UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RALPH'S GROCERY COMPANY,	)	
	)	
and	)	
	)	Case 21-CA-073942
TERRI BROWN, an Individual	)	
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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*

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INTRODUCTION

This case involves a mandatory arbitration agreement imposed on employees by Respondent, which, in part, requires employees to "maintain the confidentiality of the existence, content, and outcome of any arbitration proceedings."[1] The Board has invited the submission of *amicus curiae* briefs concerning, among other questions, the validity of the confidentiality agreement in question.

The Board asks *amici* to weigh in on whether the Board correctly held in *California Commerce Club, Inc*., 369 NLRB No. 106 (2020), that the Federal Arbitration Act (FAA) "privileges employers' maintenance of confidentiality requirements in arbitration agreements that would otherwise violate Section 8(a)(1) [of the National Labor Relations Act] by interfering with employees' exercise of their rights guaranteed by Section 7" of the Act.[2] If the FAA "does not prevent the Board from reviewing arbitration confidentiality requirements under the National

[1] *Ralph's Grocery Company and Terri Brown*, 371 NLRB 50 (2022).
[2] *Id*.

Labor Relations Act," the Board asks what standard should determine whether such requirements are lawful.[3]

The Secretary of Labor submits this *amicus curiae* brief to inform the Board of the threat that confidentiality provisions like the one at issue pose for effective enforcement of worker protection laws under the U.S. Department of Labor's (DOL or Department) jurisdiction. While confidentiality agreements do not bar employees from cooperating with a government agency,[4] confidentiality agreements 1) undermine the worker and complaint-led system of enforcement at the core of dozens of worker protection statutes enforced by the Department; and 2) subvert the freedom to exercise rights and take collective action without fear, which statutes under the Department's jurisdiction seek to promote. Thus, as the Board considers whether or how employers should have the right to impose confidentiality agreements on workers, the Department hopes that its perspective and concerns may inform the Board's adjudication.

ARGUMENT

I. Confidentiality Agreements Undermine the Worker and Complainant-led System of Enforcement at The Core of Worker Protection Statutes Enforced by DOL

Congress has charged the Department with enforcing a wide range of worker protection laws that, at their core, depend on workers being able to report violations and cooperate with the agency. These laws empower workers to file complaints with the Department and, in many cases, also allow workers to bring cases directly to courts. Confidentiality agreements do not bar workers from cooperating with DOL. Nonetheless, DOL believes that confidentiality

[3] *Id.*

[4] *See, e.g.*, *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 744–45 (1st Cir. 1996); *E.E.O.C. v. Morgan Stanley & Co.*, No. 01CIV8421RMBRLE, 2002 WL 31108179, at *1 (S.D.N.Y. Sept. 20, 2002); *Hamad v. Graphic Arts Ctr., Inc.*, No. CIV. 96-216-FR, 1997 WL 12955, at *1 (D. Or. Jan. 3, 1997).

agreements, including the type of agreement at issue in this case 1) chill workers from reporting violations to DOL as they may not be aware of their rights to come forward; 2) prevent workers from learning about broader patterns of violations that are critical to inform private and public enforcement, reporting concerns to employers early, and supporting private actions, which increase public accountability for employers; and 3) deter workers from participating in DOL investigations and sharing key information if they do not fully understand the confidentiality provision or fear employer retaliation. Research outlined below has confirmed the silencing and chilling effects of confidentiality agreements. All workers and law-abiding employers lose when workers cannot exercise their rights without fear.

