

Signing Your Rights Away:

**Coercive Waivers in the
Workplace and how
Attorneys
and Advocates can Fight Back**

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For more than 45 years, NELP has sought to ensure that America upholds for all workers her promise of opportunity and economic security through work.

NELP fights for policies to create good jobs, expand access to work, and strengthen protections and support for low-wage workers and the unemployed.

We publish research that illuminates workers' issues; promote policies that improve workers' lives; lend deep legal and policy expertise to important cases and campaigns; and partner with allies to advance crucial reforms.

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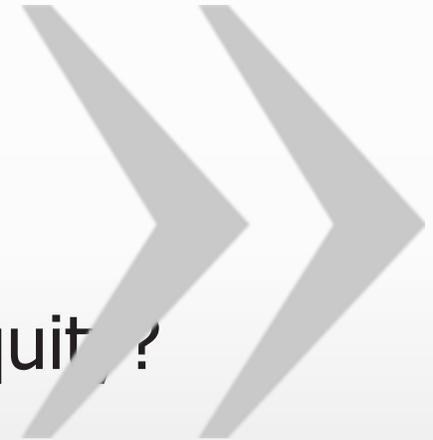
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We're passionate champions of policies and laws that help women and girls achieve their potential throughout their lives – at school, at work, at home, and in their communities. We're committed advocates who take on the toughest challenges, especially for the most vulnerable women – and we make change happen. We're proud to have been on the frontlines of virtually every advance for women for more than 40 years, benefitting their families, their communities, and the nation.

Please help us by answering the **five multiple choices questions** in the bar on the right of your screen.

1. Which best describes where you work?
2. In which geographic area do you practice law?
3. In what areas of law do you practice?
4. Are you a part of the Legal Network for Gender Equity?
5. How did you hear about this webinar?



Framing the Conversation

- Forced/Mandatory Arbitration
- Class and Collective Waivers
- Non-Disclosure Provisions
- Independent Contractor Provisions
- Non-Compete Provisions



Why is this important?

- **Magnitude of the problem**
 - Estimated 60 million workers subject to forced arbitration agreements
 - Nearly 30 percent have lost right to pursue collective actions
 - One third of the workforce subject to non-disclosure provisions
- **Forced/Mandatory Arbitration of claims results in**
 - Less claims being brought in Court, according to research
 - Individual workplace claims lost in “black hole”
 - Usually a violation of the Federal Labor Standards Act, but also can look to state or local law to remedy wage theft allegations [WHAT DOES THIS MEAN? THAT CLAIMS ARE BARRED UNDER THE FLSA?]
- **Non-Disclosure Provisions**
 - Often used during settlements to protect harassers from exposure
 - Can also be used to stop workers from speaking to each other and exposing hostile work environment

Resources

National Employment Law Project:

Najah A. Farley, Staff Attorney, nfarley@nelp.org

NELP Forced Arbitration Roundup: <https://www.nelp.org/blog/forced-arbitration-explainer-video-link-roundup/>

What's Next for Forced Arbitration: <https://www.nelp.org/blog/whats-next-forced-arbitration-go-scotus-decision-epic-systems/>

National Wage & Hour Clearinghouse (www.just-pay.org)

National Employment Lawyers Association Membership Directory:

<http://exchange.nela.org/memberdirectory/findalawyer>

NELP Resources on wage theft and independent contractor misclassification:

<http://www.nelp.org/publication/winning-wage-justice-strategies-for-effective-local-wage-law-enforcement/>

The Rise of Forced Arbitration

Federal Arbitration Act in 1925 made agreements to arbitrate current or future disputes in contracts involving interstate commerce “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”



FAA Arbitration vs. Labor Arbitration

- FAA arbitration intended to cover disputes between businesses
- Separate long history of labor arbitration as alternative to strikes to establish contract terms in unionized workplaces and to resolve grievances under collective bargaining agreements (1960 Steelworkers trilogy)



