



Women's Rights Project
ACLU National Legal Department

January 13, 2025

VIA E-MAIL (alessers@adr.org; schmidta@adr.org; tatump@adr.org)

Ann Lesser
Vice President
American Arbitration Association
120 Broadway
New York, NY 10271

Aaron Schmidt
Vice President
American Arbitration Association
120 Broadway
New York, NY 10271

Patrick Tatum
Vice President
American Arbitration Association
120 Broadway
New York, NY 10271

Re: AAA Enforcement of Arbitration Agreements that Facilitate
Indentured Servitude of Foreign-Born Workers

Dear Ms. Lesser, Mr. Schmidt, and Mr. Tatum,

The American Civil Liberties Union is a nationwide organization with more than 3 million members, activists, and supporters that has worked for over 100 years to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to everyone in this country. The ACLU Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, advocates for women who face systemic barriers to equality, including immigrant women, low-income women, and women of color. We write this letter together with twelve gender justice, civil rights, and economic justice organizations.

As organizations dedicated to protecting workers and assuring access to justice, we are alarmed to learn that the American Arbitration Association ("AAA") is administering arbitrations brought by employers against workers seeking to enforce "stay or pay" contract provisions, which automatically impose steep monetary penalties, often in the form of liquidated damages, if a worker leaves their job. Such provisions, which have become increasingly common, particularly in low-wage industries, force workers to choose between coerced labor and catastrophic financial

harm. They have been found illegal in many contexts. Moreover, we are deeply concerned that these proceedings lack fundamental fairness, including by rendering decisions against workers who lack adequate notice. By arbitrating contracts that contain “loser pays” and cost splitting provisions, provisions that violate the AAA’s own rules, workers are threatened with thousands more in arbitration costs and attorney’s fees if they defend themselves in arbitration.

We are disappointed that AAA has refused to modify its current practice with respect to “stay or pay” contracts when these issues were recently brought to its attention. The AAA has touted itself as a leader in adopting rules that purport to address the asymmetry in resources and access to information between the employer and the employee and in ensuring the fairness of arbitration generally. By continuing to administer arbitrations of “stay or pay” provisions, however, the AAA essentially facilitates indentured servitude and endangers its legitimacy as an impartial tribunal.

Most “stay or pay” contracts are substantively and procedurally unfair and are used to coerce labor.

“Stay or pay” contract provisions are often unlawful on their face under the federal and state anti-trafficking protections,¹ minimum wage laws,² Section 7 of the National Labor Relation Act,³ and/or non-compete or unfair competition laws.⁴ “Stay or pay contracts,” and the harms

¹ Trafficking Victims Protection Act (TVPA), 18 U.S.C. § 1589(a) (The Act makes it unlawful for an employer to “knowingly provide[] or obtain[] the labor or service of a person . . . by means of serious harm or threats of serious harm to that person or another person” or “by means of the abuse or threatened abuse of law or legal process.”); *see, e.g., Paguirigan v. Prompt Nursing Emp’t Agency*, 286 F. Supp. 3d 430, 535 (E.D.N.Y. 2017) (\$25,000 contract termination fee an unenforceable penalty designed to compel performance); *Byron v. Avant Healthcare Professionals, LLC*, No. 6:23-cv-1645-JSS-LHP, 2024 WL 2304490, at *12-15 (M.D. Fla. Aug. 9, 2024); *see also Carmen v. Health Carousel, LLC*, No. 1:20-cv-313, 2023 WL 5104066, at *7-9 (S.D. Ohio, Aug. 9, 2023); *Vidal v. Advanced Care Staffing, LLC*, No. 122CV05535NRMMMH, 2023 WL 2783251, at *17 (E.D.N.Y. Apr. 4, 2023); *Magtoles v. United Staffing Registry, Inc.*, No. 21CV1850KAMPK, 2021 WL 6197063, at *8 (E.D.N.Y. Dec. 30, 2021).

² Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq. (employer may not require employees to pay costs or damages that are “primarily for the benefit of the employer” when those costs or damages take the employee’s wages below applicable federal minimum wage or required overtime in the relevant workweek); 29 C.F.R. § 531.35 (where an employer does seek to recoup costs paid for the employee’s benefit, such costs may not include a “profit” for the employer).

³ *See generally*, Memorandum from Jennifer A. Abruzzo, General Counsel, NLRB, to All Regional Directors, Officers-in-Charge, and Resident Officers, NLRB, on Remedying the Harmful Effects of Non-Compete and “Stay-or-Pay” Provisions that Violate the National Labor Relations Act (Oct. 7, 2024), <https://apps.nlr.gov/link/document.aspx/09031d4583e5510c>.

⁴ *See, e.g., Colo. Rev. Stat. § 8-2-113* (Colorado non-compete law specifically allowing TRAPs, but only in narrow circumstances); *Fredericks v. Ameriflight, LLC*, No. 3:23-CV-1757-X, 2024 WL 1183075, at *5 (N.D. Tex. Mar. 19, 2024) (“If an [employment] agreement provides a severe economic penalty on a departing employee, courts use the

they cause, disproportionately impact women and workers of color. Foreign-born nurses, who have been targeted by employer policies that require workers to pay exorbitant liquidated damages if they dare to leave their job,⁵ are overwhelmingly women.⁶

Despite repeatedly being advised of the increased use of the AAA by employers attempting to enforce these unlawful and unconscionable contract terms,⁷ the AAA has continued to administer such arbitrations without adopting any procedures to allow for an administrative agency or court to review the legality of the “pay or stay” provision.

Moreover, these proceedings are being administered in circumstances that call into question the fairness of the arbitration process and violate the AAA’s *own* rules. First, arbitrations brought by employers to enforce “stay or pay” contract provisions are allowed to proceed in the absence of notice to the worker. Although the AAA Rules provide that an arbitration may proceed in the absence of any party only after “due notice,”⁸ and that “[a]ny method of service on or notice to a party must be made in such a manner to provide that party with reasonable opportunity to be heard with regard to the dispute,”⁹ arbitrations facilitated by the AAA have gone forward against workers despite reports that they never received notice and thus were denied an opportunity to be heard.¹⁰ Second, the AAA is facilitating arbitration where the arbitration clause specifies that the “loser pays,” meaning that the worker is liable to reimburse their employer for the *employer’s* attorney’s fees and arbitration costs. Such a provision appears to contravene AAA’s own due process principles.¹¹ Even if the AAA itself does not enforce this fee, it is enabling employers to

noncompete reasonableness factors to assess whether the agreement is unlawful.”) (applying Texas trade practices law) (citation omitted).

⁵ See, e.g., Dave Jamieson, *Foreign-Born Nurses Who Quit Their U.S. Jobs Face A Legal Nightmare*, HuffPost (Sept. 21, 2024), https://www.huffpost.com/entry/foreign-nurses-forced-arbitration_n_66e9ee57e4b0becbbaf0313.

⁶ 83% of foreign-born registered nurses are women. Jeanne Batalova, *Immigrant Health-Care Workers in the United States*, Migration Policy Institute (April 7, 2023), <https://www.migrationpolicy.org/article/immigrant-health-care-workers-united-states-2021#gender>.

⁷ Letter from David H. Seligman, Executive Director, Towards Justice, to Ann Lesser, Vice President, Am. Arb. Ass’n (Aug. 13, 2024); Letter from Roya Aghanori, Assistant Att’y Gen., N.Y. Off. of Att’y Gen., to Ann Lesser, Vice President, Am. Arb. Ass’n at 1 (Jan. 4, 2023) (explaining companies were using arbitration “to attempt to enforce illegal liquidated damages provisions”); *Vidal v. Advanced Care Staffing, LLC*, No. 122CV05535NRMMH, 2023 WL 2783251, at *6 (E.D.N.Y. Apr. 4, 2023) (“Courts around the country . . . have held that contracts such as this—in which immigrant workers are threatened with severe financial penalties if they leave their employment before the end of their contract term—can violate the TVPA.”).

