

Pre-Dispute Mandatory Arbitration of Sexual Harassment Complaints: Bad for Business Too

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INTRODUCTION

Consider a recent twenty-one-year-old college graduate who, over a six-week period, survived three rounds of interviews with a large coveted corporation. The human resources director finally contacts the applicant to relay an offer of employment over the telephone but limits the details to the salary, vacation, and start date. The applicant, elated by the call, anxiously waits for the written offer to arrive. The offer arrives by mail with a package of paperwork for our applicant to sign before starting employment. As she sifts through the paperwork, she finds an employment agreement containing the following clauses:

Arbitration. If a dispute arises while you are employed by Coveted Corporation, you agree to submit any dispute arising out of your employment or the termination of your employment (including, but not limited to, claims of unlawful termination based on race, gender, age, national origin, disability, or breach of contract) exclusively to binding arbitration under the Federal Arbitration Act, 9 U.S.C., Section 1. This arbitration shall be the exclusive means of resolving any dispute arising out of your employment or termination from employment by Coveted Corporation or you, and no other action can be brought in any court.

Confidentiality. The arbitration proceedings and arbitration award shall be maintained by you and Coveted Corporation required by court order or necessary to confirm, vacate or enforce the award and for disclosure in confidence to the parties' respective attorneys and tax advisors.

The applicant reads these clauses and the remainder of the employment agreement, wondering what options she really has. As a recent college graduate with no experience, she decides not to explore the meaning of this language. After all, she does not want to jeopardize her employment opportunity and believes she will never have a dispute with her new employer. The applicant signs the agreement and begins her employment. Six months into her employment, she faces repeated unwanted sexual advances from her supervisor.

The employee consults the materials she received at the start of her employment. There, she finds the following statement from her employer in the employee handbook which quotes the Global Code of Conduct:

We do not tolerate harassment at Coveted Corporation. As employees, we are all expected to act in a professional manner and to avoid any action or behavior that, if unwelcome, may be considered harassment or sexual harassment.

“Harassment” includes any conduct that unreasonably interferes with an individual’s work performance or creates an intimidating, hostile, or otherwise offensive environment. Harassment can take many forms, including using slurs, epithets, inappropriate gestures, or making demeaning jokes. Regardless of the form it takes, behavior like this is not tolerated.

We report harassment. If you think you or someone else has been subjected to any form of harassment at Coveted Corporation (whether by an employee, customer, contractor, vendor, or supplier) we ask you to report it promptly to your immediate supervisor, another manager in your area, or your Human Resources contact. Remember, no matter which method you choose to use to report your concerns, we prohibit any form of retaliation or victimization against you for making a good-faith complaint. If you are a supervisor and hear an allegation of harassing behavior, you are expected to act promptly and to appropriately notify a Human Resources Manager.

In accordance with her employee handbook, the employee meets with human resources to discuss her hostile work environment and how to address the unwanted sexual advances from her supervisor. Unfortunately, the situation does not improve and she looks for help outside her employer. Her attorney tells her that the current state of the law likely limits her options. Having signed the “take-it-or-leave-it” employment agreement, the attorney tells her client that she may be bound to its terms, thereby preventing her from accessing the court system. Instead, the employee learns that she may need to rely on a system of arbitration for relief. Unfortunately, that system has numerous flaws.¹ Her attorney closes the conversation with a warning not to discuss this matter with anyone else, as she would risk violating the Confidentiality Clause in her agreement.

The employee is not alone in her traumatic experiences at Coveted Corporation. According to a 2016 study by the Equal Employment Opportunity Commission (“the EEOC”), approximately sixty percent (60%) of female employees report that they have experienced at least one specific instance of sexually harassing behavior, such as unwanted sexual attention or sexual coercion.² This EEOC report is consistent with the findings of the Pew Research Center which found that fifty-nine percent (59%) of women have personally received unwanted sexual advances or verbal or physical harassment

1. See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

2. U.S. EQUAL OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF WORKPLACE SEXUAL HARASSMENT (2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

of a sexual nature, whether in or outside of a work context.³ With over 27,000 harassment complaints in 2017, sexual harassment is the most common complaint made to the EEOC.⁴ Making this more troubling, approximately ninety percent (90%) of individuals who say they have experienced sexual harassment never formally report the incident or incidents.⁵

Until recently, this fictional employee's harassment and the troubling experiences of other victims rarely captured the hearts of those uninvolved with the case. However, the #MeToo movement and the Harvey Weinstein saga gave birth to a wave of reported cases and consideration by Congress.⁶ In response, Senator Kirsten Gillibrand introduced a bill entitled Ending Forced Arbitration of Sexual Harassment Act of 2017.⁷ That bill and its identical companion in the House of Representatives,⁸ introduced by Representative Cheryl Bustos, stated that "no pre[-]dispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute."⁹ In a press release issued on December 6, 2017, Senator Gillibrand made the following comments:

When a company has a forced arbitration policy, it means that if a worker is sexually harassed or sexually assaulted in the workplace, they are not allowed to go to court over it; instead, they have to go into a secret meeting with their employer and try to work out some kind of deal that really only protects the predator. They are forbidden from talking about what happened, and then they are expected to keep doing their job as if nothing happened to them. No worker should have to put up with such an unfair system.¹⁰

Senator Gillibrand's statement also describes the situation facing the fictional employee above. The courtroom is not open and she must remain

3. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RESEARCH CENTER (Apr. 4, 2018), www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/.

4. *All Charges Alleging Harassment (Charges filed with EEOC) FY 2010 - FY 2017*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

5. *Moving Women Forward On the 50th Anniversary of Title VII of the Civil Rights Act*, EQUAL RIGHTS ADVOCATES (2014), <https://www.equalrights.org/wp-content/uploads/2015/04/ERA-Moving-Women-Forward-Part-Three-Equal-Pay1.pdf>.

6. 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=.b33e92f9c459.

7. S. 2203, 115th Cong. § 402(a) (2017).

8. H.R. 4734, 115th Cong. § 402(a) (2017).

9. *Id.*

10. Press Release, Kirsten Gillibrand, Standing With Gretchen Carlson, Senators Gillibrand And Graham And Representative Bustos Announce Bipartisan Legislation To Help Prevent Sexual Harassment In The Workplace, Void Forced Arbitration Agreements That Prevent Sexual Harassment Survivors From Getting The Justice They Deserve (Dec. 6, 2017), <https://www.gillibrand.senate.gov/news/press/release/standing-with-gretchen-carlson-senators-gillibrand-and-graham-and-representative-bustos-announce-bipartisan-legislation-to-help-prevent-sexual-harassment-in-the-workplace-void-forced-arbitration-agreements-that-prevent-sexual-harassment-survivors-from-getting-the-justice-they-deserve>.

quiet. In the same press release, Representative Bustos made the following statements:

If we truly want to end sexual harassment in the workplace, we need to eliminate the institutionalized protections that have allowed this unacceptable behavior to continue for too long. . . Whether it's on factory floors, in office buildings or retail businesses, 60 million Americans have signed away their right to seek real justice and most don't realize it until they try to get help. Our legislation is very straightforward and simple—if you have been subjected to sexual harassment or discrimination in the workplace, we think you—not the employer—should have the right to choose to go to court. While there are a lot of good companies that take sexual harassment seriously and work to prevent it, this legislation will help root out bad actors by preventing them from sweeping this problem under the rug.¹¹

Representative Bustos focuses on the institutionalized protections provided to the perpetrators, but acknowledges the progress certain companies have made. Gretchen Carlson, a sexual harassment victim of Roger Ailes while at Fox News,¹² stood with members of Congress at the introduction of S. 2203. There she made the following statement:

Forced arbitration is a harasser's best friend. It keeps harassment complaints and settlements secret. It allows harassers to stay in their jobs, even as victims are pushed out or fired. It silences other victims who may have stepped forward if they'd known. It's time we as a nation-together-in bipartisan fashion give a voice back to victims.¹³

In her statement, Carlson added her voice to the call to end the secrecy that provides the veil of protection for harassers. She also called for bipartisan legislation to lift that veil. Some legislators appear to have heard the call for bipartisan legislation. The Senate Bill has eighteen Cosponsors, fifteen Democrats and three Republicans.¹⁴ The identical House Bill has sixteen cosponsors, eight Republicans and eight Democrats.¹⁵ Despite its bipartisan support in the Senate and the House of Representatives, Skopos Labs¹⁶ has asserted that the bill has only a three percent chance of being enacted, and the bills have not moved past the committee stage in either the House of

11. *Id.*

12. Tom Huddleston, Jr., *Gretchen Carlson Gets Reported \$20 Million and Apology from Fox News*, FORTUNE (Sept. 6, 2016), <http://fortune.com/2016/09/06/fox-gretchen-carlson-settlement-apology/>.

13. Press Release, Kirsten Gillibrand, *supra* note 10.

14. Richard Blumenthal (D-CT), Chris Coons (D-DE), Richard Durbin (D-IL), Dianne Feinstein (D-CA), Lindsay Graham (R-SC), Kamala Harris (D-CA), Heidi Heitkamp (D-ND), John Kennedy (R-LA), Edward Markey (D-MA), Catherine Cortez Masto (D-NV), Lisa Murkowski (R-AK), Martin Heinrich (D-NM), Mazie Hirono (D-HI), Debbie Stabenow (D-MI), Margaret Hassan (D-NH), Jeanne Shaheen (D-NH), Jeff Merkley (D-OR), and Sheldon Whitehouse (D-RI).

15. Don Bacon (R-NE2), Susan Brooks (R-IN5), Barbara Comstock (R-VA10), Debbie Dingell (D-MI12), Brian Fitzpatrick (R-PA8), Lois Frankel (D-FL21), Jenniffer Gonzalez-Colon (R-PR0), Morgan Griffith (R-VA9), Luis Gutierrez (D-IL4), Pramila Jayapal (D-WA7), Walter Jones (R-NC3), Ann Kuster (D-NH2), Zoe Lofgren (D-CA19), Jacky Rosen (D-NV3), and Elise Stefanik (R-NY21).

16. Skopos Labs, Inc., founded by Professor J.B. Ruhl of Vanderbilt Law School, and computer science Ph.D. John Nay and others, uses artificial intelligence to predict the success of legislation. Its predictions appear on GovTrack at <https://www.govtrack.us/>.

Representatives or Senate.¹⁷ As discussed in Part II, this bill is not the first attempt to legislate the elimination of mandatory pre-dispute employment arbitration agreements, but is the most recent attempt.

