Labor & Employment Law Forum

Volume 7 | Issue 1 Article 4

5-2017

The Strong Do as They Can: How Employment Group-Action Waivers Alienate Employees

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"*The employment class action waiver affected me emotionally as I felt powerless in the organization. I felt isolated from others [and] that indirectly affected my performance. I was unable to focus on my job properly. I felt as if I was used as mere[ly] [a] prop in the organization with no powers. The waiver prevented me from pursuing a claim against my employer [and] that caused a lot of trouble for me.*" – Software Engineer[1]

"[*Because of the waiver]*, *I am no longer able to get justice if I am wronged... I was not able to obtain necessary uniforms, and the waiver prevented me from taking my employer to court*." – Security Officer[2]

"*At first... I fe[lt] that the employer wanted to control the employee's legal advantage. I felt somewhat weak in my position as an employee*." – IT Analyst[3]

INTRODUCTION

If an employer steals a group of employees' wages, those employees are free to file a group-action[4] lawsuit at the local courthouse to recover those wages. However, by contractual agreement, some employers require their employees to individually arbitrate their employment claims. These agreements, what this article refers to as compulsory group-action waivers,

[1] Response to an online survey the author conducted on April 12, 2016 (on file with author) (hereinafter referred to as "Survey").
[2] *Id*.
[3] *Id*. (in response to questions about the effect an employment class action waiver had on his relationship with the employer). The analyst made this comment after first noting that the waiver had little effect on him personally because the employer paid him a large amount of money. However, the analyst went on to clarify, "If I was paid less, I may feel different."
[4] When I refer to "group-action" I mean any type of employment-based court action on behalf of a relatively large number of individuals. This could be a Rule 23 class action, a Fair Labor Standards Act Collective Action, or a California Private Attorney General Action.

support the view that "the strong do as they can, while the weak suffer what they must."[5] Here, the "strong" employer requires the employee to sign away her right to join co-workers and publicly sue the employer. The waiver makes the employee "weak" through alienation – a concept refined and examined by sociologists, psychologists, theologians, and philosophers[6] – by decreasing the employee's power, meaning, community, and self-actualization in the workplace and society.

To understand how waivers alienate employees, consider this hypothetical. Mary, an immigrant housekeeper at a large hotel, unwittingly signs an employment arbitration agreement that includes a class action waiver. Throughout the 10 years she works at the hotel, she never receives her legally required rest breaks and management often forces her to work off the clock. Further, the hotel systematically discriminates against her because of her gender by refusing to promote her into leadership positions. After finding out that other housekeepers are suffering in similar ways, she decides to join with her co-workers and file a class action lawsuit. However, because she signed the class action waiver at the start of her employment, the employer forces her to resolve these claims through individual arbitration. Because arbitrating individual claims is not very lucrative, attracting competent attorneys becomes increasingly difficult. Consequently, Mary finds herself in a situation with less than adequate representation. To make matters worse, the employer handpicked the arbitrator, and the arbitrator has an existing working relationship with the employer.[7]

In effect, the class action waiver serves to alienate Mary from her work and from society more generally. For example, the waiver strips Mary of her power to influence decision making

[5] THUCYDIDES, THE PELOPONNESIAN WAR (1910), http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0200:book=5:chapter=89:section=1.
[6] *See* RABINDRA N. KANUNGO, WORK ALIENATION: AN INTEGRATIVE APPROACH 7-57 (1982) (discussing how scholars in the fields of philosophy, theology, sociology, and psychology approach alienation).
[7] *See* Part I.B.1 for a description of how unfair and biased certain types of arbitration can be.

in the company, as she cannot utilize the courts to join with other employees to resolve her claim. Further, the waiver belittles Mary's meaning and worth within the company – the waiver furthers the notion that Mary is merely a potential liability and not a valued employee. Mary is also isolated from her fellow employees and the courts because she cannot join her co-workers to ask the courts for help. All of these effects result in self-estrangement, a condition where Mary is more likely to work for external satisfaction rather than for the intrinsic value of the work itself. This often means that Mary will work just to get her paycheck at the end of the week and not because she genuinely enjoys her job. David Gregory described the alienated worker eloquently:

> A profound malaise of spirit afflicts many workers. Misery, meaninglessness, deep dissatisfaction, and often unarticulable impoverishment of purpose plague even many of the most "successful," especially if "success" is measured only by conventional norms of monetary remuneration in late capitalist society. It has long been axiomatic that most persons who work for a living, as distinguished from those peculiarly driven to "live to work," dread Monday morning.[8]

Gregory's description of an alienated worker could easily apply to Mary. The waiver further reinforces Mary's feelings of powerlessness, meaninglessness, isolation, and self-estrangement.

There is ample scholarship discussing whether employment group-action waivers in arbitration agreements should be lawful.[9] This article adds to that scholarship by presenting an additional reason why courts should find these waivers unlawful. The thrust of the policy argument is that employment group-action waivers in arbitration agreements, in practice, alienate employees by decreasing their power, meaning, community, and self-actualization within society and within the workplace. Thus, a court should not enforce them. To be clear, this article does

[8] David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 122 (1988).
[9] *See e.g.*, Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. (2015); Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945 (2013).

not argue that a court should blindly consider and adopt employee alienation as dispositive in its analysis. No, not at all. Rather, a court should consider employee alienation as part of its analysis because the inquiry falls directly in line with the goals of the national labor policy in the United States. Through the alleviation of alienation, a court is furthering labor policy. Moreover, judges are interested in the practical effects of their decisions and often want to find the more sympathetic reading of a contested legal issue.

The principle argument of this article assumes employee alienation ought to be avoided. There are those that view work as merely "toil and trouble"[10]—where work is simply a daily struggle and only a means to an end. To the contrary, this article ascribes to the views of John Stuart Mill and Karl Marx in that work ought to be inherently fulfilling and should have intrinsic worth.[11] Alienation, as will be described in Part I, is the opposite of that fulfillment. It is the lack of self-actualization, autonomy, and meaning. It is the isolation of the worker.

This article proceeds in three parts. Part I provides introductory information on employee alienation, examines the alienating effects of group-action waivers generally, and points to three reasons why alienation is important to the legal analysis of cases in this area. Part II explains the various elements of the alienation inquiry. In particular, it examines how waiving the right to participate in three different types of group-actions alienates the employee to differing degrees. These three types are Rule 23 class actions, Fair Labor Standards Act ("FLSA") collective actions, and California Private Attorney General Act ("PAGA") actions. Part III concludes with a summary.

