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The Unlikely Underdog: Skilled Immigrants in Tech Face Unique Mandatory Arbitration Challenges

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THE UNLIKELY UNDERDOG: SKILLED IMMIGRANTS IN TECH FACE UNIQUE MANDATORY ARBITRATION CHALLENGES

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INTRODUCTION

A professional offered a software engineering job at a big Silicon Valley company seems to be in a good position to negotiate her employment contract. She is educated, has experience, and may even negotiate her salary and fringe benefits, but she is unlikely to demand her prospective employer remove the mandatory arbitration provision in her employment agreement. Why? Because she needs the job. Now imagine this professional is a Senegalese national who has waited months to be sponsored on an H-1B visa by the same Silicon Valley company. All of her immigration paperwork has gone through and she has arranged to come to the United States. However, when she receives her employment contract, it contains a mandatory

arbitration provision. She thinks she understands what the provision means, but she does not argue against it because she is afraid that if she does, she may lose her job, causing her H-1B visa to be terminated.

Fast forward a year later: that same Senegalese software engineer is having problems with her employer. The company is discriminating against her and many other female software engineers. She consults an attorney who tells her the case would be best pursued as a class action, otherwise the claim is too small to be worthwhile. The problem is that the mandatory arbitration provision she "agreed" to bars her from bringing any action before a court. Because her individual claim is not worth the trouble, she never asserts her rights and continues to bear the worsening discrimination at work.

The fairness and ethics of mandatory arbitration have been sharply debated.[1] A recent Supreme Court decision upholding the enforceability of mandatory arbitration in employment contracts appears to have settled this debate.[2] However, workers still face challenges in asserting their rights when their employers impose arbitration.[3] Some scholars suggest mandatory arbitration is less likely to harm employees with high levels of education, income, and experience.[4] Despite their education, income, and experience, skilled

1. Laetitia L. Cheltenham, *The Consumer Financial Protection Bureau and Class Action Waivers After* AT&T *v.* Concepcion, 16 N.C. BANKING INST. 273, 277 (2012); *see also* United States Arbitration Act, Pub. L. No. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2006); EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: CRITICAL ASSESSMENT 127 (2006).

2. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

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

4. *See* Allison E. McClure, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1515 (2006) (providing rationales for findings of equal bargaining power between professional employees and employers); *cf.* E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 628 (2009) (arguing that "high-level" employees do not face the same problems with mandatory arbitration as other "low-level" employees because of bargaining power, sophistication, and "informational advantages in negotiating").

immigrants[5] in the technology sector ("tech") are actually in a worse position than their native-born counterparts to negotiate employment terms.[6] This is because visa sponsorship requires a single employer to sponsor a skilled immigrant to work in the United States, meaning the immigrant employee cannot easily transfer their visa to a different employer.[7] Changing employers or being fired puts a skilled immigrant worker at significant risk for deportation.[8] Being restricted to a single employer creates a compelling incentive for skilled immigrant workers to accept unfavorable arbitration terms.[9] In response to this problem and the fact that mandatory arbitration is a polarizing issue, this article presents a balanced solution that weighs the protection of skilled immigrant rights against the benefits of arbitration.

Part I of this Comment provides a brief description of skilled immigrant workers in the United States, explains arbitration procedure, and introduces the arguments for and against mandatory arbitration. Part II analyzes the current judicial and legislative positions on arbitration, describes skilled immigrants in the tech industry, and explores ways tech workers have pushed back against mandatory arbitration. Part III proposes a hybrid solution to the issue of mandatory arbitration. Finally, this Comment offers a brief conclusion on the unique challenges skilled immigrants face regarding mandatory arbitration.

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5. While recognizing the multitude of problems that mandatory arbitration creates for low-wage earning immigrants, including undocumented immigrants, this paper does not address these groups and is narrowly focused on skilled immigrants in the tech industry.

6. Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 928 (2007) [hereinafter Ontiveros, *Noncitizen Immigrant Labor*].

7. 8 C.F.R. § 214.2(h)(2)(i)(D) (2019) (requiring a skilled immigrant on an H-1B visa wishing to change employers to have the prospective employer submit a completely new visa application that must be approved before the change of employment can take place); *see also* Symposium, *Working Borders: Linking Debates About Insourcing and Outsourcing of Capital and Labor*, 40 TEX. INT'L L.J. 691, 802 (2005) [hereinafter *Working Borders*] (advocating for additional legal rights for immigrants, like the ability to port work visas to another employer).

8. Ontiveros, *Noncitizen Immigrant Labor*, *supra* note 6, at 926.

9. *See Working Borders*, *supra* note 7, at 802 (explaining how the prospect of portable employment visas would give skilled immigrants more bargaining power).

I. POSITIONS ON MANDATORY ARBITRATION

Mandatory arbitration agreements are common in employment contracts.[10] Professor Michael Z. Green[11] describes the increase in these agreements and states, "[A]greements to arbitrate have expanded to virtually every possible contractual setting, including the employment relationship."[12] In 2018, the U.S. Supreme Court issued a 5-4 decision in *Epic Sys. Corp. v. Lewis*,[13] which essentially leaves employees at the mercy of employer-dictated arbitration clauses.[14] The dissent in *Epic Systems* outlined several problems with mandatory arbitration of employment disputes, but primarily focused on the ways mandatory arbitration eviscerates employee rights to collective actions.[15] Because skilled immigrants are restricted to a single, sponsoring employer when they work in the United States on an employment visa, they are particularly vulnerable to unfair employment conditions,[16] including injustices caused by mandatory

10. Peter Danysh, *Employing the Right Test: The Importance of Restricting* AT&T v. Concepcion *to Consumer Adhesion Contracts*, 50 HOUS. L. REV. 1433, 1439 (2013).

11. Professor Michael Z. Green is a law professor at Texas A&M University Law School. He has been a full tenure professor since 2005. Before his academic career he worked as manager for a Fortune 500 company before law school and later represented employers as a chief negotiator.

12. Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 80 (2003).

13. 138 S. Ct. 1612 (2018).

14. *See* Ronald Turner, *The FAA, The NLRA, and* Epic Systems' *Epic Fail*, 98 TEX. L. REV. ONLINE 17, 18 (2019).

15. *Epic Sys. Corp.*, 138 S. Ct. at 1633-49 (Ginsburg, J., dissenting opinion); *see also* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 179 (2019) [hereinafter Sternlight, *Stymies Progress*] (explaining how mandatory arbitration prevents employees from bringing class action lawsuits).

16. *See* Matthew Lister, *Justice and Temporary Labor Migration*, 29 GEO. IMMIGR. L.J. 95, 116 (2014) (explaining how skilled immigrants are vulnerable because they are unable to easily change employers on the same visa, which makes immigrant workers "more susceptible to abuse"); *see also* Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2355 (2012) ("Mandatory arbitration presents large potential for abuse, particularly in cases where the parties have unequal bargaining power.").

arbitration. Working in the United States on an employment visa leaves skilled immigrants with very few options or bargaining power to negotiate employment terms.[17]

A. Immigrant Workers and the Challenges of H-1B Sponsorship

Immigrant workers are essential to the United States.[18] According to the United States Bureau of Labor Statistics, 28.4 million "foreign born" individuals were part of the U.S. work force in 2019.[19] In 2007 twenty-five percent of immigrants in the United States were present through employment-based immigration visas.[20] The H-1B visa an employment visa that allows highly-skilled immigrants to work in the United States.[21] H-1B visas require a single employer to sponsor an immigrant worker.[22] Highly-skilled immigrants employed in the tech industry are often present in the United States on these visas.[23]

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17. *See* Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 WILLAMETTE L. REV. 259, 268-69 (2014) (explaining that employees are compelled to agree when they have limited employment options and their employment is conditioned on consent to mandatory arbitration provisions).

