

2019

“I Like You When You are Silent”: The Future of NDAs and Mandatory Arbitration in the Era of #MeToo

Jonathan Ence

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Jonathan Ence, *“I Like You When You are Silent”: The Future of NDAs and Mandatory Arbitration in the Era of #MeToo*, 2019 J. Disp. Resol. (2019)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2019/iss2/10>

This Comment is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

"I LIKE YOU WHEN YOU ARE SILENT": THE FUTURE OF NDAs AND MANDATORY ARBITRATION IN THE ERA OF #METOO

Jonathan Ence*

I. INTRODUCTION

On October 5, 2017, the New York Times published an exposé of Harvey Weinstein, an influential film producer, which sparked what came to be known as the #METOO movement.² As part of the report, Ashley Judd and numerous other actresses outed Weinstein for using his position of power to rape, sexually assault, and sexually abuse them—accusations that spanned over thirty years.³ Inspired by the courage of these women, countless others came forward to share their stories of sexual assault by individuals in positions of power.⁴ Survivors of sexual assault appeared to garner strength against their attackers as men in power had to account for their transgressions, often leading to job loss or criminal charges.⁵ While dozens of Weinstein employees knew about his conduct, only a handful ever confronted him, and Judd was the first to go public.⁶

Despite opening the floodgates to speak out about sexual assault, a significant number of survivors have been unable to share their stories because of non-disclosure agreements (NDAs), sometimes referred to as confidentiality agreements (CAs).⁷ In the situation of McKayla Maroney, 2012 Gold Medal Olympian, USA Gymnastics forced her to sign a confidentiality agreement after settling over abuse

1. PABLO NERUDA, *I Like You When You are Silent*, in *TWENTY LOVE POEMS AND A SONG OF DESPAIR* (W.S. Merwin trans., 1993) (1924).

* B.A., Brigham Young University 2014, J.D. Candidate, University of Missouri School of Law 2020. I would like to thank the editorial staff and members of the *Journal of Dispute Resolution* for their diligent efforts in improving this publication, as well as Dean Rafael Gely for his advice and guidance.

2. 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>.

3. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, THE NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

4. See Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *TIME Person of the Year 2017: The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/> (last visited Mar. 24, 2019); see also *News About #MeToo on Twitter*, TWITTER, <https://twitter.com/search?q=#metoo&src=typd&lang=en> (last visited Sept. 6, 2018).

5. See Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (Mar. 7, 2019), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmllstory.html>.

6. Kantor & Twohey, *supra* note 2.

7. Sara Ganim & Sunlen Serfaty, *Why Some Victims of Sexual Harassment Can't Speak Out*, CNN POL., <https://www.cnn.com/2017/11/24/politics/non-disclosure-agreements-sexual-harassment> (last updated Nov. 24, 2017).

by team doctor Larry Nassar.⁸ The provision would have prevented Maroney from testifying against her attacker at the expense of a \$100,000 fine.⁹ Only after receiving a cornucopia of societal pressure did USAG decline to enforce the penalty against Maroney.¹⁰ While USAG claimed Maroney was the only victim that they forced to sign a non-disclosure agreement,¹¹ NDAs have silenced countless other women.¹²

Likewise, the Weinstein cases involved not only quieting the survivors, but also all employees of the Weinstein Corporation.¹³ It became blatantly clear that NDAs had not only restricted survivors from sharing their story cathartically, but that they had also given abusive men a path to legally harass women while simultaneously holding onto positions of power.¹⁴ Notably, the power of employers to enforce these provisions against women is largely dependent on the public's ability to chastise the employer, making it easier for low-profile cases involving smaller employers to continue in the dark.¹⁵

In response to the public outcry over CAs and, multiple states have pursued legislation to limit the abilities of employers to use NDAs in sexual harassment cases.¹⁶ In six states that legislation became law.¹⁷ At the end of September, two California bills went before Governor Jerry Brown to either receive a veto or signature.¹⁸ Furthermore, as part of the Tax Cuts and Jobs Act of 2017, Congress passed a section that prohibits tax deductions for settlements involving NDAs and sexual harassment.¹⁹

8. Victor Mather, *McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html>.

9. *Id.*

10. Heather Tucker, *USA Gymnastics Says it Will Not Fine McKayla Maroney if She Speaks Out Against Larry Nassar*, USA TODAY (Jan. 16, 2018), <https://www.usatoday.com/story/sports/olympics/2018/01/16/usa-gymnastics-mckayla-maroney-larry-nassar/1039025001/>.

11. *USA Gymnastics: There Are No Other Non-Disclosure Agreements*, ABC NEWS (Feb. 13, 2018), <https://abcnews.go.com/Sports/usa-gymnastics-disclosure-agreements/story?id=530644633>.

12. Kantor & Twohey, *supra* note 2.

13. Caitlin Gibson, *How NDAs Kept the Lid on Harassment Scandals - And Why That Might be Changing*, WASH. POST (Oct. 25, 2017), https://www.washingtonpost.com/lifestyle/style/how-ndas-kept-the-lid-on-harassment-scandals--and-why-that-might-be-changing/2017/10/25/62af1e30-b99d-11e7-a908-a3470754bbb9_story.html?utm_term=.5ff5e4b64713.

14. Ganim & Serfaty, *supra* note 7.

15. *Id.*

16. Michelle R. Smith, *Some States Place Limits on Secret Harassment Settlements*, AP NEWS (Aug. 27, 2018), <https://www.apnews.com/448968e898554d128c3247e41f7d8d91>.