[10] John Dupré & Regenia Gagnier, *A Brief History of Work*, 30 J. ECON. ISSUES 553 (1996) (quoting Adam Smith).
[11] *Id*. at 554 (describing Marx's view of work that it can bring about the "full humanity of the individual," and describing Mill's view that "work is aimed at self-fulfillment").

I. CATEGORIES OF EMPLOYEE ALIENATION AND WHY ALIENATION MATTERS

Alienation can be divided into four different categories: powerlessness, meaninglessness, isolation, and self-estrangement. Powerlessness is defined as the lack of autonomy or control. Meaninglessness is characterized by a worker's inability to predict the future and the subsequent inability of an employee to conceptualize her function in the workplace. Isolation is where an employee feels a general lack of community or support. Finally, self-estrangement is the lack of self-actualization, meaning that an employee sees work as merely a means to an end rather than an end in and of itself.

Group-action waivers bring these alienating effects into the workplace. This article assesses how all types of group-action waivers alienate through stealing power, meaning, community, and self-actualization from employees.

Finally, this part closes by examining why employee alienation matters to the legal world. This article contends that an alienation inquiry falls directly in line with the goals of our national labor policy, in particular, the National Labor Relations Act – an act that provides employees the right to organize into unions and take certain collective actions to obtain better terms and conditions in the workplace.[12] Furthermore, alienation is significant because judges care about the practical effects of their decisions and because using it as an analytical tool helps judges find more sympathetic interpretations of contested legal issues.

A. Categories of Employee Alienation

The notion of alienation has existed in the academic discourse for hundreds of years.[13] It also appears in different fields of inquiry. In theology, alienation is human's isolation from

[12] *See* 29 U.S.C.A. §§ 151-169.
[13] RABINDRA N. KANUNGO, WORK ALIENATION: AN INTEGRATIVE APPROACH 8 (1982) (noting that a scholar "pointed out that social alienation as an observed phenomenon is quite ancient....").

God.[14] In property law, alienation can mean the transfer of ownership of property.[15] To Jean-Jacques Rousseau, alienation meant surrendering power to the general will.[16] Melvin Seeman, a prominent sociologist, broke up the theory of alienation into five distinct categories: powerlessness, meaninglessness, isolation, normlessness, and self-estrangement.[17] Robert Blauner, another sociologist, slightly refined Seeman's categories and then applied them to the industrial workplace.[18] While Blauner's classification is almost identical to Seeman's, it only contains four categories: powerlessness, meaninglessness, isolation, and self-estrangement.[19] This section focuses on those four variants of alienation and attempts to define them. This article will draw from different sociologists' definitions of the terms.

1. *Powerlessness: "I lack control"*

The first category of alienation is powerlessness. Powerlessness occurs when a worker *lacks the ability to influence outcomes in the workplace, politics, or society.*[20] Other scholars have described powerlessness as a lack of participation and autonomy[21] or as the feeling of domination by people or a system.[22] Melvin Seeman, who first organized alienation into different categories, recognized powerlessness as originating from the work of Karl Marx.[23] Marx saw the owners of capitalistic enterprises alienating the worker by taking away the worker's means of decision-making decisions and the worker's privileges.[24]

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[14] *Id*.
[15] *Id*. at 9.
[16] *Id*. at 11.
[17] *Id*. at 24. *See also* Melvin Seeman, *On the Meaning of Alienation*, 24 AMER. SOCIO. REV. 783 (Dec. 1959).
[18] *See generally* ROBERT BLAUNER, ALIENATION AND FREEDOM: THE FACTORY WORKER AND HIS INDUSTRY (1964); *see also* Kanungo, *supra* note 13, at 24.
[19] *See generally* BLAUNER, *supra* note 18.
[20] Melvin Seeman, *On the Meaning of Alienation*, 24 AMER. SOCIO. REV. 783, 785 (Dec. 1959).
[21] Blake E. Ashforth, *The Experience of Powerlessness in Organization*, 43 ORG. BEH. & HUMAN DEC. PROC. 207, 207 (1989).
[22] Thomas G. Cummings & Susan L. Manring, *The Relationship between Worker Alienation and Work-Related Behavior*, 10 J. VOC. BEHAVIOR 169 (1977).
[23] Seeman, *supra* note 20, at 784. *See also* RABINDRA N. KANUNGO, WORK ALIENATION: AN INTEGRATIVE APPROACH 24-25 (1982) ("[Powerlessness] was the primary concern of Marx while dealing with labor alienation.")
[24] Seeman, *supra* note 20, at 784.

2. *Meaninglessness: "I lack importance"*

The second category of alienation is meaninglessness. Melvin Seeman describes meaninglessness as "a low expectancy that satisfactory predictions about future outcomes of behavior can be made."[25] In other words, the world is unintelligible.[26] Kanungo notes that meaninglessness "should be characterized in terms of incomprehensibility or inability to understand one's complex environment."[27] As Blauner interprets the term, meaninglessness occurs when an employee does not see the function, purpose, or importance of their activity.[28] The opposite of meaningless is when the employee fully realizes the extent of her actions and how those actions align with the company's goals.[29] In other words, the employee views herself and her contributions to the company as something more than a mere cog in a wheel.

3. *Isolation: "I lack community"*

Isolation is the third category of alienation. It occurs when the employee *lacks connection or association in a social system*.[30] Blauner describes isolation as "the feeling of being in, but not of, society, a sense of remoteness from the larger social order . . . "[31]

4. *Self-Estrangement: "I lack self-actualization"*

The final variant of alienation that this article will discuss is self-estrangement. Self-estrangement is an "elusive idea."[32] Nonetheless, it can be summed up as the *lack of inherent meaning or pride in work*.[33] An example of self-estrangement occurs when an employee merely

[25] *Id*. at 786 (italics redacted).
[26] *Id*.
[27] RABINDRA N. KANUNGO, WORK ALIENATION: AN INTEGRATIVE APPROACH 26 (1982).
[28] *See* ROBERT BLAUNER, ALIENATION AND FREEDOM: THE FACTORY WORKER AND HIS INDUSTRY 26 (1964).
[29] *See id*.
[30] Kanungo, *supra* note 27, at 27.
[31] *See* BLAUNER, *supra* note 28, at 32.
[32] Melvin Seeman, *The Urban Alienation: Some Dubious Theses from Marx to Marcuse*, 19 J. PERSONALITY & SOCIAL PSY. 135, 136 (1971).
[33] *Id.* at 790.

works for her paycheck at the end of the week and not for the intrinsic value of her job.[34] Often, self-estrangement occurs due to a combination of powerlessness, meaninglessness, and isolation. For instance, if an employee lacks control, importance, and community in the workplace or society in general, her work is more likely to only be an activity to satisfy external needs rather than rewarding in itself.[35] Self-estrangement disrupts the employee's experience of time.[36] This is because self-estrangement causes the focus to be the future end rather than the present job.[37]

B. Group-Action Waivers in General

Having identified the categories of alienation, this article will apply the framework to group-action waivers. This section views group-action waivers generally through the lens of employee alienation. The inquiry goes through the four categories of alienation: powerlessness, meaninglessness, isolation, and self-estrangement.

