

**AN ANALYSIS OF LEGISLATIVE ATTEMPTS TO AMEND  
THE FEDERAL ARBITRATION ACT: WHAT POLICY  
CHANGES NEED TO BE IMPLEMENTED FOR #METOO  
VICTIMS**

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## I. INTRODUCTION

Bosses and fellow laborers treated them as property or prey. Men crudely commented on their breasts and buttocks; graffiti of penises was carved into tables, spray-painted onto floors and scribbled onto walls. They groped women, pressed against them, simulated sex acts or masturbated in front of them. Supervisors traded better assignments for sex and punished those who refused.<sup>1</sup>

The jobs were the best they would ever have: collecting union wages while working at Ford, one of America's most storied companies. Inside two Chicago plants, women were harassed and sexually abused.<sup>2</sup> That was a quarter-century ago.<sup>3</sup> In 2017, women at those plants complained that they had been subjected to much of the same abuse.<sup>4</sup> These women alleged they were treated as those who complained before them: mocked, dismissed, threatened and ostracized.<sup>5</sup>

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.<sup>6</sup> In the workplace, this problem has been exacerbated over the past few years. When a victim has a workplace sexual harassment claim against an employee or employer, the dispute is typically resolved in arbitration.<sup>7</sup> Many issues have come up regarding the efficiency of

<sup>1</sup> Susan Chira & Catrin Einhorn, *Decades After the Company Tried to Tackle Sexual Misconduct at Two Chicago Plants, Continued Abuse Raises Questions About the Possibility of Change*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html?ad-keywords=GG&BKB&dclid=CMCV44HLx9gCFVYID AodL-8CbA>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, [HTTPS://WWW.EEOC.GOV/LAWS/TYPES/SEXUAL\\_HARASSMENT.CFM](https://www.eeoc.gov/laws/types/sexual_harassment.cfm) (last visited Feb. 2, 2019).

<sup>7</sup> 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>.

arbitration for sexual harassment claims. Most, if not all, non-union employment contracts have provisions that prevent public litigation from deciding claims—including sexual harassment.<sup>8</sup>

Sexual harassment is a national epidemic in the workplace and should be addressed as such. Women make up almost half of the total U.S. labor force.<sup>9</sup> Statistics reveal that one in three women between the ages of eighteen to thirty-four have been sexually harassed at work—many of whom were targeted by male co-workers, clients or customers, and managers.<sup>10</sup> Men have been able to evade culpability from these attacks on so many levels, from warehouse employees to corporate executives to the current president of the United States.<sup>11</sup> Unfortunately, this issue is one that has not been taken seriously enough, mostly because men have controlled the rings of “power” with regard to the work force.

Society has allowed sexual harassment to go on for too long in the corporate culture. Furthermore, the law in some respect protects harassers. Part of the problem is that lawmakers have decided that there are two ways to settle workplace sexual harassment allegations: (1) settlement, which silences victims, and (2) mandatory arbitration clauses in employment contracts, which functions (in the context of sexual harassment claims) as a “safe harbor” that both protects the harasser and also silences the victim.<sup>12</sup> In this context, “safe harbor” means that the arbitration forum offers the harasser confidentiality—the very nature of arbitration as a dispute resolution forum.<sup>13</sup>

In addition, as indicated previously, arbitration proceedings also permit the “private settlement” of the claims of the accuser—allowing the harasser to claim no wrongdoing. Among the traditional arguments for preference for deciding claims in a public court, as opposed to a private

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<sup>8</sup> *Employment Contract Provisions*, FIND LAW, <https://smallbusiness.findlaw.com/employment-law-and-human-resources/employment-contract-provisions.html> (last visited Feb. 2, 2019).

<sup>9</sup> Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017, 9:00 AM), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts>.

<sup>10</sup> *Id.*

<sup>11</sup> Meghan Keneally, *List of Trump's Accusers and Their Allegations of Sexual Misconduct*, ABC NEWS (Feb. 22, 2018, 12:47 PM), <https://abcnews.go.com/Politics/list-trumps-accusers-allegations-sexual-misconduct/story?id=51956410>.

<sup>12</sup> Debra C. Katz, *30 Million Women Can't Sue Their Employer Over Harassment. Hopefully That's Changing*, WASHINGTON POST (May 17, 2018), [https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d\\_story.html?utm\\_term=.a923678607df](https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d_story.html?utm_term=.a923678607df).

<sup>13</sup> *Id.*

adjudication system, are that: (1) court proceedings are part of the public record and, as a result, the abuser's identity is not confidential, and (2) plaintiffs have an appeal process, whereas in arbitration, the arbitrator's decision is final.<sup>14</sup> Of course, there are some exceptions relating to the arbitrator's failure to adhere to the constraints placed on the arbitrator by the parties' agreement and, perhaps, the public policy exception.<sup>15</sup>

Part II of this article will look at sexual harassment in the workplace as a unique problem and how the adjudication in a private dispute resolution system is not appropriate at this time. But for other issues—such as wages, hours, and other non-disciplinary issues—arbitration is an efficient and great method to resolve disputes. Part III of this article will analyze current legislative efforts on the issue of arbitration and sexual harassment. Over the past ten years, several legislative efforts have been made to amend the Federal Arbitration Act (FAA).<sup>16</sup> This article will focus on four bills that offer some amendment to the FAA: (1) the Arbitration Fairness Act of 2017, (2) the Restoring Statutory Rights and Interests of the States Act, (3) the Mandatory Arbitration Transparency Act of 2017, and (4) the Ending Forced Arbitration of Sexual Harassment Act of 2017.

A combination of certain legislative efforts could address part of the problem—especially with regard to allowing a claimant/victim to have the option of a public forum and banning dangerous clauses in pre-dispute agreements. But overall, workers need a comprehensive structural and legislative effort to resolve the issue of workplace sexual harassment that will: (1) give the victim the option of a public forum, and (2) amend the process of arbitrating sexual harassment claims so that it is a more equitable process for the claimant.

[T]hose of us who have had the benefit of more education, of more income, of more material circumstance, when we look at a question of policy issue, we should ask ourselves, is it in the interest of the most marginalized, not just in my class interest, and how do I take the benefits of my initiative or my family's initiative to collaborate with those communities, those most

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<sup>14</sup> *What Happens After the Arbitrator Issues an Award*, AMERICAN ARBITRATION ASSOCIATION, [https://www.adr.org/sites/default/files/document\\_repository/AAA229\\_After\\_Award\\_Issued.pdf](https://www.adr.org/sites/default/files/document_repository/AAA229_After_Award_Issued.pdf) (last visited Feb. 2, 2019).

<sup>15</sup> *Local 453, Int'l Union of Elec., Radio & Mach. Workers v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir. 1963) (holding that in limited circumstances, the courts could refuse to enforce an arbitrator's award if it violated public policy).

<sup>16</sup> *See* 9 U.S.C. § 1 (2018) (articulating that the Federal Arbitration Act (FAA) was enacted to provide for judicial facilitation of private dispute resolution through arbitration. The FAA provides for contractually based binding arbitration, resulting in an arbitration award entered by an arbitrator or arbitration panel as opposed to a judgment entered by a court of law).

marginalized . . . .<sup>17</sup>

There are several important principles that need to be included in legislative proposals aimed at amending the arbitration process to combat sexual harassment. The principles this article will use when examining the legislation are: 1) whether it appropriately permits disclosure of the identity of the harasser, 2) whether legislation allows non-disclosure agreements in settlements, and 3) whether legislation gives victims of sexual harassment the freedom of choice. In other words, is the accuser able to have appropriate discretion (after a dispute arises) to decide whether to resolve a claim in an arbitration forum or in court? Applying these principles, this article will use fundamental elements that ought to be in any policy change aimed at resolving workplace sexual harassment claims. While much has been written about mandatory arbitration generally, this article will look specifically at claims of workplace sexual harassment and arbitration, legislative efforts on the issue, and solutions to change this national problem.

## II. SEXUAL HARASSMENT IN THE WORK PLACE AS A UNIQUE PROBLEM: ADJUDICATION IN A PRIVATE DISPUTE RESOLUTION SYSTEM IS NOT APPROPRIATE AT THIS TIME

In 1986, the U.S. Supreme Court first recognized that a sexually hostile work environment claim is actionable under Title VII in *Meritor Savings Bank v. Vinson*.<sup>18</sup> A unanimous decision declared, “Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.”<sup>19</sup> To state a cause of hostile environment sexual harassment, the conduct must be unwelcome and “sufficiently severe and pervasive to alter the conditions of the victim’s employment and create an abusive working environment,” and be judged in light of the “totality of the circumstances.”<sup>20</sup> The Court did not define employer liability beyond reference to agency principles and recognition that employers are not automatically liable for a supervisor’s

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<sup>17</sup> James Pope, *Theorizing Fanon: Latin America and the Pitfalls of National Consciousness*, AFRICA WORLD NOW PROJECT, <https://soundcloud.com/africaworldnowproject/theorizing-fanon-latin-america-and-the-pitfalls-of-national-consciousness>. Host and Producer, James Pope discusses in an interview with James Early, the work of Franz Fanon, policy and democracy.

