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#UsToo: THE DISPARATE IMPACT OF AND INEFFECTIVE RESPONSE TO SEXUAL HARASSMENT OF LOW-WAGE WORKERS

Marissa Ditkowsky*

ABSTRACT

“A guest placed a tip on the counter, then stated he wanted to ‘put the tip on my ass.’ I refused and he took the tip back. I was going to tell management, but I didn’t because if he was going to be able to come back, what would stop him from aggressive acts in the future? He looked like he didn’t care about life.” This casino cocktail server’s disturbing account is one of many that UNITE HERE Local 1 collected in its groundbreaking study on sexual harassment and Chicago-area casino and hotel workers’ experiences in the workplace. A hotel housekeeper recalled her experience, saying, “[The guest] was completely naked, standing between the bed and the desk. He asked me for shampoo. I had to jump over the beds in order to get to the door and leave the room.”

On October 5, 2017, the New York Times broke the pivotal story that Hollywood producer Harvey Weinstein had covered up nearly three decades of accusations of sexual harassment and unwanted physical contact. Following the coverage, women around the world became empowered to tell their stories on social media, contributing to the #MeToo trend. Stories about sexual harassment and the use of nondisclosure agreements also fueled the movement. However, there was one common denominator among all the individual stories that received considerable press attention: these women are all affluent celebrities.

Low-wage workers continue to face widespread harassment in the workplace, yet we constantly overlook these workers’ plight. Despite #MeToo’s impact on white-collar employees and their ability to speak up for themselves, low-income workers do not benefit from the same protections that come with sheer bargaining power.

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That is why it is so vitally important for the law to step in and protect these workers. Low-wage workers are organizing, but lawyers must work as allies to empower them. This piece is intended to serve as a reminder that there is a disparity between whom the law is intended to protect and whom the law protects in practice, as well as to provide suggestions as to how we might work to address these disparities.

The legal profession must take action to protect all workers— not simply those who are affluent enough to take large financial risks, afford the most prestigious attorneys, or singlehandedly start a trend. Title VII, on its own, simply does not cut it. In this Article, I argue that the largest barriers to justice and prevention of sexual harassment for low-wage workers include (1) terms of employment and contractual barriers, (2) lack of protection, (3) status barriers, and (4) access to justice concerns.

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INTRODUCTION

“A guest placed a tip on the counter, then stated he wanted to ‘put the tip on my ass.’ I refused and he took the tip back. I was going to tell management, but I didn’t because if he was going to be able to come back, what would stop him from aggressive acts in the future? He looked like he didn’t care about life.”¹

This casino cocktail server’s disturbing account is one of many that UNITE HERE Local 1 collected in its groundbreaking study on sexual harassment and Chicago-area casino and hotel workers’ experiences in the workplace.² A hotel housekeeper recalled her experience, saying, “[The guest] was completely naked, standing between the bed and the desk. He asked me for shampoo. I had to jump over the beds in order to get to the door and leave the room.”³

On October 5, 2017, the New York Times broke the story that Hollywood producer Harvey Weinstein had covered up nearly three decades of sexual harassment and unwanted physical contact accusations against him.⁴ Following the coverage, women around the world became empowered to tell their stories on social media, contributing to the #MeToo trend.⁵ Stories about sexual harassment and the use of nondisclosure agreements also fueled the movement.⁶ However, there was one common denominator among

1. UNITE HERE LOCAL 1, *HANDS OFF PANTS ON: SEXUAL HARASSMENT IN CHICAGO’S HOSPITALITY INDUSTRY* 8 (2016).

2. *Id.* at 4–8.

3. *Id.* at 5.

4. Jodi Kantor & Meghan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/HD2G-XT9W>].

5. Samantha Schmidt, *#MeToo: Harvey Weinstein Case Moves Thousands to Tell Their Own Stories of Abuse, Break Silence*, WASH. POST (Oct. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/10/16/me-too-alyssa-milano-urged-assault-victims-to-tweet-in-solidarity-the-response-was-massive/?utm_term=.3622652657f6 [<https://perma.cc/HH8W-7WLV>].

6. See, e.g., Tom Schad, *McKayla Maroney’s Lawyer: USA Gymnastics Relented Only When Others Offered to Pay Fine*, USA TODAY (Jan. 17, 2018, 5:14 PM), <https://www.usatoday.com/story/sports/olympics/2018/01/17/mckayla-maroney-lawyer-usa-gymnastics-relented-only-when-others-offered-pay-fine/1041971001> [<https://perma.cc/QN9E-NYZ7>] (describing a non-disclosure agreement that McKayla Maroney signed when settling her claims against USA Gymnastics for sexual abuse she experienced at the hands of team doctor Larry Nassar); Michael S. Schmidt & Emily Steel, *Bill O’Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html> [<https://perma.cc/EZM5-MESB>] (discussing settlement agreements in relation to allegations against Fox News host Bill

all the individual stories that received considerable press attention: these women were all affluent celebrities.

Celebrities attempted a short-lived push to raise the voices of low-wage workers; after Alianza Nacional de Campesinas' Monica Ramirez wrote a letter on behalf of farmworker women in solidarity, she and other activists were invited to walk the red carpet at the Golden Globes.⁷ However, since that time, interest has decreased in the plight of low-wage workers, particularly those of women of color, undocumented workers, and other marginalized groups.

Title VII of the Civil Rights Act of 1964 prohibits discrimination of employees on several protected bases, including sex.⁸ It also prohibits retaliation for reporting discrimination on any protected bases.⁹ *Meritor Savings Bank v. Vinson* further established that unwelcome sexual behavior that creates a hostile work environment constitutes employment discrimination based on sex under Title VII, expanding Title VII's reach beyond *quid pro quo* harassment.¹⁰ Many states and jurisdictions also have workplace antidiscrimination statutes that may even be more expansive in their reach than federal protections. For example, the District of Columbia Human Rights Law holds employers responsible for acting either wholly or partially for discriminatory reasons; and supervisors can be held responsible simply for aiding and abetting discrimination.¹¹ It also explicitly protects employees from discrimination based on sexual orientation and gender identity.¹²

Despite the existence of protections for workers against sexual harassment, discrimination, and retaliation for reporting such discrimination, these behaviors continue to occur. In particular, service industry workers face severe and pervasive workplace harassment that has largely gone unaddressed.¹³ Their status in

O'Reilly).

7. Time Staff, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault> [https://perma.cc/4L67-EW2E]; Madison Feller & Estelle Tang, *Meet the Activists Who Walked the Golden Globes Red Carpet*, ELLE (Jan. 8, 2018), <https://www.elle.com/culture/movies-tv/g14774201/actress-activist-red-carpet-golden-globes> [https://perma.cc/9UWJ-VGYM].

8. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

9. 42 U.S.C. § 2000e-3(a) (2012).

10. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986).

11. D.C. Code §§ 2-1402.11(a), 2-1402.62 (2016).

12. D.C. CODE § 2-1402.11(a).

13. See UNITE HERE LOCAL 1, *supra* note 1, at 5-8 (finding that 49 percent of housekeepers surveyed had had a nude guest answer the door, expose themselves, or flash the worker; 77 percent of casino workers surveyed had been sexually harassed by a guest; and 43 percent of workers who did not report

the service industry leaves them more vulnerable to harassment by customers,¹⁴ as well as by coworkers, owners, managers, and supervisors, who exploit the uneven power dynamic.¹⁵ Women in tipped occupations generally, and especially workers in states where the subminimum wage for those workers is not higher than \$2.13 per hour, are more likely to experience harassment, indicating a troubling devaluation of women based upon their wages and socioeconomic status.¹⁶

The divide between whom the law is intended to protect and whom the law protects in practice is not a new concept, particularly when discussing sex-based discrimination. In *Roe v. Wade*, the Supreme Court held that individuals had a constitutional privacy right to seek abortion within the first trimester of pregnancy.¹⁷ However, the Court continued to permit state-imposed restrictions on access to abortion so long as they did not, in the Court's perspective, impose an "undue burden" on the right.¹⁸ Additionally, following an Equal Protection Clause challenge to the Hyde Amendment,¹⁹ the Court held that federally-funded medical insurance did not have to provide funding for abortions because the Court refused to consider poverty alone a suspect classification.²⁰ In reality, these restrictions have less of an effect on wealthy individuals who can bear children; this case law effectively outlawed

a guest's harassment said they knew someone who reported the harassment and nothing changed).

14. See REST. OPPORTUNITIES CTRS., UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE REST. INDUS. 1 (2014) [hereinafter REST. OPPORTUNITIES CTRS.], https://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf [<https://perma.cc/FA64-NWVN>] (noting that restaurant workers rely on tips, leading them not to report unwanted sexual behavior).

15. See *id.* at 17, 19 (finding two-thirds of women surveyed had experienced some form of sexual harassment from an owner, manager, or supervisor, and only 21 percent of women reported never having experienced sexual harassment by coworkers).

16. *Id.* at 15.

17. *Roe v. Wade*, 410 U.S. 113, 163–64 (1973).

18. *Planned Parenthood v. Casey*, 505 U.S. 833, 878, 886 (1992) (holding informed consent and twenty-four-hour waiting period requirements did not violate the Constitution); *Planned Parenthood v. Danforth*, 428 U.S. 52, 61, 81 (1976) (permitting states to define viability, require women to sign consent forms stating they were not coerced, and require reporting and record keeping requirements for facilities that perform abortions).

19. The Hyde Amendment barred the federal use of funds to pay for abortions, with few exceptions. Hyde Amendment, Pub. L. No. 94–439, § 209, 90 Stat. 1434 (1976). This prohibition is particularly significant for individuals who rely on Medicaid for health care services.

20. *Harris v. McRae*, 448 U.S. 297, 326–27 (1980).

abortion for poorer individuals who rely on Medicaid.²¹ And yet, despite the struggle of poorer individuals to access reproductive health care, the narrative continues to focus on *Roe v. Wade* and whether it will remain intact.²² Public discourse is simply not in touch with the needs of low-income women and the barriers they regularly face.²³ Congress and the Supreme Court also persistently demonstrate that they do not understand the plight of the poor and fail to adequately address their needs. As Justice Thurgood Marshall noted in his *United States v. Kras* dissent on the issue of whether one could be charged a fee to initiate a bankruptcy proceeding, “[i]t is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.”²⁴ The same deficiencies have applied, thus

21. See Am. Civil Liberties Union, *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion> [<https://perma.cc/MH8A-2PXR>].

22. See, e.g., *Brett Kavanaugh Would Gut Roe v. Wade and Criminalize Abortion*, ALL. FOR JUSTICE ACTION CAMPAIGN (Aug. 14, 2018), <https://afactioncampaign.org/2018/08/14/brett-kavanaugh-would-gut-roe-v-wade-and-criminalize-abortion> [<https://perma.cc/6ZD8-VDAN>]; Carol Joffe, *With the Appointment of Brett Kavanaugh, Roe v. Wade is Likely Dead*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/with-the-appointment-of-brett-kavanaugh-roe-v-wade-is-likely-dead/?utm_term=.740e3807c1c9 [<https://perma.cc/FUR2-C5RV>]. But see Talcott Camp, *The Supreme Court Doesn't Have to Overturn Roe to Decimate Abortion Rights*, AM. CIVIL LIBERTIES UNION (July 10, 2019, 6:30 PM), <https://www.aclu.org/blog/reproductive-freedom/abortion/supreme-court-doesnt-have-overturn-roe-decimate-abortion-rights> [<https://perma.cc/Y4FV-MX88>] (noting that case law has already significantly chipped away rights established in *Roe*).

23. As a stark illustration of this reality, people of color on welfare have been forced to undergo forced sterilization without knowledge or consent to continue to receive benefits, and people have been forced to undergo abortion or sterilization, essentially as punishment. See Tom Jackman, *Judge Suggests Drug-Addicted Woman Get Sterilized before Sentencing, and she Does*, WASH. POST (Feb. 8, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/02/08/judge-suggests-drug-addicted-woman-get-sterilized-before-sentencing-and-she-does/?noredirect=on&utm_term=.c7c8dc1ffe1e [<https://perma.cc/Z35S-2KU3>]; Jael Sillman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice*, CTR. FOR AM. PROGRESS (Oct. 1, 2004, 9:00 AM), <https://www.americanprogress.org/issues/women/news/2004/10/01/1115/undivided-rights-women-of-color-organize-for-reproductive-justice> [<https://perma.cc/327M-UJYL>]. This continued lack of choice is another demonstration of the shortcomings of *Roe*.

24. See *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

far, to enforcement against sexual harassment in the workplace. Simply put, despite #MeToo's impact on white collar employees and their ability to speak up for themselves, low-income workers do not benefit from the same protections that come with sheer bargaining power. That is why it is so vitally important for the law to step in and protect these workers.

This Article argues that the largest barriers to justice and prevention of sexual harassment for low-wage workers include (1) terms of employment and contractual barriers, including non-disclosure agreements and mandatory arbitration clauses; (2) lack of protection, including in terms of classification, retaliation, certain domestic and farmworkers, and attacks on unions and the power of collective bargaining; (3) status barriers, including immigration status; and (4) access to justice concerns, including lack of guaranteed civil representation, a lack of diversity on the bench, and struggles to subject claims to a jury of the plaintiff's peers. This list is not meant to serve as a definitive list of every legal or situational barrier that affects the rights of low-income working women; it is simply meant to serve as an introduction to the various types of issues that these women might face in accessing justice or their rights. Next, this Article addresses what legal or policy changes might remedy these issues, as well as the potential role of concerted activity. Finally, this Article concludes that, although the manner in which courts interpret the law matters from a workers' rights perspective, the solution for many of these blatant issues goes far beyond the courts: it also extends to our legislation, policies, and societal norms.

I. TERMS OF EMPLOYMENT AND CONTRACTUAL BARRIERS

A. *Mandatory Individual Arbitration Clauses*

Predispute mandatory arbitration clauses in employment contracts continue to prevent low-wage workers from holding employers accountable for the sexual harassment they experience in the workplace.²⁵ Although questions about the fundamental fairness of mandatory binding arbitration are not new, the #MeToo movement has highlighted the impact of mandatory binding arbitration agreements that require employees to waive their right to file harassment and discrimination claims in court and potentially

25. Cf. Celine McNicholas, *Ending Individual Mandatory Arbitration Alone Fails Most Workers: For Real Worker Power, End the Ban on Class and Collective Action Lawsuits*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 16, 2018, 2:11 PM), <https://www.epi.org/blog/ending-individual-mandatory-arbitration-alone-fails-most-workers-for-real-worker-power-end-the-ban-on-class-and-collective-action-lawsuits> [<https://perma.cc/2TNF-V7X7>].

as a class.²⁶ In particular, the recent Supreme Court decision in *Epic Systems Corporation v. Lewis* casts serious doubts regarding whether there is a judicial remedy to the seemingly unjust nature of signing mandatory binding arbitration agreements as a condition of employment.²⁷ According to a study by the Economic Policy Institute, more than 55 percent of workers are subject to mandatory binding arbitration clauses.²⁸ This Subpart will describe case law and statutes surrounding individual arbitration agreements and their disparate impact on low-wage workers in cases of sexual harassment.

Arbitration is a process in which a private entity, as opposed to a judge, resolves a dispute.²⁹ Binding arbitration means that the decision made by the arbitrator is final and enforceable.³⁰ If a binding arbitration agreement is mandatory, the parties are required to submit all disputes to arbitration as the exclusive remedy.³¹ Due to consistent enforcement of binding arbitration agreements and results, employers continue to incorporate predispute mandatory binding arbitration clauses in employment contracts.³² This practice forces all employees to waive their right to access the courts in order to be employed. In that sense, low-wage workers are denied a jury of their peers, which might include individuals of more diverse backgrounds than one single arbitrator. Even if an employee simply sought a bench trial, arbitrators need not be lawyers and are not

26. See generally *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act preempts state laws that define arbitration agreements disallowing classwide procedures as unconscionable); Lawrence Hurley, *Companies Win Big at Top U.S. Court on Worker Class-Action Curbs*, U.S. NEWS & WORLD REP. (May 21, 2018, 10:11 AM), <https://www.usnews.com/news/top-news/articles/2018-05-21/us-top-court-backs-companies-over-worker-class-action-claims>.

27. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding the National Labor Relations Act did not override the Federal Arbitration Act to invalidate a binding individual arbitration agreement for employees, effectively preventing concerted action).

28. ALEXANDER J.S. COLVIN, ECON. POL'Y INST., *THE GROWING USE OF MANDATORY ARBITRATION 1-2* (2017) (finding that 56.2 percent of non-union private employees are subject to binding arbitration clauses).

29. Robert B. Kershaw, *Mandatory Binding Arbitration: Goliath's New Offense*, 36 MD. B.J. 28, 29 (2003).

30. See Russell D. Feingold, *Mandatory Arbitration: What Process is Due*, 39 HARV. J. ON LEGIS. 281, 283 (2002); Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 435-36 (2007).

31. Feingold, *supra* note 30, at 283.

32. Kershaw, *supra* note 29, at 30.

always bound by governing law, unlike a judge.³³ Low-wage workers in particular also might not be aware of the circumstances under which they might challenge an arbitration agreement due to lack of knowledge or representation.

In addition to waiving their rights to a trial by jury, these workers also essentially waive their National Labor Relations Act right to concerted activity via a legal suit and Fair Labor Standards Act (FLSA) right to collective action.³⁴ If such an agreement requires individual arbitration, it is impossible to bring any sort of class action.³⁵ These restrictions disparately affect low-wage workers, who might wield more power as a collective. Additionally, a single award for a low-wage worker is unlikely to be lucrative enough to attract the representation that a class award might attract.³⁶ Therefore, individual mandatory arbitration clauses are particularly dangerous for low-wage workers. Although employers might argue that arbitration is a less formal setting in which low-wage workers would not require an attorney, the American Arbitration Association still recommends that parties seek advice of legal counsel, particularly in cases involving discrimination.³⁷

Employers also attempt to require postdispute arbitration. In these situations, an employee and employer must voluntarily agree after the rise of a dispute to send a matter to arbitration. However, due to the limited bargaining power, lack of representation, and lack of knowledge among low-wage employees in particular, it is doubtful whether post-dispute arbitration is truly voluntary, as well as whether the employee actually provides informed consent in such cases.

1. Background

The Federal Arbitration Act (FAA) prescribes the appropriate treatment of arbitration clauses in contracts. The Act states the following:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy

33. *Arbitration*, A.B.A. (Oct. 11, 2018), https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration [<https://perma.cc/GCU8-2NAZ>].

34. *See* National Labor Relations Act, 29 U.S.C. § 167 et seq. (2012); Fair Labor Standards Act, 29 U.S.C. § 218c(b) (2012) (establishing a right to collective action against employers who violate FLSA requirements); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1640 (2018) (Ginsburg, J., dissenting).

35. *See Epic Sys. Corp.*, 138 S. Ct. at 1640.