1. *Powerlessness*

Precluding the employee from utilizing group-action reduces the employee's power. This is obvious. Without the waiver, an employee has the ability to influence outcomes in the workplace through both group-action and the judiciary. With the waiver, this influence and control is gone. This article acknowledges that an employee could very well still pursue a claim using arbitration without the backing or support of other employees, as waivers often require. However, this avenue is deficient for three reasons. First, arbitration will likely be unfair to the

[34] *See id*. ("...the worker who works merely for his salary, the housewife who cooks simply to get it over with, or the other-directed type who acts "only for its effect on others" – all these (at different levels, again) are instances of self-estrangement.").
[35] *See e.g.*, Kanungo, *supra* note 4, at 28; BLAUNER, *supra* note 28, at 3 ("When work activity does not permit control (powerlessness), evoke a sense of purpose (meaninglessness), or encourage larger identification (isolation), employment becomes simply a means of making a living.").
[36] BLAUNER, *supra* note 28, at 32 ("*Self-estrangement* is based on a rupture in the temporal continuity of experience. When activity becomes a means to an end, rather than an end in itself, a heightened awareness of time results from a split between present engagements and future consideration.").
[37] *Id*.

employee and biased in favor of the employer.[38] Part of the reason is that arbitrators may feel bound to the companies that hire them for fear of losing their business in the future.[39] Additionally, companies often pay employees for their favorable testimony.[40] Moreover, arbitrators have been known to misconstrue or simply disregard the law to give a favorable ruling for the company.[41] In the arbitration setting, rules of evidence often do not apply,[42] and conflicts of interest flourish.[43] Overall, employees are at an inherent disadvantage: "Why would an arbitrator cater to a person they will never see again?" said Victoria Pynchon, an arbitrator in Los Angeles.[44]

Second, employees lose influence and power with group-action waivers because an employee can often only pursue her claim through group-action. This occurs when the employee has a negative value claim. Negative value claims are defined as lawsuits that are of insufficient value to attract qualified attorneys.[45] Thus, the only recourse available is to aggregate all similar claims, through a group-action, such that the amount of damages at stake are enough to

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[38] *See generally* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOKLYN L. REV. 1309 (2015). *But see* David Sherwyn, et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578 (2005) (arguing that employer-employee arbitration may not be unfair to the employee as "there is no evidence that plaintiffs fare significantly better in litigation.").

[39] The New York Times conducted a massive exposé on the arbitration industry examining more than 25,000 arbitrations between 2010 and 2014. The Times also interviewed hundreds of arbitrators, lawyers, plaintiffs, and judges in 35 states across America. *See* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, THE NEW YORK TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0 ("Unfettered by strict judicial rules against conflicts of interest, companies can steer cases to friendly arbitrators. In turn, interviews and records show, some arbitrators cultivate close ties with companies to get business.")

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *See id*. The Times investigation revealed that a company's lawyers and the arbitrators went to lunch and basketball games together. Further, between 2010 and 2014, 41 arbitrators each took care of 10 or more cases for just one company.

[44] *Id*. The Times' article goes on to note that an arbitrator ruled for a plaintiff in an employment discrimination case where he awarded the employee $1.7 million. No employer ever hired that arbitrator again.

[45] *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

compensate an attorney's fees. Waiving group actions effectively leaves an employer free to commit unlawful acts so long as the damages are individually low enough. This, of course, is only likely to occur in actions where monetary damages are available, such as Rule 23(b)(3) actions.[46]

Third, arbitration agreements often contain confidentiality agreements that preclude employees from divulging their case's facts to others.[47] For example, if an arbitrator finds an employer's actions unlawful, that employee is restricted from notifying her co-workers about the employer's unlawful acts. Consequently, the confidentiality agreements inherently favor the employer because they decrease the chance of future arbitration. These confidentiality agreements clearly disempower the employee and, as discussed more fully below, isolate the employee from her co-workers.

2. *Meaninglessness*

Group-action waivers cause the employee's world to be more unintelligible and, therefore, increase meaninglessness for three reasons. First, it is likely that most employees do not fully understand the implications of signing the arbitration agreement. Most employees do not have access to an attorney who can help navigate the legalese of these waivers and explain what the ramifications of the waivers are. As a result, the employee is unlikely to know the advantages and disadvantages of individual arbitration. The employee will also fail to understand the inherent advantages of group-actions and how unlikely it is to get attorney representation without group-action.

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[46] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) ("...we think it clear that individualized monetary claims belong in Rule 23(b)(3)."). It should be noted that monetary relief may be awarded in Rule 23(b)(2) class actions so long as it is incidental to the injunction. *Dukes*, 131 S. Ct. at 2557 ("[Monetary claims may not be certified under Rule 23(b)(2)] at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.").

[47] *See* Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 198-99 (2015).

Second, the coercive aspect of the mandatory waiver – an employer saying that in order to work at a job, an employee must sign away some of her rights – is likely confusing to an employee. Work is essential to human beings. Other than in the mandatory waiver context, there are few other scenarios in which a company seeks to deprive a worker of something that essential – a possible comparator might be if a worker's right to sue that company is renounced. For the average person, the rule of law and the courts are understood to be ubiquitous entities with unfettered influence; city, county, state, and federal laws confront the average person daily. This is not to mention that movies, TV shows, media, school, and society in general tell the average person that she can sue an entity if that entity does something illegal. So, to have an employer require that an employee relinquish that right to sue goes against these common norms and understanding of what rights a person should have. The employee is subsequently confused, and the world becomes a bit more unintelligible. Of course, the confusing nature depends on whether the employee is cognizant of the fact that she is signing away her rights with the waiver.

