Michigan Law Review

Volume 118 | Issue 2 Article 4

2019

Improving Employer Accountability in a World of Private Dispute Resolution

Hope Brinn
University of Michigan Law School

NOTE

IMPROVING EMPLOYER ACCOUNTABILITY IN A WORLD OF PRIVATE DISPUTE RESOLUTION

*Hope Brinn**

Private litigation is the primary enforcement mechanism for employment discrimination laws like Title VII, the Americans with Disabilities Act, and many related state statutes. But the expansion of extrajudicial dispute resolution—including both arbitration and prelitigation settlement agreements—has compromised this means of enforcement. This Note argues that state-enacted qui tam laws can revitalize the enforcement capacity of private litigation and provides a roadmap for enacting such legislation.

TABLE OF CONTENTS

* J.D. Candidate, May 2020, University of Michigan Law School. I am indebted to Professor Maureen Carroll for her invaluable guidance throughout this process. I would also like to thank Lisa Limb, Megan Brown, and the Notes Office for taking the time to review my Note and provide me with feedback.

INTRODUCTION

Private litigation is the primary enforcement mechanism of Title VII of the Civil Rights Act of 1964, the nation's landmark employment discrimination law.[1] Many other federal statutes designed to protect workers—such as the Americans with Disabilities Act (ADA),[2] the Fair Labor Standards Act (FLSA),[3] and the Family Medical Leave Act (FMLA)[4]—also share this enforcement scheme.[5] But based in part on a changing litigation landscape over the last several decades, private litigation has become increasingly ineffective at holding employers accountable for violations of these types of laws.

Rather than resolving legal disputes through litigation, parties have increasingly relied on predispute arbitration agreements and prelitigation settlement agreements, two forms of extrajudicial dispute resolution.[6] Most employees are now required to sign arbitration agreements as a condition of

1. J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1148–50 (2012) (noting that only 2 percent of job discrimination suits were brought by the federal government between 2000 and 2010); *see also* 42 U.S.C. § 2000e-5 (2012).

2. *See* 42 U.S.C. § 12188.

3. *See* 29 U.S.C. § 216(b) (2012).

4. *See id.* § 2617(a).

5. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 442 (2007).

6. ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 1 (2018), https://www.epi.org/files/pdf/144131.pdf [https://perma.cc/D2JV-TSL3]; Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, NATION (Jan. 12, 2018), https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements/ [https://perma.cc/KDW8-2UCR] ("Confidentiality agreements in sexual-harassment and -discrimination claims have become standard practice . . . .").

employment,[7] a practice upheld by the Supreme Court.[8] In these agreements, employees promise to resolve all future disputes with their employers in private arbitration instead of in court.[9] These agreements hinder the effectiveness of the mechanism Congress created to enforce these protective laws. But even employees free from arbitration agreements are unlikely to ever file employment discrimination claims.[10] Instead, aggrieved employees typically settle before ever filing a lawsuit, usually with both parties bound to confidentiality.[11] Both arbitration and prelitigation settlement agreements shield facts surrounding the alleged misconduct from public view.

The Supreme Court's recent jurisprudence suggests that it does not view this pattern of increased out-of-court dispute resolution as problematic, particularly with respect to arbitration.[12] In the Court's view, employees bound by arbitration agreements are still capable of vindicating all their statutory rights as employees; claim resolution simply takes place in a different, speedier forum.[13] Empirical research, however, indicates the opposite. Employees

7. COLVIN, *supra* note 6, at 12.

8. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (holding that the employees whose contracts contain arbitration provisions may not circumvent those provisions by joining class action lawsuits); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001) (confining the scope of § 1 of the Federal Arbitration Act to exempt only employment of transportation workers); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that ADEA claims may be subject to arbitration).

9. *See, e.g.*, Asfaw v. Lowe's HIW, Inc., No. LA CV14–00697 JAK (AJWx), 2014 WL 1928612, at *2 (C.D. Cal. May 13, 2014) ("This agreement to arbitrate means that there will be no court or jury trial of disputes between you and Lowe's HIW, Inc. which arise out of your employment or the termination of your employment. This agreement to arbitrate is intended to be broad and to cover, to the extent otherwise permitted by law, all such disputes, including but not limited to those arising out of federal and state statutes and local ordinances . . . ." (quoting Declaration of Dominique Sherie Gilmore in Support of Defendant Lowe's HIW, Inc.'s Motion to Compel Arbitration and to Dismiss Representative Action Claims at 4, *Asfaw*, 2014 WL 1928612 (No. LA CV14–00697 JAK (AJWx)), ECF No. 13-1)); *#DumpVenable for Its Deception*, PEOPLE'S PARITY PROJECT (Feb. 4, 2019), http://www.pipelineparityproject.org/dumpvenable-for-its-deception/ (on file with the *Michigan Law Review*) ("Each [Venable employee] and Venable LLP mutually, unconditionally and irrevocably agree that any claim, dispute or controversy regarding or relating to any matter whatsoever, including without limitation the employment, partnership, separation from employment . . . **MUST** be submitted to arbitration . . . . [T]his Mandatory Arbitration Provision shall also apply . . . in any context that involves Venable.").

10. *E.g.*, Russell-Kraft, *supra* note 6 (noting the large percentage of employment claims resolved via settlements before employees file a lawsuit).

11. *E.g.*, *id.*

12. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626–27 (1985).

13. *Id.* at 628 (holding that "if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history").

who sign such agreements are less likely to make a claim against their employer in *any* forum.[14]

The confidential nature of extrajudicial dispute resolution makes public enforcement through private litigation difficult, frustrating the overall purpose of employment discrimination laws. Arbitration is a largely confidential process.[15] Similarly, pre-suit settlement agreements resolve disputes outside formal court structures and nearly always include confidentiality provisions.[16] Such confidentiality is not possible in the vast majority of lawsuits, in which complaints are public records. Although confidentiality may encourage settlement and thus reduce the economic strain on the courts,[17] the secrecy makes it difficult to raise awareness of corporate misconduct or alert other aggrieved employees who might not know that they could make similar claims.[18]

In qui tam actions, private individuals sue for a penalty, part of which the individual receives as an incentive and part of which the government receives as the enforcement agency.[19] In essence, the government "hires" private individuals (called relators) to enforce its own laws.[20] This Note examines how states can use qui tam laws to address the enforcement challenges that extrajudicial dispute resolution creates for employment discrimination laws.[21] Part I describes the interaction between employment discrimination laws and private dispute resolution mechanisms. Part II examines how states can potentially use qui tam laws to enforce employment discrimination laws against the backdrop of widespread private dispute resolution. In particular, it examines case law surrounding two existing qui tam statutes, the federal False Claims Act (FCA) and the California Private At-

14. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 699–700 (2018).

15. *Id.* at 680.

16. *See, e.g.*, Russell-Kraft, *supra* note 6.

17. Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 440 (2005).

18. *See* Estlund, *supra* note 14, at 681. A recent study of sexual assault survivors suggests that "first movers"—victims who are the first person to accuse another of sexual misconduct—incur higher negative consequences for reporting by way of heightened disbelief, retaliation, exposure, and stigma. ANJANA RAJAN ET AL., CALLISTO: A CRYPTOGRAPHIC APPROACH TO DETECT SERIAL PREDATORS OF SEXUAL MISCONDUCT 2–3 (2018), https://www.projectcallisto.org/callisto-cryptographic-approach.pdf [https://perma.cc/8FPE-KSVE]. Accordingly, survivors of sexual misconduct were far more likely to report misconduct when they believed that other individuals were victimized by the same assailant. *Id.* Workplace policies and practices that promote secrecy increase the odds that victims will perceive themselves as first movers and will thus be less likely to ever make a report.

19. *Qui Tam Action*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20. *See, e.g.*, United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 932 (2009).

21. Although this Note only examines the use of qui tam laws to enforce employment discrimination laws, legislators could likely apply this structure to other public interest laws including those outside of the employment context.

torneys General Act (PAGA). Part III outlines a proposal for states that preserves enforcement of employment laws via private litigation while respecting the limits placed on states by the FAA and the right to make contracts.

I. HOW PRIVATE DISPUTE RESOLUTION UNDERMINES EMPLOYMENT DISCRIMINATION ENFORCEMENT

Recognizing the limitations of federal agencies, Congress sought to empower private litigants to enforce employment discrimination laws.[22] But as mandatory extrajudicial dispute resolution expands, private litigants are less able to serve the public regulatory function that Congress created for them.[23] The confidentiality norms and claim-suppression effects associated with extrajudicial dispute resolution undermine the private enforcement model that Congress envisioned for employment discrimination laws.

A. *Private Litigation as Public Regulation*

The United States relies primarily on private litigants to enforce a number of laws, including those that govern employment discrimination.[24] This approach has been part of the American political structure since the country's founding and differs from the public regulatory approach favored in most European countries, which centralizes enforcement in regulatory agencies.[25] Both the private and public regulatory approaches have tradeoffs.