<sup>18</sup> 477 U.S. 57, 60 (1986) (alleging that, among other things, plaintiff’s supervisor made repeated demands for sex to which she eventually acceded, publicly fondled her, and forcibly raped her. The supervisor denied all allegations. The plaintiff did not allege that employment benefits were conditioned on accepting his advances, and it was undisputed that her job advancement was based solely on merit).

<sup>19</sup> *Id.* at 65.

<sup>20</sup> *Id.* at 67-68.

conduct. The Court, however, did conclude that a claim of “hostile environment” sexual harassment is a form of sex discrimination that is actionable under Title VII.<sup>21</sup>

Under Title VII of the Civil Rights Act of 1964, an employer may not “discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>22</sup> In 1980, the Equal Employment Opportunity Commission (EEOC) adopted guidelines stating that sexual harassment was sex discrimination and defined sexual harassment to include both quid pro quo and hostile environment harassment.<sup>23</sup>

Sexual violence permeates our culture, from violent rape scenes in film and TV series to sexist dress codes that reinforce rape culture to near-daily stories of sexual assaults in most industries.<sup>24</sup> These examples create a culture that reinforces the normalization of sexual violence. Statistics demonstrate that thirty-five percent of women globally have experienced sexual harassment.<sup>25</sup> Someone in the U.S. is sexually assaulted every ninety-eight seconds.<sup>26</sup> That means more than 570 people experience sexual violence in this country every single day.<sup>27</sup> The reality

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<sup>21</sup> *Id.* at 68.

<sup>22</sup> 42 U.S.C. § 2000e-2(a)(1) (1994).

<sup>23</sup> *Policy Guidance on Current Issues of Sexual Harassment*, THE EQUAL OPPORTUNITIES COMMISSION, (March 19, 1990), <https://www.eeoc.gov/policy/docs/currentissues.html> (last visited Feb. 2, 2019).

<sup>24</sup> *See* Alanna Vagianos, *Students Protest Sexist Flyers Depicting What ‘Good Girls’ Wear to Prom*, HUFFINGTON POST (Mar. 29, 2017), [https://www.huffingtonpost.com/entry/students-protest-sexist-flyers-depicting-what-good-girls-wear-to-prom\\_us\\_58dac73ee4b01ca7b42799bb?ec\\_carp=896159728465316\\_9375](https://www.huffingtonpost.com/entry/students-protest-sexist-flyers-depicting-what-good-girls-wear-to-prom_us_58dac73ee4b01ca7b42799bb?ec_carp=896159728465316_9375); *see also* Suzannah Weiss, *5 Ways School Dress Codes Reinforce Rape Culture, Because Women Aren’t a “Distraction,”* BUSTLE (Feb. 23, 2016), <https://www.bustle.com/articles/143604-5-ways-school-dress-codes-reinforce-rape-culture-because-women-arent-a-distraction>; *see also* Alanna Vagianos, *This Student was Raped Twice in Her Dorm. Now She’s Suing Her School*, HUFFINGTON POST (Mar. 24, 2017), [https://www.huffingtonpost.com/entry/this-student-was-raped-twice-in-her-dorm-now-shes-suing-her-school\\_us\\_58d41a14e4b0f838c630a3b3](https://www.huffingtonpost.com/entry/this-student-was-raped-twice-in-her-dorm-now-shes-suing-her-school_us_58d41a14e4b0f838c630a3b3); *see also* Alanna Vagianos, *Remember Brock Turner? From 3 Months Ago? He’ll leave Jail on Friday.*, HUFFINGTON POST (Aug. 30, 2016, 11:35 AM), [https://www.huffingtonpost.com/entry/remember-brock-turner-from-3-months-ago-hell-leave-jail-on-friday\\_us\\_57c58c81e4b0cdfc5ac9256b](https://www.huffingtonpost.com/entry/remember-brock-turner-from-3-months-ago-hell-leave-jail-on-friday_us_57c58c81e4b0cdfc5ac9256b).

<sup>25</sup> Meera Senthilingam, *Sexual Harassment: How it Stands Around the Globe*, CNN (Nov. 29, 2017), <http://www.cnn.com/2017/11/25/health/sexual-harassment-violence-abuse-global-levels/index.html>.

<sup>26</sup> *About Sexual Assault*, RAINN, <https://www.rainn.org/about-sexual-assault> (last visited Feb. 2, 2019).

<sup>27</sup> Alanna Vagianos, *30 Alarming Statistics That Show the Reality of Sexual Violence in America*, HUFFINGTON POST (Apr. 5, 2017, 12:09 PM), <https://www.huffingtonpost.com/entry/sexual-assault->

is that about fifty people experience extreme sexual harassment every day when they are sexually assaulted or raped on the job.<sup>28</sup>

Recently, there has been a huge wave of women in the TV film industry coming forward accusing their employers (or former employers) of sexual harassment.<sup>29</sup> Following the immense investigations into Harvey Weinstein's conduct, more stories of victims of sexual harassment, particularly women in Hollywood, began to emerge in mainstream media leading to a string of allegations against other "prominent" men.<sup>30 31</sup>

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<sup>28</sup> Bernice Yeung, *The People #MeToo Leaves Behind*, REVEAL NEWS (Nov. 27, 2017), <https://www.revealnews.org/blog/the-people-metoo-leaves-behind/>.

<sup>29</sup> The narrative that sexual harassment against women has now become a major problem and women are finally speaking up is ahistorical considering black women have spoken about such harassment for decades but were either silence or not believed. See Agnes Constante, *Hollywood is Having a #MeToo Moment. Women of Color Have Fought This Battle for Decades*, NBCNEWS (Jan. 28, 2018, 9:41 AM) <https://www.nbcnews.com/news/us-news/hollywood-having-metoo-moment-women-color-have-fought-battle-decades-n841121> (explaining that Tarana Burke founded the #metoo movement and began using the hashtag in 2006 to raise awareness of the pervasiveness of sexual abuse and assault in society. The hashtag developed into a broader movement, following the 2017 use of #MeToo as a hashtag following the Harvey Weinstein sexual abuse allegations).

<sup>30</sup> Jodi Kantor & Megan 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> (explaining that for more than twenty years, Weinstein had also been trailed by rumors of sexual harassment and assault). See Rospenda KM, Richman JA, & Shannon CA, *Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study*, JOURNAL OF INTERPERSONAL VIOLENCE (May 7, 2008) (finding that minorities experience the highest levels of harassment and discrimination in the workplace). The narrative that sexual harassment against women has now become a major problem and women are finally speaking up is ahistorical considering black women have spoken about such harassment for decades but were either silence or not believed. The individualized coverage of these cases ignores countless people, many of whom work in low-wage jobs where the power imbalance is even less conducive to reporting sexual harassment. In light of women coming out from all industries and speaking up about their experiences, many of the high-profile cases are not by women of color. Black and brown women are (and have been) at the forefront of battling sexual harassment, and abuse.

<sup>31</sup> Agnes Constante, *Hollywood is Having a #MeToo Moment. Women of Color Have Fought This Battle for Decades*, NBCNEWS (Jan. 28, 2018, 9:41 AM) <https://www.nbcnews.com/news/us-news/hollywood-having-metoo-moment-women-color-have-fought-battle-decades-n841121> (explaining that Tarana Burke founded the #metoo movement and began using the hashtag in 2006 to raise awareness of the pervasiveness of sexual abuse and assault in society. The hashtag developed into a broader movement, following the 2017 use of #MeToo as a hashtag following the Harvey Weinstein sexual abuse allegations).

A. *Can Legislative Efforts Resolve the Issue?*

There are deep-rooted beliefs about male and female roles in sex and relationships.<sup>32</sup> Certain gendered social norms may have a role in why men sexually harass women.<sup>33</sup> These norms and beliefs are carried over into the workplace. Prior to proposing a policy to solve the issue, it is important for society to remain cognizant of the fact that the U.S. has a tradition of electing individuals who have been accused of sexually assaulting others. From many sectors in society where policies and laws are created, including the Supreme Court and the White House, there has been a deep cultural acceptance of inappropriate sexual behavior by men in power.<sup>34</sup>

In 1991, the Senate confirmed Justice Clarence Thomas, despite being accused of sexual harassment by Anita Hill in public hearings.<sup>35</sup> Anita Hill testified before the Senate Judiciary Committee that Thomas sexually harassed her as her former supervisor.<sup>36</sup> It was a defining moment for how the country viewed sexual harassment in the workplace. Anita Hill was a law professor who had worked for Thomas years earlier at the Equal Employment Opportunity Commission.<sup>37</sup> During the hearings on the issue, she testified that Thomas, as her boss, repeatedly tried to date her and subjected her to extensive unwanted conversations about sex and pornography.<sup>38</sup> Her testimony nor the shocking accusations made a big difference in his confirmation as justice to the Supreme Court.

Another glaring example of this social norm is demonstrated by the

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<sup>32</sup> Natasha McKeever, *How Unhelpful but Accepted Social Norms Fuel Sexual Assault Against Women*, INDEPENDENT (Nov. 13, 2017), <http://www.independent.co.uk/news/uk/home-news/sexual-assault-culture-societal-norms-permit-harassment-women-men-gender-imbalance-a8051586.html>.

<sup>33</sup> *Id.* (asserting that, for example, the view that men are constantly thinking about sex, and feel somehow entitled to it due to their superior status to women is one that we are familiar with).