The #MeToo movement and the Harvey Weinstein scandal focused our attention on the fairness or lack of fairness for victims of workplace sexual harassment and other discrimination. These victims, forced to pursue their claims in mandatory arbitration proceedings, need a better remedy than provided in their employment agreements. With the increase in the use of these agreements,¹⁸ the need for a solution has become more urgent. Past legislative failures do not generate confidence in a quick successful resolution. This Article, rather than suggesting a legislative solution as the best alternative, argues that our society should demand better corporate citizenship from employers. The recent social movements, fast-paced reaction spurred on by social media, and the attributes of today's employees entering the workforce may indeed provide such an opportunity. This Article begins in Part I by discussing a history of the law, limitations on the law's application, and employees' efforts to avoid mandatory arbitration provisions. Part II describes the federal and state legislative, regulatory, and executive efforts to limit the reach of the FAA in the employment context. Part III explains the need for transparency and accountability in the handling of sexual harassment complaints. Part IV calls for better corporate citizenship rather than continuing the fruitless pursuit of legislation.

I. MANDATORY PRE-DISPUTE EMPLOYMENT ARBITRATION AGREEMENTS AND RECENT DEVELOPMENTS

Before beginning a discussion of the legal history, it is important to define the types of agreements in dispute. Like the fictional college graduate's agreement, a mandatory pre-dispute employment arbitration agreement refers to a "prospective agreement between employer and employee to resolve future employment disputes by binding arbitration."¹⁹ Employers can include these agreements in employment contracts and employee handbooks, or they may appear as standalone agreements.²⁰ Sometimes these agreements are inserted into employment applications.²¹ In addition, some jurisdictions will go so far as to infer an employee's agreement to arbitrate if the employee continues to

17. *S. 2203: Ending Forced Arbitration of Sexual Harassment Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s2203>.

18. See *infra* Part III.

19. Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 594 (1995).

20. Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 8 (2014).

21. *Id.*

work for the company after receiving notice of the company's policy requiring the arbitration of employment-related claims.²² In *Howard v. Oakwood*,²³ a North Carolina appellate court found that an employee's continued employment after receiving a notice of the employer's required dispute resolution program reflected assent to arbitration. Like the fictional applicant described above, an applicant often has little or no bargaining power and cannot negotiate the terms of the agreement.²⁴ This part discusses the history of the Federal Arbitration Act ("FAA"), the development of the expansive U.S. Supreme Court interpretations of the FAA providing pro-employer benefits, and whether an employee may avoid the application of mandatory arbitration agreements in the employment context.

A. The FAA—Born from Hostility

Hostility of U.S. courts toward arbitration has its roots in the English common law.²⁵ That hostility appears in a Massachusetts Circuit Court opinion dating back to 1845, where Justice Story wrote that arbitrators "are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but *rusticum judicium*."²⁶ That hostility remained through the 1800s.²⁷ However, growing industrialization increased the number of commercial disputes and lessened some of the hostility.²⁸ In 1924, the U.S. Supreme Court upheld The Arbitration Law of New York, enacted in 1920.²⁹ The Arbitration Law of New York stated that a contract provision "shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁰ Enactment of the FAA, followed shortly thereafter and adopted much of the New York statutory language.

Because of the hostility shown to arbitration matters, the House Committee made the following comments about the FAA's purpose:

22. *Howard v. Oakwood Homes Corp.*, 516 S.E.2d 879 (N.C. Ct. App. 1999).

23. *Id.*

24. See generally Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167 (2004) (discussing the facts of jury trial waivers and the implications for arbitration).

25. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The Federal Arbitration Act's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]").

26. *Tobey v. Cty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845).

27. John C. Norling, *The Scope of the Federal Arbitration Act's Preemption Power: An Examination of the Import of *Saturn Distribution Corp. v. Williams**, 7 OHIO ST. J. ON DISP. RESOL. 140 (1991).

28. *Id.*

29. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924).

30. New York Laws of 1920, Ch. 275, effective April 19, 1920.

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.³¹

In removing the bias described above, Congress gave arbitration agreements similar treatment to other contracts to promote their enforcement.³² In addition, Congress sought to effectuate several key dispute resolution policies: (1) promoting efficiency;³³ (2) providing access to justice;³⁴ (3) ensuring freedom of contract;³⁵ and (4) diminishing the burden on the courts.³⁶

From this background, Congress wrote Section 2 of the FAA, which provides:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy 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.³⁷

The language of the FAA left a number of areas open for interpretation by the courts. Court limitations, or the lack thereof, imposed on the FAA are described below.

B. Limitations on the FAA

Courts have wrestled with the FAA's breadth since the Act's enactment. Among other issues, the courts needed to determine whether the FAA's application is limited to transactions occurring in interstate commerce, whether the FAA preempts state law, and whether the FAA applies to pre-dispute mandatory arbitration clauses in employment contracts.

31. H.R. REP. NO. 68-96, at 1-2 (1924).

32. *See id.* at 1 (noting that the FAA was designed to place arbitration agreements "upon the same footing as other contracts").

33. *See id.* at 2 (discussing Congress's desire to promote efficiency).

34. *See generally*, Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 5-6 (2009) ("Access to justice is not just a matter of courts in the basement of the house of justice. Many legal developments in the late twentieth century had a real impact on access to justice. Laws were passed that opened the way into the legal system for the underdogs, or the lawyers who represented them.").

35. *See* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 304 n.162 (1999) (noting that "[freedom of contract] was still strong in 1905 when *Lochner v. New York* was decided, and some view this period as the 'zenith' of contract in the United States"); Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 8 (1986) ("By the nineteenth century, the sanctity of contracts entered into by individuals in the exercise of their common law rights had long been one of the central norms of Liberal social thought.").

36. *See* Pettit, *supra* note 35, at 305 n. 162; Siegel, *supra* note 35, at 8.

37. 9 U.S.C. § 2 (1947).

1. Interstate Commerce Requirement

Section 2 of the FAA applies to a transaction “involving commerce.”³⁸ After enactment, the courts split in their interpretation of Section 2. Some courts concluded that the FAA applies only to those contracts where the parties “contemplated” an interstate commerce connection.³⁹ In *Burke County Public Schools Board of Education v. Shaver Partnership*, for example, a North Carolina court stated that where performance of the contract “necessarily involves, so that the parties to the agreement must have contemplated, substantial interstate activity the contract evidences a transaction involving commerce within the meaning of the Federal Arbitration Act.”⁴⁰ Other courts held that the Section 2 phrase “involving commerce” reached to the outer limits of Congress’s power under the Commerce Clause.⁴¹ In 1995, the U.S. Supreme Court finally settled the split and adopted a broad interpretation of “involving commerce” in *Allied-Bruce Terminix Companies, Inc. v. Dobson*.⁴² The Court held that the phrase “involving commerce” meant the full exercise of Congress’s power under the Commerce Clause,⁴³ and reasoned that the FAA’s legislative history “indicates an expansive congressional intent.”⁴⁴ After concluding that the phrase “involving commerce” should be interpreted broadly, the Supreme Court further determined that the FAA applies to all contracts that involve commerce and does not require the contemplation of an interstate commerce connection by the parties.⁴⁵

2. Preemption of State Law

The Supremacy Clause of the U.S. Constitution⁴⁶ mandates that state regulation must yield to the U.S. Constitution, as well as federal laws and regulations governing the same subject.⁴⁷ The FAA does not contain an express preemption clause and many states had statutes governing the validity of arbitration agreements and awards before and after the enactment of the FAA.⁴⁸

38. *Id.*

39. *See, e.g.*, *Lacheney v. Profitkey Int’l*, 818 F. Supp. 922 (E.D. Va. 1993); *Burke Cty. Pub. Sch. Bd. of Educ. v. Shaver P’ship*, 279 S.E.2d 816 (N.C. 1981); *R.J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. Ct. App. 1982).

40. *Burke*, 279 S.E.2d at 822.

41. *See, e.g.*, *Foster v. Turley*, 808 F.2d 38 (10th Cir. 1986); *Snyder v. Smith*, 736 F.2d 409 (7th Cir. 1984).

42. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995).

43. *Id.* at 274.

44. *Id.*

45. *Id.* at 278.

46. U.S. CONST. art. VI, cl. 2.

47. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992).

48. *See Kristin M. Blankley, Impact Preemption: A New Theory of Federal Arbitration Preemption*, 67 FLA. L. REV. 711, 728 (2016) (all fifty states and the District of Columbia had statutes enforcing awards granted in arbitration).

As a result, the courts eventually had to consider whether the FAA preempts state laws.⁴⁹ The courts faced state legislation and court rulings that placed restrictions on the enforcement of mandatory arbitration clauses, particularly where the states found unequal bargaining power between the contracting parties.⁵⁰ These restrictions included state requirements that mandated a judicial forum in certain matters and special conditions or procedural safeguards for use in the arbitration process.⁵¹ In its 1984 *Southland Corp. v. Keating* opinion, the U.S. Supreme Court held that the FAA applies in state court and overrides contrary state law.⁵²

Despite the *Southland* opinion, state legislatures and state courts continued to test the limits of preemption with their attempts to invalidate certain mandatory arbitration agreements. They did so by voiding agreements where they believed that arbitration would be unfair, contrary to public policy, or unfair to vulnerable individuals.⁵³ In considering these preemption matters, the U.S. Supreme Court has held that the FAA supersedes state laws that “undermine the goals and policies of [the Act].”⁵⁴ For example, the U.S. Supreme Court struck down a Montana law requiring a first-page notice to employees that the employment “contract is subject to arbitration” because a similar notice requirement did not apply to all contracts.⁵⁵ A further example, outside of the employment context, involved the holding in *AT&T Mobility LLC v. Concepcion*, where the U.S. Supreme Court rejected California’s unconscionability standard as applied to class action waivers.⁵⁶ After agreeing to a class action waiver when purchasing a cellular phone and service, Vincent and Liza Concepcion sought relief against AT&T in the California courts.⁵⁷ The Concepcions relied on *Discover Bank v. Superior Court*, where the California Supreme Court held that class action waivers in consumer arbitration agreements are unconscionable if the agreement meets certain conditions.⁵⁸ The waivers must be in an adhesion contract, involve disputes over small amounts of damages, and involve an alleged scheme to defraud.⁵⁹ The U.S. Supreme Court did not agree with the Concepcions and held that the California Supreme Court’s *Discover Bank* decision was an obstacle to the

49. *Id.*

50. See generally Brian Farkus, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOTIATION L. REV. 33, 41-43 (2016).

51. See *id.* at 42.

52. *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

53. See generally Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145 (2015).

54. *Volt Info. Scis., Inc. v. Bd. of Tr.*, 489 U.S. 468, 477 (1989).

55. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

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

57. *Id.*

58. *Discover Bank v. Superior Court*, 113 P. 3d 1100 (Cal. 2005).

