UNITED STATES DEPARTMENT OF LABOR

SOLICITOR OF LABOR

ENFORCEMENT REPORT

COERCIVE CONTRACTUAL PROVISIONS

FISCAL YEAR **2024**

Introduction

The Department of Labor and the Office of the Solicitor have encountered numerous instances of employment contracts that contain provisions that may discourage workers from exercising their rights under worker protection laws. These types of provisions—which, among other things, purport to require workers to waive their legal rights or reimburse their employer when the employer breaks the law—in many cases clearly violate the law. However, workers may not be aware that these provisions are unlawful, and even if they do know, may face the daunting prospect of expensive litigation or arbitration proceedings to vindicate their rights.

These contractual provisions—which are sometimes called "fine print"—can be highly coercive. For instance, a worker who signs a contract that contains these sorts of terms may stay in a job they would otherwise leave solely out of fear of legal and financial consequences for breaking the agreement. This can cause workers to remain in jobs that are unsafe, highly stressful, or that do not pay their workers properly. Furthermore, these provisions are more likely to impact the most vulnerable workers, such as those who earn the least or can least afford to leave their jobs. These coercive contractual provisions may also have a chilling effect on a worker's willingness to file a complaint reporting unlawful conduct or to cooperate in a Department of Labor investigation.

The Department of Labor (the Department) and the Office of the Solicitor (SOL) in particular have a unique role to play in enforcing the law and combatting the use of contractual provisions that violate worker protection laws. Workers have a right to report unlawful conduct to the Department and to cooperate in the Department's investigations and litigation, regardless of whether they have signed private contracts or mandatory arbitration agreements. The Department is not bound by private contracts or arbitration agreements between workers and employers. Where agreements are in place that prevent or chill workers from exercising their rights under worker protection laws, SOL may provide the only viable avenue for meaningful legal recourse—particularly where state and local laws are weak. SOL vigorously enforces the rights of workers who often cannot do so themselves, including workers subject to mandatory arbitration agreements and class action waivers.

In recent years, SOL has also utilized its singular position to combat coercive contractual provisions, filing innovative cases and amicus briefs to combat these growing coercive business practices. By helping ensure that all workers can report violations, engage with the Department, and exercise their rights under the law, SOL's work to combat coercive contractual provisions also represents an important overarching strategy to advance SOL's enforcement priorities, as outlined in SOL's 2022 and 2023 enforcement reports.

This special report highlights the Department's work to oppose and deter the use of coercive contractual provisions, highlighting seven types of especially concerning provisions:

I. Contractual provisions requiring workers to waive statutory protections
II. Contractual provisions that purport to require employees to agree that they are independent contractors
III. Indemnification-type provisions and related counterclaims purporting to shift liability for legal violations to workers or other entities
IV. "Loser pays" provisions attempting to require employees to pay the employer's attorney's fees and costs if the employees do not prevail in litigation or arbitration
V. "Stay or pay" provisions, including some training repayment assistance provisions, that purport to require workers to pay damages to their employer for leaving a contract early
VI. Confidentiality, non-disclosure, and non-disparagement provisions
VII. Company policies that purport to require workers to report safety concerns to their employer before contacting any government agencies

This special enforcement report addresses each of the provisions listed above. Each section includes a discussion of the issues raised by each type of provision, the worker protections implicated, and the work SOL has done so far to fight the unlawful use of these coercive provisions. The report concludes with a more extensive discussion of how the Department is not bound by contracts between workers and their employers, and thus the Department can vigorously advocate on behalf of workers in the fight against these coercive "fine print" provisions.