17. *Id.*

18. *See California May Soon Join States Placing Limits on Secret Harassment Settlements*, CBS S.F. BAY AREA (Aug. 27, 2018), <https://sanfrancisco.cbslocal.com/2018/08/27/california-may-soon-join-states-placing-limits-on-secret-harassment-settlements/>; *see also* Laurel Rosenhall, *Jerry Brown Paddles Left, Paddles Right on #MeToo Laws*, CALMATTERS (Oct. 2, 2018), <https://calmatters.org/articles/jerry-brown-paddles-left-right-on-metoo-laws/>.

19. Tax Cuts & Jobs Act § 13307, PUB. LAW 115-97 (prohibits a tax deduction for trade or business expenses paid or incurred for: (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment).

This Comment will discuss the effect of these bills and whether serious change is afoot. In the age of #METOO, many oppose the use of NDAs in sexual harassment settlements as a means of silencing survivors.²⁰ However, the Supreme Court has interpreted Title VII investigations to trump CAs, which would give the appearance that survivors have had the ability to file claims against their employers and testify against them in criminal trials.²¹ This Comment will also examine the responses of several state legislative bodies and Congress in their reactions to the #METOO movement.

II. OVERVIEW OF NON-DISCLOSURE AND ARBITRATION AGREEMENTS

Laws in the United States do not distinguish between CAs and NDAs and will often define a non-disclosure agreement as a particular type of confidentiality agreement.²² For purposes of this paper, the term "NDA" will be used to refer to both confidentiality agreements and non-disclosure agreements.

A. Non-disclosure Agreements

NDAs are a key component of most settlements resolving a legal dispute.²³ In cases of sexual harassment in the workplace, NDAs prohibit the victim from disclosing details about the settlement or facts which led to the settlement.²⁴ A majority of courts allow for an employee to testify in a civil trial despite the implementation of an NDA, however, some states have barred such testimony.²⁵

However, under Title VII of the Civil Rights Act, even after signing NDA the victim may still file charges with the Equal Employment Opportunity Commission (EEOC) or assist them with an investigation.²⁶ "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."²⁷ In *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738 (1st Cir. App. 1996), the First Circuit weighed "the impact of settlement provisions that effectively bar cooperation with the EEOC...against the impact that outlawing such provisions would have on private dispute resolution."²⁸ Applying this test, the appellate court found that confidentiality agreements prohibiting survivors

20. Jessica Levinson, *Non-Disclosure Agreements Can Enable Abusers. Should We Get Rid of NDAs for Sexual Harassment?*, NBC NEWS (Jan. 24, 2018), <https://www.nbcnews.com/think/opinion/non-disclosure-agreements-can-enable-abusers-should-we-get-rid-ncna840371>.

21. *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. App. 1996) (citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)).

22. H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018) ("'Nondisclosure agreement' means a confidentiality agreement or contract provision that prohibits the disclosure of information by a party to the contract").

23. Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), <https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/>.

24. *Id.*

25. Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 U. PITT. L. REV. 1207, 1212 (1999).

26. 42 U.S.C. § 2000e (1964).

27. *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 744 (1st Cir. 1996) (citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)).

28. *Id.*

from reporting to the EEOC would thwart Congress's intent in enacting Title VII.²⁹ Furthermore, there exists a public interest in preventing employment discrimination, sexual harassment claims, and permitting survivors to speak with the EEOC vindicates that interest.³⁰ Subsequently, the EEOC filed a notice that employers "may not interfere with the protected right of an employee to file a charge, testify, assist, or participate..." in an investigation or hearing under Title VII.³¹

However, if it were easy to file a claim under Title VII then supposedly everybody would do it, but the bar for proving sexual harassment under Title VII is extremely high, employer defenses are too strong, and the workplace ecosystem combines to deter this sort of action.³² To establish actionable sexual harassment under Title VII, a plaintiff-employee must show that (1) the employee experienced "harassing conduct" based on sex that was sufficiently severe or pervasive to create an abusive environment or alter the conditions of employment; (2) the conduct was objectively offensive to a reasonable employee under the circumstances; and (3) the conduct was subjectively offensive.³³ Moreover, the employee may only bring a complaint against the employer, but not against the individual harasser.³⁴

The Supreme Court has, more or less, adhered to two categories of sexual harassment that are actionable under Title VII: quid pro quo and hostile work environment.³⁵ Under a quid pro quo action the plaintiff-employee must demonstrate that there was a "tangible employment action,"³⁶ which is manifest in "a significant change in employment status, such as discharge, demotion, or undesirable reassignment."³⁷ If the employee proves that an action occurred, the Court has determined that such occurrence helps determine that the agency aided in committing a tort and creates vicarious liability.³⁸ If the employee is unable to prove a tangible employment action then the employer may raise the *Faragher* defense.³⁹ "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁴⁰ In other words, if an employer takes reasonable measures to prevent sexual harassment

29. *Id.* at 743.

30. *Id.* at 744.

31. General Statement, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 10, 1997), <https://www.eeoc.gov/policy/docs/waiver.html>.

32. See e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 915 (2008); Joanna L. Grossman, *The First Bite is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 700-06 (2000).

33. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

34. 42 U.S.C. § 2000e-2 (1991). See e.g., *Fantini v. Salem St. C.*, 557 F.3d 22, 31 (1st Cir. 2009); *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1079 (8th Cir. 2006); *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077-78 (3d Cir. 1996).

35. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

36. *Burlington Indus.*, 524 U.S. at 744.

37. *Id.* The 6th Circuit has held that a downgraded job evaluation, from "excellent" to "very good," does not constitute a "tangible employment action." *Morris v. Oldham Cty. Fiscal Ct.*, 201 F.3d 784, 789 (6th Cir. 2000). See also *Savino v. C.P. Hall Co.*, 199 F.3d 925, 932 n.8 (7th Cir. 1999) ("A tangible employment action has to cause a substantial detriment to the plaintiff's employment relationship.").