<sup>34</sup> Marie Slois, *How Many Presidents Have Been Accused of Sexual Misconduct? George H.W. Bush is the Latest*, NEWS WEEK (Oct. 25, 2017, 5:59 PM), <https://www.newsweek.com/how-many-presidents-have-been-accused-sexual-assault-692766> (noting that in addition to Clarence Thomas, Brett Kavanaugh has been accused of sexual harassment. In September 2018, Christine Blasey Ford publicly alleged that then-U.S. Supreme Court nominee Brett Kavanaugh sexually assaulted her in Bethesda, Maryland, when they were teenagers in the summer of 1982).

<sup>35</sup> Anita Hill, *Testimony to Senate Judiciary Committee*, SPEECHES-USA, [http://www.speeches-usa.com/Transcripts/anita\\_hill-testimony.html](http://www.speeches-usa.com/Transcripts/anita_hill-testimony.html) (last visited Feb. 2, 2019).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

fact that at least seven former presidents have been accused of sexual harassment and/or rape:

1. George H.W. Bush: Actress Heather Lind claimed that former President George H.W. Bush inappropriately touched her.<sup>39</sup>
2. Bill Clinton: Juanita Broaddrick claimed that former President Bill Clinton, when he was running for Governor of Arkansas in 1978, sexually assaulted her in a Little Rock hotel room; Paula Jones accused former President Bill Clinton of sexual harassment; Former White House intern Monica Lewinsky had a now-infamous affair with former President Bill Clinton in the 1990s and has characterized Clinton as having taken advantage of her during their affair.<sup>40</sup> Additionally, Former White House volunteer Kathleen Willey accused former President Bill Clinton of inappropriately touching her.<sup>41</sup>
3. Ronald Reagan: In an unauthorized biography of former First Lady Nancy Reagan, Kitty Kelley published claims by actress Selene Walters that then-actor and future-president Ronald Reagan forced her to have sex with him in the 1950s.<sup>42</sup>
4. Thomas Jefferson is said to have raped Sally Hemings, his slave, and had six children with her—all of whom were born into slavery.<sup>43</sup>
5. Allegations surrounding President Grover Cleveland involve a thirty-eight-year-old woman named Maria Halpin, who he allegedly raped after “courting” her and threatened her if she spoke about what occurred.<sup>44</sup>
6. President Richard Nixon was accused of “starting to make moves and then withdrawing” by secretary Nell Yates as well as inappropriately touching other secretaries.<sup>45</sup>
7. George W. Bush was accused of rape by Margie

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<sup>39</sup> *Id.*

<sup>40</sup> Associated Press & NBC News, *Former President H.W. Bush Accused by Heather Lind of Touching Her*, NBC NEWS (Oct. 25, 2017, 7:55 PM), <https://www.nbcnews.com/news/us-news/former-president-george-h-w-bush-accused-heather-lind-touching-n814131>.

<sup>41</sup> Slois, *supra* note 34; see Dylan Mathews, *The Rape Allegation Against Bill Clinton, Explained*, VOX (Nov. 14, 2017, 12:44 PM), <https://www.vox.com/2016/1/6/10722580/bill-clinton-juanita-broaddrick>; see also, AOL.com Editors, *Women Who Have Accused US Presidents of Sexual Harassment Throughout History*, AOL (Oct. 27, 2017, 8:53AM), <https://www.aol.com/article/news/2017/10/27/women-who-have-accused-us-presidents-of-sexual-harassment-throughout-history/23258173>.

<sup>42</sup> AOL.com Editors, *supra* note 41.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Schoedinger.<sup>46</sup>

*B. The Process of Arbitration*

When a victim has been harassed at work, he or she may take action against their employer to resolve this behavior. More often than not, the resolution of the dispute takes place in arbitration.<sup>47</sup> The arbitration process precludes an employee from bringing claims to court—as it was a condition of the employee’s employment.<sup>48</sup> As mentioned previously, most, if not all employment contracts, include arbitration clauses.<sup>49</sup> The arbitration clause typically reads: “[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the . . . .”<sup>50</sup>

Is arbitration an appropriate method to resolve this kind of issue? Should an employee be contractually required to arbitrate a workplace sexual harassment claim? Is arbitrating a sexual harassment claim different than a non-statutory claim like being fired without cause? Lawyers, Congress, and advocates both for and opposing arbitration have not shared the Supreme Court’s endorsement of mandatory arbitration, particularly for sexual harassment claims.<sup>51</sup>

Arbitration under the FAA and related state laws is an adjudicatory process, meaning that it is a process in which a neutral third party renders a final and binding decision upon a dispute that has been submitted to the arbitrator by opposing parties.<sup>52</sup> The adjudicatory nature of arbitration makes it similar to a public trial, but it is less formal in a number of important respects. For example, formal rules of evidence and civil procedure generally do not apply in FAA arbitrations.<sup>53</sup> Arbitration is also generally considered a “private” process.<sup>54</sup> Further, an arbitration hearing may involve the use of an individual arbitrator or a tribunal.<sup>55</sup> A tribunal may consist of any number of arbitrators though some legal

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<sup>46</sup> *Id.*

<sup>47</sup> Andrew R. Livingston & Michael Delikat, *Employment Arbitration: The Landscape and Recent Developments*, AMERICAN BAR ASSOCIATION (2018), [https://www.americanbar.org/content/dam/aba/events/labor\\_law/2018/papers/Arbitration%20of%20Employment%20Disputes%20in%20the%20USA.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/2018/papers/Arbitration%20of%20Employment%20Disputes%20in%20the%20USA.pdf).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 84 (1992).

<sup>54</sup> Livingston, *supra* note 47.

<sup>55</sup> *What is Arbitration*, MEDIATE, <https://www.mediate.com/articles/grant.cfm> (last visited Feb. 2, 2019).

systems insist on an odd number.<sup>56</sup> One and three are the most common numbers of arbitrators.<sup>57</sup> Finally, arbitration is an alternative to court action (litigation), and generally, just as final and binding (unlike mediation, negotiation, and conciliation which are non-binding).<sup>58</sup>

The Federal Arbitration Act (FAA) was passed in 1925.<sup>59</sup> The Act provides that agreements to arbitrate disputes are enforceable by courts.<sup>60</sup> Modern Supreme Court jurisprudence has substantially expanded the scope of the FAA.<sup>61</sup> The Court's decisions have also supported the use of arbitration agreements to require that disputes be arbitrated on an individual basis, precluding class actions or other collective litigation.<sup>62</sup> In the years following the FAA's passage, the type and number of arbitrations have increased greatly.<sup>63</sup> Pre-dispute arbitration provisions are now widely used for employment agreements.<sup>64</sup>

In the *Mitsubishi* Trilogy,<sup>65</sup> the Supreme Court stated that "by agreeing to arbitrate a statutory claim, the party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."<sup>66</sup> The *Mitsubishi* Trilogy concerned statutory claims arising under antitrust, securities, and racketeering laws.<sup>67</sup> The Trilogy left open the question of whether employees can arbitrate employment statutory claims, which was later answered in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>68</sup>

In *Gilmer*, the Court held for the first time, that pre-dispute agreements to arbitrate are enforceable even when statutory rights against

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (stating that an arbitration award is not a judgment. It must be confirmed by a court to become a judgment).

<sup>59</sup> 9 U.S.C. § 1 (2012).

<sup>60</sup> *Id.* at §§ 1-16.

<sup>61</sup> *Am. Express Co. et al. v. Italian Colors Rest. et al.*, 133 S. Ct. 2304 (2013); see e.g., J. Maria Glover, *Disappearing Claims and The Erosion of Substantive Law*, *YALE L. REV.* (2015).

<sup>62</sup> *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).

<sup>63</sup> Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History Symposium*, 2016 J. DISP. RESOL. 115 (2016).

<sup>64</sup> Employment Arbitration Agreements, FIND LAW, <https://employment.findlaw.com/hiring-process/employment-arbitration-agreements.html> (last visited Feb. 2, 2019).

<sup>65</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth Co.*, 473 U.S. 614 (1985).

<sup>66</sup> See *Mitsubishi Motors Co.*, 473 U.S. at 628.

<sup>67</sup> See *Rodriguez de Quijas*, 490 U.S. at 478; *McMahon*, 482 U.S. at 222; *Mitsubishi Motors Co.*, 473 U.S. at 619-20.

