

# IMPOSING INJUSTICE: THE PROSPECT OF MANDATORY ARBITRATION FOR GUESTWORKERS

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## ABSTRACT

Legislators and employers have taken steps in recent years to expand guestworker visa programs, programs that allow employers to recruit and hire foreign workers to temporarily labor in the United States. At the same time, there have been efforts to reduce the role of public law in guestworkers' lives and limit their access to courts. Some legislators proposing reforms to guestworker visa programs have endorsed employer-led efforts to prevent judicial oversight of guestworkers' claims and mandate private arbitration instead. Outside of Congress, recent Supreme Court decisions confirm the Court's broad approval of mandatory arbitration as an acceptable alternative to litigation and lend support to employer efforts to privatize the adjudication of guestworkers' claims.

This article predicts that converging trends in employment practices and dispute resolution processes will create a growing underclass of guestworkers and undermine workplace standards for all workers. The article first evaluates low-wage guestworkers' unique vulnerability and the abuses they commonly experience. Next, the article assesses the status of mandatory arbitration in employment relationships, challenges commonly held myths about mandatory arbitration, and explores the potential consequences of the increased use of mandatory arbitration for low-wage guestworkers and U.S. workplaces.

The article concludes that mandatory arbitration applied to guestworkers would represent the harmful withdrawal of public law from a group of workers to whom the government should give public protection. This conclusion is grounded, in part, in evidence that private mandatory arbitration would not be a meaningful alternative to litigation for low-wage guestworkers. Rather, it would magnify guestworkers' vulnerability and threaten to adversely impact their

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working conditions while also unfairly disadvantaging U.S. workers and law-abiding employers. Therefore, this article warns against the forced relegation of employer-guestworker disputes to arbitration. Instead, it proposes a legislative strategy for protecting guestworkers' substantive and procedural rights.

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## I.

### INTRODUCTION

*Anumang kontrobersiya o paghahabol na magmumula sa o may kaugnayan sa relasyong pang-employong ito ay isasaayos sa pamamagitan ng arbitrasyon sa pangangasiwa ng American Arbitration Association sa ilalim ng Employment Arbitration Rules at Mediation Procedures nito at ang hatol sa kaloob ng arbitrador ay maaaring ipasok sa anumang hukuman na may hurisdiksyon hinggil doon.*

Any controversy or claim arising out of or relating to this employment relationship shall be settled by arbitration administered by the American Arbitration Association under its Employment Arbitration Rules and Mediation Procedures and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>1</sup>

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1. For those of us who do not read Tagalog, the first paragraph offers insight into how the English-language version of the arbitration clause below it might appear to a guestworker who does not read English. Even for a fluent, literate English-speaker, the technical legal language of most arbitration clauses is likely to be confusing. AM. ARBITRATION ASS'N, DRAFTING DISPUTE

A woman said goodbye to her family and friends and made the trip by bus from her hometown in rural Mexico to the city of Monterrey. She carried her visa and passport, a small book of family photos, and a bag of clothes. When she arrived at the recruitment agency that facilitated her hiring for a temporary job in the U.S., she was presented with a stack of papers in English. The labor recruiter told her she had to sign several of the pages before departing. Because she could not understand the English documents, the recruiter pointed to where she had to sign on each page and she did. Though she did not know it, she had just agreed to resolve any future disputes with her U.S. employer by arbitration. After the documents were signed, she and her new co-workers boarded the bus to the airport to begin their journey to work cleaning hotel rooms as guestworkers in the U.S.

Tens of thousands of guestworkers travel to the U.S. each year from Mexico, the Philippines, South Africa, Jamaica, and other countries to temporarily work in low-wage jobs.<sup>2</sup> They plant trees, harvest tomatoes, mow lawns, and wait tables in country clubs. Some work for the time permitted by their visas and return home without incident. Others experience violations of their workplace rights; they are underpaid, injured, harassed, discriminated against, coerced to work, threatened, and assaulted.

Low-wage guestworkers are readily-available and uniquely vulnerable employees. Employers must submit applications for permission to hire guestworkers, but, once approved, they can select from a nearly limitless supply of temporary foreign employees.<sup>3</sup> While in the U.S., guestworkers are authorized only to work for their designated employers and become part of a captive, easily replaceable, and temporary workforce.<sup>4</sup>

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RESOLUTION CLAUSES 19 (2013), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002540](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540), translated by Arianne O. Reyes.

2. The top ten sending countries of H-2A guestworkers in 2014 were Mexico (83,674), South Africa (1591), Guatemala (1453), Peru (790), Honduras (525), Nicaragua (318), Romania (195), Dominican Republic (103), Costa Rica (99), New Zealand (91), and Ukraine (79). *FY2014 Nonimmigrant Visa Issued*, U.S. DEP'T ST., <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY14NIVDetailTable.pdf> (last visited Dec. 10, 2015); see also *Visa Pages*, GLOBAL WORKERS JUST. ALLIANCE, <http://globalworkers.org/visa-pages> (last visited Sept. 8, 2015) (providing statistics regarding each guestworker visa program). The top ten sending countries of H-2B guestworkers were Mexico (50,045), Jamaica (6152), Guatemala (3304), South Africa (1779), Great Britain and Northern Ireland (1537), Philippines (889), Honduras (637), El Salvador (549), Romania (471), and Japan (289). *FY2014 Nonimmigrant Visa Issued*, U.S. DEP'T ST., <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY14NIVDetailTable.pdf> (last visited Dec. 10, 2015); see also *Visa Pages*, GLOBAL WORKERS JUST. ALLIANCE, <http://globalworkers.org/visa-pages> (last visited Sept. 8, 2015) (providing statistics regarding each guestworker visa program).

3. Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 134–37 (2009) (noting pool of 166,000 H-2 visas each year).

4. *Id.*

Despite publicized reports of serious abuses,<sup>5</sup> guestworker visa programs continue to expand. The total number of guestworker visas issued annually has nearly doubled from about five and a half million in 1993 to roughly nine million two decades later.<sup>6</sup> Even during periods of record-high unemployment rates, the visa programs consistently garner substantial interest from powerful business interests, and members of Congress have taken steps in recent years to increase the number of available visas.<sup>7</sup>

Meanwhile, over the last two decades, there has also been an increase in employers' use of mandatory arbitration to resolve workplace disputes.<sup>8</sup> Mandatory arbitration requires parties to submit their disputes to a private, binding dispute resolution process subject to extremely limited judicial review. In the employment context, mandatory arbitration is used to resolve statutory claims, such as discrimination and minimum wage violations, as well as contractually-based claims.<sup>9</sup>

There is no readily available information about whether employers are currently requiring or enforcing mandatory arbitration provisions against guestworkers, or whether guestworkers are initiating arbitration actions against their employers.<sup>10</sup> There are no known cases filed by guestworkers where the employer sought to enforce a mandatory arbitration clause. Informal surveys of legal services and other plaintiffs' counsel who represent guestworkers also did not reveal any such cases. Of course, it is possible that some guestworkers have initiated arbitration, but researchers cannot reliably access that information as it is neither compiled nor publicly-available.

5. See, e.g., Kathy Finn, *Indian Workers Win \$14 million in U.S. Labor Trafficking Case*, REUTERS (Feb. 18, 2015), <http://www.reuters.com/article/us-usa-louisiana-trafficking-idUSKBN0LN03820150219>; Jessica Garrison, *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED (July 24, 2015), <http://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f#.ngYzvAXWB2>; Claire Goforth, *A Local Man's Story Illustrates the Brokenness of America's Guest Worker Program*, FOLIO WKLY. (Aug. 13, 2014), <http://folioweekly.com/A-LOCAL-MANS-STORY-ILLUSTRATES-THE-BROKENNESS-OF-AMERICAS-GUEST-WORKER-PROGRAM,10653>.

6. Despite minor fluctuations within the past twenty years, the overall trend has been substantially increasing numbers of low-wage guestworkers. See *infra* note 48–49.

7. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 17 (2015), <http://www.gao.gov/assets/670/668875.pdf>; Tory Newmyer, *Obama's Immigration Order Puts Big Business in an Awkward Spot*, FORTUNE (Nov. 21, 2014), <http://fortune.com/2014/11/21/obama-puts-big-business-in-an-awkward-spot/>.

8. Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 WILLAMETTE L. REV. 259, 261–65 (2014). For a comparison of compulsory and mandatory arbitration, see Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 16–17 (2003).

9. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (enforcing arbitration clause in suit alleging violations of the Age Discrimination in Employment Act).

10. Telephone Interview with Carmen Comsti, Paul H. Tobias Attorney Fellow, The Emp. Rights Advocacy Inst. for Law & Policy (Aug. 13, 2014).

While mandatory arbitration is not yet pervasive for low-wage guestworkers, there is evidence that employers will increasingly impose mandatory arbitration on guestworkers as a condition of employment. Starting as early as 2008, some employers included mandatory arbitration requirements in their guestworker visa applications.<sup>11</sup> More recently, legislators proposing reforms to guestworker visa programs endorsed employer-led efforts to prevent judicial oversight of guestworkers' claims and mandate private arbitration instead.<sup>12</sup>

Congress should prohibit employers from imposing mandatory arbitration on low-wage guestworkers.<sup>13</sup> This is necessary for three reasons. First, mandatory arbitration would make already vulnerable guestworkers even more susceptible to abuse and inhibit their ability to hold law-breaking employers accountable. Second, relegating guestworkers' workplace disputes to private arbitration would harmfully limit information available to the public. Third, limiting guestworkers' access to the courts will negatively impact U.S. workers and law-abiding employers.

Federal legislation is required to prevent this problem. Recent Supreme Court decisions make clear that the Court will continue to interpret the Federal Arbitration Act ("FAA") with sweeping breadth and enforce nearly all arbitration clauses.<sup>14</sup> The Court has interpreted the FAA broadly to impose nearly no limits on the enforceability of arbitration agreements and extend the scope of the Act far beyond its original intent.<sup>15</sup> In the example of the guestworker provided above, the mandatory arbitration agreement she signed would very likely be enforceable under existing law, despite her utter lack of understanding of the content of the contract, its adhesive nature, and the coercive timing of its presentation just before she was supposed to depart for the U.S. To remedy these problems, this article proposes federal legislation that would prevent the forced relegation of employer-guestworker disputes to arbitration.

Part II of this article provides a brief overview of guestworker visa programs and discusses the unique vulnerability of low-wage guestworkers and abuses that result. Part III describes the status of mandatory arbitration in employment relationships and employers' initial efforts to mandate arbitration for guestworkers. Part IV assesses the myths commonly used to support mandatory

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11. *See infra* Part III.B.1.

12. *See infra* Part III.B.2.

13. This article focuses on mandatory arbitration, but many of the same arguments apply to other contractual limits on guestworkers' workplace rights, including foreign forum selection clauses and choice of law provisions.

14. Sarah E. Belton & F. Paul Bland, Jr., *How the Arbitration-At-All Costs Regime Ignores and Distorts Settled Law*, 35 BERKELEY J. EMP. & LAB. L. 135, 137-41 (2014).

15. *Id.* For a history of the expansion of the FAA beyond its original purpose, see CATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., EPI BRIEFING PAPER NO. 414, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 6-10 (2015).

arbitration and articulates why arbitration's purported benefits are particularly illusory for low-wage guestworkers. Part V considers the U.S. government's responsibility to guestworkers and concludes that arbitration is not a meaningful alternative to litigation for low-wage guestworkers; rather, it would magnify their vulnerability and threaten to adversely impact working conditions while unfairly disadvantaging U.S. workers and law-abiding employers. Part VI, therefore, proposes a legislative strategy to protect low-wage guestworkers' substantive and due process rights.

## II.

### LOW-WAGE GUESTWORKERS IN THE U.S.

#### *A. Overview of Guestworker Visa Programs*

Guestworker programs in the U.S. have a troubled past. Early guestworkers were recruited from Mexico during World War I to perform agricultural work under a project that continued in World War II as the Mexican Labor Program, known colloquially as the Bracero program.<sup>16</sup> At its largest, the program employed nearly half a million Mexican men each year.<sup>17</sup> During World War II, guestworker programs were also established with Jamaica, Barbados, and the Bahamas.<sup>18</sup> Among the abuses experienced by these early guestworkers were extremely poor living conditions, unpaid wages, physical abuse, and lack of access to medical treatment.<sup>19</sup>

In 1952, as part of the first comprehensive immigration legislation, the Immigration and Naturalization Act ("INA"), a temporary foreign worker program was created. It included an H-2 visa for low-wage sectors, including agriculture.<sup>20</sup> Reforms to the INA in 1986 divided the H-2 visa into an H-2A visa for agricultural work and H-2B visa for temporary and seasonal non-agricultural work.<sup>21</sup> While low-wage workers are also employed under other visas, most notably the J-1<sup>22</sup> and H-1B,<sup>23</sup> this article focuses on the H-2A and H-2B visas—

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16. Andorra Bruno, Cong. Research Serv., RL32044, *Immigration: Policy Considerations Related to Guest Worker Programs 1* (2006). For a brief history of the Bracero program, see MARY BAUER, S. POVERTY LAW CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 3–5* (Booth Gunter ed., 2013), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf); Alexandra Villarreal O'Rourke, *Embracing Reality: The Guest Worker Program Revisited*, 9 Harv. Latino L. Rev. 179, 180–81 (2006).

17. BRUNO, *supra* note 16, at 1.

18. *H-2A Visa*, GLOBAL WORKERS JUST. ALLIANCE, <http://globalworkers.org/visas/h-2a#A> (last visited Sept. 12, 2015).

19. O'Rourke, *supra* note 16, at 181.

20. BRUNO, *supra* note 16, at 2.

21. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a)–(b) (2012); BRUNO, *supra* note 16, at 2.

22. The J-1 visa differs from the H-2 visas in several meaningful ways. It is part of an exchange visitor program, with work performed in the U.S. intended to be incidental to the cultural exchange. It is administered by the U.S. Department of State rather than the U.S. Department of Labor's Employment and Training Administration and the U.S. Department of Homeland

the visa programs designed to supplement the workforce in agriculture and other “low skill” work.<sup>24</sup>

Under the H-2A visa program, foreign workers can enter the U.S. to perform temporary or seasonal agricultural work.<sup>25</sup> The H-2B program permits foreign workers to perform temporary nonagricultural work, or work that meets a seasonal, peak load, or intermittent need.<sup>26</sup> Among the top H-2B occupations are landscaping, food service, amusement park work, forestry, housekeeping, construction, and industrial commercial groundskeeping.<sup>27</sup>

Guestworker visa programs are intended to achieve the dual and potentially conflicting goals of meeting employers’ temporary labor needs while protecting the interests of U.S. workers.<sup>28</sup> Employers are prohibited from discriminating against U.S. workers.<sup>29</sup> To protect U.S. workers, employers must offer the same terms and conditions of employment to them as to H-2A and H-2B

Security’s U.S. Citizenship and Immigration Services, and has less rigorous standards and oversight. Employers use the J-1 visa to employ temporary foreign workers in a variety of occupations, including at amusement parks and resorts. In the recent past, J-1 visas have received negative publicity as reports of abuses of J-1 workers have come to light. *See, e.g.*, COLLEEN P. BRESLIN, STEPHANIE LUCE, BETH LYON & SARAH PAOLETTI, REPORT OF THE AUGUST 2011 HUMAN RIGHTS DELEGATION TO HERSHEY, PENNSYLVANIA 1–27 (Fran Ansley & William Quigley eds., 2011), <https://www.brandeis.edu/ethics/pdfs/internationaljustice/Hersheys.pdf> (providing an overview of the J-1 program and the experiences of the students working at a Hershey’s distribution plant); DANIEL COSTA, ECON. POLICY INST., GUESTWORKER DIPLOMACY: J VISAS RECEIVE MINIMAL OVERSIGHT DESPITE SIGNIFICANT IMPLICATIONS FOR THE U.S. LABOR MARKET 15–22 (2011), <http://s4.epi.org/files/2011/BriefingPaper317.pdf>; MEREDITH B. STEWART, S. POVERTY LAW CTR., CULTURE SHOCK: THE EXPLOITATION OF J-1 CULTURAL EXCHANGE WORKERS 2–35 (Booth Gunter, Jamie Kizzire, Jim Knoepp & Naomi Tsu eds., 2014), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/culture\\_shock\\_1.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/culture_shock_1.pdf) (describing the problematic use of J-1 program); Sayoni Maitra, *The Sweetest Visa on Earth? Protecting the Rights of J-1 Students in the U.S. Summer Work Travel Program*, 44 COLUM. HUM. RTS. L. REV. 859 (2013) (detailing the history of the J-1 program and explaining why it is rife with abuse); Angelo Young, *J-1 Visa Abuse: Employers Exploit Foreign Students Under US Government Program Meant for Cultural Exchange*, INT’L BUS. TIMES (Dec. 9, 2015), <http://www.ibtimes.com/j-1-visa-abuse-employers-exploit-foreign-students-under-us-government-program-meant-2216874>.

23. While the H-1B visa is intended for employment in occupations that require “theoretical and practical application of a body of specialized knowledge,” employers have used the visa to employ cooks and others at pay rates of as low as \$11.00 per hour. 20 C.F.R. § 655.715 (2015); ASHWINI SUKTHANKAR, GLOB. WORKERS JUSTICE ALL., VISAS, INC.: CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM 18 (2012), [http://www.globalworkers.org/sites/default/files/visas\\_inc/index.html#/2/zoomed](http://www.globalworkers.org/sites/default/files/visas_inc/index.html#/2/zoomed).

24. For the remainder of the article, I refer to “guestworkers” and “low-wage guestworkers” interchangeably when discussing H-2A and H-2B workers. Many of the arguments made against mandating arbitration for H-2A and H-2B guestworkers also apply to guestworkers employed under other visa programs, including higher-paid workers. For a description of each of the numerous guestworker visa programs, see SUKTHANKAR, *supra* note 23, at 16–23.

25. ANDORRA BRUNO, CONG. RESEARCH SERV., R42434, IMMIGRATION OF TEMPORARY LOWER-SKILLED WORKERS: CURRENT POLICY AND RELATED ISSUES 4 (2012).

26. 8 C.F.R. § 214.2(h)(6)(ii)(B) (2015); BRUNO, *supra* note 25, at 8.

27. BRUNO, *supra* note 25, at 29.

28. *Id.* at 2.