Third, by implementing a group-action waiver, the employer reinforces the notion that the employee is just a cog in the wheel. To some employers, the waiver represents the ability to prevent meritless claims vulnerable to the group-action mechanism. In more extreme instances, however, it also represents somewhat of a get out-of-jail-free card for the employer, as the deterrence effect of the group-action is effectively gone. Simply put, the employer likes the waiver because it prevents the loss of capital, and it is easy to implement.[48] In effect, these waivers tell the employee one of two things: Either the employer does not trust its employees enough to bring only valid group-action claims, or the employer just wants to protect itself when it commits an unlawful act. Either way, this makes the employee-employer relationship

[48] *See generally* Garrett D. Kennedy & Joseph A. Piesco, *United States Supreme Court Reaffirms Use of Class Action Waivers in Arbitration Agreements: Next Stop – Employment Contracts*, EMPLOYMENT ALERT, DLA PIPER (Dec. 18, 2015), https://www.dlapiper.com/en/us/insights/publications/2015/12/us-supreme-court-reaffirms-use-of-waivers/ (noting that waivers are a cost effective and easy way to save money).

impersonalized and focused on money, reinforcing the view that the employee is just another cog on the wheel of economic profit. As another cog in the wheel, the employee's role in the workplace has less purpose, and the future of the employee's role in the company becomes more uncertain.

3. *Isolation*

Clearly, a group-action waiver isolates employees as it prevents employees from gathering together to pursue an employment claim against the employer jointly. This insulates the employee from other employees and from the judiciary. Moreover, by changing the dynamic of the interaction with employees, the waiver serves to separate the employee from the employer. Instead of the dynamic being one of collaboration, the waiver creates distrust and conflict. The waiver says, "as an employee, you are not a partner in this business. Instead, you are a potential liability." This is likely to inhibit an employee from treating her employer as a part of her community.

Additionally, the confidentiality agreements often included in these arbitration contracts further isolate the employee. These provisions limit the ability of an employee involved in arbitration from discussing any facts or conclusions found in the case. This gag rule clearly reduces the amount an employee can be involved in her community and in the workplace because she cannot, for example, help similarly situated employees if the arbitrator found an employer's actions unlawful.

4. *Self-Estrangement*

Because of the waiver's capability to reduce the employee's power, meaning, and community, the process of working becomes more a means to get money rather than an end in and of itself. The whole basis for the waiver is to save the employer's capital through reducing

negative media coverage[49] and expensive lawsuits. The intrinsic value of work is less likely to shine when that work is predicated on a document that emphasizes employer dominance and employer cost-saving measures at the expense of the loss of the right to collectively engage in a lawsuit. Thus, because the waiver diminishes the inherent value of work and places the focus of the employment relationship on monetary gain, an employee is more likely to feel self-estranged.

C. Employee Alienation Matters

This article has put forth a general theory as to how employment group-action waivers alienate the employee, but why should a court or government care about this issue? This section lays out three reasons. First, curing employee alienation helps to further the national labor policy set forth in the National Labor Relations Act. A judge should therefore consider the alienation analysis because alienation is grounded in U.S. labor policy. Second, judges are invested in the practical effects of their decisions. If a judge knows that her decision will result in the alienation of an employee, she may be less likely to rule that way. Third, related to the second reason, determining the alienating effects of a certain legal interpretation helps a court find the "sympathetic" reading. A sympathetic reading is particularly useful when reasonable minds could disagree as to the proper interpretation or reading of a certain law.

1. *Alleviating Employee Alienation Furthers the National Labor Policy*

Employee alienation contributes to the very problems that Congress and the President were intent on eliminating through the National Labor Relations Act ("NLRA"). First, Congress sought to decrease industrial strife and unrest in the workplace.[50] In particular, Congress spoke of unrest that obstructed commerce by impairing the instrumentalities of commerce and by

[49] The waiver reduces negative media coverage because, as discussed above, the arbitration proceedings are private and often confidential.
[50] 29 U.S.C.A. § 151.

decreasing employment and wages.[51] It is easy to see how employee alienation leads to industrial unrest and violence[52] — a powerless, isolated, estranged, unimportant worker is more likely to revolt against the entity causing these feelings.

Second, the NLRA's intent was to restore equal bargaining power between employees and employers.[53] In fact, the aim of the NLRA, according its chief architect, was to redistribute power in the workplace.[54] This intent is evidenced through, among other parts of the Act, Section 8(a)(2). Section 8(a)(2) of the NLRA bans company-dominated unions.[55] A company-dominated union inherently shifts power away from the employee and is "incapable of providing workers with . . . the power necessary to forge agreements with management . . . ."[56] In relevant part, alienation is the absence of employee power and participation – it is powerlessness.

Finally, the point of the NLRA was to provide employees with the right to engage in concerted activity to obtain mutual aid or protection.[57] For example, an employee has the right to discuss working conditions with other employees or to attempt to gain the support of the media concerning the employees' conditions of employment. Alienation undermines this principle because it is isolation from other employees and other actors, both internal to the company and external.

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[51] *Id.*

[52] Numerous social scientists have long recognized this phenomenon. *See, e.g.*, ROBERT BLAUNER, ALIENATION AND FREEDOM: THE FACTORY WORKER AND HIS INDUSTRY 121-22 (1964) (noting that alienated auto workers keep their dignity through fighting authority and by participating in protests); Johanna Oresckovic, *Capturing Volition Itself: Employee Involvement and the Team Act*, 19 BERKELEY J. EMP. & LAB. L. 229, 247-48 (1998) (noting that worker alienation has led to, among other negative consequences, "widespread labor unrest.").

[53] 29 U.S.C.A. § 151.

[54] Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1722-23 (2004).

[55] 29 U.S.C.A. § 158(a)(2) (An employer violates the Act when it "dominates or interferes with the formation of a labor organization or contributes financial or other support for it.").

[56] Johanna Oreskovic, *Capturing Volition Itself: Employee Involvement and the Team Act*, 19 BERKELEY J. EMP. & LAB. L. 229, 242 (1998).

[57] 29 U.S.C.A. § 157 (West) ("Employees shall have the right to...engage in...concerted activities for the purpose of mutual aid or protection.").

2. *Judges Care About the Practical Effects of Their Decisions*

Judges care about doing the right thing: "Judges are curious about social reality . . . [T]hey want the lawyers to help them dig below the semantic surface."[58] As a result, attorneys and experts in legal persuasion view the policy argument — such as this article's alienation argument — as central to legal advocacy.[59] There are of course some legal theorists and judges who advocate that judges should not make decisions based on policy implications or practical effects but rather on a mechanical application of rules.[60] Nonetheless, it is true that at least some judges see otherwise.[61] Consequently, a study and interpretation of alienation is of importance to at least some judges and other adjudicators.

