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I. INTRODUCTION

Pregnant and working mothers face a multitude of challenges when making decisions that pertain to their health, children, and their livelihoods.[1] Historically, women have encountered numerous barriers regarding their entrance and treatment in the United States labor force as a result of gender discrimination that promotes the idea that women, in their inherent ability to become mothers, renders them inadequate or inferior workers in comparison to men.[2] Unfortunately, such archaic notions of gender roles persist still; today, the reality is that women are more likely to be employed part-time, occupy lower-paid roles, and are less likely to take on managerial positions.[3] Despite such barriers erected by invidious gender discrimination, currently, mothers make up nearly one-third of all employed women in the United States labor force.[4]

One major challenge women in the workforce face is deciding how they are going to balance their careers while caring for their children.[5] With society still largely placing the responsibility of childrearing on women, despite the overwhelming number of female participants in the labor force, coupled with the absence of accessible and affordable childcare in the U.S., pregnant and working mothers often

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1. *See generally* Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 12 (1990).

2. *Id.* ("[T]here is no doubt that women often have been treated in a separate and severely restricted manner, in large part to secure and promote their roles as mothers and homemakers.").

3. Catherine Verniers & Jorge Vala, *Justifying gender discrimination in the workplace: The mediating role of motherhood myths*, PLOS ONE 1 (Jan. 9, 2018), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0190657 (noting the Gender Gap Report from 2016 indicates "that it will take … another 118 years – or until 2133 – to close the economic gap entirely.").

4. Cheridan Christnacht & Briana Sullivan, *The Choices Working Mothers Make: About Two-thirds of the 23.5 Million Working Women with Children Under 18 Worked Full-Time in 2018*, U.S. CENSUS BUREAU (May 8, 2020) https://www.census.gov/library/stories/2020/05/the-choices-working-mothers-make.html.

5. Mason, *supra* note 1, at 5 ("The needs of children greatly influence the role of women in the workplace and control the experience of women at home in an intact marriage and following a divorce.").

are disproportionately required to take leave from employment, or, alternatively, stop working altogether.[6] Prior to the enactment of the Family and Medical Leave Act of 1993 ("FMLA"), "[t]he United States [wa]s the only industrialized nation in the world that d[id] not have a national policy guaranteeing some type of maternity, family, or medical leave."[7] In an effort to remedy an unfolding crises and improve the balance between work and home life for American families, Congress enacted the FMLA for the purpose of providing an accommodating federal leave policy that protects *both* fathers' and mothers' job security while allowing parents to care for their children.[8] However, in practice, the FMLA's gender-neutrality creates a disparate impact on professional pregnant and working mothers.[9] This disparity is compounded by the use of mandatory arbitration clauses in employment contracts because research shows that such clauses disproportionally impact and disadvantage women claimants in numerous ways.[10]

This paper explores these disparities pertaining to pregnant and working mothers through an analysis of the legislative history and consequences of statutes regulating the treatment of women in the United States workforce and the impact of mandatory arbitration clauses requiring the arbitration of women's statutory rights. Specifically, Part II Section A discusses the history of women entering the workforce and the emergence of women-protective labor laws. Additionally, Section A analyzes the legal debate between special consideration, or women-protective legislation, verses equal treatment, or gender-neutral legislation, and each approaches capacity to curtail discrimination against women in the workplace. Moreover, Section B discusses the history and creation of the Pregnancy Discrimination Act of 1978 ("PDA"), its failures, and the subsequent enactment of the FMLA as a result of the PDA's inadequacies in protecting pregnant and working mothers from employment discrimination. Section C provides a comprehensive overview of the FMLA's legislative history and analyzes the disproportionate impact the FMLA imposes on women workers due to its gender-neutral nature. Section D introduces the history and consequences of mandatory arbitration clauses used in employment contracts and the practice's effect on employees; furthermore, Section D discusses women employees' ability to pursue legal action for violations of their statutory rights when subject to mandatory arbitration. Section E reviews the legislative history, considerations, and benefits behind Congress's enactment of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("Ending Forced Arbitration Act"). In conclusion, this paper sets forth and proposes that all FMLA claims be exempt from mandatory arbitration clauses because, as the legislative history shows, special consideration for pregnant and working mothers is necessary to achieve the equal treatment of *both* men and women in the workforce and safeguard employees' statutory rights.