A. The Fair Labor Standards Act (FLSA) And Other Major Worker Protection Statutes Enforced by DOL Rely on Worker Complaints

The Department administers and enforces over 180 federal laws covering about 150 million workers and 10 million workplaces.[5] These include, for example, the FLSA, which establishes minimum wage, overtime pay, and child labor protections, the Occupational Safety and Health Act (OSH Act), which protects workers' right to a safe and healthy workplace, the Employee Retirement Income Security Act (ERISA), protecting workers pension and welfare benefits rights, the Family and Medical Leave Act (FMLA), and the Mine Safety and Health Act (Mine Act).[6]

Acknowledging that the Department on its own lacks the resources to oversee each of the more than 10 million workplaces nationwide, Congress has generally designed the country's workplace protection laws to empower workers to report violations to the Department, and,

[5] U.S. Dep't of Labor, Summary of the Major Laws of the Department of Labor, https://www.dol.gov/general/aboutdol/majorlaws (last visited Mar. 15, 2022).
[6] *Id.*

under many laws, take their claims directly to courts. In many cases, the Department depends on this complaint and worker-driven system of enforcement to learn of violations and strategically deploy its limited resources.

In the FLSA context, for example, the Secretary brings FLSA enforcement actions in federal court. *See* 29 U.S.C. § 216(c), 29 U.S.C. § 217. The FLSA also provides a private right of action, 29 U.S.C. § 216(b), and section 16(b)'s right for employees to bring an action on behalf of "themselves and other employees similarly situated" has been integral to the Act's enforcement since its enactment. *See* Fair Labor Standards Act of 1938, § 16(b), 52 Stat. 1060, 1069 (1938).[7] Private FLSA actions comprise most of the FLSA lawsuits filed in federal court, and the Secretary relies on private enforcement as an important and effective complement to DOL's own enforcement and to ensure robust enforcement of the FLSA. The FMLA is similar in that the Secretary brings enforcement actions in court, and it also includes a private right of action that permits employees to initiate suits on behalf of themselves as well as other employees similarly situated. *See* 29 U.S.C. § 2617(a)(2); 29 U.S.C. § 2617(b); 29 U.S.C. § 2617(d).

The Department relies on worker complaints in numerous other statutes. In the antidiscrimination context, the Department relies, in part, on workers of federal contractors who believe they may have been discriminated against in hiring or employment to file complaints with the Office of Federal Contract Compliance Programs. *See* 41 CFR § 60-1.21; 41 CFR § 300.61; 41 CFR § 741-61. The Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) both rely on workers raising concerns about hazardous conditions. 30 U.S.C. § 813; 29 U.S.C. § 657. And plant closings and layoffs

[7] The Age Discrimination in Employment Act, which is enforced by the Equal Employment Opportunity Commission, also incorporates FLSA section 16(b)'s right to proceed collectively. 29 U.S.C. § 626(b).

are sometimes subject to the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq*., which requires that employees receive early warning of impending layoffs or plant closings. While the Employment and Training Administration (ETA) issued implementing regulations and provides information to the public on the WARN Act, the Act is enforced *only* through private action in the federal courts. 29 U.S.C. § 2104.

Decades of reduced federal investment in the Department's budget have only made it more pressing and critical to the functioning of the enforcement regime to ensure that workers are aware of their right to file complaints with the Department or through private lawsuits (where a private right of action is available) and also cooperate with DOL investigations. As a recent U.S. Department of the Treasury report on the state of market labor competition noted, "[w]ith fewer enforcement personnel and a larger workforce, it is increasingly difficult for enforcement actions to reach the same portion of workplaces," and the "probability of a firm being inspected has decreased sharply."[8] The Wage and Hour Division, for example, currently employs 731[9] investigators to protect more than 143 million workers[10] while in 1948, it employed about 1,000 investigators to protect the rights of 22.6 million workers.[11] Ultimately, workers' ability to report concerns of violations without fear plays a fundamental role in key worker protection statutes like the FLSA, OSHA, and Mine Act, many of which also protect the most vulnerable workers in our economy.

[8] U.S. Dep't of the Treasury, The State of Labor Market Competition 37 (Mar. 7, 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.
[9] On file with author.
[10] Wage and Hour Div., U.S. Dep't of Labor, *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage (last updated July 2009).
[11] Wash. Ctr. for Equitable Growth, *Executive Action to Combat Wage Theft Against Workers* (Feb. 2021), https://equitablegrowth.org/wp-content/uploads/2021/04/022421-wage-theft-fs.pdf.