Although the public regulatory approach avoids the challenges associated with extrajudicial resolution, it is rife with inefficiency and unpredictability.[26] Federal agencies, for example, are subject to political will. Accordingly, resources and agendas can ebb and flow depending on the political party in power.[27] Further, information gaps make it difficult for agencies to effectively learn about employer misconduct.[28] Private parties, however, do not face these same concerns. An aggrieved employee, for instance, has to expend fewer resources to obtain information about wrongdoing.[29] After all, that employee himself was the one to experience the misconduct.

But the private regulatory approach also has downsides. Critics of private enforcement regimes argue that they empower judges to create public

22. H.R. REP. NO. 94-1558, at 1 (1976) ("The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality.").

23. *See* COLVIN, *supra* note 6; Russell-Kraft, *supra* note 6.

24. Glover, *supra* note 1, at 1149.

25. *Id.* at 1140, 1147.

26. *See id.* at 1152–54.

27. *See id.* at 1142 n.10, 1152 & n.56.

28. *Id.* at 1154–55.

29. *Id.* at 1184.

policy, discourage voluntary cooperation with law enforcement, and lead to inconsistent and confusing doctrine.[30] Because enforcement through private litigation is "fragmented and uncoordinated," such a regime may reduce the impact of the underlying legislation.[31] And compared to public regulatory bodies, private litigants often have inferior access to the comprehensive data needed to successfully litigate employment discrimination cases.[32] Finally, as this Note argues, a private enforcement regime allows parties to contract around regulatory laws, preventing enforcement altogether.

B. *The Widespread Use of Employee Arbitration and Prelitigation Settlement Agreements*

Mandatory arbitration agreements and prelitigation settlements are popular among employers for anticipating and resolving disputes with employees. Although these devices differ in a few key ways, particularly with respect to where bargaining power lies, they frequently share several common features, including deregulation and confidentiality.

Mandatory arbitration policies require employees, as a condition of their employment, to agree to resolve legal disputes with their employer through arbitration instead of going to court.[33] In arbitration, the parties choose an individual to adjudicate the case in accordance with their predetermined agreement. Because arbitration is generally deregulated, private, and deliberately secret, it can be difficult to generalize about what the employee arbitration process actually looks like.[34]

Most arbitration agreements contain a contractual guarantee of confidentiality.[35] This guarantee is not imposed by federal statute.[36] Instead, the parties agree to it.[37] Employers, often repeat players in arbitral proceedings,

---

30. Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 667 (2013).

31. *Id.* at 671.

32. *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 369 (1984).

33. COLVIN, *supra* note 6, at 2.

34. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011) ("Despite the intensity of focus on public policy issues relating to employment arbitration, solid empirical data on this topic have proven slow and difficult to gather. Part of the reason for this is the lack of publicly available data on arbitration. Most empirical research has had to rely on cases or files for which individual arbitration service provider organizations have provided access. The resulting data sets have tended to be relatively small in size and potentially lacking representativeness of the broader population of arbitration cases.").

35. *See* Estlund, *supra* note 14, at 680. But confidentiality is not a fundamental aspect of arbitration. Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255 (2006).

36. *See* Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 482–84 (2006).

37. *Id.*

may benefit from such confidentiality agreements.[38] When employment arbitrations are confidential, the employer is effectively shielded from embarrassing allegations, whether true or unfounded.[39] This protection from public scrutiny can save employers significant costs associated with negative publicity.[40] Given this potential benefit, a majority of predispute arbitration agreements include confidentiality provisions.[41]

Over the last twenty-five years, the use of employee arbitration agreements has grown substantially. In 2018, 56 percent of private-sector, nonunion employees were subject to mandatory arbitration agreements, amounting to over sixty million workers.[42] Of employers that mandate arbitration, 39 percent had adopted their mandatory arbitration policies within the last five years, demonstrating significant recent increases.[43] Given the benefits for employers, an increasing percentage of the workforce will likely be required to submit to arbitration as a condition of employment.[44] The rapidly growing trend of employee arbitration makes understanding its intersection with labor and employment law essential.

Scholars and policymakers also struggle to gather concrete data on the use of prelitigation settlements in labor and employment litigation. No laws require disclosure of prelitigation settlements in labor and employment litigation, and the circumstances surrounding the agreements are typically secret.[45] These settlements typically arise when an employee sends a demand letter to an employer regarding potential claims.[46] In response, the employer offers a paid settlement in exchange for the employee releasing all claims and promising to not disparage the employer.[47] Similar to arbitration proceedings, predispute settlement negotiations allow employers to prevent negative public exposure.[48] But confidentiality must typically be bargained for in predispute settlements, unlike in arbitral proceedings.[49] Accordingly, the employee can monetize what the company sees as collateral damage inherent to

38. *See* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 219 (2004).

39. *See id.* at 220.

40. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 870 (2007).

41. *See* Doré, *supra* note 36.

42. COLVIN, *supra* note 6, at 2. Low-wage employees are most likely to be subject to these agreements—approximately 65 percent of workers making less than $13.00 per hour must arbitrate any relevant claims against their employers. *Id.*

43. Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 10 (2019).

44. *See* Estlund, *supra* note 14, at 706.

45. *See* Moss, *supra* note 40, at 882–83.

46. Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ASS'N LEGAL WRITING DIRECTORS, Fall 2008, at 32, 33–34.

47. Russell-Kraft, *supra* note 6.

48. Moss, *supra* note 40, at 871.

49. *See id.* at 880.

litigation, leading employees and employers to feel that the process is mutually beneficial.[50] Although precise figures are hard to obtain given the private nature of these settlements, data from plaintiffs' attorneys suggest that approximately four out of five claims settle before a lawsuit is ever filed.[51]

C. *Labor and Employment Law Enforcement Challenges Associated with Extrajudicial Dispute Resolution*

Both the nature of extrajudicial dispute resolution and its implementation present challenges to enforcing employment discrimination laws via private litigation. Arbitration may reduce the likelihood that aggrieved employees seek redress at all, as they perceive, often correctly, that the odds are stacked against them. And confidentiality norms in both arbitration and prelitigation settlements lead to information suppression and a reduced incentive for employers to comply with employment discrimination laws.

For plaintiffs and their counsel, arbitration is riskier than litigation. Plaintiffs are less likely to prevail, and when they do, their awards are typically smaller than they would be in litigation.[52] The low likelihood of success discourages plaintiffs' attorneys from taking on clients bound by arbitration clauses, given that those lawyers often rely on contingency fees that require counsel to internalize the risk.[53] Accordingly, many employees who have faced legitimate discrimination are unlikely to file a claim in arbitration. By discouraging potential claims, arbitration frustrates the fundamental purpose of employment discrimination laws by weakening the laws' deterrent effects and reducing the potential to hold violators accountable.[54]

While claim suppression is unique to arbitration, the confidentiality norms associated with both arbitration and prelitigation settlement agreements also impede the enforcement of employment discrimination laws. Even in private legal disputes, courts operate under a presumption in favor of public access to judicial records.[55] This presumption predates the Consti-

50. *See id.*

51. Russell-Kraft, *supra* note 6 ("David Sanford, a prominent plaintiffs' lawyer who works primarily on discrimination cases, estimated that 'about 80 to 90 percent' of the cases he takes on are resolved confidentially before a lawsuit can even be filed. These are claims that will never be publicly known, and Sanford's figure is typical.").

52. *See* Estlund, *supra* note 14, at 688 (noting that employees prevailed 19.1 percent of the time in arbitration, with a median award of $36,500, compared to 29.7 percent of the time in federal court, with a median award of $176,426).

53. *See id.* at 702.

54. *See id.*

55. Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 161 (3d Cir. 1993); Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988).

tution and serves a number of government interests.[56] Public access to court records, for instance, promotes confidence in the judicial system.[57]

The secrecy surrounding both arbitration and pre-suit settlement shields information of public importance, posing challenges to private enforcement schemes.[58] That employment discrimination statutes like Title VII, the ADA, and the FMLA are all enforced through private litigation further emphasizes the importance of public access to dispute records. Litigation under these statutes, in addition to increasing confidence in the judicial system, also serves an express public accountability function.[59]

Because of these important policy objectives, there should be a heightened presumption of public access to dispute records in labor and employment cases. Yet the confidentiality associated with extrajudicial dispute resolution fundamentally undermines the social purpose that labor and employment laws are designed to serve. Confidential, out-of-court resolution of employment discrimination claims cannot serve the same social purpose as litigation.[60] Employee arbitration agreements reduce an employer's liability and thus disincentivize employers from complying with employment discrimination statutes, making it more likely that employers will violate workers' rights.[61] This Note therefore examines mechanisms designed to improve employer accountability in a world of private dispute resolution.