Supreme Court Expansion

- Beginning in 1980s Supreme Court expanded reach of FAA to apply to state as well as federal cases and to statutory as well as contract-based claims; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)
- Now arbitration provisions in adhesive contracts are routinely enforced to keep federal and state statutory claims out of court, and state contract law defenses like unconscionability are found preempted by the FAA; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-52 (2011)
- In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), Supreme Court held that bans on class or collective actions imposed by employers as condition of employment are permissible under the FAA, notwithstanding the National Labor Relation's Act protection of concerted activity among workers



Fighting Forced Arbitration in Court

- Contract formation
- Enforcement by nonparties
- Defenses to enforceability (public policy, illegality, unconscionability)
- Waiver

- Contract formation disputes always resolved by court, not arbitrator; *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 130 S. Ct. 2847 (2010)
- No liberal policy favoring arbitration to tip the scale
- Contract formation questions resolved under applicable state law, sometimes leading to choice of law issues

CONTRACT FORMATION PRELIMINARIES

Contract requires offer, acceptance and consideration

Offer: did employee receive notice of contract terms in form/language they could understand?

Acceptance: employer must be able to prove that this specific employee received and signed or otherwise agreed to this specific language

Consideration: handbooks with “this is not a contract” disclaimers or unilateral change in terms provisions fail for lack of consideration (*National Federation of the Blind v. The Container Store, Inc.*, 904 F.3d 70 (1st Cir. 2018))

ELEMENTS OF CONTRACT FORMATION

- Often arises with staffing agencies, subcontractors and other joint employment situations
- Nonparties to agreement may have right to enforce it if they can prove agency, third party beneficiary or estoppel
- These issues are analyzed under state law

WHEN NONPARTIES TRY TO ENFORCE AGREEMENTS

- Despite federal presumption in favor of arbitration, arbitration agreements can still sometimes be challenged on grounds like illegality or unconscionability that apply to any contract
- Often particularly unfair provisions, such as those limiting remedies or shortening statutes of limitations, will be severed and remainder of arbitration clause will be enforced
- If entire arbitration provision is pervaded by unconscionability, courts will refuse to rewrite it through severance: *Ramos v. Winston & Strawn*, 2018 WL 5730183 (Cal. App. Nov. 2, 2018)

DEFENSES TO CONTRACT ENFORCEMENT

- If employer litigates in court before attempting to compel arbitration, may have waived right to arbitrate; waiver finding more likely the longer the delay or if employer engaged in discovery or sought ruling on the merits from judge
- Employers have also been found to have waived right to arbitrate or breached arbitration agreement by not cooperating with arbitration proceedings, including not paying arbitrator fees (*Nadeau v. Equity Residential Properties Management Corp.*, 251 F. Supp.3d 637 (S.D.N.Y. 2017))

WAIVER THROUGH INCONSISTENT CONDUCT

- Arbitration can have benefits for some employees: confidentiality, faster resolution, fewer procedural motions
- Fighting in court takes time and the party seeking arbitration gets an immediate appeal under 9 USC 16
- Use willingness to agree to arbitration to negotiate for better terms, more convenient forum, selection of desired arbitrator
- May wind up litigating some claims or against some parties in court while handling others in arbitration

WHAT IF YOU CAN'T/DON'T WANT TO FIGHT?

- Class/collective action bans are commonly joined with arbitration provisions, esp. after *Epic Systems*, but some arbitration provisions still don't say anything about class actions one way or the other
- Leading arbitration providers AAA and JAMS both have rules and procedures for handling class arbitrations
- Circuit courts are divided on whether court or arbitrator should decide whether class proceedings are available in arbitration where clause doesn't speak to the issue; in reversal of the usual trend, corporations typically want courts and not arbitrators to decide this

ARE CLASS/COLLECTIVE CLAIMS ALLOWED IN ARBITRATION?