I. Contractual Provisions Requiring Workers to Waive Statutory Protections

Based on well-settled Supreme Court and Circuit Court precedent, a worker's rights to minimum wage, overtime pay, and liquidated damages under the Fair Labor Standards Act (FLSA) may not be abridged or waived by private agreement. *See, e.g., Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.,* 325 U.S. 161, 167 (1945); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 740 (1981); *Tony & Susan Alamo Found. v. Sec'y of Labor,* 471 U.S. 290, 302 (1985); *Genesis Healthcare Corp. v. Symczyk,* 569 U.S. 66, 69 (2013). The rationale is that these fundamental FLSA rights affect the public interest by protecting workers from the abuses of substandard pay, excessive hours, and unequal bargaining relationships. But some employers require workers to sign agreements that include provisions purporting to waive their rights to bring claims or recover damages under the FLSA. These include contractual provisions requiring workers to agree to a shortened statute of limitations to bring FLSA claims or to agree to forego the recovery of liquidated damages under the FLSA if their claims succeed. The FLSA provides a two-year period following a violation (three years if the violation is willful) for workers to bring claims to remedy any violations. Contractual provisions imposing shortened limitations periods would prevent workers from fully recovering back wages and damages due for violations and, in some cases, from recovering at all. In addition, the FLSA expressly makes liquidated damages available to workers as a typical remedy in addition to the back wages due for a violation. Therefore, contractual provisions shortening limitations periods or preventing workers from recovering liquidated damages for violations undermine the remedies available under the FLSA.

Last year, SOL filed an amicus brief with the Seventh Circuit in *Rodgers-Rouzier, et al. v. American Queen Steamboat Operating Company,* arguing that a provision in an arbitration agreement shortening the limitations period for bringing FLSA claims to six months was unenforceable. In the brief, SOL explained that the FLSA's wage protections may not be waived by private contracts and that the FLSA's statute of limitations determines both the timeliness of a claim and the extent of an employee's recovery of back wages and damages. SOL argued that shortened limitations periods, such as the one included in the arbitration agreement in that case, may cause employees to waive recovery for FLSA violations, which the FLSA expressly makes recoverable and the Supreme Court has held are not waivable. Such contractual provisions contravene the FLSA's stated policies by failing to protect employees from substandard labor conditions and employers from unfair methods of competition.[1] Although the Seventh Circuit decided the case on other grounds, it observed that the FLSA is "designed to defeat rather than implement contractual arrangements" and reaffirmed that parties may not generally waive, either directly or indirectly, the statutory wages guaranteed by the FLSA. *See* 104 F.4th 978, 994 (7th Cir. 2024) (citation omitted).

SOL has made similar arguments regarding the nonwaivability of statutory rights when enforcing the Employee Retirement Income Security Act (ERISA). In *Harrison v. Envision Management Holding, Inc. Board of Directors, et al.,* the Tenth Circuit adopted the position asserted by SOL in an amicus brief that an arbitration agreement is unenforceable if it precludes participants in an employee benefits plan from pursuing plan-wide relief under Section 502(a) of the ERISA. See 59 F.4th 1090 (10th Cir. 2023). SOL asserted a similar position in *Cedeno v. Sasson*, before the Second Circuit, which issued a favorable decision on May 1, 2024, see 100 F.4th 386 (2d Cir. 2024); Coleman v. Brozen before the Fifth Circuit (awaiting decision); *Parker v. Tenneco Inc*., before the Sixth Circuit, which issued a favorable decision on August 20, 2024, see 2024 WL 3873409; and *Platt v. Sodexo* before the Ninth Circuit, which had an oral argument on September, 12, 2024.

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[1] In 2012, SOL similarly filed an amicus brief with the Sixth Circuit arguing that a provision in an employment agreement shortening the limitations period to six months for bringing FLSA claims was unenforceable. The Sixth Circuit agreed, holding that the provision has "precisely the effect" of depriving employees of their FLSA rights, "operates as a waiver of [their] FLSA claim," and is therefore "invalid." *See Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 606-07 (6th Cir. 2013).