18. *See* Yasser Killawi, *Preserving an Entrepreneurial America: How Restrictive Immigration Policies Stifle the Creation and Growth of Startups and Small Businesses*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 129, 142 (2013).

19. Bureau of Labor Statistics, News Release, *Foreign-Born Workers: Labor Force Characteristics–2019* (May 16, 2019), https://www.bls.gov/news.release/pdf/forbrn.pdf. (describing foreign-born workers as legally-admitted immigrants, refugees, temporary residents such as students and temporary workers, and undocumented immigrants).

20. Michele R. Pistone & John J. Hoeffner, *Rethinking Immigration of the Highly-Skilled and Educated in the Post-9/11 World*, 5 GEO. J.L. & PUB. POL'Y 495, 496 (2007); *see also* Julie Monroe, *Protecting the H-1B Visa: A Promise to "Hire American" in the "Nation of Immigrants"*, 2019 U. ILL. L. REV. 1385, 1386 (2019) ("The H-1B visa is the classic route for 'highly educated, foreign-born students hoping to work in the U.S.").

21. Killawi, *supra* note 18, at 144 (explaining that the H-1B visa is "the primary source for highly skilled immigrants in the U.S. workforce").

22. Lister, *supra* note 16, at 116.

23. *See* Jung S. Hahm, *American Competitiveness and Workforce Improvement Act of 1998: Balancing Economic and Labor Interests Under the New H-1B Visa Program*, 85 CORNELL L. REV. 1673, 1682 (2000) (explaining that the U.S. high-tech industry largely participates in the H-1B visa program to meet the demand for skilled workers); *see also* Dina Gerdeman, *Immigrant High-Tech*

The H-1B visa is especially important to Silicon Valley companies because the visas are used to satisfy the tech industry's demand for highly-skilled workers through hiring of skilled immigrants.[24] The number of available H-1B visas is limited to 65,000 visas each fiscal year and an additional 20,000 visas are allocated to workers who hold advanced degrees from U.S. universities.[25] Yet, demand for H-1B visas consistently exceeds the annual limit with more than 200,000 petitions submitted annually.[26] From 2010-2016, Silicon Valley had the second highest number of approved H-1B visas nationally.[27] The high demand for H-1B visas compared to their limited availability makes securing an H-1B visa extremely competitive, especially in the technology industry.[28]

Applying for an H-1B visa is a challenging and expensive process.[29] Since the allocation of total H-1B visas is reached quickly, applicants have a short window in which they must submit their visa application.[30] H-1B applications are subject to a lottery system where applications are randomly selected for adjudication.[31] Although an employer has no way of knowing whether their application will be

Workers Not Costing US Jobs, FORBES (Jan. 22, 2014), https://www.forbes.com/sites/hbsworkingknowledge/2014/01/22/immigrant-high-tech-workers-not-costing-us-jobs/#1e7adaa74f72.

24. *See* Danielle M. Drago, *Losing the Best and the Brightest: The Disappearing Wage Premium for H-1B Visa Recipients*, 17 VAND. J. ENT. & TECH. L. 1051, 1054 (2015) (explaining that the demand for skilled immigrants in the technology industry "remains largely unmet," and in order to satisfy this demand, employers turn to the H-1B visa to hire foreign workers).

25. Robert D. Aronson & Debra A. Schneider, *A Bridge over Troubled Waters: The High-Skilled Worker Rule and Its Impact on Employment-Based Immigration*, 44 MITCHELL HAMLINE L. REV. 935, 939 (2018).

26. *Id*.

27. Neil G. Ruiz & Jens Manuel Krogstad, *East Coast and Texas metros had the most H-1B visas for skilled workers from 2010 to 2016*, PEW RESEARCH CENTER (Mar. 29, 2018), https://www.pewresearch.org/fact-tank/2018/03/29/h-1b-visa-approvals-by-us-metro-area/.

28. Drago, *supra* note 24, at 1054.

29. Monroe, *supra* note 20, at 1388.

30. *See id*. (in 2016 the H-1B cap was reached in five days).

31. Emily C. Callan, *Is the Game Still Worth the Candle (or the Visa)? How the H-1B Visa Lottery Lawsuit Illustrates the Need for Immigration Reform*, 80 ALB. L. REV. 335, 336 (2017).

selected for processing, employers often try to increase their chances of selection.[32] Applications not selected are eligible for resubmission the following year.[33]

The structure of the H-1B visa application process keeps employees restricted to their employers; only a single employer can sponsor an immigrant worker.[34] To change employers, the skilled immigrant employee must have their new H-1B employer submit a new visa petition on the employee's behalf.[35] If the petition is denied, the immigrant employee's authorization to work in the United States will be terminated.[36]

Skilled immigrants must wait years for their immigration status to change from an H-1B immigrant to permanent resident due to immigration backlogs.[37] While waiting to become a permanent resident, immigrant employees must remain employed with the same employer.[38] Termination of employment will terminate the immigrant employee's H-1B status,[39] which can eliminate the immigrant worker's only chance of becoming a permanent resident. Terminated status can also lead to deportation.[40] The risk of deportation also applies to a spouse or child covered under a skilled immigrant's H-1B visa.[41] Because of this close, interdependent relationship, the

32. *See id*. at 345 (describing how some large employers use subsidiaries to submit multiple H-1B applications for the same employees).

33. *Id*. at 336.

34. 8 C.F.R. § 214.2(h)(2)(i)(A) (2019).

35. 8 U.S.C § 1184 (2020).

36. 8 U.S.C § 1184(n)(1) (2020).

37. Janice D. Villiers, *Closing the Borders: Reverse Brain Drain and the Need for Immigration Reform*, 55 WAYNE L. REV. 1877, 1889 (2009).

38. Julia Funke, *Supply and Demand: Immigration of the Highly Skilled and Educated in the Post-9/11 Market*, 48 J. MARSHALL L. REV. 419, 443 (2015).

39. Christopher Fulmer, Comment, *A Critical Look at the H-1B Visa Program and Its Effects on U.S. and Foreign Workers-A Controversial Program Unhinged from Its Original Intent*, 13 LEWIS & CLARK L. REV. 823, 855 (2009).

40. *See* Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. EMPL. & LAB. L. 1, 3 (2017) [hereinafter Ontiveros, *H-1B Visas*].

41. Ontiveros, *Noncitizen Immigrant Labor*, *supra* note 6, at 926.

immigrant worker's reliance on the sponsoring H-1B employer has been described as a "de facto indentured servitude."[42]

Many tech companies are founded or led by skilled immigrants.[43] Immigrant entrepreneurship is important to the U.S. economy and drives economic growth.[44] California has the most immigrant-founded, startup companies valued at least $1 billion or more headquartered in the state.[45] Such companies include SpaceX and Uber.[46] Silicon Valley, California is home to at least 2,000 tech companies.[47] Like other companies, tech companies often include mandatory arbitration clauses in their employment agreements.[48] However, the trend of using mandatory arbitration clauses in the context of employment agreements appears to be changing in Silicon Valley.[49]

42. Fulmer, *supra* note 39, at 855; *see also* Ontiveros, *H-1B Visas*, *supra* note 40, at 4 (discussing how the H-1B visas program perpetuates a form of involuntary servitude).

43. *See* Villiers, *supra* note 37, at 1877-78.

44. Killawi, *supra* note 18, at 131.

45. Stuart Anderson, *NFAP Policy Brief: Immigrants and Billion Dollar Startups*, NAT'L FOUND. FOR AM. POL'Y (March 2016) http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief.March-2016.pdf.

46. *Id*. at 1-2.

47. Kimberly Amadeo, *Silicon Valley, America's Innovative Advantage*, THE BALANCE (Aug. 24, 2019), https://www.thebalance.com/what-is-silicon-valley-3305808.