B. Both Workers and Law-Abiding Businesses Lose When Workers Cannot Publicly Disclose Wrongdoing or Feel Chilled from Discussing Past or Future Violations with Government Agencies like DOL

Beyond seeing worker reports of wrongdoing as a means to guide and supplement DOL's enforcement efforts, the Department views workers' ability to report wrongdoing to their co-workers, to government agencies, and through the courts as vital to promoting the *improvement* of working conditions, another core piece of DOL's mission.[12] All workers lose when any type of confidentiality agreement discourages a worker from reporting a violation that degrades the baseline conditions set by law. In addition, when workers cannot discuss past violations with fellow workers or are chilled from filing complaints with DOL or participating in future DOL investigations or private lawsuits as a result of a confidentiality agreement, workers and labor enforcement agencies lack access to vital information on potential violations or where they are likely to encounter abusive employers. Employers are also more likely to be able to continue to engage in violations when they know that a confidentiality agreement prohibits other employees from learning of an unlawful practice through the employee subject to the confidentiality provision. Law-abiding employers similarly lose when confidentiality agreements prohibit workers from sharing information with fellow workers about past violations and from working together to hold employers accountable, as well as when workers are chilled from cooperating with government agencies or legal tribunals or reporting future violations to DOL. In sum, confidentiality agreements help unscrupulous employers hide and continue to engage in violations, and they hurt law-abiding employers, which cannot compete on an even playing field.

[12] U.S. Dep't of Labor, About Us, https://www.dol.gov/general/aboutdol#:~:text=Our%20Mission,work%2Drelated%20benefits%20and%20rights (last visited Mar. 16, 2022).

C. Confidentiality Agreements Undermine Effective Enforcement of Worker Protection Laws

Confidentiality agreements like the one at issue here operate by definition to silence workers about their experiences and suspected employer violations. As such, they run directly counter to the system of public complaint-driven and worker-led enforcement that generally underlies the worker protection laws DOL enforces. Scholars and advocates have written extensively about the public policy and third-party harms tied to the silencing nature of confidentiality and non-disclosure agreements (NDAs). This section outlines concerns documented in recent studies. It also shows, more specifically, how confidentiality agreements threaten the effective enforcement of worker protection laws by preventing the disclosure of employer violations and likely discouraging employees from reporting future violations, cooperating with government agencies like DOL, and pursuing collective action with other workers.

Recent studies and articles show that confidentiality agreements and NDAs are rapidly becoming endemic in the workplace. (The research summarized here generally focuses on confidentiality agreements and NDAs without distinguishing between NDAs tied to mandatory arbitration and other NDAs.[13]) Experts estimate that over one-third of workers in the U.S. have

[13] *See, e.g.*, Jason Sockin et al., *Non-Disclosure Agreements and Externalities from Silence* (Jan. 2022), W.E. Upjohn Institute for Employment Research, https://ssrn.com/abstract=3900285; Nat'l Women's Law Ctr., *Limiting Nondisclosure and Nondisparagement Agreements That Silence Workers: Policy Recommendations* 1 (Apr. 2020), https://nwlc.org/wp-content/uploads/2020/04/NDA-Factsheet-4.27.pdf; Heidi Lynne Kurter, *4 Things You Didn't Know About Non-Disclosure Agreements*, FORBES, Jan. 21, 2020, https://www.forbes.com/sites/heidilynnekurter/2020/01/21/4-things-you-didnt-know-about-non-disclosure-agreements/?sh=614c23947c12; Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARVARD BUSINESS REVIEW, Jan. 30, 2018, https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change. It appears that more data is needed to understand the prevalence of confidentiality agreements in mandatory arbitration agreements.

