"Sign on the Dotted Line": How Coercive Employment Contracts Are Bringing Back the Lochner Era and What We Can Do About It*

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I. Introduction

CONSUMERS or members of an organization (or union or political party) can show dissatisfaction with a firm in two ways, according to Albert Hirschman's foundational organizational theory. First, "customers [can] stop[ ] buying the firm's products or some members leave the organization: this is the *exit option*."[1] Second, a "firm's customers or the organization's members [can] express their dissatisfaction directly to management or to some other authority to which management is subordinate or through a general protest addressed to anyone who cares to listen: this is the *voice option*."[2] Employees in a

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1. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970).

2. *Id.* Hirschman also discusses how loyalty can inform the decision to exercise exit or voice; however, this discussion is beyond the scope of this Article.

firm theoretically retain the same options to express dissatisfaction with their employer: If they are unhappy with the terms and conditions of work, they can "exit" or quit, or they may try to improve circumstances by complaining to their employer, either alone or with their co-workers.[3]

Both exit and voice options are recognized in United States law. The exit option, or "right" to quit, flows from the Thirteenth Amendment and the abolition of slavery and involuntary servitude.[4] It has since been reinforced by decades of case law concerning the right of at-will employees to change the terms and conditions of their work by switching jobs, or even just threatening to leave for a job that pays them more or treats them better.[5] The protections offered by the voice option largely stem from New Deal era statutes, such as the Fair Labor Standards Act ("FLSA") and the National Labor Relations Act ("NLRA"), that, in recognition of the inherent power differentials between employees and employers: (1) create certain threshold employment standards for all workplaces, enforceable by private suit; and (2) enshrine the right of employees to band together to negotiate over the terms and conditions of work.[6]

However, these statutory and constitutional rights are not absolute, and courts permit workers and employers to modify them through employment contracts or agreements. The tension between the "freedom to contract" and the "freedom of labor" is not new.[7] And the question of which doctrine has the upper hand has waxed and waned. In the late nineteenth and early twentieth centuries, during

3. Obviously unionized employees have various other bargaining rights. However, and as is discussed *infra*, this Article focuses on the rights of non-unionized workers.

4. James G. Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L. J. 1474, 1548 (2010); Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 407–08 (2006).

5. Richard A. Epstein, *A Defense of the Contract At-Will*, 51 U. CHI. L. REV. 947, 947–48 (1984). *See, e.g.*, Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (1984) ("An employment contract indefinite as to duration, is terminable at will by either the employee or employer."); Roddy v. United Mine Workers of Am., 139 P. 126, 127 (1914) ("We take it as fundamental that any man, in the absence of a contract to work a definite time, has a right to quit whenever he chooses, for any reason satisfactory to him, or without any reason. If his wages are not satisfactory, his hours too long, his work too hard, his employer or his employment uncongenial, or his colaborers objectionable, his right to quit is absolute.").

6. National Labor Relations Act, 29 U.S.C.A § 157 (West, Westlaw through Pub. L. No. 116-91); Fair Labor Standards Act, 29 U.S.C.A § 216 (West, Westlaw through Pub. L. No. 116-91).

7. Bailey v. Alabama, 219 U.S. 219, 245 (1911); Pope, *supra* note 4, at 1482.

what is known as the Lochner era, the Supreme Court used the right to contract as the justification for striking down various statutes that tried to establish basic labor standards.[8] Eventually, the pendulum swung in the other direction, permitting the passage of the Norris La-Guardia Act, the NLRA, the FLSA, and a host of state and local labor protections. These protections operate on the premise that, given the power disparities inherent in the employment relationship, there must be some minimum employment standards that cannot be bargained away, and "employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment."[9]

Today, we again find ourselves in a moment of contract supremacy. Boilerplate, coercive employment contracts are now widely used for many (if not the majority of) private sector, non-unionized employees in the United States, including lower-wage hourly workers.[10] These contracts have limited workers' rights to quit or present a credible threat of quitting through broad covenants not to compete ("non-competes"), inevitable disclosure provisions, liquidated damages clauses, and other contractual restraints on employee mobility.[11] Coercive contracts have also threatened workers' abilities to exercise voice, most obviously through mandatory arbitration and class/collective action waivers, but also through broad confidentiality and non-disparagement clauses that may chill workers from discussing the terms and conditions of work with their colleagues.[12] Hampered in their ability to exercise exit or voice, workers' power has eroded, and it can be no accident that this era has been marked by widespread

8. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57–58 (1905); Adair v. United States, 208 U.S. 161, 174 (1908); Coppage v. Kansas, 236 U.S. 1, 26 (1915).

9. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1634 (2018) (Ginsberg, J., dissenting).

10. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/EW4W-DEPK].

11. *Id.*; *see also* Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [perma.cc/RQW2-NQYQ].

12. Colvin, *supra* note 10; Colvin & Shierholz, *supra* note 11.

employer disregard for wage and employment standards[13] and stagnant wages even as the job market has tightened.[14]

The first part of this Article provides background on coercive contracts. We examine how they are entered into and enforced. We also discuss some common employment contract terms and analyze how these terms limit workers' voice and exit options. The second part of this Article considers the evolving policy, organizing, and enforcement responses to the rise in private ordering of employment. From legislative proposals to ban mandatory arbitration agreements and curtail non-competes to organizing efforts such as global worker walkouts, there has been significant recent activity in this area. However, most of these responses have focused exclusively on either restoring employee access to the courts *or* promoting free labor market movement. We argue that the most effective solutions should also focus more holistically on the nature of employment contracts as vehicles to limit workers' core rights and bargaining power. We also argue that it is critical to provide meaningful disincentives to deter employer overreach in contract drafting.

II. The Rise of Coercive Contracting

For purposes of this Article, we will use the term "coercive contracts" to refer to standardized documents unilaterally drafted by an employer and presented as a term or condition of work for the purposes of extracting a waiver of certain rights.[15] We do not intend to refer to bespoke employment contracts between highly skilled/compensated employees and their employers because these contracts are more likely to be negotiated between parties with legal representation (or at least access to legal advice), in advance of accepting a job offer or starting a new job, and to provide for a guaranteed term of employ-

13. Annette Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 21 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf [https://perma.cc/J8KB-V6D7]; Kim Bobo, Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid – and What We Can Do About It 7 (2011).

14. Josh Bivens & Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?*, Econ. Pol'y Inst. (Dec. 12, 2018), https://www.epi.org/publication/what-labor-market-changes-have-generated-inequality-and-wage-suppression-employer-power-is-significant-but-largely-constant-whereas-workers-power-has-been-eroded-by-policy-actions/ [https://perma.cc/J8KB-V6D7].

15. Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 Ariz. L. Rev. 637, 639 (2007).

ment or payment in exchange for a waiver of certain rights.[16] We also do not intend to refer to collective bargaining agreements, which are similarly the result of a bilateral negotiation between a union and employer over things of value to both of them.

In contrast to these negotiated agreements, coercive contracts are almost never bargained for. For example, of workers subject to a non-compete, fewer than ten percent report having negotiated the terms of that non-compete before "agreeing" to it.[17] Negotiation is often a moot point anyhow as coercive contracts tend to be presented only after an employee has accepted or started a job[18] and as a term and condition of that job.[19] As such, they are more akin to the "shrink-wrap" consumer contracts placed in a box with a new toaster or vacuum cleaner, for example, and used to limit a consumer rights and remedies.[20]

Indeed, Margaret Jane Radin has said that, rather than employment "contracts" or "agreements," these instruments are more accurately described as "mass-market boilerplate right deletions."[21]

The common law has developed in such a way as to largely ignore, or even permit, coercive employment contracts. While courts do impose some limitations on how unbalanced the terms of a contract

16. Our discussion herein does not include contracts purporting to designate an individual worker as an independent contractor or purporting to evade an employment relationship by selling a bogus franchise or business opportunity; although these, too, deprive workers of core rights and result from disparate bargaining power, they are beyond the scope of this Article.

17. Evan Starr et al., *Noncompetes in the U.S. Labor Force* 21 (Univ. of Mich. Law & Econ. Research Paper no. 18-013, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 [https://perma.cc/8P42-AK9P]. This percentage is not broken out by income and skill level, and thus is likely even lower than ten percent for low and middle wage/skill workers.

18. Rachel Arnow-Richman has called this "delayed term." *See* Arnow-Richman, *supra* note 15, at 647–49.

19. A recent case in California is illustrative of the extreme lack of negotiation. All employees in a workplace were presented with a new employment handbook that made mandatory arbitration a condition of continued employment. The employee in question did not sign the agreement, and she met with her employer's Human Resources department and followed up with a letter to make her disagreement known. The employer told her that agreeing to the handbook was a condition of work but did not fire her. When the employee later sued her employer for discrimination, the employer successfully compelled arbitration, arguing that despite her documented disagreement with the term, the employee was bound by it because she had not quit. *See* Diaz v. Sohnen Enterprises, 245 Cal. Rptr. 3d 827 (Cal. Ct. App. 2019).