29. 20 C.F.R. § 655.20(r) (2015); 20 C.F.R. § 655.135(a) (2015).

guestworkers.<sup>30</sup> To prevent the displacement of U.S. workers, employers seeking to employ H-2A and H-2B guestworkers must apply for labor certification, demonstrating that there are insufficient qualified U.S. workers available to perform the work and that employment of guestworkers will not adversely impact the wages or working conditions of U.S. workers.<sup>31</sup> If certification is granted, the employer may submit a petition to employ foreign workers.<sup>32</sup> Once approved, foreign workers apply for the H-2A or H-2B visa to work for the employer. To ensure employment of guestworkers doesn't depress U.S. wages, employers must pay special rates set by federal law.<sup>33</sup> Guestworkers under the H-2A and H-2B programs may be hired for temporary work of a period of up to one year.<sup>34</sup> Under both programs, the employer can seek to extend a guestworker's stay to a period of up to three years.<sup>35</sup> At the end of their visa period, guestworkers are required to return home.<sup>36</sup> There is an annual statutory limit of 66,000 H-2B visas issued,<sup>37</sup> and no limit on the number of H-2A visas issued.<sup>38</sup>

Due in part to the determined advocacy efforts of guestworkers and their allies, the H-2A and H-2B visa programs also include provisions intended to protect the interests of the guestworkers. Protections for H-2A guestworkers include a requirement that the employer will provide: a guarantee of employment for at least three quarters of the employment contract period; free safe housing, daily transportation, and the tools, supplies, and equipment needed to perform the job; three meals per day at cost or free cooking facilities; workers' compensation insurance; a copy of their employment contract or the employer's visa program application materials; and earnings statements.<sup>39</sup> H-2A guestworkers are eligible for legal representation in some employment-related

30. 20 C.F.R. § 655.20(e) (2015); 20 C.F.R. § 655.122(a) (2015).

31. 8 U.S.C. §§ 1188(a)–(c) (2012); 8 C.F.R. §§ 214.2(h)(5)–(6) (2015). Employers must also attempt to recruit U.S. workers and H-2A employers must hire qualified U.S. workers who apply for a position during the first half of an H-2A guestworker's contract.

32. For H-2A visas, see 8 C.F.R. § 214.2(h)(5)(i) (2015). For H-2B visas, see 8 C.F.R. § 214.2(h)(6)(iii)(E) (2015).

33. Employers of H-2A guestworkers must pay the highest of the adverse effect wage rate, prevailing wage, prevailing piece rate, the collectively-bargained wage, or the federal or state minimum wage. 20 C.F.R. § 655.120(a) (2015); 20 C.F.R. § 655.1308(e) (2015). Employers of H-2B guestworkers are required to pay the prevailing wage, or the federal, state, or local minimum wage, whichever is highest. 20 C.F.R. § 655.10 (2015).

34. 20 C.F.R. §§ 655.6(c) (2015); 20 C.F.R. § 655.103(d) (2015); 8 C.F.R. § 214.2(h)(6)(ii)(b) (2016); see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 5. The H-2B program previously permitted employment for periods of up to just 10 months.

35. 8 C.F.R. §§ 214.2(h)(14)–(15) (2015).

36. There are very limited bases by which an H-2B guestworker might remain in the U.S. at the end of their visa. BRUNO, *supra* note 25, at 24. After three months outside the U.S., a guestworker may be eligible to return. 8 C.F.R. § 214.2(h)(13)(iv) (2015).

37. 8 U.S.C. § 1184(g)(1)(B) (2012).

38. CCH HUMAN RESOURCES COMPLIANCE LIBRARY, ¶ 84,100 H-2A AND H-2B VISAS: TEMPORARY HIRING OF NONIMMIGRANT WORKERS (2015), Westlaw 2013 WL 1744612.

39. 20 C.F.R. § 655.122 (2015).

matters by federally-funded legal services programs.<sup>40</sup> Employers are prohibited from retaliating against H-2A guestworkers.<sup>41</sup>

Protections for H-2B guestworkers are more limited than those for H-2A guestworkers and have been the subject of substantial controversy. Implementation of the 2012<sup>42</sup> and the superseding 2015<sup>43</sup> H-2B regulations promulgated by the U.S. Department of Labor (“USDOL” or “the Department”) were stalled in protracted litigation.<sup>44</sup> Opponents of protections for H-2B workers successfully rolled some of them back using policy riders to the 2016 appropriation bills.<sup>45</sup> Unlike under the H-2A program, employers of H-2B guestworkers are not required to provide housing, meals, or cooking facilities. The employer must only pay for return travel costs where the H-2B guestworker is dismissed prior to the end of the work contract period.<sup>46</sup> Existing legal requirements for both H-2A and H-2B guestworker programs remain insufficient.<sup>47</sup>

The availability and use of guestworker visas has grown since the programs’ inception. In their first year, just forty-four H-2A visas were issued.<sup>48</sup> Since then, the number of H-2A visas annually has increased to 89,274 in 2014.<sup>49</sup> The

40. 45 C.F.R. § 1626.11(a) (2015).

41. 20 C.F.R. §§ 655.135(h)(1)–(5) (2015); 29 C.F.R. §§ 501.4(a)(1)–(5) (2015).

42. 77 Fed. Reg. 10,038 (Feb. 21, 2012) (codified at 20 C.F.R. pt. 655; 29 C.F.R. pt. 503).

43. 80 Fed. Reg. 24,042 (Apr. 29, 2015) (to be codified at 20 C.F.R. pt. 655; 29 C.F.R. pt. 503); 80 Fed. Reg. 24,146-01 (Apr. 29, 2015) (to be codified at 8 C.F.R. pt. 214; 20 C.F.R. pt. 655).

44. *Bayou Lawn & Landscape Servs. v. Sec’y, U.S. Dept. of Labor*, 621 F. App’x 620 (11<sup>th</sup> Cir. 2015) (per curiam) (vacating district court’s order that had vacated 2012 H-2B regulations and permanently enjoined the government from enforcing them and remanding for a determination of whether the April 2015 regulations moot the lawsuit); *G.H. Daniels III & Assocs., Inc. v. Perez*, No. 13-1479, 2015 WL 5156810 (10<sup>th</sup> Cir. Sep. 3, 2015) (reversing the district court’s decision as to the claim of impermissible subdelegation of DHS’s decision-making authority under the H-2B program to USDOL, dismissing for want of jurisdiction the appeal as to whether USDOL’s denial of the applications for certifications for the 2010, 2011, and 2012 seasons violated the Administrative Procedures Act, and remanding to the district court with instructions to dismiss these claims for lack of jurisdiction).

45. STAFF OF H. RULES COMM., 114TH CONG., TEXT OF H. AMENDMENT #1 TO THE S. AMENDMENT TO H.R. 2029 (Comm. Print 2015), <http://docs.house.gov/billsthisweek/20151214/CPRT-114-HPRT-RU00-SAHR2029-AMNT1final.pdf>.

46. 20 C.F.R. § 655.22(m) (2015). However, the employer may be responsible for travel expenses from the country of origin to the extent that the costs bring the guestworker’s wages below the minimum required by the Fair Labor Standards Act, 29 U.S.C. § 201 (2012).

47. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 38 (concluding “federal agencies take steps to prevent exploitation of workers and provide assistance to victims, but vulnerabilities persist”).

48. *Classes of Nonimmigrants Issued Visas*, U.S. DEP’T ST., [http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVClassIssued-Detailed/NIVClassIssued-DetailedFY1987-1991.pdf](http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVClassIssuedDetailed/NIVClassIssued-DetailedFY1987-1991.pdf) (last visited Sept. 13, 2015) (fiscal years 1987–1991).

49. *Classes of Nonimmigrants Issued Visas FY1992-1996*, U.S. DEP’T ST., <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVClassIssued-Detailed/NIVClassIssued-DetailedFY1992-1996.pdf> (last visited Sept. 13, 2015) (fiscal years 1992–1996); *Classes of Nonimmigrants Issued Visas*, U.S. DEP’T ST.,

annual number of H-2B visas issued has risen from sixty-two visas in 1987 to 68,102 in 2014.<sup>50</sup>

Guestworker programs are likely to persist and expand. For over a decade, there has been substantial interest in increasing the size and scope of guestworker programs.<sup>51</sup> Any serious proposal for comprehensive immigration reform has included an expansion of the guestworker programs. Given the prevalence and persistence of guestworker visa programs, it is critical to understand the special vulnerability of guestworkers, the government's responsibility to protect guestworkers, and how permitting employers to mandate arbitration would be a failure to protect them.

### *B. The Unique Vulnerability of Low-Wage Guestworkers*

The structures of the H-2A and H-2B guestworker visa programs combined with challenges inherent to being a low-income foreign worker laboring far from home combine to make guestworkers vulnerable to workplace abuse.<sup>52</sup> Their vulnerability is caused in large part by employment-related debt, physical, linguistic, and social isolation, and employer control over guestworkers' immigration status, housing, and current and future income.<sup>53</sup>

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<http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVClassIssued-Detailed/NIVClassIssued-DetailedFY1997-2001.pdf> (last visited Sept. 13, 2015) (fiscal years 1997–2001); U.S. DEP'T ST., *Nonimmigrant Visas Issued by Classification*, [http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI\(B\).pdf](http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI(B).pdf) (last visited Sept. 13, 2015) (fiscal years 2007–2011); *Nonimmigrant Visas Issued by Classification*, U.S. DEP'T ST., <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2013AnnualReport/FY13AnnualReport-TableXVIB.pdf> (last visited Sept. 13, 2015) (fiscal years 2009–2013); *FY2014 Nonimmigrant Visa Issued*, U.S. DEP'T ST., <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY14NIVDetailTable.pdf> (last visited Dec. 10, 2015) (fiscal year 2014). These numbers do not reflect the total number of guestworkers present in the U.S. each year; they are the number of new visas issued annually.

50. See *supra* note 49.

51. The 2016 appropriations bills that limited protections for H-2B guestworkers also dramatically expanded the size of the program.

52. See INT'L LABOR RECRUITMENT WORKING GRP., *THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE 7* (2013) [hereinafter *AMERICAN DREAM*], <http://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf>; Sukthakar, *supra* note 23, at 36 (suggesting guestworkers may be even more vulnerable to abuse than workers who lack work authorization).

53. In addition to these factors, guestworker vulnerability is augmented by the lack of transparency of the visa program, unfamiliarity with the law, and employers' widespread use of labor contractors, recruiters, and others who may be difficult to locate or hold liable for violations of the law. *AMERICAN DREAM*, *supra* note 52, at 17. Guestworkers are also a disenfranchised workforce—they cannot participate in the political process and the visa does not provide a means to ever gain citizenship.

### 1. Employment-Related Debt

Many guestworkers must incur substantial debt for the opportunity to work in the United States.<sup>54</sup> Common pre-employment expenses include medical exams, visa fees, and travel expenses.<sup>55</sup> Guestworkers' documented expenses have ranged from \$100 to \$20,000.<sup>56</sup> Expenses can be well over an individual's annual income in their home country, and most prospective guestworkers must borrow money to pay, sometimes at very high interest rates or with their family's property as collateral.<sup>57</sup> The debt may be directly to the employer, labor contractor, or recruiter, or to individuals or entities not directly associated with the work, like a family member or lending institution.<sup>58</sup> Despite the high costs, guestworkers come to the U.S. because they believe they will make sufficient money to cover any expenses and still earn money for themselves and their families.<sup>59</sup>

H-2A and H-2B employers and their agents are prohibited from charging guestworkers recruitment fees.<sup>60</sup> H-2A employers are also prohibited from seeking or receiving any payment for costs associated with obtaining labor certification.<sup>61</sup> Nevertheless, employers and their recruiters sometimes charge unlawful fees and put guestworkers further into debt.<sup>62</sup>

54. BAUER, *supra* note 16, at 9–13.

55. AM. UNIV. WASH. COLL. OF LAW IMMIGRANT JUSTICE CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., TAKEN FOR A RIDE: MIGRANT WORKERS IN THE U.S. FAIR AND CARNIVAL INDUSTRY 17 (2013) [hereinafter TAKEN FOR A RIDE], [http://www.splcenter.org/sites/default/files/downloads/resource/taken\\_for\\_a\\_ride\\_report\\_final.pdf](http://www.splcenter.org/sites/default/files/downloads/resource/taken_for_a_ride_report_final.pdf); AM. UNIV. WASH. COLL. OF LAW INT'L HUMAN RIGHTS LAW CLINIC & CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., PICKED APART: THE HIDDEN STRUGGLE OF MIGRANT WORKER WOMEN IN THE MARYLAND CRAB INDUSTRY 15, 23 (2012) [hereinafter PICKED APART], <http://www.cdmigrante.org/wp-content/uploads/2012/01/PickedApart.pdf>.

56. AMERICAN DREAM, *supra* note 52, at 23; *see also* TAKEN FOR A RIDE, *supra* note 55, at 17; BAUER, *supra* note 16, at 9–13; SUKTHANKAR, *supra* note 23, at 43, 45.

57. AROLD PALACIOS, GLOB. WORKERS JUSTICE ALL., CONFISCACIÓN DE TÍTULOS DE PROPIEDAD EN GUATEMALA: POR PARTE DE RECLUTADORES EN PROGRAMAS DE TRABAJADORES TEMPORALES CON VISAS H-2B [CONFISCATION OF PROPERTY TITLES IN GUATEMALA BY RECRUITERS OF TEMPORARY WORKERS WITH H-2B VISAS] (2013), [http://www.globalworkers.org/sites/default/files/Confiscacion%20de%20Titulos\\_Informe\\_Final.pdf](http://www.globalworkers.org/sites/default/files/Confiscacion%20de%20Titulos_Informe_Final.pdf) (documenting the appropriation of property titles by recruiters of H-2B guestworkers in Guatemala and how this practice results in worker intimidation and abuse); AMERICAN DREAM, *supra* note 52, at 9.

58. AMERICAN DREAM, *supra* note 52, at 23–28; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 25–29 (describing recruitment methods used by employers of H-2A and H-2B guestworkers).

59. PICKED APART, *supra* note 55, at 11 (2012); BAUER, *supra* note 16, at 6.

60. *Id.* at 26–27.

61. 8 C.F.R. § 214.2(h)(6)(i)(B) (2015); 20 C.F.R. § 655.22(j) (2015); 20 C.F.R. § 655.135(j) (2015); 20 C.F.R. § 655.20(o) (2015); AMERICAN DREAM, *supra* note 52, at 26.

62. *Id.* at 23–28.

Employment-related debt increases guestworkers' vulnerability to workplace abuse.<sup>63</sup> They may be reluctant to raise concerns at work for fear of losing their job and thus their ability to pay back loans. Bad actor employers exploit this financial pressure, telling guestworkers that they will be fired should they complain or seek to improve their working conditions.<sup>64</sup> Fearful of forfeiting their family home or other negative consequences, guestworkers may be coerced to continue working in unlawful conditions.<sup>65</sup> Extreme coercion related to guestworker debt has been recognized as a form of human trafficking.<sup>66</sup>

## 2. Pervasive Employer Control

While power dynamics in the employment relationship almost always favor the employer, the imbalance is extreme in the context of guestworkers.<sup>67</sup> It is amplified by the employer's control of guestworkers' immigration status, housing, and ability to earn income. Employers' pervasive control vastly increases guestworkers' vulnerability to abuses in the workplace and puts them at a heightened risk for retaliation.<sup>68</sup>

### a. Control of Immigration Status

Guestworkers' immigration statuses are tied to their employers. H-2A and H-2B employers apply for and hold their employee guestworkers' visas.<sup>69</sup> The visas are not portable; a guestworker's visa is linked to their employer and, if their job ends, the guestworker loses their immigration status and ability to remain and work in the U.S.<sup>70</sup>

63. See, e.g., Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 51 (2012) (noting the relationship between recruitment debts and human trafficking).

64. AMERICAN DREAM, *supra* note 52, at 12–15.

65. See *id.* at 14; BAUER, *supra* note 16, at 14–17; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 30.

66. Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd., 790 F. Supp. 2d 1134, 1144 (C.D. Cal. 2011) (“Plaintiffs’ allegations largely focus on the point that they had to work for Defendants so that they would be able to repay the massive debt they incurred due to Defendants’ fraud. In other words, after incurring \$5000 in debt, if Plaintiffs lost their teaching jobs they would be unable to ever repay the debt. Based on Plaintiffs’ allegations it is not surprising that Plaintiffs not only wanted, but needed to continue working in the program.”); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 30.

67. BAUER, *supra* note 16, at 14, 42 (describing the power imbalance as “vast”).

68. SUKTHANKAR, *supra* note 23, at 47–48 (“Workers’ fear of being fired and deported runs so deep that an employer may never even have to take the illegal step of articulating a threat to do so.”).

69. AMERICAN DREAM, *supra* note 52, at 37.

70. While it is theoretically possible for H-2A and H-2B guestworkers to change employers under some limited circumstances, it is quite difficult in practice. 8 C.F.R. § 214.2(h)(2)(i)(D) (2015).

Advocates for guestworkers have repeatedly identified lack of visa portability as one of the most troubling aspects of guestworker visa programs.<sup>71</sup> When the employer controls a worker's immigration status, they may feel empowered to violate the law, knowing guestworkers may be unwilling to speak up about illegal working conditions for fear of losing their job and ability to remain and work in the U.S.<sup>72</sup>

*b. Control of Housing*

Employers commonly provide guestworkers' housing.<sup>73</sup> The H-2A program requires it.<sup>74</sup> While this arrangement can be beneficial, employer-provided housing creates another potential source of vulnerability for guestworkers.<sup>75</sup>

When an employer controls an employee's housing, the employee may feel they have no space that is private or outside of their employer's control. They lack a place where they can talk openly about workplace or other concerns, have visitors, make private telephone calls, or be safe from employer threats of physical harm.<sup>76</sup> In addition, they may fear becoming homeless should the employment relationship end. This can be particularly frightening for guestworkers who do not have a support system or know anyone in the U.S. other than their employers and co-workers.

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71. BAUER, *supra* note 16, at 14–17; AMERICAN DREAM, *supra* note 52, at 14 (“Job-dependent immigration status, coupled with heavy recruitment debt, is a powerful deterrent to worker complaints.”); Lee, *supra* note 63, at 44. Interestingly, a poll showed registered U.S. voters overwhelmingly agree. Nine of ten voters polled supported “allow[ing] a legal immigrant on a work visa to leave a job without losing permission to work in the U.S. if the immigrant is being abused or mistreated by the employer.” BELDEN RUSSONELLO STRATEGISTS, AMERICAN ATTITUDE ON IMMIGRATION REFORM, WORKER PROTECTIONS, DUE PROCESS, AND BORDER ENFORCEMENT 4 (2013), <http://www.brspoll.com/uploads/files/BRS-Poll-for-CAMBIO-APRIL-16-2013-RELEASE.pdf>.