agreed to some form of confidentiality or NDA.[14] Estimates of the incidence of NDAs by industry show higher percentages in industries like Accommodation and Food Services (44%), Agriculture (51%), Construction (41.3%), Health Care and Social Assistance (55.8%), Manufacturing (57.2%), Mining (59.6%), Retail Trade (50.5%), and Transportation and Warehousing (50.7%).[15] Employer use of forced arbitration agreements has separately increased exponentially in recent years. The Economic Policy Institute reported in 2018 that mandatory arbitration agreements applied to just 2 percent of workers in 1992 and now cover more than 55 percent of the workforce.[16] Mandatory arbitration is also "more common in low-wage workplaces," as well as "in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African American workers."[17]

Proponents of confidentiality agreements argue that workers bound by such agreements benefit in some ways, including, for example, by making it more likely that parties will settle, by securing confidentiality for experiences that a worker does not wish to disclose, or by providing workers with an economic advantage in settlement negotiations when confidentiality presents something of value for the employer.[18] But most workers, and certainly workers in low-wage industries, have little to no negotiating power when executing specific terms of mandatory arbitration agreements. Moreover, the literature on NDAs and related restrictive covenants

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[14] Orly Lobel, *supra* note 13; Nat'l Women's Law Ctr., *supra*, at 1. A recent detailed analysis of 33,000 workers and 1,800 U.S. firms found that NDAs covered 57 percent of the workforce and that 88 percent of firms used NDAs for at least some workers. Jason Sockin et al., *supra*, at 7 (citation omitted).
[15] Jason Sockin et al, *supra*, at 12.
[16] Alexander J.S. Colvin, Econ. Policy Inst., *The Growing Use of Mandatory Arbitration* 1 (Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf.
[17] *Id*. at 2.
[18] *See, e.g.*, David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 Wash. U.L. Rev. 165, 182–85 (2019); Nat'l Women's Law Ctr., *supra*, at 2.

recognizes the important negative consequences for third-parties not directly bound by the agreements.[19] Those negative consequences include a system that leaves in place violators in the workplace and, in fact, "enables" them, potentially increasing unlawful behavior.[20] Confidentiality agreements also contribute to information asymmetry for workers deciding where to seek employment,[21] which hampers the improvement of working conditions that could result if workers were to reward good practices by actively choosing to work for employers with a good reputation.[22] And confidentiality agreements deprive workers of the opportunity to connect with other workers about their experience and form coalitions or engage in organizing to improve job conditions.[23]

[19] *See, e.g.*, David A. Hoffman & Erik Lampmann, *supra*, at 169–203; Nat'l Women's Law Ctr., *supra*, at 2; Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 Wm. Mitchell L. Rev. 627, 644–46, 693–771 (1999); Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. Rev. 869, 874–76, 886–93 (2016).
[20] *See* David A. Hoffman & Erik Lampmann, *supra*, at 174 (noting in the sexual harassment context that "[w]hen a firm pays a survivor to remain silent about past abuse, it is more likely to leave in place abusers and the culture that enables them" such that "[t]he result is to increase the incidence of and harm caused by sexual harassment").
[21] *Id*. at 178 ("[W]hen hush contracts keep secret the details of sexual misconduct, they make it next to impossible for new entrants to the workplace (or community, market, etc.) to be certain of their safety. . . . How are candidates for entry-level positions navigating the information asymmetry they face when deciding whether to enter into a new workplace full of landmines they couldn't unearth through even the most exhaustive due diligence?").
[22] *Id*.; Jason Sockin et al., *supra*, at 4 (noting that their study of NDAs "suggests that NDAs effectively compress the distribution of employer signals, preventing high-road employers from distinguishing themselves from low-road competitors" and that this evidence provides "the first causal evidence substantiating concerns about negative externalities that broad NDAs create by propping up firm reputation and suppressing information flows in labor markets").
[23] David A. Hoffman & Erik Lampmann, *supra*, at 179 ("The final cost we want to add to the ledger is the deprivation of survivors' ability to openly and honestly talk about their experiences and to form coalitions with other survivors"); Nat'l Women's Law Ctr., *supra*, at 2 (noting that "employers too often abuse . . . NDAs, pressuring victims into signing them in order to cover up harassment, hinder the ability of working people to come together to address worker rights violations, and avoid accountability").