- Google employees included getting rid of forced arbitration as one of their walkout demands: Google agreed for sexual harassment claims and Facebook soon followed
- Restoring Justice for Workers Act, H.R. 7109, introduced on October 30 by Jerrold Nadler (D-NY) and Bobby Scott (D-VA), would outlaw mandatory predispute arbitration for employment claims and place restrictions on postdispute arbitration with individual employees (as opposed to unions)
- Action in the states: preemption blocks many avenues but WA governor Jay Inslee's executive order requiring state agencies to consider employers' use of forced arbitration provisions and class action bans as a factor in purchasing/procurement process is a promising strategy that can be replicated elsewhere

FIGHTING OUTSIDE THE COURTROOM

NON-DISCLOSURE AGREEMENTS

a.k.a NDAs

ALEXIS RONICKHER

WHAT IS AN NDA?

An agreement between at least two parties that limits a party's ability to speak fully and truthfully about a specific subject.

Two types of NDAs in the employment context:

- Pre-dispute
- Post-dispute

NDAS & THE #METOO MOVEMENT

- Weinstein scandal highlighted the pernicious role of NDAs in sexual harassment and assault cases.
- Bill O'Reilly, Roger Ailes, Bill Cosby, Larry Nasser – all reportedly used NDAs to quiet sexual harassment and assault allegations.
- Recently, World Famous Soccer Player Cristiano Ronaldo disclosed to have settled allegations of rape for \$400,000 and an NDA.

NDAS - NOT LIMITED TO PROTECTING THE FAMOUS

- Some employers have employees sign broad NDAs prior to any dispute arising.
- Reports of such use in: the restaurant industry, the tech world, the advertising industry, even the White House.

PRE-DISPUTE NDAS

Broad pre-dispute NDAs chill workers willingness to come forward with claims and truthfully report unlawful conduct they've seen that affects others.

Example of an actual overly broad NDA:

“In connection with such employment, confidential and/or proprietary information of Employer or its assignees or licensees (such confidential information shall be referred to herein as “Confidential Information”) may be revealed to you. Such Confidential Information shall include, without limitation, details of the personal and business lives of [Founding Executive], his family members, friends, business associates and dealings...you expressly agree that you shall not, directly or indirectly, verbally or otherwise, any time (whether during or after your employment, publish, reveal, disseminate, disclose, or cause to be published, revealed, disseminated or disclosed (herein “Disclosure”) any Confidential Information to any person, firm or entity whatsoever (herein “Third Parties”). Without limiting the generality of the foregoing, Third Parties shall include, without limitation, individuals you come into contact with (including spouses, significant others, friends, relatives and acquaintances), as well as... newspapers, periodicals, magazines, publications, television stations, radio stations, publishers, and any other enterprise involved in the print or electronic media, including individuals working directly or indirectly for or on behalf of any of said entities.”

BEST PRACTICES FOR PRE-EMPLOYMENT NDAS

- Valid use is to protect intellectual property, but language must be narrowly tailored for that legitimate use.
- There should be no non-disparagement clause, since such a clause acts as a *de facto* broad restriction.
- There should not be a liquidated damages clause.

POST-DISPUTE AGREEMENTS

- Post-dispute agreements can have value to workers, particularly those who have suffered sexual violence or harassment.
- Limits information available about highly personal and traumatizing events.
- Limits reputational damage for workers.
- Encourages pre-litigation resolution.
- Unfortunately, almost always in pre-litigation resolutions a *de facto* term of settlement.

BEST PRACTICE FOR POST-DISPUTE NDAS

- Mutual confidentiality and non-disparagement provision.
 - Exceptions for disclosing to immediate family, to the worker's legal, tax and financial advisors, to the government, and as required by law.
- If there are liquidated damages clauses or payment of attorneys' fees and costs in case of breach, they need to be reciprocal.
- Liquidated damages clause should be scaled for your client's resources not the employer.
- Ideally no arbitration clause, but if there is one, it applies to the breach of either party.