72. See AMERICAN DREAM, *supra* note 52, at 37.

73. PICKED APART, *supra* note 55, at 2. In a situation involving J-I visitors employed at a McDonalds franchise, students were charged rent to live in units owned by their employer, and were housed up to eight people in a basement. Eric Veronikis, *Labor Abuse Complaints Lodged by Midstate Foreign Student Workers Help Spur Federal Legislation*, PENN LIVE (June 10, 2013), [http://www.pennlive.com/midstate/index.ssf/2013/06/students\\_advocates\\_promote\\_fed.html](http://www.pennlive.com/midstate/index.ssf/2013/06/students_advocates_promote_fed.html).

74. 8 U.S.C. § 1188(c)(4) (2012); BAUER, *supra* note 16, at 35–37.

75. Grace Meng, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence and Sexual Harassment*, HUMAN RIGHTS WATCH (May 15, 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual> (“Many farmworkers live in employer-provided housing, and unlawful termination for reporting harassment can also lead to unlawful eviction and loss of shelter.”); Univ. of Pa. Transnational Legal Clinic, *Isolated by Force: Denying Migrant Farmworkers Access to Services*, YOUTUBE (Dec. 14, 2015), <https://www.youtube.com/watch?v=-uQfVmXmVwc&feature=youtu.be> (documenting agricultural employers' denial of access to medical, legal, and social services to migrant farmworkers living in employer-owned labor camps).

76. PICKED APART, *supra* note 55, at 19–20.

*c. Control of Current and Future Income*

Guestworkers' employers control their current and possibly future income. The only lawful way for a guestworker to earn wages in the U.S. is by working for their designated employer. Thus, a guestworker cannot easily leave their job and seek work elsewhere if the job is unpleasant, they have very few hours of work, or are subjected to illegal working conditions. To do so would mean violating the terms of their visa and possibly impacting their ability to return to the U.S.<sup>77</sup> In addition, the guestworker would lose any income they were earning and the ability to pay back debts incurred to come to the U.S. in the first place.

Employers can also limit guestworkers' future prospects. Employers can recruit guestworkers from all over the world. The threat of blacklisting guestworkers or their entire community by employers and recruiters further enhances the vulnerability of guestworkers.<sup>78</sup> In some industries, recruiters in home countries identify workers using word of mouth and recommendations so workers fear harming their own and their community's prospects if they complain about working conditions.<sup>79</sup>

*d. Profound Isolation*

Guestworkers regularly experience physical, linguistic, social, and cultural isolation. This profound isolation places guestworkers at greater risk for abuse and, when abuses occur, creates substantial barriers to understanding and enforcing their rights under U.S. law.

Many guestworkers live in physical isolation.<sup>80</sup> For example, agricultural guestworkers commonly live at remote employer-owned housing located near the fields where they work. They may be many miles from their nearest neighbors and not know the name of their road or the town where they live. Many low-wage guestworkers do not have their own transportation and, if they are in a remote or even suburban area, may not have access to public transit.<sup>81</sup> Thus, they may rely exclusively on their employer if they want to go anywhere and come into contact with few people other than those related to their employment.<sup>82</sup> Physical isolation enhances guestworkers' actual and perceived vulnerability. They are in the middle of nowhere with neither the means nor

77. 8 C.F.R. § 214.2(h)(1)(i) (2015) ("Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer.").

78. SUKTHANKAR, *supra* note 23, at 53.

79. TAKEN FOR A RIDE, *supra* note 55, at 19; PICKED APART, *supra* note 55, at 15.

80. TAKEN FOR A RIDE, *supra* note 55, at viii, 24; BAUER, *supra* note 16, at 30 ("H-2 workers, who usually speak no English and have no ability to move about on their own, are completely at the mercy of these brokers for housing, food and transportation.").

81. PICKED APART, *supra* note 55, at 2, 17 (stating that crab pickers in Maryland relied exclusively on their employers for transportation to get food and medical treatment; no other options were available.).

82. PICKED APART, *supra* note 55, at 17.

knowledge to get anywhere else.<sup>83</sup> This profound isolation puts guestworkers at greater risk for physical violence as well. They are truly at their employers' mercy with no one around to intervene if violence erupts.<sup>84</sup>

Guestworkers frequently experience linguistic isolation. Guestworkers come to the U.S. from throughout the world. Many speak English as a second language or not at all. While some guestworkers read and write fluently in English, others speak only languages, such as Mixteco Bajo, which have no written component and are not commonly spoken in the U.S.<sup>85</sup> Depending where guestworkers live and work, they may not come into contact with anyone other than co-workers who speak their language. Some employers use supervisors from the same country of origin as guestworkers and who speak their language, but this too can create vulnerability as the supervisor then controls communication between the guestworkers and employer.<sup>86</sup>

Linguistic isolation creates vulnerability to abuse. To the extent that guestworkers are linguistically isolated, they may feel they have no rights or available support and have difficulty understanding their rights, communicating their needs, or accessing legal or other support when their rights are violated.<sup>87</sup> They can also be more readily controlled by bad-actor employers and supervisors, their only source of information, who can limit information conveyed or deliberately provide misinformation.<sup>88</sup>

Social isolation results in additional vulnerability.<sup>89</sup> Guestworkers live far from their families, friends, and religious and other community institutions. While they may travel to the U.S. with friends and family or eventually develop relationships in the U.S., their employment is relatively brief and they tend to be socially isolated.<sup>90</sup> When something goes wrong at work, socially isolated

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83. BAUER, *supra* note 16, at 36.

84. Garrison, *supra* note 5 (“In January 2013, a group of Mexican forestry workers said that they had been held at gunpoint in the mountains north of Sacramento and forced to work 13 hours a day and handle chemicals that made them vomit and peeled their skin, according to a search warrant affidavit filed in federal court last year by a Department of Homeland Security investigator.”); Meng, *supra* note 75 (describing sexual assault of farmworkers in isolated locations).

85. Katya Cengel, *The Other Mexicans*, NAT’L GEOGRAPHIC (June 25, 2013), <http://news.nationalgeographic.com/news/2013/06/130624-mexico-mixteco-indigenous-immigration-spanish-culture/>.

86. PICKED APART, *supra* note 55, at 30–31.

87. For example, they are unlikely to know what 911 is or, if they know the number and have access to a phone, they still may not be able to communicate with the police dispatcher.

88. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 31.

89. The purposes and findings of the federal anti-trafficking statute acknowledge the vulnerability created by social isolation. 22 U.S.C. § 7101(b)(5) (2012) (“Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.”).

90. Spouses and minor children of H-2 guestworkers may accompany or follow the guestworker to the U.S. BRUNO, *supra* note 16, at 29. Despite this possibility, low-wage guestworkers rarely have family with them.

guestworkers may not know where to turn for assistance or may feel there is no one available or able to help. They may also feel that, by comparison, the employer is extremely well-connected and thus even more powerful.<sup>91</sup>

Guestworkers may also experience profound cultural, ethnic, and racial isolation. For example, indigenous Maam-speaking forestry workers from Guatemala may be working in rural Arkansas where the majority of the population is white and English-speaking. As a result of these differences, guestworkers may perceive that they are outsiders in a hostile setting and not safe. This perception may lead them to remain isolated and to believe they have no choice but to submit to whatever the employer requires.

### 3. Limited Legal Knowledge and Access

For many reasons, including those listed above, guestworkers may not have information readily available regarding their workplace rights or how to enforce them.<sup>92</sup> Recognizing the vulnerability of guestworkers and their possible lack of information about their legal rights in the U.S., Congress included a provision in the William Wilberforce Trafficking Victims Protection Reauthorization Act (“TVPA”) that requires the creation and distribution of materials to guestworkers about their workplace rights and how to access assistance.<sup>93</sup> Despite these efforts, confusion and misinformation regarding rights remain.<sup>94</sup>

Guestworkers may have difficulty securing legal representation.<sup>95</sup> Across the country, there is a crisis in access to legal representation for low-income individuals who cannot afford to pay a private attorney.<sup>96</sup> Guestworkers face additional challenges when seeking to access attorneys as some classes of guestworkers are ineligible for Legal Services Corporation (“LSC”) funded legal services and private attorneys are frequently uninterested in or unable to take these cases.<sup>97</sup> H-2A workers and H-2B workers working in the forestry industry are eligible for LSC-funded legal services.<sup>98</sup> Unless they are a victim of domestic

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91. To help resolve this problem, Jennifer Gordon proposed linking membership in a cross-border worker organization to guestworker visas to permit people to move freely and maintain good working conditions. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 504 (2007).

92. PICKED APART, *supra* note 55, at 30; AMERICAN DREAM, *supra* note 52, at 17–19; MARY BAUER & MONICA RAMIREZ, S. POVERTY LAW CTR., *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY* 42 (Booth Gunter ed. 2010).

93. 22 U.S.C. § 7104(b) (2012). An online copy of the brochure distributed by the State Department is available at <http://travel.state.gov/content/visas/english/general/rights-protections-temporary-workers.html>. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 39.

94. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 31.

95. TAKEN FOR A RIDE, *supra* note 55, at 26; Victoria Gavito, *The Pursuit of Justice is Without Borders: Binational Strategies for Defending Migrants’ Rights*, 14 NO. 3 HUM. RTS. BRIEF 5, 6 (2007).

96. Columbia Law Sch. Human Rights Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases*, 64 SYRACUSE L. REV. 409, 410–14 (2014).

97. BAUER, *supra* note 16, at 40–41.

98. 45 C.F.R. § 1626.11 (2015).

violence, extreme cruelty, or human trafficking, other H-2B guestworkers are not.<sup>99</sup> In addition to these barriers, guestworkers may struggle to communicate with attorneys in their language, particularly as guestworkers arrive from an increasingly wide array of countries.<sup>100</sup>

### C. The Consequences of Vulnerability

Given the many potential sources of guestworker vulnerability, it is unsurprising that there have been numerous violations of guestworkers' employment-related rights.<sup>101</sup> Among the abuses are: failure to pay required wages,<sup>102</sup> discrimination and harassment,<sup>103</sup> physical injuries due to hazardous working conditions,<sup>104</sup> unsafe housing conditions,<sup>105</sup> human trafficking,<sup>106</sup> and retaliation.<sup>107</sup> Guestworkers have also experienced fraud and breach of contract.<sup>108</sup> These abuses affect guestworkers of all kinds. One longtime

99. LSC-funded programs have other restrictions as well, including a prohibition against bringing class action lawsuits. The type and effectiveness of legal actions available is limited. BAUER, *supra* note 16, at 40–41.

100. See *supra* note 3 and accompanying text.

101. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 34–37 (noting that the incidence of abuse may be underreported and reporting, *inter alia*, that 793 H-2A and H-2B guestworker employers were found by USDOL to have violated pay and/or H-2A pay statement requirements between 2009 and 2013).

102. Guestworkers have been paid less than their lawful wages as a result of deductions from their pay, failure to pay overtime, and failure to pay the required wages for all hours worked. TAKEN FOR A RIDE, *supra* note 55, at 22–24; PICKED APART, *supra* note 55, at 23–26; BAUER, *supra* note 16, at 18–20; SUKTHANKAR, *supra* note 23, at 45.

103. There are documented cases of unlawful discrimination against guestworkers on the basis of sex, national origin, and age. Discrimination may occur during recruitment, when recruiters seek out employees of a certain national origin, age, and sex, or during employment when workers may receive disparate pay rates or experience harassment or sexual assault. TAKEN FOR A RIDE, *supra* note 55, at 40–41; AMERICAN DREAM, *supra* note 52, at 12–14; SUKTHANKAR, *supra* note 23, at 40–44; Lee, *supra* note 63, at 63–67.

104. Low-wage guestworkers are employed in high-risk occupations. See BAUER, *supra* note 16, at 25. Guestworkers report regularly suffering job-related injuries. TAKEN FOR A RIDE, *supra* note 55, at 32–33; PICKED APART, *supra* note 55, at 27–29; BAUER, *supra* note 16, at 25; SUKTHANKAR, *supra* note 23, at 50. While H-2A employers are required to provide workers' compensation coverage, H-2B employers are not. *Id.* at 8.

105. Employers regularly house guestworkers in substandard housing and profit from charging them to live in it. TAKEN FOR A RIDE, *supra* note 55, at 37–39; BAUER, *supra* note 16, at 35–37.

106. Among other forms of force, fraud, and coercion, guestworkers may be compelled to work through the use of threats of harm or actual harm or may be held in debt bondage. BAUER, *supra* note 16, at 14–17. During 2012 and 2013, “service providers [funded by the Department of Justice] assisted 340 workers who were victims of human trafficking identified in typical H-2 industries.” U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 37.

107. See AMERICAN DREAM, *supra* note 52, at 5; SUKTHANKAR, *supra* note 23, at 40–53. *Close to Slavery* details many of the abuses suffered by guestworkers. BAUER, *supra* note 16.

108. Guestworkers may be given false or misleading information during recruitment and employers may fail to live up to the commitments made to the U.S. government during the labor certification process. PICKED APART, *supra* note 55, at 32–33; BAUER, *supra* note 16, at 31–34; AMERICAN DREAM, *supra* note 52, at 12–15; SUKTHANKAR, *supra* note 23, at 42.

farmworker advocate observed, “What has been striking to our group is that regardless of sector, or visa category, there are common abuses.”<sup>109</sup>

Guestworkers risk retaliation when they seek to enforce the law or improve their working conditions.<sup>110</sup> Documented cases of retaliation include loss of work hours, termination, blacklisting, and threats of physical and financial harm.<sup>111</sup> Blacklisting in particular is a threat sometimes turned on a guestworker’s entire community if they complain or seek to improve their working conditions.<sup>112</sup>

### III.

#### CONTRACTUAL LIMITS ON ACCESS TO JUSTICE: MANDATORY ARBITRATION

When faced with the abuses and violations of statutory rights detailed above, guestworkers may seek to enforce the law in U.S. courts. Unlike many other low-wage workers, employers are required to enter into written contracts with H-2A guestworkers. While not required by law,<sup>113</sup> H-2B employers may choose to use employment contracts as well. In theory, these contracts may both augment and limit rights. In practice, because the contracts would be drafted and provided by employers and are not negotiated, they may just recite the requirements of the law or include provisions more favorable to the employer. Among the provisions that would favor employers are mandatory arbitration provisions.

##### *A. The State of Mandatory Arbitration*

Arbitration is the binding resolution of a dispute by a private third party neutral. It can be mandated by statute or private agreement. Arbitration agreements are a form of forum selection clause that contractually commits the parties to forego litigation and resolve disputes through arbitration. The scope of the disputes covered, procedures permitted, and remedies available vary by agreement.

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109. Bruce Goldstein, president of Farmworker Justice quoted in Veronikis, *supra* note 73. AMERICAN DREAM, *supra* note 52, at 5 (urging that “these abuses are systemic rather than visa specific”); accord Elizabeth Johnston, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT’L L. 1121 (2010) (explaining that even higher wage guestworkers experience serious abuses, including trafficked Filipino public school teachers in Louisiana).

110. AMERICAN DREAM, *supra* note 52, at 14

111. *Id.*; TAKEN FOR A RIDE, *supra* note 55, at 43–44.

112. TAKEN FOR A RIDE, *supra* note 55, at 43; BAUER, *supra* note 16, at 16 (“The North Carolina Growers Association blacklist has been widely publicized. The 1997 blacklist, called the ‘1997 NCGA Ineligible for rehire report,’ consisted of more than 1000 names of undesirable former guestworkers.”); AMERICAN DREAM, *supra* note 52, at 14; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 37 (“[Concern about blacklisting] was evident during one of our [GAO] discussion groups in Mexico, where workers expressed concern about the fact that our meeting room had a window where people walking by could possibly see and report them to the local recruiter, affecting their chances for future employment in the United States.”)

113. 20 C.F.R. § 655.122(q) (2015).

Unlike litigation, arbitration is a private process.<sup>114</sup> With few exceptions, arbitration proceedings and their outcomes are not recorded, compiled, or publicly available.<sup>115</sup> Arbitrators<sup>116</sup> do not always produce written decisions explaining their reasoning.<sup>117</sup> Discovery is usually quite limited and may be further restricted by the parties. Judicial review of arbitrators' decisions is extremely narrow.<sup>118</sup> Arbitral awards are final and binding.<sup>119</sup>

Although historically disfavored, the Supreme Court has consistently upheld the enforceability of arbitration agreements since its decision in *Gilmer*.<sup>120</sup> Subsequent decisions have repeatedly demonstrated the Court's broad approval of mandatory arbitration.

The Court's reasoning in these decisions rests heavily on the Federal Arbitration Act ("FAA").<sup>121</sup> The Act, enacted in 1925, was passed before employment protections such as the minimum wage requirement and

114. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1216 (2006) ("[A]rbitration proceedings are closed to government officials, the press, and other uninvited third parties.").

115. As of 2004, California law requires arbitration companies involved in certain types of arbitrations, including employment, to make basic information about their arbitrations for the prior five years available and searchable online. CAL. CIV. PROC. CODE § 1281.96 (West 2014). Among the required information is: the names of the arbitrator and non-consumer party if a business entity; type of dispute involved (including the salary range of the employee); number of times the non-consumer party has been a party to arbitration or mediation administered by the company; whether the consumer was represented; key dates in the arbitration; type of disposition, if known, and who prevailed; amount of claim and award and other relief granted; and the total arbitration fee and allocation. A recent study found that just eleven of twenty-six arbitration companies involved in covered arbitrations actually posted any of the required information. Of those that posted, the information was incomplete. DAVID J. JUNG, JAMIE HOROWITZ, JOSE HERRERA & LEE ROSENBERG, REPORTING CONSUMER ARBITRATION DATA IN CALIFORNIA 2 (2013), <http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update> ("Without complete and accurate information, policy makers and the public cannot assess whether the process is fair, cannot compare arbitration's operation to other forms of dispute resolution, and cannot detect bias in the system or on the part of particular arbitration companies.").

116. Arbitrators may operate on their own or be affiliated with an organization, including the three primary arbitration organizations—the American Arbitration Association ("AAA"), Judicial Arbitration Association ("JAMS"), and National Academy of Arbitrators ("NAA").