⁸ Am. Arb. Ass’n, Employment Arbitration Rules and Mediation Procedures, Rule 29, https://www.adr.org/sites/default/files/EmploymentRules_Web_3.pdf (Revised January 1, 2023).

⁹ Am. Arb. Ass’n, Employment Arbitration Rules and Mediation Procedures, Rule 38, https://www.adr.org/sites/default/files/EmploymentRules_Web_3.pdf (Revised January 1, 2023).

¹⁰ Letter from David H. Seligman, Executive Director, Towards Justice, to Ann Lesser, Vice President, Am. Arb. Ass’n (Aug. 13, 2024).

¹¹ “The employer or company pays the arbitrator’s compensation unless the employee or individual, post dispute, voluntarily elects to pay a portion of the arbitrator’s compensation.” *Employment Arbitration Under AAA*

use it to threaten workers—and thereby coerce their continued employment—and to punish those who dare to quit.

The AAA has an obligation to uphold principles of basic fairness and reject the facilitation of indentured servitude.

The AAA’s rules allow it to “decline to administer cases.”¹² By continuing to administer these contract terms despite evidence of their legal dubiousness and abusive implementation, the AAA knowingly is allowing itself to be used to facilitate nothing less than indentured servitude. The AAA’s appreciation of analogous “concerns regarding fairness, rights, and the ability of the parties to participate,” previously led it to issue a moratorium on administering consumer debt collection arbitration.¹³ Indeed, the AAA has properly recognized before that “public discourse and an evaluation of the AAA’s own experiences,” including the “large volume of filings,” should lead to reconsideration of the Association’s approach to administering certain kinds of proceedings where one party is at an informational disadvantage. This is especially so where the terms of the contract “fall short” of “reasonable expectations of fairness and have a significant impact on [one party’s] substantive rights and remedies.”¹⁴

We urge the AAA to take similar action here and issue a moratorium on arbitrations brought by employers who seek to enforce “stay or pay” provisions against workers.

The AAA’s own Richard Naimark has testified that arbitration “can be adapted to special circumstances to provide for access to fairness and justice for all parties in a dispute.”¹⁵ Surely even Mr. Naimark would agree that fairness and justice are impossible when an employer uses the arbitral process to threaten a worker with financial ruin if they dare to leave their job. The very legitimacy of the AAA, not to mention the lives of scores of vulnerable workers, depend on the AAA’s refusing to enable such abuse.

Administration, American Arbitration Association, <https://www.adr.org/employment> (last visited Oct. 16, 2024); Am. Arb. Ass’n, *Employment Due Process Protocol* (May 9, 1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf (“We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee’s attorney fees, especially for lower paid employees.”).

¹² *Employment Arbitration Under AAA Administration*, American Arbitration Association, <https://www.adr.org/employment> (last visited Oct. 16, 2024).

¹³ See *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the H. Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. 126 (2009).

¹⁴ Am. Arb. Ass’n, Nat’l Consumer Disps. Advisory Comm., *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998),

[https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf).

¹⁵ See *supra* note 13.



Should you have any questions or wish to discuss this issue further, please contact Gillian Thomas, Senior Counsel (gthomas@aclu.org) or Jenessa Calvo-Friedman, Senior Staff Attorney (jcalvo-friedman@aclu.org), with the ACLU Women's Rights Project.

Sincerely,

American Civil Liberties Union
Asian American Legal Defense and Education Fund
Equal Rights Advocates
Legal Aid at Work
Legal Voice
National Black Worker Center
National Center for Law and Economic Justice
National Domestic Workers Alliance
National Employment Law Project
National Institute for Workers' Rights
People's Parity Project
Public Justice
Public Justice Center