48. *See* Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CALIF. L. REV. 1203, 1235 (2002) (stating that arbitration agreements are standard in most employment contracts).

49. *See* Andrew Bratslavsky, *Mandatory Arbitration of Sexual Assaults in Maritime Law*, 31 ST. THOMAS L. REV. 198, 219 (2019) (explaining that influential Silicon Valley companies are creating a new trend around mandatory arbitration, specifically with sexual harassment cases).

B. An Overview of Arbitration

Arbitration is a type of alternative dispute resolution[50] where the parties select a neutral arbitrator to assist them in resolving their dispute.[51] The arbitrator is not required to adhere to relevant law[52] unless the law to be applied is specified in the party's arbitration agreement.[53] Many arbitration agreements do not address this issue, in which case,[54] the arbitrator will apply the rules of their arbitration organization,[55] or "interpret[] the agreement between the parties."[56] The arbitrator's decision is binding and final, unless it can be shown that the arbitrator reached the decision by "manifestly disregard[ing] the law."[57] In cases where there is a significant problem with the arbitration process, the parties can seek to have a court determine the validity of an arbitration award.[58] Agreements that impose arbitration clauses are typically considered a type of adhesion contract because the party with less bargaining power is usually unable to negotiate or reject the arbitration terms.[59] Applied in the context of employment, an employee is unlikely to reject or negotiate an arbitration provision because the employer has superior bargaining power and can simply elect not to hire the employee.[60] Skilled immigrants relying on an employment visa to work likely find themselves in this position.

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50. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 469 (2006).

51. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 454 (1996).

52. Donna Meredith Matthews, *Employment Law After* Gilmer*: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 350 (1997).

53. Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 112 (1997).

54. *Id*.

55. *Id*. at 118.

56. Matthews, *supra* note 52, at 351.

57. *See* Burton, *supra* note 50, at 473.

58. *Id*. at 473-74.

59. *See id.* at 479; Matthews, *supra* note 52, at 373.

60. Matthews, *supra* note 52, at 373.

The Federal Arbitration Act ("FAA") is the guiding legislation on arbitration. The relevant text of the FAA states, "[a]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[61] With the enactment of the FAA, Congress made parties' election to arbitrate enforceable through contract law.[62] Even after the FAA was enacted, courts initially cited public policy as a basis not to enforce arbitration clauses.[63] Eventually, however, courts moved towards a uniform policy of enforcing the FAA, which meant judicial enforcement of pre-dispute arbitration clauses.[64]

The practice of imposing arbitration was not always a widespread or favored mechanism for dispute resolution as it is now.[65] Despite a broad approach to enforcement, courts were careful not to impede employees' rights, and often rejected enforcement of mandatory arbitration clauses in certain employment disputes.[66] Over time, courts abandoned their position against mandatory arbitration in employment agreements.[67] With the judiciary's backing, employers used the FAA as a basis to enforce arbitration clauses in employment agreements.[68] In *Gilmer v. Interstate/Johnson Lane Corporation*, the

61. 9 U.S.C. § 2 (2018).

62. Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1004 (1996).

63. *Id*.

64. Turner, *supra* note 14, at 18.

65. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636 (2005) (explaining that mandatory arbitration is a more recent phenomenon) [hereinafter Sternlight, *Creeping*].

66. *See* Meredith Goldich, *Throwing Out the Threshold: Analyzing the Severability Conundrum Under* Rent-A-Center, West, Inc. v. Jackson, 60 AM. U.L. REV. 1673, 1687 (2011) (discussing Supreme Court case *Barrentine v. Arkansas-Best Freight System, Inc.*, where the court rejected arbitration of a FLSA employment claim).

67. *See* Martha Nimmer, *The High Cost of Mandatory Arbitration*, 12 CARDOZO J. CONFLICT RESOL. 183, 196 (2010) (stating lower courts cited the Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corporation* "to enforce mandatory arbitration provisions in employment contracts").

68. *See* David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 457-58 (2016) (stating the

Supreme Court used the FAA to hold that a stock broker's age discrimination claim was subject to mandatory arbitration.[69] Not surprisingly, following *Gilmer*, in the late 1990's, the use of mandatory arbitration clauses in employment agreements increased significantly.[70] Similar holdings followed in several cases leading up to the Supreme Court decision in *Epic Systems* in 2018.[71] With the judiciary's shift towards enforcement of pre-dispute arbitration agreements, employers gained a strong position to impose arbitration on employees.[72]

C. What's So Wrong with Mandatory Arbitration?

Requiring employees to sign agreements containing mandatory arbitration provisions—as a condition of employment—is often viewed as coercive and problematic for employees.[73] An individual seeking a job does not have much bargaining power, if any at all, when it comes to negotiating how a future dispute with an employer should be resolved.[74] This is especially true for skilled immigrants who are not only seeking employment, but who are also seeking an employer's sponsorship: a lengthy and costly process.[75] Most employees are presented employment agreements with mandatory arbitration clauses on a "take-it-or-leave-it" basis.[76] In other instances, employees are simply deemed to have knowledge of

FAA was not intended for employment agreements, but the Supreme Court extended FAA enforcement to employment agreements with its holding in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

69. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

70. *See* Nimmer, *supra* note 67, at 187.

71. *See generally*, Turner, *supra* note 14.

72. Giesbrecht-McKee, *supra* note 17, at 262.

73. Horton & Cann Chandrasekher, *supra* note 68, at 458; Stephanie Greene & Christine Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements-#timesup on Workers' Rights*, 15 STAN. J. C.R. & C.L. 43, 45 (2019).

74. Greene & Neylon O'Brien, *supra* note 73, at 45 (explaining agreements with mandatory arbitration provisions are offered to employees as a condition of employment).

75. Sameer Ahmed, *Targeting Highly-Skilled Immigrant Workers in A Post-9/11 America*, 79 UMKC L. REV. 935, 987 (2011).

76. Greene & Neylon O'Brien, *supra* note 73, at 45.

mandatory arbitration clauses when such clauses are emailed to unsuspecting employees or hidden in fine print.[77]

Mandatory arbitration is criticized for other reasons as well. First, mandatory arbitration can restrict an employee's access to courts.[78] Arbitration also prevents class action litigation, which can be useful when an employee's individual claims are weak or monetarily insubstantial.[79] Third, employers that routinely arbitrate tend to win more cases than employees.[80] There is also a fairness and impartiality concern because employers often select and pay the arbitrator.[81] Further, arbitration ensures that claims of sexual harassment and discrimination are hidden from the public eye.[82] Finally, arbitrators do not have to be attorneys or even judges.[83]

77. Sternlight, *Stymies Progress*, *supra* note 15, at 171-72; *see also* Colvin, *supra* note 3, at 10 ("Although mandatory employment arbitration is usually established by having employees sign an arbitration agreement, typically at the time of hiring, in some instances businesses adopt arbitration procedures simply by announcing that these procedures have been incorporated into the organization's employment policies as part of the procedures for resolving workplace conflicts or grievances.").

78. Jean R. Sternlight, *Disarming Employees How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) [hereinafter Sternlight, *Disarming Employees*].

79. Sternlight, *Creeping*, *supra* note 65, at 1652.

80. *Cf.* Horton & Cann Chandrasekher, *supra* note 68, at 462-63 (explaining that employees win less often against employers that repeatedly arbitrate at high rates).

81. *See* Sharon Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131, 134 (1996) (explaining that arbitration decisions can be motivated by a desire on the part of the arbitrator to secure repeat business from employers and, accordingly, arbitrators may recognize the benefit of providing favorable decisions to employers over employees who are unlikely to use arbitration frequently).

82. *See* Marissa Ditkowsky, Comment, *#Ustoo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 62 UCLA WOMEN'S L.J. 69, 76-77 (2019) (discussing how the #Metoo movement has highlighted the way mandatory arbitration prohibits sexual harassment and discrimination claims in court).

83. Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1425 (2004) [hereinafter Sternlight, *Best Procedure*].

D. Benefits of Arbitration

By contrast, supporters of arbitration argue that the procedure is actually beneficial for employees. Although mandatory arbitration is overwhelmingly criticized, employees can benefit from arbitration as a form of dispute resolution.[84] Litigation takes time, but arbitration is lauded as being quick and efficient, which can be attractive to employees.[85] However, because arbitration requires up-front fees, and, in some cases, the same kinds of costs associated with trial, it is not completely settled whether arbitration is cost effective (though proponents of arbitration generally argue that it is).[86] Nonetheless, arbitration can be less expensive than litigation depending on the particular case and how it is arbitrated.[87] Although arbitration requires up-front fees, proponents argue it is more cost effective than litigation.[88] For example, some cases may be arbitrated in a couple of hours or entirely by phone.[89] Proponents also argue arbitration "is more likely to preserve a good relationship with an employer" and "allows employer savings to funnel into more generous employee compensation and benefits."[90] For skilled immigrants, preserving their employment relationship is paramount since their immigration

84. Giesbrecht-McKee, *supra* note 17, at 266.

85. Amanda R. James, *Because Arbitration Can Be Beneficial, It Should Never Have to Be Mandatory: Making A Case Against Compelled Arbitration Based upon Pre-Dispute Agreements to Arbitrate in Consumer and Employee Adhesion Contracts*, 62 LOY. L. REV. 531, 537 (2016).

86. *Id*. at 538. (explaining that there is a question as to the cost efficiency of arbitration and a lack of empirical data to draw a clear conclusion).

87. *See* Horton & Cann Chandrasekher, *supra* note 68, at 466 (explaining how low-income workers can benefit from arbitration because some view arbitration as cheaper); *see also* Burton, *supra* note 50, at 472-73 (describing "arbitration will be tailored to the dispute" with arbitration duration and discovery level depending on the stakes of each arbitration); *compare* James, *supra* note 85, at 538-39 (suggesting that arbitration may or may not be less expensive for litigants depending on different factors), *with* Rhys E. Burgess, Comment, *Protecting Those Who Cannot Protect Themselves: The Efficacy of Pre-Dispute Arbitration Agreements in Nursing Homes*, 17 LOY. J. PUB. INT. L. 1, 15 (2015) ("Arbitration advocates claim that by curtailing pre-trial procedures such as discovery, litigation costs are substantially reduced[.]").

88. James, *supra* note 85, at 538.

89. Burton, *supra* note 50, at 472-73.

90. Giesbrecht-McKee, *supra* note 17, at 266.

status likely depends on it.[91] One of the issues underlying the benefits of arbitration is the assumption that employees voluntarily choose to arbitrate their disputes.[92] However, when an employee does not voluntarily choose to arbitrate and, instead, is forced to arbitrate, the perceived advantages of arbitration are called into question.[93] This is especially true when there are disparate bargaining advantages between tech companies and skilled immigrants who are relying on the employer for their H-1B visa sponsorship.

Arbitration procedures are also typically more flexible and oftentimes the parties can decide the rules governing their arbitration.[94] Although being an attorney is not a requirement to be an arbitrator,[95] arbitrators can include experts in a given area. Relying on experts in a given area may be preferable to parties and helpful in resolving their dispute.[96]

II. NAVIGATING MANDATORY ARBITRATION

A. Epic Systems: The Supreme Court's Recent Support for Mandatory Arbitration

The Supreme Court's latest decision on mandatory arbitration in the employment context has a profound impact on employees.[97] The *Epic Systems* decision is comprised of three separate employment disputes.[98] Each dispute was subject to contract provisions that imposed arbitration and waived the employees' ability to bring or participate in class action litigation.[99] In each suit, the plaintiff employee brought either a court action or a class action in direct

91. *See* Ahmed, *supra* note 75, at 945-46 (explaining how immigrants present on H-1B visas often do not change employers for fear of delay or disruption of their immigrant status).

92. Giesbrecht-McKee, *supra* note 17, at 275.

93. *Id*. at 267.

94. James, *supra* note 85, at 540; *see* Cole, *supra* note 51, at 456 (stating when parties select arbitration, they can elect their own procedures).

95. Sternlight, *Best Procedure*, *supra* note 83, at 1425.

96. Cole, *supra* note 51, at 457.

97. Greene & Neylon O'Brien, *supra* note 73, at 44.

98. Turner, *supra* note 14, at 31.

99. *Id*.

opposition to the mandatory arbitration clauses each had signed.[100] Because the National Labor Relations Act ("NLRA") forbids waivers of collective actions in the employment context, the employees raised an illegality defense under the FAA's savings clause.[101] The Court conceded arbitration clauses could be revoked due to a contract defense, like illegality, but rejected the employees' argument, reasoning that arbitration clauses were not illegal merely because the clause required the parties to arbitrate their disputes.[102] In sum, the Court held the NLRA does not supersede the FAA, making class action waivers in mandatory arbitration agreements enforceable.[103]

One major issue with the Court's decision is the presumption employees knowingly and consensually enter into arbitration agreements.[104] Justice Gorsuch framed the main issue in *Epic Systems* as follows: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[105] By assuming employees knowingly enter into arbitration agreements, the Court overlooks extensive information underscoring the disparity in bargaining power between employers and employees.[106] The Court also overlooks the coercive nature of mandatory arbitration agreements, especially when an arbitration agreement is tied to a job,[107] or in the case of skilled immigrants, H-1B visa sponsorship.

Ultimately, the decision in *Epic Systems* denies employees the ability to challenge mandatory arbitration clauses in employment agreements, which in turn prevents employees from asserting their

100. *Id*. at 32.

101. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018).

102. *Id*. at 1623; *see also* Turner, *supra* note 14, at 34-35 (discussing Justice Gorsuch's rejection of the illegality defense to mandatory arbitration clauses in *Epic Systems*).

103. *Epic Sys. Corp.*, 138 S. Ct. at 1624; Greene & Neylon O'Brien, *supra* note 73, at 46.

104. Greene & Neylon O'Brien, *supra* note 73, at 70.

105. *Epic Sys. Corp.*, 138 S. Ct. at 1619.

106. Greene & Neylon O'Brien, *supra* note 73, at 70.

107. *Id*.

rights through a class or collective action mechanism.[108] The *Epic Systems* decision is generally viewed as "one of the most significant and most damaging to employees."[109] With the *Epic Systems* decision, employees are left with little recourse against mandatory arbitration clauses imposed by their employers.[110]

Like most employees, skilled immigrants are vulnerable to the ramifications of *Epic Systems*, but they are even more vulnerable because, as professionals, they are viewed as having equal bargaining power with employers.[111] This mistaken presumption likely causes legislators and judges to presume skilled immigrants have equal bargaining power with their employers and overlook the specific challenges skilled immigrants face regarding mandatory arbitration provisions in an employment contract. One specific challenge for skilled immigrants is their visa sponsorship essentially binds them to their employer.[112] This causes skilled immigrants to have even less bargaining power than an average employee because if they challenge the mandatory arbitration agreements in their employment contracts, skilled immigrants cannot easily seek an alternate employer.

Justice Ginsburg led a powerful dissent in *Epic Systems* that began by placing the NLRA and its predecessor statute, the Norris-LaGuardia Act ("NLGA"), within historical context.[113] After illustrating longstanding power imbalances between employees and employers, Justice Ginsburg explained that Congress enacted the NLGA and NLRA with "acute awareness: [f]or workers striving to gain . . . decent terms and conditions of employment, there is strength in numbers."[114] Under the dissent's analysis, the NLRA was not

108. Sternlight, *Stymies Progress*, *supra* note 15, at 177-78.

109. *Id*. at 177.