117. An AAA-recommended strategy to reduce arbitration costs and delays is to accept an arbitrator's award without a written explanation. AM. ARBITRATION ASS'N, AAA ARBITRATION ROADMAP: A GUIDE TO AAA ARBITRATION 10 (2007) [hereinafter AAA ROADMAP], [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003838](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003838) ("Requesting the arbitrator to provide findings of fact and conclusions of law can increase costs and delay the rendering of an award.").

118. See *infra* Part V.A.4.

119. AM. ARBITRATION ASS'N, RESOLVING EMPLOYEE DISPUTES 23 (2006), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_004411](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004411).

120. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 73–74 (1997); see, e.g., *Am. Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

121. Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2012).

prohibitions on discrimination existed.<sup>122</sup> The FAA mandates that arbitration clauses contained in contracts involving maritime transactions or “evidencing a transaction involving commerce” are enforceable and “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>123</sup> The Act has been repeatedly interpreted as expressing a “national policy favoring arbitration”<sup>124</sup> and is regularly applied by courts to employment disputes involving statutory claims.<sup>125</sup> Some scholars argue this is a gross misinterpretation of the Act and that such an expansion was never intended by Congress.<sup>126</sup>

Properly-drafted arbitration agreements<sup>127</sup> are routinely enforced by courts in employment disputes.<sup>128</sup> The decisions are most likely to arise in the context of an employer’s motion to stay or dismiss a lawsuit and compel arbitration when an employee initiates a lawsuit in court. While it is possible that an employee would seek to enforce an agreement to arbitrate, it is extremely uncommon.<sup>129</sup>

Courts apply state law contract principles when deciding whether there is a valid agreement to arbitrate. As with any contract, there must be consideration to have an enforceable agreement.<sup>130</sup> There may be insufficient consideration if the parties entered into the agreement prior to hiring or if the employer had the unilateral authority to alter, amend, or revoke the arbitration agreement.<sup>131</sup> Courts also require acceptance by the employee,<sup>132</sup> but this requirement is easily met. For example, by continuing to work after the employer provides notice of a mandatory arbitration policy.<sup>133</sup>

Courts occasionally find otherwise valid arbitration agreements unconscionable and thus unenforceable. Agreements have been voided where

122. U.S. COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS – FINAL REPORT 51 (1994) [hereinafter DUNLOP REPORT].

123. 9 U.S.C. § 2 (2012).

124. *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984) (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”).

125. Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived In The Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 7 (2014).

126. Schwartz, *supra* note 120, at 75–78 (reviewing the legislative history of the FAA and concluding that it was intended to apply only to contractual disputes in the commercial context).

127. This article focuses on pre-dispute arbitration agreements—agreements to engage in binding arbitration to resolve disputes that might arise in the future.

128. James Ottavio Castagnera & Michael Ostrowski, *Alternative Dispute Resolution: Employment Law*, 57 AM. JUR. TRIALS 255 § 24.7 (2014); Comsti, *supra* note 125, at 7.

129. *Wells Fargo Bank, N.A. v. Chapman*, 90 So. 3d 774 (Ala. Civ. App. 2012).

130. *See, e.g., Dumais v. Am. Golf Corp.*, 150 F. Supp. 2d 1182 (D.N.M. 2001).

131. *See, e.g., Zamora v. Swift Transp. Corp.*, 547 F. Supp. 2d 699 (W.D. Tex. 2008).

132. *See, e.g., Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002).

133. *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005).

they unreasonably favor the employer, where there was an effort to mislead or deceive the employee regarding the agreement,<sup>134</sup> and where there was no meaningful opportunity to negotiate, a high degree of difference in bargaining power, or negotiations and terms were beyond the comprehension of an ordinary employee.<sup>135</sup> These challenges, however, are very rarely successful. Courts overwhelmingly find arbitration agreements enforceable, even when the concerns detailed above are present.

With the judiciary's broad approval, arbitration is mandated in a wide variety of contexts, from consumer contracts to employment relationships. Arbitration agreements are now quite commonly required by employers as a condition of employment.<sup>136</sup> One scholar estimates that 36 million employees are subject to mandatory arbitration.<sup>137</sup> Enforceable arbitration mandates need not be in a written contract signed by the employee. They have been included in offer letters, in notices included with paychecks, and in employee handbooks.<sup>138</sup>

Among the reasons employers may prefer arbitration are the perceptions that it limits damages, shields the employer's alleged unlawful conduct and case outcomes from public view, limits discovery, and is cheaper and faster than litigation.<sup>139</sup> Some employers and their counsel view mandatory arbitration as a useful risk-management strategy.<sup>140</sup> While there are a very few cases involving highly compensated employees seeking to enforce arbitration clauses, there is no

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134. See, e.g., *Johnson v. Labor Ready, Inc.*, No. 99-2129, U.S. Dist. LEXIS 15555 (E.D. La. Oct. 4, 1999); *Kahn v. Peak*, No. 91 C 7148, 1992 U.S. Dist. LEXIS 8710 (N.D. Ill. June 17, 1992); *King v. Prudential-Bache Sec., Inc.*, 277 Cal. Rptr. 214 (Ct. App. 1990).

135. Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Actions/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 670–97 (2010).

136. Comsti, *supra* note 125, at 6.

137. *Id.* at 7.

138. Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1125 (2012).

139. Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employees are Compelled to Waive Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 776 (2005) (summarizing reasons employers prefer arbitration to resolve employment disputes). *But see* Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to its Expectations? A View From the Employer's Perspective*, 25 ABA J. LAB. & EMP. L. 227, 233 (2010) (describing relative advantages and disadvantages of arbitration from the employer's perspective and suggesting that mandatory arbitration may be more expensive and time-consuming than employers had initially anticipated).

140. One agricultural employer explained that he would require H-2A guestworkers to submit to arbitration, "for the workers' protection and to limit the risk in the operation." He analogized arbitration to an insurance policy, saying he had to carry insurance against injuries even though he had a safety plan and his workers were never injured. *Elliott Farm*, No. 2011-TLC-0040, slip op. at 3 (Dep't of Labor June 6, 2011). However, even some employers' counsel have determined that arbitration may sometimes be as costly as litigation. DAVID S. BAFFA, JOHN L. COLLINS & GERALD L. MAATMAN, JR., SEYFARTH SHAW LLP, *GUIDANCE FOR EMPLOYERS CONSIDERING MANDATORY ARBITRATION AGREEMENTS WITH CLASS AND COLLECTIVE ACTION WAIVERS* 4–6 (2013), [http://www.seyfarth.com/dir\\_docs/publications/GuidanceMandatoryArbitration.pdf](http://www.seyfarth.com/dir_docs/publications/GuidanceMandatoryArbitration.pdf) (offering pros and cons for employers considering implementation of pre-dispute class barring mandatory arbitration agreements).

literature or evidence that suggests that employees prefer arbitration to litigation.<sup>141</sup> The increase in mandatory arbitration in employment relationships has been driven by employers and approved by the courts.

*B. Employer Efforts to Mandate Arbitration for Guestworkers*

The U.S. Chamber of Commerce<sup>142</sup> identified “protect[ing] the use of binding arbitration in employment” as one of its policy priorities for 2015. It also identified expansion and streamlining of the guestworker visa program as a policy priority along with opposing increases to the minimum wage, mandated sick leave, posting employee injuries online, strengthened ergonomic standards under the Occupational Safety and Health Act (“OSHA”), and “efforts to modify Family and Medical Leave Act (“FMLA”) and Fair Labor Standards Act (“FLSA”) regulations to be less favorable to employers.”<sup>143</sup> The Chamber’s National Chamber Litigation Center’s policy priorities included “defend[ing] arbitration agreements against legal challenges intended to eliminate arbitration as a faster, cheaper, and fairer alternative to litigation” and “prevent[ing] expansion of private civil liability under key federal and state laws.”<sup>144</sup>

Employers and those who advocate in their interest have made initial efforts to mandate arbitration for guestworkers. Some employers have sought to limit their guestworker employees’ access to courts by requiring arbitration instead. Others have lobbied to lay the legislative groundwork to ensure that mandatory arbitration provisions will be enforceable in court.

141. See, e.g., *Janvey v. Alguire*, 539 F. App’x 478 (5th Cir. 2013); *Elec. Data Sys. Corp. v. Reddy*, No. 4:01-CV-373, 2002 WL 31268894 (E.D. Tex. Sept. 9, 2002); *Qadri v. PointDirex, L.L.C.*, 823 So. 2d 861 (Fla. Dist. Ct. App. 2002). As might be expected, the vast majority of employment lawsuits are initiated by employees. However, in the last decade, there has been some increase in suits initiated by employers. Matthew P. Holt, *When the Hand That Feeds Bites: Exploring Claims By Employers Against Employees*, 43 N.M. L. REV. 491 (2013).

142. The U.S. Chamber of Commerce is “the world’s largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions.” *About the U.S. Chamber*, U.S. CHAMBER COM., <https://www.uschamber.com/about-us/about-us-chamber> (last visited Feb. 10, 2015).

143. U.S. CHAMBER OF COMMERCE, U.S. CHAMBER POLICY PRIORITIES FOR 2015 (2015), <https://www.uschamber.com/about-us/us-chamber-policy-priorities-2015>. In a report summarizing its successes, the Chamber celebrated its efforts to expand access to H-2B guestworkers and limit USDOL’s authority to regulate employers. U.S. CHAMBER OF COMMERCE, U.S. CHAMBER POLICY ACCOMPLISHMENTS JANUARY–SEPTEMBER 2015, at 9 (2015), [https://www.uschamber.com/sites/default/files/2015\\_policy\\_accomplishments\\_-\\_september\\_2015.pdf](https://www.uschamber.com/sites/default/files/2015_policy_accomplishments_-_september_2015.pdf) (“Attached provisions to the Senate Labor-HHS Appropriations bill that would allow employers of H-2B workers to use private wage surveys, prevent the Department of Labor from exercising newly claimed audit authority over H-2B employers, and define a temporary need for employment that could be as long as one year in duration, as opposed to the nine-month maximum set forth in the Interim Final Regulation issued in April. Worked with the House DHS Appropriations Subcommittee to include language that created a returning worker exemption for H-2B workers who entered the United States in 2013, 2014, and 2015 for fiscal year 2016, providing much-needed cap relief for Chamber members.”).

144. *Id.*

### 1. Contractual Efforts

Agricultural employers have required H-2A guestworkers to agree to mandatory arbitration.<sup>145</sup> Starting as early as 2008, agricultural employers included this term in their H-2A application documents.<sup>146</sup> Prior to April 1, 2011, applications including mandatory arbitration provisions were routinely approved by USDOL.<sup>147</sup> However, beginning in 2011, the Department acknowledged that it had erred and began rejecting H-2A applications that included mandatory arbitration provisions.<sup>148</sup>

The Department's current position is that, in order to preserve the jobs and working conditions of U.S. workers, the H-2A program requires that "each job qualification and requirement . . . be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers in the same or comparable occupations or crops."<sup>149</sup> The requirement that H-2A guestworkers submit to arbitration is not normal and accepted among other, comparable workers and thus violates the regulation.<sup>150</sup>

When USDOL began to reject applications that contained arbitration provisions, nine employers objected and appealed. The majority of the resulting decisions affirmed and upheld the rejections.<sup>151</sup> Since this initial spate of

145. International Labor Management Corp, a company that prepared and filed visa applications for client companies, reported filing 141 H-2A visa applications between 2009 and 2011 that contained mandatory arbitration clauses. Bourne, No. 2011-TLC-00399, slip op. at 4 (Dep't of Labor June 6, 2011). The company and its officers were indicted for crimes related to visa fraud in 2014. Indictment, *United States v. Eury*, No. 1:14CR39 (M.D.N.C. filed Jan. 31, 2014), [http://www.wral.com/asset/news/local/2014/02/04/13358381/ILMC\\_indictment.pdf](http://www.wral.com/asset/news/local/2014/02/04/13358381/ILMC_indictment.pdf).

146. Bourne, slip op. at 6. An example of arbitration language included is: "The employer provides a grievance and arbitration procedure for the resolution of all grievances by workers arising out of employment under this Clearance Order. This procedure must be used to resolve all grievances. This grievance and arbitration procedure is provided as an alternative to private litigation, and does not constitute a waiver of any rights prohibited under 29 C.F.R. §501.4." Moseley Bros. Farm, No. 2011-TLC-00340, slip op. at 1 (Dep't of Labor Apr. 6, 2011).

147. Bourne, slip op. at 9; Moss Farms, No. 2011-TLC-00395, slip op. at 5 (Dep't of Labor May 18, 2011).

148. *Id.* See De Eugenio & Sons #2, No. 2011-TLC-00410, slip op. at 2 (Dep't of Labor June 13, 2011); Bourne, slip op. at 4; Elliott Farm, No. 2011-TLC-0040, slip op. at 3 (Dep't of Labor June 6, 2011); Scott Richards, No. 2011-TLC-00401 (Dep't of Labor June 6, 2011). Frey Produce & Frey Bros. #3, No. 2011-TLC-404 (Dep't of Labor June 3, 2011); Head Bros., No. 2011-TLC-00394, slip op. at 2 (Dep't of Labor May 18, 2011); Moseley Bros. Farm, slip op. at 1.

149. 20 C.F.R. § 655.122(b) (2015).

150. See, e.g., Bourne, slip op. at 4–5. The state workforce agency conducted a survey to determine whether the grievance and arbitration requirement was a normal and accepted practice among non-H-2A employers in Tennessee; it was not. Similar surveys were conducted in other states, including South Carolina and Michigan. Part of what this experience reveals is that, as of 2011, farmworkers were not required to agree to mandatory arbitration.

151. De Eugenio & Sons #2; Bourne; Elliott Farm; Scott Richards; Head Bros.; Moss Farms. In the decisions where the ALJs sided with the employers, they based their rulings on the position that a mandatory grievance and arbitration provision was not a "qualification and requirement" within the meaning of the regulation. See, e.g., Frey Produce & Frey Bros. #3.

rejections and appeals, agricultural employers appear to have ceased including arbitration provisions in their H-2A applications.<sup>152</sup>

The equivalent H-2B regulation, promulgated after the 2011 H-2A decisions,<sup>153</sup> makes clear that “requirement” means a term or condition of employment, arguably including a mandatory arbitration provision. If arbitration is not normal and accepted among similar U.S. workers, USDOL and guestworkers’ advocates can make the same arguments for H-2B guestworkers as they did in the H-2A context.<sup>154</sup>

So long as USDOL maintains its current perspective and consistently identifies and rejects H-2A and H-2B visa applications that include arbitration provisions, this approach may be sufficient. However, a change in the administration could mean a corresponding change in the Departments’ treatment of these provisions. In addition, if mandatory arbitration clauses become more pervasive in agriculture and the industries that employ H-2B guestworkers, the Department will be forced to approve applications that include arbitration provisions.<sup>155</sup> There is also the possibility that the employer will institute the policy after the guestworker has begun working, so the Department would not be able to easily intervene.

## 2. Legislative Efforts

In addition to employers including mandatory arbitration provisions in guestworkers’ employment contracts and job orders, there have been efforts to

152. Telephone Interview with Weeun Wang, Dir. of Litig., Farmworker Justice (June 17, 2014).

153. 20 C.F.R. § 655.20 (2015); 20 C.F.R. § 655.135 (2015).

154. The regulation for H-2B program is even clearer than the regulation relied on for the H-2A program: “Each job qualification and requirement must be listed in the job order and must be bona fide and consistent with the normal and accepted qualifications and requirements imposed by non-H-2B employers in the same occupation and area of intended employment. The employer’s job qualifications and requirements imposed on U.S. workers must be no less favorable than the qualifications and requirements that the employer is imposing or will impose on H-2B workers. A qualification means a characteristic that is necessary to the individual’s ability to perform the job in question. *A requirement means a term or condition of employment which a worker is required to accept in order to obtain the job opportunity.*” 20 C.F.R. § 655.20(e) (2015) (emphasis added).

155. It is beyond the scope of this article to analyze whether arbitration provisions and other terms and conditions of employment contained in the employer’s application documents are contractually-binding on guestworkers and their employers. *See, e.g., Cuellar-Aguilar v. Deggeller Attractions, Inc.*, No. 15-1219, 2015 WL 8958642 (8th Cir. Dec. 15, 2015) (allegations by H-2B guestworkers were sufficient to allege a breach of contract where employer failed to pay the prevailing wage required as a condition of participation in the guestworker visa program and in effect at the time the contract was made); *Perez-Benites v. Candy Brand LLC*, No. 1:07-CV-1048, 2011 WL 1978414 (W.D. Ark. May 20, 2011) (forms filed with the government as a condition of participation in the H-2A program and containing federally-mandated wages and working conditions formed a contract between employers and H-2A employees). *But see Hernandez Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp.2d 696, 700 (E.D. N.C. 2009) (term contained in forms filed with government that promised minimum hours of work was not required by regulations and thus not an enforceable contractual term between H-2B guestworkers and their employer).

authorize mandatory arbitration in proposed reforms to the guestworker programs. There have been numerous legislative efforts to reform the H-2A program.<sup>156</sup> Since 1998, attempts were made to reach a compromise between agricultural employers and farmworker advocates and activists.<sup>157</sup> However, the resulting bills were never enacted.<sup>158</sup> Early reform efforts protected guestworkers by providing for just-cause terminations,<sup>159</sup> but required arbitration of any resulting wrongful termination claims.<sup>160</sup>

More recent proposals to reform the H-2A guestworker program sought to restrict guestworkers' rights while endorsing employer-mandated arbitration. The "Better Agriculture Now" Act (hereinafter "H.R. 3443"), introduced in 2011, would have required LSC-funded legal services programs to "respect the arbitration process and outcome" if the employer and guestworker "have an arbitration arrangement."<sup>161</sup> The American Specialty Agriculture Act" (hereinafter "H.R. 2847"), also introduced in 2011, and "Agricultural Guestworker Act" (hereinafter "H.R. 1773"), introduced in 2013, would both require that, so long as the employer gave notice at the time the job offer was made, agricultural guestworkers could be subject to mandatory arbitration and mediation of "any grievance relating to the employment relationship" as a condition of employment.<sup>162</sup> Several of the bills would have also required covered guestworkers to submit to mediation prior to filing suit in court.<sup>163</sup>

It should come as no surprise that many of the same legislative proposals that would endorse mandating arbitration for guestworkers seek to increase the number of guestworkers while further reducing workplace protections and access

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156. For a history, see Vanessa Vogl, *Congress Giveth, and Congress Taketh Away: How the Arbitration and Mediation Clauses Jeopardize the Rights Granted to Immigrant Farmworkers by AgJOBS*, 29 *HAMLIN J. PUB. L. & POL'Y* 463, 475–80 (2008); *The Road to AgJOBS: History Leading to the Negotiations*, FARMWORKER JUST., <http://www.farmworkerjustice.org/sites/default/files/documents/AgJOBS%20The%20History%20Leading%20to%20Negotiationsfinal.pdf> (last visited Oct. 28, 2015).