Articles evaluating workers' everyday interactions with confidentiality agreements caution that workers often read such agreements too broadly and do not fully understand that confidentiality agreements cannot extend to cooperation with government agencies like the NLRB, EEOC, and DOL.[24] In some cases, "employers threaten litigation even under those circumstances in which NDAs would be void."[25] These concerns are especially salient because workers in low-wage industries encounter confidentiality agreements but often cannot afford to hire an attorney to counsel them on the scope and implications of such an agreement.[26]

Little empirical research on confidentiality agreements and NDAs has emerged due to the data and practical challenges with evaluating the effects of agreements that silence workers, and most of the research to date has focused on NDAs, generally. Past research on NDAs nevertheless helps shed light on the concerns and consequences surrounding confidentiality agreements, including confidentiality requirements that form part of a mandatory arbitration agreement. The first empirical study on the effects of NDAs confirms two critical concerns: 1) that workers are more likely to share negative information about their employers when not subject to NDAs; and 2) NDAs may chill workers from reporting violations to government agencies. The study found that "NDAs prop up firm reputation and suppress the provision of

[24] Orly Lobel, *supra* note 13; Nat'l Women's Law Ctr., *supra*, at 1; Heidi Lynne Kurter, *supra*.
[25] Orly Lobel, *supra* note 13.
[26] According to the Center for American Progress, "[p]ast estimates and more recent state-by-state studies suggest that about 80 percent of the civil legal needs of those living in poverty go unmet as well as 40 to 60 percent of the needs of middle-income Americans," though it is difficult to estimate the number precisely. Rebecca Buckwalter-Poza, Ctr. for Am. Progress, *Making Justice Equal* (Dec. 2016), https://www.americanprogress.org/article/making-justice-equal/. Regarding civil matters, "people of color, women, immigrants, the elderly, people with disabilities, and lesbian, gay, bisexual, and transgender, or LGBT, people are more likely to live in poverty and more likely to need legal assistance." *Id.* In addition, "too few Americans qualify for legal aid due to the extremely low income cutoff" but few can afford to hire a lawyer, "a luxury that runs $200 to $300 per hour on average." *Id.*

negative information" and that "policies that narrow NDAs attenuate the negative externalities on jobseekers by increasing both the supply and value of negative information."[27] It also found evidence that laws that narrow NDAs "increase[] workers' propensity to file complaints about unlawful workplace conduct with the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA)."[28] Thus, while the study did not distinguish between NDAs tied to mandatory arbitration and those that arise in other situations, it nevertheless offers valuable confirmation that silencing workers comes with negative externalities for other workers, law-abiding employers, and government enforcement agencies.

Confidentiality agreements, such as the one at issue here, interfere with the Department's effective enforcement and achievement of its mission given the chilling and silencing effects of NDAs documented in the research outlined above. Whether in the context of forced arbitration or more generally, any time a confidentiality agreement prohibits or chills workers from disclosing violations to fellow workers, government agencies, or courts, other workers lose the opportunity to gather critical information about their industry and even their own workplace. The consequences become more significant for workers subject to forced arbitration because confidentiality agreements in that context prevent workers from speaking out about concrete, past violations or suspected violations (as opposed to situations where the agreements prospectively silence workers about violations they may encounter). The documented chilling effect of confidentiality agreements on workers who may not fully understand their scope will also keep unknown numbers of workers from cooperating in Department investigations, reporting repeat or new violations after the conclusion of arbitration, and otherwise exercising

[27] Jason Sockin et al., *supra,* at 2–3.
[28] *Id*. at 2.

their statutory rights. The Department thus urges the Board and courts evaluating the validity and application of confidentiality agreements to consider those agreements' interaction with other laws and implications for enforcement interests.

