

# VISION + ACTION

Inside The Institute

The Employee Rights Advocacy  
**INSTITUTE**  
For Law & Policy

We are pleased to present the second edition of **VISION + ACTION: Inside The Institute**, a joint publication of The National Employment Lawyers Association (NELA) and The Employee Rights Advocacy Institute For Law & Policy (The Institute). Established in 2008, The Institute is NELA's public interest organization and shares NELA's mission of advancing equality and justice in the American workplace. The Institute furthers employee rights through innovative legal strategies, policy development, grassroots advocacy, and public education.

**VISION + ACTION: Inside The Institute** is a quarterly report designed to keep you abreast of The Institute's many exciting developments, projects and accomplishments as we work toward ensuring that our nation's promise of equal justice under law is a reality for all workers.

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## National Litigation Strategy Project Aims To Combat Summary Judgment Abuse

By Matthew C. Koski, Paul H. Tobias Attorney Fellow

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Central to The Institute's multi-disciplinary approach to achieving its mission of advancing equality and justice in the American workplace is the development of the National Litigation Strategy Project (NLSP). In 2009, The Institute established a Task Force, co-chaired by David L. Lee and Diane S. King, to guide the activities of the NLSP. Keeping in mind its goals of ensuring adequate remedies for violations of workers' rights and preserving their right to a jury trial, the Task Force has targeted the abuse of summary judgment in employment litigation.



Originally conceived as an efficient means to resolve simple claims between debtors and creditors, summary judgment is a legal procedure whereby cases involving undisputed material facts are decided without a trial by a judge. Summary judgment, however, has been inappropriately expanded in recent years to employment cases which typically involve complex issues of an employer's intent to discriminate, harass and/or retaliate against its workers. These cases often entail disputed material facts and thus should not be summarily

dismissed without the benefit of the full factual development that only a jury trial can provide.

Working in conjunction with NELA, The Institute conducted a survey of NELA members in April 2010 to find out more about the obstacles employee rights lawyers confront in summary judgment. The survey also asked NELA members to identify good as well as bad summary judgment decisions, and to share their best practice tips for overcoming summary judgment. The information gathered will assist the NLSP in developing

As part of its 2008 "Working for Change" agenda, the National Employment Lawyers Association created The Employee Rights Advocacy Institute For Law & Policy ("The Institute"). Our shared vision for the future is one in which workers will be paid at least a living wage in an environment free of discrimination, harassment, retaliation, and capricious employment decisions; employers will fulfill their promises to provide retirement, health, and other benefits; workers' safety and livelihood will not be compromised for the sake of corporate profit and interests; and individuals will have effective legal representation to enforce their rights to a fair and just workplace, adequate remedies, and a right to trial by jury.

We welcome your involvement in advancing equality and justice in the American workplace. There are many ways to participate in The Institute's work:

- [Make a tax-deductible contribution to The Institute](#). The Institute also accepts gifts of securities.
- Designate The Institute as a [cy pres recipient](#).
- Volunteer your special skills and talents.

## For More Information, Contact Us:

The Employee Rights Advocacy Institute For Law & Policy

44 Montgomery Street

Suite 2080

San Francisco, CA 94104

Tel: 415.296.7629

[info@employeerightsadvocacy.org](mailto:info@employeerightsadvocacy.org)

[www.employeerightsadvocacy.org](http://www.employeerightsadvocacy.org)

approaches to combat the abuse of this procedural device by defendant-employers. In addition to providing empirical evidence to support the NLSP's goal of significantly reforming summary judgment practice, the Task Force has begun organizing an academic symposium dedicated to examining summary judgment in employment cases. We anticipate hosting the symposium in 2011.

*If you would like more information about the National Litigation Strategy Project or The Institute's other programs, please contact The Institute's Director of Programs Rebecca M. Hamburg ([rhamburg@nelahq.org](mailto:rhamburg@nelahq.org)) or Paul H. Tobias Attorney Fellow Matthew C. Koski ([pht\\_fellow@employeeerightsadvocacy.org](mailto:pht_fellow@employeeerightsadvocacy.org)).*

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## The Institute Joins *Amicus* Brief In Supreme Court Forced Arbitration Case

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On April 1, 2010, The Institute joined NELA, the Service Employees International Union (SEIU), Legal Aid Society - Employment Law Center (LAS-ELC), National Employment Law Project (NELP), and Women's Employment Rights Clinic at Golden Gate University School of Law (WERC) in submitting an *amicus* brief in support of respondent Antonio Jackson in the U.S. Supreme Court case of *Rent-A-Center v. Jackson*, No. 09-497. This is the first time that The Institute has participated as a "friend-of-the court" and follows The Institute's 2009 "[National Study of Public Attitudes on Forced Arbitration](#)."

The question before the U.S. Supreme Court is whether attempts by employers to evade court consideration of challenges to the enforceability of its arbitration clause is valid. If the Court agrees, then there will be nothing to stop employers and businesses across America from inserting similar causes in their employment and consumer contracts. The result would be a wholesale elimination of judicial review of arbitration clauses - a result that is not only at odds with Congressional intent (as embodied in the Federal Arbitration Act), but would also have dire consequences for the federal government, employees and consumers.



The U.S. Supreme Court has held that challenges to the validity of arbitration clauses are for courts to decide. This makes sense given that arbitrators have strong incentives to enforce arbitration clauses, no matter how unfair or one-sided. In this case, in an attempt to evade judicial review of its arbitration clause, an employer added incredibly broad language to its clause specifying that any challenges to the arbitration clause should be decided by the arbitrator – not the court. This even included whether the parties had signed the arbitration clause in the first place. Moreover, the clause was presented to the employee in a contract of adhesion on a take it or leave it basis, thereby stripping him of any meaningful opportunity to resist the provision.

The Institute's brief argues that even if the right to have a court decide threshold challenges to enforceability can be waived through a "clear and unmistakable" agreement between the employer and its employees, a court must still determine as a threshold matter whether such a valid and enforceable delegation agreement has been made.

To read the brief, [click here](#).

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## Meet The Institute At NELA's 2010 Annual Convention

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This June, in our nation's capital, NELA will bring together hundreds of employee rights lawyers from all over the United States for its 2010 Annual Convention, **NELA at 25: Don't Stop Believing**.



As NELA's public interest organization, The Institute and its work will be proudly featured at the Convention, including at a plenary session entitled "The Institute's National Litigation Strategy Project: Reforming Summary Judgment Abuse." Members of the NLSP Task Force will discuss their preliminary plans for reforming summary judgment practice to guarantee that employees' claims for equality and justice in the American workplace are heard in American courtrooms.

The Institute is also playing an important role at the NELA Convention through its **Employee Rights Advocacy Scholarship Program**. The Scholarship Program makes the NELA Convention, as well as NELA's other continuing legal education programs, accessible to employee rights lawyers who would not be able to attend them without financial assistance. Together, The Institute and NELA are ensuring that workers have access to high quality legal representation and that their advocates are being trained by the best employment lawyers in the country. While the scholarship application process for the 2010 Annual Convention is now closed, you are invited to make a contribution to support The Employee Rights Advocacy Scholarship Program. The need for scholarship assistance is always greater than available funds can meet. Please contact Leah A. Hofkin, NELA/The Institute's Director of Development if you would like to make a tax-deductible charitable donation ([lhofkin@employeeightsadvocacy.org](mailto:lhofkin@employeeightsadvocacy.org)).

NELA's 2010 Annual Convention will take place at the Omni Shoreham Hotel in Washington, DC from June 23rd to June 26th. For more information, please visit <http://www.nela.org/convention>.