38. *Burlington*, 524 U.S. at 745.

39. See *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

40. *Id.*

(training, anti-discrimination policies, avenues for reporting, etc.) and the employee fails to use these then the employer may exit unscathed.⁴¹

On its face, the second prong—that the employee takes advantage of the opportunities—appears reasonable. Nevertheless, this recourse is typically a last-ditch effort for women, who will often only complain through the respective channels when other responses, such as ignoring the harassment, have failed.⁴²

Virginia Schein explained that women face multiple risks when reporting claims to the EEOC.⁴³ First, sexual harassment tends to occur in workplaces with designed power-related systemic qualities.⁴⁴ In other words, women will often tolerate sexual harassment rather than report it to preserve their career and professional support network.⁴⁵ Second, when women decide to report the harassment their coworkers tend to cut them off.⁴⁶ This may lead to poor job performance, which becomes a pretext for termination.⁴⁷ Moreover, the plaintiff may only file a Title VII complaint within 180 days of the incident.⁴⁸ If the survivor manages to file her claim in time, she might be rejected anyway by the EEOC, which rejects most of the claims it receives.⁴⁹

B. Mandatory Arbitration Agreements

Often, NDAs will accompany a mandatory arbitration agreement.⁵⁰ These are agreements in which an employee agrees not to sue an employer, but to bring any claims in confidential arbitration.⁵¹ Generally, arbitration can be a more favorable alternative to resolving a dispute than taking a cause of action through the court system.⁵² However, arbitration in the workplace receives noted criticism because the agreements are often hidden within the employment contract and employers

41. *Vance v. Ball St. Univ.*, 570 U.S. 421, 429 (2013) (finding that this defense may “mitigate or avoid liability” for an employer); Grossman, *supra* note 32, at 708-10 (arguing that the defense is properly applied to mitigate damages and to avoid liability only in limited circumstances, but noting that numerous courts have used *Faragher-Ellerth* to grant summary judgment for the employer).

42. James E. Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 Soc. & Soc. Res. 3, 4 (1989).

43. Virginia E. Schein, *Power, Sex and Systems*, 9 WOMEN MGMT. REV. 4, 5 (1994).

44. *Id.*

45. *Id.* (“The reward, referral and resource-sharing nature of the system pressures a woman towards tolerance rather than telling.”). See also Louise F. Fitzgerald et al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122 (1995) (“They believe that nothing can or will be done, and many are reluctant to cause problems for the harasser. The most common reason, however, is fear – fear of retaliation, of not being believed, or hurting one’s career, or of being shamed and humiliated.”).

46. *Id.*

47. *Id.*

48. *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Mar. 25, 2019).

49. Alieza Durana, *The Sexual-Harassment Victims Who Can’t Get to Court*, ATLANTIC (Oct. 8, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/year-metoo-not-everyones-protected-sexual-harassment/572329/>.

50. Kevin J. Hamilton & Harry H. Schneider Jr., *Confidential Arbitration Agreements for High-Profile Clients and Senior Executives*, 43 LITIG. 1 (2016).

51. See David Seligman, *The Model State Consumer & Employee Justice Enforcement Act*, NAT’L CONSUMER L. CTR. 59 (2016), <https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf>.

52. Barbara Kate Repa, *Arbitration Pros and Cons*, NOLO, <https://www.nolo.com/legal-encyclopedia/arbitration-pros-cons-29807.html> (last visited Nov. 16, 2018).

typically force employees to agree to such provisions.⁵³ Employment cases that end up in arbitration also have a much lower success rate than employment litigation trials.⁵⁴

Additionally, arbitration prevents these cases from entering the public realm of knowledge, shrouding the process in secrecy.⁵⁵ Nevertheless, the National Labor Relations Act makes it unlawful to prevent employees from engaging in a concerted activity.⁵⁶ Before Congress enacted the Federal Arbitration Act (FAA) in 1925, courts routinely refused to enforce agreements to arbitrate.⁵⁷ The FAA directs courts to “respect and enforce” arbitration provisions that parties agree to, thus creating a conflict between the FAA and National Labor Relations Act.⁵⁸ The Supreme Court of the United States recently decided this controversy in *Epic Systems Corp. v. Lewis*, which this article will address below in Phase III.

III. LEGISLATIVE RESPONSE TO METOO MOVEMENT

Because of the #METOO movement, state and federal legislatures have sought to prevent future prohibitions on survivors from disclosing their experiences with sexual harassment in the workplace. The National Conference of State Legislatures has reported a startling amount of legislation addressing sexual harassment.⁵⁹ This phase of the article will address the proposed and enacted legislation to combat sexual harassment.

A. Tax Cuts and Jobs Act of 2017

To deter employers from entering into nondisclosure agreements with plaintiff-employees, or to simply remove an existing tax benefit, Congress added a provision in the Tax Cuts and Jobs Act of 2017.⁶⁰ The provision provides that “[n]o deduction

53. Seligman, *supra* note 51, at 59 (“Although Congress’s purpose in enacting the FAA was to allow companies, bargaining at arms-length, to settle on an alternative dispute resolution forum, a series of recent Supreme Court decisions has expanded the Act’s reach to cover almost all employment and consumer contracts, whether or not the parties actually bargained over the term.”); *see also* David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 457-58 (2016).

54. *See e.g.*, Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

55. *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS’N 23 (Nov. 1, 2009), <https://www.adr.org/sites/default/files/Employment%20Rules.pdf> (“The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.”); *JAMS Employment Arbitration Rules & Procedures*, JAMS (July 1, 2014), <https://www.jamsadr.com/rules-employment-arbitration/english#twenty-six> (The arbitrator “shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.”).

