384-89).
- [120] *Id.* at 622.
- [121] *Supra* note 46 at 3.
- [122] *Garcia v. Chipotle Mexican Grill, Inc.*, No. 16 CIV. 601 (ER), 2019 WL 358503, at \*5 (S.D.N.Y. Jan. 29, 2019).
- [123] *Id.* at 4 (quoting Def.'s Mem. Supp. Mot. Recons. 9).
- [124] *Id.* at 4.
- [125] Lise Gelernter, *The Impact of Epic Systems in the Labor and Employment Context*, 2019 J. Disp. Resol. 115, 118 (2019).
- [126] *Id.* at 119.
- [127] *Id.*
- [128] *Id.*
- [129] See Dave Jamieson, *Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly*, HuffPost (Dec. 21, 2018), [https://www.huffpost.com/entry/chipotle-mandatory-arbitration-agreements\\_n\\_5c1bda0de4b0407e90787abd](https://www.huffpost.com/entry/chipotle-mandatory-arbitration-agreements_n_5c1bda0de4b0407e90787abd), archived at <https://perma.cc/E3AH-UCCE>.
- [130] See Steven C. Bennett, *What to Do When A Party Fails to Pay Its Portion of Arbitration Fees*, *Prac. Law.*, June 2013, at 57-61.
- [131] Chris Villani, *Harvard Group Ups Pressure To Nix BigLaw Forced Arbitration*, Law360 (March 26, 2019), <https://www.law360.com/articles/1142758/harvard-group-ups-pressure-to-nix-biglaw-forced-arbitration>, archived at <https://perma.cc/D72Z-Q7ED>.
- [132] *Id.*
- [133] *Supra* note 46 at 13.
- [134] Braden Campbell, *Backlash Has Some Employers Rethinking Forced Arbitration*, Law360 (March 1, 2019), <https://www.law360.com/articles/1134492/backlash-has-some-employers-rethinking-forced-arbitration>, archived at <https://perma.cc/V65Y-B6NW>.
- [135] See *supra* note 46 at 13.
- [136] See *supra* note 46 at 14 (“The preemptive power of the [FAA] is so strong that courts have even overturned state laws requiring that arbitration clauses be emphasized so that people realize what they’re signing”); see also *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally”).
- [137] *Supra* note 46 at 14.
- [138] *Supra* note 46 at 14.
- [139] Chris Micheli, *Private Attorneys General Act Lawsuits in California: A Review of Paga and Proposals for Reforming the "Sue Your Boss" Law*, 49 U. Pac. L. Rev 265 (2018).
- [140] *Id.* at 266 (quoting Senate Floor, Floor Analysis of SB 796, at 2 (Sept. 11, 2003)).
- [141] See *Correia*, 32 Cal. App. 5th at 615.
- [142] *Id.*
- [143] 49 U. Pac. L. Rev at 279.
- [144] *Supra* note 46 at 16.
- [145] See *supra* note 46 at 14 (“Bills introduced in six states in 2019 would authorize workers to initiate enforcement actions on behalf of a public agency for violations of labor law”).
- [146] H.R. 2749 and S. 1491, 116th Congress (2019-2020).
- [147] Since the text of Act in the 116th Congress is unavailable, the text of the Act in the 115th Congress is a guide. See H.R. 7109, 115th Congress (2017-2018).
- [148] See H.R. 7109, 115th Congress (2017-2018).
- [149] *Supra* note 46 at 13.
- [150] H.R. 1423, 116th Congress, (2019-2020).
- [151] *Id.*
- [152] *Supra* note 46 at 13.