157. Vogl, *supra* note 156, at 474–78.

158. *Id.* at 477–79.

159. S. 1645, 108th Cong. § 101(b)(2)(A) (2003); S. 2823, 108th Cong. § 101(b)(3)(A) (2003); S. 1161, 107th Cong. § 101(b)(2)(A) (2001); S. 1313, 107th Cong. § 2(a) (2001).

160. S. 1645, 108th Cong. § 101(b)(1)(B)(ii) (2003); S. 2823, 108th Cong. § 101(b)(3)(B)(ii) (2003); S. 1161, 107th Cong. § 101(b)(2)(B)(ii) (2001); S. 1313, 107th Cong. § 2(b)(ii) (2001).

161. H.R. 3443, 112th Cong. § 1(i) (2011).

162. H.R. 1773, 113th Cong. § 6(a) (2013); H.R. 2847, 112th Cong. § 6(a) (2011). The bills would also require the parties to equally divide the costs of mediation and arbitration. H.R. 1773, 113th Cong. § 6(b) (2013); H.R. 2847, 112th Cong. § 6(b) (2011).

163. H.R. 1773, 113th Cong. § 4(a) (2013); H.R. 2847, 112th Cong. § 4(b) (2011). The Senate's most recent effort at comprehensive immigration reform, S.B. 744, would have modified the current H-2A and H-2B programs, replacing them with a W-visa. The Senate's version of the bill did not discuss arbitration but would have provided free mediation services for disputes arising under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 (2012), for agricultural guestworkers and their employers. S. 744, 113th Cong. § (2232)(g)(2)(C) (2013).

to legal representation and courts.<sup>164</sup> For example, H.R. 1773 would lower and withhold wages and eliminate requirements that employers provide housing and travel-expense reimbursement.<sup>165</sup> H.R. 3443 and H.R. 2847 would prohibit LSC-funded legal programs from representing guestworkers unless they are in the U.S. at the time legal assistance is provided and the parties engage in mediation or other non-binding dispute resolution.<sup>166</sup> They would also restrict LSC-funded legal programs' outreach to guestworkers who reside on their employer's property unless they have a "prearranged appointment."<sup>167</sup> All of these proposed changes are aimed at severely limiting guestworkers' access to justice and reducing the legal exposure of their employers. Mandatory arbitration appears to be part of a broader effort to limit the rights and remedies available to guestworkers.

#### IV.

#### PREVAILING MYTHS ABOUT MANDATORY ARBITRATION

Those who support mandatory arbitration agreements present a variety of arguments in their favor. Proponents argue that agreements to arbitrate are consensual and that arbitration offers a speedy resolution of disputes, is an affordable alternative to litigation, is readily accessible to pro se parties, has comparable outcomes to litigation, and is a fundamentally fair process.<sup>168</sup> However, on examination, these claims frequently fall short. The alleged benefits of arbitration come at too high a cost or are altogether illusory for many.<sup>169</sup> This is especially true when considering the unique circumstances of guestworkers. The six prevailing myths about arbitration and why they especially fail with regards to guestworkers are discussed below.

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164. Many employers and business interests understandably want to maximize their access to guestworkers while reducing their employment-related costs and liability.

165. H.R. 1773, 113th Cong. §§ 4–6 (2013). For an overview of the bill, see FARMWORKER JUSTICE, REP. GOODLATTE'S "AGRICULTURAL GUESTWORKER ACT" WOULD HARM FARMWORKERS: IT'S TIME TO SUPPORT THE BIPARTISAN COMPROMISE AGREED TO BY EMPLOYERS AND FARMWORKERS (2013), <http://www.farmworkerjustice.org/sites/default/files/Goodlatte%20bill%20summary%204-26-13.pdf>.

166. H.R. 3443, 112th Cong. § 2(i)(4)(A) (2011); H.R. 2847, 112th Cong. § 4(b) (2011).

167. H.R. 3443, 112th Cong. § 2(i)(4)(C) (2011).

168. Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. MICH. J.L. REFORM 783, 793–94, 810 (2008).

169. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015) [hereinafter Silver-Greenberg & Gebeloff, *Arbitration Everywhere*], <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>; Jessica Silver-Greenberg & Robert Gebeloff, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (reviewing the history and prevalence of arbitration clauses in consumer and employment contracts and challenging the prevailing myths regarding mandatory arbitration).

*A. The Consent Myth*

In many circumstances, arbitration agreements do not involve any agreement at all. There is an absence of meaningful consent in many pre-dispute arbitration agreements due to the timing of the agreement, asymmetrical information, and profound power imbalances. This is especially true for guestworkers.<sup>170</sup>

Enforcement of mandatory arbitration agreements is often justified on freedom of contract principles.<sup>171</sup> From that perspective, the clauses are just another contractual term that parties can negotiate, choose to accept or reject and, once accepted, enforce. While this can certainly be true for parties with equal experience and bargaining power, it does not apply in the employment context; the profound power differences between most employers and their employees—particularly non-unionized low-wage employees—believe this formalistic view.<sup>172</sup> Given recent rates of unemployment and the pressures of global poverty, it is not realistic to expect a prospective employee to decline to enter into an employment relationship or leave ongoing employment when their employer mandates arbitration of future disputes as a condition of employment.<sup>173</sup>

While an employee may sign an employment contract or policy that contains a mandatory arbitration provision, the employee may not understand what the provision means or the consequences of committing to arbitration. Although they may be offered the opportunity, most employees cannot afford to consult with an attorney, reject a prospective job, or leave an existing job because the employer insists on arbitration as a condition of employment. Threats to terminate an employee for failure to accept an agreement to arbitrate employment claims, including claims under Title VII of the 1964 Civil Rights Act (“Title VII”), are not illegal.<sup>174</sup> Agreements signed under these conditions will be enforced by the courts.

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170. The mere presence of an arbitration provision in an employment contract may have a chilling effect where the guestworker does not even seek an attorney or file suit because the guestworker is confused by the term in the contract or assumes it means they cannot take legal action or that the employer controls the arbitration process and its outcome.

171. Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1192 (2003).

172. John S. Brubaker, *A Realistic Critique of Freedom of Contract in Labor Law Negotiations: Creating More Optimal and Just Outcomes*, 5 WASH. U. JURIS. REV. 107, 110 (2012).

173. While not applicable to guestworkers, U.S. employees receiving unemployment benefits while they search for work would almost certainly lose them if they declined an offer of an otherwise acceptable job because of a mandatory arbitration requirement, exerting further pressure to accept the employer's non-negotiable terms.

174. See, e.g., *Williams v. Parkell Prods., Inc.*, 91 F. App'x 707, 708 (2d Cir. 2003) (“[C]onditioning employment on the acceptance of an agreement to arbitrate disputes, including those arising under civil rights laws, is not itself unlawfully coercive.”).

If there is a written employment contract or arbitration policy, the employer may not provide it in a language the guestworker can read or understand.<sup>175</sup> Employers may otherwise coerce guestworkers to sign the contracts, including by waiting to present the contract until the guestworker has already gone into debt or traveled to the U.S. to begin work.<sup>176</sup> The employer could also engage in fraud by telling guestworkers the contract is not binding or misrepresenting what the arbitration language means.<sup>177</sup>

Guestworkers' lack of meaningful bargaining power makes them particularly vulnerable to coercion.<sup>178</sup> Beyond the already substantial difference in bargaining power between a low-wage worker from the U.S. and their U.S. employer, guestworkers may live in remote places with few employment opportunities and compete with a near-endless supply of other migrants from throughout the world.<sup>179</sup>

Guestworkers are foreign individuals entering the U.S. for short-term employment. Many do not speak or read English and thus cannot read or understand the documents they purportedly consent to. They are very unlikely to be aware of their employment rights under U.S. law, the procedural protections offered by litigation in U.S. courts, or the relative benefits of arbitration and litigation. In contrast, employers may develop employment policies, including mandatory arbitration, in consultation with experienced employment attorneys. While sufficient for court approval, the asymmetry in information available to the parties raises serious concerns about consent.

The timing of the requirement to enter into a mandatory arbitration agreement also impacts consent. Guestworkers are frequently not provided with written employment contracts at all. When they are, it is after they have made a

175. In *Morales v. Sun Contractors, Inc.*, 541 F.3d 218 (3d Cir. 2008), the court found the mandatory arbitration provision contained in an employment contract enforceable despite the fact that Spanish-speaking plaintiff had not read or understood the clause in the English-language contract he signed. The employer asked plaintiff's co-worker, who was not fully fluent in English, to translate the contract for plaintiff. The co-worker failed to translate or mention the arbitration clause. The court held that "in the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable." *Id.* at 222.

176. See *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995) (finding mandatory arbitration provision enforceable in Title VII action despite employees' contentions that they were required to sign documents seventy-five times during a two-hour period without explanation of the documents' contents or sufficient opportunity to read them.); BAUER, *supra* note 16, at 23; AMERICAN DREAM, *supra* note 52, at 30–31.

177. Where there is evidence of fraud, a guestworker is much more likely to successfully oppose enforcement of a mandatory arbitration agreement. See, e.g., *Morales*, 541 F.3d at 222.

178. TAKEN FOR A RIDE, *supra* note 55, at 16 ("The recruitment and application process is employer – and labor agent – driven, involving little input from the workers themselves, and often is the beginning of an imbalanced power dynamic that creates a situation ripe for abuse."); Ruben Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 30 (2006).

179. TAKEN FOR A RIDE, *supra* note 55, at 12–13 (describing economic conditions of sending communities in Mexico, the largest source of H-2B guestworkers).

substantial commitment of time and money and cannot afford to lose the job opportunity.<sup>180</sup> Thus, it is difficult to imagine guestworkers can truly refuse to accept an arbitration provision once they have already borrowed hundreds or thousands of dollars to pay for the expenses associated with getting hired and approved to come to the U.S. Should a guestworker's employer institute a mandatory arbitration policy during employment, the situation is even worse—the guestworker would have to either accept the policy or depart the country as their visa is valid for their current employer only and movement to other employment would be extremely difficult.<sup>181</sup> At these late stages, the alleged consent is achieved through coercion.

Underlying concerns about consent is the power imbalance between employers and their middle and low-wage employees. The Dunlop Commission on the Future of Worker-Management Relations recognized this problem, writing in its 1994 report (hereinafter “Dunlop Report”):

We remain very concerned about the potential for abuse of [alternative dispute resolution (“ADR”), including arbitration,] created by the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR. These concerns are obvious if the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment[.]<sup>182</sup>

This is precisely the situation guestworkers will find themselves in should their employers require them to submit to mandatory arbitration.

Individual guestworkers lack bargaining power. There are many more guestworkers seeking employment than employment opportunities. USDOL recognized this lack of bargaining power when it promulgated regulations prohibiting waiver of guestworkers' rights in the absence of private litigation or an administrative enforcement action.<sup>183</sup> If an employer chooses to require mandatory arbitration, the guestworker has no meaningful option but to accept it or risk the possibility of foregoing any employment at all; the absence of alternatives results in a bargaining failure.<sup>184</sup>

### *B. The Speedy Resolution Myth*

Proponents hold out arbitration as more efficient and readily accessible than litigation.<sup>185</sup> It is portrayed as the faster alternative. However, there are reasons

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180. PICKED APART, *supra* note 55, at 34.

181. BAUER, *supra* note 16, at 14.

182. DUNLOP REPORT, *supra* note 122, at 54–55.

183. 29 C.F.R. § 501.5 (2015).

184. Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 715–16 (2001).

185. St. Antoine, *supra* note 168, at 810.

to doubt this assertion.<sup>186</sup> A 2011 study by Alexander Colvin of AAA administered employment arbitrations found that the mean time to disposition was 361.5 days for arbitrations that resulted in an award and 284.4 days for arbitrations that settled prior to an award.<sup>187</sup> While undoubtedly shorter than litigation, ten months to a year to complete arbitration is hardly a quick resolution.<sup>188</sup> And, when the parties litigate the existence or enforceability of an arbitration agreement prior to arbitration, the time required increases dramatically.

### C. The Affordable Alternative Myth

Some argue that arbitration is less expensive than litigation and that employers' cost-savings may be passed on to consumers and employees in lower costs and higher wages.<sup>189</sup> Whether arbitration is indeed less costly than litigation is disputed and there is no evidence that arbitration cost-savings are passed on by employers.<sup>190</sup> Even experienced employment defense attorneys acknowledge that arbitration, when contested, may be as expensive and time consuming as litigation.<sup>191</sup>

As in court, there are filing fees for arbitrations.<sup>192</sup> In addition, unlike a judge, the arbitrator charges fees for time spent on a case.<sup>193</sup> Arbitration filing and arbitrator fees far exceed court filing fees and can be thousands of dollars.<sup>194</sup> Parties must still bear other costs as well, including their own attorneys' fees and

186. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1312–15 (2009) (challenging conclusions of several studies commonly-cited to support the proposition that arbitration is faster than litigation).

187. Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 8 (2011). The study analyzed 3945 arbitration cases filed and reaching disposition between January 1, 2003 and December 31, 2007. The AAA provided the data used for the study to comply with California Code requirements.

188. *Id.*

189. Drahozal, *supra* note 184, at 720 (acknowledging the lack of empirical data).

190. See Alleyne, *supra* note 8, at 19–20; Schwartz, *supra* note 186, at 1312.

191. SEYFARTH SHAW, ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT (Gerald L. Maatman, Jr. ed., 2014), <http://www.seyfarth.com/publications/2014-class-action-report>.

192. For arbitration of cases filed by an employee where the dispute arose from an employer-promulgated plan, the employee's filing fee is capped at \$200 and the employer's fee is \$1350, unless their agreement required more of the employer and less of the employee. AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 33 (2015) [hereinafter EMPLOYMENT ARBITRATION], [https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG\\_004362&revision=latestreleased](https://www.adr.org/aaa/ShowProperty?nodeId=UCM/ADRSTG_004362&revision=latestreleased). While this may seem small, \$200 is nearly ten percent of the \$2765 gross per-capita income of an individual in the Philippines. *GDP Per Capita*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Sept. 5, 2015). In addition to the filing fee, the AAA rules recommend the employer pay the \$350 per day hearing fee, room rental fees, and arbitrator-generated expenses. EMPLOYMENT ARBITRATION, *supra*, at 33–34.

193. Depending on the arrangement, arbitrators charge fees for all time spent on a matter as well as reimbursement for meals, tolls, and mileage. AAA ROADMAP, *supra* note 117, at 8.

194. Colvin, *supra* note 187, at 13 (finding a median fee of \$2475 and mean of \$6340 in employment arbitrations; of those arbitrations that included a hearing and final award, the median fee was \$7138 and the mean was \$11,070).

expenses related to discovery. Of particular importance to guestworkers who may not speak English or may wish to submit evidence in a language other than English is the cost of interpretation. Under AAA rules, for example, the party that requires interpretation must pay for the expenses associated with it.<sup>195</sup> This differs from many courts' practices and could add substantial costs for the limited English proficient guestworker.<sup>196</sup>

#### D. The Easy Access Myth

Arbitration advocates praise arbitration as simpler than litigation and thus more accessible to pro se parties.<sup>197</sup> Some allege that the relative simplicity of arbitration also makes it easier for employees to find attorneys to represent them or, in the absence of an attorney, to represent themselves. Some scholars believe that, despite arbitration's limitations, we should nonetheless accept it because the true choice is between arbitration and nothing—most middle and low-income employees cannot and will not find an attorney to represent them in litigation.<sup>198</sup> However, there is little evidence to support this argument.<sup>199</sup>

This argument assumes that pro se employees are able to successfully represent themselves in arbitration or are more likely to find counsel to represent them in arbitration than litigation.<sup>200</sup> There is no empirical evidence to support either position. A 2011 study found that 24.9% of employees represented themselves in employment arbitration and had a lower likelihood of success and were awarded lower damages than represented employees.<sup>201</sup> In its guide to representing yourself in employment arbitration, the AAA cautions, "workplace disputes, especially those involving statutory claims such as race, age, or national origin discrimination, can be difficult to present without the assistance of an attorney. At a minimum, you should consider consulting with an

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195. EMPLOYMENT ARBITRATION, *supra* note 192, at R.21 ("Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.").

196. 28 U.S.C. § 1827 (2012).

197. David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 99–100 (1999).

198. St. Antoine, *supra* note 168, at 790–92, 810.

199. Schwartz, *supra* note 186, at 1316–27 (challenging the "accessibility myth" as perhaps "the biggest misconception in the mandatory arbitration debate").

200. The form required to initiate an AAA-administered arbitration process requires the claimant, among other things, to state the amount of the claim, identify whether the claim involves statutorily-protected rights, and specify the forms of relief sought. A *pro se* claimant, and particularly a foreign guestworker for whom English is a second language, is unlikely to be able to complete this form without substantial assistance. *Employment Arbitration Rules Demand for Arbitration*, AM. ARB. ASS'N, [https://www.adr.org/aaa/ShowPDF.jsessionid.?doc=ADRSTG\\_004402](https://www.adr.org/aaa/ShowPDF.jsessionid.?doc=ADRSTG_004402) (last visited Oct. 6, 2015).

201. Colvin, *supra* note 187, at 24–25.

attorney.”<sup>202</sup> These are precisely the types of workplace disputes that guestworkers are likely to have.<sup>203</sup>

Arbitration fees also raise concerns about access to justice and fairness.<sup>204</sup> Fees associated with employment arbitration, when shared by the employee and employer, may make arbitration cost-prohibitive for the low or middle-income employee.<sup>205</sup> When borne solely by the employer, there are concerns about the actual or perceived bias of the arbitrator.<sup>206</sup> Guestworkers will almost always be unable to pay fees associated with arbitration. However, if they were filing suit in court, they could seek to have filing fees waived. As most of the employment laws include fee-shifting provisions, private attorneys may be willing to represent the guestworker.<sup>207</sup> Alternately, guestworkers may be represented by low or no-cost public interest or pro bono attorneys.