56. *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NAT’L LAB. REL. BD., <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> (last visited Mar. 25, 2019).

57. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974).

58. 9 U.S.C. § 3 (West 1947).

59. *2018 Legislation on Sexual Harassment in the Legislature*, NAT’L CONF. ST. LEGISLATURES (Feb. 11, 2019), <http://www.ncsl.org/research/about-state-legislatures/2018-legislative-sexual-harassment-legislation.aspx>.

60. Tax Cuts & Jobs Act § 13307, PUB. LAW 115-97; *see also* I.R.C. § 162(q) (2017).

shall be allowed under this chapter for—(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a non-disclosure agreement, or (2) attorney’s fees related to such a settlement or payment.”⁶¹ This provision, ambiguous as it stands, might be an attempt by Congress to gain favor with the #METOO crowd, but could have some undesired effects and may actually negatively impact survivor-plaintiffs in a sexual harassment settlement.⁶²

Unfortunately, no guidance from the IRS currently exists to help understand the applicability of this provision. Yet, Congress’s intent in adding the provision was clearly to deter employers from adding NDAs to settlement agreements.⁶³ Businesses notoriously view legal settlements as a cost of doing business and costs of doing business are generally tax deductible.⁶⁴ Therefore, the logical conclusion is that businesses will avoid attaching NDAs to settlement agreements because they would rather claim the deductible and face public outcry than not claim the deductible and veil the settlement. Moreover, the statute lacks a definition for “sexual abuse” or “sexual harassment,” and also lacks clarity for what may constitute as a “nondisclosure agreement.”⁶⁵

Even if employers are willing to hang their dirty laundry to claim a tax deduction, the provision’s ambiguity might have some unanticipated consequences: are the plaintiff’s legal fees deductible if they agree to an NDA? The clear language of the statute would indicate that the plaintiff would not be able to do so. Certainly, if a plaintiff is unable to claim legal fees as a tax deduction then this would also deter a victim from entering into an NDA, especially if they are paying an attorney on a contingency basis.⁶⁶

In *Banks v. Commissioner*, the Supreme Court determined that plaintiffs have gross income on contingent legal fees, but Congress had provided an above-the-line deduction for employment cases several months prior to the *Banks* decision.⁶⁷ In other words, generally, plaintiffs must claim 100 percent of their reward as income, even that which they pay to the attorney, but in employment cases—at least until now—employees can claim their rewards as a tax deduction.⁶⁸ This means that an incentive for *employees* to settle cases because employers might offer less to settle without an NDA.⁶⁹

61. Tax Cuts & Jobs Act § 13307, PUB. LAW 115-97.

62. Robert W. Wood, *Tax Write-Offs in Sexual Harassment Cases After Harvey Weinstein*, N.Y. ST. B. ASS’N J. 11 (Feb. 2018), http://www.woodllp.com/Publications/Articles/pdf/Tax_Write-Offs_NYSBA.pdf.

63. *Id.*

64. *Publication 535 (2018), Business Expenses*, IRS, <https://www.irs.gov/publications/p535> (last visited Mar. 25, 2019).

65. I.R.C. § 162(q) (2017); see also Paige Good, *Confidential Sexual Harassment Settlement Payments No Longer Tax-Deductible*, MCAFEE & TAFT (Mar. 28, 2018), <https://www.mcafeetaft.com/confidential-sexual-harassment-settlement-payments-no-longer-taxdeductible/> (“The [TCJA’s] failure to define key terms in the new legislation leaves open-ended whether or how the law would apply to settlements of non-sexual-harassment disputes that nevertheless contain a release of sexual harassment claims, or whether other claims like gender discrimination, gender retaliation, or bullying are subsumed by the Act.”).

66. Wood, *supra* note 62.

67. See generally I.R.C. § 162 (2017); *Commissioner v. Banks*, 543 U.S. 426 (2005).

68. *Commissioner*, 543 U.S. at 426-39.

69. *Id.*

B. The EMPOWER Act

On June 5, 2018, U.S. Senators Kamala Harris [D-CA] and Lisa Murkowski [R-AK] introduced the EMPOWER Act (Ending the Monopoly of Power Over Workplace harassment through Education and Reporting) into Congress in an effort to further curb the use of NDAs in sexual harassment settlements.⁷⁰ The bill, as introduced to Congress, contains five main objectives in combatting gaps in the law that allow employers to privately handle sexual harassment lawsuits.⁷¹

First, the bill seeks to make it unlawful for employers to provide NDAs and non-disparagement clauses in contracts “as a condition of employment, promotion, compensation, benefits, or change in employment status...[if the NDA] covers workplace harassment, including sexual harassment...”⁷² In other words, the prohibition against NDAs would cover all forms of harassment, including discriminatory, racial, religious, and not just sexual harassment.⁷³ Second, the bill provides for a confidential tip-line for the reporting of workplace harassment so Fair Employment Practice Agencies could keep a record of employers where workplace harassment is “pervasive and systemic.”⁷⁴ Third, this would benefit shareholders by ending the loopholes that companies, such as Fox News, use to avoid disclosure of harassment settlements in an effort to protect their business empire.⁷⁵ Fourth, the Empower Act would amend the previously mentioned problems with the Tax Cuts and Jobs Act by striking subsection (q) from IRC § 162.⁷⁶ In fact, the bill goes even further than simply removing the disastrous subsection as the bill would exclude from gross income the amount of the judgment in a workplace harassment settlement.⁷⁷ Finally, it provides for workplace training programs and educational campaigns on how to report and prevent workplace harassment.⁷⁸

