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Testimony of Rachel Deutsch, Center for Popular Democracy, to the Senate Workforce Committee
Senate Bill 750
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My name is Rachel Deutsch and I am the supervising attorney for worker justice at the Center for Popular Democracy. CPD is a network of high-impact base-building organizations that work to create equity, opportunity and a dynamic democracy. In recent years, our network has been deeply engaged in campaigns to win new workplace protection standards: dramatic increases to the minimum wage, paid sick and family leave, and protections against volatile and unpredictable work schedules. These victories deliver real benefits to low-wage workers and their families. Yet under-enforcement risks rendering these new legal rights hollow – along with many well-established protections.

Effective enforcement of these laws depends on a combination of public enforcement (through state attorney general offices, state agencies, district attorneys, or others) and private enforcement (through lawsuits brought by harmed individuals). This Legislature has recognized that relying on Oregon's Bureau of Labor and Industries (BOLI), or any government office, to enforce all laws single-handedly is unrealistic – that is why so many Oregon statutes include a private right of action. But today, private enforcement of employment laws is increasingly hampered by pre-dispute arbitration provisions in job applications, employee handbooks, and contracts with employees and supposedly independent contractors. These "forced arbitration" clauses undermine substantive workplace rights by foreclosing judicial remedies, while deterring all but a few from seeking justice through arbitration. This assault on private enforcement leaves Oregon's working people increasingly dependent on BOLI, which is not up to the mammoth task of monitoring all workplaces and deterring violations.

1. The Spread of Forced Arbitration and Its Impact on Compliance

The share of workers subject to forced arbitration has more than doubled in recent years. Over 60 million American workers – more than 56 percent of the non-union, private sector workforce – have lost access to court to confront wage theft and workplace discrimination.[1] The situation is even worse for low-wage workers, two-

[1] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," Economic Policy Institute, April 6, 2018. State-specific data on the scale of forced arbitration clauses is not available for Oregon. However, in the ten largest states these clauses cover between 40 and 70 percent of the workforce.

thirds of whom are covered by forced arbitration clauses. And the share of the workforce blocked from suing their employer is expected to spike sharply in coming years.[2]

While employers tout arbitration as a cost-effective alternative to litigation, its true purpose is to suppress claims. Professor Cynthia Estlund estimates that an astonishing 98 percent of employment cases that workers would otherwise bring in court are abandoned due to a clear-eyed assessment of the mechanisms that stack the deck against plaintiffs in arbitration. This silencing effect results in 315,000 to 722,000 "missing" employment cases every year.[3] The impact of so many missing lawsuits goes beyond the many individual Oregonians who lack recourse when their rights are violated. It represents a systemic and significant reduction in our collective capacity to deter violations and incentivize compliance with important standards like fair wages and overtime, earned sick leave, and the opportunity to thrive regardless of race or gender.

BOLI staffing has not kept up with the growth of Oregon's workforce. In fact, since 1993, the number of BOLI staff has shrunk by over a third. For all of Oregon, BOLI has only 34 staff in the division that enforces minimum wage, overtime, and other basic standards. That means that for every civil servant in the Wage and Hour division, there are 55,487 workers. BOLI just doesn't have the resources to fully enforce workplace laws.

The University of Chicago economist Gary Becker posited that when the profitability of violating the law exceeds the amount of the penalty, adjusted for the likelihood of being caught and punished, corporate wrongdoers make a rational choice to disregard the law. *Forced arbitration affects over half of the workforce, and has the effect of deterring virtually all of those employees from taking steps to vindicate their rights under the law.* This assault on private enforcement presents Oregon with a stark choice: either triple the enforcement capacity of BOLI, or face an economy in which bad employers are emboldened to violate workers' rights and undercut their law-abiding competitors.

2. Expanding Public Enforcement Capacity through the Whistleblower Model

Fortunately, there is an effective and time-tested model for increasing public enforcement capacity, and it does not require new appropriations. Whistleblowers – those with inside knowledge of corporate fraud or illegality – have long been an important feature of American law enforcement. In *qui tam* actions (from the Latin for "he who sues in this matter for the king as well as for himself"), whistleblowers enforce the law on behalf of the state. The Federal False Claims Act (FCA) and most of its state-law analogs rely on whistleblowers to punish the submission of fraudulent claims and obtain restitution of government losses due to fraud.[4]

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[2] Colvin, *supra* fn. 1. Of the companies that currently force arbitration on their employees, 40 percent adopted the practice in the last few years, prompted by the Supreme Court's rulings in *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors*, which broadly upheld the use of forced arbitration clauses. This adoption pattern suggests we can expect an explosion in forced arbitration clauses and class-action waivers following Epic Systems.
[3] Cynthia Estlund, *The Black Hole of Mandatory Arbitration,* North Carolina Law Review, Vol. 96, 2018; NYU School of Law, Public Law Research Paper No. 18-07.
[4] See, e.g. 31 U.S.C.A. § 3729(a)(1).