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6. *See* Christnacht & Sullivan, *supra* note 4 (finding that caretaking was the most commonly reported reason for periods of joblessness among working mothers).

7. Sabra Craig, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 52 (1995).

8. Family Medical Leave Act, 29 U.S.C. § 2601 (2006).

9. *See* Craig, *supra* note 7, at 56–57.

10. *See* Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573, 581–85 (2005).

II. BACKGROUND

A. A History of Women-Protective Employment Legislation: Special Consideration versus Equal Treatment

In the early 1800's women's jobs consisted of caring for the house and children.[11] However, during the rise of industrialization within the United States, unmarried women began to venture outside of the home, finding work in textile mills and factories; and from 1880 to 1920 the number of single women entering the workforce grew significantly.[12] During World War II, from 1940 to 1945, the number of women employed rose from fourteen million to nineteen million, and the Federal Government even began encouraging married women to enter the workforce.[13] Unsurprisingly, as the war ended, women were forced to leave their jobs to make room for the returning men, and resume their posts in the home and with the children.[14] Although the U.S. government intended to exclude women from the workforce at the end of the war, the following decade saw a slow increase of both single and married women entering employment.[15]

The increase of women entering the labor market led to the vast majority of states passing legislation that regulated the hours, wages, and working conditions of women.[16] In 1903 the state of Oregon adopted a law mandating a ten-hour workday for women working in any factories, laundry facilities, or mechanical establishments.[17] In 1908 the Oregon law was challenged on constitutional grounds when a laundry owner, Curt Muller, was prosecuted for violating the statute, allowing a female employee to be forced to work more than ten hours in one day.[18] The State's argument for the validity of the law rested on the notion that women were more susceptible than men to the harms of industrialization, and women's *unique* vulnerabilities warranted the law's special treatment; therefore, Oregon had reasonable grounds for requiring the legal limitation on women's working hours in the spirit of promoting public health and welfare, and general safety.[19] Notably, in response, Muller's brief argued that "[m]ost of the disadvantages facing women in the labor market derive from society, not biology."[20] Muller further posed important questions, asking, whether or not the law was intended to benefit women, does its outcome actually limit women's employment, therefore allowing men a competitive

11. Edith McLaughlin, *The Transformation of Women to Full Participation in the Workforce*, SEMINAR RSCH. PAPER SERIES, Paper 13, at 1 (2005) https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1009&context=lrc_paper_series.

12. *Id.* at 1–2.

13. *Id.* at 2.

14. *Id.* at 3.

15. *Id.*

16. *Id.*

17. Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 360 (2009).

18. *Id.* (noting that Muller's constitutional challenge to the Oregon Law was well-founded due to the Supreme Court's earlier decision in *Lochner v. New York*, where the Court struck down a New York Law limiting bakers to work ten-hour days because it violated the liberty to contract, under the Due Process Clause of the Fourteenth Amendment).

19. *Id.* at 362–64 (emphasis added) (alleging "[t]he overwork of future mothers thus directly attacks the welfare of the nation.").

20. *Id.* at 364.

advantage in the labor force?[21] In the end, the Supreme Court unanimously upheld the Oregon statute with an opinion that reasoned women were inferior to and dependent on men, therefore the need for legislative protection was justified.[22]

The *Muller* decision resulted in a slew of states enacting women-only protective legislation that regulated women's hours, wages, safety and health, and excluded women from certain occupations entirely.[23] However, a slow shift began in the following decades, with states passing gender neutral legislation that regulated the employment conditions of *both* men and women.[24] In the wake of multiple contradicting opinions by the Supreme Court in determining the constitutionality of statutes regulating hours and wages, the Fair Labor Standards Act of 1938 ("FLSA") emerged, setting a national minimum wage and requiring overtime pay for *both* men and women workers.[25]