II. Contractual Provisions that Require Employees to Agree that They Are Independent Contractors

Combatting the misclassification of employees as independent contractors is fundamental to the enforcement of most labor laws. This is because under most federal labor laws, only workers who are employees under those laws are entitled to the benefits and protections of the laws. Misclassifying workers as independent contractors, among other harms, denies workers legal benefits and protections that they should receive, such as minimum wage, overtime pay, and health and safety protections. Some employers seek to bolster their misclassification of workers by requiring the misclassified workers to sign agreements claiming that they are independent contractors under the law. Such agreements, however, do not determine the worker's status as an employee or independent contractor under the law.

The Department's longstanding position has been that a provision in an agreement stating that a worker is an independent contractor is not relevant to, or at the very least does not determine, whether the worker is an employee or independent contractor under the FLSA. In other words, labeling an employee as an independent contractor does not remove the employee from the FLSA's protections. As the Department's Fact Sheet #13 explains, a worker's classification is determined by the economic realities of the worker's relationship with the employer. A contractual provision stating that the worker is an independent contractor tends to reflect mere labels rather than the economic realities of the relationship: "agreeing verbally or in writing to be classified as an independent contractor—including by signing an independent contractor agreement—does not make a worker an independent contractor under the FLSA." Fact Sheet #13.

The Department brings numerous enforcement actions against employers that attempt to defend their non-compliance by wrongly claiming that workers are independent contractors under the FLSA. In those cases, SOL consistently argues against any claim that the worker's status as an independent contractor is proven by the "independent contractor agreement" that the worker was required to sign by the employer. This is because in a typical misclassification case, the agreement does not reflect any meaningful negotiation between the parties or the workers' intent to be in business for themselves. For example, in a brief filed in March 2024 with the Fourth Circuit in *Su v. Medical Staffing of America*, Case Nos. 23-2176 & 23-2284, SOL argued that labels or agreements characterizing a worker as an independent contractor are not determinative and, accordingly, that the independent contractor designation in the employer's agreements with the nurses was not material to the analysis of whether the nurses are employees or independent contractors under the FLSA.

Similarly, in Occupational Safety and Health Act (OSH Act) cases, SOL has successfully argued that contracts purporting to establish that workers were independent contractors did not detract from the workers' status as employees. *See A.C. Castle Construction Co., Inc. v. Acosta*, 882 F.3d 34, 40-41 (1st Cir. 2018); *Absolute Roofing & Construction, Inc. v. Sec'y of Labor,* 580 Fed. App'x 357, 362 (6th Cir. 2014) (noting that blanket contracts covering all work for an indefinite time are used to skirt the system and avoid the responsibilities of an employer-employee relationship); *Speedy Rooter/Capital Plumbing, Inc.,* 2019 WL 7373712 (OSHRC ALJ Docket No. 17-0274).

III. Indemnification-Type Provisions and Related Counterclaims

Some employers include provisions in contracts that seek to shift to workers the liability for and/or the cost of the employer's own violations of employment laws. These types of provisions include indemnification provisions whereby the employer requires the worker to reimburse it for any costs and expenses (including attorneys' fees) spent defending against a claim by the worker and any back wages and damages that the employer must pay the worker for the employer's own violations. Employers have included these provisions in contracts with workers that the employer misclassifies as independent contractors but who are employees under the law.

Practically, indemnification-type provisions in contracts with workers mean, for example, that a worker would be told that even if they bring a legal action and prove that they are an employee, they will nevertheless have to pay back the employer for any damages that they win along with the costs the employer incurred in defending itself. Not surprisingly, an employee will be much less likely to report the misclassification if it appears that the employer will win no matter the outcome and the employee may have to pay for the employer's legal defense.

As reflected in the numerous cases referenced below, an employer cannot seek indemnification or contribution from its employees (including by offsetting wages due to the employees) for the employer's liability under the FLSA. Such contractual provisions are contrary to public policy and unenforceable, and they chill workers' willingness to bring FLSA claims and participate in the Department's enforcement of the FLSA. (Contractual provisions requiring workers to pay the employer's attorneys' fees if the employer prevails in an FLSA claim brought by the worker raise similar concerns and are addressed in a separate section below.)