110. *Id*. at 178.

111. Spitko, *supra* note 4, at 628.

112. *See* Killawi, *supra* note 18 at 144 (explaining H-1B visas require a sponsoring employer).

113. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting opinion).

114. *Id*.; *see also* Greene & Neylon O'Brien, *supra* note 73, at 63 (noting coercive tactics by employers such as "yellow dog contracts," which prevented employees from joining a union, led Congress to pass the NLRA).

considered subordinate to the FAA because neither the case law cited by the majority, nor the FAA, required subordination.[115]

The *Epic Systems* dissent also raised a few important considerations. First, an individual employee's claim may be too small and not worth the trouble of pursuing in court.[116] Because mandatory arbitration subverts an employee's right to bring a collective action, the employee, forced to go it alone, may never bring a claim.[117] Second, employees might not fully understand what they are waiving when they agree or are deemed to have consented to mandatory arbitration clauses.[118] Justice Ginsburg noted the mandatory arbitration clauses at issue in *Epic Systems* were emailed to employees. By remaining in their employment, the employees were deemed to have consented.[119] Mandatory arbitration, as imposed in the manner described in *Epic Systems*, raises serious concerns about whether the parties are truly entering into such agreements bilaterally.[120] Third, and perhaps most important, is the fact that mandatory arbitration clauses stand to undermine the enforcement of statutory rights.[121] Since mandatory arbitration prevents employees from bringing collective actions that may be more practical than an

115. Harvard Law Review, Case Comment, *Federal Arbitration Act and National Labor Relations Act-Arbitration and Collective Actions-Collective Arbitration Waivers*-Epic Systems Corp. v. Lewis, 132 HARV. L. REV. 427, 431 (2018); *see also Epic Sys. Corp.*, 138 S. Ct. at 1642 (Ginsburg, J., dissenting opinion) ("Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections.").

116. *Epic Sys. Corp.*, 138 S. Ct. at 1647 (Ginsburg, J., dissenting opinion).

117. Greene & Neylon O'Brien, *supra* note 73, at 63.

118. Sternlight, *Stymies Progress*, *supra* note 15, at 172 ("Studies have shown that these kinds of clauses are not, in fact, generally read or understood by employees; certainly these are not the knowing agreements alluded to by Justice Gorsuch [in *Epic Systems*].").

119. *Epic Sys. Corp.*, 138 S. Ct. at 1636 n.2 (Ginsburg, J., dissenting opinion); *see also* Sternlight, *Stymies Progress*, *supra* note 15, at 172.

120. *See* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017, 1038 (1996) ("Some courts might find that some arbitration clauses do not give employees adequate notice of the fact that by signing them, they are waiving some or all of their statutory employment rights.").

121. *Epic Sys. Corp.*, 138 S. Ct. at 1647 (Ginsburg, J., dissenting opinion) (noting that the enforcement gap will likely widen if employers can use mandatory arbitration to prevent collective action).

individual claim, employers could easily violate worker rights without consequence.[122] Despite their education and status as professionals,[123] skilled immigrant workers in the tech sector are especially vulnerable to the concerns raised by the dissent in *Epic Systems*.

B. Mandatory Arbitration and Skilled Immigrants in Tech

Tech jobs tend to be high paying[124] and attract highly-skilled immigrants who have education and a global network.[125] Like other educated professionals, immigrants in the technology sector enter into various types of employment agreements.[126] Because large companies are more likely to utilize mandatory arbitration,[127] it follows that highly-skilled immigrants enter into employment agreements containing mandatory arbitration clauses with big Silicon Valley companies. Like the majority's unspoken assumptions about equal bargaining power in *Epic Systems*,[128] there is a similar perception that professional employees have near equal bargaining power to negotiate contracts with employers.[129] Many courts have echoed this sentiment, often holding professionals have equal

122. *See* Sternlight, *Disarming Employees*, *supra* note 78, at 1309-10 (explaining that federal and state laws enacted to protect worker rights are "worthless" if they are unenforceable, and employee rights are often enforced by workers bringing individual and collective actions in courts, but mandatory arbitration denies employees access to the courts).

123. *See* Hyacinth Leus, *Practice Tips: Using the H-1B Visa to Fill Staffing Needs with Foreign Professionals*, 23 L.A. LAW. 24, 24 (2000) (stating in order to qualify for an H-1B visa, the immigrant must qualify as a professional by having a university degree or equivalent professional experience).

124. *See* Marissa Perino, *The 20 Highest-paying Companies in Silicon Valley in 2019*, BUS. INSIDER (Sept. 18, 2019), https://www.businessinsider.com/highest-paying-companies-silicon-valley-tech-2019-9 (explaining that many Silicon Valley companies pay salaries that are above average).

125. *See* Farhad Manjoo, *Why Silicon Valley Wouldn't Work Without Immigrants*, N.Y. TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/technology/personaltech/why-silicon-valley-wouldnt-work-without-immigrants.html.

126. *See* McClure, *supra* note 4, at 1497-98 (listing the different kinds of professionals that enter into employment agreements, including engineers).

127. Colvin, *supra* note 3, at 11.

128. Greene & Neylon O'Brien, *supra* note 73, at 70.

129. McClure, *supra* note 4, at 1498.

bargaining power with employers when professionals challenge adhesion contracts in the employment context.[130] Courts reason employment agreements containing mandatory arbitration clauses and offered on a take-it-or-leave-it basis are not unconscionable, nor entered into unknowingly, because professionals have the education, skills, and experience necessary to negotiate their employment agreements.[131]

Professionals are perceived to have equal bargaining power because of their education, business savvy, and possible experience with the agreements they sign.[132] One article contends professionals are "less likely . . . to be disadvantaged" by mandatory arbitration provisions, and are less likely to agree to a contract "that is grossly unfair to the employee."[133] However, such presumptions about professional bargaining power can be inaccurate.[134] This is particularly true for skilled immigrants because they are subject to employment visa sponsorship by a single employer.[135] Discussing the reliance of skilled immigrants on their employers, Robert D. Aronson and Debra A. Schneider note:

> Foreign nationals holding nonimmigrant visa status based on employment generally require the petitioning employer's involvement in order to maintain status. Not only is the beneficiary dependent on the willingness of his or her employer to engage in the sponsorship process, but the foreign national's maintenance of status is dependent on the continuation of employment in a manner consistent with the terms of the nonimmigrant status.[136]

Essentially, the unique relationship between a sponsoring employer and a skilled immigrant created by the H-1B visa process, discourages skilled immigrants from quitting or going against their

130. *Id*. at 1509.

131. *See* Spitko, *supra* note 4, at 628; *cf*. McClure, *supra* note 4, at 1506-07 (detailing how courts find unequal bargaining power in cases where the employee is a non-professional).

132. McClure, *supra* note 4, at 1515.

133. Spitko, *supra* note 4, at 628-32.

134. McClure, *supra* note 4, at 1516.

135. Lister, *supra* note 16, at 116.

136. Aronson & Schneider, *supra* note 25, at 951-52.

employer.[137] Given the high level of dependency on the sponsoring employer, a skilled immigrant who is offered employment through H-1B visa sponsorship by a tech company in Silicon Valley is likely not in a position to negotiate employment terms. This is because changing employers on an H-1B visa costs money, can be timely and risky, and could jeopardize a skilled immigrant employee's immigration status.[138]

Despite recent reforms to employment visa sponsorship which aim to provide stability and security to immigrant workers, the complexities and risk around switching employers or disrupting a skilled worker's immigration status still exists.[139] These issues are compounded when a spouse or child is also relying on the skilled immigrant's H-1B visa status because losing a job or failure to find an alternate employer could mean loss of immigration status for the entire family.[140] Despite having a legal right to do so, many skilled immigrants cannot realistically change employers.[141] Thus, the benefits of immigration reform do little to increase bargaining power for skilled immigrants. Assuming a skilled immigrant does not have comparable options outside of the United States,[142] she will have limited options under H-1B sponsorship; with limited options comes less bargaining power.[143]

Even though highly-skilled immigrants have a certain level of knowledge and expertise, there can still be pressure to unwillingly agree to mandatory arbitration. With employment visas, the

137. Ontiveros, *H-1B Visas*, *supra* note 40, at 4.

138. *See* Ahmed, *supra* note 75, at 945 (explaining although changes to portability have made it "easier" to change employers, an H-1B visa holder still needs the second employer to sponsor them, submit a new application and pay fees, and the new application must be approved by the government).