<sup>68</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

discrimination are at issue.<sup>69</sup> Gilmer, a terminated financial services manager who sued Interstate, claimed age discrimination under the Age Discrimination Employment Act of 1967 (ADEA).<sup>70</sup> Gilmer had an agreement, as required by the New York Stock Exchange, to arbitrate any dispute arising from his employment or termination.<sup>71</sup> When Gilmer's case went before the United States Court of Appeals for the Fourth Circuit, the court compelled Gilmer to arbitrate because the court found that there was no congressional intent in the ADEA to preclude enforcement of arbitration agreements in arbitration.<sup>72</sup> The Supreme Court agreed with the Fourth Circuit and compelled arbitration.<sup>73</sup> The Court used the *Mitsubishi* Trilogy for support, finding statutory claims are arbitrable under the FAA.<sup>74</sup>

Despite the fact that the Court in *Gilmer* found no congressional intent in the history of the ADEA to preclude arbitration of an ADEA claim, at the time the ADEA was enacted in 1967, arbitration was the adjudicating forum for labor and commercial disputes only.<sup>75</sup> Unlike non-statutory claims that might arise from a labor or commercial dispute, ADEA claims involve civil rights violations.<sup>76</sup> Thus, is considered a statutory claim.<sup>77</sup> It is likely that when Congress created the ADEA, it never considered that statutory claims would be resolved by arbitration rather than in court. The Supreme Court, however, has consistently and with bipartisan unity endorsed arbitration whether it is by pre-dispute or post-dispute agreement.<sup>78</sup>

### C. *In What Context Does Arbitration Work?*

In many circumstances, arbitration is a very effective method for

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<sup>69</sup> *Id.*

<sup>70</sup> *Gilmer*, 500 U.S. at 23-24. The ADEA is codified at 29 U.S.C. §§ 621-34 (2000).

<sup>71</sup> *Gilmer*, 500 U.S. at 23.

<sup>72</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990), rev'd, 500 U.S. 20 (1991).

<sup>73</sup> *Gilmer*, 500 U.S. at 35.

<sup>74</sup> *Id.* at 26.

<sup>75</sup> See 29 U.S.C. § 621 (2018); *Wilko v. Swan*, 346 U.S. 427 (1953).

<sup>76</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth Co.*, 473 U.S. 614 (1985).

<sup>77</sup> *Id.*

<sup>78</sup> *Mara Kent. Forced vs. Compulsory Arbitration of Civil Rights Claims*, 23 LAW & INEQ. 95 (2005); see, e.g. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

resolving work place disputes. For example, imagine that an employee was terminated without warning after coming into work late (once). And this employee had been working at this company for over fifteen years with no disciplinary record. In this example, the employee probably would want to have some kind of recourse with the employer. Arbitration would be effective to resolve the issue because of the speediness, the cost, and the parties' ability to control the process.

Alternative dispute resolution methods (ADR) are generally viewed as providing the opportunity for a faster and less expensive dispute resolution process. Furthermore, many commentators believe that the parties may obtain better quality solutions and a better process in ADR methods than they would obtain in the courts.<sup>79</sup> For example, once an arbitrator is selected, in some cases, the matter can be heard immediately.<sup>80</sup> In litigation, often, a case may wait until the court has time to hear it; this can mean many months, even years, before the case is heard.<sup>81</sup>

Other important considerations include cost and the party's ability to control the process. The large and increasing costs of litigation is also a major factor in preference for the arbitration procedure. In *Cole v. Burns*,<sup>82</sup> the U.S D.C. Circuit Court answered whether an employer could require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrators' fees. The court held it can not because "public law confers both substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated, . . . [and] employees cannot be required to pay for the services of a 'judge' in order to pursue their statutory rights."<sup>83</sup> Additionally, the costs for the arbitration process are limited to the fee of the arbitrator (depending on the size of the claim, expertise of the arbitrator, and expenses) and attorney fees.<sup>84</sup> Costs for litigation can be very high—including court fees and trial preparation.<sup>85</sup> Furthermore, ADR processes that are not court-connected (and even some that are) are generally private proceedings in which the parties have more control over the

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<sup>79</sup> *Mediation vs. Arbitration vs. Litigation: What's the Difference*, FINDLAW, <https://adr.findlaw.com/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html> (last visited Feb. 2, 2019).

<sup>80</sup> Jean Murray, *The Difference Between Arbitration and Litigation*, THE BALANCE SMALL BUS. (Dec. 15, 2018), <https://www.thebalance.com/arbitration-vs-litigation-what-is-the-difference-398747>.

<sup>81</sup> *Id.*

<sup>82</sup> 105 F.3d 1465 (D.C. Cir. 1997).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

process, the standard of the decision, and the remedies.<sup>86</sup>

*D. Dangers of Arbitrating Sexual Harassment Claims*

Access to the judicial system, whether federal or state, is a fundamental right of all Americans.<sup>87</sup> That right should extend fully to persons who have been subjected to sexual harassment in the workplace.<sup>88</sup> However, as mentioned above, many employers require their employees, as a condition of employment, to sign arbitration agreements mandating that sexual harassment claims be resolved through arbitration instead of judicial proceedings.<sup>89</sup> The lack of judicial review and the enforcement of confidentiality clauses during the proceeding can make arbitration a difficult process for sexual harassment victims.

i. Judicial review

Generally, judicial review of arbitrators' decisions is very narrow, one of the narrowest standards of judicial review in jurisprudence.<sup>90</sup> It has been argued that this lack of judicial review undermines the public function of litigation: "[b]y closing off access to proceedings, eliminating judicial precedent, and allowing parties to write their own laws, we compromise society's role in setting the terms of justice."<sup>91</sup> Consider the following examples:

1. The U.S. Court of Appeals for the Seventh Circuit remarked in a decision that courts should not review arbitrators' interpretations of contracts even if they are incorrect or "wacky," so long as the arbitrator attempted to interpret the contract at all.<sup>92</sup>
2. The U.S. Court of Appeals for the Third Circuit considered an arbitrator's decision that inexplicably cited and relied upon language that was not included in a key document.<sup>93</sup> The court held that such a mistake, while glaring, does not fatally taint the balance of the arbitrator's decision in this case.<sup>94</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Cole v. Burns*, 105 F.3d 1465 (D.C. Cir. 1997).

<sup>89</sup> *Arbitration Agreements*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/forced-arbitration-agreements> (last visited Feb. 2, 2019).

<sup>90</sup> *Lattimer-Stevens Co. v. United Steelworkers of Am. Dis.* 27, 913 F.2d 1166, 1169 (6th Cir. 1990).

<sup>91</sup> See Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 695 (1996) (citations omitted).

<sup>92</sup> See *Wise v. Wachovia Securities, Inc.*, 450 F.3d 265, 269 (7th Cir. 2006).

<sup>93</sup> *Brentwood Med. Assoc's v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005).

<sup>94</sup> *Id.*

3. The California Supreme Court held that even when an arbitrator's decision would cause substantial injustice, it was not subject to judicial review.<sup>95</sup>

*E. Arbitration is Not a Good Option at this Time*

*Jones v. Halliburton Co.*<sup>96</sup> addresses the need for reform of current arbitration law. Although the arbitration agreement was not enforced, the case does inform the current discussion.<sup>97</sup> In *Jones*, the issue was the arbitrability of claims arising from an alleged rape that took place in employment housing.<sup>98</sup> *Jones* began working for Halliburton/KBR in 2004 as an administrative assistant in Houston, Texas.<sup>99</sup> She alleged that while she was employed, she was sexually harassed by her supervisor, and because of this harassment, she demanded to be moved to another department.<sup>100</sup>

On July 21, 2005, *Jones* signed an employment contract containing an arbitration provision with Overseas Administrative Services (OAS), "a foreign, wholly-owned subsidiary of Halliburton/KBR."<sup>101</sup> Two days after arriving in Iraq, she complained to several managers about being subjected to unwanted sexual harassment in the barracks.<sup>102</sup> *Jones* contended that no action was taken; instead, she was advised to "go to the spa."<sup>103</sup> The next day, *Jones* alleged she was "drugged, beaten, and gang-raped by several Halliburton/KBR employees in her barracks bedroom."<sup>104</sup> Then, *Jones* contends she "was placed under armed guard . . . and not permitted to leave; and, despite repeated requests, she was denied access to a telephone to contact her family."<sup>105</sup>

In 2007, *Jones* filed a complaint in a federal district court in Texas.<sup>106</sup> Her complaint included the following causes of action: (1) negligence, (2) negligent undertaking, (3) sexual harassment and hostile work environment under Title VII, (4) retaliation, (5) breach of contract, (6) fraud in the inducement to enter the employment contract, (7) fraud in the inducement to enter the arbitration agreement, (8) assault and

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<sup>95</sup> *Moncharsh v. Heily & Blase*, 832 P.2d 899 (Cal. 1992).

<sup>96</sup> 583 F.3d 228 (5th Cir. 2009).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 230.

<sup>100</sup> *Id.* at 231.

<sup>101</sup> *Id.* at 231.

<sup>102</sup> *Jones v. Halliburton Co.*, 583 F.3d 228, 231 (5th Cir. 2009).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

battery, (9) false imprisonment, (10) negligent hiring, supervision, and retention of employees involved in the alleged assault, and (11) intentional infliction of emotional distress.<sup>107</sup> The district court determined that all of these claims were arbitrable, except numbers (8)–(11).<sup>108</sup>

In September 2009, the United States Court of Appeals for the Fifth Circuit affirmed that holding in *Jones v. Halliburton Co.*<sup>109</sup> The Fifth Circuit held that the District Court was correct in determining the assault and battery, false imprisonment, negligent hiring, supervision, and retention of employees involved in the alleged assault, and intentional infliction of emotion distress, were outside the scope of the arbitration clause because “in most circumstances, a sexual assault is independent of an employment relationship.”<sup>110</sup>

Jones spent years fighting for a jury trial, and six years after the alleged attack, she was able to litigate her claim in court in a civil suit that accused KBR of knowingly sending her into a hostile workplace.<sup>111</sup>

Jones’s story caught the attention of Senator Al Franken (D-Minn.) and other lawmakers.<sup>112</sup> As a result, Franken introduced and pushed the Franken Amendment.<sup>113</sup> In October 2009, by a vote of sixty-eight to thirty, the Senate approved Franken’s measure barring the military from contracting with companies that force their employees to take legal complaints to mandatory arbitration—rather than a civil jury—in cases involving sexual assault.<sup>114</sup> Section 8816 of the Department of Defense Appropriations Act, otherwise known as the “Franken Amendment,” dramatically restricts the use of mandatory arbitration clauses in employment contracts between defense contractors and their employees or independent contractors.<sup>115</sup>

In his floor statement explaining the basis for proposing the amendment, Senator Franken explained that, while he viewed arbitration

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<sup>107</sup> *Id.* at 232.

