

ELIZABETH WARREN  
MASSACHUSETTS

COMMITTEES:  
BANKING, HOUSING, AND URBAN AFFAIRS  
HEALTH, EDUCATION, LABOR, AND PENSIONS  
ARMED SERVICES  
SPECIAL COMMITTEE ON AGING

## United States Senate

March 27, 2019

UNITED STATES SENATE  
WASHINGTON, DC 20510-2105  
P: 202-224-4543

2400 JFK FEDERAL BUILDING  
15 NEW SUDBURY STREET  
BOSTON, MA 02203  
P: 617-565-3170

1550 MAIN STREET  
SUITE 406  
SPRINGFIELD, MA 01103  
P: 413-788-2690

[www.warren.senate.gov](http://www.warren.senate.gov)

Kate S. O'Scannlain  
Solicitor of Labor  
United States Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

Dear Solicitor O'Scannlain,

I write today to seek clarification about your recent comments and request information about the Department of Labor's (DOL) approach to bringing enforcement actions or pursuing litigation against companies in cases where an employer has broken a law that DOL enforces but where affected workers signed arbitration agreements as a condition of their employment.

At a Practising Law Institute event in New York in February 2019, you reportedly said that DOL "hasn't taken a definitive stance on whether it will pursue lawsuits against companies in cases where the workers have signed arbitration agreements,"<sup>1</sup> which prevent them from going to court when their employer has violated their rights.<sup>2</sup> These comments raise questions about DOL's willingness to take action to protect workers if they have signed arbitration agreements.

As Solicitor of Labor, you are the top legal advisor at DOL. Your comments appeared to indicate that, under your watch, the Department may not be willing to protect groups of employees that—because they have effectively been forced to sign away important legal rights—are most in need of federal protection. Because DOL's adoption of such a policy would be damaging to vulnerable workers nationwide and constitute a break from recent precedent, I write to seek clarification and understanding of how DOL will handle such cases in the future.

More than half of non-union, private-sector workers—over 60 million Americans—are subject to forced arbitration clauses, which require workers to resolve violations of their legal rights committed by their employers through an arbitration system rather than going to court.<sup>3</sup> These clauses are particularly common among large employers and in industries that disproportionately employ women or African American workers.<sup>4</sup> And they generally cover any legal dispute brought by an employee, including crucial workplace protections ranging from health and safety standards to prohibitions on wage theft and child labor.

---

<sup>1</sup> Bloomberg Law, "Punching In: Jeffrey Epstein, Ralph Northam, and Organized Labor," Chris Opfer and Jaclyn Diaz, March 4, 2019, <https://news.bloomberglaw.com/daily-labor-report/punching-in-jeffrey-epstein-ralph-northam-and-organized-labor>.

<sup>2</sup> *Id.*

<sup>3</sup> Economic Policy Institute, "The growing use of mandatory arbitration." Alexander J.S. Colvin, April 6, 2018, <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

<sup>4</sup> *Id.*

Arbitration outcomes typically disadvantage workers. Compared to workers who are able to sue their employers in court, workers in arbitration are less likely to recover damages, recover less money in damages (if they manage to recover them at all), and have more trouble obtaining legal representation.<sup>5</sup> Employers have a variety of unfair advantages over employees in the context of arbitration,<sup>6</sup> and, for these reasons, forced arbitration undoubtedly contributes to the under-enforcement of employment laws, and an inability for workers to collect their fair share of restitution when their rights have been violated, in workplaces where it applies.

Workers who sign these forced arbitration agreements have traditionally had a backstop: DOL's enforcement of labor laws. Even in cases where workers are forced into arbitration, DOL has the authority to respond to complaints, inspect facilities, and take employers to court for violating employment laws. Because forcing an employer that has broken the law to change its practices and compensate its employees is nearly impossible for workers subject to forced arbitration to do on their own, DOL's enforcement of the law in these workplaces is particularly critical.