II. EXPLORING THE USE OF QUI TAM ACTIONS TO ENFORCE EMPLOYMENT DISCRIMINATION LAWS

Qui tam laws can help preserve the power of employment discrimination laws that are enforced primarily through private litigation. In particular, qui tam statutes maintain public transparency and deter violations of statutes like Title VII, the ADA, and the FMLA. Like private rights of action, qui tam actions compensate individuals who identify legal violations. But unlike plaintiffs in private rights of action, plaintiffs in qui tam actions sue on behalf of the government, not on behalf of themselves.[62] Because qui tam actions and private rights of action protect different interests, courts handle

56. *Littlejohn*, 851 F.2d at 678.

57. Republic of the Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991). Courts seal or protect records from public view only when the "disclosure will work a clearly defined and serious injury to the party seeking closure." Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984).

58. *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1231 (2006).

59. *See* Glover, *supra* note 1, at 1153.

60. *See Notice No. 915.002*, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, U.S. EEOC (July 10, 1997), https://www.eeoc.gov/policy/docs/mandarb.html [https://perma.cc/YW5Z-VZNK].

61. *See id.*

62. *See id.*

waivability and arbitrability of such claims differently.[63] Accordingly, structuring employment discrimination laws to create qui tam enforcement mechanisms may adequately address the dwindling enforcement power of private rights of action.

A. *The Historical Development of Modern Qui Tam Actions*

Qui tam laws can be traced back to thirteenth-century England.[64] Injured individuals brought claims on behalf of themselves and the Crown as a strategy for having their cases heard in respected royal courts, which typically heard only matters pertaining to government interests.[65] About a century later, royal courts expanded jurisdiction to hear purely private matters and the use of these dual actions declined.[66] At the same time, Parliament began enacting statutes allowing "informers" to recover a share of relevant fines, even if the informer himself was not injured.[67]

Borrowing from their English counterparts, American legislators began enacting qui tam laws in the colonial period.[68] Congress first passed the False Claims Act (FCA) in the nineteenth century, but the law did not take its modern form until 1986.[69] In an attempt to curb notorious levels of fraud among military contractors, Congress strengthened the FCA by dramatically increasing penalties and the percentage of fines a successful relator could recover.[70] Congress also removed barriers to bringing qui tam actions by eliminating both the "any prior government knowledge" defense (which barred qui tam suits if any government official had knowledge of the fraud) and the

63. "Waivability" refers to the enforceability of a contractual waiver of the ability to bring a particular type of claim. For instance, the Court held in *AT&T Mobility LLC v. Concepcion* that a consumer's contractual promise not to bring any class claims in either arbitration or litigation was valid and enforceable. 563 U.S. 333 (2011). "Arbitrability" refers to the enforceability of contracts promising to bring a legal claim in an arbitral forum instead of a court. For example, in *Iskanian v. CLS Transportation Los Angeles, LLC*, the court held that an employee's promise to arbitrate any claims was not valid as to claims arising under PAGA. 327 P.3d 129 (Cal. 2014).

64. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000).

65. *Id.*

66. *Id.* at 775.

67. *Id.*

68. *Id.* at 776.

69. False Claims Amendment Act of 1986, Pub. L. 99-562, 100 Stat. 3153; An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863). The FCA allows any person to serve as a private attorney general and bring a claim against a federal government contractor for fraud. John R. Thomas Jr. et al., *The False Claims Act Past, Present, and Future*, FED. LAW., Dec. 2016, at 64, 65. As a reward for enforcing the law on behalf of the government, those bringing the claims receive a percentage of any money recovered in litigation or settlement. *Id.*

70. James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1272–74 (2013).

requirement that even a successful relator pay attorney's fees.[71] In addition, Congress established protections for relators by barring retaliation against whistleblowers.[72] These changes revitalized qui tam claims as a litigation device.[73]

Recognizing the efficacy of using qui tam actions to enforce public law, California enacted PAGA in 2003 to enforce its labor code.[74] The legislature identified two problems. First, many labor code violations were punishable only by criminal misdemeanors rather than civil penalties.[75] Because district attorneys tended to devote their limited resources to prosecuting violent crimes, labor code violations often went unpunished.[76] Second, there were inadequate government resources to support enforcement of those statutes that did create civil penalties.[77]

PAGA addressed both of these issues. Because California's labor agencies were underfunded, the legislature determined that "it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations."[78] Under PAGA, an aggrieved employee may bring a representative claim on behalf of herself and a class of similarly situated employees seeking civil penalties.[79] If the claim prevails, PAGA distributes 75 percent of the civil penalties to California's Labor and Workforce Development Agency (LWDA) and the remaining 25 percent to the aggrieved employees.[80]

---

71. *Id.* at 1274.

72. *Id.*

73. *Id.* at 1275.

74. Labor Code Private Attorneys General Act of 2004, ch. 906, 2003 Cal. Stat. 6628 (codified as amended at CAL. LAB. CODE §§ 2698–99.6 (West 2011 & Supp. 2019)); Arias v. Superior Court, 209 P.3d 923, 929 (Cal. 2009). Notably, PAGA currently faces a challenge to its constitutionality. In November 2018, the California Business & Industrial Alliance (CABIA) filed suit in the Orange County Superior Court against the State of California challenging the constitutionality of PAGA. Complaint for Injunctive and Declaratory Relief, Cal. Bus. & Indus. All. v. Becerra, No. 30-2018-01035180-CU-JR-CXC (Cal. Super. Ct. Nov. 28, 2018). Specifically, the complaint alleged that PAGA fines were excessive and in violation of the Eighth Amendment of the U.S. Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 48–49. In addition, the complaint asserted that the law violated the separation of powers, due process, and equal protection rights articulated in the California Constitution. *Id.* at 41–42, 46–48, 52–54. This lawsuit is unlikely to succeed given that in *Iskanian*, a case that continues to be widely cited by California state courts, the California Supreme Court denied the challenge to PAGA's constitutionality. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 154 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

75. *Iskanian*, 327 P.3d at 146.

76. *Id.*

77. *Id.*

78. *Arias*, 209 P.3d at 929.

79. *Id.* at 930.

80. *Id.*; *see, e.g.*, Bernstein v. Virgin Am., Inc., 365 F. Supp. 3d 980, 983, 992–93 (N.D. Cal. 2019) (awarding $25 million for PAGA claim brought by California flight attendants employed by Virgin America, 25 percent of which was shared among the aggrieved employees); Revised Class Action Settlement Agreement and Release at 11, Singer v. Postmates, Inc., No.

B. *Waivability of Qui Tam Claims*

Employers use waiver agreements to minimize their liability for violations of employment discrimination laws, qui tam or otherwise. A common type of waiver requires that an employee waive their right to bring certain types of claims against their employer in any forum.[81] Whether employers' attempts to enforce such waivers will succeed is informed by the Supreme Court's Federal Arbitration Act (FAA) jurisprudence.

The Court has interpreted the FAA to require that arbitration agreements be enforced on their own terms.[82] But this general rule has a number of exceptions that render waiver provisions unenforceable. For example, the FAA's savings clause requires courts to enforce arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract."[83] Additionally, under the Court's "effective vindication doctrine," arbitration agreements are invalid when they prevent a party from vindicating their substantive rights afforded by federal statute.[84]

Many arbitration agreements contain class action waiver provisions.[85] In such contracts, parties agree to submit any claims to individual arbitration and forego the ability to bring a class claim.[86] Recent Supreme Court jurisprudence has made clear that that these waiver provisions are overwhelmingly valid.[87] Qui tam actions resemble class actions insofar as they involve one party complaining about injury to individuals other than the plaintiff. This creates the troubling possibility that courts would simply enforce waivers of qui tam-style claims as they do for class claims. This Section analyzes the Court's treatment of class and representative claim waivers both in and out of the qui tam context to demonstrate how federal courts treat the waivability of qui tam-style actions more broadly.

4:15-cv-01284-JSW (N.D. Cal. Aug. 25, 2017) (describing a court-approved settlement that awarded 25 percent of a $100,000 settlement to several Postmates employees who filed a PAGA claim for violation of California's minimum wage law).

81. *See* COLVIN, *supra* note 6, at 2 ("Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures . . . .").

82. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).

83. 9 U.S.C. § 2 (2012).

84. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985); *see also* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 280 (2015).

85. COLVIN, *supra* note 6, at 2.

86. *See* Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 700–01 (2010); *see also, e.g.*, PEOPLE'S PARITY PROJECT, *supra* note 9 ("Covered Disputes **MUST** be arbitrated only on an individual basis. . . . Disputes . . . **MUST** be arbitrated in separate, individual proceedings.").

87. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); *Concepcion*, 563 U.S. 333.