3. *Employee Alienation helps a Court find the "Sympathetic" Reading*

Finally, analyzing alienation allows a court, as well as the public, to find the sympathetic reading when confronted with a legal issue that can be reasonably interpreted different ways. As Justice Blackmun once stated, "[t]he question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one

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[58] *See* RICHARD POSNER, HOW JUDGES THINK 283 (2008).
[59] *See, e.g.*, Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59 (2001); Michael R. Smith, *The Sociological and Cognitive Dimensions of Policy-Based Persuasion*, 22 J.L. & POL'Y 35 (2013); Maureen B. Collins, *A Place for Policy*, 89 ILL. B.J. 543 (2001); Ken Swift, *The Writer's Corner: Making Policy Arguments*, 61 BENCH & B. MINN. 30 (2004).
[60] *See* Elaine Mcardle, *Filling in the Gaps*, HARV. L. BUL., July 1, 2008, http://today.law.harvard.edu/book-review/filling-in-the-gaps/ (quoting Harvard Law Professor Einer Elhauge stating, "There's a nice, popular conception that judges are just umpires calling balls and strikes, and that they just have to mechanically apply the rules.").
[61] *See, e.g.,* Theodore A. McKee, *Judges As Umpires*, 35 HOFSTRA L. REV. 1709, 1715 (2007) ("We judges must resist the temptation to assume that we are beyond the reach of the forces that shape the mindsets and beliefs of our non-jurist peers."); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 705-11 (2007) (criticizing the view that judges make decisions based only on the rules and without outside interference or policy preferences).

which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."[62]

As will be discussed, the legality of group-action waivers is an open one. A court can reasonably interpret the law as allowing and disallowing these waivers in the employment context. The current stance of the National Labor Relations Board ("NLRB") and several circuit courts is evidence of this. The NLRB has held in numerous cases that an employment class or collective action waiver violates the right to engage in concerted activity, a right protected under the NLRA.[63] Circuit courts, on the other hand, find that the Federal Arbitration Act ("FAA") requires enforcement of the waiver.[64] As this article will show, group-action waivers alienate employees depriving them of power, meaning, community, and intrinsic pride in the workplace. As a result, a court should be more likely to find the NLRB's interpretation as the sympathetic interpretation: group-action waivers are unlawful in the employment context.

II. WAIVING THE RULE 23 CLASS ACTION, FLSA COLLECTIVE ACTION, AND PAGA ACTION ALIENATES EMPLOYEES

This article's central argument is that group-action waivers in employment arbitration agreements alienate employees. However, the degree of alienation depends upon which group-action mechanism an employee waives. This section analyzes three common employment group-actions through the lens of alienation: Rule 23 class action waivers, FLSA collective action waivers, and PAGA action waivers.

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[62] *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 212-13 (1989) (Blackmun, J. Dissenting).

[63] *See*, *e.g.*, *In Re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) (holding that group-action waivers in arbitration agreements violate the NLRA); *Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) (reaffirming *In Re D. R. Horton, Inc.*). The relevant language in the NLRA is derived from 29 U.S.C. § 157 (West) ("Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."). For articles discussing the NLRB's conflict with the circuit courts, *see* Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945 (2013) (arguing that the employee's right to pursue class claims is a substantive right under the NLRA rather than a procedural right and, thus, is not in conflict with the Federal Arbitration Act).

[64] *See, e.g.*, *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) (finding that the Federal Arbitration Act requires enforcement of class and collective action waivers in employment arbitration agreements); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) (same); *see also* Michael H. Dell, *5th Circuit Rejects NLRB's D.R. Horton Decision*, 22 NO. 3 N.J. EMP. L. LETTER 3 (Jan. 2014).

A. Rule 23 Class Action Waiver

To begin, it is best to understand the unique features of the Rule 23 class action before looking at the waiver's alienating effects. Rule 23 of the Federal Rules of Civil Procedure permits a plaintiff whose lawsuit satisfies certain criteria to pursue her claim as a class action.[65] Rule 23 can be divided into two separate types of class actions: Rule 23(b)(2) and Rule 23(b)(3).[66] Both have distinctive characteristics.

Rule 23(b)(2) involves mainly injunctive relief rather than monetary damages.[67] Because it is injunctive relief, it is slightly de-individualized – every employee affected obtains the same relief. Additionally, when a class representative sues the employer under Rule 23(b)(2), the court is not obligated to send notice to absent class members.[68] Finally, there is no requirement that absent class members opt-in to or opt-out of the class action.[69] This adds to the de-individualized nature of Rule 23(b)(2).

Conversely, the Rule 23(b)(3) class action is concerned mainly with monetary relief rather than injunctive relief.[70] Personal notice is required and so is the ability for absent class members to opt-out of the lawsuit.[71] Also, relief can be individualized – each class member can receive a designated amount of money as relief.[72] Finally, Rule 23(b)(3) is more difficult to certify than Rule 23(b)(2) because Rule 23(b)(3) requires two additional criteria be satisfied:

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[65] *See generally* Fed. R. Civ. P. 23.
[66] Fed. R. Civ. P. 23(b)(2-3).
[67] Fed. R. Civ. P. 23(b)(2) (the rule states that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final **injunctive relief or corresponding declaratory relief** is appropriate respecting the class as a whole) (emphasis added). *See also* Newberg on Class Actions § 1:3 (5th ed.) ("This category is typically employed in civil rights cases and other actions not primarily seeking money damages.").
[68] Fed. R. Civ. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class."). Note that the court is not required to give notice but may if it wants.
[69] *See* Fed. R. Civ. P. 23(b)(2); Fed. R. Civ. P. 23(c)(2)(A) (notice that there is no requirement that potential class members have the opportunity to opt-out of the class action). However, for Rule 23(b)(3) class actions, the potential class members must have the opportunity to opt-out. *See* Fed. R. Civ. P. 23(c)(2)(B)(v).
[70] Newberg on Class Actions § 4:24 (5th ed.) ("the structure of Rule 23 generally steers money damage class actions into Rule 23(b)(3), with its greater procedural protections . . . .").
[71] *See* Fed. R. Civ. P. 23(c)(2)(B).
[72] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) ("we think it clear that individualized monetary claims belong in Rule 23(b)(3).").

predominance and superiority.[73] Specifically, Rule 23(b)(3) requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[74]

It is also important to note which entity created Rule 23 and the policy behind its creation. The Civil Rules Advisory Committee originally created Rule 23.[75] The Chief Justice of the U.S. Supreme Court appoints members of this committee.[76] This committee consists of experts on civil procedure from the judiciary and academia.[77] The Committee takes notice and comment during rulemaking when the Judicial Conference of the United States and the Supreme Court have the opportunity to review a proposed rule.[78] Eventually, the proposed rule is sent to Congress.[79] If Congress does nothing within a specified period, then the rule goes into effect.[80]

The policy behind Rule 23 was to alleviate burdened courts, remove the risk of inconsistent results in different courts, secure class-wide relief for class-wide harms, and provide a mechanism to resolve small injuries of a large number of individuals.[81] In short, Rule 23 was not created specifically to address employment issues.