20. Arnow-Richman, *supra* note 15, at 639–40.

21. Margaret Jane Radin, *Response: Boilerplate in Theory and Practice* 3–4 (Univ. of Mich. Law & Econ. Research Paper no. 15-005, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2522896 [https://perma.cc/M7EW-MBRM].

may be, they often only examine the reasonableness of a contract as applied to an individual employee based on their particular facts and circumstances. For example, a provision in a contested contract can be voided if it violates clear public policy or if it is "unconscionable."[22] A contract provision may be procedurally unconscionable—the process by which the contract is entered into is so unfair that courts refuse to uphold it—or substantively unconscionable—the terms of the contract are so unfair that a court may strike some portion of them. However, courts typically only grant such injunctive relief for the individual party challenging the provision, and they do not extend that relief to all employees subject to the provision in question. And while the provisions of coercive contracts work together and are interrelated, courts generally consider the legality of various terms separately—for example, re-writing an offending contract term (or the contract term being challenged) without looking at the fairness concerns posed by the entirety of a contract.

While courts consider each term in an employment contract on an employee-by-employee and term-by-term basis, in practice one term rarely appears alone. An employer taking the time and spending the money on an attorney to draft them a contract likely wants it drafted as comprehensively as possible, and as such, most coercive contracts are likely to contain multiple provisions that impact exit and voice. For example, it has been documented that employers who utilize an employment contract requiring mandatory arbitration of disputes are significantly more likely to also require employees to agree to a non-compete.[23] But the terms go beyond just mandatory arbitration and non-competes: Confidentiality, inevitable disclosure, extensive dispute resolution procedures, and non-disparagement clauses are all common employment contract terms. The prevalence of attorney drafting tools like Thomson Reuter's Westlaw Practical Law, which provides sample employment contracts by jurisdiction for corporate counsel and management-side attorneys, as well as websites like

22. Arnow-Richman, *supra* note 15, at 662–63 (for a general discussion of some contract defenses); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 766–67 (2004). Non-competes are generally subject to a rule of reason test, originally articulated in Mitchel v. Reynolds (1711) 24 Eng. Rep. 347 (QB), and later incorporated into most states' common law. *See, e.g.*, Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 396–97 (Ill. 2012).

23. Colvin & Shierholz, *supra* note 11 (showing that between 42.6%–53.7% of employers who use mandatory arbitration clauses also use non-competes, whereas only 28.9%–43.3% of employers who don't require mandatory arbitration use non-competes).

rocketlawyer.com facilitate drafting such broad employment contracts by allowing anyone to fill in the blanks on a template employment agreement containing numerous terms.[24]

Although there is much more to be learned about the prevalence and contents of coercive employment contracts, the data that does exist shows that their use is widespread. In 1992, only two percent of private sector non-unionized employees were covered by an employment contract that contained a requirement of mandatory arbitration.[25] By 2018 that number had rocketed to 56.2% (or 60.1 million American workers),[26] and a more recent estimate projected that by 2024 more than eighty percent of private sector, non-union workers will be covered by arbitration clauses.[27] Non-competes are another common employment contract term: A recent survey of employers found that roughly half of responding employers required at least some employees in their establishment to enter into a non-compete, and roughly one-third required *all* employees to enter into a non-compete regardless of their job duties or compensation.[28]

Thus, while coercive contracts containing multiple, often overbroad, restrictions are used widely for many, if not most, private sector employees, they are largely unconstrained by a legal framework that examines them on a person-by-person and term-by-term basis.

III. Common Coercive Contract Terms and Their Impacts

What do common contractual terms mean, how do they co-exist with each other, and what is their significance for employees' overall exit and voice options? The following section provides definitions and examples of provisions used in actual contracts, quoted by courts, or filed as exhibits in litigation. While some of these examples are rela-

24. *See, e.g.*, *Legal Documents & Forms,* ROCKET LAW., https://www.rocketlawyer.com/legal-documents-forms.rl/#employers [https://perma.cc/P3SD-PDHW]. Note that this sample employment agreement contains, among other things, broad confidentiality requirements and a non-compete.

25. Colvin & Shierholz, *supra* note 11.

26. *Id.*

27. Kate Hamaji et al., *Unchecked Corporate Power*, ECON. POL'Y INST. (May 20, 2019), https://www.epi.org/publication/unchecked-corporate-power/ [https://perma.cc/EJZ8-TU3U].

28. Colvin & Shierholz, *supra* note 11. Prior surveys of employees found that around eighteen percent of employees report being be covered by a non-compete. *See* OFFICE OF ECON. POL'Y, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (2016); Starr et al., *supra* note 17, at 17. The difference is likely attributable to employees' lack of knowledge about the contents of their employment contracts.

tively run-of-the-mill, other examples push the limits or outright violate what a court would consider acceptable and uphold. Some of them arose in contract disputes or because of a challenge to a particular term, while others did not. We have not made particular distinctions between them because, in practice, coercive contracts frequently contain terms that would not be upheld in court but nonetheless affect workers' behaviors.[29] For our purposes, it was sufficient that the provisions cited below were representative of types of provisions commonly used in employment contracts and had actually been used in real employment contracts, likely for multiple employees over a number of years, before they were the subject of litigation.

A. Non-competes

Non-compete clauses restrict an employee from working for a competitor, typically in a certain area for a certain a period of time after leaving employment. For example:

> [E]mployee agrees not to engage directly or indirectly, either personally or as an employee, associate, partner, or otherwise, or by means of any corporation or other legal entity, or otherwise, in any business in competition with Employer and, in addition, not to solicit customers of Employer for Employee's own benefit or for the benefit of any third party, during the term of employment and for a period of two (2) years from the last day of employment, within a 100 mile radius of employment location.[30]

While most courts have held that non-competes may only be upheld or enforced where they specify the kind of activity considered competitive and the area in which it would be competitive,[31] it is not uncommon to see these restrictions drafted far more broadly. In the example above, competitive activity is undefined, the geographic scope is 100 miles from the employee's place of employment (meaning that an employee would likely have to move in order to reasonably commute to a job with a competitor), and the duration of the non-

29. Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts* 24 (Univ. of Mich. Law & Econ. Research Paper no. 16-032, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2858637 [https://perma.cc/5NZD-JRP5](citing studies finding, for example, that non-competes are signed at approximately the same rates in states that would enforce them and states that would not).

30. Osborne v. Brown & Saenger, Inc., 904 N.W.2d 34, 36 (N.D. 2017).

31. Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 396 (Ill. 2012) ("A restrictive covenant, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public.") (citing various examples).

compete is two years—a time period that extremely few employees could afford to wait out.[32]

Other non-competes may not contain such limitations at all:

> I agree that during the course of my employment and for a period of twelve (12) months immediately following the termination of my relationship with the Company for any reason, whether with or without cause, at the option either of the Company or myself, with or without notice, I will not, either directly or indirectly, engage in any activity that is in any way competitive with the business or demonstrably anticipated business of Company, and I will not assist any other person or organization in competing or in preparing to compete with any business or demonstrably anticipated business of Company.[33]

This provision fails to give the employee an indication of what kind of business it would consider a competitor of the company, nor does it appear to have any geographic limitation whatsoever. It also specifically applies regardless of whether the employee is fired or voluntarily quits.

Non-competes are the ultimate exit restriction. They explicitly limit an employee's outside employment options with the very employers who are most likely to find their skills valuable. As such, it is not surprising that research finds that employees who work under non-competes exhibit "both longer tenures and a reduced propensity to leave for a competitor."[34] Indeed, around forty percent of employees working under a non-compete say that it has been a factor in turning down a job with a competitor.[35] Moreover, these restrictions on exit likely have secondary effects on employee voice: An employee will be more likely to speak up and less afraid of retaliation if they know they could take their skills elsewhere and get another job. While this is not a perfect measure of voice, studies have shown that hourly workers' wages go up when states stop enforcing their non-competes, suggesting that the limitation on outside options harms employees' abilities to negotiate for higher wages with their current employer.[36] The same is likely true for other terms and conditions of work.

32. *Osborne*, 904 N.W.2d at 36.

33. Dowell v. Trunk Club, Inc., No. 2017-ch-9876, *complaint filed*, WL 3087804, at *6–7 (Ill. Cir. Ct., Cook Cty. July 20, 2017).

34. Starr et al., *supra* note 29, at 24.

35. *Id.* at 24, 25.

36. Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements (Dec. 9, 2019) (unpublished working paper) (available at SSRN: https://ssrn.com/abstract=3452240) (examining the impact of a 2008 Oregon law banning non-competes for low-wage workers and finding a marked increase in hourly wages).

B. Mandatory Arbitration

Mandatory arbitration clauses require employees to agree, notwithstanding any right they may have to enforce statutory employment protections through a suit in public court, that any dispute arising from their employment will be heard in a confidential private forum before a third-party arbitrator (usually a private attorney). A typical arbitration clause may read:

> The parties to the Agreement acknowledge and agree that any dispute or claim arising out of this Agreement, including, but not limited to any resulting or related transaction or the relationship of the parties, shall be decided by neutral, exclusive and binding arbitration . . . .[37]

The requirement that any disputes be arbitrated is often a final step in a rigid alternative dispute resolution process created by coercive contracts. For example:

> The employees and [EMPLOYER] agree that any dispute or claim between the employees and [EMPLOYER], including any dispute or claim that may arise out of or that is based upon any past, present and future employment relationship (including but not limited to any wage claim, any claim for wrongful refusal to employ, wrongful termination or any other claim based upon any employment discrimination, age, disability, statue, regulation or law), including tort, civil rights, disabilities, and harassment claims . . . shall be resolved by mediation and arbitration . . . .
> GOOD FAITH MEETING: A meeting shall be held promptly between the parties to attempt in good faith to negotiate a resolution of dispute. If, within seven (7) days after such meeting, the parties have not succeeded in negotiation a resolution of the dispute, they agree to submit the dispute to mediation.
> MEDIATION: The parties agree to participate in good faith in . . . mediation . . . . If the parties are not successful in resolving the dispute through the mediation, then the parties agree that the dispute shall be settled by . . . arbitration.
> COST EFFICIENCIES: . . . the parties agree to exclude attorneys in the dispute resolution process and avoid court proceedings. Neither party shall have the right to have any attorney attend or be present in the dispute resolution process without advance written consent of the other party.
> EXPENSES: Each party shall bear its own costs and expenses associated with the dispute resolution process.[38]

37. Beltran v. AuPairCare, Inc., 907 F.3d 1240, 1248 (10th Cir. 2018) (This particular arbitration provision also purported to allow the employing party to unilaterally select the arbitrator in any dispute—a term that was struck as procedurally and substantively unconscionable.).

38. Plaintiff's Response in Opposition to Defendant's Motion to Compel Arbitration, Exhibit 10 at 1, Grant v. Adair Homes, Inc., No. 19-cv-25039 (Cir. Ct. Or., Lane Cty. Aug. 29, 2019).

Alternative dispute resolution programs with arbitration requirements clearly impact employees' voice by foreclosing private rights of action and, often, minimizing the chance of any alternative dispute proceeding. While there are certainly benefits to both employees and employers if they are able to resolve disputes relatively quickly and inexpensively during alternative dispute resolution, the hurdles at every step and the lack of procedural safeguards accounting for differences in bargaining power between employees and employers mean that disputes may end not because the employee feels that a dispute has been adequately resolved, but rather because she has reached the limit of money and resources required to push the employer to agree to anything further (if anything at all). On top of these existing power differentials, some arbitration provisions are explicitly structured to dissuade claims or "stack the deck" in favor of the employer. Examples of this include the provision discussed above that claims to prohibit an employee from retaining a lawyer to represent them in arbitration, or provisions permitting the employer to select the arbitrator—i.e., pick the judge—in any dispute.[39] While these types of requirements are, of course, likely to be found procedurally or substantively unconscionable if reviewed by a court, many employees lack the resources to ever to get to court.

Arbitration agreements are also typically accompanied by class action waivers. These might say something like:

> With respect to covered claims subject to arbitration hereunder, (1) You and [Employer] are waiving the right to consolidate any claim which You individually or [Employer] may have with the claim of any other person and [(2)] the individual right to participate as a representative of a class, as a private attorney general, or as a member of a class of claimants, in any lawsuit or arbitration proceeding . . . .[40]

Class action waivers mean that there is effectively no vehicle by which to aggregate small claims into an alternative proceeding. Accordingly, this makes it extremely difficult to find an attorney willing to take the case on a contingency fee basis, as individual damages are often comparatively small.[41] As a result, more than diverting employees into a system of alternative dispute resolution, mandatory arbitra-

39. *See, e.g., Beltran,* 907 F.3d at 1248 (striking a provision permitting a company to unilaterally select the arbitrator and forum in disputes with au pair childcare providers).

40. Memorandum of Law in Support of Defendants' Motion to Compel Arbitration and to Dismiss, Schultz v. TCF Fin. Corp., No. 1:15-cv-01865 (N.D. Ill. Mar. 30, 2015), 2015 WL 1875515.

41. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1184–85 (2012) (explaining that "the FLSA systematically

tion paired with class action waivers prevents disputes from ever being heard.[42] Situations that might have otherwise been court cases often end up falling into what Cynthia Estlund has termed the "black hole" of mandatory arbitration—they are never filed or pursued at all.[43] The impact on employee voice is direct and severe.

Mandatory arbitration also has secondary effects on workers' voice by effectively shielding from public knowledge complaints that would have been heard in open court.[44] Arbitration is a private process, and the parties are often bound by confidentiality about arbitral proceedings from the outset. As the #MeToo movement and subsequent news coverage has demonstrated, this can mean that patterns of workplace violations, such as sexual harassment or sex discrimination in pay and promotional opportunities, persist and remain secret even at large employers like Fox News[45] or Kay Jewelers.[46] Employees who might have otherwise banded together to demand change internally as a group, or to file a class or collective lawsuit, were not aware for years or even decades that other co-workers had experiences similar to theirs.

C. Confidentiality and Non-disclosure Clauses

Confidentiality and non-disclosure clauses ("NDAs") typically define some subset of information or knowledge acquired during employment as "confidential" and bar employees from revealing such information to entities outside the company, either during course of their employment or for some period after their employment ends. NDAs may be written narrowly to protect only sensitive or trade secret information. For example:

> The Employee . . . agrees, except as required by Employee's duties while employed by the Company, not to use or disclose to any per-

tends to generate low-value claims," therefore "mechanisms that facilitate the economics of claiming are required").

42. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 692–99 (2018) (estimating the gap between court-filed cases and arbitrations and the extent to which arbitrations never move forward).

43. *Id.* at 700.

44. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 Chi.-Kent L. Rev. 463, 467 (2006).

45. Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers*, Vox (May 18, 2018), https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court [https://perma.cc/G5LL-HFY7].

46. Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, N.Y. Times Mag. (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html [https://perma.cc/G85R-QPUS].

> son, firm[,] or corporation, at any time, either during his/her employment with the Company or thereafter, any trade secret or confidential information of the Company, whatsoever, including, without limitation, information regarding any of the Company's customers, markets, future plans, the prices at which it obtains or has obtained its raw materials and other supplies . . . .[47]

An NDA may also be written far more broadly and purport to protect information that is otherwise public, discoverable, or would not otherwise seem to be particularly confidential. Such overly broad NDAs can have potential voice and exit impacts.

For example, a contract may define "confidential information" to include "any information pertaining to the wages, commissions, performance, or identity of employees of Employer."[48] In the particular contract that used this definition, it went on to say that an employee:

> shall neither directly nor indirectly (i) disclose to any person not in the employ of Employer any Confidential or Proprietary Information, or (ii) use any such information to the Employee's benefit, the benefit of any third party or [e]mployer, or to the detriment of Employer, or (iii) use any such information to solicit any employee of Employer to seek employment elsewhere.[49]

As written, this clause would seem to prohibit the employee from discussing wages, salaries, or even the names of co-workers with any third party and thus has clear implications for employee voice. For example, an employee prohibited from discussing things like wages and commissions with any third parties, such as attorneys, friends, or family members, will be less equipped to discover whether she is being sufficiently compensated or receiving other benefits or protections that she is entitled to at work. She will also be barred from talking to union or community organizers or revealing the names of co-workers who might also be interested in participating in a collective action or organizing. Due to these clear implications for employee voice, the National Labor Relations Board has held that clauses that bar employees from discussing terms and conditions of work including salary, identity of employees, job performance, and pay violate section 7 of the NLRA.[50] This is because such rules have "a serious adverse impact

47. Archer Daniels Midland Co. v. Sinele, 2019 IL App (4th) 180714, ¶ 15.

48. Schwans Home Serv., Inc., 364 N.L.R.B. No. 20, at *6 (2016).

49. *Id.*

50. Nat'l Labor Relations Bd. v. Long Island Ass'n for Aids Care, Inc., 870 F.3d 82, 86 (2d Cir. 2017) (affirming the NLRB's decision that a confidentiality agreement "that employees would reasonably construe to prohibit them from discussing wages or other terms and conditions of employment with employees or nonemployees and the media" violates the NLRA and therefore it is illegal to fire an employee for refusing to sign such an agreement).

on the central NLRA right of employees to contact one another and discuss working conditions and employment disputes," and that impact is not outweighed by any legitimate employer interest.[51] Yet these terms remain relatively commonplace, in part because employees are unlikely to know that such provisions are illegal. Indeed, they create a bit of a chicken and egg problem: Violating a rule in a coercive contract is typically grounds for termination, yet it may be the only way for an employee to talk to others about conditions in the workplace or find out if the underlying contractual rule is legal.