1. Class Action Waiver Jurisprudence

Beginning with the landmark case *AT&T v. Concepcion*, the Supreme Court has consistently enforced agreements in which parties waive their right to bring class claims in either litigation or arbitration.[88] In *Concepcion*, plaintiffs invoked a California rule providing that adhesion contracts[89] containing class action waivers are unconscionable.[90] They argued that any arbitration clause contained in an adhesion contract must allow plaintiffs to arbitrate claims on a class-wide basis.[91] The Supreme Court rejected this argument, stating that the FAA preempts any state rule invalidating class action waivers.[92] The Court reasoned that Congress, in adopting the FAA, intended to favor efficient and informal arbitration proceedings.[93] Arbitration's informality, the Court held, was at odds with formalistic and often cumbersome class proceedings.[94]

Confirming the legality of class action waivers, the Court held in *Epic Systems Corp. v. Lewis* that such waivers were valid even in employment contracts.[95] Plaintiffs argued that the National Labor Relations Act (NLRA) protects employees' right to engage in "collective action" in the form of class arbitration or litigation.[96] The Court disagreed, holding that Congress passed the NLRA to protect collective *bargaining*.[97] Accordingly, the Court concluded that Congress did not intend to include class arbitration in its protection of employees' "other concerted activities for the purpose of collective bargaining."[98]

Finally, the Court's *American Express Co. v. Italian Colors Restaurant* decision restricted the applicability of the effective vindication doctrine.[99] This doctrine requires that parties to arbitration agreements have some forum, judicial or arbitral, to vindicate their statutory rights.[100] But in *Italian Colors*, the Court held that, even when a plaintiff's individual arbitration costs would exceed the maximum possible recovery for a federal statutory

88. *Concepcion*, 563 U.S. at 352.

89. An adhesion contract is "[a] standard-form contract prepared by one party, to be signed by another party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms." *Adhesion Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

90. *See Concepcion*, 563 U.S. at 337–38.

91. *Id.*

92. *See id.* at 352.

93. *See id.* at 348.

94. *Id.* at 349–50.

95. 138 S. Ct. 1612, 1632 (2018).

96. *See Epic Sys.*, 138 S. Ct. at 1622.

97. *Id.* at 1630.

98. *See id.* at 1617, 1632.

99. 570 U.S. 228, 235–36 (2013).

100. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (articulating the effective vindication doctrine).

violation, courts should still enforce the class action waiver.[101] The Court rejected the plaintiff's contention that the waiver prevented them from effectively vindicating their federal statutory rights.[102] Writing for the majority, Justice Scalia noted that high costs, even costs exceeding the prospective recovery, do not foreclose plaintiffs' ability to vindicate their rights.[103] Formally, plaintiffs are still able to pursue arbitration, but only at a prohibitively high cost.[104]

2. Validity of Representative Action Waivers Under PAGA

Analyzing how federal and state courts treat waiver of PAGA claims provides valuable insight into the potential efficacy of a qui tam employment discrimination regime. In *Iskanian v. CLS Transportation of Los Angeles, LLC*, a plaintiff-employee filed suit against his employer under PAGA, alleging a litany of wage and workplace violations.[105] But because the plaintiff had signed an arbitration agreement that included both a class and representative action waiver, the defendant-employer moved to compel individual arbitration.[106] Although neither party disputed that the waiver encompassed representative PAGA claims, the plaintiff argued that such waivers were invalid under state law and that the FAA did not preempt those state laws.[107]

The court first looked to California state laws governing waivability of statutory rights to determine the validity of the waiver.[108] One statute stated that the courts would not enforce contracts rooted in exempting a party from responsibility for violating a law.[109] Another statute stated that private individuals cannot waive the benefit of a law enacted for the public's benefit.[110] Given the public purpose PAGA was intended to serve, the court held that an employee's right to bring a PAGA action was unwaivable.[111] To allow such a waiver would "disable one of the primary mechanisms for enforcing

101. *Italian Colors*, 570 U.S. at 238–39.

102. *Id.* at 235.

103. *Id.*

104. *See id.* at 238–39.

105. 327 P.3d 129, 133 (Cal. 2014). Specifically, the plaintiff alleged that CLS "failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, or pay final wages in a timely manner." *Iskanian*, 327 P.3d at 133.

106. *Id.*

107. *Id.* at 145.

108. *Id.* at 148.

109. CAL. CIV. CODE § 1668 (West 2011) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.").

110. CAL. CIV. CODE § 3513 (West 2016) ("Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.").

111. *Iskanian*, 327 P.3d at 153.

the Labor Code" and effectively exempt employers from liability for legal violations.[112]

In response, the defendant argued that the contract did not require waiver of all PAGA claims, just those claims that are *representative*.[113] Therefore, the plaintiff could still bring individual claims against his employer but was barred from bringing claims on behalf of other aggrieved employees.[114] The court rejected this argument on the grounds that PAGA's statutory language appears to refer only to representative claims.[115] Additionally, even if the statute had created both individual and representative claims, the penalties assessed against employers for individual claims would be insufficient to deter employers from violating labor and employment laws.[116] Because the legislature identified systemic deterrence as a primary justification for enacting PAGA, the ability to waive representative claims would frustrate its core purpose.[117]

Having decided the question of PAGA's applicability, the court then turned to the issue of preemption. Given the supremacy of federal law, a state law invalidating an arbitration agreement cannot be enforced if the FAA preempts it.[118] The FAA preempts any state law that interferes with its fundamental purpose: ensuring efficient, streamlined resolution of *private* disputes through arbitration.[119] But the court held that PAGA actions are disputes between an employer and a state agency, meaning they fall outside the scope of an arbitration agreement, which binds only the employer and the employee.[120] Because the state agency and the employer never entered into an arbitration agreement, the FAA did not preempt a state rule barring the waiver of qui tam claims.[121]

The Ninth Circuit adopted the *Iskanian* approach.[122] In *Sakkab v. Luxottica Retail*, the Ninth Circuit held that the FAA does not prevent "states from authorizing qui tam actions to enforce state law" and found the *Iskanian* rule valid.[123] This decision was consistent with the Ninth Circuit's

112. *Id.* at 149.

113. *Id.*

114. *Id.*

115. *Id.* (highlighting plaintiff's argument that "the PAGA . . . authorizes an aggrieved employee to file a claim 'on behalf of himself or herself *and* other current or former employees' does not permit an employee to file an individual claim" (quoting CAL. LAB. CODE § 2699(a) (West Supp. 2019) (emphasis added by court))).

116. *Id.* (citing Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 862 (Ct. App. 2011)).

117. *See id.*

118. *Id.*

119. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

120. *Iskanian*, 327 P.3d at 149.

121. *See id.* at 151.

122. *See* Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 439 (9th Cir. 2015); Hernandez v. DMSI Staffing, LLC, 79 F. Supp. 3d 1054, 1064–65 (N.D. Cal. 2015).

123. *Sakkab*, 803 F.3d at 439–40. As of November 2018, no other circuit appears to have entertained questions regarding the waivability of qui tam claims.

jurisprudence holding waivers of the FCA invalid.[124] In a 1995 opinion, the court asserted that the sole purpose of qui tam actions, including FCA claims, is to "vindicate the public interest" by "deterring fraud and returning funds to the federal treasury."[125] The court wrote that allowing prefiling releases of FCA claims, particularly when the government has not been made aware of the allegations, would undermine the purpose of the FCA itself, to inform the government of wrongdoing.[126]

C. *Arbitrability of Qui Tam Claims*

Even if courts refuse to enforce qui tam waivers, they may still subject qui tam claims to arbitration. In many ways, the arbitration process—shrouded in secrecy and designed to disincentivize the filing of claims—is antithetical to the goals of a qui tam labor and employment discrimination regime. But while arbitration may not be the ideal avenue through which to file a qui tam claim, it can be done. With certain public protections in place, arbitrated qui tam claims could still uphold the public purpose underlying such claims. Because PAGA is among the most litigated state qui tam statutes and the only one that governs labor code violations,[127] analysis of its arbitrability informs the potential arbitrability of a qui tam regime designed to enforce employment discrimination laws.

1. Arbitrability of PAGA Claims

California state courts have consistently held that at least some PAGA claims are not arbitrable.[128] In *Tanguilig v. Bloomingdale's*, the California First District Court of Appeal held that a "PAGA claim cannot be ordered to arbitration without the *state's* consent."[129] The court reasoned that PAGA

---

124. *See* United States v. Johnson Controls, Inc., 457 F.3d 1009, 1019 (9th Cir. 2006); United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995).

125. *Green*, 59 F.3d at 968.

126. *Id.* at 963. Notably, this holding would also prevent an employer from entering into a prelitigation settlement with an employee that required the employee to release any claims or keep the claims confidential. A qui tam legal structure could thus address the confidentiality challenges associated with both arbitration and prelitigation settlements.

127. *See* Chris Micheli, *Private Attorneys General Act Lawsuits in California: A Review of PAGA and Proposals for Reforming the "Sue Your Boss" Law*, 49 U. PAC. L. REV. 265, 265 (2018).