II. Confidentiality Agreements Subvert the Principles and Goals Associated with Retaliation Protection and Collective Action in Laws Enforced by DOL

A number of the Department's key worker protection laws—the FLSA, FMLA, Mine Act, ERISA, and the OSH Act, for example—include important protections for workers who file complaints or aid investigations into their violations. These anti-retaliation and whistleblower protection laws are vital to the enforcement of the core protections with which they are associated under the Department's purview. The provisions give workers protection if they file a complaint, voice concerns, or cooperate with the Department's investigations and their employer retaliates against them. By providing these protections, Congress has repeatedly recognized that employees are this Nation's eyes and ears for identifying and controlling workplace violations and hazards. The provisions also more broadly advance the principle that workers should be free to exercise their rights. And under the FLSA, Congress has expressly recognized collective action as an important mechanism for effective enforcement of our laws. By silencing workers, confidentiality agreements directly subvert these principles and goals.

A. Worker Protection Laws Enforced by DOL Commonly Support the Exercise of Workplace Rights Without Fear of Retaliation

The laws that DOL enforces commonly include robust anti-retaliation protections. These provisions often allow for punitive and compensatory damages, in addition to other remedies like reinstatement that can help make a worker whole when an employer has retaliated. The following examples highlight how Congress and courts have long recognized that for rights to

prove meaningful, workers must believe that they can assert their rights and hold employers accountable without fear of being fired, harassed, or otherwise discriminated against.

The FLSA provides workers strong protection from retaliation for exercising their FLSA rights in any venue. The Act provides that it shall be unlawful for any person "to discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3). The Act allows for "such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) . . . , including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). When DOL learns that retaliation or the threat of retaliation may discourage workers from exercising their rights under the FLSA or other laws or that an employer has subjected a worker to an adverse action, DOL seeks to intervene early and stop retaliation as soon as possible. DOL's record of frequently obtaining preliminary injunctions[29] and substantial punitive damages for workers[30] subjected to

[29] *See, e.g.*, Press Release, U.S. Dep't of Labor, U.S. Department of Labor Obtains Court Order Restraining Massachusetts Contractors from Unlawful Retaliation Against Employees Who Assert Rights (Nov. 9, 2020), https://www.dol.gov/newsroom/releases/sol/sol20201109; Press Release, U.S. Dep't of Labor, US Department of Labor Obtains Preliminary Injunction Restraining Massachusetts Contractor from Retaliating Against Employees (May 24, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210524-1; Press Release, U.S. Dep't of Labor, Federal Court Orders Louisiana Farm, Owners to Stop Retaliation After Operator Denied Workers' Request for Water, Screamed Obscenities, Fired Shots (Oct. 28, 2021), https://www.dol.gov/newsroom/releases/whd/whd20211028-0; Press Release, U.S. Dep't of Labor, US Department of Labor Files Restraining Order to Stop Rosedale Farm Operator from Retaliating Against H-2A Workers, Obstructing Investigation (Sept. 22, 2021), https://www.dol.gov/newsroom/releases/whd/whd20210922-2.

[30] *See, e.g.*, Press Release, U.S. Dep't of Labor, Court Orders Massachusetts Employer Who Threatened Employee to Pay $25K in Punitive Damages, Plus $164K in Wages, Damages to Underpaid Employees (Mar. 9, 2022),

retaliation underscores the fundamental nature of the right in the FLSA and other laws to come forward freely and without fear. As the Department's Wage and Hour Acting Administrator recently noted in a Field Assistance Bulletin providing guidance to staff about retaliation, "[a]nti-retaliation protections safeguard the basic rights afforded to workers in the United States" and "hold the promise that workers can complain to the government or make inquiries to their employers about violations of the law without fear that they will be terminated or subject to other adverse actions as a result."[31]