Overly broad confidentiality requirements or NDAs may also indirectly harm employees' exit options. For example, the confidentiality requirements above, which prohibit the disclosure of any information regarding the identity or job performance of an employee, would prohibit one employee from recommending a former co-worker to a new employer.[52] Part (iii) of the contract example above also explicitly prohibits solicitation of co-workers, which also clearly has exit implications.[53] At all levels of the labor market, an introduction and recommendation from a former co-worker are ways that employees can move to a new and better job.

Another way NDAs can harm exit is when combined with the "inevitable disclosure" doctrine.[54] Under this doctrine, an employer essentially defines certain information as confidential or trade secrets and then purports to bar an employee from going to work for a competitor for a period of time on the basis that such competitive employment would "inevitably" lead the employee to rely on or disclose such trade secrets or confidential information.[55] California courts, which do not recognize non-compete agreements, have rejected confidenti-

51. Memorandum from Peter B. Robb, NLRB General Counsel to all Regional Directors, Officers-in-Charge, and Resident Officers (June 6, 2018) (on file with author) (stating that rules that "prohibit discussion of working conditions or other terms of employment" should be considered prohibited Category 3 rules under the framework established in *The Boeing Co.*, 365 N.L.R.B. No. 154, slip op. at 15 (2017), because they have a serious adverse impact on central NLRA rights).

52. Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. (forthcoming 2020) (manuscript at 12–14) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373184## [https://perma.cc/49DE-DY86]).

53. *Id.* (manuscript at 12) (arguing that non-solicitation of former employees effectively creates "non-competes that cover not only the employee who signs the agreement but also the affecting the entire workforce of the employer").

54. The inevitable disclosure doctrine allows a plaintiff to prove that a defendant has misappropriated trade secrets "by demonstrating that defendant's new employment will inevitably lead them to rely on the plaintiff's trade secrets." PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).

55. Whyte v. Schlage Lock Co., 125 Cal. Rptr. 2d 277, 281 (Cal. Ct. App. 2002).

ality agreements with inevitable disclosure provisions as essentially de facto non-competes.[56]

D. Non-disparagement

Like NDAs and confidentiality provisions, non-disparagement clauses attempt to limit what employees can say about their employment during or for a period after that employment. Specifically, as the name suggests, non-disparagement provisions generally limit employees from complaining about or "disparaging" the employer to the outside world. For example, "[i]f there is a specific problem or some way that you are not happy with your job, you are required to inform the owner verbally or in writing *before* mentioning the problem to anyone else, including co-workers or customers."[57]

This type of ban seems primarily concerned with (1) preventing multiple employees from discussing their pay or other terms and conditions of work with each other, similar to the confidentiality provisions discussed earlier; and (2) preventing employees from saying anything negative about their terms and conditions of work to customers.

Other non-disparagement-type clauses seem more focused on preventing reputational harms from generating negative publicity in traditional media or social media outlets. One clause that was the subject of a successful challenge prohibited employees from disclosing "administrative information such as salaries [and the] contents of employment contracts" and from being "interviewed by any media source, or answer[ing] any questions from any media source regarding their employment" or "the workings and conditions of [employer]" without permission.[58] A Chipotle employee in Pennsylvania was fired for violating the company's policy after he tweeted about the company's "cheap #labor" and only being paid $8.50 per hour (an administrative law judge later found that Chipotle's policy violated the

56. *Id.* at 293 ("When . . . a confidentiality agreement is in place, the inevitable disclosure doctrine in effect converts the confidentiality agreement into such a covenant not to compete."); *see also* Alex Harrell, *Is Anything Inevitable: The Impending Clash Between the Inevitable Disclosure Doctrine and the Covenants Not to Compete Act*, 76 Tex. B.J. 757, 761 (2013).

57. Exhibit A at A11, First Peek Ultrasound L.L.C. v. Weideman, 2018 IL App (1st) 180858 (Ill. App. Ct. 2018), 2018 WL 6438309. First Peek Ultrasound v. Weidemann, 2018 IL App (1st) 180858 (italics in original).

58. Nat'l Labor Relations Bd. v. Long Island Ass'n for Aids Care, Inc., 870 F.3d 82, 84 (2d Cir. 2017).

NLRA).[59] A Yelp employee was fired after writing an open letter to the company's CEO about the challenges of surviving on her $1500 per month salary in San Francisco.[60]

In either permutation, broad non-disparagement clauses like these directly impair employees' abilities to exercise voice or change terms and conditions at their jobs by directing external pressure at the employers. Given that consumers, particularly millennial consumers, are increasingly factoring a company's social responsibility into their decision making,[61] provisions like these—whether legal or not—deprive employees of a potentially very valuable strategy to make change within their workplaces.

E. Other Terms

While the examples discussed above are some of the most common provisions found in coercive employment contracts, they are by no means the only contractual provisions with implications for workers' exit and voice options. Contractually shortened statutes of limitations, for example, prevent workers from being able to bring legal claims within the full statute of limitations determined by the legislature. Courts have varied in their response to these provisions—some have permitted them, while others have rejected them as waivers of procedural and substantive rights and as contrary to the public purpose of worker protection laws.[62] Choice of venue and forum selection clauses may also discourage filings by requiring a worker to incur

59. David Boroff, *Ex-Chipotle Worker in Pennsylvania Wins Labor Ruling After He was Fired for Tweeting About Poor Working Conditions*, N.Y. DAILY NEWS (Mar. 16, 2016), https://www.nydailynews.com/news/national/fired-chipotle-worker-complained-twitter-wins-ruling-article-1.2566397 [https://perma.cc/8LLX-4M6Z].

60. Jonathan Chew, *Yelp Fired an Employee After She Wrote a Post About Her Lousy Pay*, FORTUNE (Feb. 22, 2016), https://fortune.com/2016/02/22/yelp-employee-ceo/ [https://perma.cc/D3JR-TZJA].

61. *See, e.g.*, Paul A. Argenti, *Corporate Ethics in the Era of Millennials*, NPR (Aug. 24, 2016), https://www.npr.org/sections/13.7/2016/08/24/490811156/corporate-ethics-in-the-era-of-millennials [https://perma.cc/FQ99-SK4J]; Sarah Landrum, *Millennials Driving Brands to Practice Socially Responsible Marketing*, FORBES (Mar. 17, 2017), https://www.forbes.com/sites/sarahlandrum/2017/03/17/millennials-driving-brands-to-practice-socially-responsible-marketing/#663bc9794990 [https://perma.cc/ZV8V-DH68].

62. *See, e.g.*, Rodriguez v. Raymours Furniture Co., Inc., 138 A.3d 528 (N.J. 2016) (holding that a private agreement frustrating the public purpose of anti-discrimination laws by shortening the two-year limitations period for private claims to six months could not be enforced); Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603 (6th Cir. 2013) (holding that a shortened limitations provision in an employment agreement operated as an impermissible waiver of claims under the FLSA and the Equal Pay Act). *But see, e.g.*, Hunt v. Raymour & Flanigan, 963 N.Y.S.2d 722, 723 (N.Y. App. Div. 2013) (permitting a shortened six-month statute of limitation for discrimination claims).

the time and expense of travel to bring a claim.[63] Some contracts even contain liquidated damages provisions or requirements that employees pay back training costs.[64] Courts generally do not allow employers to impose penalties upon workers simply for leaving their jobs. However, by designating a payment as "liquidated damages" or training reimbursement, some employers may disguise that it is, in reality, a disallowed penalty. These provisions clearly discourage mobility and exit.[65]

IV. Policy and Organizing Responses

Various policy and organizing efforts have emerged in response to the extensive contractual limitations on worker voice and exit that we have described above.

A. Responses to Mandatory Arbitration and Contractual Limitations on Voice

Responses to contractual limitations on voice have focused primarily on trying to end, limit, circumvent, or ameliorate the ill-effects of forced arbitration. They have included legislative proposals at the federal and state level, as well as direct pressure and organizing by workers of their own employers.