128. *See, e.g.*, Hernandez v. Ross Stores, Inc., 212 Cal. Rptr. 3d 485, 489 (Ct. App. 2016); Tanguilig v. Bloomingdale's, Inc., 210 Cal. Rptr. 3d 352, 360 (Ct. App. 2016); Williams v. Superior Court, 188 Cal. Rptr. 3d 83, 84 (Ct. App. 2015); Securitas Sec. Servs. USA, Inc. v. Superior Court, 184 Cal. Rptr. 3d 568, 571 (Ct. App. 2015).

129. *See Tanguilig*, 210 Cal. Rptr. 3d at 360 (" '[A] PAGA claim lies outside the FAA's coverage . . . .' " (quoting Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 151 (Cal. 2014))). California's judicial hierarchy includes superior courts (also known as trial courts), courts of appeal, which are divided into six districts, and finally the California Supreme Court. *See generally About California Courts*, CAL. CTS., https://www.courts.ca.gov/2113.htm [https://perma.cc/X3GT-GEVL]. Unlike with the federal judiciary, published opinions of the

plaintiffs merely act as proxies for the state, which is itself not a party to the employment agreement.[130] PAGA's remedy structure bolsters this viewpoint: plaintiffs are not suing for damages; rather, they are suing for civil penalties largely payable to the state.[131] PAGA disputes, therefore, lie outside the scope of employment agreements mandating arbitration and cannot be submitted to arbitration without California's consent.[132]

The California Fifth District Court of Appeal complicated PAGA analysis in *Esparza v. KS Industries, L.P.*, where an employee filed a lawsuit against his employer on behalf of himself and other aggrieved employees.[133] The complaint asserted that KS Industries violated the California Labor Code by failing to pay minimum and overtime wages to its employees, among other charges.[134] The plaintiff-employee sought recovery in the form of "unpaid wages, civil penalties, interest, attorneys' fees and costs."[135] While the plaintiff asserted that PAGA plainly included recovered wages as a part of the civil penalties, the defendant argued that this was merely an attempt to circumvent the arbitration agreement by masking the private dispute as a PAGA claim.[136]

The *Esparza* court held that claims requesting victim-specific relief were arbitrable because wage disputes are fundamentally private, and unpaid wages could never be considered civil penalties.[137] Because the FAA's purpose was to encourage arbitration of *private* disputes, any claim that could be brought privately could be arbitrated.[138] Nevertheless, the court did find that the civil penalties of $50 for any initial violation and $100 per subsequent violation per pay period constituted civil penalties rather than victim-specific relief like backpay.[139] Accordingly, the plaintiff's claims for civil fines could not be submitted to arbitration.[140]

In a nearly identical claim, a different California appellate district reached a contrary conclusion regarding the arbitrability of claims for un-

courts of appeal are binding on all superior courts. Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962). If several courts of appeal are divided on an issue before a superior court, however, the trial court judge may exercise their discretion and choose to follow the guidance of either appellate court. *Id.* Published opinions from one court of appeal do not bind any other court of appeal. *In re* Marriage of Shaban, 105 Cal. Rptr. 2d 863, 870–71 (Ct. App. 2001).

130. *Tanguilig*, 210 Cal. Rptr. 3d at 360 (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002)).

131. *Id.*

132. *Id.*

133. 221 Cal. Rptr. 3d 594, 598 (Ct. App. 2017).

134. *Esparza*, 221 Cal. Rptr. 3d at 598.

135. *Id.* at 599.

136. *Id.*

137. *Id.* at 607.

138. *Id.*

139. *Id.* at 606–07.

140. *Id.* at 607.

paid wages.[141] In *Lawson v. ZB, N.A.*, the court disagreed with the analysis in *Esparza* because the relevant Labor Code provision created no private right of action, express or implied.[142] Because the statute giving rise to the cause of action contained no private right of action, the court held that arbitration should not have been compelled.[143]

Federal courts have been even less consistent than state courts regarding the arbitrability of PAGA claims. In *Valdez v. Terminix*, the Ninth Circuit interpreted the *Sakkab* holding to mean that all PAGA claims were arbitrable.[144] Specifically, the court held that since the claims arose out of the employment relationship, the arbitration agreement covered the dispute.[145] In *Mandviwala v. Five Star Quality Care*, the Ninth Circuit came to the opposite conclusion, holding that PAGA claims potentially giving rise to civil penalties could not be subject to compelled arbitration.[146] However, the court indicated that the question was one of state law, and therefore the Ninth Circuit's interpretation was not binding.[147] Muddling the jurisprudence further, the Ninth Circuit's prior opinion held that PAGA arbitrability could only be resolved by examining the FAA, creating a federal question.[148]

2. Arbitrability of FCA Claims

Given the internal contradictions within the opinions deciding the arbitrability of PAGA claims, it is difficult to predict how courts would respond to a similar state qui tam regime governing employment discrimination claims. Accordingly, this Note next examines the jurisprudence surrounding the arbitrability of federal qui tam claims to gain insight into the arbitrability of state qui tam claims. Although the preemption analysis will differ, the reasoning behind whether arbitration is consistent with the federal statute can shed light on the potential effectiveness of comparable state laws.

Federal case law examining the arbitrability of federal qui tam claims is inconclusive. Yet defendants facing FCA claims have sought to compel arbi-

---

141. Lawson v. ZB, N.A., 227 Cal. Rptr. 3d 613, 626 (Ct. App. 2017), *aff'd on other grounds sub nom.* ZB, N.A. v. Superior Court, 2019 WL 4309684 (Cal. Sept. 12, 2019).

142. *Compare id.* at 624 (finding that a private right of action is not expressly authorized, and should not be implied, under § 558), *with* CAL. LAB. CODE § 203(b) (West Supp. 2019) (expressly authorizing a private right of action).

143. *Lawson*, 227 Cal. Rptr. 3d at 624–25. Subsequent to the writing of this Note, the California Supreme Court criticized this analysis based on its "close, contextual analysis of the [PAGA] statutory scheme," adopting *Esparza*'s view of unpaid wages as outside PAGA's civil penalty. *See* ZB, N.A. v. Superior Court, 2019 WL 4309684, at *6–12 (Cal. Sept. 12, 2019). Accordingly, any PAGA claims seeking victim-specific relief can be arbitrated pursuant to the relevant employment contract. The fact that the lower California courts split on this issue, though, may still be relevant in assessing how other states may interpret qui tam statutes.

144. Valdez v. Terminix Int'l Co., 681 F. App'x 592 (9th Cir. 2017).

145. *Id.* at 594–95.

146. 723 F. App'x 415, 417 (9th Cir. 2018).

147. *Mandviwala*, 723 F. App'x at 417.

148. *Valdez*, 681 F. App'x at 593.

tration on remarkably few occasions. This is despite the fact that, ostensibly, individuals in the best position to inform the government about ongoing fraud would be employees of companies engaging in the illicit activity. In the limited number of cases that do address arbitrability of FCA claims, courts have tended to find that the claims belong to the government, not the relator.[149] Because the government is not a party to the arbitration agreement, the claims cannot be compelled to arbitration.[150]

In the most recent federal appellate case addressing this issue, the Ninth Circuit skirted the arbitrability question and resolved the claim through a textual analysis of the arbitration agreement itself.[151] In *United States ex rel. Welch v. My Left Foot Children's Therapy*, an employee of the functional therapy company filed a sealed complaint against her employer, alleging violations of the federal FCA and the Nevada FCA.[152] She alleged that her employer presented fraudulent claims to Medicare and Tricare (another government health program) by treating patients who could not benefit from services, overbilling, and falsifying medical records.[153] When the relator joined My Left Foot, she signed an arbitration agreement promising to arbitrate claims that "ar[ose] out of 'or related to' the employment relationship" or employment context.[154] The court noted, however, that the employer could have written the contract to include "any and all disputes whatsoever."[155] The employer's own contract language ultimately limited the scope of the agreement.[156]

The Ninth Circuit then examined two cases from the Fifth and Eleventh Circuits addressing the same question.[157] Both circuits determined that a sexual assault that occurred in the workplace did not "arise out of" or "relate to" the employment relationship.[158] Even though the sexual assault would not have occurred but for the employment, there was no direct connection between the assault and employment.[159] Indeed, the courts reasoned that the defendant could have sexually assaulted the plaintiff even in the absence of

149. *See* Stoner v. Santa Clara Cty. Office of Educ., 502 F.3d 1116, 1126 (9th Cir. 2007); Nguyen v. City of Cleveland, 138 F. Supp. 2d 938, 939 (N.D. Ohio 2001); Mikes v. Strauss, 889 F. Supp. 746, 755 (S.D.N.Y. 1995). *But see* Deck v. Miami Jacobs Bus. Coll. Co., No. 3:12–cv–63, 2013 WL 394875, at *6–7 (S.D. Ohio Jan. 31, 2013).

150. *See Stoner*, 502 F.3d at 1126.

151. United States *ex rel.* Welch v. My Left Foot Children's Therapy, LLC, 871 F.3d 791, 794 (9th Cir. 2017).

152. *Id.* at 795.