SOL has consistently and successfully argued that employers cannot seek indemnification or contribution under the FLSA by shifting their liability to the workers or another entity or individual (such as supervisors, independent contractors, third-party payroll companies, or joint employers). *See, e.g., Scalia v. Employer Solutions Staffing Group*, LLC, 951 F.3d 1097, 1103-04 (9th Cir. 2020); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 144 (2d Cir. 1999); *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1407-08 (10th Cir. 1992); *Acosta v. RAB Communications, Inc.*, No. 2:18-cv-1513, 2019 WL 7282347, at *4 (S.D. Ohio. Dec. 27, 2019); *Scalia v. MICA Contracting, LLC*, No. 1:18-cv-590, 2019 WL 6711616, at *2 (S.D. Ohio Dec. 10, 2019). As one district court explained, allowing employers to shift their liability through such provisions "would allow employers to contract away their obligations under the FLSA—a result that would be contrary to the purpose of the statute by weakening an employer's incentive to comply with the FLSA." *MICA Contracting*, 2019 WL 6711616, at *2.

SOL recently obtained a permanent injunction against Cargomatic, Inc., restraining the company from retaliating against delivery drivers who assert their FLSA rights and prohibiting the company from pursuing indemnity actions against any driver who has filed an FLSA complaint. Cargomatic is a transportation logistics company that calls itself a "broker" and contracts with drivers who deliver freight for its shipping company customers. Earlier this year, Cargomatic retaliated against multiple drivers who are plaintiffs in a private wage and hour lawsuit against CEVA Freight LLC, one of Cargomatic's customers. The plaintiff-drivers allege that they are CEVA's misclassified employees who have been denied overtime and other wages under the FLSA and California Labor Code. After the plaintiff-drivers filed the lawsuit, Cargomatic sent multiple threatening letters to them claiming that their contracts with the company require them to indemnify Cargomatic for all losses arising from the plaintiffs' claims against CEVA, including the cost of defending the lawsuit. Cargomatic managers also verbally threatened the plaintiff-drivers with countersuits for $150,000 in attorney's fees and termination if they did not dismiss their case against CEVA. Under the consent judgment, Cargomatic is permanently enjoined from retaliating against any drivers—including the plaintiffs in the CEVA case—who assert their FLSA rights and it is also enjoined from enforcing or threatening to enforce any indemnity clauses against drivers for losses arising from FLSA claims.

SOL also recently received a favorable decision in *Provencher v. Bimbo Bakeries USA, Inc.*, 705 F.Supp.3d 238 (D. Vt. 2023), where SOL intervened in a private FLSA action to argue for dismissal of a baking company's unjust enrichment counterclaim against its workers. In October 2022, bakery distributor drivers filed a private lawsuit in federal district court alleging they were misclassified as independent contractors under the FLSA and were entitled to overtime back wages. Bimbo Bakeries USA Inc. then countersued the drivers, seeking restitution of any money the workers earned while working for the companies, trying to offset any back wages or liquidated damages the court may ultimately award to the workers. As noted above, SOL intervened to move to dismiss the counterclaim, arguing that the FLSA does not allow employers to assert these types of claims against their workers who are seeking back wages. In its filing, SOL explained that courts have recognized that similar counterclaims tend to discourage workers from asserting their FLSA rights, which would include the right to participate in the Department's investigations and enforcement cases. In addition, SOL argued that enforcement efforts may suffer if employers raise impermissible counterclaims in FLSA cases, as the Department depends on workers coming forward to report potential FLSA violations. The district court agreed, concluding that the unjust enrichment counterclaim to offset an award of back wages and liquidated damages should be treated the same as an indemnification/contribution claim, which courts have previously held are foreclosed under the FLSA, as noted above. *Id*. at 249-52. The court then concluded that the FLSA preempts counterclaims such as the one at issue in this case where those counterclaims cut against the central purposes of the FLSA. *Id*. at 252-56. Consistent with SOL's argument, the court concluded that unjust enrichment counterclaims may chill workers from asserting their rights, including coming forward to inform the Department of potential violations of the FLSA. *Id*. at 256.