As discussed above, several circuit courts have found that employment Rule 23 class action waivers are lawful.[82] However, the NLRB has found that any employment group-action

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[73] Fed. R. Civ. P. 23(b)(3).
[74] *Id*.
[75] *See generally Panel Eight: Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. 135, 137 (2004).
[76] *Committee Membership Selection*, UNITED STATES COURTS (last visited April 20, 2017), http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection.
[77] *See In re Nat. Football League Players Concussion Injury Litig.*, 775 F.3d 570, 589-90 (3d Cir. 2014).
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *See* Tom Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C.L. REV. 501, 504-505 (1969).
[82] *See, e.g.*, *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) (finding that the Federal Arbitration Act requires enforcement of class and collective action waivers in employment arbitration agreements); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) (same); *see also* Michael H. Dell, *5th Circuit Rejects NLRB's D.R. Horton Decision*, 22 NO. 3 N.J. EMP. L. LETTER 3 (Jan. 2014).

waiver is unlawful because such waivers violate the NLRA.[83] However, because Congress empowered the federal circuit courts to enforce the NLRB's orders, the NLRB's legal stance likely has little practical effect so long as the circuit courts continue to refuse to enforce the NLRB's ban of these waivers.[84] While the Supreme Court has found that mandatory group-action waivers in other contexts are lawful,[85] it has yet to decide whether group-action waivers in the employment context are lawful. Thus, Rule 23 class action waivers in the employment context are presently lawful.

What follows is an analysis of the alienating effects of waiving these characteristics of Rule 23. Similar to Section B of Part I above, this section analyzes Rule 23 under the four categories of alienation: powerlessness, meaninglessness, isolation, and self-estrangement.

1. *Powerlessness*

Waiving Rule 23(b)(2) and Rule 23(b)(3) class actions decreases worker power to differing degrees. Rule 23(b)(2) requires no notice and no opt-out mechanism. Therefore, an absent class member loses less autonomy when Rule 23(b)(2) class actions are waived because she would have had less of a chance of knowing about the class action even if she had not signed the waiver. It should be noted that there are instances when the media, co-workers, or other people put the absent class member on notice. In practice, an absent class member of a Rule 23(b)(2) class action does not always lose autonomy because of a lack of court notice. On the

[83] *See*, *e.g.*, *In Re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) (holding that group-action waivers in arbitration agreements violate the NLRA); *Murphy Oil Usa, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) (reaffirming *In Re D. R. Horton, Inc.*).

[84] *See Basic Guide to the National Labor Relations Act,* NATIONAL LABOR RELATIONS BOARD, OFFICE OF THE GENERAL COUNSEL (1997)*, https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf* ("If an employer or a union fails to comply with a Board order, Section 10(e) empowers the Board to petition the U.S. court of appeals for a court decree enforcing the order of the Board enjoining conduct that the Board has found to be unlawful. Section 10(l) provides that any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any appropriate circuit court of appeals.").

[85] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (finding that class action waivers are enforceable in the consumer contract context even where state common law prohibits such waivers); *Am. Exp. Co. v. Italian Colors Rest.,* 133 S. Ct. 2304 (2013) (finding class action waiver enforceable in the merchant contract context).

other hand, because Rule 23(b)(3) class actions contain an opt-out and notice requirement, waiving Rule 23(b)(3) decreases employee control and power more. The ability to opt-out is not significantly empowering because the court assumes the employee is already part of the class action. If the employee does nothing, the case continues with her as part of the class. The affirmative act of opting-in would provide much more control and power for the employee. In contrast, Rule 23(b)(3)'s additional requirements of predominance and superiority make it more difficult to succeed in certifying the class. Thus, an employee's ability to influence outcomes is not as great.

2. *Meaninglessness*

Rule 23(b)(2)'s lack of notice contributes to uncertainty about future events in the workplace. This is because without notice, the absent class member has no knowledge about the ongoing class action.[86] Moreover, if the employee is not required to be fully informed about the class action, surely that employee's importance and function is already decreased. Therefore, waiving this right has little effect on meaninglessness. For opposite reasons, waiving Rule 23(b)(3)'s notice requirement decreases meaning more greatly.

Waiving Rule 23 class actions in general has little effect on employee meaning because of who created Rule 23 and why they created it. The Civil Rules Advisory Committee, the entity that effectively created Rule 23, is less connected to the employee than say, the federal or a state government. The Chief Justice selects the individuals on the Committee and not the people. Thus, an average employee cannot directly influence who is on the committee like she can directly influence who is in Congress or the state legislature. Further, the employee's interests were not the central purpose behind Rule 23. Recall that Rule 23's goals were to alleviate burdened courts, remove inconsistency between different courts, secure class-wide relief for

[86] However, even if Rule 23(b)(2) does not require notice, courts may still mandate it. Further, an absent class member may know about a class action through the media, co-workers, and others.

class-wide harms, and resolve small injuries of a large number of individuals. Rule 23 wasn't created specifically for the employee. Because the Civil Rules Advisory Committee is not that connected to the average employee, and because the Committee's focus was not on employee needs, waiving Rule 23 only slightly decreases employee meaning in society; the waiver only barely changes the employee's purpose and function with respect to government.

3. *Isolation*

Rule 23(b)(2)'s non-individualized, injunctive relief seems to add to feelings of community in the workplace. For instance, say a court determines that the employer misclassified a class of individuals as independent contractors instead of employees. The court then orders that the employer recognize the class as employees ensuring that the employer provide the class all the benefits of being a *bona fide* employee. As a result, these individuals become more integrated into the workplace and more involved with each other because relief affects all the employees and the class. Therefore, waiving Rule 23(b)(2) class actions limits this potential for community and adds to isolation. Conversely, Rule 23(b)(3)'s focus on individualized relief – that is, monetary relief – puts emphasis on the individual rather than the community. Waiving this inevitably has less of an effect on isolation because of this emphasis on *individual* relief.

Further, waiving Rule 23 in general isolates the employee from the Civil Rules Advisory Committee. Although the committee has significant public input and advice, it is still more disconnected from the employee than, say, local and federal governments. Accordingly, isolation is limited in this instance.