What this bill would not do is prohibit the use of NDAs in the event of a settlement so long as the settlement benefits both the employer and employee.⁷⁹ In other words, employers could still strongarm a plaintiff-employee into signing an NDA as long as (a) the NDA was not prearranged and a condition of employment, and (b) the settlement was beneficial to both sides.⁸⁰ This section of the bill may just be fluff because section 4 of the bill, which covers the prohibition of the NDAs, clearly excludes settlements; furthermore, it may seem odd for a plaintiff-employee to accept a settlement that is not in some arbitrary measure beneficial.⁸¹

70. S. 2994, 115th Cong. (2018); Eleanor Salsbury, *Women in Congress are Taking on Sexual Harassment with the EMPOWER Act*, MS. MAGAZINE (June 14, 2018), <http://msmagazine.com/blog/2018/06/14/women-congress-taking-sexual-harassment-empower-act/>.

71. See *The EMPOWER Act: Ending the Monopoly of Power Over Workplace Harassment Through Education and Reporting*, https://frankel.house.gov/uploadedfiles/empower_act_-_summary.pdf.

72. S. 2994, 115th Cong. (2018).

73. *The EMPOWER Act*, *supra* note 71.

74. *Id.* at 1.

75. *Id.* at 1-2.

76. *Id.* at 2.

77. S. 2994, 115th Cong. (2018).

78. *The EMPOWER Act*, *supra* note 71, at 3.

79. S. 2994, 115th Cong. (2018).

80. *Id.*

81. *Id.*

C. Arbitration Fairness Act of 2018

In a February 12, 2018 letter to Congress the attorneys general of every single U.S. State unanimously concluded that “[w]hile there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims... [Arbitrators] are not positioned to ensure that such victims are accorded both procedural and substantive due process”⁸² Perhaps as a response to this letter, Senator Richard Blumenthal (D-CT) introduced the Arbitration Fairness Act of 2018 (AFA) on March 22.⁸³

The AFA identifies the original intention of the FAA to apply to “disputes between commercial entities of generally similar sophistication and bargaining power,” but that the Supreme Court extended this meaning to employment disputes and that have run amok.⁸⁴ The AFA seeks to amend the FAA to prohibit mandatory arbitration agreements in employment, consumer, antitrust, or civil rights disputes.⁸⁵ The AFA likely faces an uphill battle, even though the Democrats now control the House.⁸⁶ Ignoring the fact that this has been languishing since March, the bill has no bipartisan support,⁸⁷ which means that even if it did pass in the House it likely would not pass in the Republican controlled Senate.

D. Ending Forced Arbitration of Sexual Harassment Act of 2017

Even before Sen. Blumenthal introduced the AFA, Sen. Kirsten Gillibrand (D-NY), along with Sen. Lindsay Graham (R-SC), introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017.⁸⁸ This bill purports to do exactly what its overly elongated name suggests, that is end mandatory arbitration in sexual harassment cases.⁸⁹ However, as John B. Lewis points out, the broad language of this bill may actually eliminate all forms of employment related arbitration agreements.⁹⁰

The strength of this Senate Bill is much greater than the Arbitration Fairness Act because it has bipartisan support, which is important because this issue is largely pushed by Democrats.⁹¹ Therefore, if Democrats were able to attract a few

82. *Sexual Harassment Claims to be Exempted from Binding Arbitration Agreements?*, LOCKABY PLLC (Feb. 15, 2018), <https://www.lockabylaw.com/blog/2018/02/sexual-harassment-claims-to-be-exempted-from-binding-arbitration-agreements.shtml>.

83. S. 2591, 115th Cong. (2018).

84. *Id.*

85. *Id.*

86. Shane T. Roeber & Davis Kuelthau, *Supreme Court Upholds Individual Proceedings in Arbitration Agreements - Hindering Class Actions*, NAT'L L. REV. (June 19, 2018), <https://www.natlawreview.com/article/supreme-court-upholds-individual-proceedings-arbitration-agreements-hindering-class>; Deirdre Shesgreen et al., *U.S. House: Democrats Win Control, Ending Unified GOP Rule of Washington*, USA TODAY (Nov. 6, 2018), <https://www.usatoday.com/story/news/politics/2018/11/06/house-midterms-results/1830966002/>.

87. S. 2591, 115th Cong. (2018).

88. *Id.*

89. *Id.*

90. Baker & Hostetler LLP, *Another Bill Aimed at Employee Arbitration Agreements - This Time to Nullify Epic Systems*, LEXOLOGY (Nov. 6, 2018), <https://www.lexology.com/library/detail.aspx?g=94a42dfc-dd2b-44f7-b713-8800af20a7ec>.

91. Tim Ryan, *Democrats Fight to Curb Forced Arbitration Clauses*, COURTHOUSE NEWS (Mar. 7, 2017), <https://www.courthousenews.com/democrats-fight-curb-forced-arbitration-clauses/>.