1. Proposed Federal Legislation Limiting Arbitration

Two bills have been proposed at the federal level to address forced arbitration in the employment context: (1) The Forced Arbitration Injustice Repeal ("FAIR") Act[66] and (2) the Restoring Justice for Workers Act.[67]

The FAIR Act more broadly addresses forced arbitration in a range of settings, not only the workplace. It would make pre-dispute

63. *See, e.g.*, Beltran et al. v. AuPairCare, Inc., 907 F.3d 1240, 1258–59 (10th Cir. 2018) (discussing the law on forum selection clauses). A striking example of a problematic venue clause was struck by Ontario's highest court in January 2019: Uber Technologies Inc. required its Ontario drivers to resolve pay or other work issues through a process in the Netherlands. Jacquie McNish & Greg Bensinger, *Canadian Court Slams Uber's Arbitration Process*, WALL STREET J. (Jan. 2, 2019), https://www.wsj.com/articles/canadian-court-slams-ubers-arbitration-process-11546474649.

64. *See* Terri Gerstein, *These Americans Are Trapped in Their Jobs: They Need to Pay $10,000 to Quit*, GUARDIAN (Apr. 8, 2018), https://www.theguardian.com/commentisfree/2018/apr/08/sinclair-broadcast-anchors-us-labor-contracts [https://perma.cc/D7JL-XXYJ].

65. *See* Lobel, *supra* note 52 (discussing various common "exit penalties").

66. Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

67. Restoring Justice for Workers Act, S. 1491, 116th Cong. (2019).

forced arbitration clauses and joint-action waivers unenforceable for employment, consumer, anti-trust, and civil rights claims.[68] The Restoring Justice for Workers Act focuses specifically on employment relationships. It would make pre-dispute forced arbitration agreements for employment disputes unenforceable. In addition, it would make post-dispute forced arbitration agreements for employment disputes unenforceable if any employment-related benefit was conditional on agreeing or the employee agreed to arbitration under threat of adverse action.[69] Both of these proposals specify they would not affect collective bargaining agreements that require labor arbitration between unions and employers, except that no such arbitration provision would have the effect of waiving a worker's right to seek judicial enforcement of constitutional or statutory rights.[70]

2. State-Level Campaigns to Address Forced Arbitration

The Federal Arbitration Act ("FAA") has been interpreted to require courts to give effect to agreements to arbitrate, and broad preemption under the statute severely limits the ability of states and localities to legislate or take other action to curb forced arbitration.[71] Nonetheless, in the wake of the #MeToo movement, several states have passed laws seeking to limit forced arbitration specifically in sexual harassment or discrimination cases.[72] For example, Maryland enacted legislation rendering void any provision in an employment contract that waives a substantive or procedural right or remedy related to a future claim of sexual harassment or retaliation for reporting sexual harassment.[73] Vermont similarly passed a law prohibiting employers from requiring current or prospective employees to sign an agreement as a condition of employment, waiving a substantive or procedural right or remedy with respect to a sexual harassment

68. Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 402(a) (2019).
69. S. 1491 § 402(a)(2).
70. *Id.* § 402(d)(2); H.R. 1423 § 402(b)(2).
71. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).
72. Indeed, there seems to be a general tendency among some policymakers to treat sexual harassment as particularly ill-suited for forced arbitration. For example, in February 2018, every state attorney general in the country signed a letter to Congress seeking to preserve court access and curb forced arbitration in sexual harassment cases. Letter from the Nat'l Ass'n of Att'ys Gen. to Cong. Leadership (Feb. 12, 2018) (available at https://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20-%20NAAG%20Sexual%20Harassment%20Mandatory%20Arbitration.pdf [https://perma.cc/8T4U-C43M]).
73. Disclosing Sexual Harassment in the Workplace Act of 2018, S.B. 1010, § 1(A), 2018 Gen. Assemb., Reg. Sess. (Md. 2018).

claim.[74] New York originally enacted legislation prohibiting mandatory arbitration in cases involving sexual harassment,[75] and later extended that prohibition to all discrimination claims.[76] The states of Illinois,[77] New Jersey,[78] and Washington[79] have also passed laws containing limitations on arbitration in discrimination cases. California's legislature went further, enacting a law known as "AB51" prohibiting employers from requiring a worker, as a condition of employment, to waive any "right, forum, or procedure" for violations of workplace anti-discrimination laws or the labor code.[80] Additionally, it allows for attorneys' fees for enforcement and provides that "an agreement that requires an employee to opt out of a waiver or take any affirmative action in order to preserve their rights is deemed a condition of employment," thereby rendering invalid even arbitration agreements with an employee opt-out opportunity.[81]

These state efforts face an uphill battle against court challenges claiming FAA preemption. In June 2019, a federal judge found that New York's original law (limited to sexual harassment only) was preempted.[82] And in December 2019, days before AB51 was to take effect, a federal judge granted a temporary restraining order ("TRO") enjoining enforcement of AB51,[83] followed by a preliminary injunction issued on January 31, 2020.[84]

3. Use of State Procurement Authority to Limit Arbitration

States have generally not pursued a strategy of using their procurement powers to incentivize government contractors to refrain from using forced arbitration or, at the very least, to disclose their policies in this regard. One exception is an Executive Order ("Order") issued by Washington Governor Jay Inslee in June 2018, requiring state agencies "to the extent permissible under state and federal law" to "seek to contract with qualified entities and business owners

74. Vermont Act 183, H. 707, § 1(g), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).
75. S.B. 7507C § 296-d, Subpart B, 2017-2018 Leg. Sess. (N.Y. 2018).
76. A. 8421, §8, 2019-2020 Reg. Sess. (N.Y. 2019).
77. S.B. 0075, 101st Gen. Assemb. (Ill. 2019).
78. S. 121, § 1, 2018-2019 Reg. Sess. (N.J. 2019); *see also* §§ 10:5–12.7.
79. S.B. 6313, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
80. A.B. 51, 2019 Leg., Reg. Sess. Ch. 711 § 3 (Cal. 2019).
81. *Id.*
82. Latif v. Morgan Stanley & Co. LLC, No. 1:18-cv-11528 (S.D.N.Y. June 26, 2019).
83. *See* Chamber of Commerce of the U.S. v. Becerra, No. 2:19-cv-02456-KJM-DB, Dkt. No. 24 (E.D. Cal. Dec. 30, 2019).
84. *See* Chamber of Commerce of the U.S. v. Becerra, No. 2:19-cv-02456-KJM-DB, Dkt. No. 44 (E.D. Cal. Dec. 30, 2019).

that can demonstrate or will certify that their employees are not required to sign, as a condition of employment, mandatory individual arbitration clauses and class or collective action waivers."[85] This Order is hortatory; it contains no mandatory language that would dictate contracting consequences for a company using forced arbitration.

4. Whistleblower Campaigns

One innovative state-level proposal would create a new whistleblower cause of action in order to ensure continued enforcement of workers' rights[86]—modeled after longstanding state False Claims Act laws, which permit whistleblowers to act as *qui tam* relators, as well as after California's Private Attorney Generals' Act ("PAGA").[87] These proposals would allow whistleblowers, including workers with forced arbitration clauses, to file claims on behalf of the state against an employer for violations of the state's wage and hour, discrimination, and other workplace laws.[88] Most of the penalty revenue would be paid to the state, with a portion rewarding the whistleblowers. The state could use the revenue to hire more investigators or partner with community organizations to educate consumers and workers about their rights. One commentator has noted the likelihood that this model would be upheld under the FAA: "Taken together, the public nature of the qui tam action and the penalty structure should allow enabling legislation to elude FAA preemption under *Concepcion* and its progeny."[89]

Spurred in large part by advocacy of the Center for Popular Democracy and its membership organizations, legislators in several states have proposed bills under this model, including Massachusetts,[90] Maine,[91] New York,[92] Oregon,[93] Vermont,[94] and Washington.[95] Al-

85. Wash. Exec. Order No. 18-03 (June 12, 2018), https://www.governor.wa.gov/sites/default/files/exe_order/18-03%20-%20Workers%20Rights%20%28tmp%29.pdf [https://perma.cc/DF92-LZV2].

86. Terri Gerstein & David Seligman, *How States Can Enforce Workers' Rights when Trump and His Supremes Don't Want To*, Am. Prospect (Nov. 14, 2018), https://prospect.org/economy/states-can-enforce-workers-rights-trump-supremes-want/ [https://perma.cc/XX56-Y6VP].

87. Cal. Lab. Code §§ 2698 et seq. (West 2016).

88. Some of these proposals would also cover consumer law violations.

89. Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 Fordham L. Rev. 2223, 2237 (2018).