153. *Id.*

154. *Id.* at 794, 798.

155. *Id.* at 797.

156. *Id.* at 798.

157. *Id.* at 799.

158. *Id.*

159. *Id.*

any employment relationship.[160] The Ninth Circuit found Welch's case analogous because the relator could have brought the case even if she had never been employed by My Left Foot.[161] That Welch would not have learned of the fraud but for the employment was "immaterial" because she could have learned about it through other means.[162] The arbitration agreement did not cover all claims related to the *employer*; instead, it covered those related to the *employment*.[163] Since the arbitration did not encompass the claim at issue, the court denied the defendant's motion to compel arbitration.[164]

Welch suggests that when anyone—not just an employee of a company engaging in misconduct—can serve as a relator, courts may find that the resulting qui tam claim does not flow from the employment relationship. But the case leaves open the possibility that employers could simply broaden the language of arbitration agreements to include any dispute between the parties regardless of how the claims arose. Whether such a sweeping agreement would be enforceable would be a matter of state law—by way of the FAA's savings clause—and therefore could vary by jurisdiction.

3. Arbitrability of Employment Disputes Involving the EEOC

Because neither PAGA nor FCA jurisprudence provide definite conclusions on the arbitrability of qui tam claims, this Note next analyzes the arbitrability of claims involving the Equal Employment Opportunity Commission (EEOC) to examine the relationship among private parties, employers, and the federal government in the enforcement of employment discrimination laws. In employment discrimination cases involving federal claims, aggrieved employees must first submit their complaints to the EEOC.[165] When the EEOC finds reasonable cause that an employee's rights were violated, it may choose to pursue relief on behalf of the aggrieved employee.[166] If the agency chooses not to pursue the claim itself, the complainant may file the claim on their own.[167]

The Supreme Court took up the question of arbitrability of claims brought by the EEOC in a 2002 case, *EEOC v. Waffle House*.[168] In that case, an employee filed a charge with the EEOC alleging disability discrimina-

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 800.

165. 42 U.S.C. § 2000e-5(e)(1) (2012). The EEOC is a federal agency created under Title VII that administers and enforces laws regarding workplace discrimination. Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 307–08 (2001).

166. 42 U.S.C. § 2000e-5(b).

167. 29 C.F.R. § 1601.28(b)(1) (2018).

168. 534 U.S. 279.

tion.[169] After the EEOC unsuccessfully attempted to negotiate a resolution with Waffle House, the agency filed suit in federal court.[170] Waffle House filed a motion to compel arbitration, citing an agreement the aggrieved employee had signed.[171] The district court denied the motion, asserting that the employee's actual agreement contained no promise to arbitrate.[172] While the Fourth Circuit found that a valid and enforceable arbitration agreement did exist, it ultimately concluded that the EEOC could not be compelled to arbitrate all claims because the EEOC was not a party to the agreement.[173] In an attempt to give some effect to the arbitration agreement, the court held that the EEOC was prohibited from seeking victim-specific relief.[174] Therefore, when an aggrieved employee signs an arbitration agreement, the EEOC is only entitled to pursue injunctive relief.[175]

Noting a circuit split on the arbitrability of claims brought by the EEOC, the Supreme Court granted the EEOC's petition for a writ of certiorari.[176] The Court reversed the Fourth Circuit, holding that the EEOC was entitled to pursue injunctive and victim-specific relief on behalf of the aggrieved employee in court.[177] The Court relied heavily on the EEOC's control over the direction of the claim.[178] Specifically, the agency maintains exclusive jurisdiction over the claim for 180 days and is not required to seek the employee's consent before prosecuting the claim.[179] Since the claims were solely within the purview of the EEOC, the EEOC was not a proxy for the employee and thus not bound by the arbitration agreement.[180] *Waffle House* suggests that regulatory enforcement agencies like the EEOC operate as more than stand-ins for employees, even when they seek relief that the employees could obtain individually. The *Waffle House* Court's reasoning offers guidance as to how courts might handle the converse situation, in which individuals seek relief on behalf of the government.

---

169. *Waffle House*, 534 U.S. at 283.

170. *Id.*

171. *Id.* at 283–84.

172. EEOC v. Waffle House, Inc., No. Civ.A. 3:96–2739–O, 1998 WL 35168489, at *2 (D.S.C. Mar. 23, 1998).

173. EEOC v. Waffle House, Inc., 193 F.3d 805, 811–12 (4th Cir. 1999).

174. *Id.* at 813.

175. *Id.*

176. *Waffle House*, 534 U.S. at 285. *Compare* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999) (allowing the EEOC to seek all remedies on behalf of an employee bound by an arbitration agreement), *with* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon, 210 F.3d 814 (8th Cir. 2000) (proscribing the EEOC from seeking monetary relief for the employee but permitting it to seek injunctive relief), *and* EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998) (same).

177. *Waffle House*, 534 U.S. at 285, 291–92.

178. *Id.* at 291–92.

179. *Id.*

180. *Id.* at 297–98.

In sum, analysis of litigation surrounding PAGA, the FCA, and claims brought by the EEOC demonstrates the strengths and shortcomings of employment discrimination laws, particularly those designed to protect employees. Legislatures interested in enacting such laws must carefully examine the likelihood that claims brought under them will be subject to enforceable waivers and arbitration. To ensure their effectiveness, the statutes must be structured to anticipate challenges on both fronts.

III. EFFECTIVE USE OF STATE QUI TAM LEGISLATION TO ENFORCE EMPLOYMENT DISCRIMINATION LAWS

Both public and private enforcement mechanisms for employment discrimination have been underused in recent decades. This underenforcement stems in large part from barriers to traditional means of enforcement. Cash-strapped attorney general offices often lack the resources to respond to labor and employment claims, and employees pursuing private rights of action are increasingly stymied by restrictive arbitration agreements.[181] Where a law's primary enforcement mechanisms are ineffective, its deterrent effect is seriously weakened. Without a likelihood of economic consequences, employers have little incentive to comply with cost-imposing laws.

Though the federal government has not prioritized addressing the underenforcement of employment discrimination laws, state legislatures have a different set of political priorities. States may not face the same bureaucratic barriers to enacting legislation designed to address these underenforcement concerns.[182] As Part II explained, whistleblower laws offer one avenue through which states may combat barriers to enforcement. As of the writing of this Note, California is the only state to have used qui tam legislation in an attempt to enforce employment discrimination laws.[183] Although imperfect, California's PAGA offers a useful starting point for looking at how states might develop their own qui tam regimes.[184] This Part draws on the PAGA,

---

181. *See* Terri Gerstein & Marni von Wilpert, *State Attorneys General Can Play Key Roles in Protecting Workers' Rights*, ECON. POL'Y INST. (May 7, 2018), https://www.epi.org/publication/state-attorneys-general-can-play-key-roles-in-protecting-workers-rights/ [https://perma.cc/F7FJ-HY4A] (finding that only six states and the District of Columbia have any staff in the attorney general's office dedicated to enforcing labor laws). Because federal agencies like the EEOC and the Wage and Hour Division of the Department of Labor have been stretched thin, state attorney general offices can play a key complementary role in enforcing employment violations where the federal government cannot. *See id.*

182. *See, e.g.*, Karla Walter et al., *States at Work: Progressive State Policies to Rebuild the Middle Class*, CTR. FOR AM. PROGRESS ACTION FUND (Mar. 21, 2013, 8:09 AM), https://www.americanprogressaction.org/issues/economy/reports/2013/03/21/57375/states-at-work-progressive-state-policies-to-rebuild-the-middle-class/ [https://perma.cc/Z92J-2CZQ] (discussing the important role states play in shaping economic policy).

183. Micheli, *supra* note 127, at 265.

184. *See* Labor Code Private Attorneys General Act of 2004, CAL. LAB. CODE § 2698 (West 2011). Although this Note examines the potential of applying qui tam legislation to employment discrimination laws, there is no reason such a structure could not also be used to

FCA, and EEOC case law discussed in the prior Section to develop an outline for an effective state qui tam statute. Section III.A articulates strategies states can employ to ensure qui tam claims cannot be waived. Section III.B then identifies mechanisms that can help states address accountability challenges associated with private dispute resolution. Finally, Section III.C provides recommendations for avoiding preemption by the FAA.

A. *Crafting State Qui Tam Laws to Avoid Waivability*

To ensure that the prospective state law possesses real enforcement power, it should prevent employers from being able to compel employees, as a condition of their employment, to waive their right to bring legal claims. If courts were to find waivers of state qui tam claims valid, the regime's enforcement power would be virtually destroyed. States could, however, make such legislation more resistant to waivability challenges by clearly stating the public enforcement purpose that the law serves.