59. *Id.*

accomplishment and execution of the FAA and, therefore, the FAA preempted the decision.⁶⁰

3. Application to Employment Contracts

After the enactment of the FAA in 1925, uncertainty existed concerning the application of the FAA to employment contracts. Resolution came with the U.S. Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁶¹ In *Gilmer*, the Court enforced a securities industry employee's agreement to arbitrate a dispute arising from employment. This shocked employers who previously believed that the decision in *Alexander v. Gardner-Denver Co.*⁶² would bar courts from enforcing pre-dispute mandatory arbitration claims in the employment context.⁶³ This seemed to prompt businesses to compel arbitration to a greater degree and opened the floodgates for further agreements containing pre-dispute mandatory arbitration provisions.⁶⁴ In its 2001 decision in *Circuit City v. Adams*, the U.S. Supreme Court specifically ruled that the FAA applied to arbitration agreements written into employment contracts removing any doubt as to the application of the FAA to such matters.⁶⁵

C. Avoiding Application of the Agreement

However, despite its expansive application, the FAA left a "crack in the door" to dispute an arbitration clause via the "Savings Clause."⁶⁶ This phrase is contained in Section 2, stating: "upon such grounds as exist at law or in equity for the revocation of any contract."⁶⁷ The Savings Clause essentially permits arbitration challenges when an employee can prove that the contract should be revoked using ordinary contract law principles.

There are several ways in which employees can overcome mandatory arbitration agreements and bring their claims in court.⁶⁸ One such challenge involves an assertion that the employment agreements were not written

60. *Concepcion*, 563 U.S. 333.

61. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

62. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that an employee's statutory right to trial *de novo* under Title VII of the Civil Rights Act of 1964 is not foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement).

63. See Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638 (2005).

64. See *id.*

65. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

66. 9 U.S.C. § 2 (1947).

67. *Id.*

68. See Sternlight, *supra* note 63, at 1644.

sufficiently broadly to cover the particular claim made by the employee.⁶⁹ In reviewing this type of challenge, the Supreme Court has instructed that “[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”⁷⁰ Employees also challenge the validity of mandatory arbitration agreements with claims of unconscionability.⁷¹

In reviewing an agreement for unconscionability, the U.S. Supreme Court strictly adheres to the principle that arbitration agreements are “placed on the same footing as other contracts.”⁷² Therefore, employees attempting to avoid arbitration agreements needed to look within the body of existing contract law for a solution. In doing so, many such employees relied on the doctrine of unconscionability. Section 208 of the Restatement (Second) of Contracts, with respect to contracts or terms, provides:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

The U.S. Supreme Court has sanctioned unconscionability challenges to arbitration provisions, but has also made it clear that the doctrine of unconscionability may not be used to discriminate against arbitration agreements as compared to other contracts.⁷³ In reviewing pre-dispute mandatory employment arbitration agreements the U.S. Supreme Court ruled that “[m]ere inequality in bargaining power. . . , is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”⁷⁴ The California courts have interpreted this language to mean that an agreement can withstand an unconscionability challenge unless there is a showing that both procedural and substantive unconscionability exist.⁷⁵ Procedural

69. *Id.*

70. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

71. *See Sternlight, supra* note 63, at 1644.

72. *See H.R. REP. NO. 96, 68th Cong., 1st Sess., 1* (1924) (noting that the FAA was designed to place arbitration agreements “upon the same footing as other contracts”); DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463, 468 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardega*, 546 U.S. 440, 443 (2006)).

73. *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987) (“A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.”)

74. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

75. *See, e.g., 24 Hour Fitness, Inc. v. Superior Court*, 66 Cal. App. 4th 1204, 1212-13 (1998).

unconscionability refers to unfairness in the formation of the contract and substantive unconscionability refers to excessively disproportionate terms.⁷⁶

The Fourth Circuit, however, placed a limit on employer overreach and found against an employer based on substantive unconscionability alone in *Hooters of America, Inc. v. Phillips*.⁷⁷ There, the Fourth Circuit denied the employer's motion to compel arbitration. The court described the agreement terms as "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding."⁷⁸ The terms overwhelmingly favored the employer with respect to the filing of notices and the choice of arbitrators.⁷⁹ The terms also limited employee claims to those in their notice, but allowed the employer to raise any matter in the arbitration.⁸⁰ In addition, only the employer could move for summary judgment or seek to vacate the arbitration award.⁸¹ So, while the general rule requires a finding of both procedural and substantive unconscionability, dramatic overreaching by the employer in drafting the terms renders the agreement void without an additional finding of procedural unconscionability.⁸²

II. FEDERAL AND STATE LEGISLATIVE EFFORTS

The states have taken legislative steps to provide protection for certain parties to arbitration agreements, but must stay within the limits of the FAA. Given these limits, employees have sought relief from Congress and the executive branch. These Congressional and executive branch efforts, presented in chronological order below,⁸³ have produced no meaningful results in restricting the use of mandatory arbitration agreements. The following discussion begins with enacted and proposed state legislation and then addresses the mostly unsuccessful Congressional and executive branch efforts used to restrict pre-dispute mandatory arbitration agreements.

A. State Legislation

States have expressed different levels of contempt for arbitration agreements. Alabama, an outlier among the states, specifically provides

76. See Leff, *Unconscionability and the Code-The Emperor's New Clause*, 115 U. PA. L.REV. 485, 487 (1967).

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

78. *Id.* at 938.

79. *Id.* at 938-39.

80. *Id.*

81. *Id.* at 939.

82. See also, *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 748-49 (2015) (holding that provisions that "shock the conscience" can render an agreement or a portion of an agreement invalid in the absence of procedural unconscionability).

83. Where Congress has attempted enactment of legislative on more than one occasion, the earliest occasion is used for ordering purposes here.

enforced arbitration agreements.⁸⁴ Alabama has not repealed this statute despite the opinion of its own Alabama Supreme Court stating that the FAA preempts its application.⁸⁵ Unlike Alabama, most states have arbitration acts that are similar to Section 2 of the FAA.⁸⁶ Iowa and Missouri have similar rules to Section 2 of the FAA, but both states exclude “contracts of adhesion” and certain other matters from their rules.⁸⁷ These exemptions create their own controversy, in that the FAA may preempt these exclusions.

Maryland and Washington have sought to bar the use of mandatory pre-dispute arbitration agreements when the cause of action involves sexual harassment or sexual assault. Effective October 1, 2018, Maryland amended its Labor and Employment Law to void any “provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment.”⁸⁸ Maryland also amended its Labor and Employment Law to prohibit employers from taking any adverse action against an employee who refuses to sign such an agreement⁸⁹ and to require that employers pay the employee’s attorneys’ fees and costs.⁹⁰

Effective June 7, 2018, Washington prohibits employers from requiring an employee, as a condition of employment, to sign a nondisclosure agreement that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace, at work-related events, between employees, or between an employer and an employee off the employment premises.⁹¹ Any nondisclosure agreement signed by an employee as a condition of employment that prevents the disclosure or discussion of sexual harassment or sexual assault is against public policy and is void and unenforceable.⁹² Consistent with the preemption discussion above, both the Maryland law and the Washington law will likely face employer challenges based on preemption by the FAA. Despite

84. ALA. CODE § 8-1-41(3) (2018).

85. See *Crown Pontiac, Inc. v. McCarrell*, [695 So. 2d 615](#) (Ala. 1997); *see also Hurst v. Tony Moore Imports, Inc.*, [699 So. 2d 1249](#), 1251 (Ala. 1997).

86. E.g., ALASKA STAT. § 09.43.010 (2018); ARIZ. REV. STAT. § 12-1501 (2018); CONN. GEN. STAT. § 52-408 (2018); DEL. CODE ANN. tit. 10, § 5701 (2018); FLA. STAT. § 682.02 (2018); LA. STAT. ANN. § 9:4201 (2018); MASS. GEN. LAWS ch. 251, § 1 (2018); N.J. STAT. ANN. § 2A:24-1 (West 2018); N.D. CENT. CODE § 32-29.3-06 (2018); OR. REV. STAT. § 36.620(1) (2018); 42 PA. CONS. STAT. § 7303 (2018); S.D. CODIFIED LAWS § 21-25A-1 (2018); TENN. CODE ANN. § 29-5-101 (2018) (contains exception for real property disputes); TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (West 2018); UTAH CODE ANN. § 78B-11-107 (West 2018); WYO. STAT. ANN. § 1-36-103 (2018).

87. IOWA CODE § 679A.1(2)(a) (2018); MO. REV. STAT. § 435.350 (2018).

88. MD. STAT. ANN. § 3-715(a) (2018).

89. MD. STAT. ANN. § 3-715(b) (2018).

90. MD. STAT. ANN. § 3-715(c) (2018).

91. WASH. ADMIN. CODE § 49.44.210(1) (2018).

92. WASH. ADMIN. CODE § 49.44.210(2) (2018).

the challenges they may face, additional states have similar legislation in process.⁹³

B. Unsuccessful Federal Legislation and Revoked Executive Orders

1. 2007 to 2018—The Arbitration Fairness Act

In what could be described as “beating a dead horse,” the House of Representatives has introduced bills labeled The Arbitration Fairness Act on seven separate occasions. These introductions began in 2007 and have continued through 2018. In 2007 and 2009, the bills amended Section 2 of the FAA by providing that “No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.”⁹⁴ In 2011, the House slightly modified the bill to provide that “no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.”⁹⁵ In 2013, the House added antitrust disputes to the list of disputes covered in the proposal.⁹⁶ The 2015, 2017, and 2018 versions of the bill contain language identical to that of the 2013 version with respect to the validity and enforceability of pre-dispute arbitration agreements.⁹⁷ It appears that the seventh attempt, in keeping with the trend, still will not muster enough votes. Skopos Labs predicts that the Arbitration Fairness Act of 2018 has a three percent (3%) chance of success.⁹⁸

2. Rape Victims Act of 2009

The Rape Victims Act of 2009 would have made any agreement between an employer and employee to arbitrate a dispute unenforceable with respect to any claim arising out of a rape allegation.⁹⁹ Currently, claims arising out of rape allegations are arbitrable because existing arbitration agreements are enforceable in employment contracts unless Congress “has evinced an intention to preclude such agreements for the dispute at issue.”¹⁰⁰ The purpose of the Rape Victims Act was to evince Congress’s intent that employees should not be

93. *Sexual Harassment Policies in State Legislatures*, NAT’L CONFERENCE OF STATE LEGISLATURES (June 6, 2018), <http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx>.

94. H.R. 3010, 110th Cong. (2007); H.R. 1020, 111th Cong. (2009).

95. H.R. 1873, 112th Cong. (2011).

96. S. 878, 113th Cong. (2013).

97. S. 2591, 115th Cong. (2018); S. 537, 115th Cong. (2017); S. 1133, 114th Cong. (2015).

98. S. 259: *Arbitration Fairness Act of 2018*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s2591>.

99. S. 2915, 111th Cong. (2009).

100. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

compelled by an employer to arbitrate any claim relating to a tort arising out of rape.¹⁰¹ This bill did not make it out of committee.