### *E. The Fairness Myth*

Arbitration advocates assure critics that the process is fair. However, in addition to the many issues raised above, the repeat player effect and the potential for biased, unqualified, or otherwise ineffective arbitrators raise serious concerns about fairness.<sup>208</sup>

202. AM. ARBITRATION ASS’N, REPRESENTING YOURSELF IN EMPLOYMENT ARBITRATION: AN EMPLOYEE’S GUIDE 3 (2013), <https://www.adr.org/aaa/ShowPDF?doc=ADRSTAGE2011225>.

203. The presence of a lawyer may be necessary for guestworkers to bring legal claims in any forum. A GAO study observed, “NGO representatives said access to legal representation can be an important factor in determining whether workers file complaints to report abuses and DOL officials also confirmed that complaints brought under the H-2A and H-2B programs generally come from advocacy groups or attorneys.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-154, *supra* note 7, at 44.

204. Arbitration is also a lucrative business. The AAA reported 2013 gross earnings of \$68,462,000 in fees for administering arbitrations. AM. ARBITRATION ASS’N, 2013 ANNUAL REPORT & FINANCIAL STATEMENTS 35 (2014), <https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTAGE2021420&revision=latestreleased>.

205. Alleyne, *supra* note 8, at 32.

206. *Id.* at 37–41. The AAA requires employers to pay arbitrators’ fees over \$150 when the arbitration agreement was promulgated by the employer unless the employee voluntarily agreed to pay after the dispute arose. A study of AAA arbitrations found that the employer paid ninety-seven percent of the time. EMPLOYMENT ARBITRATION, *supra* note 192, at 33–35; Colvin, *supra* note 187, at 14.

207. For example, the FLSA provides for the award of reasonable attorney’s fees and costs in minimum wage and overtime cases. 29 U.S.C. § 216(b) (2012).

208. Barry Winograd, *Developing Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration Proceedings*, 35 Berkeley J. Emp. & Lab. L. 61 (2015) (proposing that, so long as mandatory arbitration is permitted in employment disputes, professional standards should be put into place to help ensure fairness and due process in arbitration and reviewing the standards being developed by the National Academy of Arbitrators). *But see* Gary Minda & Douglas Klein, *The New Arbitral Paradigm in the Law of Work: How the Proposed Employee Free Choice Act Reinforces Supreme Court Arbitration Decisions in Denying Free Choice in the Workplace*, 2010 MICH. ST. L. REV. 51, 86–90 (2010) (explaining why it is impracticable to expect arbitrators and arbitration organizations to be self-policing).

The repeat player effect benefits a party that participates in a dispute resolution process multiple times. In employment arbitration, employers are much more likely to benefit from this phenomenon.<sup>209</sup> One study found empirical support for this often cited concern, with employees winning just 16.9% of cases against repeat-player employers in comparison to 31.6% of cases against one-time employers and receiving substantially lower awards. The effect was exaggerated when an employer used the same arbitrator multiple times.<sup>210</sup>

Even when arbitrators are not biased, they may not have the knowledge or experience to properly apply the law or ensure a fair arbitration process.<sup>211</sup> There are no mandatory minimum standards for arbitrators.<sup>212</sup> While the leading arbitration organizations may have standards of their own, no uniform standard requires an arbitrator to be an attorney or have a law degree.

Guestworkers bring claims that raise complex issues, including claims under the FLSA, TVPA, civil Racketeer Influenced and Corrupt Organizations Act (“RICO”), Title VII, and various state laws. Current knowledge of these specialized areas of law—as well as an understanding of the guestworker visa program—is required to properly apply the law in arbitration. The arbitrator must also be confident and knowledgeable enough in these areas to withstand possible pressure and overreaching by employer’s counsel in an arbitration, particularly if the guestworker is unrepresented.

Reduction in court dockets should not be achieved by limiting court access for the most vulnerable litigants. As arbitration proponents correctly point out, mandatory arbitration has the potential to reduce demands on the judiciary by redirecting potential litigants to private arbitration. This creates space on court dockets to more expeditiously hear other cases and could conceivably lead to reduced taxpayer expenses. However, compelled arbitration is not the only way to shrink court dockets. A \$15,000 filing fee would also reduce demands on the judiciary yet that barrier to justice is hopefully unacceptable to most. Indeed, reducing court dockets of valid claims may not be a desirable goal. There are numerous ways to reduce demands on the judiciary that neither limit access to justice nor hinder enforcement of the law. For example, improved employer

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209. 66.3% of the cases studied involved an employer who had at least one additional arbitration in the data set. Colvin, *supra* note 187, at 19. *But see* Drahozal, *supra* note 184, at 769 (arguing arbitrators have an incentive not to be or appear biased because it may result in avoidance by plaintiffs’ counsel—who are likely repeat players even when their clients aren’t—and in increased regulation and legislation).

210. *Id.* at 21.

211. Vogl, *supra* note 156, at 484.

212. The primary national arbitration organizations, AAA, NAM, and JAMS, have minimum qualifications for their arbitrators. *Hearing Officer Recruitment*, NAT’L ARB. & MEDIATION, [http://www.namadr.com/hearingofficers\\_recruit.cfm](http://www.namadr.com/hearingofficers_recruit.cfm) (last visited Sept. 3, 2015); *JAMS Career Center*, JAMS, <http://www.jamsadr.com/> (last visited Sept. 1, 2015); *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARB. ASS’N, [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003878](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878) (last visited Sept. 2, 2015).

compliance with workplace laws would decrease court dockets while increasing fair competition among employers and improving working conditions.

#### F. *The Equal Outcome Myth*

Many arbitration proponents say there is no meaningful difference between the outcomes parties achieve through arbitration and litigation. Some early studies purported to show equal or better outcomes for employees in arbitration, but those studies may suffer from the lack of substantial and complete data and a focus on high-salary earners.<sup>213</sup> However, the most recent and relatively comprehensive study found that, in comparison to court trials, the employee win rate was lower (21.4%) and the award amount was “substantially lower” (a median of \$36,500 and mean of \$109,858 for awards to successful employees).<sup>214</sup> The study found that median awards in available employment litigation studies were between five and ten times greater than those in arbitration.<sup>215</sup> In fact, the Supreme Court itself has acknowledged in dicta that the choice between arbitration and litigation can determine the outcome in a case.<sup>216</sup> The reasons provided by the Court included the loss of the right to trial by jury, arbitrators’ lack of “the benefit of judicial instruction on the law”, the absence of reasoned opinions, and the limited record and review of arbitral awards.<sup>217</sup>

Regardless of whether or why employees fare worse in arbitration, the widespread perception is that they do. As a result, arbitration diminishes the value of employees’ valid claims. Employees are likely to secure lower settlement offers if employers and their counsel believe the employer faces less risk of liability in arbitration.<sup>218</sup> As arbitration proceedings and outcomes are

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213. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 784–93 (2003) (summarizing early studies on arbitration outcomes). Early studies including St. Antoine, *supra* note 168, at 791, 811, suggest that outcomes are better for employees in arbitration. But see COLVIN, *supra* note 187, at 6 (summarizing the findings and explaining that employees with individually-negotiated contracts fare better in arbitration than lower prestige and pay employees); Alleyne, *supra* note 8, at 25–26 (challenging the author’s conclusions). The lack of available data suggests some problems with arbitration—the process is still largely private and data about the process, parties, claims, and outcomes is hidden.

214. COLVIN, *supra* note 187, at 1–23. The study analyzes the data from 3945 arbitration cases that were filed and resolved between January 1, 2003 and December 31, 2007. The author points out that the cases resolved through litigation and arbitration may differ, that settlement patterns may impact his findings, and cautions that additional research is needed to identify the reasons for the difference in arbitration and litigation outcomes.

215. *Id.* at 11.

216. *Berhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956).

217. *Id.*; see also Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L.REV. 1309, 1320 (describing *Berhardt*, 350 U.S. 198).

218. As with other employee suits, the majority of guestworkers’ claims are resolved through settlement. See, e.g., *Perez-Benites v. Candy Brand, LLC*, No. 1:07-CV-1048, 2011 WL 1978414 (W.D. Ark. May 20, 2011); Memorandum of Law in Support of Joint Motion for Preliminary Approval of Proposed Class Action Settlement Agreement and Notice to Class Member, Rosiles-

usually private, employers face less potentially damaging public exposure, another consideration that might reduce offers for settlement of valid claims.

## V.

### CONSEQUENCES OF MANDATING ARBITRATION FOR GUESTWORKERS

By allowing employers to impose mandatory arbitration on guestworkers, the federal government would permit harmful consequences for guestworkers, U.S. workers, and law-abiding employers. It would ensure our economy increasingly relies on a readily-replaceable underclass of foreign workers who have diminished workplace rights and no meaningful public oversight over their working and living conditions.

#### *A. Consequences for Guestworkers*

The U.S. government should protect guestworkers. The government created and now implements and oversees the guestworker visa program. It would be inequitable to invite foreign citizens to lawfully enter the country to meet the labor needs of U.S. employers and then permit those individuals to be barred from accessing the full protections of U.S. laws and courts. The government encourages and accepts the benefits of guestworkers' labor and, as a result, should ensure their wellbeing and lawful treatment.<sup>219</sup> Permitting employer-mandated arbitration would be a violation of that obligation.<sup>220</sup>

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Perez v. Superior Forestry Serv., Inc., No. 1:06-cv-0006 (M.D. Tenn. filed Feb. 10, 2010), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/case/superior\\_settlement\\_memo021010.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/superior_settlement_memo021010.pdf); *Arkansas Company to Pay \$1.5 Million to Guestworkers Owed Back Wages in SPLC Lawsuit*, SOUTHERN POVERTY L. CTR. (Jan. 5, 2012), <https://www.splcenter.org/news/2012/01/05/arkansas-company-pay-15-million-guestworkers-owed-back-wages-splc-lawsuit>.

Thus, guestworkers would suffer the impact of the diminished value of their claims.

219. Courts have recognized the public's interest in enforcement of workplace statutes, including the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 (2012), *see, e.g.*, *Perez v. Blue Mountain Farms*, 961 F. Supp. 2d 1164, 1171 (2013) ("Congress has expressed a strong public interest in protecting migrant agricultural workers by enacting the [Act]."); *Chao v. Meggitt*, No. 3:04CV7396, 2006 WL 2252526, at \*2 (N.D. Ohio Aug. 4, 2006) ("The public's interest in protecting those members of society in the lower economic strata from exploitation far outweighs any potential injury to Defendant in requiring compliance [through issuance of a permanent injunction]."), Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (2012), *see, e.g.*, *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1359 (1975) ("Furthermore, the eradication of discrimination by race and sex promotes public interests and transcends private interests."); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201 (1971) ("The vindication of the public interest expressed by the Civil Rights Act constitutes an important facet of private litigation under Title VII."), and the Fair Labor Standards Act, 29 U.S.C. § 201 (2012), *see, e.g.*, *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982) ("The FLSA was passed to protect certain segments of the population from substandard wages and excessive work hours. An unequal bargaining position with their employer rendered these employees incapable of protecting themselves, and Congress deemed their plight in the aggregate injurious to national health and efficiency. The FLSA thus was conceived with a public and a private purpose: it established a set of individual rights that would create a healthier environment for all workers.").

220. Under some circumstances, enforcing mandatory arbitration agreements against guestworkers could violate U.S. treaty obligations. BRESLIN, *supra* note 22, at 10–11 (stating that

While not a legally-binding obligation, the U.S. government arguably owes a duty to guestworkers because the very structure of the visa programs is a significant source of guestworkers' heightened risk of abuse.<sup>221</sup> Lack of visa portability has been repeatedly cited as one of the central reasons for guestworkers' vulnerability to abuse.<sup>222</sup> Because the design of the guestworker visa programs is one of the primary causes of guestworkers' vulnerability, the government has a moral, if not legal, obligation to ensure their rights are protected and enforced. One way to provide oversight and monitor working conditions is through the public hearing and resolution of guestworkers' legal claims in court.

Given its interest in ensuring uniform compliance with workplace protections and, at a minimum, its moral obligation to guestworkers, the government should prohibit the use and enforcement of mandatory arbitration agreements. Failure to do so causes harm to guestworkers and subjects them to the arbitration problems detailed in Part IV, as well as reduced procedural protections and remedies, possible waiver of statutory rights, and insufficient protection from retaliation. Each of these concerns is described below.

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failure to enforce guestworkers' rights under U.S. law runs counter to U.S. obligations under international law); *see, e.g.*, International Covenant on Civil and Political Rights art. 2, § 3, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . ; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."); *id.* art. 14, §1 ("All persons shall be equal before the courts and tribunals."); *id.* art. 26. ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, . . . language, . . . national or social origin, . . . birth or other status."). While the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, permits discrimination on the basis of citizenship, it too requires equal access to the law. *Id.* ("[A]ll human beings are equal before the law and are entitled to equal protection of the law against any discrimination . . ."); *id.* art. 5 ("States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice . . ."); *id.* art. 6 ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the *competent national tribunals and other State institutions*, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." (emphasis added)). The ICERD specifically mentions workplace rights. *Id.* art. 5(e)(i)-(ii).

221. Lee, *supra* note 63, at 42.

222. *See infra* Part II.B.2.a; Lee, *supra* note 63, at 42, 44 (noting that lack of portability is a critical way that guestworker programs facilitate labor abuses).

### 1. Limited Procedural Protections and Remedies

Arbitration and arbitration agreements can profoundly limit would-be litigants' access to beneficial procedural protections. Limits include shortened statutes of limitations,<sup>223</sup> reduced scope and amount of discovery,<sup>224</sup> loss of the constitutional right to a jury trial,<sup>225</sup> and restricted remedies,<sup>226</sup> including prohibitions on punitive damages. These limits can profoundly impact the outcome of arbitration, particularly for low-wage guestworkers.<sup>227</sup>

Guestworkers already face such tremendous barriers to enforcing their rights that they should not be subject to any additional limitations. For example, guestworkers who have returned to their country of origin as required by their visas may have difficulty appearing at hearings or depositions and participating in discovery.<sup>228</sup> Arbitration presents additional barriers and much less certainty about whether the arbitrator will make accommodations to ensure the guestworker can participate in the matter. For example, the AAA's policy for determining the locale of an employment arbitration permits for the input of the parties.<sup>229</sup> However, if there is disagreement, the arbitrator makes a final and binding determination.<sup>230</sup> In one case, the employee—a seaman from a foreign country—could not afford to travel to another country to participate in arbitration or to hire an attorney.<sup>231</sup> Despite this, the court found the agreement enforceable.<sup>232</sup>

The ability to participate in a class action lawsuit is critical to enforcing the rights of guestworkers. The substantial financial liability employers face in class actions also creates incentives to comply with employment law.<sup>233</sup> However,

223. Courts are somewhat divided on whether shortening a limitations period renders an otherwise enforceable arbitration clause unenforceable. Some courts simply turn the matter over to the arbitrator to determine whether the provision is enforceable. *Morrison v. Circuit City Stores, Inc.*, 70 F. Supp. 2d 815 (S.D. Ohio 1999). *But see Jackson v. Cintas Corp.*, 425 F.3d 1313 (11th Cir. 2005); *St. Antoine*, *supra* note 168, at 803–05.

224. *See Sparks v. Vista Del Mar Child & Family Servs.*, 145 Cal. Rptr. 3d 318 (Ct. App. 2012) (finding arbitration agreement prohibiting discovery unconscionable and thus unenforceable).

225. *LeRoy*, *supra* note 139, at 777.

226. *St. Antoine*, *supra* note 168, at 808–09.

227. *Alleyne*, *supra* note 8, at 40–41.

228. Marsha Chien, *When Two Laws are Better Than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L L. 15, 25 (2010).

229. AM. ARBITRATION ASS'N, LOCALE DETERMINATIONS: AAA (2011), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003910](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003910).

230. *Id.*

231. *Gawin v. Princess Cruise Line Ltd.*, 706 F. Supp. 2d 1261 (S.D. Fla. 2009).

232. *Id.*

233. One large defense firm's managing partner counseled, "The stakes in these types of employment lawsuits can be extremely significant, as the financial risks of such cases are enormous. More often than not, class actions adversely affect the market share of a corporation and impact its reputation in the marketplace." SEYFARTH SHAW, *supra* note 191, at Letter from J. Stephen Poor.

class action waivers contained in mandatory arbitration clauses have been found enforceable by the Supreme Court.<sup>234</sup> Loss of the ability to aggregate claims is especially troubling for guestworkers. Due to the economic considerations of private attorneys and the limited resources of free lawyers, guestworkers' claims may not go forward individually.<sup>235</sup> In addition, workers fearful of retaliation may be comfortable participating in a class action but not initiating an action of their own.<sup>236</sup>

One of the largest wage and hour settlements reported in 2013 was a class action brought by guestworkers from India.<sup>237</sup> The average settlement amount per class member was approximately \$1,600.<sup>238</sup> Had this not been a class action, it is highly unlikely that the employees involved would have been able to secure an attorney to represent them or would have recovered as much as they did. Although the action took nearly seven years to resolve, it was still more efficient than individual actions, including arbitrations, brought by hundreds of employees.

Another class action, brought by the Equal Employment Opportunity Commission ("EEOC") on behalf of H-2A guestworkers from Thailand, resulted in a consent decree that required the employer company to take specific steps to ensure its labor contractors complied with federal anti-discrimination laws and to submit to annual audits.<sup>239</sup> Future employees will benefit from the advocacy on behalf of this class of guestworkers. Without the risk of financial liability associated with a class action, it is unlikely that the employers would have agreed to such meaningful injunctive relief.<sup>240</sup>

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234. *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). In a report for employers summarizing class action litigation, the law firm Seyfarth Shaw, LLP described the American Express decision as "inform[ing] the ever-growing body of case law that allows employers to utilize carefully crafted workplace arbitration agreements to manage their class action litigation risks. . . . This ought to help defendants avoid wage and hour class action litigation more easily for those employers that choose to institute workplace arbitration agreements." SEYFARTH SHAW, *supra* note 191, at 3 (emphasis added).

235. Ruan, *supra* note 138, at 1123–25.

236. JEAN R. STERNLIGHT, *FORCED ARBITRATION UNDERMINES ENFORCEMENT OF FEDERAL LAWS BY SUPPRESSING CONSUMERS' AND EMPLOYEES' ABILITY TO BRING CLAIMS* 6 (2013), <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1000&context=congtestimony>.