In addition to guaranteeing workers a right to assert their FLSA rights without fear through its anti-retaliation provisions, the FLSA recognizes the importance of collective action in the effective enforcement of critical minimum wage and overtime rights. As noted above, under the FLSA, the Department may bring suit itself, and employees may also independently bring suit in court of competent jurisdiction for unpaid wages and liquidated damages. 29 U.S.C. § 216(b). The statute permits employees to sue individually or on behalf of "other employees similarly situated," provided that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party." *Id*. Employees who prevail are entitled to reasonable attorney's fees. *Id*. In collective actions, employees must "opt in" to be a party to the action, in contrast to class actions under Fed. R. Civ. P. 23(b)(3), where employees

https://www.dol.gov/newsroom/releases/whd/whd20220309-0; Press Release, U.S. Dep't of Labor, New Hampshire Retailer Pays $50,000 in Punitive Damages to Worker Terminated After Asking For Owed Overtime Wages (Feb. 1, 2022), https://www.dol.gov/newsroom/releases/whd/whd20220201-0; Press Release, U.S. Dep't of Labor, Federal Court Enters Consent Judgment Permanently Enjoining Massachusetts Contractor from Employee Retaliation (Nov. 3, 2021), https://www.dol.gov/newsroom/releases/whd/whd20211103.

[31] Memorandum from Jessica Looman, Acting Administrator of the Wage and Hour Division, U.S. Dep't of Labor, to Regional Administrators, Deputy Regional Administrators, Directors of Enforcement, District Directors (Mar. 10, 2022), https://www.dol.gov/sites/dolgov/files/WHD/fab/fab-2022-2.pdf.

are members of a class unless they "opt out" of it. FLSA collective actions often include large numbers of employees. *See, e.g.*, *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 874 (8th Cir. 2011) (5,543 servers and bartenders); *In re Novartis Wage and Hour Litig.*, 611 F.3d 141, 144 (2d Cir. 2010) (2,500 pharmaceutical sales representatives); *Veliz v. Cintas Corp.*, No. C03-1180 RGS SBA, 2009 WL 1766691, at *2 (N.D. Cal. June 22, 2009) (2,400 service sales representatives). Given the Department's limited resources, collective actions constitute a necessary complement to the Department's enforcement because they allow employees to redress violations that otherwise would not be remedied.

In the health and safety context, the OSH Act protects workers from retaliation under Section 11(c) of the Act (29 U.S.C. § 660). Section 11(c) bans retaliation against workers not only for filing complaints with OSHA and the employer, but also, in part, for exercising rights under the OSH Act. Among those rights is the right to communicate with union officials and co-workers about occupational hazards. *Donovan v. Diplomat Envelope, Inc.*, 587 F. Supp. 1417, 1424 (E.D.N.Y. 1984), *aff'd without opinion*, 760 F.2d 253 (2d Cir. 1985); OSHA Whistleblower Protection Program, U.S. Dep't of Labor, *Investigator's Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Provision* 5, https://www.osha.gov/sites/default/files/11cDeskAid.pdf (last updated Jan. 9, 2019). The Secretary may seek "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." 29 U.S.C. § 660. In addition, OSHA's Whistleblower Protection Program enforces 24 other whistleblower statutes covering workers in airline, consumer products, environmental, financial reform, food safety, commercial motor vehicle, health insurance reform, motor vehicle safety, nuclear energy, railroads, securities, and antitrust

matters.[32] Under almost all of these statutes, employees litigate their cases before DOL administrative law judges.

When it comes to mine safety, MSHA, as well as court and Federal Mine Safety and Health Review Commission decisions, recognize the life and death importance of empowering workers to report violations without fear. The Mine Act prohibits discharge, discrimination, or interference with the exercise of statutory rights of any miner. 30 U.S.C. 815(c)(1). Miners have the right to report hazards to MSHA, 30 U.S.C. § 813(g), and courts have recognized how miners may be chilled from exercising those rights. *Marshall Cty. Coal Co. v. FMSHRC*, 923 F.3d 192 (D.C. Cir. 2019). Miners who believe they have suffered retaliation can file a complaint with MSHA; the Act requires an investigation to begin within 15 days of the Secretary's receipt of the complaint, and "if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). These protections are essential for miners. Congress stated that, for the Mine Act to be effective, "miners will have to play an active part in the enforcement of the Act" and "must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977).