Women-protective labor laws persisted still, even after the passage of the FLSA.[26] Proponents of such legislation believed women needed special protections against the threat of exploitation in the workplace, while opponents viewed this special treatment as a mechanism for restricting women to inferior positions in the labor force.[27] However, the passage of Title VII of the Civil Rights Act of 1964 ("Title VII") "trumped *Muller*-style protective legislation," prohibiting, *inter alia*, sex-based employment discrimination.[28] An exception under Title VII set out a defense to sex-based classifications, "allow[ing] employers to make sex-based employment decisions upon a showing that sex is a bona fide occupational qualification ("BFOQ") necessary to the normal operation of th[e] particular business or enterprise."[29] Supporters of "*Muller*-style" legislation worried that a narrow reading of the BFOQ defense would effectively end women-protective legislation, while feminists feared an expansive reading would threaten the antidiscrimination purpose of Title VII, allowing for such sex-based laws to continue.[30]

The debate over the BFOQ provision resulted in the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with administering and enforcing Title VII, issuing Guidelines declaring that women-protective employment legislation was no longer relevant to the present role of women in the workforce, and explicitly stated such laws employing sex-based classifications to

21. *Id.*

22. *Id.* at 365 ("[I]n the struggle for subsistence she is not an equal competitor with her brother. Even if all restrictions on [her] political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection.") (quoting Muller v. Oregon, 208 U.S. 412, 422 (1908)).

23. *Id.* at 366.

24. Ginsburg, *supra* note 17, at 366 (emphasis added).

25. *Id.* at 366–69 (emphasis added) (stating in 1941 the Supreme Court upheld the FLSA in *United States v. Darby*, noting, *inter alia*, "the statute is not objectionable because applied alike to both men and women.") (quoting United States v. Darby, 312 U.S. 100, 125 (1941)).

26. *Id.* at 369.

27. *Id.*

28. *Id.* at 370; *see also* Allen Fisher, *Women's Rights and the Civil Rights Act of 1964*, NAT'L ARCHIVES, https://www.archives.gov/women/1964-civil-rights-act (June 17, 2022) (revealing the original proposed bill of the Civil Rights Act of 1964 did not include sex-based discrimination, with the category added as an amendment only to Title VII during the floor debate, likely in an attempt to kill the bill entirely; however, this effort failed, with President Lydon B. Johnson signing the bill with the amendment into law on July 2, 1964).

29. Ginsburg, *supra* note 17, at 371 (alteration in original) (quoting 42 U.S.C. § 2000e-2(e)).

30. *Id.*

be in direct conflict with Title VII.[31] Furthermore, the EEOC interpreted the defense *narrowly*, leaving women-protective laws without a safe hiding space in the BFOQ exception.[32] Thus, states began repealing their women-only labor laws, seemingly ending "*Muller*-style" legislation, with equal treatment proponents celebrating the victory.[33]

B. Special Consideration versus Equal Treatment Continued: The Pregnancy Discrimination Act & the Birth of Family Medical Leave

Although *Muller* laws began to disappear with the passage of Title VII, the legislative debate between equal treatment versus special consideration approaches to women's rights in the workplace persisted with the issue of pregnancy.[34] Constitutional challenges to employer and state policies, such as forcing pregnant women to leave their jobs well before giving birth, and exclusionary practices of precluding pregnant women from receiving unemployment and/or disability benefits occupied the Supreme Court during the 1970s.[35] And in 1972, the EEOC took a definitive stance on the subject, setting forth Guidelines declaring that pregnancy-based classifications of employees constituted a violation of Title VII.[36] Moreover, the EEOC stated pregnancy-related disabilities qualify for the same employment benefits afforded to employees with temporary disabilities.[37] The Supreme Court in *General Electric Co v. Gilbert*, explicitly disagreed with these EEOC Guidelines.[38] Instead, the Court held that an employer's decision to exclude pregnancy from disability benefits did not constitute sex discrimination because the employer's plan merely

31. *Id.* at 371–72; *see also* U.S. EEOC, *What You Should Know: EEOC Regulations, Subregulatory Guidance and other Resource Documents* (May 5, 2016), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource (noting the EEOC's authority to issue legislative regulations under Title VII is limited to procedural, record keeping and reporting matters, and such regulations issued outside the scope of these limitations imposed by Congress, termed "interpretive regulations," do not generate any new legal rights or obligations, with court's following interpretive regulations only to the extent they find the EEOC's position persuasive).