IV. "Loser Pays" Provisions

Some employers have added provisions in employment contracts that purport to require the worker to pay the employer's attorney's fees and costs if the employer prevails in an employment dispute—also known as "loser pays" provisions. These "loser pays" provisions discourage workers from advocating for their legal rights, because many workers cannot afford to risk being forced to pay thousands of dollars for their employer's attorney's fees if their case is not successful. Accordingly, these provisions have a chilling effect that prevents workers from bringing claims under worker protection laws.

Furthermore, some laws, like the FLSA, contain a one-way fee shifting provision, which means that a worker who wins their case can obtain an award of attorney's fees from the employer, but an employer who wins the case cannot recover attorney's fees from the worker. Thus, "loser pays" provisions are not permitted under the FLSA. But employers still often include them in contracts workers must sign, especially in agreements that require the parties to resolve their disputes in arbitration.

In March 2023, SOL brought a case (amended in July 2023) in the U.S. District Court for the Eastern District of New York seeking an injunction to prevent Advanced Care Staffing, LLC (ACS) and other defendants from violating the FLSA by pursuing arbitration to enforce an agreement that contained a "loser pays" provision. The case involves nurses from the Philippines who were recruited by ACS to work in the United States. ACS required them to sign a contract that stated that the nurses had to work exclusively for ACS in the U.S. for three years. The agreement also required all employment-related disputes to go to arbitration, and provided that the party that lost in arbitration had to pay the winning side's attorney's fees (in addition to other types of damages, like lost profits).

In May 2024, the court issued a favorable decision, denying ACS's motion to dismiss the case. *See Su v. Advanced Care Staffing, LLC*, No. 23-cv-2119, 2024 WL 2053706, at *11 (E.D.N.Y. May 8, 2024). The court held that ACS's attempt to recover attorney's fees (and future profits and arbitration costs) may be a type of unlawful "kick-back" prohibited by the FLSA. The court explained that an employer is not permitted to recover costs from its employees that are primarily for the employer's benefit, and the types of damages ACS is seeking, including attorney's fees, are "categorically" for its own benefit. *Id.*

SOL also filed an amicus brief in the Second Circuit in private FLSA litigation brought against ACS specifically to oppose the company's use of a "loser pays" agreement. In that case, an immigrant nurse, Benzor Shem Vidal, alleged that ACS assigned him to work in a nursing home in Brooklyn that was severely understaffed, such that Vidal could not adequately care for his patients. Afraid of losing his nursing license, he quit after three months. ACS then initiated arbitration proceedings to recover its alleged damages and costs, which the district court enjoined. In the brief, SOL argued that the "loser pays" agreement prevents Vidal from vindicating his FLSA rights for several reasons: it violates the FLSA, which only permits one-way fee-shifting for employees (but not employers) to recover attorney's fees; it subjects him to the risk of incurring costs that he cannot afford in order to advance his FLSA claims; and it would chill him and other similar workers from bringing FLSA claims.

The Second Circuit agreed with SOL's argument, ruling in March 2024 that the nurse showed that the prospect of paying ACS's attorney's fees was so daunting that it could prevent him from pursuing his FLSA rights. *See Vidal v. Advanced Care Staffing, LLC*, No. 23-303-cv, 2024 WL 980634, at *2 (2d Cir. March 7, 2024).

V. Stay or Pay Provisions

Another type of provision that some employers include in employment contracts purports to require workers to pay their employer for leaving a job if they quit before working there for a certain length of time, known as a "stay or pay" clause. A "stay or pay" contract provision creates a large financial obstacle that deters a worker from leaving their job, and thus can have the effect of trapping a worker in a job for months or years, leaving the worker particularly vulnerable to workplace violations. This means a worker might stay in a job where their employer is violating worker protection laws because the worker cannot afford to leave.