90. S. 1066, 191st Leg. (Mass. 2019).

91. S.P. 558, 1st Reg. Sess. 2019 (Me. 2019).

92. S. 1848/A. 2265 (N.Y. 2019).

93. S.B. 750, 80th Leg. Assem., Reg. Sess. (Or. 2019).

94. H.R. 483, 2019 Reg. Sess. (Vt. 2019).

though initiated in response to the proliferation of forced arbitration, these developments may demonstrate a broader shift by workers' rights advocates away from an individual rights enforcement model, which is susceptible to broad waivers of contractual rights, and towards a public rights enforcement approach.

5. Organizing Campaigns

In addition to legislative efforts, workers and worker organizations have taken collective action in response to forced arbitration. Most notably, over 20,000 Google workers walked off the job in November 2018 to protest the company's handling of sexual harassment cases.[96] Organizers of the walkout voiced a list of demands, which included ending the use of private arbitration.[97] The walkout's targeting of forced arbitration was, among other things, a strong expression of worker voice, and also powerful repudiation of the company's limitation on that voice through requiring arbitration. Within a week, the company announced that it would stop requiring arbitration for claims of sexual harassment or assault,[98] and by February 2019, the new policy expanded to include all employee disputes.[99] While the organizers of the Google walkout have continued to advocate for greater voice for company employees,[100] several have since left the company, alleging retaliation.[101] Those who remain have continued to advocate for an end to forced arbitration for Google's temporary workers, vendors, and contractors ("TVCs").[102] They have also advocated in favor of the FAIR Act and other curbs on forced arbitra-

95. H.B. 1965, 66th Reg. Sess. (Wash. 2019).

96. Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest over Handling of Sexual Harassment*, N.Y. Times (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html [https://perma.cc/TJ7G-QLLC].

97. *Id.*

98. Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. Times (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html [https://perma.cc/V3LQ-6UEW].

99. Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html [https://perma.cc/3ES4-PCHK].

100. Googlers for Ending Forced Arb., https://sites.google.com/view/endforcedarbitration/home?authuser=0 [https://perma.cc/22B5-5GV9].

101. Sara Ashley O'Brien, *One Year After the Google Walkout, Key Organizers Reflect on the Risk to their Careers*, CNN Bus. (Jan. 9, 2020), https://www.cnn.com/2019/11/01/tech/google-walkout-one-year-later-risk-takers/index.html [https://perma.cc/5FQS-YXCJ].

102. *TVC Suppliers*, Googlers for Ending Forced Arb., https://sites.google.com/view/endforcedarbitration/take-action/tvc-suppliers?authuser=0 [https://perma.cc/4K3N-9NKB].

tion.[103] In the wake of Google's decision to stop forcing its workers into arbitration, several other technology companies followed suit, including Facebook, Airbnb, eBay,[104] and Microsoft[105]—all of which ended forced arbitration for sexual harassment claims.

A group of Harvard Law students, called the People's Parity Project[106] (originally the Pipeline Parity Project[107]) has spearheaded another grassroots effort to combat forced arbitration by leading a campaign to pressure law firms to end their use of forced arbitration for not only associates, but also all employees. In addition to convincing many law firms to stop using forced arbitration, the organization successfully campaigned for the National Association of Law Placement to include questions about law firms' use of forced arbitration for associates in its upcoming Directory of Legal Employers.[108] The People's Parity Project has also advocated against forced arbitration more broadly.[109]

While it is unclear whether these efforts could be replicated for lower-skilled workers or employers with fewer reputational interests, the successes of these campaigns suggest that contractual issues can be organizing issues. They also demonstrate that employers may be willing to change their policies if they lead to negative publicity or risks to their brand and consumer reputation.

103. *Legislation*, GOOGLERS FOR ENDING FORCED ARB., https://sites.google.com/view/endforcedarbitration/legislation?authuser=0 [https://perma.cc/BN25-8E58].

104. Didi Martinez, *Facebook, Airbnb and eBay Join Google in Ending Forced Arbitration for Sexual Harassment Claims*, NBC NEWS (Nov. 12, 2018), https://www.nbcnews.com/tech/tech-news/facebook-airbnb-ebay-join-google-ending-forced-arbitration-sexual-harassment-n935451 [https://perma.cc/5XXX-7QVV].

105. Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html [https://perma.cc/MQ3P-TL7K].

106. PEOPLE'S PARITY PROJECT, https://www.peoplesparity.org/ [https://perma.cc/W8ZZ-6AMB].

107. Vail Kohnert-Yount, *Introducing the People's Parity Project*, PEOPLE'S PARITY PROJECT, https://www.pipelineparityproject.org/introducing-the-peoples-parity-project/ [https://perma.cc/W8ZZ-6AMB].

108. Karen Sloan, *Under Pressure from Students, NALP Adds Data on Mandatory Arbitration at Law Firms*, LAW.COM (Dec. 3, 2019), https://www.law.com/2019/12/03/under-pressure-from-students-nalp-adds-data-on-mandatory-arbitration-at-law-firms/ [https://perma.cc/5HTT-F5BR].

109. Sejal Singh & Andre Manuel, *Harvard Law Students Are Taking on Forced Arbitration*, NATION (Apr. 15, 2019), https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/ [https://perma.cc/TK8R-R5XS].

B. Responses to Non-competes and Other Contractual Limitations on Mobility

1. Proposed Federal Legislation

In the past year, there has been a flurry of attention at the federal level to the problem of rampant non-compete agreements, with two federal proposals to ban or limit non-competes and a potential federal rulemaking. The bipartisan Workforce Mobility Act of 2019 would prohibit the use of non-competes in almost all situations, with limited exceptions.[110] The bill would be enforced collaboratively by the United States Department of Labor and the Federal Trade Commission ("FTC"), with civil fines for violations and a private right of action and attorneys' fees. The far more modest Freedom to Compete Act[111] would apply to a more limited group of workers.

In addition, in March 2019, the not-for-profit organization Open Markets Institute, along with a number of labor and advocacy organizations, submitted a petition to the FTC asking it to undertake a rulemaking on the subject of non-competes.[112] This petition demonstrates a trend toward viewing the issue not only in terms of individual workers' rights, but also in looking at the aggregate effect of individual contracts on labor markets at large. In January 2020, the FTC held a workshop on the topic with testimonies from numerous legal and economic experts,[113] most of whom provided analysis supporting restrictions on non-competes, and also received comments from the public.[114] Meanwhile, state attorneys general have urged the FTC to act: In July 2019, eighteen state attorneys general submitted comments to the FTC urging greater consideration of labor issues in enforcement of anti-trust laws.[115] Several months later, another coalition

110. Workforce Mobility Act of 2019, S. 2614, 116th Cong. (2019).

111. Freedom to Compete Act, S. 124, 116th Cong. (2019).

112. Petition from Open Mkts. Inst. et al. on Rulemaking to Prohibit Worker Non-Compete Clauses to the Fed. Trade Comm'n (Mar. 20, 2019) (available at https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf [https://perma.cc/6EB9-Z92H]).

113. *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, FED. TRADE COMMISSION (Jan. 9, 2020), https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues [https://perma.cc/EG7Y-M22E]. Author Jane Flanagan signed this petition and testified at the FTC on this issue.

114. *FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts*, REGULATIONS.GOV, https://www.regulations.gov/docket?D=FTC-2019-0093 [https://perma.cc/896E-FE53].

115. KARL A. RACINE ET AL., PUBLIC COMMENTS OF 18 STATE ATTORNEYS GENERAL ON LABOR ISSUES IN ANTITRUST (2019), https://attorneysgeneral.org/wp-content/uploads/

specifically urged the FTC to engage in rulemaking on non-competes.[116]

2 State Laws

Meanwhile, a number of states have recently passed laws limiting employers' abilities to impose non-compete agreements on their employees. Laws passed in Illinois, Maine, Maryland, Massachusetts, New Hampshire, Oregon, Rhode Island, and Washington ban non-compete agreements or make them unenforceable for some or most workers based on their income.[117] Other states have recently limited the use of non-compete agreements for particular professions: physicians (Florida), broadcasters (Utah), and home health aides (Connecticut).[118] State reforms also vary in terms of whether they specify a time limit for the duration of non-compete agreements; whether an employer has to pay money to workers (also known as "garden leave") while a non-compete agreement is in effect; and what kind of notice or transparency is required of employers.[119]

New laws in Maine and Washington are particularly noteworthy. Washington's law is unusually strong and protective of workers.[120] It allows employers to enforce non-competes only against workers who earn over a certain annual salary threshold: $100,000 (for employees) and $250,000 (for independent contractors).[121] Even for those highly-compensated workers, non-competes must be disclosed in writing at the time the worker accepts the employment offer.[122] If the non-compete is signed later, the worker must receive independent considera-

2019/07/2019.07.15-Comments-re-Non-Compete-Clauses-in-Labor-Contracts.pdf [https://perma.cc/GF4H-HAJ2].