<sup>108</sup> *See Jones v. Halliburton Co.*, 583 F.3d 228, 232 (5th Cir. 2009).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Stephanie Mencimer, *Why Jamie Leigh Jones Lost Her KBR Rape Case*, MOTHER JONES (July 7, 2011, 11:30 AM), <https://www.motherjones.com/politics/2011/07/kbr-could-win-jamie-leigh-jones-rape-trial/>.

<sup>112</sup> Cynthia Dizikes, *Senate Passes Franken Amendment Aimed at Defense Contractors*, MINNPOST (Oct. 6, 2009), <https://www.minnpost.com/politics-policy/2009/10/senate-passes-franken-amendment-aimed-defense-contractors/>.

<sup>113</sup> Department of Defense Appropriations Act, H.R.3326, 111th Cong. (2010), <https://www.congress.gov/amendment/111th-congress/senate-amendment/2575/text>.

<sup>114</sup> Dizikes, *supra* note 112.

<sup>115</sup> *Id.*

as “an efficient forum” for purely commercial disputes, he viewed it as ill-suited to resolving “claims of sexual assault and egregious violations of civil rights.”<sup>116</sup> Because arbitration is “conducted behind closed doors,” Senator Franken argued that it “doesn’t bring persistent, recurring and egregious problems to the attention of the public” and “doesn’t establish important precedent that can be used in later cases.”<sup>117</sup>

The Franken Amendment prohibits awarding any federal contracts in excess of one million dollars appropriated or made available from the Defense Appropriations Act of 2010 unless the contractor agrees not to enter into or enforce forced arbitration agreements against their employees or independent contractors for claims related to Title VII of the Civil Rights Act of 1964 and various tort claims.<sup>118</sup> The restriction on the use of mandatory arbitration agreements is incorporated into specific Department of Defense (DOD) contracts or task/delivery orders through the use of a new contract clause.<sup>119</sup>

The Franken Amendment is a step in the right direction because of the financial restriction applied to contractors.<sup>120</sup> The contract clause within the Franken Amendment limits a contractor’s ability to use mandatory arbitration provisions in employment agreements in two ways.<sup>121</sup> Under the scope of the restriction, the contractor is prohibited from entering into any new employment agreement with an employee or independent contractor that would require the arbitration of a covered claim.<sup>122</sup> The contractor is also prohibited from enforcing any such mandatory arbitration provision in existing employment agreements, to the extent the contractor seeks to force the employee to arbitrate covered claims.<sup>123</sup> The restriction applies to all employees or independent contractors of an affected contractor, not merely those employees or independent contractors performing work related to the contract containing the DFARS contract clause.<sup>124</sup> The Franken Amendment must be renewed annually as part of the DOD appropriation process.<sup>125</sup> While it passed easily in the Senate in 2009, the amendment was opposed by

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<sup>116</sup> 155 CONG. REC. S10,028 (Oct. 1, 2009).

<sup>117</sup> *Id.*

<sup>118</sup> Restrictions on the Use of Mandatory Arbitration Agreements, 75 Fed. Reg. 76,295 (Dec. 8, 2010) (to be codified at 48 C.F.R. pt. 222).

<sup>119</sup> 48 C.F.R. § 252.222-7006 (2019).

<sup>120</sup> *Id.* However, the one-million-dollar limit may allow contractors who have a need less than that amount to remain unaffected.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Dizikes, *supra* note 112.

KBR, other defense contractors and business interests, and the Pentagon.<sup>126</sup>

i. Confidentiality: The Root of The Issue

The Alliance for Justice stated in its publication *Arbitration Activism* that “open court proceedings can expose corporate misconduct in the public record, but through arbitration, corporations can prevent negative publicity [and] keep their wrongdoing secret . . . .”<sup>127</sup> Although the process of arbitration is private, it is not confidential per se. It is the confidentiality clause which hushes the victims and not necessarily the arbitration process. In arbitration, the forum is private, but the parties must agree to the confidentiality of the award.<sup>128</sup> In some cases, the parties have the option to make the arbitration public if both parties agree.<sup>129</sup> These characteristics are not inherent to arbitration but too often become part of the process.

In order to have real change in arbitration reform, however, amendments to the FAA are needed. These changes need to be clear, targeted, and effective. In 2015, Former “Fox & Friends” co-host Gretchen Carlson sued Fox News Chairman and CEO Roger Ailes after she was fired for rebuffing his sexual advances and challenging a sexist newsroom culture.<sup>130</sup> Carlson, who spent eleven years at the network, described being ostracized and marginalized by Fox News for pushing back against condescending treatment.<sup>131</sup> After seven and a half years as a co-host on “Fox & Friends,” Carlson was reassigned in 2013 to an early afternoon time slot.<sup>132</sup> Fox News terminated her employment 2016.<sup>133</sup> In her suit against Roger Ailes, Carlson claimed she tried addressing what she considered to be discriminatory treatment during a September 2015 meeting with Ailes, who allegedly responded that their problems could have been better solved if they had a sexual relationship.<sup>134</sup> At the time,

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<sup>126</sup> *Id.*

<sup>127</sup> ALLIANCE FOR JUSTICE, *ARBITRATION ACTIVISM: HOW THE CORPORATE COURT HELPS BUSINESS EVADE OUR CIVIL JUSTICE SYSTEM* 5 (2013).

<sup>128</sup> *Employment Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION, [https://www.adr.org/sites/default/files/EmploymentRules\\_Web\\_0.pdf](https://www.adr.org/sites/default/files/EmploymentRules_Web_0.pdf).

<sup>129</sup> *Id.*

<sup>130</sup> Michael Calderone, *Former Fox News Host Gretchen Carlson Files Sexual Harassment Suit Against Roger Ailes*, HUFFINGTON POST (July 6, 2016, 12:23 PM), [https://www.huffingtonpost.com/entry/gretchen-carlson-harassment-lawsuit\\_us\\_577d22c1e4b09b4c43c1c624](https://www.huffingtonpost.com/entry/gretchen-carlson-harassment-lawsuit_us_577d22c1e4b09b4c43c1c624).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

lawyers for Roger Ailes asked a judge to halt Gretchen Carlson's "shameless publicity campaign" against her former boss and send her sexual harassment lawsuit against him to arbitration in accordance with her employment contract.<sup>135</sup>

Through the arbitration process, employers can limit what employees are allowed to say about the proceeding and the final decision of their case.<sup>136</sup> The confidentiality of the proceeding allows the disputing parties, arbitrator, witnesses, and others who attended the arbitration to be barred from disclosing statements made in arbitration, documents tendered in arbitration, or observations of conduct by parties, witnesses, and arbitrators during the course of the arbitration.<sup>137</sup>

After Gretchen Carlson filed her complaint, Fox News took decisive action and settled the dispute for \$20 million.<sup>138</sup> Since then, Carlson has been an advocate for ending mandatory arbitration.<sup>139</sup> Carlson stated that "forced arbitration allows sexual harassment and assault to fester in the workplace by keeping victims from discussing their cases publicly or taking them to court."<sup>140</sup> Even though a key issue is non-disclosure agreements, a number of legislation attempt to amend the FAA to remedy the issue of workplace-sexual harassment.<sup>141</sup> Some specifically address

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<sup>135</sup> Jonathan Stempel, *Fox News' Ailes Seeks to Force Harassment Case into Arbitration*, METRO US (July 09, 2016), <https://www.metro.us/news/fox-news-ailes-moves-for-arbitration-in-carlson-employment-case/jZzpgh—Fm95ISIXA00EurDdPqCiUQ>.

<sup>136</sup> Pope, *supra* note 17 at 68.

<sup>137</sup> *Id.*

<sup>138</sup> Nathaniel Brown, *21st Century Fox Settles Lawsuit with Gretchen Carlson*, 21ST CENTURY FOX (Sept. 6, 2016, 12:37 PM), <https://www.21cf.com/news/21st-century-fox/2016/21st-century-fox-settles-lawsuit-gretchen-carlson>.

<sup>139</sup> Jessica Guynn, *'Enough is Enough': Gretchen Carlson Says Bill Ending Arbitration Would Break Silence in Sexual Harassment Cases*, USA TODAY (Dec. 6, 2017), <https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/>.