139. *See generally* Aronson & Schneider, *supra* note 25 (discussing different congressional actions and resulting regulations directed at skilled immigration and noting that issues of uncertainty and disrupted immigration status still persist).

140. Ontiveros, *Noncitizen Immigrant Labor*, *supra* note 6, at 926.

141. Ontiveros, *H-1B Visas*, *supra* note 40, at 9.

142. *Cf.* Lister, *supra* note 16, at 111 (skilled immigrants on H-1B visas may have just as good employment prospects overseas as in the United States). However, the Lister article does not consider other reasons why a skilled immigrant with good job prospects in their home country might still need a job in the United States.

143. Giesbrecht-McKee, *supra* note 17, at 268-69 (explaining how limited employment options increase the imbalance of bargaining power).

immigrant employee relies on the employer's sponsorship.[144] Because of this reliance on a single employer for sponsorship, skilled immigrant employees are in a vulnerable position and can be taken advantage of.[145] No matter how educated or business savvy a skilled immigrant is, they may not resist a mandatory arbitration clause for fear their employer will decline sponsorship.[146] Immigrant employees sponsored to work in the United States are simply not in a position to "protest unjust conditions or to quit."[147] Highly skilled immigrants are also unlikely to assert their rights against their employer,[148] which brings up questions of whether consent to mandatory arbitration is voluntary.[149] As a result, skilled immigrants who face discrimination or are victims of wage and hour theft may suffer in silence if their claim is too small to pursue individually.[150]

Another potential issue is highly-skilled immigrants may not understand the rights they are waiving when they agree to a mandatory arbitration provision.[151] Skilled immigrants are likely unfamiliar with arbitration, their legal options, and the U.S. legal system.[152] Being in this position does not leave immigrant

144. Killawi, *supra* note 18, at 144 (explaining skilled immigrant workers are usually sponsored by one employer through the H-1B temporary worker program, and workers who are approved enter the United States and work for their petitioning employer). *See generally* Hahm, *supra* note 23.

145. Hahm, *supra* note 23, at 1698.

146. *See* Todd H. Goodsell, *On the Continued Need for H-1b Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153, 172 (2007) (explaining that employers know that H-1B employees are less likely to reject unreasonable assignments because their immigration status depends on their employment).

147. Ontiveros, *H-1B Visas*, *supra* note 40, at 4.

148. Goodsell, *supra* note 150, at 172.

149. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1636 n.2 (2018) (Ginsburg, J., dissenting opinion).

150. *See id*. at 1647 (arguing that expenses may outweigh bringing an individual claim, and that fear of retaliation may also deter bringing an individual claim).

151. *See* Nimmer, *supra* note 67, at 206 (discussing immigrants who do not speak English, as "lack[ing] a strong knowledge of their statutory rights or the American judicial system"). Nonetheless, the logic here, is the same, because although a skilled immigrant likely speaks English, they may not have the basic understanding of U.S. laws or the judicial system that a native-born worker would.

152. *Id*.

professionals much better off than low-wage earning immigrants who may not fully understand arbitration due to language barriers.[153] In both cases, the immigrant employee does not appreciate the rights that are relinquished with forced arbitration.[154] Furthermore, having little to no experience with the U.S. legal system, immigrant employees are likely worse off than native-born professionals who typically have some knowledge of the U.S. legal system through general experience. Thus, highly-skilled immigrants face unique challenges that native-born employees do not face when they are required to consent to a mandatory arbitration clause in an employment agreement.[155]

When the overwhelming trend has become to include mandatory arbitration clauses in employment agreements, it becomes difficult for workers, including skilled immigrant professionals in tech, to negotiate against mandatory arbitration.[156] In the unlikely event that a skilled immigrant professional in tech secures multiple employers for U.S. sponsorship, the likelihood each of those employers requires mandatory arbitration is high.[157] In other words, skilled immigrants in tech faced with mandatory arbitration in one agreement are likely to find similar provisions with different employers. For these reasons, skilled immigrant workers in tech may be in a worse position to negotiate employment terms than native-born professionals.

153. *See* Carlos Antonio Lopez, *Revoking an Employer's License to Discriminate*, 56 RUTGERS L. REV. 513, 532 (2004) (noting immigrant workers with limited knowledge of English "may be unaware or uninformed of their employment rights").

154. *See* Sternlight, *Stymies Progress*, *supra* note 15, at 172 ("Studies have shown that these kinds of clauses are not, in fact, generally read or understood by employees.").

155. *See* Sabrina Underwood, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers Under the H-1b Visa Program*, 15 GEO. IMMIGR. L.J. 727 (2001) (discussing the various inequities faced by H-1B visa workers.).

156. *See* McClure, *supra* note 4, at 1519.

157. *See* Colvin, *supra* note 3, at 23 (explaining that studies reveal that more than half of U.S. workplaces subject their employees to mandatory arbitration agreements).

C. Public Opinion and Push Back

Although courts have increasingly moved towards enforcing mandatory arbitration clauses in the employment context,[158] public sentiment seems to be trending in the opposite direction.[159] Tech workers have successfully used collective action to pressure some Silicon Valley companies to abandon mandatory arbitration, at least with respect to sexual harassment claims.[160] Because highly-skilled immigrants make up a significant segment of the Silicon Valley tech industry,[161] many of them were likely involved in worker pressure to change how Silicon Valley Companies resolve employment disputes. Tech workers' stance against mandatory arbitration tends to mirror general public opinion on the issue.[162] Studies also show that many Americans oppose mandatory arbitration.[163]

158. Ditkowsky, *supra* note 82, at 79.

159. *See generally* Anna M. Hershenburg & Molly O'Casey, *When the Techies Go Marching In: An Industry Updates Its Sexual Harassment Dispute Resolution Policy*, 37 ALTERNATIVES TO HIGH COST LITIG. 18 (2019).

160. *See* Molly O'Casey, *A Movement is Born? Google Eliminates Mandatory Arbitration*, 37 ALTERNATIVES TO HIGH COST LITIG. 60, 60-62 (2019); Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html; Jillian D'Onfro, *A Post-Walkout Google Goes Public with Updated Harassment and Discrimination Policies, Promises to 'Listen'*, FORBES (Apr. 25, 2019), https://www.forbes.com/sites/jilliandonfro/2019/04/25/a-post-walkout-google-goes-public-with-updated-harassment-and-discrimination-policies-promises-to-listen/#17ed09e076b1; Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html.

161. *See* Hahm, *supra* note 23, at 1682 (discussing that U.S. high-tech industry largely participate in H-1B visa program to meet demand for skilled workers); s*ee also* Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 521 (2002) (stating "high-technology businesses around the country are often heavy users of such H-1B workers, nowhere more so than in Silicon Valley").

162. *National Study of Public Attitudes on Forced Arbitration*, EMP. RTS. ADVOC. INST. FOR L. & POL'Y (2009), http://employeerightsadvocacy.org/publications/national-study-of-public-attitudes-on-forced-arbitration/.

163. *Id*.