"Stay or pay" clauses often attempt to make workers liable for a variety of expenses, such as the employer's costs to replace the worker, the employer's lost profits, the employer's attorney's fees, and the cost of certain training provided to the worker. In some cases, the Department is seeing attempts by employers to recover significantly more money from an employee who has resigned than the employer ever even paid to the employee.

The Department's regulations and several court cases have established that employers are generally not allowed to recover many of these types of costs from employees.[2] A Department regulation, 29 C.F.R. § 531.35, states that under the FLSA, employers cannot require employees to "kick back" wages to the employer where the kickbacks would bring the employee's pay below the required minimum wage or overtime wage . Rather, wages must be paid "free and clear"—that is, they must be paid finally and unconditionally, without any attempt by the employer to claw them back. *Id.*

In the Advanced Care Staffing (ACS) case discussed above, SOL is challenging an employer's "stay or pay" provision that required immigrant nurses to work for the company for three years, or else to pay the company for lost profits, attorney's fees, and the costs of arbitration if they quit early. In May 2024, a district court ruled that SOL presented a viable legal theory that ACS's effort to recover these costs from its former employees is an unlawful attempt to force those employees to "kick back" their wages to ACS. *See Su v. Advanced Care Staffing*, 2024 WL 2053706. SOL contends that if ACS were able to recover those costs, it would impermissibly reduce the nurses' wages below the minimum wage and overtime pay requirements of the FLSA. Furthermore, given that the FLSA prohibits employers from making employees pay costs that are primarily for the benefit of the employer (such as ordinary business expenses) to the extent that such deductions bring the worker's wages below the required minimum wage or overtime pay, SOL is arguing that ACS's attempt to make its employees compensate it for lost profits violates the law. The district court agreed that SOL presented a plausible claim that at least some of the damages sought by ACS were primarily for its benefit, and, thus, the contract written by ACS may violate the FLSA.

2. Courts have recognized there may be an exception where the cost at issue is primarily for the benefit of the employee, such as when an employer pays for an employee to obtain an educational credential that would be transferrable and useful in another job, such as a college course or a degree. *See, e.g., Gordon v. City of Oakland*, 627 F.3d 1092, 1096 (9th Cir. 2010) (permissible for employer to recover cost of police academy training, a portable credential); *Ketner v. Branch Banking & Tr. Co.*, 143 F. Supp. 3d 370, 383 (M.D.N.C. 2015) (explaining that payment for non-portable training may be an unlawful kick back, in contrast to cases like *Gordon* where "plaintiffs received a certification recognized beyond their former employers").

VI. Confidentiality, Non-Disclosure, and Non-Disparagement Provisions

The Department has also encountered broadly worded confidentiality, non-disclosure, and non-disparagement provisions that purport to bar workers from, among other conduct, discussing company policies and employment-related issues with others; communicating with government investigators without notifying their employer; and making any statements about their employer without the employer's permission. In some cases, these confidentiality, non-disclosure, and non-disparagement provisions could reasonably be understood by workers to prohibit communicating with the Department, or otherwise filing complaints regarding potentially illegal conduct, such as wage and hour or occupational safety and health violations, and have been accompanied by threats of monetary penalties, loss of employment, or both. In such circumstances, these provisions can have a chilling effect on workers' ability and willingness to communicate with the Department or otherwise exercise their legal rights under statutes such as the FLSA and the OSH Act.

Contractual provisions barring workers from communicating with the Department or other government agencies are not enforceable. Additionally, confidentiality, non-disclosure, and non-disparagement provisions that chill workers' communication with the Department are in conflict with the FLSA and the OSH Act, the effective enforcement of which depends on workers' ability to speak openly and confidentially with Department investigators. For example, the FLSA was enacted in part to remedy unequal bargaining power between employers and workers, and its protections may not be waived. The FLSA's anti-retaliation provision prohibits employers from threatening employees with disciplinary action or monetary penalties for engaging in or preparing to engage in activities such as participating in a Departmental investigation or filing a complaint, which are protected under the law. Additionally, the FLSA grants the Secretary broad powers to investigate employers and to gather information from employees and others. However, despite the fact that confidentiality, non-disclosure, and non-disparagement provisions that limit workers' ability to communicate with the Department are not enforceable and in conflict with the FLSA, the Department has encountered them in workers' employment, separation, and severance agreements.