116. Letter from Keith Ellison, Minn. Att'y Gen. et al., to Joseph Simons, Fed. Trade Comm'n Chairman (Nov. 15, 2019) (available at http://www.ag.state.mn.us/Office/Communications/2019/Documents/20191115_MultistateFTCNonCompeteLetter.pdf [https://perma.cc/UR8K-T9TD]).

117. *See* 820 ILL. COMP. STAT. 90/5(c) (2017); ME. REV. STAT. ANN. tit. 26, §§ 599-A, B (2019); MD. CODE ANN., LAB. & EMP. § 3-716 (West 2019); MASS. GEN. LAWS ch. 149, § 24L (2018); N.H. REV. STAT. ANN. § 275:70-a (2019); OR. REV. STAT. § 653.295 (2020); 28 R.I. GEN. LAWS ANN. § 28-59 (West 2020); and WASH. REV. CODE §§ 49.62 *et seq.* (2020).

118. FLA. STAT. § 542.336 (2019); Post-Employment Restrictions Act, UTAH CODE ANN. §34-51-201 (2019); H.B. 7424, § 305, 2019 Conn. Legis. Serv. P.A. 19-117 (Conn. 2019).

119. For example, Massachusetts's non-compete law requires payment of garden leave, limits duration to twelve months in most cases, and contains requirements regarding when the employee must be notified about a non-compete. MASS. GEN. LAWS ch. 149, § 24L(b) (Westlaw, current through Ch. 153 of 2019 1st Annual Sess.).

120. WASH. REV. CODE § 49.62 (Westlaw, current with IM 976 (Ch. 1) of the 2020 Reg. Sess. of Wash. Leg.).

121. *Id.* §§ 49.62.020 (1)(b), 49.62.030(1).

122. *Id.* § 49.62.020 (1)(a)(i).

tion for it.[123] Further, non-competes are not enforceable in Washington if an employee is laid off without cause, unless the employer pays garden leave of the employee's base salary during the non-compete period, less interim earnings.[124] The law contains a rebuttable presumption that non-competes longer than eighteen months are unenforceable.[125] Finally, there are fines of up to $5000 per employee, plus attorneys' fees.[126]

Maine's law echoes some of these provisions (required disclosure of a non-compete prior to an employment offer and $5000 fines for violation).[127] But it is noteworthy in that it attempts to bar other restrictions on employee exit other than non-competes by also prohibiting "restrictive employment agreements," which are defined as agreements between two or more employers (such as a contractor and subcontractor, or franchisor and franchisee) not to solicit or hire each other's current or former employees.[128]

3. State Enforcement by Attorneys General

Several state attorneys general have brought investigations or lawsuits challenging coercive employment terms using common law, antitrust laws, or other bases for action. The attorneys general of Illinois and New York obtained several settlements that addressed abuse of non-compete agreements.[129] Both offices reached settlements with the national fast food chain Jimmy John's,[130] the co-working space WeWork,[131] and check cashing or payment processing firms.[132] The New York Attorney General also settled a case releasing reporters

123. *Id.* § 49.62.020 (1)(a)(ii).
124. *Id.* § 49.62.020 (1)(c).
125. *Id.* § 49.62.020 (2).
126. *Id.* § 49.62.080 (2).
127. ME. REV. STAT. ANN. tit. 26, § 599-A (Westlaw current through 2019 1st Reg. Sess. Ch. 531 of 1st Special Sess. of 129th).
128. ME. REV. STAT. ANN. tit. 26, § 599-B (Westlaw current through 2019 1st Reg. Sess. Ch. 531 of 1st Special Sess. of 129th).
129. The authors were bureau chiefs within the New York and Illinois Attorney General offices during the time of many of these cases.
130. Samantha Bomkamp, *Jimmy John's Agrees to Pay $100,000 to Illinois AG over Noncompete Contracts*, CHI. TRIB. (Dec. 7, 2016), https://www.chicagotribune.com/business/ct-jimmy-johns-settlement-1208-biz-20161207-story.html [https://perma.cc/A6QQ-UBZP]; Press Release, N.Y. State Att'y Gen.'s Office, A.G. Schneiderman Announces Settlement With Jimmy John's to Stop Including Non-Compete Agreements in Hiring Packets (June 22, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete [https://perma.cc/P5ZJ-CR25].
131. Yuki Noguchi, *Under Pressure, We Work Backs Down on Employee Noncompete Requirements*, NPR (Sept. 18, 2018), https://www.npr.org/2018/09/18/648881004/wework-backs-down-on-employee-noncompete-requirements [https://perma.cc/UAR9-WXAM].

from the Law 360 news site from their non-competes,[133] and the Washington Attorney General's office resolved a lawsuit against a Washington coffee chain.[134] In these cases, the attorneys general typically obtained agreements from employers to stop using all or most non-competes and to notify employees of this policy change.

In addition, the Washington Attorney General's office has undertaken an extensive initiative to end the use of no-poach agreements in franchise agreements. In October 2019, his office announced that they had negotiated the end of no-poach clauses in 155 companies nationwide.[135] Also, a group of eleven state attorney general offices reached out to several national fast food franchisors about such agreements in their franchise contracts,[136] reaching settlement with four franchisees to date.[137]

In addition to securing the ability to exit for thousands of individual workers, the attorneys general's actions in this area also speak to and seek redress for the aggregate harms of workers' diminished exit options, such as harm to state economies.

132. Press Release, Ill. Att'y Gen.'s Office, Attorney General Madigan Reaches Settlement with National Payday Lender for Imposing Unlawful Non-Compete Agreements (Jan. 7, 2019), http://illinoisattorneygeneral.gov/pressroom/2019_01/20190107b.html [https://perma.cc/96J3-7VAG]; Press Release, N.Y. Att'y Gen.'s Office, A.G. Underwood Announces Settlement With Payment Processing Firm to End Use of Non-Compete Agreements (Oct. 26, 2018), https://ag.ny.gov/press-release/2018/ag-underwood-announces-settlement-payment-processing-firm-end-use-non-compete [https://perma.cc/HK73-88E7].

133. Press Release, N.Y. Att'y Gen.'s Office, A.G. Schneiderman Announces Settlement With Major Legal News Website Law360 to Stop Using Non-Compete Agreements for Its Reporters (June 15, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-major-legal-news-website-law360-stop-using [https://perma.cc/NY6N-AAKW].

134. Press Release, Wash. Att'y Gen.'s Office, Attorney General Bob Ferguson Stops King County Coffee Shop's Practice Requiring Baristas to Sign Unfair Non-Compete Agreements (Oct. 29, 2019), https://www.atg.wa.gov/news/news-releases/attorney-general-bob-ferguson-stops-king-county-coffee-shop-s-practice-requiring [https://perma.cc/3ALP-33Y6].

135. Press Release, Wash. State Att'y Gen.'s Office, AAG to Testify to Congress as AG Ferguson's Anti-No-Poach Initiative Reaches 155 Corporate Chains (Oct. 28, 2019), https://www.atg.wa.gov/news/news-releases/aag-testify-congress-ag-ferguson-s-anti-no-poach-initiative-reaches-155-corporate [https://perma.cc/4XWQ-U8QR].

136. Rachel Abrams, *'No Poach' Deals for Fast-Food Workers Face Scrutiny by States,* N.Y. Times (July 9, 2018), https://www.nytimes.com/2018/07/09/business/no-poach-fast-food-wages.html [https://perma.cc/X7JZ-NX8P].

137. Press Release, Mass. Att'y Gen., Four Fast Food Chains to End Use of No-Poach Agreements (Mar. 12, 2019), https://www.mass.gov/news/four-fast-food-chains-to-end-use-of-no-poach-agreements [https://perma.cc/WTA5-73F4].

V. Analysis and Recommendations

The fundamental cause of coercive contracts is the inherent inequality in bargaining power between individual workers and employers—a worker who understood what they were signing and had some choice in the matter simply would not make such a bad deal. As such, the most effective solutions involve increasing workers' bargaining power through collective bargaining and increased union density, as well as through addressing monopsony and non-competitive labor markets that have emerged in recent decades. A discussion of how to meet these goals is beyond the scope of this Article. Until then, however, more specific policies and measures can go a long way toward reducing the harm of coercive contracts described herein.

A. Current Efforts

The efforts described in Section IV are all critical to ensuring that our existing statutory employment protections remain meaningful by giving workers voice and the opportunity to exit. It is essential to pass federal legislation ending forced arbitration and class waivers in the employment context. Until that happens, state whistleblower laws and workers organizing against arbitration both have key roles to play in safeguarding workers' rights and pushing back against employers who strip workers of the ability to seek justice from a judge and jury.