Republican votes, this bill could theoretically pass the Senate and then enter the now Democratic controlled House of Representatives.⁹² Nevertheless, in a divided Congress with little hope of amenable relations this bill may be placed on the backburners in favor of other policy concerns.⁹³

E. State responses

While Congress has found it difficult to get the ball rolling on METOO legislation, state legislators in nearly every state have enacted or proposed legislation to deal with sexual harassment in the legislature,⁹⁴ and several jurisdictions have proposed restrictions on the use of NDAs in workplace harassment cases.⁹⁵

a. Washington

On March 21, 2018, Washington Governor Jay Inslee signed SB 5996, which may have been the inspiration for at least part of the EMPOWER Act.⁹⁶ The two are nearly identical in the prohibition of employers requiring employees to sign a nondisclosure agreement as a condition of employment.⁹⁷ Similarly, the bill provides that there is no prohibition against confidentiality provisions in settlement agreements between an employee and employer.⁹⁸

b. Arizona

On April 25, 2016, Arizona passed HB 2020, which prohibits public officials from using taxpayer money to settle sexual harassment or sexual misconduct claims as well permitting survivors who signed NDAs to break their contracts in the limited situation of testifying at a criminal trial.⁹⁹ This bill was motivated in large part by the previously mentioned case of McKayla Maroney, who was initially barred from testifying at Larry Nassar's trial.¹⁰⁰

92. Sarah Binder, *Here are 4 Things to Expect from a New, Trumpier, More Polarized Congress*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/11/07/here-are-4-things-to-expect-from-a-new-trumpier-more-polarized-congress/?utm_term=.f31c3886c3dd.

93. Megan Cassella, Nancy Cook, & Gabby Orr, *What Can Get Done in a Divided Washington*, POLITICO (Nov. 6, 2018), <https://www.politico.com/story/2018/11/06/2018-elections-house-democrats-trump-relationship-930651>.

94. *2018 Legislation on Sexual Harassment in the Legislature*, *supra* note 59.

95. Smith, *supra* note 16.

96. S.B. 5996, 65th Leg., Reg. Sess. (Wash. 2018).

97. *Id.*

98. *Id.*

99. H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018); ARIZ. REV. STAT. § 12-720(B) (2018).

See also Andrew Nicla, *Bill Allowing Sex Harassment Victims to Break Some Non-Disclosure Agreements Heads to Ducey*, AZCENTRAL (Apr. 12, 2018), <https://www.azcentral.com/story/news/politics/arizona/2018/04/12/bill-allowing-sex-assault-harassment-victims-break-non-disclosure-agreements-heads-doug-ducey/440055002/>.

100. Dustin Gardiner, *Arizona Lawmakers: Break Secrecy Pacts That Protect Sexual Predators*, AZCENTRAL (Feb. 16, 2018), <https://www.azcentral.com/story/news/politics/2018/02/16/arizona-lawmakers-break-secrecy-pacts-protect-sexual-predators/345496002/>.

c. New York

In what is blatantly the most comprehensive legislation on sexual harassment, New York has all but enacted Senate Bill S7848A.¹⁰¹ This bill, if signed by Governor Andrew Cuomo, would prohibit NDAs in any settlement of a sexual harassment claim *unless* the complainant requests confidentiality.¹⁰² This would give the plaintiff-employee the autonomy to choose whether to share her story.¹⁰³ Additionally, the bill provides that, "except where inconsistent with federal law," employers shall not include mandatory arbitration clauses for claims of sexual harassment.¹⁰⁴

d. Maryland

Although Maryland's "Disclosing Sexual Harassment in the Workplace Act of 2018" does not explicitly place any limitations of NDAs or arbitration, the bill does provide that "a provision in an employment, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment...is null and void as being against the public policy of the State."¹⁰⁵ This appears to be another prohibition on arbitration clauses; however, it is unclear why the state legislature chose to use such broad language.¹⁰⁶ Additionally, the bill provides that employers with 50 or more employees shall conduct and report surveys regarding the number of sexual harassment settlements the employer has had over the last 10 years.¹⁰⁷

e. Missouri

On February 22, 2018 Missouri state Representative Kevin Corlew introduced House Bill 2552, which would amend Missouri's Uniform Arbitration Act to render unenforceable any arbitration clause between an employer and at-will employee under certain conditions.¹⁰⁸ Those conditions are that 1) the clause must purport to make the proceedings confidential; and 2) it must be one of the following claims: sexual harassment, sexual assault, human trafficking, a felony or misdemeanor under RSMo 566, or any other type of discrimination against a protected class.¹⁰⁹ The original bill did not include the last clause about discrimination against a protected class and was added after passing the Special Committee on Small Business with a vote of 8-0.¹¹⁰

101. S.B. 7848A, 2018 Leg. Sess. (N.Y. 2018).

102. *Id.*

103. *Id.*

104. *Id.* at Part B.

105. H.B. 1596, 2018 Reg. Sess. (Md. 2018).

106. *Id.*

107. *Id.*

108. H.B. 2552, 2018 Reg. Session. (Mo. 2018).

109. *Id.*

110. *Id.*

f. California

Perhaps the most important state in the wake of the #METOO movement legislation is California because many of the NDAs and mandatory arbitration agreements arise out of Hollywood.¹¹¹ On January 3, 2018, California State Senator Connie Leyva introduced Senate Bill (SB) 820, which prohibits provisions in settlement agreements that prevent the disclosure of factual information relating to certain claims of sexual assault, harassment, or discrimination.¹¹² While a survivor could choose to keep her name private, the perpetrator's identity cannot be confidential.¹¹³ On September 30, 2018, Governor Jerry Brown signed SB 820 into law.