3. 2014—Executive Order 13673

On July 31, 2014, President Obama issued Executive Order 13673, Fair Pay and Safe Workplaces.¹⁰² Section 6(a) of the Executive Order provided that:

Agencies shall ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise. Agencies shall also require that contractors incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million.¹⁰³

The Executive Order directed the Federal Acquisition Regulatory Council (“FAR Council”) to amend its regulations consistent with the Order’s requirements, and directed the Secretary of Labor (“Secretary”) to develop guidance to assist agencies in implementing the Order.¹⁰⁴ The rule was amended again to reflect the findings of a preliminary injunction issued by the United States District Court for the Eastern District of Texas.¹⁰⁵ On December 16, 2016, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration, on behalf of the FAR Council, amended the FAR Council’s rule to conform to the district court’s injunction.¹⁰⁶

On March 27, 2017, President Donald Trump signed a resolution of disapproval of the FAR Council’s rule¹⁰⁷ under the Congressional Review Act, 5 U.S.C. 801 *et seq.* Under the Congressional Review Act, a rule shall not take effect or continue if a joint resolution of disapproval of the rule is enacted.¹⁰⁸ Additionally, on March 27, 2017, President Trump issued Executive Order 13782, revoking Executive Order 13673, section 3 of Executive Order 13683, and Executive Order 13738, and directing all executive departments and agencies, “as appropriate and to the extent consistent with law, [to] consider promptly rescinding any orders, rules,

101. S. 2915, 111th Cong. § 2(b).

102. Fair Pay and Safe Workplaces, 79 Fed. Reg. 45,309 (2014).

103. *Id.*

104. 81 Fed. Reg. 58,562 (Aug. 25, 2016) (FAR Council’s rule); 81 Fed. Reg. 58,654 (Aug. 25, 2016) (Secretary’s guidance).

105. *See Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655 (E.D. Tex. Oct. 24, 2016).

106. 81 Fed. Reg. 91,636 (Dec. 16, 2016).

107. H.R.J. Res. 37, 115th Cong. (2017).

¹⁰¹ 5 U.S.C. 801 (2012).

regulations, guidance, guidelines, or policies implementing or enforcing the revoked Executive Orders and revoked provision[.]’¹⁰⁹ The benefits of Executive Order 13673 were short-lived.

3. Restoring Statutory Rights and Interests of the States Act

On February 4, 2016, Senator Leahy introduced into Congress the Restoring Statutory Rights and Interests of the States Act of 2016. The proposed bill provided the following exception to Section 2 of the FAA:

Subsection (a) shall not apply to a written provision that requires arbitration of a claim for damages or injunctive relief brought by an individual or small business concern (as defined in section 3 of the Small Business Act (15 U.S.C. 632)), in either an individual or representative capacity, arising from the alleged violation of a Federal or State statute, the Constitution of the United States, or a constitution of a State, unless the written agreement to arbitrate is entered into by both parties after the claim has arisen and pertains solely to an existing claim.¹¹⁰

This bill varied slightly from the Arbitration Fairness Act of 2015, discussed above.¹¹¹ On March 7, 2017, Senator Leahy reintroduced the bill, without any changes, as the Restoring Statutory Rights and Interests of the States Act of 2017.¹¹² Both bills lacked bipartisan support and did not make it out of committee.¹¹³

4. Mandatory Arbitration Transparency Act of 2017

This bill prohibits pre-dispute arbitration agreements from containing a confidentiality clause regarding an employment, consumer, or civil rights dispute that could be interpreted to prohibit a party from: (1) making a communication in a manner such that the prohibition would violate a whistleblower statute; or (2) reporting or making a communication about tortious conduct, unlawful conduct, or issues of public policy or public concern.¹¹⁴ This bill provided an exception for situations when a party can demonstrate a confidentiality interest that significantly outweighs the private and public interest in disclosure. This bill differs from the Arbitration Fairness Act in that it addresses the confidential nature of the agreement rather than barring pre-dispute mandatory arbitration. The narrower scope here may not materially

109. 82 Fed. Reg. 15,607 (Mar. 27, 2017).

110. S. 2506, 114th Cong. § 3(a)(2) (2016).

111. H.R. 2087, 114th Cong. § 3 (2015).

112. S. 550, 115th Cong. (2017).

113. *S. 550: Restoring Statutory Rights and Interests of the States Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s550>.

114. S. 647, 115th Cong. § 2(a) (2017).

increase its likelihood of passage as Skopos Labs has predicted only a three percent (3%) chance of enactment.¹¹⁵

5. Tax Cuts and Jobs Act

Congress, unable to move comprehensive legislation out of committee, did successfully enact some mandatory arbitration reforms in tax legislation. Effective with amounts paid or incurred after December 22, 2017, and under the new section 162(q) of the Internal Revenue Code, Congress restricted the availability of business deductions for settlements or payments related to sexual harassment or sexual abuse when the payment is subject to a nondisclosure agreement. In this legislation, Congress did not ban the pre-dispute mandatory arbitration agreement or prohibit agreements with a nondisclosure clause.¹¹⁶ However, by denying the deduction for certain expenses, Congress made the agreements more expensive for employers.

6. Ending Forced Arbitration of Sexual Harassment Act of 2017

As described in the Introduction, this bill would “prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of a sex discrimination dispute.”¹¹⁷ This bill received a three percent (3%) chance of enactment from Skopos Labs.¹¹⁸ Given this bill’s prognosis and the prognosis of the other legislation discussed in this part, it appears that federal legislation targeting pre-dispute mandatory arbitration and associated nondisclosure agreements, other than tax legislation, remains unlikely.

III. AN URGENT NEED FOR TRANSPARENCY AND ACCOUNTABILITY

American employers increasingly require their workers to sign pre-dispute mandatory arbitration agreements.¹¹⁹ The Employee Rights Advocacy Institute for Law & Policy conducted research on the use of arbitration in the workforce.¹²⁰ In turn, Professor Imre S. Szalai wrote the study entitled “The Widespread Use of Workplace Arbitration among America’s Top 100 Companies”.¹²¹ The study concluded that eighty (80) of the companies in the

115. S. 647: *Mandatory Arbitration Transparency Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s647> (compared to a three (3%) chance for the Arbitration Fairness Act of 2017).

116. I.R.C. § 162(q) (2012).

117. H.R. 4570, 115th Cong. § 402(a) (2017).

118. H.R. 4734: *Ending Forced Arbitration of Sexual Harassment Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr4734>.

119. See Colvin, *supra* note 1.

120. IMRE S. SZALAI, *THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA’S TOP 100 COMPANIES* 3 (2018), <http://employeerightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf>.

121. *Id.*

Fortune 100, including subsidiaries or related affiliates, have used arbitration in connection with workplace-related disputes since 2010.¹²² Of those eighty (80) companies, thirty-nine (39) have used arbitration clauses containing class, collective, and joint action waivers.¹²³

The results for the Fortune 100 companies remain consistent with the findings of a similar study conducted by Alexander J.S. Colvin for the Economic Policy Institute in 2018.¹²⁴ Colvin found that 50.4 percent (50.4%) of employees faced requirements to sign mandatory arbitration agreements.¹²⁵ Colvin determined that employers establish mandatory employment arbitration by having employees sign an arbitration agreement at the time of hiring. Colvin also noted some instances where businesses adopt arbitration procedures simply by announcing that these procedures have been incorporated into the organization's employment policies.¹²⁶ The likelihood of mandatory arbitration agreements increases with the size of the employer. Colvin's research on companies with 1,000 or more employees showed that 65.1% had mandatory arbitration.¹²⁷

The prevalence of these agreements and their increased use in recent years forces us to examine their role in our society. This part begins with a brief discussion as to why victims of sexual harassment should have and may need more protection than other plaintiffs. This part continues by describing these problems using fact patterns illustrating the extraordinary challenges facing employees and the perpetuation of the problem through the cover-ups created by confidentiality clauses.

A. Why Sexual Harassment is Different

Social scientists have concluded that harassment leaves a detrimental impact on the physical and mental health of its victims that often lasts for years.¹²⁸ Harassment has been associated with increased risk of anxiety, depression, and post-traumatic stress disorder.¹²⁹ Research also reveals that sexual harassment contributes to financial difficulties, primarily by instigating a job change.¹³⁰ Victims often leave their employment due to frustration with an employer's inadequate response after reporting the harassment.¹³¹ Therefore,

122. *Id.* at 4.

123. *Id.*

124. See Colvin, *supra* note 1.

125. *Id.* at 5.

126. *Id.*

127. *Id.* at 6.

128. See e.g., Heather McLaughlin et al., *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOCIETY 333, 334 (2017).

129. *Id.* at 334.

130. *Id.* at 351.

131. *Id.*

sexual harassment, like that experienced by the fictional applicant/employee, could have lasting economic effects. Research has shown that “harassment experienced in women’s twenties and early thirties knocks many off-course during this formative career stage.”¹³²

Silencing these victims’ voices through private arbitration and tolerating confidential pre-dispute mandatory arbitration agreements could perpetuate serious and demeaning conduct and shield those who perpetrate it. Consistent with this argument, Microsoft’s President and Chief Legal Officer nicely summarized the argument for why sexual harassment differs from other private arbitration:

We appreciate that many companies and business associations believe that the opportunity for private arbitration is sufficient. A great many responsible companies—Microsoft among them—have put in place a variety of internal processes so employees can escalate concerns. Arbitration alone has seemed reasonable to supplement these processes, and for most issues that seems appropriate. But as each new story about sexual harassment demonstrates, current approaches in this area have proven insufficient. Even as we look squarely at the sins of the past, we must take stronger steps to prevent these problems in the future. Because the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard.¹³³

The National Association of Attorneys General agrees with Microsoft and provided the following similar statement:

While 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.¹³⁴

The statements of Microsoft’s President and the National Association of Attorneys General acknowledge that arbitration provisions may be appropriate in certain situations, but victims of such serious employer misconduct need their voices to be heard to stem this tide of egregious behavior. But for Gretchen Carlson’s complaint against Roger Ailes at Fox News, decades of harassment could have gone unnoticed.

Because of the nature of an employer’s misconduct, a court’s opinion may also provide a certain level of dignity for the victim. It assures them that their views and arguments were heard and considered, and that the court respected

132. *Id.* at 352.

133. Brad Smith, *Microsoft Endorses Senate Bill to Address Sexual Harassment*, MICROSOFT (Dec. 19, 2017), <https://blogs.microsoft.com/on-the-issues/2017/12/19/microsoft-endorses-senate-bill-address-sexual-harassment/>.