4. *Self-Estrangement*

Because Rule 23(b)(2) focuses on non-monetary ends, it seems to emphasize that work is not all about money. Instead, it promotes the notion that work may be an end in and of itself and

have intrinsic benefits worth more than the paycheck at the end of the week. Therefore, waiving (b)(2) class actions enhances self-estrangement significantly. On the other hand, (b)(3) class actions are chiefly concerned with obtaining monetary relief. This promotes the notion that work is predominantly about money and not necessarily about anything else. Consequently, waiving (b)(3) class actions does not considerably affect self-estrangement.

B. FLSA Collective Action Waiver

Congress enacted the Fair Labor Standards Act ("FLSA") to "eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[87] In this vein, the FLSA collective action rule was specifically created to help the worker. This is in contrast to Rule 23 class actions because Rule 23 was implemented to cover a wide variety of legal actions.

The FLSA collective action contains unique components.[88] It requires that an employee opt-in rather than opt-out.[89] Thus, an employee must affirmatively decide that she wants to pursue the claim with her fellow co-workers – unlike a class action, the court does not assume she is a part of the lawsuit. Furthermore, every employee who opts in has party status and can argue her claim in court.[90] Similar to Rule 23(b)(3), personal notice is required. Collective action also requires that the employees suing the employer be "similarly situated," which the FLSA does not define.[91] While some courts issuing certification resort to analyzing the "similarly situated" standard using the Rule 23 criteria, most courts use an ad-hoc method.[92]

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[87] 29 U.S.C.A. § 202(b).
[88] *See Id.* at § 216(b).
[89] *Id.* ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought").
[90] *See* COLLECTIVE ACTIONS UNDER THE FAIR LABOR STANDARDS ACT, 7B FED. PRAC. & PROC. CIV. § 1807 (3d ed.).
[91] 29 U.S.C.A. § 216(b).
[92] *See* Matthew Hoffman, Comment, *Fast's Four Factors: A Solution to Similarly Situated Discovery Disputes in FLSA Collective Actions*, 49 HOUS. L. REV. 491, 502-505 (2012).

Arguably, this ad-hoc standard is not as difficult to satisfy than the certification criteria in both Rule 23(b)(2) and Rule 23(b)(3) class actions.[93]

As already discussed, there is conflict between the NLRB and the federal circuit courts as to the legality of any group-action waiver in the employment context, and the U.S. Supreme Court has not addressed this question as of yet. However, this conflict has little practical effect because the circuit courts enforce the NLRB's orders.[94] As a result, the FLSA collective action waiver is currently lawful.

What follows is an analysis of these components through the lens of alienation. As with this article's other analyses, this section looks at the four categories of alienation.

1. *Powerlessness*

Collective action's opt-in requirement provides immense power to the employee. The court makes no assumptions as to the employee's choice to be a part of the lawsuit. Instead, it asks the employee to tell the court that she wants to be involved with the suit. This obviously provides great power to the employee – the employee has ultimate control. As a result, waiving this decreases employee control and autonomy considerably. Just as Rule 23(b)(3) requires notice, so does a FLSA collective action. Waiving this collective action right obviously decreases the ability for an employee to influence the workplace. Collective action requires a less stringent certification process, and, therefore, the employee has more power. Finally, opted-in employees enjoy full party status and the ability to be present in court. As a result, the waiver reduces even more power by eliminating this party status.

[93] Allan G. King, et al., *You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-In Collective Actions Under the FLSA*, 5 FED. CTS. L. REV. 1, 12-15 (2011) (describing six procedural differences between Rule 23 and FLSA Collective Actions that indicate that Rule 23 is more difficult to satisfy).
[94] *See* Part II.A.

The collective action waiver also indirectly steals power away from the employee. Congress enacted the FLSA to protect the workers from unscrupulous employers.[95] The people (including relevant employees) elect Congress, and Congress represents the people. Thus, the collective action waiver is taking power away from Congress, and, by extension, the employee.

2. *Meaninglessness*

By waiving the right to collective action, the worker's outlook on her future is more unintelligible and less ascertainable, resulting in a loss of purpose both in the workplace and in society. Common knowledge leads an average employee to assume that if she petitions her government to create a law (FLSA) that establishes a process that effectively protects her, an employer should be precluded from requiring the employee to relinquish her right to that process. The waiver goes against the thought that "in America, the law is king."[96] Therefore, an employee's future is indeterminable with respect to society. "What other federal legal protections have I signed away?" an employee may ask. This uncertainty extends to the workplace as well. By requiring waiver of a federal law specifically designed to protect employees, the employer is telling the employee that she is not important to the workplace.

3. *Isolation*

The collective action creates community through the ability to affirmatively opt-in to a lawsuit and through the relative ease in satisfying the "similarly situated" requirement. It also connects the worker to their federal government, as the FLSA is an act created by the U.S. Congress. Consequently, waiving the collective action right not only isolates an employee from other employees in the workplace, but it also insulates an employee from the protections of the federal government.

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[95] *See generally* 29 U.S.C.A. § 202(b).
[96] THOMAS PAINE, COMMON SENSE (1776), http://www.let.rug.nl/usa/documents/1776-1785/thomas-paine-common-sense/let-the-assemblies-be-annual.php.

4. *Self-Estrangement*

Collective action waivers intensify self-estrangement. This is due to the FLSA's purpose of eliminating detrimental labor conditions. This focus on helping vulnerable employees furthers the notion that work is more than just about a paycheck. The workplace must also be beneficial to the employee in other ways. As a result, waiving the collective action process tells an employee that one way to achieve those non-monetary benefits is shut off. The practice of working then becomes a means simply to get by.