Recently, SOL, working closely with the Department's enforcement agencies, has sought to combat these types of provisions. In March 2022, SOL filed an amicus brief before the NLRB, arguing that overly broad confidentiality agreements undermine the worker protections and enforcement schemes of laws enforced by the Department, including the FLSA, and that such confidentiality agreements subvert the principles and objectives associated with the anti-retaliation protections of such laws. SOL has consistently maintained, including in amicus briefs, that employees cannot stipulate to the dismissal of their FLSA claims without approval from a court, in part to guard against the risk to workers of overbroad confidentiality, non-disclosure, and non-disparagement provisions.

In July 2024, SOL brought a complaint in the U.S. District Court for the Eastern District of New York seeking an injunction to prevent Smoothstack, Inc., from violating the FLSA by imposing broad confidentiality, non-disclosure, and non-disparagement provisions on its current and former employees that chill their ability to speak openly and freely with the Department. Smoothstack's employment agreements and its employee handbook contain confidentiality, non-disclosure, and non-disparagement provisions that restrict and discourage employees from communicating with the Department or otherwise filing a complaint under the FLSA, including by requiring employees to notify Smoothstack if they are contacted by a government investigator, prohibiting employees from communicating with government investigators except if compelled by law, and prohibiting employees from discussing employment issues with other employees. The agreements also include provisions subjecting employees to termination for violating the terms of their agreements. Smoothstack requires employees to agree to complete approximately two years of billable work and subjects workers to up to $30,000 in penalties for purported training costs, future lost profits, and administrative expenses if they breach the terms of their agreements with Smoothstack or resign or are terminated before

completing the approximately two years of billable work. Smoothstack also requires employees to sign separation agreements upon leaving its employment containing additional non-disclosure, non-disparagement, and confidentiality provisions and subjecting former employees to tens of thousands of dollars in monetary fees for violating these provisions. SOL's complaint alleges that Smoothstack is retaliating against its current and former employees, in contravention of the FLSA, by dissuading them from engaging in conduct protected under the Act through these overly broad contractual provisions and the threat of termination or a significant monetary fee. And it alleges that Smoothstack is unlawfully interfering with the Department's authority to investigate and effectively enforce the FLSA.

The Department also faces situations where a restrictive non-disclosure agreement (NDA) leads employees to believe that they cannot fully cooperate with the Department's investigation. These NDAs may lead employees to believe that disclosing relevant information, including documents, might violate the NDA signed upon hire. In one situation the Department faced, a contested NDA defines "confidential information" very broadly, encompassing elements like business processes, practices, methods, policies, and communications. This creates a potential conflict with government interests, particularly where an agreement also requires employees to channel any requests to disclose such information from government agencies through the employer.

NDAs generally cannot limit individuals' ability to assist in investigations. *See Advanced Reimbursement Sols. LLC v. Aetna Life Ins. Co.*, No. CV-19-05395-PHX-DLR, 2021 WL 2981582, at *2 (D. Ariz. July 15, 2021) ("Agreements requiring a person to remain silent about the events leading up to a dispute or illegal practice, absent an otherwise valid reason to protect that information, are against public policy."); *EEOC v. U.S. Steel Corp.*, 671 F. Supp. 351, 357 (W.D. Pa. 1987) (company was enjoined from including provision in pension agreement by which employees agreed not to "'counsel or assist' in the prosecution of claims under the ADEA"), *supplemented*, 728 F. Supp. 1167 (W.D. Pa. 1989), *rev'd on other grounds*, 921 F.2d 489 (3d Cir. 1990).