36. McNicholas, *supra* note 25.

37. AM. ARBITRATION ASS'N, REPRESENTING YOURSELF IN EMPLOYMENT ARBITRATION: AN EMPLOYEE'S GUIDE 3.

thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an 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.³⁸

The Supreme Court has interpreted this savings clause to permit only generally applicable contract defenses, and not “defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”³⁹

The Federal Arbitration Act states, “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁴⁰ However, the Supreme Court has interpreted this exemption narrowly to apply only to transportation workers.⁴¹

The Court has consistently upheld the enforcement of mandatory binding arbitration contracts in employment,⁴² consumer disputes, and other realms.⁴³ The Court has interpreted the Federal Arbitration Act to be a “liberal federal policy favoring arbitration.”⁴⁴ In *Epic Systems*, the Court further solidified this stance. Although Congress is free to amend the statute, the Court refused

38. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

39. *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

40. 9 U.S.C. § 1 (2012).

41. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding an arbitration agreement as a condition for employment was enforceable in a discrimination case).

42. There is one caveat to the continued enforcement of arbitration agreements. Even though mandatory binding arbitration agreements prevent an employee from bringing an individual suit, and might bar collective action, the EEOC is still permitted to pursue the claim and victim-specific relief. *See generally* *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding the EEOC could pursue an Americans with Disabilities Act claim on behalf of an employee even though the employee had signed an arbitration agreement).

43. *See, e.g.,* *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (holding a court cannot refuse to enforce contractual waiver of class arbitration because the plaintiff’s cost of individually arbitrating a claim exceeds the potential recovery); *AT&T Mobility LLC*, 563 U.S. at 333; *Circuit City Stores, Inc.*, 532 U.S. at 105 (holding the Federal Arbitration Act employment exemption only applies to transportation workers, rendering an arbitration agreement enforceable in this employment discrimination claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that the Federal Arbitration Act requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act).

44. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

to substitute its own judgement for that of Congress.⁴⁵ In its opinion, the Court noted that Congress has also proven that it knows how to override the Federal Arbitration Act should it so choose.⁴⁶ The Court has also consistently endorsed the view that only generally applicable contractual arguments can be made to invalidate a binding arbitration agreement.⁴⁷ However, the Court has dependably rejected all unconscionability and public policy arguments, as well as arguments that arbitration, in certain instances, would breach federal law, claiming that these attacks are based solely on the very nature of the arbitration agreement in violation of the Federal Arbitration Act.⁴⁸

In *Epic Systems*, Justice Ruth Bader Ginsburg's dissent addresses the fact that the business community sought legislation that would allow merchants to enter into binding arbitration agreements due to court backlog.⁴⁹ However, such a law would enable merchants of relatively equal bargaining power to arbitrate commercial disputes.⁵⁰ Justice Ginsburg contends that the statute was never intended to apply to employment agreements, as evidenced by both the legislative history and employment exemption in the text.⁵¹ Justice Elena Kagan addressed similar concerns in *American Express Company v. Italian Colors Restaurant*, a case involving a small business that signed a mandatory binding arbitration agreement with American Express; Justice Kagan writes in her dissent that an arbitration agreement should not be enforced if it simply allows a company or individual to contravene federal law or liability.⁵² This line of thinking could also be applied to employers.

45. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

46. *Id.* at 1626 (refusing to hold that the National Labor Relations Act could override the Federal Arbitration Act without explicit language to indicate such intent in the NLRA).

47. *See id.* at 1622; *AT&T Mobility LLC*, 563 U.S. at 339.

48. *See Epic Sys. Corp.*, 138 S. Ct. at 1623; *see also Am. Exp. Co.*, 570 U.S. at 239 (Thomas, J., concurring) (noting that the plaintiffs do not make a duress or other similar claim, but rather a claim that enforcing the arbitration agreement would contravene the policies of antitrust laws and prevent the effective vindication of a federal right); *AT&T Mobility LLC*, 563 U.S. at 339.

49. *Epic Sys. Corp.*, 138 S. Ct. at 1642 (Ginsburg, J., dissenting).

50. *Id.* at 1642–43.

51. 9 U.S.C. § 1 (2012); *Epic Sys. Corp.*, 138 S. Ct. at 1643.

52. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 240–41 (2013) (Kagan, J., dissenting) (stating that the majority has allowed a monopoly power to escape liability and the response is essentially that is “[t]oo darn bad”).

2. Arguments for and Against Mandatory Binding Arbitration

There are several benefits for both employers and employees to enter into arbitration agreements. Litigation is expensive and slow, which poses an issue for both an employer and employee.⁵³ Using arbitration prevents further court backlog and is more informal.⁵⁴ Arbitration is a private venture, which attracts less publicity.⁵⁵ Less publicity could benefit both an employer and an employee—particularly a low-wage worker that might have less recourse in attempting to find another job should information about her experiences of complaint be revealed to other employers. Arbitration prevents abuse of the use of class actions, which often yield unfair settlements that primarily enrich lawyers.⁵⁶ Finally, arbitration utilizes experienced decision makers who could be experts in the field in question, whereas a traditional court would likely use a jury comprised of jury members who lack expertise, although they are likely well intentioned.⁵⁷ For low-wage workers in particular, a jury is often not comprised of one's peers due to economic barriers and dismissal of jurors of one's race due to potential "bias."

There are also a number of negative aspects to including an arbitration agreement in an employment contract. Arbitration is a private venture that attracts less publicity. Many of these cases are arbitrated with no public record of what occurred or what resulted.⁵⁸ There is also little to no government oversight, which persists despite evidence of biases in the process.⁵⁹ In using arbitration, employers also often select the arbitrator they prefer to use; in that way, employers essentially rig the system, not only in choice of venue, but also in that they are providing repeat business to arbitrators, who are therefore incentivized to find more favorably for the employer.⁶⁰ In a 2007 study, Public Citizen found that the National Arbitration Forum ruled for companies 94 percent of the time

53. James C. Cawood, Jr., *Alternative Dispute Resolution*, 22 Md. B.J. 4, 4 (1989).

54. Kershaw, *supra* note 29, at 29; Kathleen Howard Meredith, *Benefits of Binding Arbitration*, 22 Md. B.J. 13, 14 (1989).

55. Meredith, *supra* note 54.

56. Kershaw, *supra* note 29, at 33.

57. *Id.* at 13–14.

58. Kershaw, *supra* note 29, at 30.

59. *Id.* at 29; Alexia Fernández Campbell & Alvin Chang, *There's a Good Chance You've Waived the Right to Sue Your Boss*, Vox (Sept. 7, 2018, 4:21 PM), <https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration> [<https://perma.cc/Y46L-QDUD>].

60. JOHN O'DONNELL, PUB. CITIZEN, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 15 (2007).

in the consumer context in a sample of nearly 19,300 California cases.⁶¹ Arbitration agreements also often specify which arbitrator will be used.⁶² Therefore, not only are employees devoid of choice in the arbitration process, but they are also devoid of the choice of venue, which would exist if the employee were to file a lawsuit.⁶³ For low-wage workers, venue makes a difference for several reasons. For one, travel might be too expensive. Second, the judge's, as well as the likely jury's, race, life experiences, and understanding might be dependent upon geography or district. Third, they might be limited in terms of representation; and if they rely on legal aid, it might be difficult to find any representation to accompany them to a venue that is not local, or to arbitration period.

In regard to the argument that jury members lack expertise, not every judicial case need involve a jury; in cases in which a party does not demand a jury trial, a bench trial may still occur.⁶⁴ In such a case, jury members without expertise would not be making the decisions. Additionally, the judge would be bound within reason by precedent, the rules of evidence, and certain rules of procedure to which arbitrators are not bound. However, even if a bench trial does not occur, a right to trial by jury in criminal cases was important enough to include in the Bill of Rights, despite its potential drawbacks.⁶⁵ The idea behind a trial by jury is that (1) it would not be solely up to one individual how the case is decided; and (2) a jury of one's peers is, arguably, more in tune with the realities and effects of the case. A jury of one's peers is vital to prevent implicit bias from dictating the decision of one individual arbitrator—or even judge.⁶⁶ In cases of mandatory binding arbitration, low-wage workers are denied their right to a trial by jury, which would ideally be filled with a jury that actually might understand the workers' experiences.

61. *Lost in the Fine Print*, ALL. FOR JUSTICE (2014), <https://www.afj.org/multimedia/first-monday-films/films/lost-in-the-fine-print> [<https://perma.cc/5ANM-EZ4U>].

62. *Id.*

63. *See Mandatory Arbitration Clauses are Discriminatory and Unfair*, PUB. CITIZEN (2019), <https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair> [<https://perma.cc/H4KZ-R45U>] (noting that arbitration clauses often require arbitration in locations that are inconvenient for consumers, leading consumers to pay for long-distance travel); *see also* 28 U.S.C. § 1391 (2012) (describing venues in which an individual can file a federal claim).

64. *See* FED. R. CIV. P. 39(b).

65. *See* U.S. CONST. amend. VII; FED. R. CIV. P. 38(a).

66. *See infra* note 303–305 and accompanying text (describing the importance of jury trials of one's peers as preventing barriers to access to justice).

Arbitration clauses are being used to shield companies from class actions and liability generally.⁶⁷ Arbitration agreements are often individual, meaning the employee must bring any claims to individual arbitration.⁶⁸ That means employees cannot take collective action or file a claim together.⁶⁹ A clear depiction of the effect of *Epic Systems* can be seen in the Eastern District of Michigan case *Williams v. FCA US LLC*, in which African American Fiat-Chrysler employees tried to file a class action claim regarding the routine racial discrimination in employee hiring and promotion process.⁷⁰ Ultimately, the Fifth Circuit held against the employees, and they were forced to individually arbitrate their claims.⁷¹ When companies shield themselves from class actions, they also prevent some individual claims because the actions become less lucrative as the potential for damages decreases, particularly in actions involving low-wage workers.

Although arbitration proponents cite cost savings, speed, and efficiency, in reality the cost saving is minimal since arbitrators typically charge between \$750 and \$1,200 per day and hearings often experience delays in scheduling.⁷² Finally, employees, especially low-wage workers, do not always understand these clauses or the rights they are surrendering, nor do they always have a choice to simply find employment elsewhere, particularly if all competitors are using the same clauses.⁷³

3. Generally Applicable Contract Defenses

To form a valid contract, there must be mutual assent to the terms of the contract and consideration.⁷⁴ Typical affirmative defenses to breach of contract are either based on a party's inability to assent (based on minority, lack of capacity, physical or economic duress, undue influence) or a fatal defect in the contract itself

67. Kershaw, *supra* note 29, at 30.

68. *Id.*

69. *Id.*

70. *Williams v. FCA US LLC*, No. 17-10097, 2018 WL 2364068 (E.D. Mich. May 24, 2018).

71. *Id.* at *8.

72. Kershaw, *supra* note 29, at 28.

73. *Cf.* Jeff Govern, *When Consumers Give Up Their Right to Trial in Financial Disputes*, N.Y. TIMES: DEALBOOK (Jan. 30, 2015, 1:12 PM), <https://dealbook.nytimes.com/2015/01/30/when-consumers-give-up-their-right-to-trial-in-financial-disputes> [<https://perma.cc/TKQ2-AT3Z>] (describing a survey of over 668 consumers indicating that consumers do not understand the binding arbitration clause, nor do they believe they are giving up their right to a trial by jury when they agree to a binding arbitration clause).

74. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981).

(impossibility or impracticability, misrepresentation, illegality, non-disclosures, or unconscionability).⁷⁵ Public policy arguments might also be made.⁷⁶ The most relevant affirmative defenses in regard to binding arbitration are duress, illegality, and unconscionability. In addition, lack of mutual assent and consideration can be cited, meaning a contract did not exist in the first place.

a. Consideration Arguments

In general, a contract cannot be formed without consideration, which requires reciprocal inducement and detriments at the time the promise is made.⁷⁷ In *Noohi v. Toll Bros, Inc.*, the Fourth Circuit invalidated an arbitration agreement that would have prevented a buyer from bringing a claim in court but did not require the seller to submit to arbitration in the same manner.⁷⁸ The Fourth Circuit stated that its holding was not because such arbitration agreements are, in general, unenforceable.⁷⁹ Rather, the Fourth Circuit found that the particular arbitration agreement at issue was unenforceable because it was only binding on the consumer, meaning it lacked consideration at the time of its inception.⁸⁰ Because the underlying contract was invalid, the court found that *Concepcion's* embrace of arbitration agreements, save for a generally applicable contract defense, was therefore inapplicable.⁸¹ If a binding arbitration agreement lacks consideration, or any of the requirements to form a contract, it would, logically, be unenforceable. However, because of the fact-intensive nature of these inquiries, it is difficult to draw out a bright-line rule that future employee litigants could use to successfully invalidate arbitration agreements.

b. Duress Arguments

A contract may be voidable because of duress if the inducement of assent involves an improper threat, harassment, or entrapment.⁸² The threatened party in such cases must have no reasonable alternative but to assent.⁸³ Economic duress involves a threat to property. A party using a defense of economic duress must prove (1) that there was a wrongful or improper threat, (2) a

75. *See id.* §§ 161, 164, 175, 177, 208, 214, 261.

76. *See id.* §§ 178–79.

77. *See id.* § 71.

78. *Noohi v. Toll Bros. Inc.*, 708 F.3d 599, 609–10, 612 (4th Cir. 2013).

79. *Id.* at 612–13.

80. *Id.* at 609–10, 612.

81. *Id.* at 612.

82. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. LAW INST. 1981).

83. *Id.*

lack of reasonable alternative, and (3) that the threat substantially contributed to the making of the contract.⁸⁴ Although some courts have held that taking advantage of desperation is sufficient, many courts agree with the assessment by Judge Richard Posner, who wrote that the fact that a party agreed to a settlement because of a desperate need for money could not be the basis for duress unless the opposing party had caused the financial hardship.⁸⁵

In jurisdictions that allow claims of economic duress when a party takes advantage of another party's desperation, it is possible that one could make a claim of economic duress in regard to binding arbitration.⁸⁶ Finding a job is necessary to pay for the costs of living, and when there are limited options, employees do not have the flexibility to say no to a take-it-or-leave-it employment contract that includes a binding arbitration clause, nor do they have the bargaining power to negotiate regarding such a clause. However, these cases are unlikely to be successful; it is also likely that these cases would be extremely fact-specific and that holdings would not be broadly applicable.⁸⁷ It is dubious that, in most cases, an employer

84. *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15, 21 (Alaska 1978).

85. *See Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 928–29 (7th Cir. 1983) (holding that a company was not under economic duress when it entered into a settlement). *Compare Butitta v. First Mortg. Corp.*, 578 N.E.2d 116, 120 (Ill. App. Ct. 1991) (holding that taking advantage of the financial stress of another party may constitute duress, regardless of whether the party caused the financial stress), *with Smart Mktg. Group, Inc. v. Publ'ns Intern. Ltd.*, No. 04C0146, 2008 WL 4287704, at * 6 (N.D. Ill. Sept. 11, 2008) (quoting *Selmer Co.*, 704 F.2d at 928) (arguing that a party using overdue commission payments that party caused as leverage in negotiations does not inherently deprive the other party of free will, still leaving a question of fact).

86. There is a dearth of case law that successfully makes such an argument. Although the Court of Appeals of Texas held that an employer had used economic duress to procure agreement to an arbitration clause, the holding was reversed. *In re RLS Legal Solutions, LLC*, 156 S.W.3d 160, 163–65 (Tex. Ct. App. 2005), *rev'd*, 221 S.W.2d 629 (Tex. 2007) (finding the employee explicitly objected to the arbitration provision and employer withheld payment until the employee signed the agreement containing the provision).

87. *See Hopkins v. New Day Fin.*, 643 F. Supp. 2d 704, 716 (E.D. Pa. 2009) (holding an arbitration provision was enforceable absent evidence that the company was responsible for the financial pressure employees felt when they signed the provision, even though the employees were told that they would be fired if they chose not to sign); *Carrick v. Aquent, Inc.*, 294 F. Supp. 2d 1012, 1019 (E.D. Wis. 2003) (finding a restrictive covenant, including an arbitration provision, was enforceable and refusing to render contract unenforceable on grounds of duress); *In re RLS Legal Solutions, LLC*, 221 S.W.2d at 630–32 (holding an arbitration clause was enforceable when economic duress in obtaining a signature to an employment agreement was not related explicitly to an arbitration provision).

can be said to cause the economic duress that forces an employee to enter into a binding arbitration agreement. However, in cases involving harassment, it is possible to argue that the employer is responsible for the employee's financial situation if the employer's harassment or failure to address harassment led to any costs or pecuniary damages.

c. Unconscionability Arguments

Unconscionability can lead a judge to order the rescission of a contract.⁸⁸ However, under the FAA, arbitration agreements cannot be found to be unconscionable simply because they are binding.⁸⁹ There must be more involved. An unconscionable agreement must typically be both procedurally and substantively unconscionable. In general, binding arbitration agreements have only been found to be procedurally unconscionable when (1) they involve an adhesion contract,⁹⁰ (2) no other location is bargaining on different terms or providing alternative terms, (3) there is unequal bargaining power between parties, (4) the terms are presented in a tricky manner or hidden, and (5) no person with a reasonable choice would assent to the terms.⁹¹

An agreement is substantively unconscionable when enforcement of the terms would be shocking to a judge's conscience and one's superior bargaining power is used to form a contract that is so one sided, it would be unjust to enforce.⁹² For example, in *Hooters of America, Inc. v. Phillips*, the Fourth Circuit held that, although an arbitration agreement to settle a harassment claim against an employer was generally permitted, rescission was necessary because the contract was so egregiously unfair that the rules essentially constituted a breach of the employer's contractual obligation to draft arbitration rules in good faith, meaning that it was substantively unconscionable.⁹³ However, cases like *Hooters* are few and far

88. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

89. See Federal Arbitration Act, 9 U.S.C. § 2 (2012); see, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

90. An adhesion contract, in this sense, is a contract drafted by one party to be signed by another.

91. See, e.g., *Higgins v. Super. Ct. of L.A. Cty.*, 45 Cal. Rptr. 3d 293 (Ct. App. 2006).

92. See, e.g., *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88 (Ct. App. 2004).

93. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (stating that the provisions of the arbitration agreement at issue required that all arbitrators be selected from list created by employer; placed no limits on whom the employer could place on list; required employee to notice claims but did not require employer to notice defenses; and allowed the employer, but not the employee, to expand scope of proceedings).

between, and such determinations are extremely case specific due to the limitations of the FAA.⁹⁴ Additionally, the Fourth Circuit decided *Hooters* prior to *Concepcion* or *Epic Systems*. The fact that the average base pay of a “Hooters girl” is three dollars per hour, or that “Hooters girls” are subject to disproportionate amounts of sexual harassment, did not appear factor into the Fourth Circuit’s analysis regarding the unconscionability of the agreement.⁹⁵

d. Public Policy Arguments

A contract may be unenforceable on the grounds of public policy if it is contrary to a previously addressed legislative goal or if a potential consequence of enforcement clearly outweighs the interest in its enforcement.⁹⁶ Generally, when a contract is invalidated based upon public policy, the contract is already contrary to a constitution, statute, regulation, or common law.⁹⁷ Courts are far less likely to apply a public policy argument absent any other legal arguments.⁹⁸ A public policy argument might be particularly compelling in cases involving low-wage workers, as opposed to white collar workers who might have more bargaining power.