In 2014, California enacted the Private Attorneys General Act (PAGA), which replicated many of the FCA's essential *qui tam* features in order to enhance enforcement of the state's labor code. Workers can file suit against their employer for most violations of the Labor Code and collect civil penalties on behalf of the State. Because PAGA is a representative action, the penalty amount is determined based on the number of workers in the state affected by the violation. PAGA has been enormously successful in empowering low-wage workers to vindicate their rights, promoting compliance with California workplace protections, and generating revenue for the state labor agency. In the most recent fiscal year, California's Labor and Workforce Development Agency received over $34 million in PAGA penalties. PAGA revenue has funded a wide variety of enforcement programs, including 13 staff devoted to addressing misclassification of employees as independent contractors; a comprehensive bilingual media campaign about workers' rights under California's Heat Illness Prevention regulations; enforcing farmworkers' rights to organize; and disbarring employers that violate state prevailing wage laws from bidding on public contracts.[5]

Incentives for whistleblowers have proven critical to uncovering information about illegal practices. Whistleblowers were the driving force behind disclosure of the Enron, Worldcom, and UBS tax fraud scandals.[6] Studies estimate that whistleblowers are responsible for approximately half of all detected fraud.[7] In 2017, 92 percent of the total recovery in federal FCA cases came from suits litigated by *qui tam* plaintiffs – resulting in the recovery of $3.4 billion for the U.S. government.[8] Myths about greedy trial lawyers using *qui tam* suits to harass defendants for a quick profit are not substantiated by the data. *In fact, analysis of over 4,000 qui tam suits shows that qui tam attorneys are better at screening meritorious cases, and that their expertise minimizes enforcement costs.*[9]

3. SB 750 Builds on These Precedents to Create an Innovative Enforcement Model

SB 750 combines PAGA's essential model with important oversight provisions that derive from feedback from the California DOL's experience administering PAGA claims and input from BOLI staff around Oregon-specific enforcement procedures. The bill allows the agencies to outsource the risk and cost of litigation to relators' counsel, while retaining the ability to oversee the case (by intervening, disqualifying relator's counsel if necessary, and approving settlements). Relators can act as a "force multiplier" for the under-resourced agency,

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[5] Data provided by Mark Woo-Sam, California Labor and Workforce Development Agency, by email of December 10, 2018 to Michael Rubin of Altshuler Berzon in response to Public Records Act request; data provided by Mark Janatpour, Deputy Labor Commissioner, California, by email of February 20, 2019, to Michael Rubin in response to Public Records Act request.

[6] Lesley Curwen, "The Corporate Conscience," THE GUARDIAN, June 21, 2003; Julia Homer & David M. Katz, "WorldCom Whistleblower Cynthia Cooper," CFO Magazine, Feb. 1, 2008; David Kocieniewski, "Whistle-Blower Awarded $104 Million by I.R.S." NY TIMES, Sept. 11, 2012.

[7] Aaron Jordan, "Whistleblowing Is a Key Regulatory Tool," The Regulatory Review, Feb. 2018.

[8] https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017.

[9] David Freeman Engstrom, "*Harnessing the private attorney general: Evidence from qui tam litigation*," Columbia Law Review. 112. 1244-1325 (2012).

collecting penalties to deter violations and building a culture of compliance, while increasing the agency's resources to conduct its own strategic enforcement activities.

4. Resourcing Community Outreach and Education

SB 750 earmarks a portion of the agency's share of penalty revenue to community-based outreach and education – partnerships between enforcement agencies and community-based organizations through which community groups conduct specific enforcement-related activities. Community groups can reach and build trust with low-wage workers in ways that local agencies cannot. Formally enlisting these organizations to play a role in enforcement brings culturally and linguistically appropriate outreach, industry-specific expertise, and sensitivity to the fears of an immigrant community that is increasingly under attack. Community organizations disseminate information about employment standards at their workplaces and in community settings, conduct know-your-rights trainings, help workers detect violations in their workplaces and gather information that the enforcement agency can use to prosecute cases, assist workers in filing complaints, identify patterns in high-violation industries to assist in targeted, proactive investigation and enforcement, and assist the enforcement agency in monitoring of workplaces.[10]

Cities like Seattle, San Francisco, and Los Angeles have integrated community partners into enforcement work via dedicated grants for outreach and education. This model improves enforcement of labor standards, particularly in "economic sectors with substantial immigrant populations where violations are endemic and difficult to eradicate."[11] In San Francisco, approximately one-third of the complaints received by the Office of Labor Standards Enforcement come from the contracted community groups, and 85% of the cases that result in recovery for workers originate through this program.[12] SB 750 will not only generate new revenue for enforcing workers' rights, but also allow Oregon to invest in this proven strategy for supporting vulnerable workers to vindicate their rights.

The forced arbitration crisis has dramatically eroded private enforcement, leaving BOLI as the sole protector of a growing number of Oregon workers. We urge this committee to support SB 750 to ensure that BOLI has sufficient capacity to create a culture of compliance with crucial workplace protections.

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[10] National Employment Law Project, Building Robust Labor Standards Enforcement Regimes in Our Cities and Counties (March 2015), *available at* https://www.nelp.org/publication/building-robust-labor-standards-enforcement-regimes-in-our-cities-and-counties/.
[11] Seema N. Patel, et al., California Co-Enforcement Initiatives that Facilitate Worker Organizing, *available at* http://harvardlpr.com/wp-content/uploads/2017/11/Patel-Fisk-CoEnforcement.pdf
[12] NELP, supra n. 11.