In addition, the Employee Benefits Security Administration (EBSA) enforces Section 510 of the ERISA, which prevents an employer from taking punitive action against a participant for exercising his or her rights under an employee benefit plan. 29 U.S.C. § 1140. Similarly, the Office of Federal Contract Compliance Programs enforces the anti-retaliation provisions of

[32] U.S. Dep't of Labor, Occupational Safety and Health Administration, Statutes, https://www.whistleblowers.gov/statutes (last visited Mar. 20, 2022).

Executive Order 11246, which protect against intimidation and interference based on filing a complaint, assisting in an investigation, opposing an unlawful practice under equal opportunity laws, or exercising other protected rights. 41 C.F.R. § 60-1.32. The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination in employment against a person who applies to be a member, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service. 38 U.S.C. § 4311. It also, in part, prohibits retaliation against a person because that person has exercised a right under the law. *Id*.

B. Confidentiality Agreements Subvert the Freedom to Exercise One's Rights or Take Collective Action Embedded in Worker Protection Laws Under DOL's Jurisdiction

As emphasized above, confidentiality agreements function by definition to silence workers. In the context of forced arbitration, confidentiality agreements like the one at issue in this case prohibit workers from discussing violations they have experienced and thus stand in the way of free collective action. Like retaliation and the threat of retaliation, confidentiality agreements also enable employers to evade the Department's scrutiny and will likely chill workers' exercise of their rights and cooperation with the Department in the future. As such, they directly subvert the principles of free exercise of rights in our worker protection laws, and, within the FLSA, the right to collective action. The Department will continue to monitor their use and implications for workers' ability to assert their rights and cooperate with our investigators, and the Department urges the Board to consider these implications in its analysis to the extent possible.[33]

[33] The Department also notes that the silencing and chilling nature of confidentiality agreements pose separate concerns based on the Department's role as a federal contractor and enforcer of various federal contracting laws. The federal government has long emphasized the importance of transparency and responsible investment of taxpayer dollars through federal contracting. Statutes

CONCLUSION

The Department considers confidentiality agreements a direct threat to its ability to effectively enforce the country's worker protection laws. While confidentiality agreements do not bar employees subject to them from cooperating with government labor enforcement investigations, such agreements, particularly in the context of forced arbitration, operate to silence workers and chill complaints, cooperation with government agencies like DOL, and collective action. The laws Congress enacted to protect workers depend at their core on workers' ability to report violations and publicly hold employers accountable. The retaliation protection provisions in numerous worker protection laws and the collective action mechanism in the FLSA stand as a testament to Congress' recognition of the importance of creating a rights and enforcement system in which workers can freely exercise their rights. Ultimately, the rapid proliferation of confidentiality agreements in the mandatory arbitration context and beyond fundamentally undermines our complaint-based system of workplace law enforcement.

Respectfully submitted,

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like the False Claims Act advance those goals by ensuring, in part, that employees of entities that receive government contracts can report wrongdoing without fear of retaliation. *See* 31 U.S.C. § 3730(h) (providing retaliation protection for any employee, contractor or agent who experiences various forms of adverse action because of lawful acts done under the False Claims Act). To the extent that confidentiality agreements are likely to chill employees' ability to serve as whistleblowers in the federal contracting context, DOL would urge the Board and any entity addressing the validity and scope of confidentiality agreements to factor in the potential consequences for the integrity of our federal contracting process.

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CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Brief for the Secretary of Labor have been served electronically this 21st day of March, 2022 upon the following counsel of record:

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