In weighing the interest in enforcement, a court must consider (1) the parties’ justified expectations, (2) any forfeiture that would result if enforcement were denied, and (3) any special public interest in the enforcement of the contract.⁹⁹ In weighing public policy interests against such enforcement, the court must consider (1) the strength of that policy as manifested by legislation or judicial decisions, (2) the likelihood that a refusal to enforce the term will further that policy, (3) the seriousness of any misconduct involved and the extent to which it was deliberate, and (4) the directness of the connection between that misconduct and the term.¹⁰⁰

94. See Federal Arbitration Act, 9 U.S.C. § 2 (2012).

95. See *Hooters of America, Inc.*, 173 F.3d at 938; Lauren B. Moffitt & Dawn M. Szymanski, *Experiencing Sexually Objectifying Environments: A Qualitative Study*, 39 COUNSELING PSYCHOL. 67,82–85 (2011); *Hooters Girl Hourly Pay*, GLASSDOOR, https://www.glassdoor.com/Hourly-Pay/Hooters-Hooter-Girl-Hourly-Pay-E5770_D_KO8,19.htm# [<https://perma.cc/29VB-5EZW>].

96. See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981).

97. See, e.g., *Cary v. Cary*, 937 S.W.2d 777, 781 (Tenn. 1996).

98. However, public policy presumptively outweighs enforcement of certain restraint of trade clauses: promises involving commission of a tort; inducing violation of a fiduciary duty; interfering with the contract of another; exempting liability from harm caused intentionally, recklessly, or negligently; and exempting consequences of misrepresentation. See RESTATEMENT (SECOND) OF CONTRACTS §§ 186, 192–96 (AM. LAW INST. 1981).

99. See *id.* § 178(2).

100. See *id.* § 178(3).

Courts have not seemingly yet but could reasonably find that there is a public policy against binding employees to arbitration due to (1) the economic necessity of employment, (2) the unequal bargaining power, particularly in cases involving low-wage workers with more limited resources, (3) the interest in having an impartial court hear a claim, as opposed to an arbitrator, (4) the public interest in such cases and results being available for public record, which is frequently not the case with arbitrated cases, or (5) conflict with some other employment or civil rights law or protection, among other arguments. However, when weighing employees' actions against prevailing policy interests in settling claims, minimizing court dockets, and deferring to precedential interpretations of the FAA, courts, including the Supreme Court, have been reluctant to broadly find for employees in such cases due to its insistence that such a contract cannot be unenforceable simply because it requires arbitration.¹⁰¹ In *Epic Systems*, for example, the Supreme Court rejected employees' claims that enforcement of arbitration would be "illegal" based upon the public policy advanced in the National Labor Relations Act (NLRA).¹⁰² The courts have also elected to interpret the FAA to include even those arbitration agreements resulting out of unequal bargaining power, as well as those included as conditions of employment, despite reasonable interpretations of the Act that would quash such a belief.¹⁰³

101. *Epic Sys. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

102. *Id.* ("Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today." (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011)). *But see* *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 290–93 (2002) (permitting the EEOC to vindicate the public interest on behalf of an employee despite the existence of an arbitration agreement between the employee and employer).

103. *See* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting) ("[The FAA] was intended to overcome that attitude, but a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration . . . [T]he Court is standing on its own shoulders when it points to those cases as the basis for its narrow construction of the exclusion in § 1."). The FAA includes an exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," although the Supreme Court has elected to limit this interpretation only to transportation workers. *See* *Federal Arbitration Act*, 9 U.S.C. § 1 (2012); *Circuit City Stores, Inc.*, 532 U.S. at 109, 112 (holding an arbitration agreement as a condition for employment was enforceable in a discrimination case).

4. The Status of Harassment and Discrimination Claims Subject to Arbitration

The lack of general arguments one can successfully make against binding arbitration between employers and employees does not change simply because a cause of action is related to discrimination or harassment. In fact, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that the FAA required enforcement of arbitration agreements for claims arising under the Age Discrimination in Employment Act.¹⁰⁴

Although the Fourth Circuit in *Hooters of America, Inc. v. Phillips* found an arbitration agreement to be invalid in a harassment case, it was not due to the nature of the claim or the fact that arbitration was mandated.¹⁰⁵ The invalidation was due to an unconscionability argument extremely specific to that case.¹⁰⁶ Any unconscionability argument must refer to the time at which the contract was made; therefore, whether the argument is made due to a worker's experience of sexual harassment or some other workplace ill is immaterial.¹⁰⁷ One could argue that a binding arbitration agreement that includes harassment and discrimination claims is unconscionable or violates public policy. However, that argument would likely fail, and it begs the question as to why a harassment or discrimination claim can or should be placed on a different tier than any other type of claim that involves equal or greater harm. Any duress, consideration, or other generally applicable contract defenses would also have to be determined on a case-by-case basis and are unlikely to succeed.

5. Solutions

The courts, at this time, do not appear to provide a feasible solution for the issue of binding arbitration agreements against employees.¹⁰⁸ Given precedent and the current composition of the courts, unless Congress amends the FAA or other relevant legislation to either explicitly exclude certain types of arbitration

104. 500 U.S. at 23.

105. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

106. *Id.* (finding unconscionable arbitration that required following of rules required that all arbitrators be selected from list created by employer; placed no limits on whom the employer could place on list; required employee to notice claims but did not require employer to notice defenses; and allowed the employer, but not the employee, to expand scope of proceedings).

107. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

108. See generally *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

clauses or provide states more flexibility in this area, there does not appear to be a way to legally render binding arbitration agreements between employees and employers unenforceable.

a. State Legislative Solutions to Binding Arbitration

Any state legislation rendering unenforceable arbitration in all employment contracts, or simply rendering unenforceable arbitration in cases involving harassment or discrimination, would likely be invalidated. Such legislation would essentially be rendering arbitration clauses unenforceable due to the fact that they require binding arbitration. The Supreme Court has held that the FAA preempts such state action.¹⁰⁹ Unless Congress amends the FAA to provide states with more flexibility in this area, or the Supreme Court overturns its precedent—which is highly unlikely—it is unlikely that any state law would be valid. However, several states have passed or attempted to pass legislation on the topic regardless.¹¹⁰ It remains to be seen whether these will be challenged or what will come of those challenges, but future litigation seems likely.

b. Federal Solutions to Binding Arbitration

i. Congressional Solutions

Recently, there has been increased pressure on Congress to address the issue of binding arbitration agreements between employers and employees, particularly in regard to cases of sexual

109. *AT&T Mobility LLC*, 563 U.S. at 339.

110. *See, e.g.*, N.Y. C.P.L.R. 7515(a)(2), 7515(a)(4)(b)(i)–(iii) (McKinney Supp. 2019) (prohibiting provisions in any contract that require parties to submit to mandatory arbitration in cases of sexual harassment); Assemb. B. 3080, 2017–18 Leg., Reg. Sess. (Cal. 2018) (“A person shall not, as a condition of employment, continued employment, the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act . . . or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation.”); S.B. 1748, 2018 Leg., Reg. Sess. (Fla. 2018) (“Any provision of a contract or agreement that waives a substantive or procedural right or remedy relating to a claim of discrimination, retaliation, harassment, or a violation of public policy in employment is unconscionable, void, and unenforceable with respect to any such claim arising after the contract or agreement with the waiver is entered into.”); H.B. 578, 2018 Leg., Reg. Sess. (La. 2018) (proposing a prohibition on predispute arbitration agreements that would mandate arbitration in cases of sexual harassment).

harassment.¹¹¹ Congress has already proposed several bills that would address the issue.¹¹²

In December 2017, the House of Representatives and the Senate introduced bipartisan bills that would amend the FAA to render unenforceable binding arbitration agreements in cases of sex discrimination.¹¹³ Given the tremendous impact of the #MeToo movement, as well as other social and political realities, a focus on sex discrimination, which includes sexual harassment, might make the bill more likely to pass. However, this solution excludes other types of harassment, discrimination, and assault. These other types of claims might also cause severe damages to employees, which these bills inherently exclude due to their specificity. Legislatures should instead introduce bills that would render arbitration agreements unenforceable for *all* harassment and discrimination claims, if not for all disputes.

In February 2019, Democrats introduced the Forced Arbitration Injustice Repeal (FAIR) Act of 2019 in the Senate and the House of Representatives.¹¹⁴ This bill appears to be more or less a reiteration of the Arbitration Fairness Acts of 2017 and 2018.¹¹⁵ As opposed to focusing solely on sexual harassment disputes, however, this bill addresses issues with arbitration regarding claims arising from all employment, consumer, or civil rights disputes.¹¹⁶ This amendment would be the most inclusive and ideal, although, given the current political climate and realities, it is less likely to pass.¹¹⁷

111. Jacqueline Thomsen, *AGs Demand Congress End Mandatory Arbitration in Sexual Harassment Cases*, THE HILL (Feb. 13, 2018, 6:33 PM) <http://thehill.com/regulation/administration/373715-all-us-ags-demand-congress-end-mandatory-arbitration-in-sexual> [<https://perma.cc/78SS-6L3Q>].

112. Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018); Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017).

113. Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017); Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017).

114. Forced Arbitration Injustice Repeal Act of 2019, S. 610, 116th Cong. (2019); Forced Arbitration Injustice Repeal Act of 2019, H.R. 1423, 116th Cong. (2019).

115. Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018); Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017); Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

116. Arbitration Fairness Act of 2018, S. 2591, 115th Cong. (2018).

117. Shane T. Roeber, *Supreme Court Upholds Individual Proceedings in Arbitration Agreements—Hindering Class Actions*, NAT'L L. REV. (June 19, 2018), <https://www.natlawreview.com/article/supreme-court-upholds-individual-proceedings-arbitration-agreements-hindering-class> [<https://perma.cc/BES7-QBU7>] (noting the Arbitration Fairness Act was unlikely to pass due to the composition of Congress).

The fact that neither bill is bipartisan is indicative of the political ties and roadblocks that would be involved in passing such a bill.¹¹⁸ Those who oppose the bill would likely state that it is overbroad, prejudices employers, and would unnecessarily clog courts.

In October 2018, the Restoring Justice for Workers Act was introduced in the House of Representatives.¹¹⁹ The bill was a direct response to *Epic Systems*. It aimed to (1) prohibit pre-dispute arbitration agreements in employment contracts, (2) prohibit retaliation against employees for refusing to arbitrate employment disputes, (3) ensure that post-dispute arbitration agreements are voluntary, and (4) amend the National Labor Relations Act to prohibit agreements that interfere with an employee's right to take collective action in disputes.¹²⁰ However warranted such a response to *Epic Systems* might have been, there were no Republican cosponsors.¹²¹ Now that the Democrats have taken control of the House and introduced the FAIR Act, it is unclear whether the bill would pass in the Senate, or whether the president would sign such a bill.

Congress has also proposed prohibiting arbitration clauses that include a confidentiality clause.¹²² The bill would allow employees to communicate about causes of action consistent with federal and state whistleblower laws, as well as report, including to public officials, and communicate about tortious or otherwise unlawful conduct and issues of public policy.¹²³ This solution would address the public interest in knowledge about disputes and resolutions. However, it would not necessarily address the employee's right to a trial by jury or a fair binding decision.

The Safety Over Arbitration Act of 2017, which ultimately failed, would have prohibited arbitration in cases in which the cause of action involved a threat to public health or safety.¹²⁴ This proposal is similar to sunshine-in-litigation statutes, which prohibit

118. See *Cosponsors: H.R. 1423–116th Congress (2019–2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1423/cosponsors> [<https://perma.cc/52FK-PKMB>]; *Cosponsors: S. 610–116th Congress (2019–2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/610/cosponsors> [<https://perma.cc/VQN8-XP8C>].

119. Restoring Justice for Workers Act, H.R. 7109, 115th Cong. (2018).

120. *Id.*

121. *Cosponsors: H.R. 7109–115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/7109/cosponsors> [<https://perma.cc/GMT9-BZGH>].

122. Mandatory Arbitration Transparency Act of 2017, S. 647, 115th Cong. (2017); Mandatory Arbitration Transparency Act of 2017, H.R. 4130, 115th Cong. (2017).

123. *Id.*

124. Safety Over Arbitration Act of 2017, S. 542, 115th Cong. (2017).

the use of nondisclosure agreements to conceal public hazards.¹²⁵ The reasoning behind such a statute would be to prevent concealment of information in which the public could be at risk. One could argue that harassment in the workplace would fall under such a specific exception due to the possibility that harassment, especially if severe or pervasive enough, could place others at risk; however, there would be no guarantee that a court would agree if the legislature chooses to remain so vague.

Congress could also amend the FAA to provide states with more flexibility in regard to whether to consider certain types of binding arbitration agreements illegal or against public policy. Such an amendment would effectively render *Concepcion* irrelevant and outdated. This fix might be easier to pass given the political makeup and majority of the current Congress—particularly the Republican majority in the Senate. However, it would not assist every employee in every state. It would be up to states to make such changes on their own.

ii. Equal Employment Opportunity Commission Solutions

Even though mandatory binding arbitration agreements prevent an employee from bringing an individual suit, and might bar collective action, the Equal Employment Opportunity Commission (EEOC) is still permitted to pursue an individual claim and victim-specific relief and essentially circumvent the restrictions of mandatory binding arbitration.¹²⁶ Therefore, the EEOC should attempt to pursue as many viable claims of harassment and discrimination against employers as possible in cases in which employees are limited. However, the EEOC cannot pursue every claim, leaving many victims of sexual or other forms of harassment with no recourse. Additionally, this exception to circumvent arbitration clauses does not necessarily apply to state agency action, which an employee might be required to exhaust to make state claims of discrimination.¹²⁷

125. *See, e.g.*, FLA. STAT. § 69.081 (2018) (defining “public hazard” as “an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury”); WASH. REV. CODE § 4.24.601 (2018).

126. *See generally* EEOC v. Waffle House, Inc. 534 U.S. 279 (2002) (finding the EEOC did not sign the arbitration agreement and sought to vindicate the public interest).

127. *See id.* at 314–15 (Thomas, J., dissenting) (“The Court should not impose the FAA upon States in the absence of any indication that Congress intended such a result, . . . yet refuse to interpret a *federal* statute in a manner

It is also possible that the mandatory binding arbitration agreement contains a confidentiality clause preventing the employee from reporting the claim to an agency such as the EEOC. Even if such clauses are actually unenforceable, employees are not always aware that that is the case, particularly in the case of low-income workers who might not be educated or are likely not represented by an attorney. Employers are therefore not inherently disincentivized from using mandatory binding arbitration.

c. Cultural and Companywide Shifts

In addition to legislative solutions, companies may change policies independent of legal requirements. Several major companies, such as Uber and Lyft, have already stated that they will not enforce binding arbitration agreements in cases of harassment for drivers, riders, and employees who make sexual harassment claims,¹²⁸ and they have received positive press for effecting such a change.¹²⁹ Such a solution could improve the public's perception about a company, particularly in the #MeToo era.

However, there are several issues with simply relying on companies to change policies on their own. First, not all companies are taking such action, and all employees should be entitled to the right to take harassment and discrimination claims to court. Second, some of these policies are overly narrow. For example, many only address sexual harassment, as opposed to other forms of harassment. Further, it is still unclear why harassment or discrimination claims are considered more or less severe than other types of workplace rights claims, or why there is more of a public interest in the courts taking on such cases than other types of claims.

d. Recommendations

Currently, it seems that the best path to prevent arbitration of harassment and discrimination claims in the employment context would be for Congress to pass legislation doing so. Long-term, it would be best to pass legislation that would render arbitration

compatible with the FAA, especially when Congress has expressly encouraged that claims under that federal statute be resolved through arbitration.”).

128. See Greg Bensinger, *Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims*, WALL ST. J. (May 15, 2018, 6:00 AM), <https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400> [<https://perma.cc/Y4HA-V7AR>]; Kirsten Korosec, *Lyft Follows Uber in Ending Forced Arbitration for Sexual Harassment Claims*, FORTUNE (May 15, 2018), <http://fortune.com/2018/05/15/lyft-follows-uber-in-ending-forced-arbitration-for-sexual-harassment-claims> [<https://perma.cc/R6XE-4J2N>].

129. See, e.g., Bensinger, *supra* note 128; Korosec, *supra* note 128.

completely unenforceable in an employment context, particularly since egregious violations of employees' rights can involve claims other than those of harassment and discrimination. The broader the prohibitions on arbitration agreements in employment, the less likely employees with valid claims are denied of their rights. It would prevent the continual need to add exceptions to the enforceability of arbitration agreements as new cutting-edge issues arise, as well as prevent any potential legal or factual argument that an employer might make to recategorize a sexual harassment claim to support enforcement of the agreement. For now, if only legislation addressing arbitration in sexual harassment cases can pass muster, legislators might choose to settle, and it might have to do.

In the meantime, should individuals continue to bring cases regarding the enforceability of arbitration agreements, they must focus on generally applicable contract claims, such as duress, that do not attack the nature of arbitration itself.¹³⁰ There are undoubtedly arbitration agreements that are also unconscionable, but those arbitration agreements would be specific to each case.¹³¹ Additionally, the EEOC should focus on pursuing harassment and discrimination claims in which the employee has signed a mandatory binding arbitration agreement. Perhaps these shifts would affect whether employers choose to include such clauses in employment contracts, although there is no guarantee.

Binding arbitration is a beneficial tool to prevent court backlog for those of relatively equal bargaining power.¹³² However, employers' imposition of binding arbitration agreements on employees is a coercive practice that prevents class actions, as well as some claims, from being heard, publicized, or handled fairly.¹³³ In the #MeToo era, there has been a particular focus on protecting women from sexual harassment in the workplace.¹³⁴ It is in the public interest to be aware of harassment claims made against employers, and it is in the interest of workers to be able to bring a collective action, have their case heard by a jury if they so choose, and hold employers

130. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

131. *See, e.g., Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (holding an arbitration agreement that implemented employer rules that were so egregiously unfair that the arbitration process became one-sided was unconscionable: the employer was not required to file responsive pleadings or notice defenses, the employee was required to provide a list of fact witnesses while the employer was not, and the possibilities for a third neutral arbitrator were to be selected from a list the employer compiled).

132. *See Epic Sys. Corp.*, 138 S. Ct. at 1642 (Ginsburg, J., dissenting).

133. Kershaw, *supra* note 29, at 29.

134. *See Hurley, supra* note 26.

appropriately accountable. Amending the FAA may be the only way to force courts to stop enforcing fundamentally unfair arbitration agreements.¹³⁵

B. *Nondisclosure Agreements*

When the #MeToo movement took off in 2017, of particular concern was the fact that many of the women who accused Weinstein of sexual harassment and unwanted physical contact agreed to confidentiality clauses in settlements.¹³⁶ These clauses have the obvious effect of preventing victims of harassment and other inappropriate sexual behaviors from telling their stories. As more stories about the use of nondisclosure agreements are reported, these agreements and their enforceability have become a contentious topic.¹³⁷

Nondisclosure agreements require signatory parties to keep certain sensitive information confidential.¹³⁸ Although nondisclosure agreements may be used to protect trade secrets or ideas, they may also be included in employment contracts or settlement agreements in cases of harassment in the workplace.¹³⁹ The obligation to remain silent typically applies to the employer and the employee alike. However, an employee may still report an incident of harassment to the EEOC even after signing a settlement with a nondisclosure agreement, although low-wage workers in particular might not be aware of that right due to lack of knowledge or representation.