VII. Company Policies Requiring Workers to Report Safety Concerns to Their Employer Before Contacting the Authorities

SOL and the Occupational Safety and Health Administration have taken a stand against employers who retaliate against employees for reporting safety concerns or other violations to government agencies before reporting them to their employers. For example, in *Bakis v. Maersk Line, Ltd., Assistant Secretary of Labor for Occupational Safety and Health*, Party in Interest, 2023-SPA-0003 (U.S. Dep't of Lab. ALJ), SOL tried a case under the Seaman's Protection Act (SPA), 46 U.S.C. 2114, in which the Assistant Secretary alleged that Maersk fired Bakis because he reported safety violations to the Coast Guard before reporting them to supervisory personnel and giving the company time to abate the violations. The company had a policy forbidding the reporting of safety violations to the Coast Guard unless the seaman has previously reported them to a supervisor and waited until the violations were abated.

SOL, on behalf of the Assistant Secretary, argued that SPA confers an unconditional right on seamen to report safety violations directly to the Coast Guard. After the hearing, but before the ALJ's decision was issued, SOL obtained a settlement which, among other things, requires Maersk to change its policy so that personnel may report violations to the Coast Guard without first reporting them to supervisors. Maersk changed its policy. In addition, Maersk must communicate its policy change to its personnel, train supervisors about SPA, and provide SPA fact sheets to its personnel. Bakis will receive $303,486 in back pay.

Conclusion

The Department has worked to combat the use of coercive "fine print" provisions in employment contracts, including within arbitration agreements. Many agreements that have a chilling effect on workers' ability or willingness to file suit on their own behalf or that purport to require workers to submit to arbitration (rather than bringing a case in court) are unenforceable. But regardless of whether such an agreement is enforceable, the Department is not bound by contracts between workers and employers and thus has a unique role to play in fighting the use of these "fine print" or "coercive" contractual provisions.

Arbitration agreements and other private contracts cannot prevent the Department from seeking relief on behalf of the workers who have signed them. The Department has well-established authority to bring enforcement actions on behalf of workers, regardless of whether those workers have agreed to arbitrate disputes with their employer. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287 (2002) (holding that an arbitration agreement does not prevent an agency from seeking to "enjoin an employer from engaging in unlawful employment practices" or pursuing victim-specific relief like "reinstatement, backpay, and compensatory or punitive damages"); *see also Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 32 (1991) (holding that agencies may seek class-wide and equitable relief on behalf of workers who signed an arbitration agreement). Indeed, SOL has repeatedly defeated arguments that the Department's enforcement authority is constrained by mandatory arbitration agreements between employers and employees.[3]

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[3] For example, in *Secretary of Labor v. Arizona Logistics dba Diligent Delivery Systems*, the employer tried to force the Department into arbitration, but the district court and the Ninth Circuit affirmed the Department's independent authority to recover unpaid wages and damages in court despite the employee's mandatory arbitration agreement, and SOL obtained a consent judgment requiring the employer to pay $5.75 million in back wages, damages, and penalties. *See Secretary of Labor v. Arizona Logistics, Inc.*, 998 F.3d 393 (9th Cir. 2021). Additionally, in *Secretary of Labor v. CE Security LLC*, a case in which SOL alleged that the employer misclassified workers as independent contractors to evade the FLSA, the district court rejected the employer's attempt to force the Department into arbitration based on the clauses they included in their workers' contracts. *See Secretary of Labor v. CE Security LLC*, No. 21-CV-00057, 2021 WL 3774198 (E.D.N.Y. Aug. 25, 2021). Similarly, courts have accepted the Department's position that arbitration agreements do not prevent SOL from seeking relief under section 11(c) of the OSH Act, 29 U.S.C. 660(c). For instance, in *Marshall v. N. L. Indus., Inc.,* 618 F.2d 1220, 1222–23 (7th Cir. 1980), the court held that an arbitration which awarded only reinstatement to a discharged employee did not bar SOL from filing suit under section 11(c) to obtain back pay.