<sup>140</sup> *Id.* In April 2009, The Employee Rights Advocacy Institute for Law & Policy (The Institute), in collaboration with Public Citizen, unveiled findings of a National Study of Public Attitudes on Mandatory Arbitration. The study was based on a major national survey on mandatory arbitration of employment and consumer claims conducted by Lake Research Partners. Roughly three-quarters of Americans believe they can sue an employer or company should they be seriously harmed or have a major dispute arise—even if they are bound by forced arbitration terms.

<sup>141</sup> Arbitration Fairness Act, S. 537, 115th Cong. (2017); Mandatory Arbitration Transparency Act, S. 647, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/647>; Restoring Statutory Rights and Interests of the States Act, S. 2506, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/senate-bill/2506>; Ending Forced Arbitration of Sexual Harassment Act of 2017, H.R. 4734, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/house-bill/4734/text>; along with cosponsors Representatives Walter B. Jones, Jr. (R-NC), Elise Stefanik (R-NY), and Jayapal Pramila (D-WA).

confidentiality agreements.<sup>142</sup> The confidentiality clause is a critical clause that should be examined in all legislative efforts to amend the FAA.

The Supreme Court first recognized sexual harassment as a form of discrimination in 1986. Since then, employers and their attorneys have generally insisted that victims who receive financial settlements as a result of harassment allegations sign confidentiality agreements.<sup>143</sup> A typical confidentiality clause prohibits the employee not only from revealing the amount paid to her but also from discussing the facts and allegations relating to the underlying events.<sup>144</sup> Often, these clauses contain a “liquidated damages” provision; if the facts are revealed, the employee automatically owes the employer some astronomical sum.<sup>145</sup> Liquidated damages generally include the amount paid in the settlement and sometimes much more, especially if the settlement amount was small.<sup>146</sup> This keeps many victims of harassment from making their experiences known to others who might face the same dangers.<sup>147</sup>

The issue with confidentiality agreements in the context of the arbitration of sexual harassment claims is that in many ways they protect the harasser more than the victim. As a result, the confidentiality clause may allow a harasser to continue their abusive behavior. For example, Harvey Weinstein used non-disclosure agreements for decades to silence his victims.<sup>148</sup> For nineteen years, Zelda Perkins told no one about how Hollywood mogul Harvey Weinstein had repeatedly harassed her while she worked as his assistant in Miramax’s London office.<sup>149</sup> She couldn’t speak of the alleged harassment because under the terms of a contract negotiated between her and Weinstein’s attorneys, she had agreed to never share her story.<sup>150</sup> According to a New York Times report,

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<sup>142</sup> Mandatory Arbitration Transparency Act, S.647, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/647>.

<sup>143</sup> Minna J. Kotkin, *How the Legal World Built a Wall of Silence Around Workplace Sexual Harassment*, WASH. POST (Oct. 20, 2017), [https://www.washingtonpost.com/outlook/how-the-legal-world-built-a-wall-of-silence-around-workplace-sexual-harassment/2017/10/20/ac1f41dc-b2b1-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.89251de241d5](https://www.washingtonpost.com/outlook/how-the-legal-world-built-a-wall-of-silence-around-workplace-sexual-harassment/2017/10/20/ac1f41dc-b2b1-11e7-9e58-e6288544af98_story.html?utm_term=.89251de241d5).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FINANCIAL TIMES (Oct. 23, 2017), <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589>.

<sup>149</sup> *Id.*

<sup>150</sup> Caitlin Gibson, *NDA's Kept the Lid on Harassment Scandals—And Why That Might Be Changing*, WASH. POST (Oct. 25, 2017), <https://www.washingtonpost.com>.

employees of Weinstein's company were required to sign contracts promising not to make statements that could harm the reputation of the firm or its top executives.<sup>151</sup> When these woman sued Weinstein for harassment, he and his company settled the claims confidentially—pairing payments with a condition that the plaintiffs not talk about the details of their cases, which allowed Weinstein to continue his behavior because the victim was paid off in secret.<sup>152</sup> In non-disclosure agreements, parties are not allowed to discuss what happened in the matter, and if they do, they will face money damages.<sup>153</sup> Arbitration agreements almost always contain non-disclosure agreements.<sup>154</sup>

### III. AN ANALYSIS OF CONGRESSIONAL EFFORTS

Going back to the principles, this article will assess the bills on: (1) whether the bills appropriately permit disclosure of the identity of the harasser, (2) whether the legislation allows non-disclosure agreements in settlement, and (3) whether the bills give victims of sexual harassment the freedom of choice. Over the past ten years, there have been several attempts to amend the FAA to combat sexual harassment, including but not limited to: (1) the Arbitration Fairness Act of 2017, (2) the Restoring Statutory Rights and Interests of the States Act, (3) the Mandatory Arbitration Transparency Act of 2017, and (4) Ending Forced Arbitration of Sexual Harassment Act of 2017. Opponents of employment arbitration want mandatory pre-dispute arbitration agreements banned outright.<sup>155</sup> On the other hand, supporters want arbitration left alone.<sup>156</sup> Ultimately,

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com/lifestyle/style/how-ndas-kept-the-lid-on-harassment-scandals—and-why-that-might-be-changing/2017/10/25/62af1e30-b99d-11e7-a908-a3470754bbb9\_story.html?utm\_term=.cf05ba786933.

<sup>151</sup> *Id.*

<sup>152</sup> Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017, 7:20 AM), <https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda>.

<sup>153</sup> Nina Dadpey, *Issues Enforcing Nondisclosure Agreements*, ASSOCIATION OF CORPORATE COUNSEL (Apr. 7, 2017), <https://www.acc.com/legalresources/quickcounsel/issues-enforcing-nondisclosure-agreements.cfm>.

<sup>154</sup> *Id.*

<sup>155</sup> *Arbitration*, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, <https://www.consumeradvocates.org/for-consumers/arbitration> (last visited Feb. 2, 2019).

<sup>156</sup> See e.g., Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements in Consumer Contracts*, IN 17TH ANNUAL CONSUMER FINANCIAL SERVICES INSTITUTE, CORPORATE LAW AND PRACTICE, COURSE HANDBOOK SERIES, B-1946 201, 221-22 (Practicing Law Institute 2012) (describing one study of arbitration participants showing that a majority thought that arbitration was faster, cheaper and simpler than going to court); Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 BUS. LAW. 1081, 1091 (1988) (“The primary advantage for

the decision to arbitrate should be up to the victim.

Senators have long recognized the importance and value of a fair arbitration process. During committee hearings about arbitration, senators have expressed their intention in amending the FAA so that arbitration is a more equitable process—allowing citizens to have a “choice” between arbitration and court before a dispute arises.<sup>157</sup>

#### A. *Hearings on the Arbitration Fairness*

##### i. 2007 Hearing on the Arbitration Fairness Act

On December 12, 2007, the U.S. Senate Subcommittee on the Constitution on the Judiciary held a hearing on the Arbitration Fairness Act of 2007.<sup>158</sup> Senator Russ Feingold, Chair of the Senate Judiciary Subcommittee on the Constitution, discussed the bill’s purpose:

Just as its name suggests, the Arbitration Fairness Act is designed to return fairness to the arbitration system. Arbitration can be a fair and efficient way to settle disputes. I strongly support voluntary alternative dispute resolution methods, and we ought to encourage their use. What this bill does, though, is ensure that citizens once again have a true choice between arbitration and the traditional civil court system by making unenforceable any predispute agreement that requires arbitration of a consumer, employment, or franchise dispute. The bill does not apply to mandatory arbitration systems agreed to in collective bargaining, and it certainly does not prohibit arbitration if all parties agree to it after a dispute arises.<sup>159</sup>

##### ii. 2009 Hearing: Examining the use of Arbitration in Employment Contracts, Long-Term Care Facility Admission Contracts and Other Consumer Contracts

On September 15, 2009, the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, examined the use of arbitration in employment contracts, long-term care facility admission contracts, and other consumer contracts.<sup>160</sup> During the hearing

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consumers in binding arbitration is that it offers at least the possibility of a faster and cheaper decisionmaking mechanism for their complaints.”).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> S. 1782, *The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary U.S. Senate, 110th Cong. (2007)* (statement of Senator Russ Feingold, Chair of the Senate Judiciary Subcommittee on the Constitution), <https://www.gpo.gov/fdsys/pkg/CHRG-110shrg42605/pdf/CHRG-110shrg42605.pdf>.

<sup>160</sup> *The Federal Arbitration Act: Is the Credit Card Industry Using the Act to*

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Congresswoman Linda T. Sanchez Stated:

Last Congress, when I chaired this Subcommittee, we held several hearings to investigate the fairness and usefulness of arbitration agreements. We learned among other things that arbitration is a very useful alternative to the court system, but especially when the parties agreeing to arbitrate have about the same level of knowledge and the same amount of sophistication regarding it. On the other hand, we also found that in certain circumstances arbitration agreements can be forced on vulnerable parties who have little knowledge about what they are signing, and quite frankly, little choice, if any choice, in the matter at all. I want to be very clear that I strongly support the principles of arbitration and the arbitration process. Arbitration can clear court dockets, provide swift resolution and reduce legal fees. But because it can also limit evidence and damages and deny the possibility of a jury trial, it must be willingly entered into by both parties, not just the party with the superior economic power.<sup>161</sup>

She further stated:

There is nothing that would take it away in a post-dispute, which means that parties after a dispute arises could agree to have their dispute settled in binding arbitration if they so choose. But it would not force people into that scenario when they haven't had adequate time to recognize what they are signing when they sign a mandatory, pre-dispute, binding arbitration clause.<sup>162</sup>

iii. 2011 Hearing: Arbitration: Is It Fair When Forced?