Recent scholarship credits social movements like "#metoo" and "#timesup" with inspiring workers to speak out against mandatory arbitration of sexual harassment claims.[164] In November 2018, tech workers at Google offices worldwide walked out of work to protest how Google handled sexual harassment claims.[165] One of the top demands resulting from the protest was to abandon mandatory arbitration of sexual harassment claims.[166] Google gave into these demands and abandoned mandatory arbitration of sexual harassment claims,[167] and after additional pressure from its employees, Google ceased using mandatory arbitration for all employment disputes.[168] Following in Google's footsteps, other Silicon Valley tech companies have eliminated mandatory arbitration for sexual harassment cases.[169] Some companies have also eliminated mandatory arbitration of discrimination claims as well.[170]

Although not a tactic used by tech professionals, drivers for DoorDash, a Silicon Valley tech company, recently pushed back against mandatory arbitration by simultaneously filing thousands of individual arbitration claims.[171] The arbitration fees for DoorDash

164. *See* Ditkowsky, *supra* note 82, at 140 (crediting the #metoo movement with giving low-wage workers recognition and voice to speak out about workplace injustices).

165. Xuan-Thao Nguyen, *Disrupting Adhesion Contracts with #metoo Innovators*, 26 VA. J. SOC. POL'Y & L. 165, 188 (2019).

166. *Id*.

167. *Id*. at 189-90; Gerrit De Vynck, *Google Moves to End Forced Arbitration for All Worker Complaints*, BLOOMBERG (Feb. 21, 2019, 1:40 PM), https://www.bloomberg.com/news/articles/2019-02-21/google-moves-to-end-forced-arbitration-for-all-worker-complaints.

168. De Vynck, *supra* note 171.

169. Ditkowsky, *supra* note 82, at 94; Brendan Williams, *Sign or Else: Employment Arbitration in the Wake of an Epic Decision*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 259, 268 (2019) (discussing Facebook arbitration agreement changes); Hershenburg & O'Casey, *supra* note 163, at 23-24 (discussing arbitration agreement changes at Apple, Airbnb, eBay, and Square).

170. Hershenburg & O'Casey, *supra* note 163, at 23; *see also* Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 19 UTAH L. REV. 973, 1013-14 (2019) (explaining that Google, Airbnb, and Microsoft are the few companies in Silicon Valley that have abandoned mandatory arbitration for discrimination claims).

171. Charlotte Garden, Opinion, *DoorDash's Multimillion-dollar Arbitration Mistake*, WASH. POST (Feb. 16, 2020 7:00 a.m.),

alone were about $12 million.[172] When DoorDash refused to pay, the drivers submitted a motion to compel DoorDash to arbitrate and adhere to its own mandatory arbitration policy.[173] Faced with thousands of simultaneous, individual arbitration claims, DoorDash wanted to abandon mandatory arbitration and proceed with a class action lawsuit for its own convenience.[174] However, Judge William Alsup of the United States District Court for the Northern District of California ruled in favor of the drivers and remarked, "DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order."[175]

Despite consistent judicial support for mandatory arbitration,[176] public sentiment is generally against the practice[177] and push back at some Silicon Valley companies has been somewhat successful.[178] However, Congress has yet to deal with mandatory arbitration clauses in employment agreements and has only introduced bills that would eliminate mandatory arbitration for certain types of disputes but has repeatedly failed to pass such legislation.[179]

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https://www.washingtonpost.com/opinions/2020/02/16/doordashs-multimillion-dollar-arbitration-mistake/; Alison Frankel, '*This Hypocrisy Will Not be Blessed': Judge Orders DoorDash to Arbitrate 5,000 Couriers' Claims*, REUTERS (Feb. 11, 2020, 2:53 PM), https://www.reuters.com/article/us-otc-doordash/this-hypocrisy-will-not-be-blessed-judge-orders-doordash-to-arbitrate-5000-couriers-claims-idUSKBN2052S1.

172. Frankel, *supra* note 175.

173. Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

174. *See id*. at 1065.

175. *Id*.

176. Giesbrecht-McKee, *supra* note 17, at 262.

177. Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 U. KAN. L. REV. 47, 77 (2010).

178. *See* O'Casey, *supra* note 164 (discussing the various technology companies that have unilaterally chosen to abandon mandatory arbitration due to pressure).

179. Andrew McWhorter, *A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration*, 52 COLUM. J.L. & SOC. PROBS. 521, 532-33 (2019).

D. Federal Legislative Positions on Mandatory Arbitration

Recognizing the Supreme Court's continued support for mandatory arbitration in the employment context, scholar Alexander J.S. Colvin places hope in Congress to reverse the trend and protect U.S. workers.[180] Many Democratic lawmakers have spoken out about the unfairness of mandatory arbitration, contending that mandatory arbitration eliminates employee choice.[181] For example, a Democrat majority led House of Representatives introduced the Forced Arbitration Injustice Repeal ("FAIR") Act which aims to restrict mandatory arbitration in certain contexts, including employment agreements.[182]

The FAIR Act sets forth two purposes regarding arbitration.[183] The Act's first purpose seeks to prohibit pre-dispute arbitration agreements regarding future employment, consumer, antitrust, or civil rights disputes.[184] The second purpose is broader than the first and seeks to prohibit "agreements and practices that interfere with the right of individuals, workers, or small businesses to participate in joint, class, or collective actions related to an employment, consumer, antitrust, or civil rights dispute."[185]

The FAIR Act still has an arduous journey before the bill becomes law,[186] with opposing positions on mandatory arbitration generally split along party lines.[187] Specifically, conservatives tend to support

180. Colvin, *supra* note 3, at 24 ("If the Supreme Court does not reverse its trend of supporting mandatory arbitrations, it will be necessary for Congress to act to ensure that American workers have an effective means of enforcing the rights they have been promised.").

181. *See generally* Andrew Wallender, *Democrats Decry 'Toxic Culture' of Forced Arbitration in Hearing*, BLOOMBERG LAW NEWS (May 16, 2019, 1:06 PM), https://news.bloomberglaw.com/daily-labor-report/democrats-decry-toxic-culture-of-forced-arbitration-in-hearing.

182. *See* Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 2(2) (2009).

183. *Id*.

184. *Id*.

185. *Id*.

186. *Id*.

187. Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 713 (2016) [hereinafter, Ware, *Politics of Arbitration*].

the enforcement of mandatory arbitration provisions, while progressives tend to oppose the use and enforcement of mandatory arbitration provisions.[188]

III. ARRIVING AT BALANCED SOLUTIONS

While there are plausible solutions to address the issues surrounding mandatory arbitration, these solutions are not comprehensive enough. For instance, it would seem that employee action, like the Google walkout, effectively solves the problem of employer-mandated arbitration, but such efforts do not yield predictable results. Employees will not be successful every time they make collective demands on their employer.[189] Additionally, leaving employee rights to the discretion of employers will not produce uniform protections for all employees.

A common proposed solution to the issue of mandatory arbitration calls for Congress to pass legislation like the FAIR Act, which would invalidate pre-dispute arbitration in the employment context.[190] This approach would abrogate cases like *Epic Systems*.[191] The challenge with this approach is its sweeping effect.[192] In some circumstances, arbitration can be beneficial and preferred by both parties to a dispute.[193] By taking a rigid stance against mandatory arbitration, Congress would prevent employers from including arbitration provisions in employment agreements, even when the employee understands, wants, and agrees with that provision.

Another approach to resolve problems imposed by mandatory arbitration is to balance the bargaining power between an employee and employer, preventing issues of fairness and increasing informed

188. *Id*. at 719.

189. Fan, *supra* note 174, at 998.

190. Sternlight, *Disarming Employees*, *supra* note 78, at 1354; Colvin, *supra* note 3, at 24; Ditkowsky, *supra* note 82, at 94-95 (advocating for legislation that would make arbitration of employment disputes completely unenforceable).