237. *Vedachalam v. Tata Consultancy Servs., Ltd.*, No. C06-0963CW, 2013 WL 3929919 (N.D. Cal. July 18, 2013). *Vedachalam* was a class action lawsuit involving claims *inter alia* that employer required L-1 guestworkers to turn over their individual tax refunds to their employer, and that resulted in a \$29.75 million settlement. *Id.*; see also SEYFARTH SHAW, *supra* note 191, at 13.

238. *Vedachalam*, 2013 WL 3929919.

239. *EEOC v. Glob. Horizons, Inc.*, No. 11-CV-257 (D. Haw. Nov. 27, 2013); see also SEYFARTH SHAW, *supra* note 191, at 18.

240. See Silver-Greenberg & Gebeloff, *Arbitration Everywhere*, *supra* note 169.

### 2. *De Facto Waiver of Statutory Rights*

Mandatory arbitration agreements create the troubling possibility of functioning as de facto waivers of statutory rights.<sup>241</sup> Waiver of guestworkers' workplace rights may occur when guestworkers have valid claims against their employers but are unable to participate in arbitration and thus cannot enforce the rights. For example, they may not be able to participate because they have returned to their country of origin, cannot communicate in English, or do not have the necessary access to internet, fax machines, and email; cannot afford to participate in the arbitration; statutorily-mandated remedies are restricted; or the law is improperly applied by the arbitrator to the benefit of the employer. Although some of these challenges could occur in judicial litigation, in that setting, procedural and legal safeguards are in place to limit their impacts and a public process encourages accountability.

Guestworkers need enforceable workplace rights and meaningful remedies when their rights are violated. While waiver of statutory rights is a troubling prospect for any employee, guestworkers' already substantial vulnerability is enhanced when their access to judicial remedies and procedures is limited and, thus, places them outside the protections of the law. Employers may believe they can act with impunity towards guestworkers because they have no meaningful remedies. When a population's access to the courts and legal redress are consistently limited, impacted individuals may feel powerless, bad actors are empowered to act with impunity, and a culture of non-compliance prevails.<sup>242</sup>

### 3. *Inadequate Protection from Retaliation*

Those who take legal action, individually or collectively, to protect their rights may experience threats and other forms of retaliation.<sup>243</sup> Vulnerable employees need meaningful and timely protection from retaliation. Low-wage workers are vulnerable to retaliation.<sup>244</sup> Guestworkers are even more so.<sup>245</sup> Guestworkers risk retaliation in the U.S. and at home. When threats are from

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241. STERNLIGHT, *supra* note 236, at 1.

242. *Rights and Protections for Temporary Workers*, U.S. VISAS, <http://travel.state.gov/content/visas/english/general/rights-protections-temporary-workers.html> (last visited Sept. 2, 2015).

243. In the course of a case brought by H-2 workers, a plaintiff was threatened that his village would be burned if he did not end the lawsuit. BAUER, *supra* note 16, at 40. A carnival worker who sought medical treatment was not invited to return to work the following season. TAKEN FOR A RIDE, *supra* note 55, at 34. A crab picker was not rehired after speaking with her employer about her wage-related taxes. PICKED APART, *supra* note 55, at 30.

244. Ruan, *supra* note 138, at 1119–20.

245. *Supra* Part II.B.

outside of the U.S., they can be particularly disturbing, including threats to harm family members or blacklist an entire community from future employment.<sup>246</sup>

Judges have the authority to respond to retaliation and immediately intervene, order a party to cease unlawful conduct, and hold the party in contempt if it fails to do so. Employers may face criminal contempt and even jail time if they do not cease their retaliatory conduct.<sup>247</sup> If the judge assigned to a case is unavailable, a duty judge can handle emergencies.<sup>248</sup> In contrast, arbitrators do not have the power of contempt. As a result, parties may be less likely to comply and, in the event of noncompliance, there is no means for immediate intervention and serious consequences.<sup>249</sup> Arbitrators' orders are not self-enforcing. Consequently, when a party receives a favorable ruling and the other party fails to comply, the prevailing party must apply to the court to have the ruling made an enforceable order.<sup>250</sup> This highlights the arbitrator's inability to provide meaningful protection to guestworkers who face retaliation for enforcing their workplace rights. Some arbitration organizations' rules provide for the possibility of emergency court intervention, or interim measures, during an arbitration.<sup>251</sup> However employees seeking protection would have to initiate a separate legal action in court and the judge handling the matter would be entirely unfamiliar with the underlying issues and dynamics involved.

The lack of judicial formality and courtroom security measures may result in intimidation of claimants.<sup>252</sup> Guestworkers threatened with harm in the past, or who are generally fearful of their former employers or supervisors, may be intimidated in the informal conference room setting. Of course, there is also the possibility that the more informal setting may be more comfortable than a courtroom for others.<sup>253</sup>

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246. In one instance, H-2A workers who had successfully settled a lawsuit were frightened to accept their settlement payments for fear that they would be blacklisted from future employment. BAUER, *supra* note 16, at 41.

247. *United States v. United Mine Workers*, 330 U.S. 258, 294 (1947).

248. The AAA has optional rules regarding appointment of an emergency arbitrator, but they must be adopted by the parties in their arbitration clause or by special agreement. Appointment of an emergency arbitrator may take up to two business days. EMPLOYMENT ARBITRATION, *supra* note 192, at 42–43.

249. If the parties agreed that the arbitration would be conducted pursuant to the rules of an arbitration organization, the arbitrator may have the authority to use fines, adverse inferences, and dismissal of claims as sanctions. However, these sanctions are unlikely to provide immediate relief to a guestworker who has been threatened or otherwise retaliated against and arbitrators are likely to be reluctant to impose stiff sanctions. Kristen M. Blankley, *Lying, Stealing, and Cheating: The Role of Arbitrators as Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 472–89 (2014).

250. UNIF. ARBITRATION ACT § 18 cmt. 1 (NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS 2000).

251. EMPLOYMENT ARBITRATION, *supra* note 192, at R.29 (“A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.”).

252. Schmitz, *supra* note 114, at 1211, 1228–29.

253. *Id.*

#### 4. Limited Judicial Review

In addition to limited procedural protections and remedies, de facto waiver of statutory rights, and inadequate protection from retaliation, another harmful consequence of mandating arbitration for guestworkers is that extremely narrow judicial review of arbitral awards leaves little opportunity to correct misapplications of the law and procedural irregularities.<sup>254</sup> The FAA permits a district court to vacate, modify, or correct an arbitration award only in very limited circumstances—for example, when there is evidence of fraud or arbitrator corruption.<sup>255</sup> Some courts have vacated arbitration agreements when the arbitrator had showed a “manifest disregard” for the law.<sup>256</sup> However, even this narrow basis for judicial review has now been called into question and circuit courts have split on whether manifest disregard is still a basis for vacatur.<sup>257</sup> What remains clear is that a party must clear “a high hurdle” and “it is not enough for the party to show that the panel committed an error, or even a serious error.”<sup>258</sup> Guestworkers cannot rely on the courts to protect their rights when the law is incorrectly applied in an arbitration or there are concerns about the fairness of the arbitration process or outcome. A more reliable approach is needed.

Arbitrations are also often not recorded or transcribed, resulting in a limited record in the event that there is judicial review. The withdrawal of any judicial oversight of guestworkers’ employment renders guestworkers more vulnerable to abuse and to arbitrator error, bias, and misconduct.<sup>259</sup>

#### B. Consequences for U.S. Workers, Employers, and Public

If the government fails to meet its obligation to guestworkers by permitting employers to impose mandatory arbitration, there will be harmful consequences for U.S. workers, law-abiding employers, and the public.

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254. *ARW Exploration Co. v. Aguirre*, 45 F.3d 1455, 1462 (10<sup>th</sup> Cir. 1995) (“[M]aximum deference is owed to the arbitrator’s decision. In fact, the standard of review of arbitral awards ‘is among the narrowest known to the law.’”) (quoting *Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (1989)).

255. 9 U.S.C. § 10(a) (2012) (permitting courts to vacate an award and order a rehearing only: “(1) Where the award was procured by corruption, fraud, or undue means; (2) Where there was evident partiality or corruption in the arbitrators, or either of them; (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced; or (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”).

256. *Wilko v. Swan*, 346 U.S. 427 (1953).

257. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008); Phillip J. DeRosier, *Judicial Review of Arbitration Awards Under Federal and Michigan Law: Similar but Different*, 92-FEB MICH. B.J. 34, 34–35 (2013).

258. *Stolt-Nielsen S.A. v. AnimalFeeds Internat’l Corp.*, 559 U.S. 662, 671 (2010).

259. See Vogl, *supra* note 156, at 490–91.

### 1. Privacy Problems

The private nature of arbitration limits the effectiveness of workplace laws and acts against Congress' intent in passing them. Workplace laws are intended to benefit all employees and ensure an even playing field for employers.<sup>260</sup> Public laws demand a public process. Arbitration drastically limits the information that is available to the public, including consumers, the press, legislature, enforcement agencies, and courts.

Legal actions regarding violations of workplace laws should result in public decisions. Legal proceedings and outcomes of cases brought by guestworkers against their employers should be publicly available. Civil suits brought by guestworkers have been a critical means to raise public awareness about potential issues in the guestworker visa programs.<sup>261</sup>

Courts have long recognized the public's need to know the outcomes of cases and are reluctant to file documents under seal. Indeed, courts have refused to approve FLSA settlements that include confidentiality provisions or to file proposed settlements of workplace claims under seal because of the public's interest in the proceedings and outcomes.<sup>262</sup> Public decisions permit the public and legislature to monitor issues of critical public importance and can lead to investigations and policy change.<sup>263</sup> Public decisions also permit identification

260. See Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 253–57 (2009) (providing the Congressional purpose underlying key federal workplace statutes, including the FLSA, Title VII, and TVPA); *supra* note 219 and accompanying text.

261. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1053, CLOSED CIVIL AND CRIMINAL CASES ILLUSTRATE INSTANCES OF H-2B WORKERS BEING TARGETS OF FRAUD AND ABUSE (2010), <http://www.gao.gov/assets/320/310646.pdf>; Elizabeth Flock, *More Human Trafficking Lawsuits Filed Against Major U.S. Shipbuilder*, U.S. NEWS & WORLD REP. (Aug. 8, 2013), <http://www.usnews.com/news/articles/2013/08/08/more-human-trafficking-lawsuits-filed-against-major-us-shipbuilder>.

262. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (“The legislative history of the Fair Labor Standards Act shows congressional intent to protect certain groups of the population from substandard wages and excessive hours which endanger the national health and well-being and free flow of goods in interstate commerce.”); *see, e.g., Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 339 (S.D.N.Y. 2012) (“Aside from undermining the ability of the public to monitor the judiciary, ‘[s]ealing an FLSA settlement agreement between an employer and employee, reviewing the agreement *in camera*, or reviewing the agreement at a hearing without the agreement’s appearing in the record . . . thwarts Congress’s intent both to advance employees’ awareness of their FLSA rights and to ensure pervasive implementation of the FLSA in the workplace.” (alterations in original) (quoting *Dees v. Hydradry Inc.*, 707 F. Supp. 2d 1227, 1241, 1245 (M.D. Fla. 2010))); *Bouzzi v. F & J Pine Restaurant, LLC*, 841 F. Supp. 2d 635, 639 (E.D.N.Y. 2012) (“There are two independent grounds upon which the presumption of public access attaches to FLSA settlement agreements; the first is the general public interest in the content of documents upon which a court’s decision is based, including a determination of whether to approve a settlement, and the second is the *private-public character of employee rights under the FLSA, whereby the public has an independent interest in assuring that employees wages are fair and thus do not endanger the national health and well-being.*” (emphasis added)).

263. *Lee*, *supra* note 63, at 69–70 (“The increased use of private civil remedies by guest workers can publicly expose how these programs sanction, if not promote, criminal exploitation.

and monitoring of ongoing and systematic, willful, and intentional violations of the law by specific actors, such as patterns of workplace discrimination.<sup>264</sup> The public nature of litigation may also encourage employers to comply with the law in order to avoid negative publicity that might harm their business or reputation.<sup>265</sup> A transparent dispute resolution process also builds participant and public confidence in the process and helps ensure the process is fair.<sup>266</sup>

Relegating disputes to arbitration results in underdeveloped legal doctrine.<sup>267</sup> In employment law, a paucity of legal doctrine could increase uncertainty for both employers and employees—one of the harms pre-dispute arbitration seeks to avoid.<sup>268</sup> Further uncertainty is caused by arbitrators' broad range of views, experiences, and ability to enforce the law.

Finally, the private nature of arbitration awards diminishes any deterrent effect that large, publicized awards might have.<sup>269</sup> Although employers may be encouraged to comply with the law by reports of large awards for guestworkers whose rights were violated, unpublished private awards have little to no impact. As a result, employers will have little to discourage them from acting with impunity towards guestworkers.

## 2. Impunity in the Workplace

Failure to enforce U.S. employment protections diminishes working conditions for all workers and thus undermines the purpose of the employment

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The resulting narratives can confer legitimacy on the necessary agenda of substantially modifying or eradicating guest worker programs that compromise individual liberty.”); Schmitz, *supra* note 114, at 1211, 1129–31 (explaining how published opinions benefit the public, including developing the law, providing information regarding health and safety issues, sparking investigations, and policy initiatives).

264. Schmitz, *supra* note 114, at 1121, 1128–29.

265. See, e.g., *Wolinsky v. Scholastic Inc.*, 900 F. Supp. 2d 332, 338 (S.D.N.Y. 2012) (discussing an employer’s unsuccessful argument that embarrassing customer inquiries, allegations from competitors, and copycat lawsuits would result from a public settlement).

266. JUNG, *supra* note 115, at 2 (“Without complete and accurate information, policy makers and the public cannot assess whether the process is fair, cannot compare arbitration’s operation to other forms of dispute resolution, and cannot detect bias in the system or on the part of particular arbitration companies.”).

267. Jessica Oser, *The Unhinged Use of Internal ADR Programs to Resolve Sexual Harassment Controversies in the Workplace*, 6 CARDOZO J. CONFLICT RESOL. 283, 302–03 (2005) (“Additionally, as more case law emerges and society becomes more informed, the law changes to adapt to societal notions of fairness and justice. If, however, sexual harassment law is resolved almost exclusively in alternative fora, the law will not develop even when society does.”); Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT’L ARB. 479, 501 (2005) (“[B]y removing the common body of public decisional authority we are hindering policy-making bodies, commercial enterprises and individuals by denying them one of their most valuable commodities— information.”); St. Antoine, *supra* note 168, at 788.

268. Raymond, *supra* note 267.

269. St. Antoine, *supra* note 168, at 787.

laws.<sup>270</sup> For example, the federal overtime law requiring employees to be paid at a rate of one and a half times their regular rate of pay for all hours worked over forty in a workweek was intended, in part, to decrease unemployment by creating an incentive for employers to hire multiple employees rather than a single employee to work long hours.<sup>271</sup> If the overtime requirements of the FLSA are not applied to guestworkers, work will not be spread among the working population as Congress intended.

Private suits are critical to ensuring compliance with U.S. employment requirements and benefit the entire workforce.<sup>272</sup> Lawsuits brought by individuals are an important way to enforce labor and employment protections for all, in addition to vindicating individual rights.<sup>273</sup> These private attorney general suits not only help to ensure the rights of the aggrieved worker are protected, but also help to achieve general compliance. Ensuring private attorney general suits can be brought is particularly critical given the insufficient government enforcement resources available.<sup>274</sup>

### 3. *Perverse Incentive to Hire Guestworkers*

To the extent that mandatory arbitration agreements act as de facto waivers of guestworkers' workplace rights or limit the remedies they can recover when their rights are violated, a growing portion of the working population will be outside of the protections of the law. This creates a perverse incentive to hire guestworkers rather than U.S. workers.<sup>275</sup>

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270. SUKTHANKAR, *supra* note 23, at 105.

271. 29 U.S.C. § 207(a)(1) (2012); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948).

272. Kim, *supra* note 260, at 287–99.

273. Kim, *supra* note 260, at 253–57.

274. BAUER, *supra* note 16, at 38–40 (detailing the limited resources of USDOL to monitor and ensure compliance with workplace laws and describes the failure of USDOL to intervene when adequately abuses are uncovered); Lee, *supra* note 63, at 44–49 (describing why and how government enforcement mechanisms have failed to adequately protect guestworkers). According to TAKEN FOR A RIDE, *supra* note 55, at 27, USDOL only conducted investigations regarding twenty-two H-2B employees between 2007 and 2011. *Accord* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-458T, WAGE AND HOUR DIVISION'S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT 18 (2009) (describing WHD wage enforcement as "ineffective . . . leaving thousands of low wage workers vulnerable to wage theft").

275. Despite its failure to adequately do so, the U.S. government has repeatedly expressed interest in creating, monitoring, and enforcing the rights of guestworkers. In May 2013, USDOL's Wage and Hour Division and Honduras' consulate general entered into an agreement of understanding to educate U.S. employers and Honduran migrants working in the U.S. their rights under U.S. law, including laws regarding the H-2A program. A regional administrator of the Wage and Hour Division remarked, "[T]hrough our efforts, workers will be educated on their rights under Wage and Hour laws and be assured that they are fully protected under all its statutes." Press Release, U.S. Dep't of Labor News Release No. 13-0872-DAL (May 14, 2013). U.S. consular official now must also ensure visa applicants have received, read and understood a pamphlet on workers' rights in the U.S.

Although guestworkers are not intended to displace U.S. workers, numerous concerns have been raised about employment of guestworkers in jobs that could have been filled by local workers.<sup>276</sup> The U.S. has a stated interest in encouraging employers to hire available U.S. workers rather than guestworkers.<sup>277</sup> There has already been discrimination against U.S. workers who are systematically discouraged from seeking or accepting employment and face disparate treatment once employed.<sup>278</sup> Ensuring that guestworkers have access to the courts may be one way to encourage employers to truly try to identify U.S. workers before resorting to employment of guestworkers. Failure to do so could inadvertently cause some employers to hire guestworkers—who may be perceived as cheaper and more readily abused—over available U.S. workers.