On October 13, 2011, Senator Al Franken (D-MN) presided over a Senate Judiciary Committee hearing titled "Arbitration: Is It Fair When Forced?"<sup>163</sup> The Senate Judiciary Committee held a full committee hearing on the fairness of "forcing consumers and employees into arbitration."<sup>164</sup> The witnesses who testified for the majority were Minnesota Attorney General Lori Swanson, Dr. Deborah Pierce, and Public Justice attorney Paul Bland.<sup>165</sup> The witnesses testifying for the minority were Victor Schwartz, on behalf of the U.S. Chamber of Commerce, and Professor Christopher Drahozal.<sup>166</sup>

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*Quash Legal Claims: Hearing Before the Subcomm. on Com. and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. (2009).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Arbitration: Is it Fair When Forced?: Hearing Before the Comm. On Judiciary*, 112th Cong. 1 (2011).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

The most powerful testimony came from Dr. Pierce and Attorney General Swanson. Dr. Pierce testified about her experience going through the forced arbitration process when she was the victim of gender discrimination by a medical partnership in Pennsylvania.<sup>167</sup> Her employment contract required that she take her case to arbitration before the American Health Lawyers Association.<sup>168</sup> After a long, expensive process, the arbitrator ruled against her.<sup>169</sup> In her testimony she said: “[f]or me, the mandatory arbitration process was unbelievably expensive, unfair and biased. It took away my faith in a fair and honorable legal system which is supposed to protect the civil rights of its citizens.”<sup>170</sup> She explained that the arbitration process never allowed her a meaningful opportunity to have her Title VII employment discrimination claim heard.<sup>171</sup> This is the key issue with nondisclosure agreements.

### *B. Legislative Efforts*

#### *i. The Arbitration Fairness Act (AFA)*

The Arbitration Fairness Act (AFA) was reintroduced in 2018, in the Senate by Senator Franken.<sup>172</sup> The AFA would amend the FAA by making it unlawful for employers to impose arbitration on employees except when knowingly and voluntarily agreed to after a dispute arises or pursuant to a collective bargaining agreement.<sup>173</sup> The AFA does not ban voluntary arbitration.<sup>174</sup> The text of the bill is identical to prior versions of the bill.<sup>175</sup>

The Arbitration Fairness Act prevents forced pre-dispute arbitration clauses.<sup>176</sup> Consumers may still opt to arbitrate a dispute with a company but only when that consumer determines that it is the appropriate forum at the time the conflict arises and not before.<sup>177</sup> If passed, the AFA will mandate that “no predispute arbitration agreement shall be valid” if it requires the arbitration of an employment, consumer, franchise, or civil

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Arbitration: Is it Fair When Forced?: Hearing Before the Comm. On Judiciary, 112th Cong. 1 (2011).*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Arbitration Fairness Act, S.2591, 115th Cong. (2018).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

rights dispute.<sup>178</sup> Although this bill gives victims of sexual harassment the freedom of choice of forum, the bill does not address whether it allows non-disclosure agreements in settlement.<sup>179</sup>

ii. The Mandatory Arbitration Transparency Act (MATA) of 2017.

On March 15, 2017, Senator Richard Blumenthal (D-CT) introduced MATA.<sup>180</sup> The introduction of MATA represents a new approach to limit the harmful effects suffered by workers who are “forced” to arbitrate workplace claim.<sup>181</sup> The bill prohibits enforcement of any pre-dispute forced arbitration provision that contains a “covered confidentiality clause,” defined as communications that would violate a state or federal whistleblower statute, those involving tortious or other unlawful conduct disputes, or issues of public policy or concern.<sup>182</sup>

MATA establishes an exception if either party can demonstrate a confidentiality interest that significantly outweighs the private and public interest in disclosure.<sup>183</sup> Confidentiality clauses are typically included in forced arbitration provisions and serve to shield employers from accountability by keeping workplace violations, including widespread misconduct by an employer, secret from the public and from other employees who might seek redress for similar grievances.<sup>184</sup> Essentially this bill establishes that if there is a mandatory arbitration provision in a contract and if in that provision there is a further provision for confidentiality, the mandatory arbitration provision cannot be enforced against the employee. So, any mandatory arbitration agreement that contains a provision for confidentiality is a non-enforceable agreement to arbitrate. As a result, there would be no arbitration agreement and the victim of harassment would be free to sue in court. However, MATA allows an exception: if either party can demonstrate a confidentiality interest that significantly outweighs the public interest in disclosure.<sup>185</sup>

The party seeking confidentiality has the burden of demonstrating an interest in including a confidentiality clause in the arbitration agreement.<sup>186</sup> The default provision should be non-confidentiality. But,

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<sup>178</sup> Arbitration Fairness Act, S.2591, 115th Cong. (2018).

<sup>179</sup> *Id.*

<sup>180</sup> The Mandatory Arbitration Act, S.647, 115th Cong. (2017).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> The Mandatory Arbitration Act, S.647, 115th Cong. (2017).

when considering the exception to allow a non-confidentiality clause, the victim in a sexual harassment claim should have a lower burden to prove their interest in confidentiality. On the other hand, the employer would have the same “interest.” However, under the circumstance of workplace sexual harassment, employers should have a higher burden. Certain “interests” brought by employers should not be allowed to be considered. Interests may run afoul of: (1) public interest and (2) protection of employees.

This section of the article will explain why a higher burden should be placed on employers. The factors that are suspect in terms of the employer’s “interest” for confidentiality are: (1) slander and (2) the effect the confidential information would have on the employer’s business. These factors are not valid in terms of consideration for employers to have confidentiality agreements in pre-arbitration disputes.

#### 1. Slander: Why it is Not a Valid Interest

Should there be an interest that would allow the setting aside of confidentiality? No employer wants to admit sexual harassment either could or already has happened in the workplace. In protecting their “reputation” after sexual harassment settlements, however, the company’s behavior supersedes the attempt to reach a societal good in which women are protected in the work place.

Considerations include “deterrence” on one hand (i.e. exposure of the identity of the employer should encourage the employer to clean up its act) and the “reputation” interest of the employer on the other hand, which is an economic interest. An economic interest should not be elevated above the deterrence value that would be achieved by exposure. A company that conceals its identity and behavior while facing sexual harassment claims only impedes attempts to protect women in the workplace by keeping other employees ignorant of the dangerous environment. Men and women have a right to be aware of the workplace environment they will be employed in. While it is important for companies to promote the wonderful aspects of their workplace culture, it is equally important for current and future employees to be aware of the dangers in their workplace culture.<sup>187</sup> This creates a space of transparency and protection that is necessary for employees.

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<sup>187</sup> Dr. Michelle Rozen, *The Seven Characteristics of Successful Company Cultures*, HUFFINGTON POST (Sept. 29, 2017, 09:03 AM), [https://www.huffingtonpost.com/michelle-rozen/the-seven-characteristics\\_b\\_11339884.html](https://www.huffingtonpost.com/michelle-rozen/the-seven-characteristics_b_11339884.html).

## 2. Does the Grievant Have Options? The Dangers of Total Bans on NDAs in Arbitration

A total ban on non-disclosure agreements (NDAs) is insufficient. The remedial needs of victims should be a priority. What matters the most when a complaint arises is that it is resolved in a way that is positive for the victim. To achieve this outcome, the resolution process may need to be private and include a non-disclosure agreement, at the discretion of the victim. Often, employees who experience harassment fail to report the behavior or file a complaint because they anticipate and fear a number of reactions: disbelief of their claim, inaction on their claim, receipt of blame for causing the offending actions, social retaliation (including humiliation and ostracism), and professional retaliation, such as damage to their career and reputation.<sup>188</sup>

With this understanding, a victim who complains and is subject to arbitration may reasonably choose to have an NDA. These fears are valid and well founded. One 2003 study found that seventy-five percent of employees who spoke out against workplace mistreatment faced some form of retaliation.<sup>189</sup> Other studies have found that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as hostility and reprisals against the victim.<sup>190</sup> Such responses understandably harm the victim in terms of adverse job repercussions and psychological distress.<sup>191</sup> One researcher concluded that based on these results, the most “reasonable” course of action for the victim to take in many work environments is to avoid reporting the harassment.<sup>192</sup> Legislative attempts to amend arbitration

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<sup>188</sup> Lilia M. Cortina, *Workplace Harassment: Examining the Scope of the Problem and Potential Solutions*, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), [https://www.eeoc.gov/eeoc/task\\_force/harassment/testimony\\_cortina.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm) (citing K. A. Lonsway et al., *Sexual Harassment in Law Enforcement: Incidence, Impact and Perception*, 16 POLICE QUARTERLY 117 (June 2013)).

<sup>189</sup> Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOLOGY 247, 255 (2003).

<sup>190</sup> Mindy Bergman et al., *The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87(2) J. APPLIED PSYCHOLOGY 230 (2002).

<sup>191</sup> Bergman et al., *supra* note 187; Cortina & Magley, *supra* note 186.