LEGAL ATTACKS ON NDAS

Reasons to attempt an attack

- Strong interest from the media and the public right now
- Furthers other goals, such as:
 - Gaining access to more witnesses/plaintiffs,
 - Showing an environment is hostile to protected activity,
 - Gaining media interest in your case

Vehicle

- Seeking a declaratory judgment that NDA invalid
- Examples: Stormy Daniels' suit against President Trump; suit against the restaurateur Mike Isabella

LEGAL DEFENSES FOR EMPLOYEES SUBJECT TO NDAS

- Overbroad
- Unconscionable
- Disproportionate liquidated damages
- Contrary to public policy
- Lack of consideration

ADVOCACY STRATEGIES FOR COMBATING THEIR USAGE

Pre-Dispute

- Educate workers about pre-dispute NDAs
- Industry walk outs against their use?
- Media scrutiny
- Legislation

Post-Dispute

- Educate advocates and lawyers about best practices

NON-DISCLOSURE AGREEMENTS: LEGISLATIVE STRATEGIES

Ramya Sekaran

STATE LEGISLATIVE ADVANCES TO LIMIT NDAS

- Outpouring of stories via the Me Too movement increased awareness about the need for transparency
- Pre-employment NDAs as a condition of employment and NDAs in settlement agreements
- Five states enacted legislation to prohibit employers from requiring employees to sign nondisclosure agreements as a condition of employment
- Four states enacted legislation to limit the use of NDA provisions in settlement agreements related to claims of harassment and discrimination

STRATEGIES FOR STRENGTHENING LEGISLATIVE PROTECTIONS

- Include all forms of discrimination and other employment law violations in legislation limiting NDAs
 - Most protections enacted in the past year restrict NDAs solely in the context of sexual harassment/sexual assault claims
- Reaffirm employees' rights to provide testimony or evidence, file claims or make reports to any federal or state enforcement agency or in state or federal litigation, including class or collective actions, despite a NDA
- Ensure employees are not penalized for breaking a NDA
- Include all types of workers in any new protections limiting NDAs

PREVENTING EMPLOYER COERCION IN EMPLOYEE-REQUESTED NDAS

- Employees should retain the option of keeping their stories confidential. However, legislation must include procedural protections to curtail employer coercion.
- Key protections include:
 - providing a reasonable economic or other benefit to the individual that is on par with the benefit to the employer.
 - including an informed consent provision
 - N.Y. C.P.L.R. 5003-b
 - S. 121, 218th Leg. (N.J. 2018)

FEDERAL EFFORTS TO ADDRESS NDAS: ENDING THE MONOPOLY OF POWER OVER WORKPLACE HARASSMENT THROUGH EDUCATION AND REPORTING (“EMPOWER ACT”)

➤ **Bi-partisan and bicameral sponsorship**

- S. 2988, S. 2994 Sens. Harris (D-CA) & Murkowski (R-AK)
- H.R. 6406 Reps. Frankel (D-FL-21), Poe (R-TX-02), Nadler (D-NY-10), Comstock (R-VA-10), Blunt Rochester (D-DE)

➤ **Key transparency components**

- Prohibits pre-employment non-disclosure agreements (NDAs) and non-disparagement clauses
 - NDAs would still be permitted in specific settlements if they are mutually agreed and mutually beneficial
- Requires public companies to report to the SEC information regarding incidents of workplace harassment (including sexual harassment) and retaliation
- Confidential (not anonymous) tip line at EEOC

NATIONAL WOMEN'S LAW CENTER RESOURCES

- **NWLC Testimony on Sexual Misconduct Before the DC Council Committee on the Judiciary and Public Safety**
<https://nwlc.org/resources/nwlc-testimony-on-sexual-misconduct-before-the-dc-council-committee-on-the-judiciary-and-public-safety>
- **Webinar – #MeTooOneYearLater: Principles and Legislative Priorities for Eliminating Workplace Harassment**
<https://nwlc.org/resources/webinar-metoooneyearlater-principles-and-legislative-priorities-for-eliminating-workplace-harassment/>
- **#MeToo One Year Later: Progress In Catalyzing Change to End Workplace Harassment**
<https://nwlc.org/resources/metoo-one-year-later-progress-in-catalyzing-change-to-end-workplace-harassment/>
- **#MeTooWhatNext policy fact sheet**
<https://nwlc.org/resources/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability/>
- **State Playbook for Gender Equity: Prevent Sexual Harassment in Your State**
<https://nwlc.org/resources/prevent-sexual-harassment-in-your-state/>



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Questions?



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