Similar to SB 820 in focus, but much larger in scope, Governor Brown also signed SB 1300, which prohibits non-disparagement agreements as a condition for a raise, bonus, employment, or continued employment if the agreement purports to deny the employee the right to disclose information about unlawful acts in the workplace.¹¹⁴ Moreover, the bill prohibits employers from requiring employees to sign a release of claim or right under FEHA as a condition for a raise, bonus, employment, continued employment.¹¹⁵ Notably, SB 1300 does not limit the prohibition on non-disparagement agreements to sexual harassment, but to any unlawful act in the workplace.¹¹⁶ Nevertheless, not everyone in California was ecstatic about Brown's signing of SB 1300 because it allegedly makes it more difficult to quickly resolve meritless claims short of litigation.¹¹⁷

On the same day that he signed SBs 820 and 1300, Governor Brown addressed another bill that was on his desk, Assembly Bill 3080, which was introduced on February 16, 2018.¹¹⁸ This bill sought, among other things, to prohibit mandatory arbitration clauses in employment contracts when the claim is regarding sexual harassment or assault.¹¹⁹ The bill contained language similar to Maryland's statute by prohibiting the waiver of "any right, forum, or procedure."¹²⁰

Governor Brown vetoed the bill that was likely dead on arrival.¹²¹ His veto statement provided strong arguments for why he felt this bill would violate federal law and why the provisions prohibiting arbitration clauses in New York and Maryland are likely unenforceable.¹²² Specifically, he cited *DIRECTV, Inc. v. Imburgia* and *Kindred Nursing Centers L.P. v. Clark* to defeat the theory that the Federal

111. Melanie Mason, *As the Legislative Year Ends, the #MeToo Movement Shows its Influence*, L.A. TIMES (Sept. 3, 2018), <http://www.latimes.com/politics/la-pol-ca-legislature-harassment-response-20180903-story.html>.

112. S.B. 820, 2018 Leg., Reg. Sess. (Cal. 2018).

113. *Id.*

114. S.B. 1300, 2017-18 Leg., Reg. Sess. (Cal. 2018).

115. *Id.*

116. *Id.* ("[I]ncluding, but not limited to, sexual harassment").

117. Dan Schnur, *Did Jerry Brown Make the Right Decisions on #MeToo Bills? California Leaders are Split*, SACRAMENTO BEE (Oct. 8, 2018), <https://www.sacbee.com/news/politics-government/influencers/article219579645.html> ("The governor got it wrong when he signed SB 1300, a bill that will make it harder for meritless claims to be quickly resolved short of litigation:").

118. Assemb. B. 1300, 2017-18 Leg., Reg. Sess. (Cal. 2018).

119. *Id.*

120. *Id.*

121. Letter from Edmund G. Brown Jr., Governor of California, to Members of the California State Assembly (Sept. 30, 2018) (available at <https://www.gov.ca.gov/wp-content/uploads/2018/09/AB-3080-veto-9.30.pdf>).

122. *Id.*

Arbitration Act only governs the enforcement of arbitration agreements and not the initial formation.¹²³ As if anticipating the vague language provided in the Disclosing Sexual Harassment in the Workplace Act of 2018 and the more comprehensive language in SB 7848, Justice Kagan stated in her opinion in *Clark* that "The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'"¹²⁴ She continued that "[the FAA] also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."¹²⁵

In another opinion impacting arbitration, the Supreme Court of the United States handed down the decision in *Epic Systems Corp. v. Lewis*, which would determine that the FAA trumps the Nation Labor Relations Act, preventing employees from collective arbitration and requiring individual arbitration.¹²⁶ However, in *Epic Systems*, Justice Gorsuch seemed to invite Congress to reconsider the policy underlying its decision,¹²⁷ and in Justice Ginsburg's dissent she wrote that "[c]ongressional correction of the Court's elevation of the FAA... is urgently in order."¹²⁸

On October 30, 2018, House Representative Jerrold Nadler (D-NY-10), along with 58 other Democratic representatives, introduced the Restoring Justice for Workers Act, which seeks to overturn the ruling in *Epic Systems* by amending the National Labor Relations Act to prohibit any impairments to collective litigation and by prohibiting *any* pre-dispute agreement that would require arbitration in employment disputes.¹²⁹ The bill would also prohibit post-dispute agreements unless they are "truly voluntary and within the informed consent of employees."¹³⁰ This bill has a high likelihood of passing the Democratic controlled House and may garner some bipartisan support in the Senate because of its similarity to the bipartisan Ending Forced Arbitration in Sexual Harassment Act.¹³¹ Where it might lose that bipartisanship is in the comprehensive effect in prohibiting mandatory arbitration clauses in more than just sexual harassment cases.¹³² Nonetheless, this is a problem that Congress could theoretically resolve in a "Conference Committee," where members of the House and Senate meet to work out the kinks of similar but incompatible bills.¹³³

123. *Id.*; *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) ("The Federal Arbitration Act is a law of the United States . . . [c]onsequently, the judges of every State must follow it."); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

124. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)) (emphasis added).

125. *Id.*

126. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

127. *Id.* at 1626. "[W]hen Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so." *Id.*

128. *Id.* at 1633.

129. H.R. 7109, 115th Cong. (2017).

130. *Id.*

131. S. 2591, 115th Cong. (2018).

132. Robert Barnes, *Supreme Court Rules That Companies Can Require Workers to Accept Individual Arbitration*, WASH. POST (May 21, 2018), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-that-companies-can-force-workers-into-individual-arbitration/2018/05/21/09a3a968-5cfa-11e8-a4a4-c070ef53f315_story.html?utm_term=.2aafaa7f9b20.

133. *Glossy Term Conference Committee*, U.S. SENATE, https://www.senate.gov/reference/glossary_term/conference_committee.htm (last visited Mar. 26, 2019).