When gymnast McKayla Maroney sought to speak out about the abuse she experienced at the hands of Larry Nassar by

135. See, e.g., *Epic Sys. Corp.*, 138 S. Ct. at 1626, 1632 (stating the Supreme Court will not substitute its judgment for Congress, and that Congress has proven that it knows how to explicitly override the Federal Arbitration Act).

136. See Kantor & Twohey, *supra* note 4.

137. See, e.g., Schad, *supra* note 6; Schmidt & Steel, *supra* note 6.

138. Rebecca K. Myers, *Confidentiality, Nondisclosure and Secrecy Agreements*, LEXIS PRACTICE ADVISOR JOURNAL (Nov. 30, 2015), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2015/11/30/confidentiality-nondisclosure-and-secrecy-agreements.aspx> [https://perma.cc/5HH2-7NLJ]. This article focuses on confidentiality agreements with regard to business information. As the author notes: "In the employment context, confidentiality agreements are beneficial to an employer because they allow the free-flow of confidential information within an organization in order to maximize business efforts but at the same time prohibit employees from using or disclosing confidential information, such as client lists, strategic plans, know-how, technologies, marketing strategies, and proprietary relationships outside the scope of their job responsibilities." *Id.*

139. See Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 249 (2018); Myers, *supra* note 138.

providing a voluntary victim statement for sentencing proceedings, Maroney feared that USA Gymnastics would enforce a nondisclosure agreement that was included in their settlement.¹⁴⁰ However, public figures, such as actress Kristen Bell and model and television host Chrissy Teigen, offered to pay the fine so that Maroney could speak without the fear that USA Gymnastics would seek to enforce the gag order.¹⁴¹ As inspiring as this solidarity might be, it is unlikely that public figures would offer to pay such an exorbitant amount of money for a low-wage worker whose story might not receive the same amount of publicity. Additionally, these workers would likely not have counsel informing them of the enforceability of such a clause. Finally, harassment of low-wage workers is frequent and often severe, such that providing funds for any given low-wage worker would be almost impossible. Nondisclosure agreements thus have more of a chilling effect on low-wage workers who cannot afford to take such a risk. Employees might wish to speak out for multiple reasons, including to, like Maroney, testify in another case that does not settle or is a criminal case, warn other workers, inform the public of an employer's failures, or empower others to tell their stories, among others.

1. Arguments for Including Nondisclosure Agreements in Settlements for Workplace Harassment and Discrimination Claims

Nondisclosure agreements incentivize employers to settle, as well as to provide employees with more money when they do settle. An employer would be incentivized to settle if including a nondisclosure agreement were an option because part of the benefit of settling would be to prevent disclosure of details that might taint its reputation. An employer would be more likely to settle for more money as a result of inserting a nondisclosure agreement because (1) the employee would, theoretically, be more likely to negotiate more money in exchange for a nondisclosure agreement and (2) increasing the amount of money would not appear to be an admission of guilt because details would never be disclosed.

Employers also note that not every claim is meritorious; some cases are just nuisances that employers prefer to settle, whether to prevent litigation, save time and resources, or prevent tarnishing

140. Schad, *supra* note 6.

141. Scott Gleeson, *Chrissy Teigen Offers to Pay \$100,000 Fine for McKayla Maroney to Speak Out Against Nassar*, USA TODAY (Jan. 16, 2018, 4:01 PM), <https://www.usatoday.com/story/sports/olympics/2018/01/16/chrissy-teigen-offers-pay-100000-fine-mckayla-maroney-larry-nassar/1036339001> [<https://perma.cc/6LAN-VD2B>].

their reputations even if the claim is weak or unreliable. Therefore, employers are encouraged to settle, even when the facts are unclear or the plaintiff's claim is weak, because they can incorporate nondisclosure agreements. In that same vein, because false accusations can be made, employers might want to protect the name of the accused due to the potential impact on employability or reputation. With a nondisclosure agreement, an employee would, presumably, not be able to disclose the name of the accused individual, in addition to any other facts pertaining to the claim.

Finally, employers argue that employees do have a meaningful choice between settling and litigating. Employees are able to weigh their interests in deciding whether to settle, and they are capable of making such decisions themselves. If these employees do not wish to remain silent, they do have the option of pursuing a charge.

Because nondisclosure agreements are enforceable against the employer as well, employees facing harassment or discrimination might want a nondisclosure agreement to maintain confidentiality for fear of damage to reputation, unemployability, retaliation, or other reasons, particularly for a low-wage worker with minimal recourse. Alternatively, employees might genuinely prefer signing a nondisclosure agreement over enduring lengthy litigation that could take years to complete and would likely require them to relive traumatic past experiences. Additionally, litigation could be expensive, including court and attorney fees that low-wage workers might not be able to afford. Low-wage workers might also require immediate funds and thus might be unable to wait to go through the litigation process, particularly if they are seeking new employment or health care due to the harassment or assault. For employees facing harassment or discrimination who have only weak evidence, settling might be the only sure method of receiving any monetary compensation, so incentivizing employers to settle is imperative. Finally, even for employees with strong cases, litigation is always risky, since success can depend upon the assigned judge, the jury, and so many other factors. Litigation is especially risky if a low-wage worker must bring a case *pro se*.

2. Arguments Against Including Nondisclosure Agreements

In permitting nondisclosure agreements in settlements for such cases, legislatures allow employers to take advantage of employees' more immediate needs in exchange for silence. To argue that employees have a say in the terms of the contract ignores a significant bargaining power disparity that often exists between

the employer and employee. Low-wage workers might not be able to afford an attorney, or the same caliber of attorney that the employer can afford; might not know their rights; and, as a result, workers may be taken advantage of.¹⁴² The argument, for example, that employers are more likely to provide an employee with more money in a settlement with a nondisclosure agreement due to the increased room for negotiation assume an employee has the requisite knowledge or understanding to effectively negotiate, or, alternatively, counsel to assist.

The argument that employers lack incentive to settle with a prohibition on nondisclosure agreements is also not entirely convincing. Employers would still be incentivized to settle in many situations. Settling would still amount to less time and legal fees than trial.¹⁴³ Additionally, there are certain cases that a company would not want a jury or the EEOC to hear, especially if the facts are extreme, likely to incite emotion, or are not in their favor. In these cases, there is a risk that the jury might award more in damages, monetary or otherwise, than a settlement or the EEOC might require.¹⁴⁴ There is also still a difference in the potential for media attention between a settlement and a court case, depending upon the facts.¹⁴⁵ Of course, with a low-wage worker, there is less of a risk of media attention, but in the age of #MeToo, an employer cannot be too certain.

The concern about protecting innocent accused persons is a valid one, but it is unclear how often false accusations actually occur. The probability that an accusation for sexual harassment or inappropriate sexual behavior is false is low.¹⁴⁶ However, it is reasonable, given our strongly held notions of due process, that an employer would want to protect an accused employee as well as the victim, particularly if the case is weak.¹⁴⁷ That said, an employer

142. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 33–34, 43–45 (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/J32Z-GLQG>].

143. See Suzanne Lucas, *Why Employers Settle Sexual Harassment Claims*, CBS NEWS (Nov. 3, 2011, 5:04 PM), <https://www.cbsnews.com/news/why-employers-settle-sexual-harassment-claims> [<https://perma.cc/YM6U-TH62>].

144. *Cf. id.*

145. *See id.*

146. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 *VIOLENCE AGAINST WOMEN* 1318, 1318 (2010) (finding that false accusation rates for sexual assault lie between two and ten percent).

147. *See* Lucas, *supra* note 143 (describing an employer's incentive to keep high level, high performing employees on staff).

could protect such an employee by performing a diligent investigation, or by including a clause that only prevents the disclosure of the alleged harasser's name.

Finally, the argument that employees might want confidentiality is valid. However, companies would not typically have an incentive to share details about harassment or assault in the workplace. It is therefore not likely that employees would have to be concerned about employers sharing their stories; the concern is therefore likely one sided. Additionally, if an employer is actually concerned about an employee's rights and confidentiality, it does not have to reveal details about the employee, even if there is no nondisclosure agreement.

Prohibiting nondisclosure agreements would allow employees to talk about their experiences at any time they feel comfortable, if at all. Nondisclosure agreements can be a coercive mechanism for covering up misconduct and shielding powerful players from accountability for their actions. Employees might fear the repercussions of violating such an agreement, creating a chilling effect for employees who might later seek to hold powerful individuals accountable, even if not in a civil action. Employees, for the aforementioned reasons, might have to settle, and permitting employers to include nondisclosure agreements. This allows employers to provide employees with take-it-or-leave-it settlement agreements that require silence in exchange for settlement. Knowledge of these incidents is also in the public interest; a prohibition would protect the public right to know.

3. Generally Applicable Contract Defenses

Much like arbitration agreements, nondisclosure agreements may be invalid if the contract itself is void or voidable, whether due to minority, lack of capacity, physical or economic duress, undue influence, misrepresentation, nondisclosures, or unconscionability.¹⁴⁸ However, as with arbitration, any arguments would be extremely specific to the case at hand, meaning that it would be difficult to predict the potential outcome of a claim based upon precedent. Despite clear differences in bargaining power between low-wage workers and employers, a nondisclosure agreement would not be automatically unconscionable.

Any liquidated damages for a breach of a nondisclosure agreement may only be "an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties

148. RESTATEMENT (SECOND) OF CONTRACTS §§ 161, 164, 175, 177, 208 (AM. LAW INST. 1981); *see supra* note 76 pp. 13–19.

of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”¹⁴⁹ Unreasonable liquidated damages are of particular concern to low-wage workers who cannot afford to breach such contracts otherwise and might fear breaching the contract due to the stated damages regardless of whether they are enforceable.

4. Solutions

There are infinite solutions to this issue that contemplate employers’, employees’, and the public’s interests, each with their own benefits and drawbacks. This Article will discuss some of the most prominent or popular.

a. The Ayres Solutions

Ian Ayres outlines several potential compromises to address the nondisclosure agreement debate, particularly in regard to addressing the issue of repeat offenders.¹⁵⁰ Addressing the issue of repeat offenders would prevent future harassment. When repeat offenders are not held accountable, they are likely to continue their harassing behavior.¹⁵¹ One of Ayres’ suggestions involves placing all employee allegations in an information escrow to be released for investigation by the EEOC if another complaint is received against the same accused party.¹⁵² This solution would potentially place the responsibility on employers to ensure that an employee accused of harassment does not offend again. The solution would also serve the public interest by allowing for EEOC intervention to hold employers accountable for repeat offenders, prevent future harassment, and remove the burden of litigation from individual employees.

However, this solution does not address the reality that a repeat offender might very well only have been reported once, particularly if the harasser is targeting low-wage workers who might fear retaliation, are not part of a union or collective voice, or do not otherwise feel safe reporting the incident to their employers. It therefore leaves workers, particularly low-wage workers, in a potentially unsafe working environment.

Additionally, this solution would not serve the public interest of accountability for single offenses, since the EEOC would not be alerted until a perpetrator is accused on another occasion.

149. RESTATEMENT (SECOND) OF CONTRACTS § 356.

150. See generally Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (June 2018).

151. *Id.* at 77.

152. See *id.* at 79, 84–87.

This solution would also not necessarily serve the public interest in having accessible information about the incident. Just because the EEOC is investigating an incident does not mean the information will ever be made public. The EEOC is required to maintain confidentiality during the investigation phase prior to bringing litigation, if it chooses to do so. It also must withhold evidence of information gathered during conciliation or other informal discussions from subsequent hearings, unless it has the consent of both parties to disclose such information.¹⁵³ The public has an interest in knowing whether employers are violating Title VII by harassing—or permitting the harassment of—its employees, and this solution does not address that need. This solution also requires all employees to feel comfortable reporting, and to understand how to do so within their companies. Otherwise, repeat offenders will not be properly identified.

The employer might also be reluctant to settle for the same reasons it might be reluctant to settle without a nondisclosure agreement. In this case, the employer's potential liability and instigating an EEOC investigation is reliant upon the actions of the accused employee, and the accused employee's actions might not be entirely within the employer's control. The employer could certainly create an environment in which harassment is not tolerated or hold the accused employee accountable, but as long as the company does not fire the accused employee, the company is taking a risk.

It is possible that the use of an escrow would make employers more likely to terminate accused employees for fear of EEOC investigation. However, terminating accused employees can have negative and lasting consequences for those employees that might not be warranted or helpful in correcting behaviors. Rehabilitation and restorative justice would be far more effective for those found to have harassed fellow employees.¹⁵⁴ Internal proceedings must also be fair and perceived as such. For example, depending upon the circumstances, it might not be proportional or fair to be fired for a single statement as opposed to assault or more egregious forms of harassment. If accused employees believe that a company has treated them unfairly, the company opens itself up to further liability.

153. 42 U.S.C. § 2000e-5(b) (2012); 29 C.F.R. § 1601.22 (2018).

154. Lesley Wexler & Jennifer K. Robbennolt, *#MeToo and Restorative Justice*, A.B.A. (2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/me-too-and-restorative-justice [<https://perma.cc/ZGU5-Q6H7>] (describing the benefits of restorative justice, which addresses the needs of both victims and harassers in cases of sexual harassment).

Ayres' second proposed solution is to explicitly carve out the employee's right to disclose information to the EEOC or other investigative authorities, even with a nondisclosure agreement in play.¹⁵⁵ This solution would ensure that employees are aware of their rights, potentially minimizing the chilling effect and increasing the probability that employees will be aware of their rights. It would also allow the EEOC to "vindicate the public interest in preventing employment discrimination."¹⁵⁶

Even though this requirement would make it more likely that employees would be aware of and take advantage of their right to report, employees already retain these rights when they sign a settlement agreement; the right to file such a complaint is nonwaivable.¹⁵⁷ However, low-wage workers might be less likely to be aware of that fact, so it could be helpful for low-wage workers. Despite that, this requirement would rely on the employer to actually take action in carving out this right, and an employer would have little incentive to make the employee aware of this right if the employer believes that its conduct will not be reported. A low-wage worker who is unaware of this right in the first place would be unlikely to know that such a right should be carved out in a nondisclosure agreement. Finally, the same issues exist with this solution as the first Ayres solution: The ability to report to the EEOC does not inherently make it possible for the public to learn about the harassment.

The third solution Ayres proffers involves including a condition in settlement agreements that any misrepresentation by the perpetrator about the employee and perpetrator's interactions would constitute a material breach, which would allow the employee to speak freely about what occurred and correct any inaccurate information.¹⁵⁸

However, employers might be reluctant to settle for the same reasons they might be reluctant to do so without a nondisclosure agreement, simply because the agreement is reliant upon whether the accused party misrepresents past interactions with the employee. As discussed, the employer does not always have full control over its employees, even despite its best efforts. In terms of the

155. Ayres, *supra* note 150, at 79–81. Vermont has adopted this solution. VT. STAT. ANN. tit. 21 § 495h(h)(2) (2018) (requiring agreements that settle a sexual harassment claim to explicitly state that the employee may report sexual harassment to any state or federal agency).

156. Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 326 (1980).

157. See EEOC v. Astra U.S.A., Inc., 94 F.3d 738, 744–45 (1st Cir. 1996) (holding non-assistance clauses in settlement agreements prohibiting contact with the EEOC are against public policy).

158. Ayres, *supra* note 150, at 79, 81–83.

employee's interests and the public interest, this compromise only allows the employee to speak under a very narrow set of circumstances. Additionally, the accused party would be able to frame the story before the employee, and the court of public opinion can be unforgiving and lack nuance.

b. Limitations on the Facts Nondiscrimination Agreements Can Cover

One other possible solution is to prohibit only nondisclosure agreements that cover the facts or circumstances that give rise to a claim, as opposed to the terms of a settlement. Arizona has already enacted such a prohibition, while states such as California and Rhode Island have sought, or are seeking, to institute such a prohibition.¹⁵⁹ New York proposed, but ultimately rejected, a variation of this solution that would allow nondisclosure agreements regarding the amount of money received in a settlement or the terms and conditions of a settlement reached by an arbitrator.¹⁶⁰ This solution would allow employees to share their experiences, which would be in the public interest, but it would not allow them to share the terms of the settlement, allowing for some requirement of discretion.

One concern about this solution is that the terms of the settlement might still be in the public interest. Whether the agreement was fair, for example, might be important for the public to assess. How much the employee received in the settlement could also provide an idea of the merits and severity of the claim, and potentially the employer's financial situation. The revealed amount might also provide low-wage workers who feel they have little bargaining power and who have no counsel with grounds to ask for more funds in a settlement negotiation; they would be able to better determine what their claim might be worth. Second, it might be difficult for employees, including low-wage workers, to separate the facts giving rise to the claim from the facts surrounding the terms of the agreement or negotiations, particularly if they are asked about them following any sort of media or attention, opening them up to liability. Third, the employer might also actually prefer to conceal the facts over the terms of the settlement because the facts of the case are likely more sensitive and likely to attract attention than

159. ARIZ. REV. STAT. ANN. § 12-720 (Supp. 2018); S.B. 820, 2017-2018 Leg., Reg. Sess. (Cal. 2018); S. 2687, 2018 Leg., Reg. Sess. (R.I. 2018).

160. S. 6382A, 2017-2018 Leg., Reg. Sess. (N.Y. 2017); Assemb. B. 8765, 2017-2018 Leg., Reg. Sess. (N.Y. 2017) (stating "[t]he provisions of this subdivision shall not apply to the terms and conditions of an award issued by an arbitrator . . . or the amount of any monetary consideration provided in a settlement).

the specific terms of the settlement. Therefore, there would still be a potential issue with incentivizing employers to (1) settle and (2) settle for more money. Employees might also want the facts to be concealed for the same reason.

c. Revealing Information About the Harasser Prior to Signing any Nondisclosure Agreement

Noreen Farrell, the executive director of Equal Rights Advocates, has suggested requiring employers to disclose whether the same accused employee has been involved in prior settlements or complaints during any new sexual harassment settlement negotiation.¹⁶¹ In finding out that a perpetrator is a repeat offender, an employee might not want to agree to a nondisclosure agreement, which might deter an employer from settling. Ultimately, it might therefore lead the victim to bring legal charges. Additionally, if the employee understands that the accused individual is a repeat offender, the employee might be more likely to want to hold the company or individual publicly accountable, particularly if the employee knows that others might also come forward. Alternatively, the solution might also embolden employees to negotiate better terms or demand that the repeat offender be terminated.

However, similar to Ayers' second solution, because this solution would require affirmative and honest action by employers, it might not work. Even with strict enforcement provisions that would hold them accountable for not revealing such information, (1) employees might never know they were wronged or that their employers lied and (2) employees might not want to risk violating the terms of the nondisclosure agreement. This solution also still permits the use of nondisclosure agreements; therefore, it could also complicate a company's duty to enforce prior nondisclosure agreements. A company might, arguably, have to violate a previous agreement to fulfill this requirement. Special carve-outs might be necessary for future nondisclosure agreements in this case. The solution also might fail for similar reasons to Ayers' first solution: a repeat harasser targeting low-wage workers simply might not have been reported despite serial behavior, leaving workers to rely on incomplete information in determining how to negotiate the settlement.