134. Letter of 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).

them as individuals.¹³⁵ A court's opinion would also show respect for the participants and their views by providing proof that they at least deserved an explanation for the decision.¹³⁶

B. Unequal Bargaining Power

Although it may appear on its face that both parties voluntarily entered into a pre-dispute mandatory arbitration agreement, such a conclusion would require a finding that the employee knew of the agreement and had a meaningful choice with respect to consent.

1. Unaware of existence of the clause

The FAA requires the existence of a valid contract under state law and incorporates state law in determining whether assent of the parties to a contract exists.¹³⁷ Under state law, it is well-settled that mutual assent between parties is necessary for the formation of a contract.¹³⁸ As discussed below, employees have challenged whether the manner in which employers provide mandatory arbitration agreements permitted or allowed for the assent of the employee. An agreement to arbitrate is clear when the employer presents an employee with an application or employment agreement with an arbitration clause, consideration is received by both parties, the employee signs the agreement, and the employee receives notice of the arbitration rules. However, employers have sought to compel arbitration in situations where the arbitration clause lies buried in a lengthy employment agreement or does not appear in the contract itself. Concerned with such situations, the National Association of Attorneys General has written a letter to congressional leadership complaining that "These arbitration requirements often are set forth in clauses found within the 'fine print' of lengthy employment contracts."¹³⁹ In *Patterson v. Tenet Healthcare, Inc.*, the Eighth Circuit enforced an arbitration agreement where the arbitration agreement appeared on page thirty-one of the employee handbook signed by the employee.¹⁴⁰ In some instances, simply acknowledging the receipt of an employee handbook can provide the requisite assent when the

135. See Susan A. FitzGibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485, 506 (1990) (noting that opinions contribute to the therapeutic nature of the process by demonstrating that the arbitrator heard and considered the arguments).

136. See Boyce F. Martin, Jr., *Judges on Judging: In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193 (1999) (arguing that litigants deserve a cogent written explanation of a decision).

137. See, e.g., Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 685 (1996) ("state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.").

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

139. Letter from National Association of Attorneys General to Congressional Leadership, *supra* note 134.

140. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834-35 (8th Cir. 1997).

employee also acknowledges the existence of the handbook.¹⁴¹ One jurisdiction has gone even further by inferring an employee's agreement to arbitrate because the employee continued to work after receiving notice of the company's policy that all claims are subject to arbitration.¹⁴²

Even when employers highlight the arbitration provisions, employees have difficulty with these agreements. Some employees sign employment agreements unaware that the agreements contain an arbitration clause or lacking the understanding of the clause's importance.¹⁴³ Indeed, research has found that employees are often unaware or fail to recall that they have signed arbitration agreements and may not understand the content and meaning of these documents.¹⁴⁴ Unfortunately, this typically provides no legal protection for employees, since general contract law usually holds that parties assent to agreements regardless of whether or not they read and understand the contract's terms.¹⁴⁵ For example, in *Booker v. Robert Half Int'l, Inc.*,¹⁴⁶ the court held that an employee assented to an arbitration agreement, notwithstanding the employee's failure to read or understand it or the employer's failure to explain it.

2. Employees lack leverage in negotiating the terms

Job applicants, such as the fictional applicant in the Introduction, may read their employment agreements and assume that they are non-negotiable adhesion contracts. This power imbalance in employment relationships results in contracts that are generally not bargained-for exchanges.¹⁴⁷ As a result, employers are able to unilaterally decide to arbitrate disputes and plan arbitration procedures with no employee input or bargaining.¹⁴⁸

141. See 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199 (1998); Serpa v. Cal. Sur. Investigations, Inc., 215 Cal. App. 4th 695 (2013); cf. Esparza v. Sand & Sea, Inc., 2 Cal. App. 5th 781, 790-91 (2016) (holding that a mere reference to an employee handbook with an arbitration policy does not create an enforceable obligation to arbitrate when that handbook states that it does not create enforceable rights).

142. Howard v. Oakwood Homes Corp., 516 S.E.2d 879 (N.C. Ct. App. 1999).

143. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POLICY REV. 233 (2002) (concluding that a high percentage of adults are incapable of extracting pertinent information from form contracts); see also Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (stating that consumers rarely read adhesion contracts and even less likely to understand what they read).

144. *Id.*

145. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981).

146. *Booker v. Robert Half Int'l, Inc.*, 315 F.Supp.2d 94 (D.D.C. 2004).

147. Griffin Toronjo Privateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, [32 PACE L. REV. 114, 125 \(2012\)](#).

148. *Id.* at 125.

*Hicks v. Mission Bay Management, LLC*¹⁴⁹ provides an example of such leverage in negotiating a pre-dispute mandatory arbitration agreement. Mission Bay Management LLC, doing business as Hilton San Diego Resort & Spa, offered Hicks a job as a spa director.¹⁵⁰ Hicks was living in Minnesota when she received a letter outlining the offer that stated, “Your acceptance of this letter and the terms stated herein affirms that there are no other agreements, nor other information upon which you are relying in making your decision.”¹⁵¹ The letter did not mention arbitration.¹⁵² Hicks accepted the offer, canceled interviews she had scheduled for a position in Florida, sold her belongings, and moved to San Diego.¹⁵³ On July 20, 2006, four days before she was to begin work, Hicks received a four-page employment application.¹⁵⁴ The last paragraph of that application contained an arbitration clause.¹⁵⁵ Approximately four years later, Hicks sued for pregnancy and sex discrimination, among other related counts.¹⁵⁶ In response, Mission Bay Management, LLC sought to compel arbitration.¹⁵⁷

Reviewing the sequence of these events highlights the overwhelming leverage maintained by employers in these situations. Here, the employer hid the arbitration clause until the employee had canceled other interviews, sold her belongings, and moved to San Diego from Minnesota. Like the fictional applicant/employee in the Introduction, once Hicks had arrived in San Diego she had little remaining bargaining power. After reviewing the appeal, the California Appellate Court found procedural unconscionability due to the surprise and oppression in this matter, but compelled arbitration because both procedural and substantive unconscionability must be present before an arbitration clause is deemed unenforceable. In this case, Hicks had not met her burden with respect to substantive unconscionability.¹⁵⁸ With the unconscionability standard set this high, the ordinary employee in situations similar to the fictional applicant/employee in the Introduction will have an extraordinarily difficult time fighting compelled arbitration.

149. *Hicks v. Mission Bay Mgmt.*, No. D058683, 2011 Cal. App. Unpub. LEXIS 9218, at *1 (Cal. App. 4th Nov. 30, 2011).

150. *Id.*

151. *Id.* at *1-2.

152. *Id.* at *2.

153. *Id.*

154. *Id.*

155. *Id.* at *2-3.

156. *Id.* at *3.

157. *Id.* at *4.

158. *Id.* at *26.

C. Confidentiality

The U.S. Supreme Court has observed that “justice cannot survive behind walls of silence.”¹⁵⁹ Although this statement appeared in an opinion discussing a trial, it should not be any less true when assessing arbitration. Even if a worker wins the case, confidentiality provisions can shield repeat offenders from exposure. Harvey Weinstein’s contracts with his employees illustrate this point. Employees working for Weinstein signed contracts stating they would not harm the company’s “business reputation” or “any employee’s personal reputation.”¹⁶⁰ Weinstein also entered into settlement agreements with accusers that restricted their ability to discuss his misconduct.¹⁶¹ One such contract apparently provided for the destruction of evidence along with a signed statement by the victim that the conduct did not occur.¹⁶² Another contract apparently required one of Weinstein’s victims to say positive things about Weinstein if contacted by the media.¹⁶³

Scholars began to criticize confidential settlements of discrimination claims long before the Weinstein scandal.¹⁶⁴ Professor Theresa Beiner concluded that a confidential settlement “relieves employers of an obligation or incentive to examine their workplaces and consider that there may be organizational structural components that permit discrimination to flourish.”¹⁶⁵ Fox News provides an excellent example of a failure of management to investigate its own culture. Some of the Fox News employees reported harassment for over a decade.¹⁶⁶ Fox News settled numerous cases hiding the harassment with confidential settlements and arbitration.¹⁶⁷ The cascading disclosures ultimately led to the departure of Ailes, O’Reilly, and Bill Shine.¹⁶⁸ These dramatic

159. *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966).

160. 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>.

161. Ellen Gabler, Megan Twohey & Jodi Kantor, *New Accusers Expand Harvey Weinstein Sexual Assault Claims Back to '70s*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/us/harvey-weinstein-sexual-assault-allegations.html>.

162. Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, THE NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>.

163. Terry Gross, *‘Times’ Reporters Describe How A Paper Trail Helped Break The Weinstein Story*, NATIONAL PUBLIC RADIO (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564310240/times-reporters-describe-how-a-paper-trail-helped-break-the-weinstein-story>.

164. See, e.g., Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC’Y REV. 1, 26 (2012).

165. Theresa M. Beiner, *The Many Lanes Out of Court: Against Privatization of Employment Discrimination Disputes*, 73 MD. L. REV. 837, 880 (2014).

166. See John Koblin, *Former Anchor Speaks Out About Harassment Suit*, N.Y. TIMES, July 13, 2016, at B1.

167. Emily Steel & Michael Schmidt, *O’Reilly Thrives as Settlements Add Up*, N.Y. TIMES, Apr. 2, 2017, at A1.

168. See Michael M. Grynbaum & Emily Steel, *Fox News, Pledging New Culture, Ousts Another Symbol of Old One*, N.Y. TIMES, May 2, 2017, at A1.

events all began with a lawsuit by Gretchen Carlson, a former anchor at the network.¹⁶⁹ Due to the publicity following these events, Fox News had no choice but to investigate and confront years of harassment.

IV. PURSUING BETTER CORPORATE CITIZENSHIP BY DEMANDING TRANSPARENCY AND ACCOUNTABILITY

Justice Brandeis wrote, “Publicity is justly commended as a remedy for social and industrial diseases.”¹⁷⁰ As discussed below, publicity may create advocates at the employee, customer, and shareholder level for better handling of sexual harassment claims. This part discusses how our fast-paced social media culture makes corporate sexual harassment cover-ups difficult to hide, thereby making it easier for today’s employees to discover and avoid offending employers. Armed with a better understanding of employee behavior and a responsibility to society, employees, corporations and their shareholders have changed the performance metrics in a manner that may lead us out of these troubled times. These businesses may be the best bet for taking steps to eliminate the mandatory pre-dispute employment arbitration agreements that have hidden the culture of sexual harassment and denied victims their day in court. To the contrary, companies that cover up sexual harassment could suffer in many ways including difficulties in attracting and retaining talented workers and attracting new investors for their businesses. This part also examines transparent business culture, the business benefits of a culture without pre-dispute mandatory arbitration agreements, and calls for better corporate citizenship. Three Fortune 100 companies were chosen to illustrate the points discussed in this part: Best Buy Co., Inc. (“Best Buy”), CVS Pharmacy, Inc. (“CVS”), and TJX Companies, Inc. (“TJX”).