When a portion of the working population is held outside of the protections of the law, it creates a perverse incentive for employers to hire those excluded workers in lieu of protected workers.<sup>279</sup> Courts and USDOL have recognized this problem in relation to undocumented workers.<sup>280</sup> Numerous courts and agencies have stated that wage and hour laws requiring workers be paid a minimum wage and overtime wages must be applied to employees who lack work authorization, because failure to do so would encourage employers to hire more undocumented employees.<sup>281</sup> When employers are required to comply with the law equally

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276. One Florida employer successfully sought permission to use the H-2B visa program to hire a tattoo artist for five months during 2014; it is difficult to imagine that a suitable U.S. tattoo artist could not be found. *ATOMIC TATTOOS-TAMPA BAY, LLC, H-2B APPLICATION FOR TEMPORARY EMPLOYMENT CERTIFICATION ETA FORM 9142B* (2014).

277. 20 C.F.R. § 655.22 (2015); 20 C.F.R. § 655.135 (2015); *AMERICAN DREAM*, *supra* note 52, at 8.

278. *BAUER*, *supra* note 16, at 31.

279. As described in Part II.A, *supra*, there are requirements regarding hiring of guestworkers that are intended to ensure foreign workers do not replace U.S. workers. However, it isn't clear that they are effective. See *EXCLUDED WORKERS CONG., UNITY FOR DIGNITY: EXPANDING THE RIGHT TO ORGANIZE TO WIN HUMAN RIGHTS AT WORK 13* (2010), [http://www.unitedworkerscongress.org/uploads/2/9/1/6/29166849/unity\\_for\\_dignity\\_report.pdf](http://www.unitedworkerscongress.org/uploads/2/9/1/6/29166849/unity_for_dignity_report.pdf); *SUKTHANKAR*, *supra* note 23, at 50.

280. *Arizona v. U.S.*, 132 S. Ct. 2492 (2012); *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002); *DeCanas v. Bica*, 424 U.S. 351 (1976); *Order Denying Motion for Reconsideration, Mezonos Maven Bakery, Inc. & Latino Justice PRLDEF*, 35 NLRB No. 47 (2011); *Iron Workers Local 455 v. Lake Constr. & Dev. Corp.*, 7 OCAHO 964 (1997).

281. When describing the rationale for applying the federal law that establishes a minimum hourly pay rate and overtime pay for all hours worked over forty each week to undocumented workers in an *amicus* letter, USDOL explained, "This enforcement policy concerning undocumented workers is essential to achieving the purposes of the FLSA to protect workers from substandard working conditions, to reduce unfair competition for law-abiding employers, and to spread work and reduce unemployment by requiring employers to pay overtime compensation. . . . The Department has long understood that undocumented workers tend to accept substandard employment conditions and are less likely to report wage violations for fear of being deported, which can depress wages and working conditions for all workers." Brief for U.S. Dep't of Labor as Amicus Curiae Supporting Appellant at 6–7, *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292 (11th Cir. 2011) (citing 29 U.S.C. § 202(a) (2012); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36–37 (1987); *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942)). While the legal arguments differ, the underlying policy rationale for enforcing the law as to all workers applies equally to guestworkers.

without regard for an employee's immigration status, employers' incentives to favor guestworkers over U.S. workers diminish and compliance with the law increases.

#### 4. *Unfair Competition for Employers*

Permitting a contractual provision that encourages employers of guestworkers to avoid employment law requirements creates an unfair disadvantage for employers who comply with the law.<sup>282</sup> If bad actor employers perceive that they need not follow the law, for example, they may pay sub-minimum wages while their law-abiding counterparts pay all required wages when due.

### VI:

#### LEGISLATIVE RECOMMENDATIONS

The U.S. government should not permit guestworkers to be compelled to submit to arbitration. Unfortunately, many courts are all too willing to enforce arbitration agreements and future legislation condoning guestworker arbitration would reduce the judiciary's already limited oversight.<sup>283</sup>

Current approaches to limit mandatory arbitration agreements are insufficient. While advocates have had remarkable recent success keeping mandatory arbitration clauses out of H-2A guestworkers' employment contracts for the past several years,<sup>284</sup> the approach will only work so long as there is a receptive administration and mandatory arbitration does not become more widely required in agricultural employment.

If a guestworker is presented with a mandatory arbitration clause in their employment contract or subsequently, they can in theory decline to enter into it

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282. "While improving working conditions was undoubtedly one of Congress' concerns, it was certainly not the only aim of the FLSA. In addition to the goal identified by petitioner, the Act's declaration of policy, contained in § 2(a), reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions. This Court has consistently recognized this broad regulatory purpose. 'The motive and purpose of the present regulation are plainly . . . that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce.'" *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36–37 (1987) (alteration in original) (footnote omitted) (quoting *United States v. Darby*, 312 U.S. 100, 115 (1941)) (citing 29 U.S.C. § 202(a) (2012)). *See also* *Reich v. Petroleum Sales, Inc.*, 30 F.3d. 654, 658 (6th Cir. 1994) ("Such awards [of wages to absent workers] benefit the public interest by depriving the employer of any benefits accrued as a result of its illegal pay practices and by protecting those employers who comply with the FLSA from unfair competition with those employers that do not.").

283. Order Granting Defendants' Motion to Compel Arbitration and Stay Proceedings, *Huang v. Washington Mut. Bank*, No. C07-0736RSM, 2008 WL 4103918 (W.D. Wash. Aug 25, 2008); Order Granting Motion to Compel Arbitration, *Shirl v. Drexel Burnham Lambert Inc.*, Nos. 4-88-866, 4-88-867, 4-88-879 & 4-89-94, 1989 WL 90159 (D. Minn. May 24, 1989).

284. Telephone Interview with Weeun Wang, Dir. of Litig., Farmworker Justice (June 17, 2014).

or leave the employment relationship. However, this is entirely unrealistic in the context of low-wage guestworkers.

Once a dispute emerges, guestworkers and their advocates can try to limit enforcement of mandatory arbitration clauses on a case-by-case basis. Guestworkers who choose to file a lawsuit in court can try to make a variety of challenges. They can challenge the existence of an enforceable contractual commitment to arbitrate, argue the provision is unenforceable using state contract law arguments, such as unconscionability, fraud, or duress, or by claiming it violates the visa program regulation that requires job requirements be “consistent with the normal and accepted qualifications and requirements” in the same occupation and area of employment.<sup>285</sup> This last argument would require a survey or other evidence of the use of mandatory arbitration in the relevant region and industry and may be difficult information for guestworkers to access and prove.

Challenging enforcement of arbitration requirements on an individual basis is far from an ideal approach; it is available only to a few committed guestworkers with determined attorneys and, in many cases, unlikely to succeed. As described above, the mere presence of an arbitration clause in a contract could dissuade guestworkers from taking legal action and possibly attorneys from agreeing to represent them. Even if a guestworker proceeds with legal action in the face of a mandatory arbitration provision, courts have been so receptive to enforcing arbitration clauses that this approach is unlikely to be consistently successful. It also requires guestworkers to secure an attorney and for the attorney and their guestworker client to challenge the arbitration provision rather than just initiating arbitration. Given courts’ overwhelming enforcement of arbitration provisions, most guestworkers and their attorneys are unlikely to risk expending very limited resources to challenge an arbitration provision in court.

Individual adjudication regarding enforceability of arbitration is an uncertain, resource-intensive strategy that will likely fail in most instances. Rather than resolving issues surrounding the enforcement of arbitration clauses, courts should expend their resources on the underlying substantive claims.

A clear prohibition against imposing mandatory arbitration on guestworkers will create more certainty for guestworkers and their employers than piecemeal privately-initiated litigation challenging the enforcement of arbitration agreements. It will also save resources as parties will not have to expend public and private resources litigating whether the mandatory arbitration clause is indeed enforceable in the first place.

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285. 20 C.F.R. § 655.20 (2015); 20 C.F.R. § 655.135 (2015).

A preferable approach is passage of a federal statute that prohibits pre-dispute mandatory arbitration for guestworkers.<sup>286</sup> The guestworker program is a federally-created and administered program, the federal government has plenary power over immigration, and the FAA preempts most state efforts to curtail the use of arbitration. State laws limiting use and enforcement of arbitration clauses are likely to be preempted.<sup>287</sup> A federal statute will also ameliorate any concerns about the possible applicability of the New York Convention.<sup>288</sup>

Most of the desired reforms could be achieved through passage of the Arbitration Fairness Act of 2015.<sup>289</sup> The proposed legislation would amend the FAA to invalidate pre-dispute arbitration agreements in employment, consumer, antitrust, and civil rights matters.<sup>290</sup> It would also ensure that a judge, not an arbitrator, would apply federal law to decide issues regarding the arbitrability of a claim.<sup>291</sup>

In the absence of such sweeping reforms, Congress should prohibit mandated arbitration in employment disputes involving guestworkers. There is precedent for statutorily excluding categories of workers and workplace claims from mandatory arbitration.<sup>292</sup> For example, defense contractors may not require their employees to arbitrate workplace discrimination or tort claims arising from sexual assault or harassment.<sup>293</sup> More recently, bipartisan legislation was introduced that would prohibit mandatory arbitration of Uniformed Services Employment and Reemployment Rights Act (“USERRA”) claims.<sup>294</sup> For the

286. Although this article does not address consumers and employees generally, many of the same concerns regarding low-wage guestworkers also apply to consumers and other groups that have unequal bargaining power, relatively small claims, and enter into contracts of adhesion.

287. *Doctor’s Assoc. v. Casarotto*, 517 U.S. 681 (1996) (holding FAA preempted Montana law that required arbitration clause to be in underlined capital letters on the first page of the contract; FAA preempts state laws that apply only to arbitration provisions).

288. The U.S. is a party to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. §§ 201–08 (2012). The Convention requires courts of state parties to recognize and enforce arbitral awards and to stay or dismiss legal actions pending arbitration if there is a valid agreement to arbitrate between the parties. Among other requirements, arbitration agreements are only enforceable under the Convention if the matter is arbitrable under the laws of the state where the agreement will be enforced. Thus, if Congress prohibits mandatory arbitration of guestworkers’ claims, the Convention will not apply. This is already arguably the case, but a federal statute prohibiting enforcement of mandatory arbitration agreements against guestworkers would resolve any uncertainty.

289. Arbitration Fairness Act of 2013, HR 2087, 114th Cong. (2015); Arbitration Fairness Act of 2013, S. 1133, 114th Cong. (2015).

290. Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 3(a) (2015); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. § 3(a) (2015).

291. Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 3(a) (2015); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. § 3(a) (2015).

292. See Burch, *supra* note 217, at app. (summarizing federal bills introduced between 1995 and 2010 to eliminate or otherwise limit mandatory arbitration).

293. Department of Defense Appropriations Act of 2010 § 8116(a)(1), Pub. L. 111-118, 123 Stat. 3409 (2009).

294. 38 U.S.C. §§ 4301–35 (2012).

many reasons provided in Part II.B *infra*, guestworkers are also an appropriate category of workers to exclude from mandatory arbitration.

The U.S. government should not compel guestworkers to submit to arbitration nor endorse employer efforts to do so. Rather, any reforms to the existing guestworker program should clarify that guestworkers may not waive their right to access U.S. courts and that pre-dispute arbitration agreements are unenforceable. In addition to mandatory arbitration clauses, any other limits on guestworkers' substantive or procedural rights should be made unenforceable, including other forms of forum selection clauses, foreign choice of law provisions, and class action waivers.

Rather than prohibit arbitration or enforcement of pre-dispute arbitration agreements altogether, some advocate trying to improve arbitration.<sup>295</sup> Among the early recommendations to ensure some due process protections for employees were the Dunlop Report<sup>296</sup> and subsequent American Bar Association's Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (hereinafter "Employment Protocol").<sup>297</sup>

The Dunlop Report recommended that all arbitration of workplace disputes involving statutory claims meet reasonable, minimal quality standards:

[1] [a] neutral arbitrator who knows the laws in question and understands the concerns of the parties; [2] a fair and simple method by which the employee can secure the necessary information to present his or her claim; [3] a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees; [4] the right to

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295. See St. Antoine, *supra* note 168, at 810 (arguing that the only realistic alternative for lower and middle-income wage earners to enforce their workplace rights is arbitration – based on the assumption that private attorneys will not find it economically feasible to represent them in litigation – and on the assumption that unrepresented employees can successfully participate in arbitration more effectively than litigation). However, if this is the case, then it seems most appropriate to permit only post-dispute arbitration—where the employee first has the opportunity to seek out the advice and possible representation of an attorney. Another option is to take further steps to ensure meaningful access to representation in employment matters. For example, expanding the eligibility of guestworkers for LSC-funded legal representation beyond H-2B forestry workers. See Ruan, *supra* note 138, at 1141–42 (arguing that advocates should focus on making arbitration clauses more fair to low-wage employees and recommends permitting representation in arbitration by non-attorney advocates and adopting fair arbitration terms).

296. The Commission was convened in 1993 by Secretary of Labor Robert Reich to report on several questions, including "What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?" DUNLOP REPORT, *supra* note 122, at 3.

297. AM. ARBITRATION ASS'N, EMPLOYMENT DUE PROCESS PROTOCOL (1995) [hereinafter EMPLOYMENT DUE PROCESS PROTOCOL], [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2025665&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2025665&RevisionSelectionMethod=LatestReleased). The Employment Protocol was developed by the Task Force on Alternative Dispute Resolution in Employment in 1995.

independent representation if the employee wants it; [5] a range of remedies equal to those available through litigation; [6] a written opinion by the arbitrator explaining the rationale for the result; and [7] sufficient judicial review to ensure that the result is consistent with governing laws.<sup>298</sup>

The Employment Protocol similarly recommended employees be permitted to select the representative of their choice, that parties share fees except where economically impossible, that employers reimburse a portion of employee's legal fees, and that the arbitrator have authority to award fees.<sup>299</sup> It further recommended "adequate but limited" pre-trial discovery, including "necessary" depositions and access to "reasonably relevant" information.<sup>300</sup> To address concerns regarding bias, it recommended an arbitrator selection process involving an arbitration agency and an arbitrator duty to disclose actual or perceived conflicts of interest.<sup>301</sup> To ensure adequately skilled arbitrators, it recommended use of unbiased arbitrators experienced in employment law and trained in arbitration.<sup>302</sup> The Employment Protocol also included a recommendation that contact information for parties involved in all prospective arbitrators' most recent arbitrations be made available and that arbitrators issue a written opinion and award.<sup>303</sup> Notably, the Task Force that drafted the Employment Protocol could not agree on whether employers should be permitted to require pre-dispute arbitration agreements.<sup>304</sup> In contrast to the Dunlop Report, the Employment Protocol suggested the arbitrator's award be "final and binding and the scope of review . . . limited."<sup>305</sup>

Subsequent recommendations have been based on similar proposals designed to promote fairness in the arbitration process that include increased judicial review and more protective standards.<sup>306</sup> Some reformers recommend that arbitration be permitted only when agreed to after a dispute arises, not as a condition of employment.<sup>307</sup> These recommendations have not generally been adopted, and courts continue to widely sanction arbitration without any of these basic safeguards.

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298. DUNLOP REPORT, *supra* note 122, at 56–57.

299. EMPLOYMENT DUE PROCESS PROTOCOL, *supra* note 297.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Ruan, *supra* note 138.

307. St. Antoine, *supra* note 168, at 789–91 (summarizing the relative benefits of post-dispute arbitration agreements for employees, including greater likelihood that voluntarily entered into because dispute has already occurred, may no longer be employed so no threat of retaliation or loss of employment opportunity, facts largely known so more able to make an informed decision).

Proposed modifications to arbitration, while potentially helpful, fail to address the full range of serious concerns about mandatory arbitration and the specific issues raised by the prospect of imposing mandatory arbitration on low-wage guestworkers. These include profound power and information imbalances, the absence of oversight, and a lack of enforcement mechanisms when problems arise.<sup>308</sup> Partial reforms risk giving the impression of fairness without actually providing meaningful due process protections and addressing other serious concerns.

While post-dispute arbitration agreements address some of the most troubling concerns regarding coercion, post-arbitration agreements do not protect guestworkers from numerous other concerns about arbitration. For example, post-dispute agreements do nothing to address guestworkers' need for counsel, the risk of arbitrator bias, limited protections and remedies, and the consequences of private proceedings. While post-dispute arbitration is theoretically more fair, parties are unlikely to agree to it. Employers will refuse to settle smaller claims in the hopes that the employee will not have the means to file a lawsuit and, in cases with larger claims, employees will be more likely to successfully secure legal representation and opt to litigate.<sup>309</sup> Thus, post-dispute arbitration agreements are not a practical alternative.<sup>310</sup>

Of course, litigation is not a panacea.<sup>311</sup> Bias in the courts, fear of retaliation, the costs and time required to participate in litigation, and guestworkers' difficulty finding representation all still present challenges, not to mention the inadequacy of existing legal protections and remedies. Litigation also has the potential to undermine organizing efforts and other more empowering approaches to long-term meaningful change for guestworkers and other low-wage workers.<sup>312</sup> However, access to the courts remains a critical tool for ensuring safe, just, and fair workplaces for both U.S. and foreign workers.<sup>313</sup> Some scholars suggest that civil litigation also offers the possibility of empowering guestworkers, providing opportunities for storytelling and narrative-shifting, and ultimately inspiring policy change.<sup>314</sup>

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308. Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 166–67 (2005).

309. St. Antoine, *supra* note 168, at 789–91.

310. *Id.*

311. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change Symposium: Economic Justice in America's Cities: Visions and Revisions of a Movement*, 30 HARV. C.R.-C.L. L. REV. 407, 437–41 (1995) (describing the risks of relying on legal actions and why litigation is inadequate as a long-term advocacy strategy for low-wage workers); Ruan, *supra* note 138, at 1114–15 (discussing limitations of individual private actions in court).

312. *Id.*

313. Lee, *supra* note 63, at 67 (arguing private civil actions can vindicate individual rights, enforce workplace norms, create new legal precedent, and thereby strengthen workplace protections and provide vindication to plaintiffs).

314. *Id.* at 68–70.

VII.  
CONCLUSION

Guestworkers' unique vulnerability—particularly the vulnerability caused by the very structure of the guestworker visa program—demands that the legislature and judiciary ensure them adequate protections. The federal government controls the visa program that puts guestworkers at risk of workplace abuse and has plenary power to change it; thus, the federal government has an obligation to monitor guestworkers' experiences and ensure their workplace rights are protected. Guestworkers face such tremendous barriers to enforcing their rights that the government cannot permit employers to impose additional barriers to justice, procedural or otherwise. Guestworkers must be able to seek redress in all available forums that have jurisdiction over the parties and their claims. Failure to ensure full access to the courts and protections of the law would be a breach of the government's responsibility to guestworkers and a detriment to guestworkers, U.S. workers, and the public.