161. Knight Kiplinger, *Should Nondisclosure Agreements Be Banned in Sexual Harassment Settlements?*, KIPLINGER (Apr. 4, 2018), <https://www.kiplinger.com/article/business/T008-C013-S002-ndas-in-sexual-harassment-settlements.html> [<https://perma.cc/TR9L-LYTU>].

d. Procedural Limitations on Nondiscrimination Agreements

Another proposed solution is to require employers to offer a settlement both with and without the nondisclosure agreement, even if the option without the nondisclosure agreement would provide the employee with less money.¹⁶² This solution would prevent employers from presenting take-it-or-leave-it settlement agreement terms that include nondisclosure clauses. However, even with these supposed choices, low-wage workers still might feel like they have no choice but to agree to the nondisclosure agreement option. If the monetary disparity is that significant, the terms without the nondisclosure agreement might not properly cover funds needed while attempting to find another job or receiving mental or other health treatment, for example. If the disparity is large enough, the practice could arguably still be coercive. Employers could also still wield their increased negotiating power or apply disproportionate pressure on the employee to choose the option containing the nondisclosure agreement.

Some states have instituted prohibitions on nondisclosure agreements when the settlement is a result of certain behaviors. In California, nondisclosure agreements in settlements are prohibited in cases of felony assault, sexual exploitation of a minor, or child sexual assault.¹⁶³ McKayla Maroney, for example, argued that the nondisclosure agreement she signed against Larry Nassar was invalid because it settled a matter establishing a cause of action for an act of child sexual abuse.¹⁶⁴ Other states have “sunshine-in-litigation” statutes that deem clauses that conceal information that could be considered a public hazard to be both against public policy and unenforceable.¹⁶⁵

This solution would prevent covering up the most extreme behaviors with a nondisclosure agreement. Surely, the more hazardous or extreme the act, the greater the public interest would be in knowing about the issue. These laws can also include other types

162. Evan Gibbs, *Non-Disclosure Agreements in the #MeToo Era*, ABOVE THE LAW (Feb. 20, 2018, 10:51 AM) <https://abovethelaw.com/2018/02/nondisclosure-agreements-in-the-metoo-era> [<https://perma.cc/9BMX-ND3W>].

163. CAL. CIV. PROC. CODE § 1002(a)(1)–(2) (Supp. 2018).

164. Complaint at 27, *Maroney v. Mich. State Univ.*, No. BC687396 (Cal. Super. Ct. Dec. 20, 2017).

165. *See, e.g.*, FLA. STAT. § 69.081 (2018) (defining “public hazard” as “an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury”); WASH. REV. CODE § 4.24.601 (2018).

of harassment or assault, as opposed to just including those of a sexual nature. However, this solution would only prevent covering up the most extreme behavior, and legislatures would be required to draw moral and ethical lines that might be difficult to discern. If a legislature decided not to draw any specific lines, such as in a sunshine-in-litigation statute concerning public hazards, the statute might be too vague, meaning that there is no guarantee in any particular situation whether the act giving rise to the complaint is one that would trigger a prohibition on nondisclosure agreements. Due to the vague nature of such legislation, advocacy would be necessary to ensure that it is applied to protect employees, and even then, such advocacy might not be successful. In particular, low-wage workers might not have access to counsel to perform such statutory heavy advocacy.

Another solution would involve ensuring that, even if nondisclosure agreements about the facts or terms of a settlement are entirely prohibited in harassment and assault cases, the employee's name could still remain confidential upon request during negotiations or court order. Indiana attempted this solution in a bill that failed to pass the Indiana House of Representatives.¹⁶⁶ This solution would address concerns about employee anonymity in banning nondisclosure agreements. However, this solution would invite some of the same criticisms from employers as an all-out ban, since the only issue this solution addresses is employee anonymity. This solution might also empower employees to disclose details about a company anonymously because there would be no nondisclosure agreement and their identities would be protected. Anonymity can decrease accountability because of the more limited consequences, allowing sources to mischaracterize the facts.

Another issue with this solution is that employees would have to be aware of this right in order to take advantage of it. However, employees, particularly low-wage workers, may not have lawyers in these negotiations who can make them aware of their rights. In the case that an employee does not, perhaps it would be useful to require that the employee's rights are outlined in the agreement. This solution could also require additional payment or retention of legal counsel to pursue a court order, which many low-income employees in particular might not be able to afford. Those who do not secure counsel might experience confusion throughout the process or might simply be ineffective at securing the court order.

Washington State has passed a ban on nondisclosure agreements that limit, prevent, or punish a witness for providing

166. H.B. 1237, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018).

testimony or discovery in other cases related to sexual assault or harassment, even if the individual signed a nondisclosure agreement.¹⁶⁷ This ban would prevent instances like that which Maroney experienced when she faced potential punishment for providing a voluntary victim impact statement at the sentencing of Larry Nassar, who sexually abused her.¹⁶⁸ This ban would also help to support later cases for others experiencing sexual harassment, assault, or discrimination, and would prevent covering up evidence required to prove such cases, particularly when employees in those later cases have not signed any sort of settlement or nondisclosure agreement. This solution would address the public interest in holding repeat offenders accountable. However, this solution still does not necessarily allow employees to speak on their own; the exception only applies if they need to provide evidence or testimony at a later time. Employees might also feel limited in what they can say, even if they are allowed to speak candidly in such a context. This solution would theoretically eliminate a company's ability to contractually limit such disclosures. Many employers currently include requirements to inform the employer of any subpoena so that it can quash the subpoena, as well as requirements to limit disclosure to only what is necessary to share, among others, in nondisclosure agreements. However, it is unclear what Washington's statute encompasses as a requirement limiting such disclosures and how far those protections would extend.

The New Jersey General Assembly introduced a solution that would render nondisclosure agreements in settlements unenforceable against employees.¹⁶⁹ However, if the employee publicly revealed any information such that the employer was reasonably identifiable, the nondisclosure agreement would become unenforceable against the employer.¹⁷⁰ This solution addresses concerns about employee confidentiality, since employees only come forward if and when they are ready. The solution would also allow employees to tell their stories.

Employers would have the same issues with this solution as they would with an all-out prohibition; however, arguably, this solution provides even less of an incentive to settle due to the unequal

167. S.B. 6068, 65TH Leg., 2018 Leg., Reg. Sess. (Wash. 2018) (enacted) (stating "a nondisclosure policy or agreement that purports to limit the ability of any person to produce evidence regarding past instances of sexual harassment or sexual assault by a party to the civil action does not affect discovery or the availability of witness testimony relating to that civil action").

168. Schad, *supra* note 6.

169. Assemb. B. 5287, 218th Leg., Reg. Sess. (N.J. 2018).

170. *Id.*

application of the nondisclosure agreement. There would be no guarantee that an employee would not come forward, consequently setting the narrative before the employer would even be able to speak to the issue. On the other hand, a large employer would presumably have the resources to effectively refute and overcome accusations. An accused harasser might not.

Another solution is to only allow nondisclosure agreements to be included in settlements when mediation occurs, or when some third party is tasked with resolving the conflict. This solution would address potential concerns about unequal bargaining power and fundamental fairness. However, one challenge with this solution is ensuring that a third-party mediator is truly unbiased, given that a mediator is likely to receive payment from the employer. Additionally, employees might still change their minds later on and want to speak, even if, at the time, they do agree to a nondisclosure agreement in mediation. Finally, this solution still does not address the public interest of knowledge about the occurrence.

Allowing nondisclosure agreements to be included in settlements for harassment cases when the employee requests one is a solution that has appeared in bills introduced in California and Rhode Island, among other states.¹⁷¹ This solution would still permit nondisclosure agreements to exist, but only if the employee makes such a request. Under the Rhode Island bill, such a request from the employee must be explicit and unilateral.¹⁷² This solution would address concerns about employee confidentiality. However, this solution would be almost impossible to enforce. Ensuring that employers are not suggesting that the employee “voluntarily” ask for the inclusion of a nondisclosure agreement would be incredibly difficult.

Minnesota has considered and rejected, while New Jersey is currently considering, legislation that would bar the use of nondisclosure agreements to settle sexual assault and harassment claims against certain state officers and employees, members of the legislature, and candidates.¹⁷³ Arguably, there is a much greater public interest in awareness of any misconduct by government officials, since they create our laws and dictate policies. Those who run for, and serve in, public office should also be aware that their actions will be under greater scrutiny. Therefore, states might consider at

171. S.B. 820, 2017–2018 Leg., Reg. Sess. (Cal. 2018); S. 2687, 2018 Leg., Reg. Sess. (R.I. 2018).

172. S. 2687, 2018 Leg., Reg. Sess. (R.I. 2018).

173. H.F. 3034, 90th Leg., 2017–2018 Reg. Sess. (Minn. 2018); S.B. 2395, 2018–2019 Leg., Reg. Sess. (N.J. 2018); Assemb. B. 3608, 2018–2019 Leg., Reg. Sess. (N.J. 2018).

the very least prohibiting nondisclosure agreements only in settlements with government officials, candidates, or certain high-ranking employees. No requirement would have to be imposed on any private employer; the requirements would only be imposed on public officials, political candidates, and certain high-ranking government employees.

The most obvious barrier to passing such legislation is that it would require those who are currently in office to hold themselves accountable.¹⁷⁴ Government officials might also be less likely to settle without the promise of nondisclosure, which could force employees to endure lengthy trials that rehash traumatic experiences. Another potential issue with this solution is that, again, employees might prefer confidentiality. Finally, this solution only applies to the government, and the public certainly has an interest when these incidents take place in private employment settings as well.

e. Implementing Reporting Requirements

The federal or state governments might also require publicly traded companies to report to the Securities and Exchange Commission (SEC) or state securities regulators when they face widespread sexual-harassment claims, when those claims are brought against high-level executives, when companies settle, and for how much they settle. This solution, which was discussed in an article in *The Nation* and which Congress has proposed, would not specially ban nondisclosure agreements such that employees could speak about their experiences.¹⁷⁵ However, *The Nation's* suggestion would require companies to acknowledge widespread claims or claims against high-level executives, and Congress' proposal would require companies to acknowledge the number of settlements

174. After pressure from the Democratic Party and the public, former Senator Al Franken (D-Minn.) did resign amid accusations of sexual misconduct. See Michelle Goldberg, Opinion, *Franken Should Go*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/opinion/al-franken-sexual-harassment.html> [<https://perma.cc/QF3G-G3AN>]. However, that decision is still met with some controversy by politicians and the general public—in particular, men. See Laura McGann, *The Still-Raging Controversy over Al-Franken's Resignation, Explained*, VOX (May 21, 2018, 6:20 AM), <https://www.vox.com/2018/5/21/17352230/al-franken-accusations-resignation-democrats-leann-tweedden-kirsten-gillibrand> [<https://perma.cc/7TNR-U2NY>].

175. See Sunlight in Workplace Harassment Act, S. 2454, 115th Cong. (2018); Sunlight in Workplace Harassment Act, H.R. 5028, 115th Cong. (2018); Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, THE NATION (Jan. 12, 2018), <https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements> [<https://perma.cc/HQJ7-UENL>].

and the amount for which they settle in sexual abuse and covered harassment and discrimination cases. Stockholders in publicly traded companies should be entitled to this information.

Of course, stockholders have a large financial interest in whether there is widespread sexual harassment, claims against high-level executives, or settlements, since these could affect the company's success. Stockholders also have an interest in knowing how much a company paid in a settlement agreement in terms of the company's financials. Although Congress' solution would have still prevented employees from discussing their stories or the specific facts and circumstances of the claim, at least the public would be aware that the business entered into such an agreement and for how much.¹⁷⁶ Reform regarding the reporting of settlements and settlement amounts appears to be more helpful in these circumstances. This solution also takes pressure off of employees to come forward with their specific stories if they choose not to do so. The information would already, hopefully, be accurately recorded in a report to the SEC. Should legislatures pursue this route, they must be sure to include all types of harassment claims based on protected bases. Congress appears to have included a number of types of harassment in addition to sexual harassment in its proposals.¹⁷⁷

One challenge is that this reporting mechanism would rely on the company to report the incidents. *The Nation's* suggestion regarding reporting of widespread claims or claims against high-ranking executives could allow for false claims of harassment to affect a company's market performance, although, again, it appears that most complaints of harassment are reliable. The employee could also provide helpful information or context that is not available just by looking at an SEC report. One final issue with this solution is that it only applies to publicly traded companies, and many businesses are not. In fact, low wage workers are much more likely to work at small businesses.¹⁷⁸

Marci Hamilton, a law professor and founder of CHILD USA, proposed placing pressure on employment practices liability insurance providers under threat of legislative reforms because of the role these providers play in encouraging nondisclosure and covering the acts of companies.¹⁷⁹ Hamilton believes that if legislatures

176. S. 2454; H.R. 5028.

177. S. 2454; H.R. 5028.

178. GREGORY ACS & AUSTIN NICHOLS, URBAN INST., *LOW-INCOME WORKERS AND THEIR EMPLOYERS* 6 (2007), <https://www.urban.org/sites/default/files/publication/46656/411532-Low-Income-Workers-and-Their-Employers.PDF> [<https://perma.cc/B4J4-GR8T>].

179. Marci A. Hamilton, Opinion, *Here's a Simple Way to Bring an End*

propose legislative reforms regarding insurance policies and requirements, insurance providers will begin to require companies to undergo trainings and conduct audits as a condition of coverage.¹⁸⁰ Hamilton believes legislatures must also place pressure on insurance companies to address the promotion of nondisclosure agreements, intimidation, and other “predator-friendly” practices.¹⁸¹ However, this solution is indirect, and only potentially addresses the working environment. This solution would not involve reporting of incidents, nor would it permit employees who signed nondisclosure agreements to speak about their cases. It could be something that legislatures consider as a separate matter to address workplace environment. It also does not necessarily address the small businesses at which low-income workers are employed.

Federal or state governments might also require employers to report detailed information, such as the number of complaints they receive, whether those complaints involve repeat offenders, and/or how much the company has paid to settle harassment or discrimination claims. This solution, which is similar to SEC reporting requirements but would apply to even those employers that are not publicly traded companies, would also not allow specific employees to tell their stories. However, the public would be made aware of the existence of settlements and claims, even if it is unable to access more detailed information. This solution would protect the privacy of employees, as well as the interest of the company in still permitting nondisclosure.

One potential drawback is that these statistics are just numbers, and they might not tell the entire story. Employees would be able to fill in gaps and provide context that data simply could not provide. Another issue with this solution is that numbers can be misleading. The success of this solution would require both employees to feel comfortable and trust the system enough to report and the employer to properly report. Underreporting might occur because companies compare themselves to one another in an effort to achieve the lowest relative report rate, even though companies with the highest report rates might actually be the companies creating a safe enough environment that employees feel comfortable coming forward. These same issues have occurred on college campuses in regard to required reporting of sexual assault under the Clery Act—colleges have, in the past, feared reporting high rates

to *Sexual Abuse*, NEWSWEEK (Nov. 24, 2017, 10:13 AM), <http://www.newsweek.com/heres-simple-way-bring-end-sexual-abuse-721485> [<https://perma.cc/449D-J6VB>].

180. Russell-Kraft, *supra* note 175.

181. Hamilton, *supra* note 179.

of sexual assault, even though reporting zero incidents of sexual assault is both unrealistic and implies students do not feel comfortable reporting.¹⁸²

At the very minimum, nondisclosure agreements in harassment settlements should be completely prohibited for members of the legislature, certain high-ranking government employees, and political candidates. In these cases, the public interest far outweighs the interests of the accused party. Additionally, given their positions of power, these officials, candidates, and high-ranking employees tend to have the resources or ability to defend themselves and control the narrative. The power disparity in these cases is substantial; therefore employees should be provided with the option to remain anonymous by request in the negotiating process or court order if they are concerned that the employer will use their names and fear retaliation or do not wish to receive attention.

For private employers, a combination of many of these solutions would be ideal. Perhaps the SEC and state securities and exchange commissions could enforce publicly traded business' duties to their stockholders by requiring reporting of widespread claims, or claims against high-ranking executives. An information escrow permitting the EEOC to investigate when there are multiple claims against a repeat offender and mandatory reporting of claims and settlements would also be a helpful undertaking, even if it is not in nondisclosure agreements' stead. Mandatory reporting or reporting to the SEC, however, still would not permit employees to tell their stories if a nondisclosure agreement were in place. The numbers alone are not sufficient to capture the extent of the problem, particularly if companies were required to self-report or the company environment is not conducive to reporting harassment. Permitting the EEOC to investigate claims against repeat offenders would also help to prevent harassment and hold the offender accountable, but it would not necessarily result in public knowledge of the incidents that transpired due to EEOC privacy requirements and policies.

f. Prohibition of Nondisclosure Agreements

The best, although imperfect, solution that deals directly with nondisclosure for private employers is the same as the best solution for public officials: prohibit nondisclosure agreements but allow the employee's name to remain confidential by request in the settlement negotiation process or court order. A request for

182. See *89 Percent of Colleges Reported Zero Incidences of Rape in 2015*, AM. ASS'N OF UNIV. WOMEN (May 10, 2017), <https://www.aauw.org/article/clery-act-data-analysis-2017> [<https://perma.cc/LYH5-P8BH>].

confidentiality would not be a completely one-sided nondisclosure agreement because a company would still be permitted to discuss the incident. However, it would not be permitted to release the name of the employee. Although only allowing one-sided nondisclosure agreements, in which the duty to remain silent is on the employer, would be similar and involve less work for the employee, there would be no guarantee that the employer would agree to a completely one-sided nondisclosure agreement. Therefore, a solution that allows employees to keep their names confidential upon request or court order would better protect employees who truly wish to remain anonymous.

Overall, employers will still be incentivized to settle. There are still myriad incentives to do so, including time, money, and potential publicity. One drawback is that employers might not be willing to settle for as much money. Nondisclosure agreements provide additional leverage for employees to negotiate better settlements. Additionally, allowing nondisclosure agreements might allow employers to feel more comfortable providing more money because the amount of money, which could indicate fault or severity, would not be released. However, even without nondisclosure agreements, employers would still be incentivized to settle, and as such, they would need to negotiate in a manner such that an employee would agree to a settlement. Employers would still have to consider the employee's monetary demands in negotiations. Therefore, even if employees do not walk away with as much money as they might have received if including a nondisclosure agreement were an option, employees can still negotiate with employers regarding the amount of money they receive. Again, these assertions are all based on the assumption that the employees are represented, there are no language barriers, and the employees feel that they are in a position to negotiate, which is less likely when considering low-wage workers.

If the concern with prohibiting nondisclosure agreements is truly that employees might want confidentiality, allowing employees to request anonymity in negotiations or by court order would address that concern. Employers that are actually concerned about protecting the identities of employees could simply do so voluntarily as opposed to using this argument as a talking point to support the use of nondisclosure agreements.

If an employee does have counsel, requiring a court order would not be the largest burden to impose. However, it might require an employee to pay or secure an attorney for additional time and to actually file a claim in court, which a low-income employee

might not be able to afford. Otherwise, the employee would have to request the court order *pro se*, which could result in confusion throughout the process and ultimately prove unsuccessful. If an employee does not have counsel, which is more likely for low-income workers, requiring a court order would be extremely onerous.