A. Discovery is Inevitable in our “Glassdoor Culture”

Today, businesses operate in a transparent environment where behavior is difficult to hide.¹⁷¹ Employees may air their grievances in public forums, such as Glassdoor, often outside the control of their employers.¹⁷² The Glassdoor website allows the publication of anonymous reviews and experiences by employees and promises to be “the most trusted and transparent place for

169. See Kelly Couturier, *The Nine and a Half Months That Shook Fox News*, N.Y. TIMES, Apr. 20, 2017, at B6.

170. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 62 (National Home Library Foundation 1933) (1914).

171. David Brown et al., *Culture and Engagement: The Naked Organization*, DELOITTE (Feb. 27, 2015), <https://www2.deloitte.com/insights/us/en/focus/human-capital-trends/2015/employee-engagement-culture-human-capital-trends-2015.html>.

172. *Id.*

today's candidate to search for jobs and research companies.”¹⁷³ The anonymity provided users on the site may encourage additional feedback from the employees. Glassdoor's Terms of Agreement states, in part, the following:

Defending Our Users. While we have no obligation to do so, we reserve the right, to the fullest extent permitted by applicable law, to take appropriate action to protect the anonymity of our users against the enforcement of subpoenas or other information requests that seek a user's electronic address or identifying information.¹⁷⁴

Unfortunately, there are times when employers may have failed to monitor postings or correct the behavior reported on Glassdoor or any other website. For example, more than a year before Harvey Weinstein was first accused of sexual harassment, one employee of the Weinstein Company said that sexual harassment was “the norm” at the Weinstein Company in a Glassdoor review.¹⁷⁵

To illustrate the need for transparency and accountability, this part uses the three companies listed above to analyze the codes of conduct and arbitration agreements for consistency. With each of the three companies, the codes of conduct stand in stark contrast to the mandatory arbitration agreements. In other words, the companies demand exemplary behavior from their employees, but hide that behavior from public view through pre-dispute mandatory arbitration. After reviewing the codes of conduct and agreements, a keyword search for reviews of these businesses reveals that certain employees have concerns about sexual harassment and the mandatory arbitration agreements presented to them. These social media postings are meant to illustrate that businesses may have difficulty hiding pre-dispute mandatory arbitration agreements and sexual harassment. However, the accuracy and authenticity of the sexual harassment and discrimination claims cannot be confirmed or denied by social media postings. In addition, any one review may, in fact, be misleading or merely represent the rant of an unhinged employee.

1. Best Buy

In Section 2 of Best Buy's Code of Business Ethics, titled Responsibility to Each Other, Best Buy implores its employees to “treat each other respectfully and ethically.”¹⁷⁶ Section 2 also demands a Harassment-Free Workplace using the following terms:

173. *Community Guidelines*, GLASSDOOR (June 16, 2018), https://help.glassdoor.com/article/Community-Guidelines/en_US.

174. *Glassdoor Terms of Use*, GLASSDOOR (May 22, 2018), <https://www.glassdoor.com/about/terms.htm>.

175. Former Employee, *Vice Preseidnt [SIC]*, GLASSDOOR (Mar. 30, 2016), <https://www.glassdoor.com/Reviews/The-Weinstein-Company-LLC-Reviews-E40796.htm>.

176. *Best Buy Code of Business Ethics*, BEST BUY CO. 13 (last visited Sept. 10, 2018), https://corporate.bestbuy.com/wp-content/uploads/downloads/BBY_Code_of_Business_Ethics_080121.pdf.

Best Buy prohibits any type of harassment in the workplace by an employee, supervisor, customer or visitor. This includes, but is not limited to, harassment on the basis of age, sex, race, color, ethnicity, citizenship, national origin, sexual orientation, gender identity, creed, religious preference or belief, disability, marital/family status or any other characteristic protected by law. Various national, state, local and provincial laws may include additional protected categories.

Despite the Code of Conduct's demand for respectful and ethical behavior, Best Buy has a pre-dispute mandatory arbitration agreement with a class waiver that ensures that disputes alleging contrary acts remain confidential.¹⁷⁷ The manner in which the arbitration agreement is communicated to new employees is described in *Dugan v. Best Buy Co. Inc.*, an action by an employee to avoid compelled arbitration.¹⁷⁸ Best Buy communicated its arbitration policy to employees through an eLearning module.¹⁷⁹ The eLearning module consisted of four screens. The first screen, titled "Employee Solutions Process," read:

Best Buy is committed to a welcoming, inclusive environment where employees come to work every day to do what they enjoy doing.¹⁸⁰

From time to time you may encounter a concern that, if left unresolved, could negatively affect your employment experience. It [i]s Best Buy's goal to resolve all these [i]ssues and, in fact, has a clear well-established [i]nternal process to do just that.¹⁸¹

The second screen, bearing the same title, outlined a progressive system for employees to address employment-related concerns, starting with discussions with the employee's manager, next to human resources personnel, and then to the Employee Relations (ER) team. The text continued, "Under the Peer Review Program, eligible employees may have certain involuntary terminations reviewed, first by an ER manager and, if still not satisfied by the outcome, by a panel of managers and peers." If those steps did not address the concern, employees could "choose to file a formal legal claim." The screen text concluded, "Effective March 15, 2016, you will bring that claim in arbitration, rather than in court."¹⁸²

A note at the bottom of both the first and second screens directed the employee to a link to a site at which "[a]dditional details" could be found.¹⁸³

The heading of the third screen was: "Why is Best Buy Implementing an Arbitration policy?" The text that followed suggested that the arbitration process was more favorable than court proceedings.¹⁸⁴

177. *Arbitration Policy*, BEST BUY CO. (Mar. 15, 2016), <https://hr.bestbuy.com/documents/10180/18184820/Best+Buy+Arbitration+Policy/8dce654e-3427-43c2-a025-d25a2052c477?version=1.1>.

178. *Dugan v. Best Buy Co.*, No. A-1897-16T4, 2017 N.J. Super. Unpub. LEXIS 2053, at *1 (N.J. Super. Ct. App. Div. Aug. 11, 2017).

179. *Id.* at *2.

180. *Id.*

181. *Id.*

182. *Id.* at *2-3.

183. *Id.* at *3.

The last screen read:

As with any other Best Buy policy, by remaining employed, you are considered to have agreed to the policy. The purpose of the eLearning is to ensure you read and understand the policy.¹⁸⁵ Employees who do not take this eLearning are still subject to the policy.¹⁸⁶

I have read and understand the Best Buy Arbitration Policy that takes effect on March 15, 2016.¹⁸⁷

Just below that paragraph, the words, “I acknowledge,” appeared in a box that was intended to be mouse-clicked by the reader. A link at the bottom of the page allowed the reader the opportunity to “read and review” the policy and “FAQs” - frequently asked questions.¹⁸⁸

Reddit and Glassdoor reviewers commented on Best Buy’s mandatory arbitration policy. Reddit is a social news aggregation, web content rating and discussion website.¹⁸⁹ As one can see from the Reddit posting below, Reddit user “AngryBlueShirt” was unhappy with the arbitration agreement.¹⁹⁰

Anyone else agree that the Arbitration Policy is the last straw?

Every year I feel less valued. The pay is stagnant, the environment is [sic] all the problems of a commission store, without the commission. The upwards mobility is now nonexistent. We are often treated not as employees, but as potential thieves. And now to top it off, they are forcing us into an arbitration agreement.

It is time that we stop allowing ourselves to be tossed around. Let’s find our local UFCW office, and sign up. At this point, what would unionizing take away from us that hasn’t already been lost?

We are on social media, so it isn’t like they can stop us organizing. And if every store signs on, they can’t shut us all down.¹⁹¹

In this posting, AngryBlueShirt expressed displeasure with the mandatory arbitration agreement and further suggested unionization as a response to this “last straw.”

Best Buy can find similarly displeased employees on Glassdoor, where user “Geek Squad,” a Best Buy employee at the time of the posting, stated that the

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at *3-4.

189. *Reddit*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Reddit> (last visited Sept. 10, 2018).

190. Angry Blue Shirt, *Anyone Else Agree that the Arbitration Policy is the Last Straw?*, REDDIT (Feb. 9, 2016), https://www.reddit.com/r/Bestbuy/comments/44xg76/anyone_else_agree_that_the_arbitration_policy_is/.

191. *Id.*

company engaged in “rampant discrimination, and sexual harassment.”¹⁹² Geek Squad also suggested that the company should “get rid of mandatory arbitration.”¹⁹³

2. CVS

CVS’s Code of Conduct titled “Respecting Colleagues” details harassment policies. In this section, CVS briefly discusses harassment, stating, “CVS Health is committed to maintaining a workplace environment free from discrimination, harassment and violence.”¹⁹⁴ The Code of Conduct also provides harassment examples, asks employees not to disrupt the work environment through harassing behavior, and refers employees to the CVS Health Policy and Procedure Portal for further information.

In addition to the Code of Conduct, CVS provides a Health Colleague Handbook that greatly elaborates upon Workplace Sexual Harassment.¹⁹⁵

CVS Health strictly prohibits and will not tolerate sexual harassment in the workplace. The company firmly believes that every colleague is entitled to a work environment free of offensive conduct of a sexual nature, regardless of its form or manner. The company recognizes that sexual harassment in the workplace seriously and negatively impacts colleague morale, trust, communication, teamwork and productivity, and creates legal liabilities for the company, its supervisors, and, in some cases, its colleagues. Sexual harassment consists of sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature either explicitly or implicitly when:

Submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment; and

Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

Such conduct has the purpose or effect of substantially interfering with an individual’s work performance or altering the terms and conditions of the individual’s employment by creating an intimidating, hostile or offensive working environment.¹⁹⁶

The CVS Health Colleague Handbook also lists examples of offensive conduct, discusses how employees should report offensive conduct, and describes the investigation procedures CVS employees should follow. The handbook stops short, neglecting to discuss relevant procedures for when CVS and an employee have a legal dispute. In other words, mandatory arbitration is not mentioned as the exclusive remedy.

192. *Current Employee, Geek Squad*, GLASSDOOR (Nov. 6, 2017), <https://www.glassdoor.com/Reviews/Employee-Review-Best-Buy-RVW17748600.htm>.

193. *Id.*

194. *Code of Conduct*, CVS HEALTH 17, <https://cvshealth.com/sites/default/files/cvs-health-code-of-conduct.pdf> (last visited Sept. 10, 2018).

195. *CVS Health Colleague Handbook*, CVS HEALTH 11-13 (2017), https://heplb08.hrbpo.hewitt.com/myHRCVS/handbook/forms/FRM_CVSHealCollHand.pdf.

196. *Id.* at 11-12.