C. PAGA Action Waiver

There are several relevant components of the PAGA action to this analysis. First, an aggrieved employee brings a PAGA action on behalf of California to recover civil penalties for Labor Code violations.[97] This effectively deputizes the employee making that employee an agent of the state.[98] Second, the employee must provide notice to the employer and to the Labor and Workforce Development Agency ("LWDA") containing the alleged facts and arguments supporting the claim.[99] If the LWDA does not respond in 33 days, chooses not to cite the employer, or does not issue a citation after 158 days, the employee can begin the lawsuit.[100] Third, the PAGA action does not need to comply with the Rule 23 requirements of certification.[101] Fourth, workers receive 25 percent of any penalties collected from the employer.[102] The rest goes to the state.[103]

It is important to the alienation analysis to note which entity enacted PAGA and the policy behind it. California enacted PAGA to address two primary problems that delayed prosecution of Labor Code violations: (1) district attorneys considered these violations a low

[97] Cal. Lab. Code § 2699 (2016).
[98] *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 209 P.3d 937, 943 (Cal. 2009).
[99] Cal. Lab. Code § 2699.3(a)(1) (2016).
[100] *Id.* at § 2699.3(a)(2)(A-B).
[101] *Willner v. Manpower Inc.*, 35 F. Supp. 3d 1116, 1136 (N.D. Cal. 2014).
[102] Cal. Lab. Code § 2699(i).
[103] *Id.*

priority and (2) insufficient government resources.[104] Moreover, the primary reason for PAGA is to deter.[105]

In contrast with both Rule 23 class action waivers and FLSA collective action waivers, the California Supreme Court and the Ninth Circuit have found PAGA action waivers unlawful. The California Supreme Court in *Iskanian* found that a PAGA action waiver is contrary to public policy and therefore unlawful.[106] Moreover, the court found that the Federal Arbitration Act ("FAA") does not preempt PAGA because the Federal Arbitration Act's ("FAA") aim was to offer a forum for determination of private disputes, and PAGA is a dispute between a public entity and the employer.[107] Almost all of the monetary penalties go to the state.[108] The aim of the PAGA action is not to help private parties but rather to safeguard the public.[109] Furthermore, resolving a split among the California federal district courts on this issue, the Ninth Circuit found PAGA action waivers unlawful for the same reasons articulated in *Iskanian*.[110]

Like the previous inquiries, this section looks at the PAGA action through the lens of the four categories of alienation.

1. *Powerlessness*

The amount of power a PAGA action provides to an employee should not be understated. It is immense. The employee becomes an agent and a deputy of the state charged with suing his employer for illegal acts. The action, therefore, crosses out of the private realm and into the public realm. Additionally, there is no complicated certification requirement, in effect making it

[104] *Medina v. Vander Poel*, 523 B.R. 820, 825 (E.D. Cal. 2015), *appeal dismissed* No. 15-15301 (9th Cir. May 11, 2015).
[105] *Brown v. Superior Court*, 157 Cal. Rptr. 3d 779, 790 *review granted and opinion superseded sub nom. Brown v. S. C.*, 307 P.3d 877 (Cal. 2013).
[106] *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 133 (2014) *cert. denied*, 135 S. Ct. 1155 (2015).
[107] *Id*. at 384.
[108] *Id*. at 388.
[109] *Id*. at 386.
[110] *See Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015).

easier to bring forth a lawsuit.[111] Consequently, a waiver relinquishes an enormous amount of power and ability to influence the workplace.

2. *Meaninglessness*

Similar to the discussion in the powerlessness inquiry, by deputizing the employee, her function in society is amplified ten times over. She now, as a deputy, represents the people of the state of California – all 38 million of them – and is tasked with protecting their interests. When a statute that specifically elevates employees to such a level of importance must be waived, the employee's world is surely more unintelligible and uncertain.

3. *Isolation*

PAGA action waivers alienate the employee from the state government. This isolation is more significant than both FLSA collective action and Rule 23 class action waivers because the state government is most closely linked to the employee. The employee has an easier chance of affecting state politics than she does federal politics or actions of an unelected committee.

4. *Self-Estrangement*

PAGA actions reinforce the idea that work is satisfying for its intrinsic nature rather than for extrinsic motives such as money. This is because the state collects most of the monetary penalties. Accordingly, money for the employee is not the chief concern of the action. In fact, PAGA actions are primarily concerned with deterrence. Therefore, waiving PAGA actions contribute to the notion that work is not an end in and of itself but rather a means for something else like money.

III. CONCLUSION

This article has laid out the central contention that group-action waivers should not be enforced because they alienate the employee. Waivers alienate the employee by reducing the

[111] *But see*, *supra* notes 98-99 (parts of the PAGA statute that require extensive exhaustion requirements, which plaintiffs may see as burdensome).

employee's power, meaning, and community. As a result, the employee is more likely to be self-estranged. Courts and society in general should care about these alienating effects because alleviating alienation furthers our nation's labor policy and its goal of empowering workers. Moreover, examining alienation helps a court determine the practical effects of its decision and to find more sympathetic interpretations of a law. Finally, the alienating effects of different types of group-action waivers run the spectrum. Rule 23 class action waivers, FLSA collective action waivers, and PAGA action waivers all alienate the employee to different degrees.

Consider the hypothetical from the introduction. Mary's situation is similar to employees in the real world.[112] Having effectively precluded her from the group-action process, the waiver leaves Mary with little recourse to lessen the effects of alienation. She could quit her job and look for work elsewhere. However, even if she could find work as a housekeeper at another hotel, the same problems would persist with her new employer. Another option is to obtain union representation. Assuming a union could win the support of the employees at the hotel, union representation could decrease alienation and help keep the hotel accountable. As a result, the alienating effects of group-action waivers might be somewhat reversed or stagnated. Most employers would probably greatly oppose this option. Additionally, Mary has the option of going to the media. A news media outlet may be interested in publishing a story about the bad working conditions at the hotel. The news story may shame the hotel into changing its unlawful practices. This might increase the power, meaning, and community of Mary and somewhat negate the alienating effects of the waiver.

Although beyond the scope of this article, a company like the hotel in Mary's situation could ban group-action waivers while also implementing certain mechanisms that would keep the potential costly group-action lawsuit at bay. One of these mechanisms could be workplace

[112] *See e.g.*, Survey, *supra* notes 1-3.

democracy. If all housekeepers at the hotel had a direct say in how they are treated and how their work is organized, a company is less likely to violate the housekeepers' rights. In that instance, employees would be less likely to file a group-action. Moreover, the housekeepers might obtain more freedom through workplace democracy by receiving power, meaning, community, and self-actualization.

A company can also obtain representation from a competent attorney who cares about the rights and well-being of the employees. Labor and employment laws are confusing[113] and an employer likely does not purposely violate them. An attorney can help a company like the hotel navigate the laws to ensure that it does not violate its employees' rights. This approach would make it so that employees are less likely to file a group-action claim.

In sum, this article hopes to lead to further analysis of the alienating effects of workplace laws on employees. As far as I know, this paper is the first to critically analyze how a certain law or legal interpretation alienates employees. I hope it is not the last.

[113] *See e.g.*, Leonora M. Schloss & Aaron N. Colby, *An Ounce of Prevention: Avoiding Wage-and-Hour Claims*, 23 ANDREWS EMP'T LITIG. REP. 1 (2009) (noting the "tremendous amount of wage-and-hour legislation that employers must comply with and interpret," and the "widespread confusion" concerning overtime laws).