The various ongoing campaigns to stop rampant overuse of non-competes are also extremely important. The bipartisan Workforce Mobility Act, referenced above,[138] is the most comprehensive and thorough proposal, and it would address overuse of non-competes by banning them nationally except in very limited circumstances. An FTC rulemaking could also help to ensure a broad national solution. Until then, states should continue to pass laws prohibiting or limiting non-competes, and they should be sure to include the following elements.

First, non-competes should be prohibited, not simply unenforceable. Most non-compete agreements never make it to court because workers either assume they are valid or cannot afford the cost of hiring an attorney to challenge the provision. This results in a chilling effect, as workers stay in their jobs even though their contract may have an unenforceable non-compete. In addition, making non-competes unenforceable provides employers with little disincentive from using them, since the worst-case scenario is for a court to find the non-

138. *See supra* Section IV.B.1.

compete invalid. However, if non-competes are affirmatively prohibited with enforcement, potential penalties, and a private right of action, the chilling effect of such consequences would have a greater impact on dissuading employers from including them. Second, non-compete agreements should be prohibited not only for very low-wage workers, but for most or all workers, given their impact on job mobility, competition, and basic fairness. States that decide to permit non-compete agreements should adopt a relatively high and clear income cutoff, below which workers cannot be subject to a non-compete agreement; specify that it must be disclosed prior to a job offer; require payment of garden leave during any period the non-compete is operative; provide a maximum duration that would be considered reasonable; and only permit those agreements that protect an employer's legitimate business interests when reasonable in duration and geographic scope. Finally, we recommend restricting not only contracts between employer and employee (as Maine's new law does), but also business-to-business contracts that may limit job mobility such as "no-poach" or "no-hire" agreements.[139]

B. Additional Proposals

The above proposals would go a long way toward mitigating the harm caused by one-sided, coercive employment contracts, particularly forced arbitration and non-competes. But states should also consider taking the following measures to address these concerns.

1. Use of Procurement Powers

States could encourage greater transparency around employers' contract usages by requiring that all government contractors disclose (a) whether they permit court actions or require arbitration of their employees and consumers and (b) data regarding any and all employee or consumer lawsuits and arbitrations filed against them. A bill to this effect is currently being considered in Virginia: It would require localities, in their contracting and purchasing process, to require disclosure about use of arbitration and seek to contract with entities that do not use pre-dispute arbitration for workers or consumers.[140] To avoid FAA preemption, states enacting such measures should be clear that they are taking these actions not as policymakers hostile to arbitration, but rather in their procurement capacity, seek-

139. ME. REV. STAT. ANN. tit. 26, § 599-B (2019).
140. S.B. 645, 2020 Sess. (Va. 2020).

ing to ensure high quality products and continuity of service provision without the disruption of unexpected bad publicity, litigation, or workplace strife.

2. Improving Transparency Regarding Arbitration

States could require that all workplace arbitration complaints and results be served upon the state attorney general, both to create a record of cases and also to allow the state to step in and address patterns and practices of violations that may be obscured by arbitration's lack of transparency. This requirement is unlikely to be preempted by the FAA because it does not disfavor arbitration, but rather treats it similar to court cases, which are all public record. Moreover, there is precedent for requiring service upon the state when matters are of interest to the state itself and its inhabitants. For example, in New York, complaints alleging workplace retaliation must be served upon the attorney general's office.[141] In addition, federal Class Action Fairness Act notices are routinely served upon the relevant attorneys general.[142]

In addition, states could require arbitration administrators to routinely report on their work. A recently passed law in New Jersey seeking to improve fairness within the arbitral forum provides an interesting model: It requires arbitration organizations handling above fifty consumer arbitrations per year to publish quarterly reports of information about arbitrations handled. It also contains provisions curtailing conflicts of interest among arbitrators and limiting fees for consumers.[143]

3. Other Contractual Limitations on Voice and Exit

While this has not been the focus of efforts to date, state statutes could also be passed to address the various additional contractual abuses described in this Article—for example, prohibiting the waiver of statutes of limitation in workplace rights cases, or prohibiting employers from requiring that employees pay excessive sums as "liquidated damages" for leaving a job. Legislatures could make clear when it is their intent that private parties not be permitted to waive or mod-

141. N.Y. LAB. LAW § 215(2)(b) (McKinney, Westlaw through L.2019, Ch. 752).

142. 28 U.S.C.A § 1715 (Westlaw through Pub. L. No. 116-91).

143. A. 4972, 218th Leg. (N.J. 2019).

ify statutory provisions, as has long been understood for the FLSA's minimum wage provisions, for example.[144]

4. General Oversight and Focus on Coercive Employment Contracts

In addition to any specific provisions that would be disallowed, there is a need to address the broader context of employment contracts: how they are formed and how they are used. The extreme disparity of bargaining power between workers and employers, combined with the deference of courts (especially the Supreme Court) to the form of a contract, suggests that contracts will remain a vehicle for deprivation of workplace rights in the future, perhaps in ways that we have not yet imagined. Private employment contracts should not be permitted to gut important laws and rights granted by the legislature. We should take measures to avoid the slippery slope toward a second *Lochner* era. But how?

The answer lies in a multi-pronged approach with legislation, enforcement, and worker organizing.

a. Contract Transparency and Disclosure

Legislators should pass laws to improve procedural and substantive fairness in employment contracts. Some of the needed procedural measures involve transparency—laws should require any contract to be included with job postings, or at the time of a job offer, so as to provide sufficient time for a prospective employee to review them. Statutes should also require that workers be provided with a complete hard copy of any contract they are asked to sign. Statutes could also address situations in which workers are asked to sign a contract in languages they do not speak—for example, any such contract could be presumptively invalid absent evidence of an accurate translation or interpretation prior to signing.

Another option would be for states to consider passing laws requiring employers to provide employees with a simple, one-page, twelve-point-font plain language summary of any employment contract terms to which they will be expected to agree. The Consumer Fraud Protection Bureau has created plain language "know before

144. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945); Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981).

you owe" mortgage forms,[145] which received praise when they were released.[146] The federal labor department or state labor agencies could create similar forms for employment contracts to ensure, at the very least, that ordinary workers understand what they are signing without the help of a lawyer.

b. Government Collection of Data and Policymaking

In addition, government labor agencies could collect data and issue reports on employment contracts in order to document any trends, identify new practices that may be curtailing workers' rights and mobility, and serve as the basis for future legislative proposals. At the very least, labor enforcement agencies should routinely ask for and collect copies of employment contracts when they are conducting wage and hour, discrimination, or other investigations of workplace violations.

c. Courts and Bar Ethics Committees

Courts should review one-sided coercive employment contracts with a careful eye, understanding the boilerplate nature of such contracts and the power disparity involved. They should be wary of accepting the fiction that such contracts represent a true meeting of the minds. To the extent management attorneys engage in excessive overreach, courts should impose penalties if available and invalidate such contracts rather than reforming or excising the offending provisions. And state bar ethics committees should consider whether professional rules of conduct permit employer attorneys to draft contracts with clearly prohibited or unenforceable terms.

d. Worker Advocates and Organizations

Finally, worker advocates and organizations should understand the ways in which employment contracts are being used to curb voice and exit, and they should incorporate questions about employment contracts and challenges in their ongoing organizing and advocacy activities.

145. *CFPB Finalizes "Know Before You Owe" Mortgage Forms*, CONSUMER FIN. PROTECTION BUREAU (Nov. 20, 2013), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-know-before-you-owe-mortgage-forms/ [https://perma.cc/6DE3-UKWM].

146. Mark Greene, *CFPB To Launch Plain Language Common Sense Mortgaging*, FORBES (Jan. 5, 2015), https://www.forbes.com/sites/markgreene/2015/01/05/cfpb-to-launch-plain-language-common-sense-mortgaging/#1be2ef382226 [https://perma.cc/2TT4-9Q4D].

VI. Conclusion

More than the laws on the books, the terms of a worker's employment contract increasingly define the rights she enjoys at work, as well as her ability to enforce those rights or walk away for a better opportunity. Yet while coercive contracts have an outsized influence on our workplace voice and exit options, our understanding of the particular terms contained within these private agreements is limited, as is our understanding of their aggregate effects across a workforce or labor market. Greater transparency, accountability, and research is needed.

What is clear is that the old Lochnerian "freedom of contract" model has once again proven itself unable to account for differences in bargaining power, leaving workers with little choice but to "agree" to whatever terms their employer mandates in a unilateral boilerplate contract. There have been some exciting organizing and policy efforts to counter this imbalance and reign in employment contracts, but additional creative strategies are still needed to protect workers' core exit and voice rights.