Despite the Code of Conduct's demand for respect among its colleagues, CVS's pre-dispute mandatory arbitration agreement ensures that disputes alleging contrary acts remain confidential. CVS communicated this arbitration agreement to its employees through an online learning system, "Learnet." The arbitration agreement requires employees to opt out if they want to decline the agreement. *Hall v. CVS Health Corp.* describes the manner in which CVS communicated the arbitration policy to employees.

On October 5, 2014, CVS invited its employees to participate in a training course, Arbitration of Workplace Legal Disputes. The course explained the employees' rights as to arbitration, the manner in which they accept the policy's terms, and how they may opt out of the policy.

The policy provided that employees would accept the policy by continuing their employment with CVS Health after becoming aware of the policy, but allowed employees to opt out within 30 days of first viewing or receiving the policy. To opt out, the policy explained that an employee must mail a written, signed and dated letter stating clearly that he or she wishes to opt out of the CVS Health Arbitration of Workplace Legal disputes Policy. The letter must be mailed to [CVS's P.O. Box in Rhode Island]. In order to be effective, the colleague's opt out notice must be postmarked no later than 30 days after the colleague first views or receives the policy. Please Note, sending in a timely notice is the only way to opt out. A colleague cannot opt out by refusing to complete training or attend meetings about the policy.¹⁹⁷

A reviewer on "SDN"—the social media website for a non-profit organization created to help students become doctors¹⁹⁸—critically reviewed CVS's policies, similar to that of Best Buy. The following posting appeared there.

To all CVS employees, have you acknowledged the arbitration training on Learnnet (course 800305)? I know most employees probably didn't even have time to read it while working and blindly acknowledged it.

I hope most, if not all, of you opted out of this agreement. Since CVS is repeatedly sued for labor law violations, especially in California, they decide [sic] come up with this stupid agreement to avoid "class action" or "collective action" lawsuits. This ploy is to avoid them having to pay out all employees involved in similar circumstances. Arbitration also favors the employer [rather] than the employee.

Please opt out soon and the only way to do so is by a written, signed and dated letter sent to them. This MUST be done within 30 days or you're legally bound to use an arbitrator of their choosing to dispute legal claims, rather than having to deal with a judge and jury.¹⁹⁹

Similar to Glassdoor and Reddit's open platforms, Quora has provided insight into the impact of mandatory arbitration on employees. Quora is a website that defines itself as a place to share knowledge and better understand

197. *Hall v. CVS Health Corp.*, No. 2:17-cv-00289-KOB, 2018 U.S. Dist. LEXIS 37177 (N.D. Ala. Mar. 7, 2018).

198. STUDENT DOCTOR NETWORK, <https://www.studentdoctor.net/>.

199. H8_CVS, *CVS Arbitration of Workplace Legal Disputes*, STUDENT DOCTOR NETWORK (Nov. 21, 2014) <https://forums.studentdoctor.net/threads/cvs-arbitration-of-workplace-legal-disputes.1108755/>.

the world.²⁰⁰ Visitors to Quora's website can ask questions and receive answers from other members.²⁰¹ In a question and answer session on Quora, visitors discussed CVS's mandatory arbitration agreements. In the paragraphs below, a bullet point response from a person identifying himself as "someone that went to law school" follows the mandatory arbitration agreement question.²⁰²

Why did CVS Health Pharmacy ask its employees recently to embrace an arbitration clause limiting their rights to litigate employee issues?

Mainly, to prevent class action lawsuits for systemic abuses.

To avoid embarrassment from suits on public record.

Because arbitration favors the employer more than courts do.²⁰³

Like Best Buy, the social media comments reflect concerns about employer abuses and the lack of transparency resulting from the pre-dispute mandatory arbitration agreements.

3. TJX

Similar to CVS, TJX Companies, Inc. ("TJX") supplies a Code of Conduct. TJX's Code of Conduct provides, "We do not tolerate harassment at TJX. As TJX Associates, we are all expected to act in a professional manner and to avoid any action or behavior that, if unwelcome, may be considered harassment or sexual harassment."²⁰⁴ However, TJX restricts its employees' protections to those provided in the law through a clause asserting, "The Code is not intended to confer any special rights or privileges upon any of us or to provide greater or lesser rights than those provided by applicable law."²⁰⁵ That same Code of Conduct also states, "The Code is not a contract. TJX retains the right to unilaterally modify the Code and Company policies at any time, without advance notice, to the extent permitted by applicable law."²⁰⁶

Despite the Code of Conduct's demand for respect among its colleagues, TJX has a pre-dispute mandatory arbitration agreement with a class waiver that ensures disputes remain confidential.²⁰⁷ The eighth clause of the agreement provides employees with an opportunity to decline participation in the

200. *Why Quora Exists*, QUORA, <https://www.quora.com/about>.

201. *Id.*

202. Robert Wagner, *Why Did CVS Health Pharmacy Ask its Employees to Embrace an Arbitration Clause Limiting Their Rights to Litigate Employee Issues?*, QUORA (Nov. 11, 2014), <https://www.quora.com/Why-did-CVS-Health-Pharmacy-ask-its-employees-recently-to-embrace-an-arbitration-clause-limiting-their-rights-to-litigate-employee-issues>.

203. *Id.*

204. *TJX Global Code of Conduct*, TJX, <https://www.tjx.com/files/pdf/TJX-Code-of-Conduct.pdf>.

205. *Id.*

206. *Id.*

207. *TJX Arbitration Agreement*, TJX, https://tjx.mycompliancemanager.com/documents/TJX_Your_Voice_New_Hire_Arbitration_Agreement.pdf.

agreement.²⁰⁸ However, an employee wishing to decline must comply with one of the two affirmative actions described below.

An Associate who does not want to participate in this Agreement may prepare a signed and dated letter stating that the Associate declines to participate in this Agreement. The letter should include the Associate's Associate Identification Number ("AIN") and the location where the Associate works. The Associate should mail his or her letter to The TJX Companies, Inc., PO Box 2410, Kyle, TX 78640, and should retain a copy of the letter for his or her records. Alternatively, the Associate may decline to participate in this Agreement by accessing the Agreement through myTJX.com and typing the Associate's first and last name in the text field labeled "I decline to participate in this Agreement."²⁰⁹

Similar to Best Buy and CVS, TJX received social media criticism concerning its pre-dispute mandatory arbitration agreements. On February 10, 2014, a person identified as a "Sales Associate in Boston, MA" posted a lengthy Glassdoor review of TJX.²¹⁰ In the "Cons" section, "Sales Associate in Boston, MA" articulated numerous complaints about the company.²¹¹ Among other thoughts, the employee stated the following:

Their newest tricks are two: first they are trying to get all employees to sign binding arbitration agreements waiving the employees [sic] rights to sue the company for their many abuses. You would no longer be able to sue for back wages, discrimination or poor working conditions. The company has been killed by successful suits in the past and they do not want to be forced to pay for their own misdeeds!²¹²

Because public disclosure is inevitable, businesses should revisit their reliance on private settlements and confidential arbitration as a way to conceal malfeasance.

B. Employees May Reward Employers for Transparency and Accountability

In a transparent environment, employees can better judge the performance of current and potential employers. Those judgments favorably impact the recruiting and retention of employees. Employers adopting policies favorable to employees and avoiding the inclination to conceal malfeasance may reap financial rewards due to more effective recruiting and increased retention rates.

1. Recruiting

Recruiting the right people generates substantial benefits for employers. In its calculation of a return on investment, The Boston Consulting Group has

208. *Id.* at 4.

209. *Id.*

210. Sales Associate in Boston, MA, *A Terrible Company For a Grown Person to Work for Any Length of Time*, GLASSDOOR (Feb. 10, 2014), <https://www.glassdoor.com/Reviews/Employee-Review-TJX-Companies-RVW3676197.htm>.

211. *Id.*

212. *Id.*

called recruiting the most important human resources function.²¹³ Given recruiting's importance and the movement toward transparent employment, it follows that employment policies should reflect the desires of incoming employees.

Software Advice, a Gartner Company, provides research and user reviews on software and is considered a source of expertise for numerous business publications. Software Advice's recent survey claims that nearly fifty percent (50%) of job seekers in the U.S. read Glassdoor reviews, suggesting reviews can influence recruiting efforts.²¹⁴ Software Advice concluded that "Having a strong—and positive—presence on Glassdoor can improve your brand and help pique applicants' interest in your company."²¹⁵ Therefore, doing business in the transparent environment created by Glassdoor and other social media websites may require improvements to corporate behavior in an effort to attract the most talented employees from today's job seeker pool. As seen above, employees may discuss sexual harassment and mandatory arbitration in their employer reviews. Efforts to improve workplace culture and refraining from mandating arbitration could have a positive impact on the attraction of qualified employees.

2. Retention

Similar to its conclusions on recruiting, The Boston Consulting Group has concluded that companies that invest in people enjoy better economic performance. Compared to low-performing companies, high-performing companies are more likely to have policies that promote retention.²¹⁶ To the contrary, employee turnover hurts companies. The Society of Human Resource Management's research suggests that direct replacement costs can reach fifty to sixty percent (50% to 60%) of an employee's annual salary, with total costs associated with turnover ranging from ninety to two hundred percent (90% to 200%) of an employee's annual salary.²¹⁷ As of 2016, the Society of Human Resource Management estimated the employee turnover rate at eighteen

213. Strack, et. al., *From Capability to Profitability*, THE BOSTON CONSULTING GROUP, (July 2012), http://image-src.bcg.com/Images/BCG_From_Capability_to_Profitability_Jul_2012_tcm9-103684.pdf.

214. Brian Westfall, *How Job Seekers Use Glassdoor Reviews*, SOFTWARE ADVICE, <https://www.softwareadvice.com/resources/job-seekers-use-glassdoor-reviews/>.

215. *Id.*

216. Strack, et. al., *supra* note 213.

217. David G. Allen, *Retaining Talent*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/documents/retaining%20talent-%20final.pdf>.

percent (18%).²¹⁸ When companies consider the turnover rate and turnover cost, they should conclude that turnover prevention is good for business.

With the substantial costs associated with turnover, many would expect companies to encourage retention and avoid policies and behaviors that lead to turnover. Unfortunately, because many employees quit their jobs rather than continue working in a harassing work environment, sexual harassment may have long-term consequences for careers.²¹⁹ One study has shown that harassment at ages 29-30 can increase financial stress into the early thirties.²²⁰ Approximately thirty-five percent (35%) of the effect can be attributed to the victim's job change, a common response to severe sexual harassment.²²¹ Some quit to avoid harassers and others quit because of dissatisfaction or frustration with the employer's response.²²² Removing pre-dispute mandatory arbitration agreements should create the transparency necessary to curb the behavior. It should also remove some of the frustration experienced by those dissatisfied with the employer's response to their complaints.