In every state, courts render contracts that contravene public policy unenforceable.[185] Because courts often rely on legislative history to understand the public policy aims of a statute, state legislatures considering a qui tam regime should take care to clearly articulate the rationale for such legislation. *Iskanian*, in which an employer sought to enforce a waiver of representative PAGA claims, is instructive. The court examined the purpose PAGA was designed to serve to determine its relationship to the state's public policy.[186] The court cited PAGA's legislative history in which legislators detailed the state's limited capacity to enforce labor law violations and proposed a qui tam regime as a solution.[187] Similarly, state legislatures considering enacting qui tam laws should clearly state the purpose that the legislation will serve.[188]

Legislative pronouncement alone would likely be insufficient to sustain a finding of a public purpose if the content of the law did not support the same conclusion. Accordingly, states should also take steps to ensure that the proposed legislation *substantively* works to vindicate the goal of enforcing state labor and employment laws to maintain a fair and competitive economy. For example, the legislative language and structure of PAGA played a significant role in convincing the *Iskanian* court to invalidate the employer's PAGA

enforce other public interest laws. For instance, while PAGA prohibits employers from paying employees less because of their sex, it also enforces wage and hour rules. *See* CAL. LAB. CODE § 2699(a) (West Supp. 2019) (creating a private right of action for any aggrieved employee where the Labor and Workforce Development Agency would otherwise be permitted to enforce a civil penalty); California Equal Pay Act, CAL. LAB. CODE § 1197.5(k)(1) (West Supp. 2019) (establishing an employee's right to share wage information with fellow employees); CAL. LAB. CODE § 226.7(b) (West Supp. 2019) (providing for meal or rest periods).

185. *See* Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 697 (2016).

186. *See* Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 149 (Cal. 2014).

187. *Id.* at 146.

188. *See id.*

waiver.[189] Relying on PAGA's legislative language, which empowered citizens to bring representative claims to recover civil penalties rather than individualized damages, the court held that PAGA plaintiffs were truly serving as deputized attorneys general rather than as private litigants seeking to make themselves whole.[190] The court also deemed it legislatively significant that, before bringing a PAGA claim, employees were required to provide written notice to the LWDA and give the department the opportunity to bring a civil action itself.[191] In reaching its decision to invalidate PAGA waivers, the court held that such waivers would frustrate the law's public policy aims and were thus unenforceable pursuant to state law.[192]

In creating a qui tam regime, states can make a number of design choices that enable courts to easily understand the legislation's public regulatory purpose. States should begin by creating representative claims either following California's approach or through the more traditional qui tam relator structure.[193] By formally identifying these claims as ones in which plaintiffs act on behalf of the government rather than themselves, the legislature clearly communicates that the plaintiffs are working to vindicate the public interest.[194] To further crystallize the public role that state qui tam actions would serve, any proposed statute should assess civil penalties against violators rather than award individual damages. A majority of fines recovered from qui tam enforcement actions should be funneled back to the state labor department; only a small fraction of the money—though enough to incentivize bringing claims—should go to the individual plaintiff or relator.[195]

In addition to designing the complaint and recovery structure to highlight the public focus of the law, state legislatures would be wise to include statutory language and procedures that further evince this motive. For instance, like California,[196] a state may wish to give its labor enforcement agency exclusive jurisdiction over relevant qui tam claims for a certain amount of time. A notice requirement, in which aggrieved employees must inform their

189. *Id.* at 146, 149.

190. *Id.* at 146.

191. *Id.* at 146–47.

192. *Id.* at 149.

193. California created representative actions whereby an aggrieved employee could bring a claim on behalf of herself and other similarly situated employees. CAL. LAB. CODE § 2699(a) (West Supp. 2019).

194. Lawson v. ZB, N.A., 227 Cal. Rptr. 3d 613, 624 (Ct. App. 2017), *aff'd on other grounds sub nom.* ZB, N.A. v. Superior Court, 2019 WL 4309684 (Cal. Sept. 12, 2019). Compare to Title VII, 42 U.S.C. § 2000e-2(k) (2012), which has clear public policy goals but uses a traditional plaintiff-defendant structure. Title VII claims are subject to arbitration. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 124 (2001).

195. In PAGA cases, 25 percent of recovered penalties are distributed amongst aggrieved employees, and the remaining 75 percent goes to the State of California. CAL. LAB. CODE § 2699(i) (West Supp. 2019). In FCA cases, the relator receives anywhere between 15 and 30 percent of the recovery. 31 U.S.C. § 3730(d) (2012).

196. CAL. LAB. CODE § 2699.3(a)(2)(A) (West Supp. 2019).

state's labor department of their intention to file suit, reinforces the idea that the government first maintains control before choosing whether to delegate enforcement to private citizens.[197] Making explicit the statute's public policy goals helps insulate the law against waivability challenges.

Because state law generally controls the voidability of contracts, legislatures should ensure that the language describing the law's public purpose reflects the state's determined grounds for invalidating private agreements that are contrary to public policy. For example, California law holds that a party can waive their right to bring a claim under a statute intended solely for that party's benefit but not a statute the legislature has created "for a public reason."[198] Consequently, the legislature's clear articulation of PAGA's public purpose enabled the statute to withstand waivability challenges.[199] Other states have phrased their public policy contractual enforcement exceptions differently. For instance, the Connecticut Supreme Court held that individuals or groups cannot waive "a public obligation created by statute."[200] Accordingly, state legislators should tailor their statutory language to the language courts have used in defining the public policy grounds for voiding a contract. Congruence with state law makes the legislative intent clear to courts. If the state qui tam law's relevant rights and remedies are aligned with its stated public interest goals, courts will be more likely to hold waivers of such claims invalid on public policy grounds.

B. *Crafting State Qui Tam Laws to Avoid Collateral Damage Associated with Arbitration and Prelitigation Settlement*

Even if courts invalidate state qui tam claim waivers on public policy grounds, these claims could still face barriers to enforcement. Arbitration and prelitigation settlement agreements reduce the efficacy of employment discrimination laws by suppressing the number of complaints by aggrieved employees and quashing public access to information regarding employer misconduct.[201] But with appropriate structures in place, these negative effects can be avoided even when courts enforce arbitration and prelitigation settlement agreements. In crafting qui tam legislation, state legislatures

197. PAGA requires that aggrieved employees give written notice to the Labor and Workforce Development Agency. *Id.* § 2699.3(a)(1)(A). Within sixty days, the agency will notify the complainant whether it intends to investigate the complaint. *Id.* § 2699.3(a)(2)(A). After receiving notice that the agency will not investigate, or sixty-five days after submission of the complaint, the employee may commence a civil action. *Id.*

198. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 680 (Cal. 2000) (quoting CAL. CIV. CODE § 3513 (West 2016)).

199. *Cf. id.*

200. Pereira v. State Bd. of Educ., 37 A.3d 625, 655 (Conn. 2012) (quoting L'Heureux v. Hurley, 168 A. 8, 11 (Conn. 1933)).

201. *See* Estlund, *supra* note 14; Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929–30 (2006).

should keep an eye toward enforcement and create public accountability requirements to ensure that the law sufficiently vindicates the public interest.

Courts may be more likely to deem a qui tam claim outside the scope of an employee arbitration agreement if the public purpose of the law is clearly articulated and the government's role clearly delineated.[202] In cases where courts have declined to compel qui tam claims to arbitration, analysis has largely centered on the fact that the claims belong to the *government*, which was not a party to the employment contract.[203] But the legislature merely stating that the claims belong to the government will likely prove insufficient, because the substance of the law and the procedures by which it is enforced must reflect the fundamentally public purpose the law serves.[204] Courts may be more likely to find that the government, rather than the employee, fundamentally controls the qui tam claim when the legislation incorporates some or all of the following characteristics: (1) conferring exclusive, time-limited jurisdiction of relevant claims to the state; (2) expressly declining to create a private right of action; and (3) allowing any person, not just an employee, to bring a claim against a violator.

First, state legislators should consider creating a regime that relies on government agencies like the EEOC or California's LWDA to process complaints filed by aggrieved employees.[205] This regime supports the assertion that the claims belong to the government and that private litigation is merely a means the government has selected for public enforcement.[206] In *EEOC v. Waffle House*, the EEOC represented both the public interest in deterring employers from engaging in unlawful and discriminatory conduct and the private employee's interest in recovery for the workplace injury.[207] The remedies sought—injunctive relief and individual damages—served both sets of interests.[208] Because the agency was "the master of its own case," retaining both exclusive jurisdiction over the claims for 180 days and the ability to pursue claims without the aggrieved employee's consent, it was within the

202. *See* United States *ex rel.* Welch v. My Left Foot Children's Therapy, LLC, 871 F.3d 791, 794 (9th Cir. 2017).

203. *See* Nguyen v. City of Cleveland, 138 F. Supp. 2d 938, 939 (N.D. Ohio 2001); Mikes v. Strauss, 889 F. Supp. 746, 755 (S.D.N.Y. 1995). *But see* Deck v. Miami Jacobs Bus. Coll. Co., No. 3:12–cv–63, 2013 WL 394875, at *6–7 (S.D. Ohio Jan. 31, 2013).