Given the importance of DOL's responsibility to enforce our nation's most basic labor laws in cases where employees were required to sign forced arbitration agreements, I am deeply concerned that the Department may be considering dismantling this backstop. In August 2018, you sent a memorandum to DOL directing them to inform "front office leadership...of proposed enforcement actions where the Department would litigate on behalf of an employee(s) who has agreed to arbitrate employment disputes with his or her employer," implying that such cases—which the Department has pursued for years—now "involv[ed] significant legal issues."<sup>7</sup> Your recent comments raise more questions about how DOL will handle these cases. You indicated, correctly, that DOL "continue[s] to have the authority to bring our enforcement matters even if an arbitration agreement exists."<sup>8</sup> But you reportedly did not commit to using that authority, stating that DOL "hasn't taken a definitive stance on whether it will pursue lawsuits against companies in cases where the workers have signed arbitration agreements."<sup>9</sup> Presumably as explanation for the August 2018 memorandum, you also said that you "care about knowing" about forced arbitration agreements because the Department "has limited resources" and you "want to make sure [DOL is] using [its] limited resources in the most efficient and effective way."<sup>10</sup>

Vindicating the rights of workers who too often are denied restitution through the use of forced arbitration agreements is undoubtedly worth Department resources. Your comments were troublesome to the extent that they implied anything less than a firm commitment to pursue enforcement actions and/or litigation against employers using forced arbitration agreements

---

<sup>5</sup> Economic Policy Institute, "The arbitration epidemic," Katherine V.W. Stone and Alexander J.S. Colvin, December 7, 2015, <https://www.epi.org/publication/the-arbitration-epidemic/>.

<sup>6</sup> *Id.*

<sup>7</sup> U.S. Department of Labor, "Memorandum for: Deputy Solicitors; Regional Solicitors; Associate Solicitors," August 10, 2018, <http://src.bna.com/COE>.

<sup>8</sup> Bloomberg Law, "Punching In: Jeffrey Epstein, Ralph Northam, and Organized Labor," Chris Opfer and Jaclyn Diaz, March 4, 2019, <https://news.bloomberglaw.com/daily-labor-report/punching-in-jeffrey-epstein-ralph-northam-and-organized-labor>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

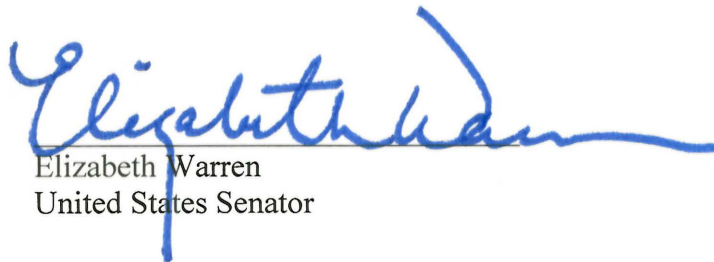
when they have broken the law. DOL's failure to act in these cases would amount to a disturbing change in policy that would strip important protections from millions of workers who need them most.

In order to better understand your approach to enforcement against employers that use forced arbitration agreements, I ask that you provide answers to the following questions no later than April 11, 2019.

1. Since you directed DOL attorneys to notify front office leadership of proposed enforcement actions where DOL would litigate on behalf of an employee working under forced arbitration agreements in August 2018, how many such notifications have you received?
  - a. How many *total* enforcement or litigation actions against employers who have required employees to sign forced arbitration agreements have DOL attorneys proposed since you sent that directive on August 10, 2018?
  - b. How many enforcement or litigation actions did DOL actually initiate in the cases where an employer required employees to sign forced arbitration agreements since August 10, 2018?
  - c. How many *total* enforcement or litigation actions did DOL actually initiate during the same time period?
2. What is DOL's current policy related to the determination of whether or not to pursue enforcement and/or litigation actions against employers using forced arbitration agreements?
3. Does the presence of a forced arbitration agreement make DOL more or less likely to initiate an enforcement action? If so, why?
4. Please describe your decision-making process for determining whether to change DOL's policy on bringing enforcement or litigation actions against companies whose workers have been required to sign a forced arbitration agreement as a condition of their employment. What factors do you believe weigh for and against pursuing enforcement in those circumstances?

Thank you for your attention to this important matter.

Sincerely,



Elizabeth Warren  
United States Senator