C. Investors Consider New Performance Metrics

Organizations are no longer assessed solely on traditional metrics such as financial performance, or even the quality of their products or services. Rather, investors increasingly judge businesses on the basis of their relationships with their workers, customers, communities, and impact on society at large—transforming them from business enterprises into social enterprises.²²³

An organization's financial performance appears to be linked to its citizenship record. Organizations have created hundreds of corporate social responsibility ("CSR") and "best places to work" indexes such as *Fortune*'s Most Admired Company list.²²⁴ A new meta-study found a direct correlation between CSR index ranking and profitability.²²⁵

218. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, 2017 HUMAN CAPITAL BENCHMARKING REPORT (2017), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2017-Human-Capital-Benchmarking.pdf>.

219. McLaughlin, *supra* note 128, at 334.

220. *Id.* at 351.

221. *Id.*

222. *Id.*

223. *The Rise of the Social Enterprise*, DELOITTE (2018), https://www2.deloitte.com/content/dam/insights/us/articles/HCTrends2018/2018-HCTrends_Rise-of-the-social-enterprise.pdf.

224. *The World's Most Admired Companies*, FORTUNE, <http://fortune.com/worlds-most-admired-companies/>.

225. Harmony J. Palmer, *Corporate Social Responsibility and Financial Performance: Does It Pay To Be Good* (Dec. 3, 2012) (senior thesis, Claremont McKenna College), [https://scholarship.claremont.edu/cgi/viewcontent.cgi?referer=&http\(sredir=1&article=1502&context=mc_theses](https://scholarship.claremont.edu/cgi/viewcontent.cgi?referer=&http(sredir=1&article=1502&context=mc_theses).

Investors appear to have noticed the new metrics. A study of 22,000 investment professionals found that seventy-eight percent (78%) have increased their investments in CSR-focused firms.²²⁶ An organization's track record of corporate citizenship can lift financial performance and brand value, while failure to engage can destroy reputation and alienate key audiences.²²⁷ Understanding that employment brand correlates directly with the quality of hiring and retention, some investors also evaluate organizations through online rating platforms such as Glassdoor.²²⁸ Investors reviewing these online rating platforms would likely find concern in the CVS, TJX, and Best Buy reviews described above.²²⁹

D. Trust in Business May Pay Off

Across the globe, people trust business more than government. The 2018 Edelman Trust Barometer reported that people worldwide place fifty-two percent (52%) trust in business "to do what is right," versus just forty-three percent (43%) in government.²³⁰ In the United States, in particular, trust in government has hit a four-year low, at just thirty-three percent (33%).²³¹ Deloitte recently concluded the following with respect to trust in business:

Citizens are looking to business to fill the void on critical issues such as income inequality, health care, diversity, and cybersecurity to help make the world more equal and fair. This expectation is placing immense pressure on companies—consumers and employees alike are holding companies' feet to the fire when it comes to how they treat their employees, communities, and society at large.²³²

Several businesses have begun to fill the government's void. These employers have adopted changes to their employment policies consistent with the government's legislative efforts.

Microsoft Corporation, one of the world's biggest software makers, said on December 19, 2017 that it had eliminated forced arbitration agreements with

226. SCHRODERS, [GLOBAL INVESTOR STUDY: GLOBAL PERSPECTIVES ON SUSTAINABLE INVESTING 3-7 \(2017\)](https://www.schroders.com/en/sysglobalassets/digital/insights/2017/pdf/global-investor-study-2017/schroders_report_sustainable-investing_final.pdf), https://www.schroders.com/en/sysglobalassets/digital/insights/2017/pdf/global-investor-study-2017/schroders_report_sustainable-investing_final.pdf.

227. *The Rise of the Social Enterprise*, *supra* note 223.

228. Dimple Agarwal et al., *Citizenship and Social Impact: Society Holds the Mirror*, DELOITTE (Mar. 28, 2018), https://www2.deloitte.com/insights/us/en/focus/human-capital-trends/2018/corporate-citizenship-social-impact.html?id=us:2ps:3gl:confidence:eng:cons:111617:nonem:na:s06LYQWt:1100004746:268089541598:b:RLSA_Human_Capital_Trends:Citizenship_Social_Impact_BMM:nb#endnote-15.

229. See *infra* Part IV, A.

230. EDELMAN, 2018 EDELMAN TRUST BAROMETER: GLOBAL REPORT 5 (2018), <https://www.edelman.com/trust-barometer>.

231. *Id.* at 11.

232. 2018 Deloitte Global Human Capital Trends Unveiled, DELOITTE (May 9, 2018), <https://hrtimesblog.com/2018/05/09/2018-deloitte-global-human-capital-trends-unveiled/>.

employees who make sexual harassment claims.²³³ “The silencing of people’s voices has clearly had an impact in perpetuating sexual harassment,” Brad Smith, Microsoft’s President and Chief Legal Officer, said in a phone interview.²³⁴ In a blog post, Brad Smith elaborated on Microsoft’s position and explained the company’s support for federal legislation:

That’s why today Microsoft becomes the first Fortune 100 company to endorse bipartisan legislation that will ensure that people’s concerns about sexual harassment can always be heard. We’re also taking a new step within Microsoft to ensure this will be the case, even while that legislation is pending. Senators Kirsten Gillibrand and Lindsey Graham recently introduced new legislation—[S. 2203, the Ending Forced Arbitration of Sexual Harassment Act of 2017](#)—which Microsoft supports. This bill would ensure that every person facing sexual harassment in the workplace can make their case in a public court, rather than solely behind closed doors in private arbitration.²³⁵

Smith explained Microsoft’s actions with the following statement:

But as each new story about sexual harassment demonstrates, current approaches in this area have proven insufficient. Even as we look squarely at the sins of the past, we must take stronger steps to prevent these problems in the future. Because the silencing of voices has helped perpetuate sexual harassment, the country should guarantee that people can go to court to ensure these concerns can always be heard.

After returning from Washington to Seattle, we also reflected on a second aspect of the issue. We asked ourselves about our own practices and whether we should change any of them. At Microsoft we’ve never enforced an arbitration provision relating to sexual harassment, and we pride ourselves on having an open-door policy that encourages employees to raise any such concerns internally so they can be investigated thoroughly and addressed appropriately. But we also reviewed and found that we have contractual clauses requiring pre-dispute arbitration for harassment claims in employment agreements for a small segment of our employee population. We concluded that if we were to advocate for legislation ending arbitration requirements for sexual harassment, we should not have a contractual requirement for our own employees that would obligate them to arbitrate sexual harassment claims. And we should act immediately and not wait for a new law to be passed. For this reason, effective immediately, we are waiving the contractual requirement for arbitration of sexual harassment claims in our own arbitration agreements for the limited number of employees who have this requirement.

Ride-hailing companies Uber Technologies Inc. and Lyft Inc. scrapped mandatory arbitration to settle sexual harassment or assault claims, giving

233. Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES, (Dec. 19, 2017), (<https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html>).

234. *Id.*

235. Smith, *supra* note 133.

victims several options to pursue their claims including public lawsuits.²³⁶ Uber's victims were previously required to enter into confidentiality agreements as part of arbitration to settle claims, which prevented them from speaking publicly about the facts surrounding any sexual assault or harassment. Uber announced in a blog post that its employees can now settle claims through either mediation or arbitration, where they have the option of confidentiality, or court. "We commit to publishing a safety transparency report that will include data on sexual assaults and other incidents that occur on the Uber platform," Uber's Chief Legal Officer, Tony West, wrote. Lyft also removed the confidentiality requirement for sexual assault victims and ended mandatory arbitration for individuals. "This policy extends to passengers, drivers and Lyft employees," it said.²³⁷

Orrick Herrington & Sutcliffe, an international law firm founded in San Francisco, California serving technology, energy, infrastructure and finance clients, has 940 attorneys and gross revenues approaching \$1 billion.²³⁸ Recently, the firm announced that it would no longer require any of its employees, including associates, to sign mandatory arbitration agreements.²³⁹ "Orrick has decided that it's time for us to make a change," the firm said in a statement given to Above the Law. Mitchell Zuklie, Orrick's chairman, said, "We listened to the conversation on this issue and realized it was time for us to make a change. We're very focused on being a best place to work for the best talent, and that means taking a fresh, forward-thinking look at everything we do."

Top law schools seem to have joined the fight to create transparency and accountability by requiring disclosure of mandatory arbitration agreements and nondisclosure provisions for those firms participating in campus recruiting for summer associates.²⁴⁰ Fourteen of the country's top law schools have asked that firms participating in campus recruiting disclose such policies in a new survey.²⁴¹

236. Laharee Chatterjee, *Uber, Lyft Scrap Mandatory Arbitration for Sexual Assault Claims*, REUTERS BUS. NEWS (May 15, 2018), <https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG112>.

237. *Id.*

238. Orrick, LAW.COM, <https://www.law.com/law-firm-profile/?id=227&name=Orrick-Herrington-Sutcliffe>.

239. Staci Zaretsky, *The First Biglaw Firm To Willingly Do Away With Its Mandatory Arbitration Policy*, ABOVE THE LAW (Mar. 27, 2018, 10:42 AM), <https://abovethelaw.com/2018/03/this-billaw-firm-is-the-first-to-step-forward-and-do-away-with-mandatory-arbitration-for-all-employees/>.

240. Stephanie Ward, *Top Law Schools Ask Law Firms to Disclose Arbitration Agreements for Summer Associates*, ABA JOURNAL (May 17, 2018, 7:10 AM), http://www.abajournal.com/news/article/top_law_schools_ask_law_firms_to_disclose_arbitration_agreements_for_summer.

241. *Id.*

V. CONCLUSION

This paper takes no issue with arbitration as a general means of settling disputes with employees. Attorneys zealously representing employers may and should seek arbitration and confidentiality as a means of protecting their clients' interests. In addition, certain victims may need or prefer the confidentiality provided by arbitration and nondisclosure agreements.

Instead, this paper focuses on pre-dispute mandatory arbitration agreements and their associated nondisclosure provisions by describing their detrimental impact on employees. This impact extends to the physical and mental health of its victims, contributes to their financial difficulties, and knocks many victims off-course during the formative years of their careers. Silencing these victims' voices through private arbitration and tolerating confidential pre-dispute mandatory arbitration agreements could perpetuate serious and demeaning conduct, while shielding perpetrators.

Various federal legislative efforts have failed and state legislative efforts are likely preempted by the FAA. Despite the lack of an effective governmental response, employers should not sit silently and miss an opportunity to improve relations with employees and reduce the prevalence of sexual harassment. Today, in a world with increased transparency, employers cannot hide from sexual harassment behind mandatory arbitration agreements or nondisclosure provisions. Given this backdrop, we should direct our efforts to convince employers that the fight for transparency and accountability will yield results in recruiting and retaining the best and brightest employees, ultimately generating financial and other rewards for investors and employers.