204. *See, e.g.*, *Mikes*, 889 F. Supp. at 755–56 (looking to the "primarily remedial" function of the provision at issue in concluding that a claim for retaliatory discharge, unlike related qui tam claims, belonged in arbitration).

205. *See* Labor Code Private Attorneys General Act of 2004, CAL. LAB. CODE § 2699.3 (West Supp. 2019) (requiring aggrieved employees to provide written notice of the violation to the employer and LWDA before being permitted to bring a civil action).

206. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 291 (2002); Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 149 (Cal. 2014).

207. *See Waffle House*, 534 U.S. at 291.

208. *See id.* at 290–91. Make-whole, victim-specific damages served the public interest even if they also served the private interest. *Id.* at 291–92.

agency's authority to decide which remedies to pursue.[209] As a nonparty to the employee arbitration agreement, the EEOC could bring the claim against the employer without being compelled into arbitration.[210]

Although state qui tam claims differ from EEOC claims in that an individual, rather than a government agency, brings the action, *Waffle House* still provides insight into how courts may determine who "owns" a particular claim. States enacting their own qui tam laws will likely want to maintain some ownership over the relevant claims to preserve the regime's public enforcement goals. *Waffle House* indicates that when claims systems require aggrieved employees to file complaints with the state agency that oversees such claims, courts may be more inclined to find that the government exercises substantial control over the claims and thus decline to compel arbitration.[211]

Second, states should consider declining to create a private right of action when enacting qui tam legislation. Although the jurisprudence is not entirely settled on the issue, courts seem to be more likely to decline to compel arbitration when the qui tam statute creates no private right of action for individuals.[212] In *Lawson v. ZB, N.A.*, the California Fourth District Court of Appeal determined that even though individuals may recover a portion of penalties assessed in PAGA claims, plaintiffs must bring the claim on behalf of the LWDA.[213] Furthermore, the plaintiff in *Lawson* sued primarily to recover only a designated fine for every week the employer was not compliant with state overtime laws and rest breaks; recovered wages were secondary.[214] Aggrieved employees have private means to recover lost wages but no private avenue to assess civil penalties against their employer.[215] Relying on that fact, the court held that while PAGA claims for back pay could be compelled to arbitration, equivalent claims for civil penalties could not.[216]

To clearly communicate the dominant public purpose of the law, states should pass qui tam legislation that enacts only civil fines that an aggrieved employee could not recover through any other means. This does not mean the violations need be substantively different than if individual damages were available; the state qui tam law could expressly prohibit underpayment of wages, for example, which is something barred by other state laws.[217] But

209. *Id.* at 291.

210. *Id.* at 292.

211. *See id.* at 291–92.

212. *See* Lawson v. ZB, N.A., 227 Cal. Rptr. 3d 613, 624 (Ct. App. 2017), *aff'd on other grounds sub nom.* ZB, N.A. v. Superior Court, 2019 WL 4309684 (Cal. Sept. 12, 2019); Esparza v. KS Indus., L.P., 221 Cal. Rptr. 3d 594, 607 (Ct. App. 2017).

213. *Lawson*, 227 Cal. Rptr. 3d at 620.

214. *Id.* at 625.

215. *Id.*

216. *Id.*

217. *See, e.g.*, CAL. LAB. CODE § 1194 (West 2011) (providing a civil remedy for workers paid less than the legal minimum wage independent of PAGA).

the state law must assess a unique penalty not akin to victim-specific, make-whole relief.

Third, states may want to allow a broad range of individuals to bring qui tam claims against employers. Although California chose to limit those who can bring qui tam claims against employers to employees of those companies,[218] other states considering adopting similar whistleblower legislation may be wise to allow any knowledgeable individual to bring such claims. In the most recent federal case involving a qui tam claim brought by an employee against a fraudulent employer, the Ninth Circuit declined to compel arbitration on the grounds that the arbitration agreement was limited to "*any claim* between the Company and Employee arising out of 'or related to' the employment relationship."[219] Since any individual—employee or not—can file suit for FCA violations, the court determined that the employee's allegations did not relate to her employment.[220] This was despite the fact that the employee only became aware of the fraud because of her employment relationship.[221] Therefore, a statute allowing any knowledgeable individual to bring a qui tam claim makes it less likely that the court will find that the claim is covered by an arbitration agreement that governs disputes related to employment.

Because compelled arbitration presents barriers to government enforcement of public interest laws, states enacting their own qui tam legislation may wish to broaden the class of individuals who can bring such claims. If a state followed California's lead by limiting those who can bring PAGA claims to aggrieved employees, courts may be more likely to find that the dispute arose out of the employment relationship and that the arbitration agreement thus governed. Accordingly, states wishing to communicate to courts the public nature of these qui tam claims should allow any individual with personal knowledge of violations to bring such claims in court.

C. *Tackling both Arbitration and Prelitigation Settlements*

Confidentiality provisions are a common feature of both arbitration agreements and prelitigation settlement agreements. These provisions threaten enforcement of employment discrimination laws by suppressing public knowledge of employers' wrongful conduct. Accordingly, when passing qui tam legislation designed to enforce labor and employment laws, states should establish structures that mitigate such information suppression. States can do so in a way that simultaneously addresses the use of confidentiality provisions in both contexts.

---

218. CAL. LAB. CODE § 2699(a) (West Supp. 2019).

219. United States *ex rel.* Welch v. My Left Foot Children's Therapy, LLC, 871 F.3d 791, 798 (9th Cir. 2017).

220. *Id.* at 799.

221. *Id.*

To preserve public knowledge of employment discrimination violations, states could implement a complaint disclosure requirement. For instance, a state could make public any complaint filed with the relevant state labor agency or publish a list of employers under investigation for failing to comply with relevant labor and employment laws.[222] Another option is for states to require court approval of any settlement agreements stemming from complaints of qui tam violations.[223] Finally, to deter employers from seeking enforcement of confidentiality provisions, states should consider enacting legislation invalidating contract provisions that prevent potential plaintiffs from discussing relevant matters with the state labor agency.[224] Ensuring that information regarding potential violations is made available to the public would help to prevent collective action problems and deter employers from skirting liability in the court of public opinion.[225]

Legislation allowing employee grievances would not only mitigate the genuine problem of information suppression but also further insulate qui tam legislation from challenges that would reduce its efficacy. Rules that do not attack arbitration on their face but are applied in a manner generally unfavorable to arbitration are preempted by the FAA.[226] States choosing to enact whistleblowers laws designed to enforce employment regulations must ensure that their laws do not single out arbitration for unfavorable treatment.[227] Addressing the enforcement challenges posed by confidentiality agreements would thus prevent the courts from misreading the legislation as targeting arbitration.

---

222. *Cf.* Allie Bidwell, *Feds Target 55 Colleges in Sex Assault Investigation*, U.S. NEWS (May 1, 2014, 2:26 PM), https://www.usnews.com/news/blogs/data-mine/2014/05/01/55-colleges-under-investigation-for-possible-title-ix-sexual-violence-violations (on file with the *Michigan Law Review*) (discussing the Obama Administration's decision to publish the list of colleges and universities under investigation, but not yet found in violation, for mishandling sexual assault and harassment complaints).

223. *See, e.g.*, CAL. LAB. CODE § 2699(*l*)(2) (West Supp. 2019) ("The superior court shall review and approve any settlement of any civil action filed pursuant to [PAGA]. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court."). Requiring settlement approval ensures both that the government is aware of any alleged violations and that any settlements sufficiently serve the public in the way the legislature contemplated. *See id.* § 2699.3(b)(4).

224. Federal courts have held that private agreements cannot interfere with the government's ability to enforce the law. Accordingly, a confidentiality agreement cannot prevent an employee from filing a charge with the EEOC. *E.g.*, EEOC v. Astra USA, Inc., 94 F.3d 738, 744–45 (1st Cir. 1996).

225. *See* RAJAN ET AL., *supra* note 18, at 2.

226. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011). Accordingly, the Supreme Court found that the FAA preempted a California state law that invalidated waivers of class claims because the formal procedures inherent to class claims undermined the purpose of arbitration. *Id.* at 352.

227. *See id.* at 341.

CONCLUSION

As the use of extrajudicial dispute resolution of labor and employment claims rises and state agency resources stagnate, many states struggle to adequately enforce employment discrimination laws central to creating a healthy and competitive economy. Qui tam laws can give states an additional, cost-effective enforcement tool that is insulated from some of the enforcement challenges that extrajudicial dispute resolution poses. Both California and the federal government have employed this technique to enforce laws designed to curb fraud and labor law violations. Despite numerous challenges to their validity, these qui tam regimes have consistently been upheld by the courts as valid tools for enforcing public interest laws. States struggling to deter employers from engaging in bad behavior should adopt their own qui tam regimes to stymie the growing challenge of underenforcement of employment discrimination laws.