191. Sternlight, *Disarming Employees*, *supra* note 78, at 1354.

192. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 493 (2011) (describing a prior version of the FAIR Act as "excessively broad").

193. For a brief discussion on the benefits of arbitration see James, *supra* note 85, at 536-41.

consent.[194] Collective action by employees on the front end could be useful. To do this, employees may consider unionizing, which would allow for negotiating employment terms, including whether parties use arbitration to resolve disputes.[195] The difficulties with this approach are the decline of unionized labor in the United States[196] and employers are able to vigorously reject unions in their workplaces.[197] These challenges are more profound in a place like Silicon Valley because unions are generally not prevalent in the tech industry.[198] As one commentator noted, "Unionization is unlikely in industries marked by 'short job tenures, heavy use of temporary labor, and heavy use of immigrant labor'—practices associated with Silicon Valley."[199]

Rather than a divisive approach to mandatory arbitration, an ideal solution is a balanced approach that considers employee rights, the interests of justice, and the benefits of arbitration. By proposing complete elimination of mandatory arbitration in employment agreements, Congress assumes an employee would never consent to a pre-dispute arbitration provision.[200] Instead, Congress could enact legislation that utilizes a balancing test or factor test for courts to follow when a mandatory arbitration clause is challenged by an employee. This approach may be more likely to receive bi-partisan support.

There are several balancing factors a court should consider in determining whether it should enforce an arbitration provision. One factor a court may consider is the number of similar claims other employees seek to bring against the employer. If it is clear justice is

194. Green, *supra* note 12, at 82.

195. *Id*. at 79, 89. (explaining how union representation allows for collective action that balances power in employment negotiations).

196. Barbara J. Fick, *The Changing Face of the American Workplace*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 1, 5 (1998).

197. Green, *supra* note 12, at 100.

198. Kenneth M. Geisler II, *Fissures in the Valley: Searching for a Remedy for U.S. Tech Workers Indirectly Displaced by H-1B Visa Outsourcing Firms*, 95 WASH. U. L. REV. 465, 500 (2017) (discussing how unions are fairly absent in the tech industry).

199. *Id*. (quoting Hyde, *supra* note 165, at 498).

200. *See* Sharon Hoffman, *supra* note 81, at 156 (discussing how the advantages of arbitration may be "appealing to both the employer and the employee" and that arbitration is a "commendable option for work-related disputes as long as they are not coercive").

better served through a collective action, employees might not be forced to arbitrate. Another factor courts may look at is the employee's position in society. If the employee's social status is one that is vulnerable to exploitation or abuse, arbitration would not be required. A third factor may be the legal and societal impact of an employee's claim. If the claim is one that would contribute to case law regarding a statutory right or constitutional right, arbitration might not be compelled. Lastly, courts may balance these three factors against the employer's interest for seeking arbitration. If the employer's interest in arbitrating the dispute outweighs the employee's interest against arbitration, then the employee might be required to arbitrate.

A second solution could be found in the use of exceptions. Exceptions are a common legal mechanism and are equally as important as the laws they modify.[201] Congress seeks to eliminate mandatory arbitration and practices that would limit collective action through the FAIR Act.[202] Exceptions to a general ban on mandatory arbitration can achieve the objectives of the FAIR Act in a more equitable manner. For example, Congress could enact legislation that does not outright ban mandatory arbitration, but generally prohibits mandatory arbitration, subject to narrow exceptions. This approach would likely be more successful than the FAIR Act, as drafted, considering the political makeup of the current Congress.[203] Using exceptions could allow litigation or collective actions—despite mandatory arbitration provisions—in certain circumstances. For example, the use of an exception in the case of DoorDash would have allowed drivers to bring a class action when the number of arbitrations

201. *See* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991) ("But although exceptions are an omnipresent feature of the legal terrain, their very pervasiveness appears to prompt the view that exceptions are but adjuncts to what is really important. However useful it may be to consider specific exceptions in particular doctrinal realms, thinking about exceptions as such does not get us very far in thinking about law.").

202. Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 2(2) (2009).

203. With the Democrats controlling the House of Representatives and Republicans controlling the Senate, legislation that completely eliminates mandatory arbitration is not likely to receive bi-partisan support. *See* Ware, *Politics of Arbitration*, *supra* note 191, at 719 (explaining that conservatives generally support the enforcement of mandatory arbitration provisions, while progressives generally oppose enforcement).

contemplated exceeded a threshold number, which would have been beneficial to both DoorDash and its drivers.

Turning specifically to skilled immigrants, Congress has enacted legislation to protect immigrants workers in the past.[204] Because skilled immigrants with H-1B visa status are distinguishable from other employees,[205] Congress can pass legislation to create an exception that requires employers to specifically provide sponsored immigrants with options for arbitration and traditional litigation.[206] Although this is not to advocate for preferential treatment of skilled immigrants over native-born workers,[207] the rights of skilled immigrants in tech will be better protected if they have additional options to resolve their disputes.[208] However, given the fact skilled immigrants face unique challenges with mandatory arbitration because of their H-1B visa status, enacting legislation with exceptions specifically tailored for the unique experience of skilled immigrants could be a useful solution.

CONCLUSION

As this Comment highlights, skilled immigrants in Silicon Valley are not likely to be viewed as a group particularly vulnerable to the disadvantages imposed by mandatory arbitration. Skilled immigrants'

204. Rick Su, *Working on Immigration: Three Models of Labor and Employment Regulation*, 51 WASHBURN L.J. 331, 341 (2012) (stating that federal immigration laws also regulate "employment relations involving immigrant workers").

205. Rajiv S. Khanna, *Liquidated Damages Clauses in H-1b Visa Holders' Employment Contracts*, 58 PRAC. LAW. 37, 37 (Oct. 2012).

206. Congress has used its legislative power to address other issues unique to sponsored immigrants. *Id*. (discussing federal laws specifically tailored to protect H-1B employees from being "subjected to penalties for leaving [a] sponsoring employer").

207. *See* Su, *supra* note 211, at 345 (recommending that regulations should avoid setting immigrants and native workers apart but noting immigrant workers need to be empowered "so that they can negotiate the labor market in the same way as native workers").

208. *See* Pamela G. Rubin, *Immigrants as Grievants: Protecting the Rights of Non-English-Speaking Union Members in Labor Arbitration*, 8 GEO. IMMIGR. L.J. 557, 571 (1994) (contending that with labor disputes, courts and legislatures can "uphold immigrants' rights by affording them more options to pursue their grievances").

education, high-paying jobs, and status as professionals create a perception that they have equal bargaining power with powerful Silicon Valley employers. Yet, employment visa sponsorship creates unique challenges for skilled immigrants regarding the stability of their immigration status and their ability to change jobs. Because a limited number of H-1B visas are in high demand, skilled immigrants risk their livelihoods and possible deportation if they are fired or unable to find another sponsoring employer. H-1B visa regulations create a strong reliance on the sponsoring employer by the immigrant employee, drastically weakening the skilled immigrant's bargaining power and their ability to negotiate arbitration clauses in employment contracts. Although some Silicon Valley companies have done away with mandatory arbitration in certain cases, employers' wide use of mandatory arbitration, and the Supreme Court's endorsement of it, compounds the challenges faced by skilled immigrants.

Moreover, extreme approaches on either side of the mandatory arbitration debate either disregard the notice and consent problems that mandatory arbitration poses, or disregard the benefits that consensual, pre-dispute arbitration agreements provide. The practice of imposing arbitration in the employment agreements cannot be characterized as just or fair. Instead of endorsing or eliminating arbitration in the employment context, solutions should strive for a middle ground that allows employees to bypass mandatory arbitration when certain interests are served. A less polarized approach to mandatory arbitration not only benefits skilled immigrant workers, but it is also advantageous for all U.S. workers.

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