IV. OPPOSITION TO PROHIBITIONS ON NDAS AND MANDATORY ARBITRATION

While the culture of #METOO has led to a resounding cultural impact, not everyone agrees that restrictions on NDAs and mandatory arbitration clauses is the correct response.¹³⁴ In a written statement to the E.E.O.C., Kathleen McKenna, partner at Proskauer Rose LLP stated that proposals to make NDAs unlawful in sexual harassment disputes are counterproductive.¹³⁵ She explained that while eliminating NDAs might bring attackers to light, an unintended consequence would be that employers would be less likely to settle a dispute, thus decreasing the odds that the plaintiff ends up recovering any damages.¹³⁶ Not all accusations that reach a settlement would satisfy the “severe or pervasive” conduct standard required under Title VII, meaning that at least some cases that settle favorably for the plaintiff would never make the EEOC’s threshold.¹³⁷ Further, this process would harm employers, who are typically vicariously liable for the acts of a supervisor or manager, by shaming them for the actions of an employee that they actually condemn.¹³⁸

Moreover, McKenna condemns a prohibition on mandatory arbitration.¹³⁹ These laws would burden the already over-encumbered court system with more sexual harassment claims because if NDAs and arbitration are both prohibited then employers have lost incentive to bargain.¹⁴⁰ McKenna asserts that the embarrassment of an essentially public dispute would likely prove too much for many plaintiffs and may be a deterrent to bringing accusations.¹⁴¹ Perhaps suggesting a slippery slope argument, she concludes that “one should think long and hard about elevating the protections of sexual harassment claimants above those who raise other claims of discrimination.”¹⁴² In other words, the next logical step might be to eliminate mandatory arbitration agreements for all kinds of discrimination.¹⁴³

There are a myriad of reasons why survivors might prefer to keep their settlement private, but most of the legislation still permits the use of NDAs as long as the plaintiff wills it.¹⁴⁴ Interestingly, Robin Shea, partner at Constangy, Brooks, Smith & Prophete LLP, suggested making NDAs in sexual harassment cases akin to those in age discrimination claims, where the plaintiff has a safe harbor to consider a negotiation.¹⁴⁵ However, her suggestion appears to miss the mark by proposing that

134. Robin Shea, *In Defense of Confidentiality (Yes, Even in Harassment Cases)*, CONSTANGY BROOKS, SMITH & PROPHETE LLP (Jan. 12, 2018), <https://www.constangy.com/employment-labor-insider/ban-confidentiality-in-sex-harassment-settlements-youll>.

135. *Written Testimony of Kathleen M. McKenna Proskauer Rose LLP*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/eeoc/task_force/harassment/mckenna.cfm (last visited Nov. 16, 2018).

136. *Id.*

137. *Id.*; Hafiz, *supra* note 23.

138. *Written Testimony of Kathleen M. McKenna, supra* note 135.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. See S. 2994, 115th Cong. (2018) (“The provisions of subsection (a) do not apply to a nondisclosure clause or nondisparagement clause contained in a settlement agreement or separation agreement that resolves legal claims or disputes when . . . (B) such clauses are mutually agreed upon and mutually benefit both the employer and the employee.”).

145. Shea, *supra* note 134.

the law be changed so that a sexual harassment claimant would be entitled to a much higher settlement with an NDA than without.¹⁴⁶ This seemingly innocuous result would undermine the ability of the claimant's autonomy by forcing her to choose between a higher settlement or the capability of sharing her story. Former judge for the Tenth Circuit of the United States Court of Appeals Deanell Reece Tacha asserts that alternative dispute resolution forums (i.e. arbitration) are tailor-made for sexual harassment claims in that they contain values of confidentiality, listening, neutrality, and mutual respect.¹⁴⁷ Additionally, the constraints on litigation and the rules of evidence may make arbitration a much more favorable forum for truth-seeking.¹⁴⁸

V. CONCLUSION

If effective change in the #METOO era comes from legislation, one likely should not rely on Congress to resolve those issues any time soon.¹⁴⁹ Any change in employment laws regarding mandatory arbitration will likely only be resolved in state legislators,¹⁵⁰ or perhaps by a sneaky Senator slipping a "rider" into a new spending bill.¹⁵¹ Moreover, as Kathleen McKenna noted, in order to eliminate mandatory arbitration agreements the legislature would likely have to prohibit their use in all discriminatory contexts.¹⁵² The downside to such a result is that it remains unclear if the Supreme Court will find statutes that prohibit mandatory arbitration to be in violation of federal law.¹⁵³ While it may take an amendment to the Federal Arbitration Act to bring about actual change in mandatory arbitration agreements, the trend of eliminating NDAs from employment contracts and settlement negotiations in cases of sexual harassment is at least one of the outstanding results of the movement.¹⁵⁴

146. *Id.*

147. Hon. Deanell Reece Tacha, *A Case for Litigation Alternatives in #MeToo Movement*, JAMS (May 23, 2018), <https://www.jdsupra.com/legalnews/a-case-for-litigation-alternatives-in046797/>.

148. *Id.*

149. Catherine Rampell, *States are Taking Action on #MeToo. Why isn't Congress?*, WASH. POST (Oct. 15, 2018), https://www.washingtonpost.com/opinions/states-are-taking-action-on-metoo-why-isnt-congress/2018/10/15/88b8fbf4-d0b3-11e8-83d6-291fceed2ab1_story.html?utm_term=.495bae4727aa.

150. *Id.*

151. Robert Longley, *What are Rider Bills in Government?*, THOUGHTCO., <https://www.thoughtco.com/rider-bills-in-the-us-congress-stealth-legislation-4090449> (last updated Apr. 3, 2018).

152. *Written Testimony of Kathleen M. McKenna*, *supra* note 135.

153. David S. Baffa, Noah A. Finkel & Joseph S. Turner, *United States: Halloween Bill Provides A Scare by Seeking to Prohibit Workplace Arbitration Altogether*, MONDAQ, <http://www.mondaq.com/unitedstates/x/752646/> (last updated Nov. 8, 2018).

154. Jessica Bennett, *After #MeToo, The Ripple Effect*, N.Y. TIMES (June 28, 2018), <https://www.ny-times.com/2018/06/28/arts/what-is-next-metoo-movement.html>.