Another drawback is the need for employees to be aware of their right to the court order, which would be difficult to ensure without an attorney. Employers could be required to explain these rights to employees during the negotiation process, but there would be no guarantee that employers would honor such requirements. One final drawback is the potential for court involvement when the employee does not want to enter into a court process. These processes can take a long time and might require employees to relive past traumatic experiences. The purpose of settling is to avoid this process, and when employees are required to obtain a court order to protect their anonymity, it defeats this purpose. There would be no guarantee that employers would be willing to, without a court order, include an employee's anonymity in the terms of a settlement.

g. Recommendation

Settlement is a valuable tool both for employers and employees. For employers, settlement saves time, energy, funds, and, potentially, prevents increased publicity. For employees, settlement prevents dredging up past traumatic experiences, saves money, and can allow for quicker access to funds while attempting to find new employment or for needed medical care as a result of harassment or assault. Overall, settlement prevents court backlog. However, these interests in settling are not a justification for allowing employers to keep instances of harassment and assault a secret. Even without nondisclosure agreements, there is still an incentive for employers and employees alike to settle.

Settlement should be encouraged as a matter of public interest. However, the public interest in knowing what occurred, preventing future harassment, and holding employers accountable outweighs employers' arguments to allow nondisclosure agreements in settlements regarding workplace harassment or assault. If there is concern about the employee's need for confidentiality, jurisdictions could still allow employees to remain anonymous by request or court order, which can be sealed. Even so, the public still has the right to know what occurred to (1) inform its consumption decisions, (2) inform its employment decisions, (3) understand the effectiveness of existing policies pertaining to harassment, and (4) understand the scope and nature of persistent harassment, among other reasons. In cases of harassment or assault claims

against public officials, there is an even greater public interest in the matter because these officials set the legislative agenda and create policy.

Prohibitions on nondisclosure agreements are not sufficient to eradicate harassment. Reporting requirements, culture changes beyond legislation, notifying employees of their rights in the settlement agreement, and other changes are also helpful and potentially necessary to protect the public interest. Additionally, making what occurs during internal processes confidential is also problematic, and continuing to allow that to occur would, at least partially, defeat the purpose of prohibiting nondisclosure agreements in such settlements. Ensuring that employees are not silenced by virtue of signing a settlement agreement should they decide to speak is a matter of public interest that must be protected.

II. LACK OF TITLE VII PROTECTIONS

There are several pitfalls and gaps directly in Title VII that make it difficult for all workers to assert their right to work in an environment free from sexual harassment. Employers take advantage of these gaps to avoid potential liability. This Article will describe several problems with Title VII and its limitations.¹⁸³

A. *Misclassification of Workers and Increased Use of Independent Contractors*

1. Background

There are myriad reasons why Harvey Weinstein's accusers might have waited many years to report the harassment they experienced at his hand, including concern about violating nondisclosure agreements, concern about the reaction society might have, or concern about retaliation and blacklisting in the industry.¹⁸⁴ One key reason for the delay might have been that these women were

183. See also 42 U.S.C. § 2000e(b) (2012); *Morton v. Mancari*, 417 U.S. 535, 547–48 (1974); *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 672 (10th Cir. 1980); Rebecca Clarren & Jason Begay, *Confronting the 'Native Harvey Weinstains'*, THE NATION (Mar. 30, 2018), <https://www.thenation.com/article/confronting-the-native-harvey-weinsteins> [<https://perma.cc/V5WQ-YZUU>]. Although this paper will not address the lack of Title VII protection for American Indian and Alaskan native tribes, for which tribal laws apply, that issue might be further explored in a manner that recognizes the colonial history and nature of sexism on reservations.

184. See Bryce Covert, *Actresses—and Millions of Other Workers—Have No Federal Sexual-Harassment Protections*, THE NATION (Oct. 19, 2017), <https://www.thenation.com/article/actresses-and-millions-of-other-workers-have-no-federal-sexual-harassment-protections> [<https://perma.cc/K2MJ-XYRQ>].

likely independent contractors, meaning any protections afforded to employees under Title VII did not apply to them.¹⁸⁵ It is also possible that some were misclassified as independent contractors despite their status as employees, so they might not have been aware that they too were protected under Title VII.¹⁸⁶ These types of issues not only affect struggling actors attempting to break into the entertainment industry, who might have little bargaining power, but they also extend into myriad industries that almost exclusively employ low-wage workers.¹⁸⁷

Title VII provides protections for employees.¹⁸⁸ Title VII vaguely defines an employee as “an individual employed by an employer.”¹⁸⁹ Therefore, Title VII excludes protection for independent contractors, who are viewed not as employees, but entities or individuals who are hired to perform a specific task and are able to exercise their own decisionmaking, discretion, and power of negotiation.¹⁹⁰ To avoid compliance with antidiscrimination laws, among other workplace protections, employers are increasingly misclassifying their employees as independent contractors, or simply hiring workers who are legally considered independent contractors, rather than employees.¹⁹¹ This practice is particularly harmful for low-wage workers with more limited bargaining power and who are already more vulnerable to sexual harassment. Regardless of the severity of the offense, if an individual is not considered an employee, Title VII claims cannot be pursued, leaving workers susceptible to harassment and companies free from liability, barring any state provisions that extend such protections or contractual provisions between the company and the independent contractor.¹⁹²

Courts are empowered to determine whether an individual is an independent contractor or employee when a dispute arises. Although the label placed on a worker is not dispositive,

185. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(f), 2000e-2 (2012); Covert, *supra* note 184.

186. *See* Covert, *supra* note 184.

187. *Cf. id.*

188. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

189. Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2012).

190. *See* Brown v. J. Kaz, Inc., 581 F.3d 175, 181 (3d Cir. 2009).

191. *Cf.* Covert, *supra* note 184.

192. *See, e.g.*, O’Connor v. Davis, 126 F.3d 112 (2d Cir. 1997) (holding that a student, who was paid by her university for a senior year placement, could not pursue a Title VII claim against a hospital whose employer called her “Miss Sexual Harassment,” asked her to participate in an orgy, and asked her to remove her clothes prior to a meeting with him, among other crude remarks because the hospital was not her employer).

these classifications must be challenged to affect the worker's title.¹⁹³ Once the label is challenged, courts typically apply a hybrid between the economic realities and common law right to control tests, depending upon the jurisdiction.¹⁹⁴ For example, in *Alexander v. FedEx Ground Package Systems*, the Ninth Circuit applied a test that considered whether the person to whom service is rendered had the right to control the manner and means of accomplishing the result desired.¹⁹⁵

Factors used to determine the right to control include (1) whether the one performing services is engaged in a distinct occupation or business; (2) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (3) the skill required in the particular occupation; (4) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (5) the length of time for which the services are to be performed; (6) the method of payment, whether by the time or by the job; (7) whether or not the work is a part of the regular business of the principal; and (8) whether or not the parties believe they are creating an employer-employee relationship.¹⁹⁶ Other jurisdictions have exclusively applied a similar economic realities test that focuses on the amount of control the worker has over his or her job, as well as (1) the kind of occupation, (2) the skills required for the work, (3) who furnishes the equipment used and place of work, (4) method of payment, and (5) benefits accumulated.¹⁹⁷ These factors permit a court to correct any misclassification of low-wage workers with more limited bargaining power, particularly given that the level of skill, the method of payment, and the intent of the parties are considered.

When employers hire independent contractors to do work that would otherwise be conducted by employees, or when employers misclassify employees as independent contractors to skirt laws, workers are unable to seek remedies for harassment they experience in the workplace. Even if a worker is actually an employee, the worker might not be aware of his or her rights due to his or her classification as an independent contractor. That is particularly true

193. See *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 989 (9th Cir. 2014).

194. *Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997).

195. *Alexander*, 765 F.3d at 989.

196. *Id.*

197. *EEOC v. Pettegrove Truck Serv.*, 716 F. Supp. 1430, 1433 (S.D. Fla. 1989).

of low-wage workers who might not be able to access legal counsel, feel that they cannot assert their rights due to a power imbalance, or who might be more easily intimidated if they are not educated about their legal rights.

2. Solutions

An ideal solution to fill the gaps in Title VII coverage would be to amend Title VII to include protections for independent contractors. In 2018, Congresswoman Eleanor Holmes Norton introduced the Protecting Independent Contractors from Discrimination Act in an attempt to do so.¹⁹⁸ However, the bill was largely unsuccessful and ultimately only gained one cosponsor.¹⁹⁹ Such attempts are more likely to be successful in states due to the disposition of Congress. New York recently passed legislation that prohibits employers from permitting sexual harassment of nonemployees in the workplace, meaning that it is irrelevant whether workers are classified as independent contractors or employees.²⁰⁰

If Congress or the states do not address the issue themselves, however, the EEOC should maintain as flexible definitions of who constitutes an employee as is permitted under Title VII. Currently, the EEOC's definition of "employee" is the same vague definition that is applied in Title VII.²⁰¹ However, the EEOC Compliance Manual contains a number of factors to apply in considering whether an individual is an independent contractor or employee, including but not limited to, (1) the employer's right to control when, where, and how work is performed; (2) the level of skill required for the work; (3) whether the employer furnishes tools; (4) whether the work is performed on the employer's premises; (5) whether there is a continuing relationship between the worker and the employer; and (6) whether the employer has the right to assign additional projects.²⁰² Even with this broad definition, however, the EEOC is not empowered to punish employers for misclassification absent any cause for discrimination. Therefore, it might be beneficial for Congress, as well as state legislatures, to codify factors or empower

198. Protecting Independent Contractors from Discrimination Act of 2018, H.R. 4972, 115th Cong. (2018) (proposing an amendment to Title VII stating that independent contractors must be treated as employees).

199. *Cosponsors: H.R. 4972–115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/4972/cosponsors> [https://perma.cc/X2CK-B5N6].

200. N.Y. EXEC. LAW § 296-d (McKinney Supp. 2019).

201. 29 C.F.R. § 1601.2 (2018).

202. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL SECTION 2: THRESHOLD ISSUES, <https://www.eeoc.gov/policy/docs/threshold.html> [https://perma.cc/C9L3-NQEC].

broad agency enforcement to ensure that courts are exploring the correct factors. Without a court's willingness to view classification beyond the label, employees will be denied vital protections.

These efforts should be pursued, not just for the benefit of workers, but also for the proper recoument of taxes. In 1984, the Internal Revenue Service (IRS) estimated that misclassification of employees as independent contractors led to revenue losses of about \$1.6 billion.²⁰³ In a 2009 report, the Government Accountability Office called on the Department of Labor and IRS to enhance enforcement of misclassification, improve outreach to workers, and improve interagency coordination.²⁰⁴ States have a vested interest in pursuing claims of misclassification due to the loss of millions of dollars per year in taxes.²⁰⁵ Massachusetts, New York, New Jersey, Minnesota, and Wisconsin have passed legislation to target misclassification.²⁰⁶ New York has targeted specific industries that are more likely to misclassify workers, including the cab and construction industries.²⁰⁷ Massachusetts has taken a stricter approach, implementing a strong rebuttable presumption that workers are employees.²⁰⁸ States and their attorneys general must continue to pursue these cases, implement a clear and formal complaint process, and conduct outreach to ensure workers are aware of (1) their rights and signs that they are being misclassified and (2) how and where to file complaints against employers. States such as California have also adopted standards presuming that all workers are employees, placing the burden on those classifying the workers.²⁰⁹

203. U.S. GOV'T ACCOUNTABILITY OFFICE, GOA-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION 10 (2009), <https://www.gao.gov/assets/300/293679.pdf>.

204. *Id.* at 41–42.

205. *Billions in Revenue Lost Due to Misclassification and Payroll Fraud*, JOBS WITH JUSTICE, http://www.jwj.org/wp-content/uploads/2010/08/100809mis-classificationfactsheetfinal_logo.pdf [<https://perma.cc/6QN9-TAVE>].

206. *See, e.g.*, MASS. GEN. LAWS ch. 149, § 148B (2016); MINN. STAT. § 181.723 (2016); N.J. STAT. ANN. §§ 34:20–1 to 34:20–11 (West Supp. 2019); N.Y. LAB. LAW § 861 (McKinney Supp. 2019); N.Y. WORKERS' COMP. LAW § 18-c (McKinney Supp. 2019); WIS. STAT. § 103.06 (2017–18).

207. *See, e.g.*, N.Y. LAB. LAW § 861; N.Y. WORKERS' COMP. LAW § 18-c.

208. *See* MASS. GEN. LAWS ch. 149, § 148B.

209. *See* *Dynamex Operations W., Inc. v. Super. Ct.*, 416 P.3d 1, 34 (Cal. 2018) (applying the presumption that a worker is an employee unless (1) the worker is free from control and direction of the hirer in connection with the performance of the work, both under contract for the performance and in fact, (2) the worker performs work that is outside the usual course of the hiring entity's business, and (3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work

In terms of encouraging employers to hire individuals as employees as opposed to independent contractors, increased enforcement for those who misclassify their workers as independent contractors might encourage employers to hire workers as employees out of concern for liability. However, it is unclear how else to incentivize businesses to not take a resource-saving action that might well be legal. Independent contractors are not only cheaper, but they also do not require benefits, unless otherwise stipulated in the contract initiating the relationship. Perhaps some sort of tax incentive for employers might be put in place, or federal agencies might wish to be more selective about to whom they award contracts. If anything, the current tax law encourages employees to become independent contractors and waive their rights as employees, further perpetuating this uphill battle.²¹⁰

B. *Fear of Retaliation*

1. Background

Sandra Pezqueda was a dishwasher and chef's assistant at the Terreneva Resort in Rancho Palos Verdes, California.²¹¹ When her supervisor consistently offered her more hours if she would go out with him, tried to kiss her, and called her at her home to ask her if she would get coffee with him, Pezqueda complained to another supervisor.²¹² Soon after, supervisors began to criticize her work, and she was eventually fired.²¹³ Pezqueda lamented on her traumatic experience, stating, "I knew if I spoke up there would be retaliation . . . That's why other women never speak up about what happened to them."²¹⁴ Pezqueda, however, is not alone in her fear of retaliation as a low-wage worker.

Title VII, among other equal employment opportunity laws, prohibits retaliation against employees for protected activities,

performed for the hiring entity).

210. See generally Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017); Narendra Acharya & Jordan Faykus, *New Tax Law Could Incentivize Employees To Become Independent Contractors—Employers Should Proceed With Caution*, THE COMPENSATION CONNECTION (Jan. 23, 2018), <http://www.thecompensationconnection.com/2018/01/23/new-tax-law-could-incentivize-employees-to-become-independent-contractors-employers-should-proceed-with-caution> [https://perma.cc/8HSV-ZPNC].

211. Alana Semuels, *Low-Wage Workers Aren't Getting Justice for Sexual Harassment*, THE ATLANTIC (Dec. 27, 2017), <https://www.theatlantic.com/business/archive/2017/12/low-wage-workers-sexual-harassment/549158> [https://perma.cc/WC7K-LV84].

212. *Id.*

213. *Id.*

214. *Id.*

including making charges or otherwise testifying, assisting, or participating in enforcement proceedings.²¹⁵ Retaliation may include demotion, firing, or any other retaliatory act.²¹⁶ Retaliation has a severe chilling effect on the reporting of discrimination in the workplace; without such prohibitions, civil rights protections such as those under Title VII would essentially be inoperable.²¹⁷ However, as common sense would dictate, simply making an act illegal does not inherently prevent individuals from taking such action. Despite prohibitions against retaliation, the most frequently alleged bases of discrimination in federal sector cases is retaliation.²¹⁸ In fiscal year 2017, the EEOC received 41,097 retaliation complaints out of a total 84,254 complaints.²¹⁹

Low-wage workers, who often cannot afford to risk losing their jobs or who might fear that they will not be employable based upon their particular skill sets, geographic location, or other factors, may face increased fears about the potential for retaliation. By increasing scrutiny on employers who may condone harassment through inaction, #MeToo has made it harmful for an employer's reputation to retaliate against employees for making sexual harassment claims.²²⁰ The letter of the law certainly prohibits such retaliation.²²¹ However, such cases may be difficult to prove or enforce. Additionally, if employers believe they will gain more from instilling fear and

215. Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012); *see also* Age Discrimination Employment Act, 29 U.S.C. § 623(d) (2012); Americans with Disabilities Act, 42 U.S.C. § 12203(a)–(b) (2012).

216. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); Age Discrimination Employment Act, 29 U.S.C. § 623(a) (2012); Americans with Disabilities Act, 42 U.S.C. § 12112(a)–(b) (2012).

217. *See* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, RETALIATION—MAKING IT PERSONAL, https://www.eeoc.gov/laws/types/retaliation_considerations.cfm [<https://perma.cc/CT5B-X4DZ>].

218. *Id.*

219. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ALL STATUTES (CHARGES FILED WITH EEOC): FY 1997–FY 2018, <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> [<https://perma.cc/6ZH6-74GX>]; U.S. EQUAL EMP'T OPPORTUNITY COMM'N, RETALIATION-BASED CHARGES (CHARGES FILED WITH EEOC): FY 1997–FY 2018, <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm> [<https://perma.cc/SDB4-WC32>].

220. *See* Donna Lenhoff, *The #MeToo Movement Will be in Vain if We Don't Make These Changes*, WASH. POST (Jan. 25, 2018) [<https://perma.cc/T56V-T9VK>] (describing #MeToo's exposure of harassment and retaliation in the workplace); *see also* Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49 (2018) (describing potential retaliatory consequences as firing, discipline, negative evaluations, department or shift changes, demotion, ostracizing, or increased surveillance, as well as how they contribute to harassment in the workplace).

221. Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012).

taking a retaliatory action than they might lose from any punishment for taking such a retaliatory act, the incentive for retaliation still exists. The law falls short in this regard.

Retaliation may be established if “a reasonable worker might be dissuaded from engaging in protected activity” should an employer take a specific action.²²² To establish a prima facie case of a retaliation, a plaintiff must show that (1) she engaged in protected activity, (2) her employer took adverse employment action against her, and (3) a causal connection exists between the protected activity and the adverse action.²²³ A plaintiff may also indirectly demonstrate retaliation if she can demonstrate that (1) after she complained of discrimination, she was subject to an adverse action despite performing up to the employer’s legitimate job expectations and (2) similarly situated employees were not subject to such an adverse action.²²⁴

Courts have expressed concerns that if retaliation protections become too broad, employers will fear merely managing their employees.²²⁵ However, this concern is misplaced, since the standard is an objective standard. Courts must determine whether an action is materially adverse or whether a reasonable employee would be dissuaded from taking protected actions.²²⁶ Additionally, the Supreme Court has also abrogated attempts at expanding what constitutes an adverse action.²²⁷ In *Mattern v. Eastman Kodak Company*, the Fifth Circuit held that theft of an employee’s tools and an alleged visit by supervisors to an employee’s home, which included verbal threats of termination, reprimand for not being at the employee’s assigned station, and placing an employee on final warning, were not adverse actions.²²⁸ The Fifth Circuit held that Title VII only addressed ultimate employment decisions, including hiring, firing, promotion, and compensation.²²⁹

222. See *Thompson v. North American Stainless, LP*, 562 U.S. 170, 174 (2011) (finding a reasonable worker would not engage in a protected activity if she knew that her fiancé would be fired).

223. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994).

224. *Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 740 (7th Cir. 2006).

225. See, e.g., *Nelson v. Univ. of Maine Sys.*, 923 F. Supp. 275, 281 (D. Me. 1996).

226. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

227. *Id.* at 61–62.

228. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707–08 (5th Cir. 1997).

229. *Id.* at 707. But see *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 67 (2006) (rejecting the ultimate employment decisions requirement, holding that Title VII does not confine the actions it prohibits to those that occur in the workplace or are related to employment).

It is unclear where the Supreme Court might lie in future cases. Based upon the Court's holding in *University of Texas Southwestern Medical Center v. Nassar*, it is possible the Court might establish more stringent requirements.²³⁰ In that case, the Supreme Court held that Title VII retaliation claims must demonstrate but-for causation, as opposed to simply proving that race, color, religion, sex, or national origin was a motivating factor as set out in the Civil Rights act.²³¹ If the Supreme Court could overturn *Abood v. Detroit Board of Education* in *Janus v. AFSME*, delivering a significant blow to public sector unions that rely on fair share fees, it is not without reason to suspect the Supreme Court could also abridge workers' rights in this respect in favor of similar corporate interests.²³² If it is true that low-wage workers are unable to hire effective, or any, counsel, the barriers for bringing a retaliation claim are even more extensive.

2. Solutions

Practically speaking, access to legal representation, whether in the form of a demand letter or some other tactic that puts an employer on alert that any retaliation will be subject to legal challenge, might assuage workers' fear of retaliation. Unionization and collective action might also help workers who fear retaliation to feel more secure due to the sheer power of numbers.

Legally, punishment for retaliation must be strengthened to be effective. Currently, even if an employer is sanctioned for retaliating against one employee, employers benefit from instilling fear in other employees. It therefore might still be far more worth it, particularly for wealthy businesses, to retaliate against one employee and pay damages than to not retaliate and risk backlash by numerous employees at a later date. The law must better address the far-reaching results of retaliation, as opposed to isolating its effects in a single case, when considering punishment for retaliation.

230. 570 U.S. 338, 352–54 (2013).

231. *Id.*; see also 42 U.S.C. § 2000e-2(m) (2012) (establishing that impermissible consideration of race, color, religion, sex, or national origin occurs when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor, even if other factors also motivated the action).

232. See *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478 (2018) (holding *Abood* erred in concluding that public-sector agency-shop arrangements did not violate the First Amendment).

C. *Lack of Protections for Domestic Workers and Farmworkers*

1. Background

Many antidiscrimination laws, including Title VII, only apply to employers with at least fifteen employees.²³³ Naturally, this provision excludes many domestic workers from the protections available to other employees.²³⁴ In some instances, domestic workers might also be independent contractors; in such cases, domestic workers would also not be protected under federal law.²³⁵ Many state antidiscrimination statutes also explicitly exclude domestic workers.²³⁶ Although states such as New York do provide specific protections for domestic workers, it is neither guaranteed nor is it the norm.²³⁷

Despite a general lack of protection under federal and state antidiscrimination laws, domestic workers are subject to some of the most extreme instances of sexual harassment and abuse because of (1) the isolating working conditions, (2) their class, (3) their migrant status, (4) their gender, since domestic workers are overwhelmingly women, and (5) the threat of lost employment and the fact that the supply of domestic workers to exceed demands.²³⁸ In one Nation-

233. 42 U.S.C. § 2000e(b) (2012) (defining “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”); 42 U.S.C. § 2000e-2(a) (establishing unlawful employment practices for employers).

234. Although this piece focuses on Title VII, it is important to note that farm and domestic workers were explicitly excluded from other worker protection statutes, such as the FLSA and the NLRA. Cf. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336–37, 1336 n.12 (1987) (describing the racial discrimination that infected New Deal programs as a result of negotiations, which survives in the exclusion of farmworkers from FLSA maximum hour and overtime provisions).

235. See 42 U.S.C. § 2000e(f) (2012) (defining “employee”); 42 U.S.C. § 2000e-2(a) (establishing protections for employees).

236. See, e.g., N.J. STAT. ANN. § 10:5-5(f) (West 2013) (stating an employee “does not include any individual employed in the domestic service of any person”).

237. N.Y. EXEC. LAW § 296-b (McKinney 2013) (establishing unlawful discriminatory practices for employers of domestic workers). Domestic workers have made incredible strides across the nation to organize and enact Domestic Worker Bills of Rights, which have been passed in Illinois, Massachusetts, California, New York, Oregon, Hawaii, and Connecticut. NAT’L DOMESTIC WORKERS ALL., <https://www.domesticworkers.org/bill-of-rights/illinois> [<https://perma.cc/ZF8T-DA5X>].

238. MARTHA FARRELL FOUND., SEXUAL HARASSMENT OF DOMESTIC WORKERS AT THEIR WORKPLACES 7–8, <http://www.marthafarrellfoundation.org/>

al Domestic Workers Alliance study, 36 percent of live-in workers reported being threatened, insulted, or verbally abused within the previous twelve months.²³⁹ One worker, Etelbina Hauser, revealed that her bosses consistently groped her, exposed themselves, or asked for sex.²⁴⁰ “He wanted sexual services. I wanted to get my payment back, the money that was owed to me . . . I didn’t know where [to turn for help]. That’s why I’m saying, we are invisible.”²⁴¹

Domestic workers also may have special visas that allow them to work in the United States, often to escape poverty and earn money to send to their families.²⁴² These workers are often physically and sexually abused, and might even be victims of trafficking.²⁴³ However, these workers might not report their abuse for fear of losing employment by their sponsors and revocation of their visas.²⁴⁴ In *United States v. Alzanki*, for example, a domestic worker from Sri Lanka with a B-1 visa was threatened, prevented from leaving the residence, deprived of her passport, assaulted, and threatened with deportation, among other acts.²⁴⁵

Many of the same gaps in protection also deprive farmworkers of protections against discrimination.²⁴⁶ Agricultural work is

uploaded_files/pdf_files/1529667465_First%20report.pdf [https://perma.cc/9G-FX-HMGN].

239. LINDA BURNHAM & NIK THEODORE, NAT’L DOMESTIC WORKERS ALL., CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHI. & DATACENTER, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK 33 (2012), http://www.idwfed.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1 [https://perma.cc/KE8D-BLBT].

240. Alexia Fernández Campbell, *Housekeepers and Nannies Have No Protection from Sexual Harassment Under Federal Law*, Vox (Apr. 26, 2018, 1:10 PM), <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws> [https://perma.cc/6MVM-RPV6].

241. Keturah Gray et al., *Working Women Share Stories of Sexual Harassment While on the Job*, ABC (Apr. 20, 2018, 5:22 AM), <https://abcnews.go.com/GMA/News/working-women-share-stories-sexual-harassment-job/story?id=54449605> [https://perma.cc/TD5X-D43U].

242. HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 1 (June 2001), <https://www.hrw.org/reports/2001/usadom/usadom0501.pdf> [https://perma.cc/N6ZA-357D].

243. *Id.*

244. *Id.*

245. *United States v. Alzanki*, 54 F.3d 994 (1st Cir. 1995), *cert. denied*, 516 U.S. 1111 (1996) (holding evidence was sufficient for a rational jury to find the domestic worker’s employer was guilty of an involuntary servitude offense).

246. Ai-Jen Poo & Mónica Ramírez, *Female Domestic and Agricultural Workers Confront an Epidemic of Sexual Harassment*, AM. CIVIL LIBERTIES UNION (May 4, 2018, 2:30 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/female-domestic-and-agricultural-workers-confront> [https://perma.cc/4CF9-6R7S].

similarly isolated, and many farmworkers are immigrants.²⁴⁷ Their overall status and intersecting identities makes them particularly vulnerable to sexual harassment and abuse while at work, and general laws concerning battery or fault fail to adequately protect them from harm. Not every incident will give rise to a crime, and there is no guarantee of protection against retaliation for reporting such instances, particularly if the employee is not a union member.

2. Solutions

The best way to address gaps in the law is, of course, to fill them. The ideal solution would be to eradicate requirements for the number of employees an employer must hire before federal protections can be triggered. Additionally, changes to whether independent contractors are covered under Title VII could affect certain types of domestic workers. Currently, more progressive states are the most probable outlet for effecting such changes due to the composition of Congress. States like New York provide protections specifically for domestic workers and workers traditionally not covered under federal antidiscrimination laws that might well be applied to hold abusive and discriminatory employers accountable for some of the more severe instances of workplace sexual harassment and assault.²⁴⁸

Since it is not likely that comprehensive immigration reform will occur in the near future based upon the numerous recent failures to reach a consensus, one other potential temporary solution is to permit domestic workers who rely on a visa to maintain their visa if they leave their sponsoring employer due to some sort of physical or sexual abuse, or if they lose their employment with their sponsor simply because they report such abuse. Although it would not address all instances of workplace harassment, providing expansive retaliation protections for workers who file tort claims or criminal complaints with law enforcement officials would also be helpful. Additionally, establishing clear tort or other claims for harassment might be a sufficient stopgap measure until more comprehensive changes are enacted.

²⁴⁷ *Id.*

²⁴⁸ N.Y. EXEC. LAW § 296-b (McKinney 2013).

III. DECREASED BARGAINING POWER AS INDIVIDUALS AND THE SIMULTANEOUS ATTACK ON UNIONS

A. *Background*

Unions have the potential to represent low-wage workers' interests in collective bargaining agreements, as well as advocate for legislative policies that protect workers' rights. In the wake of #MeToo, unions have worked with employers to effect changes in the workplace, and have worked with legislatures across the country to pass ordinances to keep employees safe from harassment and discrimination in the workplace.²⁴⁹ Unions such as UNITE HERE have been leaders in advocating for low-wage workers, particularly casino and hospitality workers who are often subject to extreme instances of sexual harassment by customers.²⁵⁰ For example, UNITE HERE Local 1 helped to pass a Chicago ordinance requiring hotels to equip employees with panic buttons, among other preventative measures.²⁵¹ UNITE HERE has also been working with individual employers to effect change. Just last year, the union led a strike against Marriott hotels, not only to protest the hotel chain's subpar wages and health care, but also to pressure Marriott to provide housekeepers with panic buttons.²⁵² Without a unified voice, low-wage workers might find it more difficult to advance workplace policies that protect workers from harassment. However, laws limiting unions' effectiveness and ability to organize prevent workers from being able to assert their voices to the greatest extent possible.

Low-wage employees in particular have less bargaining power against employers for several reasons, including the threat of unemployment, perceived replaceability, and lack of knowledge about their rights. This unequal bargaining power is exacerbated without the power of a union, which serves as a unit for negotiating collective bargaining agreements.²⁵³ Currently, American union

249. Karen Kent, '*Panic Button*' Ordinance for Hotel Workers Sense a Strong #MeToo Message, CHI. SUN-TIMES (July 1, 2018, 10:39 AM), <https://chicago.suntimes.com/working/panic-button-ordinance-for-hotel-workers-sends-a-strong-metoo-message> [<https://perma.cc/WXD4-YJAU>].

250. See generally UNITE HERE LOCAL 1, *supra* note 1.

251. CHI. MUN. CODE § 4-6-180 (2018); Kent, *supra* note 249.

252. Alexia Fernández Campbell, *Why Nearly 8,000 Marriott Workers are Striking in 8 Cities*, VOX (Oct. 10, 2018, 3:40 PM), <https://www.vox.com/2018/10/10/17955272/marriott-hotel-workers-strike> [<https://perma.cc/HT7T-NKZQ>].

253. See Katherine Peralta, *The Fallof Unions from Power*, U.S. NEWS & WORLD REP. (Jan. 2, 2015, 12:01 AM), <https://www.usnews.com/news/articles/2015/01/02/workers-weakened-bargaining-power-fuels-income-inequality>.

membership is at its lowest level since the Great Depression, further fueling income inequality in the United States.²⁵⁴ This Article will focus on current laws and their effects on unions' ability to effectively organize, disproportionately leaving low-wage workers unable to negotiate better work conditions that protect workers from sexual harassment.

Although globalization is often cited to explain the decrease in union membership, a similar decrease has not occurred in many European countries.²⁵⁵ One of the many factors that sets America apart from its European counterparts is the Labor Management Relations Act of 1947 (Taft-Hartley Act).²⁵⁶ The Taft-Hartley Act amended the National Labor Relations Act to prevent unions from committing unfair labor practices, such as coercion or intimidation in forming a union or holding union elections. In practice, however, the Taft-Hartley Act simply limits the power of unions through provisions protecting employers' free speech, prohibiting secondary boycotts, and permitting the adoption of right-to-work laws, among others.²⁵⁷

Despite the misleading nomenclature, right-to-work laws provide that workers who do not wish to join a union need not pay what are called agency, or fair share, fees to the union, even though unions are still required by law to represent these individuals.²⁵⁸ These laws essentially allow workers to reap all union benefits without paying.²⁵⁹ This situation inherently leads to decreased resources to collectively bargain. Since the Taft-Hartley Act was passed, twenty-eight states have adopted right-to-work laws, either by statute or constitutional amendment.²⁶⁰ However, after the Missouri legisla-

254. *Id.*

255. Dwyer Gunn, *What Caused the Decline of Unions in America?*, PAC. STANDARD (Apr. 24, 2018), <https://psmag.com/economics/what-caused-the-decline-of-unions-in-america> [<https://perma.cc/7MDN-KJ4G>].

256. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947); Gunn, *supra* note 255.

257. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947); Joseph Shister, *The Impact of the Taft-Hartley Act on Union Strength and Collective Bargaining*, 11 INDUS. & LAB. REL. REV. 339, 339-43 (1958).

258. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947); Rick Ungar, *'Right-to-Work' Laws Explained, Debunked and Demystified*, FORBES (Dec. 11, 2012, 2:37 PM), <https://www.forbes.com/sites/rickungar/2012/12/11/right-to-work-laws-explained-debunked-demystified/#4e073744480b> [<https://perma.cc/96XM-PQZ6>].

259. *Id.*

260. *Right-to-Work Resources*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx> [<https://perma.cc/9JAT-KF92>].

ture passed such a statute in 2017, voters defeated the legislation in a referendum.²⁶¹

In regard to public sector unions, the recent *Janus v. AFSCME* delivered a huge blow to public sector workers.²⁶² In *Janus*, the Supreme Court overturned *Abood v. Detroit Board of Education*, holding that it was a violation of the First Amendment for government employers to require workers who did not wish to be a part of a union to pay fair share fees.²⁶³ Previously, *Abood* had stricken a balance that permitted labor unions to charge fair share fees, provided that those fees were not used for any political or ideological purposes.²⁶⁴ However, the Supreme Court held that avoiding free riders was not a compelling interest such that it could uphold the alleged First Amendment violation.²⁶⁵ This holding has a similar effect as right-to-work laws in the private sector.

There are also many workers who are not guaranteed the right to organize, including farmworkers and domestic workers; in fact, they are explicitly excluded from the National Labor Relations Act.²⁶⁶ Despite this lack of protection, nonprofit organizations such as Alianza Nacional de Campesinas and Farmworker Justice have been doing vital work to advocate with and on behalf of workers. Farmworkers and domestic workers have been fighting state by state to end bans on organizing.²⁶⁷ However, in many states, these workers are still do not have the guaranteed right to organize.

261. Jeff Stein, *Missouri Voters Defeat GOP-Backed 'Right to Work' Law, in Victory for Unions, Associated Press Projects*, WASH. POST (Aug. 7, 2018), https://www.washingtonpost.com/business/2018/08/08/missouri-voters-defeat-gop-backed-right-work-law-victory-unions-associated-press-projects/?utm_term=.9550a4b41a03 [<https://perma.cc/7SNZ-86X6>].

262. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, Council 31, 138 S. Ct. 2448 (2018).

263. *Id.* at 2478.

264. *Id.* at 2487 (Kagan, J., dissenting); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977).

265. *Janus*, 138 S. Ct. at 2466.

266. 29 U.S.C. § 152(3) (2012) (defining “employee”). The legacy of slavery carried through to prevent workers, such as farmworkers, from being guaranteed the right to organize. See Kamala Kelkar, *When Labor Laws Left Farm Workers Behind—and Vulnerable to Abuse*, PBS (Sept. 18, 2016, 4:47 PM), <http://www.pbs.org/newshour/nation/labor-laws-left-farm-workers-behind-vulnerable-abuse> [<https://perma.cc/4K4B-Q9E3>].

267. See, e.g., Josh Russell, *NY Farmworkers Fight to End 80-Year Ban on Unionizing*, COURTHOUSE NEWS SERV. (Feb. 11, 2019), <https://www.courthouse-news.com/farmworkers-appeal-80-year-old-exclusion-in-ny-labor-law> [<https://perma.cc/U7Q2-2NED>].

B. *Solutions*

There is no simple solution for ensuring unions regain strength. Of course, repealing right-to-work statutes and constitutional amendments, repealing the Taft-Hartley Act, and reversing *Janus* would increase unions' ability to organize. However, it is highly unlikely that Congress will act to repeal any portion of Taft-Hartley, and given the current composition of the Supreme Court and the recentness of *Janus*, reversal of the decision at any point in the near future is highly improbable.

One solution is to focus on private sector attacks by states that have passed right-to-work statutes or constitutional amendments. Although it is unlikely that right-to-work statutes or constitutional amendments could be repealed in every state, stories like those of Missouri provide a sense of optimism that perhaps the labor movement could work to repeal right-to-work laws.²⁶⁸ Another solution might involve advocacy on behalf of organized workers to effect change in the workplace, similar to UNITE HERE's work on panic button ordinances that allow hospitality workers to immediately seek help should guests expose themselves or touch housekeepers inappropriately.²⁶⁹ The Chicago ordinance requires hotels to adopt written policies regarding harassment by a guest, allow workers to request reassignment to prevent interactions with an offending guest, and provide paid time off to report incidents to law enforcement.²⁷⁰ Perhaps these efforts could help unions garner support, both with lawmakers and the general public. However, this advocacy is certainly more difficult to accomplish with diminished resources.

In regard to farmworkers and domestic workers, including them as employees in the National Labor Relations Act would be ideal. However, for now, it is up to states to extend these rights to protect their workers. States should follow California's lead. California was the first state to establish collective bargaining rights for farmworkers following advocacy by agricultural workers, who fought tooth and nail just to gain the right to organize.²⁷¹ States must continue to extend these rights to workers.

268. See Stein, *supra* note 261.

269. See CHI. MUN. CODE § 4-6-180; Kent, *supra* note 249.

270. CHI. MUN. CODE § 4-6-180.

271. Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act, of 1975 CAL. LAB. CODE § 1140 *et seq.* (West 2011) (codifying these rights). For discussion of the advocacy battle leading up to the passage of the Act, see Adam Janos, *When Millions of Americans Stopped Eating Grapes in Support of Farm Workers*, HISTORY, <https://www.history.com/news/delano-grape-strike-union-ed-farm-workers-filipinos> [<https://perma.cc/5XWA-DFQZ>].

