

# Forced Arbitration Enabled Employers to Steal \$12.6 Billion From Workers in Low-Paid Jobs in 2019

*By imposing forced arbitration, employers prevented workers earning less than \$13 per hour from recovering \$12.6 billion in stolen wages.*

*By Hugh Baran*

**F**orced arbitration is increasingly being imposed on workers as a condition of employment, denying them the right to go before a judge and jury when their employer breaks the law 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 be subject to forced arbitration.

## Key Findings

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- **\$12.6 billion** in wages was stolen from private-sector non-union workers earning less than \$13 an hour who are subject to forced arbitration. Employers using forced arbitration requirements have effectively prevented these workers from ever recovering their stolen wages.
- **24 million** private-sector non-union workers in the United States earning less than \$13 per hour were subject to forced arbitration in 2019.
- Using available data, we estimate that 26% of them, or **6.25 million** workers, have experienced wage theft in the last year.
- Because these workers are subject to forced arbitration, and typically also collective/class waivers, 98% of them—**6.13 million** workers—will never file a claim at all to recover their stolen wages.
- 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—as a result of both voluntary compliance and increased private enforcement by workers—would put \$2.5 billion back in workers' pockets annually, and \$25 billion over the next decade.

### **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**

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- Few workers are aware that they have lost the important right to bring claims before a judge and jury. But 55% of all private-sector non-union employees are currently subject to forced arbitration, including 64.5% of workers earning less than \$13 per hour.<sup>1</sup>
- Making this 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.
- 59.1% of Black workers and 57.6% of women workers are subject to forced arbitration, making Black workers and women workers the most likely groups to be subject to forced arbitration. Moreover, 54.3% of Hispanic workers are subject to forced arbitration, as are 55.6% of white workers and 53.5% of men.<sup>2</sup>
- By 2024, it is projected that 80% of all private-sector non-union employees will be subject to forced arbitration requirements and class/collective action waivers.<sup>3</sup>
- Forced arbitration heavily favors employers.<sup>4</sup> 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 their claims.<sup>5</sup> For those few who do go to arbitration, their recoveries are significantly lower than if a judge and jury heard their case.<sup>6</sup>

### **How We Arrived at Our Findings**

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

There are currently 37,300,000 total private-sector non-union workers in the United States earning a wage of less than \$13 per hour.<sup>7</sup> 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,<sup>8</sup> we calculate that 24,058,500 of these workers are 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*.<sup>9</sup> 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.<sup>10</sup> 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%.

### **Estimating how many of these workers experience wage theft**

Based on available data and studies from the past 12 years, we estimate that at least 6,255,210 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.<sup>11</sup> 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.<sup>12</sup>
- 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.<sup>13</sup>

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 use of forced arbitration.

### **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.<sup>14</sup> With no effective access to justice, workers simply abandon their claims.

Based on that finding, we calculate that 6,130,105 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.

Accordingly, the 6,130,105 employees earning less than \$13 an hour who are subject to forced arbitration, and do not file claims, are unable to recover nearly \$12.6 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 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.<sup>18</sup>

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.<sup>19</sup> The average caseload per investigator doubled between 2008 and 2018, and the backlog of open cases grew by 76% over the same time period.<sup>20</sup> As a result, the Department recovers less than 3% of the nearly \$1 billion in unpaid minimum wages stolen from New Yorkers.<sup>21</sup> Other state agencies face similar capacity constraints.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup>

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 3.7% to 3.9% of the wages stolen from these workers in 2019—and would still leave over \$12 billion in stolen wages unrecovered.

But USDOL is deprioritizing workers subject to forced arbitration. In an August 2018 memorandum, Solicitor of Labor Kate O’Sannlain instructed attorneys in her office to

inform senior political appointees before commencing enforcement actions to recover wages of workers subject to forced arbitration.<sup>25</sup> O’Scannlain subsequently observed that she believed the agency’s resources were better concentrated elsewhere.<sup>26</sup> Her memorandum and comments indicate that USDOL is more interested in protecting employers’ right to use forced arbitration than in targeting them with public enforcement actions.<sup>27</sup>

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.<sup>28</sup> Without such information, fully prioritizing employers that use forced arbitration would be difficult for agencies to practically implement.

**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.<sup>29</sup>

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.<sup>30</sup> 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 Stolen From Low-Wage Workers Currently Subject to Forced Arbitration, or That Could be Recovered Through Private Enforcement
20%	\$2.51 billion
40%	\$5.02 billion
60%	\$7.54 billion
80%	\$10.1 billion
100%	\$12.6 billion

Source: Calculations by the author.

## Acknowledgments

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## Endnotes

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- <sup>1</sup> 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>.
- <sup>2</sup> *Id.* at 9.
- <sup>3</sup> 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>.
- <sup>4</sup> 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 from awarding the level of relief that would be available in court.”).
- <sup>5</sup> 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/>.
- <sup>6</sup> KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC 19 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf>.
- <sup>7</sup> Based on Economic Policy Institute analysis of 2019 Current Population Survey microdata from the U.S. Bureau of Labor Statistics.
- <sup>8</sup> COLVIN at 9.
- <sup>9</sup> *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/>.
- <sup>10</sup> HAMAJI at 4, 22.
- <sup>11</sup> 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>.
- <sup>12</sup> 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>.
- <sup>13</sup> Jenny Montoya Tansey, Public Rights Project, *Voices from the Corporate Enforcement Gap* 9 (2019), <https://www.publicrightsproject.org/press/enforcementgap>.
- <sup>14</sup> 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/>.
- <sup>15</sup> See U.S. DEPARTMENT OF LABOR, *Wage and Hour Division Data for Fiscal Year 2019*, <https://www.dol.gov/agencies/whd/data>.
- <sup>16</sup> 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.”).
- <sup>17</sup> COOPER & KROEGER at 10, tbl. 1.
- <sup>18</sup> 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>.
- <sup>19</sup> 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>.
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.* at 13.
- <sup>22</sup> See HAMAJI at 5–8 (describing overburdened state labor enforcement agencies in Maine, New York, Massachusetts, Vermont, Oregon, and Washington).
- <sup>23</sup> 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).
- <sup>24</sup> 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).
- <sup>25</sup> 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>.
- <sup>26</sup> 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 Practising 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 want 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.”).
- <sup>27</sup> 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), <sup>28</sup> 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.

<sup>29</sup> See FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* 75–100 (2008).

<sup>30</sup> 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).

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