<sup>192</sup> Mindy E. Bergman, *Workplace Harassment: Examining the Scope of the Problem and Potential Solutions*, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), [https://www.eeoc.gov/eeoc/taskforce/harassment/testimony\\_bergman.cfm](https://www.eeoc.gov/eeoc/taskforce/harassment/testimony_bergman.cfm) (“It is actually *unreasonable* for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies and created further damage to people who had already been harassed. Further, because

should be careful regarding total bans on NDAs because some victims, if given the option, may want to have a NDA. As mentioned previously, more focus should be put on the details of the NDA. For example, an important consideration is whether the NDA is unilateral and would allow one party more control over the agreement.

The legislation does not go far enough. Pursuant to the current language of the bill, an employer may argue it has an interest in non-disclosure.<sup>193</sup> The bill should clarify and limit what can be considered as a valid interest. Otherwise, non-disclosure agreements are still going to be enforced in arbitration agreements once employers claim they have an “interest.”

iii. The Restoring Statutory Rights and Interests of the States Act

On February 4, 2016, Senator Patrick J. Leahy (D-VT) introduced the Restoring Statutory Rights and Interests of the States Act.<sup>194</sup> First, the bill attempts to exempt from the FAA claims brought by individuals or small businesses arising from violations of federal or state law, the U.S. Constitution, or a state constitution and would permit these claims to proceed in a court of law.<sup>195</sup> Arbitration is still an option if the parties voluntarily choose to arbitrate a dispute after it arises.<sup>196</sup> Second, the bill would allow federal and state courts to apply their respective jurisdictional laws concerning contract interpretation to find arbitration provisions unconscionable or unenforceable notwithstanding the FAA.<sup>197</sup> Third, the bill would give to the courts, not arbitrators, the essential task of determining whether an arbitration agreement is enforceable in the first place.<sup>198</sup>

Due to the scope of this article, this article will only address the first point: exempting claims arising from federal or state law and giving the victim the choice of deciding which forum to adjudicate their case. The legislation would ensure that fine-print terms of corporate contracts, specifically pre-dispute binding (or mandatory) arbitration clauses, no longer prevent an aggrieved employee the rights and remedies guaranteed

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remediating the situation did not make the person whole—that is, did not overcome the damage caused by harassment—and helpful vs. hurtful responses were each found about 50% of the time, reporting is a gamble that is not worth taking in terms of individual well-being.”).

<sup>193</sup> *Id.*

<sup>194</sup> Restoring Statutory Rights and Interests of the States Act, S.2506, 114th Cong. (2016).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

by civil rights and other state and federal laws. Increasingly, employers insert mandatory arbitration terms in non-negotiable contracts with their workers that require disputes to be resolved in private arbitration proceedings instead of in court.<sup>199</sup> Numerous types of worker claims arise out of some form of a contract, and many claims of wrongdoing are based on violations of state and federal law.<sup>200</sup>

The Act addresses pre-dispute arbitration but does not mention the possibility of parties agreeing to have their pre-dispute claim arbitrated.<sup>201</sup> Both parties should have the option to arbitrate or not. And if parties elect to arbitrate sexual harassment claims (though it is not necessarily the best forum for these claims), then the Act should also address to what extent NDAs are valid and the process of arbitrating these claims. Arbitration is still an option if the parties voluntarily choose to arbitrate a dispute after it arises.<sup>202</sup> This allows the victim autonomy in choosing the right forum for his or her dispute. This bill does not discuss whether it allows NDAs in settlement—in the instance that employees would like to have their dispute brought in arbitration.<sup>203</sup> This is an important option for the victim to have. It is critical for victims to be able to have the option to hide their identity and not the harasser's.

#### iv. Ending Forced Arbitration of Sexual Harassment Act of 2017

Senator Kirsten Gillibrand (D-NY) introduced The Ending Forced Arbitration of Sexual Harassment Act of 2017.<sup>204</sup> An identical version of the bill was introduced in the House by Congresswoman Cheri Bustos.<sup>205</sup> The bills would combat sexual harassment by prohibiting forced arbitration of sex discrimination claims, including alleged discriminatory pay or benefits, discharge, failure to promote, or other common adverse actions.<sup>206</sup> The bill defines sex discrimination disputes as any employment dispute arising from cognizable sex discrimination claims under Title VII of the Civil Rights Act of 1964.<sup>207</sup> An employer likely

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<sup>199</sup> Szalai *supra* note 63.

<sup>200</sup> The Mandatory Arbitration Act, S.647, 115th Cong. (2017).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> She was joined by cosponsors Senators Lindsay Graham (R-SC), Kamala Harris (D-CA), Lisa Murkowski (R-AK), Dick Durbin (D-IL), Heidi Heitkamp (D-ND), and Diane Feinstein (D-CA).

<sup>205</sup> Ending Forced Arbitration of Sexual Harassment Act, H.R.4734, 115th Cong. (2017). The cosponsors included: Representatives Walter B. Jones, Jr. (R-NC), Elise Stefanik (R-NY), and Jayapal Pramila (D-WA).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

would be unable to compel a claim of sex discrimination into arbitration and thus would have to litigate sex discrimination claims publicly in federal or state court.

The Act makes no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute.<sup>208</sup> This part of the bill could be beneficial for the victim because it allows the victim autonomy and freedom of choice to bring his or her dispute to court. However, the bill goes a bit too far in that it attempts to eliminate the practice of arbitration through the “technical and conforming amendment.”<sup>209</sup>

Currently, Section 1 of the FAA contains an exclusion from its mandate to enforce arbitration agreements for employees involved in transportation.<sup>210</sup> This amendment would strike certain limiting language from Section 1 of the FAA so that Section 1 simply would read as follows: “nothing herein contained shall apply to contracts of employment.”<sup>211</sup> As a result, the FAA arguably no longer could be used as the vehicle to enforce any arbitration agreement in the employment context. This language likely would mean that employers would not be able to enforce arbitration agreements with their employees. It would not matter whether the agreement is optional or a condition of employment or if it contained a waiver of the ability to bring a class or collective action.

Combating sexual harassment by prohibiting mandatory arbitration of sex discrimination claims is an effective way to prevent employment contracts from precluding sexual harassment victims to raise their claim in court. However, the Ending Forced Arbitration of Sexual Harassment Act should address other important factors in the resolution of sexual harassment claims. The primary issue that policy makers must address is having a work place that’s a safe environment for workers.

The broader the legislation, the more people it affects. These legislative initiatives are an attempt to address issues in the workplace with regard to workers (mostly women) affected by sexual harassment. It seems that the legislation goes beyond that and in some ways diminishes the focus on women in the work place. The problem in

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> 9 U.S.C. § 1 (2018).

<sup>211</sup> Seyfarth Shaw, *SLOW DOWN Congress: You Are About to Render the FAA Inapplicable to Employment Disputes (and Class Waivers), and You Probably Don’t Realize It*, WAGE & HOUR LITIGATION BLOG (Dec. 7, 2017), <https://www.wagehourlitigation.com/arbitration-agreements/slow-down-congress-you-are-about-to-render-the-faa-inapplicable-to-employment-disputes-and-class-waivers-and-you-probably-dont-realize-it/>.

arbitration has mainly been where women have been sexually harassed and forced to arbitrate the dispute and sign a confidentiality agreement. The bill, however, goes further than its title (Ending Forced Arbitration of Sexual Harassment) and attempts to do away with the process of employment arbitration. The arbitration process needs to be re-structured so that sexual harassment victims have a similar process to the court system. Then, the victim could have two somewhat equal options to choose from to adjudicate their issue—either in court or arbitration.

In February 2018, Attorneys General throughout the country touched on some of these points in a letter to Congress.<sup>212</sup> Every Attorney General in the U.S. signed a letter to Congress demanding lawmakers end the practice of mandatory arbitration in sexual harassment cases.<sup>213</sup> In the letter, the Attorneys General noted: “[w]hile there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.”<sup>214</sup> Although some arbitrators are actually attorneys, the Attorneys General touch on a key issue of arbitration reform: if sexual harassment claims are arbitrated (whether because both parties agreed post-disputes or some other fair reason), policy makers should focus on making the process more just.

The Attorneys General also touched on NDAs stating:

Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.<sup>215</sup>

As mentioned previously, NDAs and arbitration are separate but often parties in arbitration sign NDAs.<sup>216</sup>

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<sup>212</sup> Letter from National Association of Attorneys General to Congressional Leadership (Feb. 12, 2018), [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

## IV. CONCLUSION

As Paulo Freire writes: “[m]any political and educational plans have failed because their authors designed them according to their own personal views of reality, never once taking into account (except as mere objects of their actions) the men-in-a-situation to who their program was ostensibly directed.”<sup>217</sup> Currently, the process of arbitration is not the best forum for resolving sexual harassment disputes. If Congress amends the FAA, there are many structural changes that need to be implemented in the process to make it more victim centered. Legislation needs to appropriately permit the disclosure of the harasser’s identity, allow the victim the option to enforce NDAs in settlement, and give victims of sexual harassment the freedom of choice. In other words, the victims should have the option (after a dispute arises) to decide whether to resolve a claim in an arbitration forum or in court.

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<sup>217</sup> PAULO FREIRE, *THE PEDAGOGY OF THE OPPRESSED* (1970).