IV. STATUS BARRIERS

A. *Background*

Undocumented persons are, of course, more likely to be low-wage workers.²⁷² However, it is unclear whether undocumented immigrants are entitled to protections under Title VII. Based on the current composition of the courts and prior case law, a court is unlikely to find that an undocumented immigrant could avail herself of Title VII protections.²⁷³ In *Egbuna v. Time-Life Libraries*, the Fourth Circuit held that an employee could not file a Title VII claim for corroborating another employee's allegations of sexual harassment because he was an undocumented immigrant.²⁷⁴ The Fourth Circuit explained that qualification for the job was not to be determined by capacity to complete the job, but rather by whether the employee was authorized to work in the United States at the time of the alleged incident.²⁷⁵ In its opinion, the Fourth Circuit distinguished *SureTan, Inc. v. NLRB*, a Supreme Court decision holding that an undocumented immigrant could sue an employer for unfair labor practices under the National Labor Relations Act (NLRA). *SureTan, Inc.* predated the Immigration and Nationality Act's criminalization of hiring undocumented workers.²⁷⁶ The Supreme Court has since held that an undocumented immigrant can no longer sue an employer for unfair labor practices under the NLRA.²⁷⁷ Although these Supreme Court cases deal with the NLRA, they are informative in determining whether an individual may be considered an employee under other labor and employee protection statutes, including Title VII and the Fair Labor Standards Act.

B. SOLUTIONS

Since the Supreme Court is unlikely to uphold Title VII rights for low-wage workers who are undocumented, and at least one

272. If anything, many undocumented persons are not even paid the minimum wage due to their status. Sebastián González de León, *For Many Undocumented Workers, There's No Such Thing as Minimum Wage*, IN THESE TIMES (July 9, 2018, 5:29 PM), http://inthesetimes.com/working/entry/21284/wage_theft_Chicago_undocumented_workers_minimum_wage [https://perma.cc/5GHX-YSGD].

273. See generally *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147–52 (2002); *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187–88 (4th Cir. 1998) (en banc).

274. *Egbuna*, 153 F.3d at 187–88.

275. *Id.* at 187.

276. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–94 (1984); *Egbuna*, 153 F.3d at 187–88.

277. *Hoffman Plastic Compounds*, 535 U.S. at 147–52.

circuit has already declined to uphold these rights, it would be beneficial for Congress to amend the Immigration and Nationality Act or Title VII itself to address the conflict the Supreme Court has interpreted between the Immigration and Nationality Act's criminalization of hiring unauthorized aliens and worker protection statutes.²⁷⁸ Although crime victims may obtain U visas, it is far from a perfect solution because this process is onerous, undocumented immigrants might be unaware and unable to obtain counsel, there is still a risk of deportation, and harassment does not always rise to the level of a crime.²⁷⁹ Congress must pass legislation to ensure that undocumented workers who report harassment are not only protected under the law, but will also not risk deportation. Otherwise, undocumented immigrants, many of whom are low-wage workers, will continue to be exploited fear reporting their assailants and harassers. These severely unequal power dynamics are currently ripe for abusers and harassers to take advantage.

V. ACCESS TO JUSTICE CONCERNS

A. *Lack of Legal Representation*

1. Background

Access to justice for low-income individuals is a major concern within our legal system. That concern, of course, includes low-wage workers who face sexual harassment and discrimination in the workplace. In general, low-income individuals receive inadequate or no legal assistance for 86 percent of civil legal problems they face.²⁸⁰ Although the Supreme Court has declined to categorically require representation for those who cannot afford it in the types of civil cases it has reviewed, it has not ruled out the possibility that due process might require representation in certain cases.²⁸¹ The extent to which *Turner* and *Lassiter*, which provide that appointment of counsel might be required by due process under certain circumstances, would support the right to counsel is

278. *Hoffman Plastic Compounds*, 535 U.S. at 147–52; *Egbuna*, 153 F.3d at 187–88.

279. See 8 U.S.C. § 1101 (a)(15)(U) (2012) (referring to crimes such as rape, sexual exploitation, domestic violence, trafficking, and abusive sexual contact).

280. LEGAL SERVS. CORP., *supra* note 142, at 30.

281. See, e.g., *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18 (1981) (neglecting to require representation for an indigent client in a case regarding the termination parental rights case); *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011) (applying the *Mathews* test to determine whether counsel was required by due process in a specific civil contempt case).

unclear.²⁸² However, it is unlikely that any blanket right to counsel would exist in cases involving workplace discrimination, particularly since case law has well established that there is no constitutional right to employment.

In combination with this lack of a right to counsel in civil cases, organizations that provide pro bono legal assistance to indigent clients, including those funded through the Legal Services Corporation (LSC),²⁸³ are underfunded and overburdened. The LSC estimated that out of one million low-income Americans it would serve in 2017, it could only fully address the legal needs of about half.²⁸⁴ Additionally, it found that a lack of available resources accounted for between 85 and 97 percent of civil legal issues that LSC-funded organizations do not fully address.²⁸⁵

Without the ability to afford counsel, and without a guaranteed right to counsel, low-income workers might not feel confident filing claims *pro se*, and might experience a heightened fear of retaliation or some other consequence. Professor Russell Engler concluded that “[t]he greater the power opposing a litigant, and the more that a litigant lacks power, the greater will be the need for representation.”²⁸⁶ Certainly, a low-income employee who lacks bargaining power filing a claim against a powerful employer, particularly a large company, would most benefit from legal representation. Even if these employees do file claims *pro se*, they might miss important procedural or substantive requirements involved in bringing a discrimination claim.²⁸⁷

In discrimination claims, the EEOC or state fair employment practices agencies may litigate cases consistent with the public interest.²⁸⁸ For example, recently, the EEOC has filed a number of lawsuits against major employers for harassment on numerous bases.²⁸⁹ However, agencies can only pursue a limited number of cases.

282. See, e.g., *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972) (holding only that there is a property interest in continued employment by a state when there is a legitimate claim of entitlement).

283. LSC is a publicly-funded nonprofit established by Congress to provide funding for civil legal aid to clients in financial need.

284. LEGAL SERVS. CORP., *supra* note 142, at 8.

285. *Id.*

286. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 40 (2010).

287. *Id.* (noting the importance of having an advocate with the knowledge and expertise to handle a specific type of claim or proceeding).

288. Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (2012).

289. Press Release, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC Files Seven More Suits Against Harassment (Aug. 9, 2018), <https://www.eeoc.gov/>

In fiscal year 2017, the EEOC only filed lawsuits for 107 out of the 59,466 Title VII claims it received.²⁹⁰

In addition to the potential cost of legal representation, access to legal representation might also be affected by perceived capacity, language barriers, and access to information, among countless other factors.²⁹¹ Lack of access to legal representation also affects, and is inherently intertwined with, every previously discussed barrier to justice for low-wage workers. For example, lack of representation might lead a worker to sign an unfair arbitration or nondisclosure agreement, to be unaware that he or she is misclassified, or to fear retaliation on a more extensive level.

2. Solutions

The best manner of addressing the lack of adequate, or any, legal representation is to invest more resources in broadening access to it, whether in enforcement agencies, pro bono legal organizations, or other branches of government tasked with representation in such matters. Even if the Supreme Court were to hold that representation was required in civil cases regarding workplace discrimination, investment would be required to ensure that representation not only existed but was also adequate. After all, in criminal cases, in which an attorney is constitutionally required, there has been major controversy over the adequacy of such representation, the lack of resources, and standards for workload

eeoc/newsroom/release/8-9-18h.cfm [https://perma.cc/2ME9-6M4M]; Press Release, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC Files Seven Suits Against Harassment (June 14, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-14-18.cfm> [https://perma.cc/HZH4-5C3J].

290. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *EEOC Litigation Statistics, FY 1997 through FY 2018*, <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> [https://perma.cc/9PDF-HYXA]; U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC) (Includes Concurrent Charges with ADEA, ADA, EPA, and GINA): FY 1997–FY 2018*, <https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> [https://perma.cc/TH8C-84NK]. The EEOC may issue right-to-sue letters for cases that it cannot, or chooses not to, pursue. The EEOC also provided successful mediation for a number of employees, meaning those cases would not have been subject to litigation.

291. Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581 (2016) (discussing the legal and ethical implications of representing someone under guardianship, which means the individual has been judicially determined to lack capacity to make certain decisions); Kathryn Alfisi, *Language Barriers to Justice*, WASH. LAWYER (Apr. 2009), <https://www.dbar.org/bar-resources/publications/washington-lawyer/articles/april-2009-language-barriers.cfm> [https://perma.cc/X8MD-25FX].

limits.²⁹² State and federal legislatures would essentially need to (1) mandate representation and (2) allocate resources to ensure adequate representation.

Another solution to the lack of adequate representation would be to promote unionization and prevent its decline. One of the benefits of having a union is that it must provide fair representation in grievance processes incorporated in the collective bargaining agreement to all members of the bargaining unit, although the union has discretion in terms of whether it provides an attorney for the grievant.²⁹³ Assuming the union is the exclusive bargaining representative of a particular unit, this right to fair representation applies regardless of whether a member of the bargaining unit is a union member.²⁹⁴ Therefore, low-wage workers would receive representation, potentially legal in nature if the union determines that to be necessary, in filing a complaint against an employer for sexual harassment in the workplace.

Finally, as previously mentioned, permitting collective and action against employers might allow low-wage workers to attract representation; otherwise, their cases are typically not considered lucrative.²⁹⁵ However, permitting predispute mandatory individual arbitration agreements as a condition of employment hampers that possibility. Essentially, many of the factors that would improve conditions for workers would also provide greater access to legal representation.

292. Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, THE GUARDIAN (June 17, 2015), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked> [<https://perma.cc/R5L7-U2VU>].

293. See 29 U.S.C. § 158(b)(1)(A) (2019); *Vaca v. Sipes*, 386 U.W. 171, 177 (1967) (holding “a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration”); *Miranda Fuel Company, Inc.*, 140 N.L.R.B. 181, 185 (1962) (interpreting the National Labor Relations Act § 8(b)(1)(A) to prohibit unions “from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair”); see, e.g., *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483–84 (9th Cir. 1985) (holding that unions may decide whether to provide an attorney to a grievant).

294. See, e.g., *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1016–17 (3d Cir. 1977), cert. denied, 434 U.S. 837 (1977); *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 74 (5th Cir. 1945). This point also further demonstrates the importance of fair share fees, as described above.

295. McNicholas, *supra* note 25.

B. *Evidentiary and Credibility Concerns*

1. Background

Although plaintiffs need only prove their case by a preponderance of the evidence, there are several evidentiary and credibility hurdles that plaintiffs must overcome to successfully argue their case without immediate dismissal or summary judgment. First, harassment does not always occur when witnesses or present, it is not always documented in an email, and it is typically no longer so outright that there is no question the animus was due to discrimination of an employee's protected status. Second, in hostile work environment actions, not only do employees need to prove that harassment was "severe or pervasive," but employers are also provided with several defenses that would be simple to conjure.²⁹⁶ Third, juries and judges alike simply might not find individuals who come forward to be credible. In addition to the fact that preconceived biases and beliefs might make women seem less credible, particularly to male jurors,²⁹⁷ victims of harassment might experience trauma or develop other mental health conditions that affect their ability to linearly, coherently, and consistently recount facts;²⁹⁸ victims might be people of color, leading to additional questions of credibility by white judges and jurors;²⁹⁹ and victims might

296. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986) (establishing the severe or pervasive standard). The defenses available differ based upon whether the claim is quid pro quo or hostile work environment, or whether it involves another employee or a supervisor. See 29 C.F.R. § 1604.11(d) (2018) (stating that an employer is liable for harassment by a coworker if it knew or should have known about the conduct and failed to take "immediate and appropriate corrective action"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807–08 (1998) (holding an employer can escape vicarious liability for harassment absent tangible employment action by a supervisor if the employer can demonstrate that (1) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise").

297. Natalie Taylor, Austl. Inst. of Criminology, *Juror Attitudes and Biases in Sexual Assault Cases*, TRENDS AND ISSUES IN CRIME AND CRIMINOLOGY (Aug. 2007), <https://pdfs.semanticscholar.org/778e/d44f51a0a07de92ffba26357fa980f2addbd.pdf> [<https://perma.cc/6PU8-7BGD>] (describing that juror outcomes are based upon beliefs and attitudes, as opposed to the actual facts presented, in sexual assault cases).

298. Ellie Smith, *Trauma-Impacted Evidence and the Assessment of Witness Credibility*, GLOB. SEC. AND DISASTER MGMT. (Aug. 17, 2018), <https://gsdm.global/trauma-impacted-evidence-and-the-assessment-of-witness-credibility> [<https://perma.cc/GN4C-KGQ3>].

299. See generally Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450 (2016) (describing

have physical, psychiatric, intellectual, or other disabilities — whether a result of the harassment or even one factor contributing to the harassment — leading judges and jurors to inappropriately question or assess their credibility due to misconceptions about disability or due to the manner in which the victim describes the events,³⁰⁰ among a host of other challenges.

2. Solutions

In regard to the issue of lack of witnesses and implicit discrimination, the answers lie in the manner in which judges and juries assess facts and credibility and apply legal standards. Elizabeth Tippett argues that judges may begin to apply the “severe or pervasive” standard, as well as the *Faragher* defense in regard to employer reasonableness in preventing discrimination, in a manner that is more favorable to employees in light of #MeToo.³⁰¹ Tippett hopes these applications will, at the very least, prevent an almost immediate grant of summary judgment for employers.³⁰² Although entirely possible, that certainly will not, and has not, occurred overnight. One judge’s idea of what is reasonable is highly subjective and variable. However, judges must evolve regarding their notions as to what is reasonable or potentially reasonable so as to warrant a jury trial on a genuine issue of material fact.

In regard to credibility, it is paramount that plaintiffs actually have their claims heard by a jury of their peers. The law prohibits exclusion from jury service based upon race, color, religion, sex, national origin, or economic status.³⁰³ Even still, (1) juries lack the necessary diversity due to the barriers involved in serving on a jury³⁰⁴ and (2) judges may still often dismiss claims or enter summa-

courtroom exclusion of people of color and its impact on credibility determinations).

300. Cf. Joseph Shapiro, *In Their Own Words: People with Intellectual Disabilities Talk about Rape*, NPR (Jan. 20, 2018, 7:00 AM), <https://www.npr.org/2018/01/20/577064075/in-their-own-words-people-with-intellectual-disabilities-talk-about-rape> [<https://perma.cc/9TBB-ADXU>] (describing how people with disabilities are often not believed when they report incidents of sexual assault).

301. Tippett, *supra* note 139.

302. *Id.*

303. 28 U.S.C. § 1862 (2012).

304. See Hon. Donovan W. Frank & Brian N. Aleinikoff, *Juries and the Disabled*, FED. LAWYER, Dec. 2012, at 36, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2012/December/Juries-and-the-Disabled.aspx?FT=.pdf [<https://perma.cc/9PYV-EKME>] (noting the marked lack of access for people with disabilities to serve on juries); Emily Green, *Finding a Jury of Your Peers Actually is Pretty Complicated*, NPR (Dec. 27, 2014, 10:55 AM), <https://www.npr.org/2014/12/27/372916940/>

ry judgment even before a jury trial occurs. Ensuring that diverse judges sit on the bench is therefore of utmost importance—that includes women, LGBTQIA+ individuals, people with disabilities, people of color, and so many other disenfranchised identities.³⁰⁵

CONCLUSION

There are a number of barriers that prevent low-wage workers from asserting rights under Title VII. Not only do these workers struggle to assert their rights, but they are also far more likely to experience sexual or other forms of harassment in the workplace due to their status.³⁰⁶ However, the media has largely focused on harassment in white collar employment, such as in the upper echelons of the entertainment industry. Although the media should certainly shed light on the experiences of women in the entertainment and other white-collar industries, it has largely failed to highlight low-wage industry women's traumatic and severe experiences of harassment.

Women of a similar stature to Gwyneth Paltrow who accused Harvey Weinstein of sexual harassment, are protected because they have the means to accuse harassers without fear of retaliation, excessive legal fees, liquidated damages for violating any nondisclosure agreement, or other barriers.³⁰⁷ In that sense, the protection is, frankly, more extralegal than legal in nature; the protection is in Paltrow's and similarly situated actress', access to funds, high profile, and media following. Low-wage workers do not benefit from such extralegal protections. Not only that, but low-wage workers might even be in the United States illegally, independent contractors, domestic workers, or other types of workers for whom Title VII does not apply. Our current laws fail to protect the women who require these shields the most, making their purpose and application far too limited.

getting-tried-by-a-jury-of-your-peers-isn-t-as-simple-as-it-sounds [https://perma.cc/Q42Q-WUDV] (stating people of color were more likely to experience too much a financial burden to serve as a jury member for an extended period of time).

305. Cf. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONSTITUTION SOC'Y. FOR LAW AND POLICY, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?* (2016), <http://gavelgap.org/pdf/gavel-gap-report.pdf> [https://perma.cc/A7AD-TC7V] (finding more than half of state trial judges and state appellate judges are white men).

306. REST. OPPORTUNITIES CTRS., *supra* note 14.

307. Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001> [https://perma.cc/8V2G-LCYF].

Certain barriers impact low-wage workers disproportionately in pursuing claims for sexual harassment in the workplace: mandatory individual arbitration clauses; nondisclosure agreements; misclassification of workers and increased use of independent contractors; the need for adequate, or any, legal representation; fear of retaliation; the lack of protections for domestic workers and farmworkers; the lack of protections for immigrants who have entered the United States illegally; and legislative attacks on the right to organize. The United States must continue to ensure that the law works for all women, not simply celebrities or those with the means to protect themselves without the cushion of the law, by filling gaps in protections and coverage of preexisting statutes, as well as by codifying new protections, such as those regarding arbitration and nondisclosure agreements, that would allow low-wage workers to seek justice in the workplace. Until Congress takes effective action, it is up to states to enact more expansive protections for working people, even if it is not clear that they have the authority to do so based on federal preemption.

Of course, who sits on the courts matters. The merits of the opinions delivered in decisions such as *Epic Systems* and *Janus* may be debated by reasonable persons; any difference in the composition of the Supreme Court might have led to an outcome that would be more protective of low-wage workers, and workers generally. However, given the unlikelihood that any progressive change will come from the highest court at this time, it is up to Congress to legislate, and to make its intentions patently clear should the legislation be challenged. It is also up to society to change its views about low-wage workers. The court of public opinion and change in societal norms and expectations can very well impact not only legislators, but also who sits on the courts. If we continue to see low-wage workers in the same way as these harassers in the workplace do—other, meaningless, exploitable, inhuman—it is unlikely we will make any progress. The #MeToo movement has created a moment with the power to amplify the voices of low-wage workers who have long been speaking their truths and fighting for fairer workplaces.

It is up to allies to work with low-wage workers and amplify their voices. Simply permitting activists like Monica Ramirez of Alianza Nacional de Campesinas and other activists to walk the red carpet following their efforts to express solidarity with Hollywood is not enough.³⁰⁸ Without the voices of low-wage workers in the forefront of this movement, it will be impossible to effect changes necessary to protect all women—not just the women at the top.

308. Time Staff, *supra* note 7; Feller & Tang, *supra* note 7.