32. Ginsburg, *supra* note 17, at 372. ("Federal courts reached the same conclusion in response to women's complaints that their States' purportedly protective laws denied them valuable jobs.").

33. *Id.*

34. *See, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984); *see also* Mason, *supra* note 1, at 45 ("The great majority of recent arguments which pit equal consideration against special consideration in the workplace have focused on the specific act of birth, not only because that is the one issue in which there is a clear-cut physical difference between men and women which has implications in the workplace, but because, according to many feminists, it is the *only* incidence in which men and women differ in the workplace.").

35. Ginsburg, *supra* note 17, at 373–74; Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 645–46 (1974); Turner v. Dep't of Emp. Sec. of Utah, 423 U.S. 44, 46 (1975) (noting the Supreme Court in both *LaFleur* and *Turner* held that such employment policies use of the conclusive presumption of incapacity regarding pregnant employees violated the Due Process Clause of the Fourteenth Amendment); *but see* Geduldig v. Aiello, 417 U.S. 484, 494–97 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (holding California's disability insurance program's exclusion of pregnancy-related disabilities from coverage did not constitute "invidious discrimination under the Equal Protection Clause" because the exclusion did not "wor[k] to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.").

36. Ginsburg, *supra* note 17, at 374.

37. *Id.* at 374–75.

38. *Id.* at 375.

"covers some risks, but excludes others."[39] Specifically, the Court reasoned the employer plan, which covered the same categories of risk for both men and women employees, to be facially nondiscriminatory, as "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[40] Therefore, the Court concluded the employer plan did not violate Title VII.[41]

The *General Electric Co.* decision sparked public action, with hundreds of organizations joining together for the single cause of advocating against the discrimination of pregnant employees.[42] Congress answered this call to action, passing the PDA.[43] The PDA amended section 701 of Title VII to prohibit sex discrimination on the basis of pregnancy by adding subsection (k), which explicitly states the terms "because of sex" or "on the basis of sex" cover classifications based on pregnancy, childbirth, or related medical conditions.[44] The PDA further requires that women affected by pregnancy "be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work …"[45] Effectively, the PDA treats pregnancy as a short-term disability, requiring employers to provide pregnant women the same benefits afforded to their male counterparts with temporary disabilities.[46]

Thus, Congress's legislative approach to the issue of pregnancy discrimination did not provide special treatment for women employees, in contrast to the *Muller* laws enacted nearly seventy-five years earlier.[47] Instead, Congress employed an equal treatment "solution" through the PDA by classifying pregnancy as a short-term disability.[48] However, after the PDA's enactment, the question remained: "Does Title VII, as amended by the PDA, permit *preferential* treatment for pregnant workers?"[49] The *Miller-Wohl Company, Inc. v. Commissioner of Labor & Industry* case encompassed this question and the inherent debate between the two theories of special consideration versus equal treatment legislation regarding women in the workplace.[50] In *Miller-Wohl Company, Inc.*, the plaintiff-employer asked the court to strike down the Montana Maternity Leave Act ("MMLA") on three grounds: (1) the law violated the Equal Protection Clause of the Fourteenth Amendment; (2) the law violated the Due Process Clause of the Fourteenth Amendment; and (3) the law squarely conflicted with Title VII and the PDA because the MMLA mandated

39. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), *as recognized in* Young v. UPS, 575 U.S. 206 (2015).

40. *Id.* (quoting Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974)).

41. *Id.* at 139 ("For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and woman alike, which results from the facially evenhanded inclusion of risks.").

42. Ginsburg, *supra* note 17, at 375.

43. *Id.*

44. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

45. *Id.*; *see also* Ginsburg, *supra* note 17, at 375–76 ("Congress thus displayed an understanding that perhaps eluded the Court in *Aiello* and *Gilbert*: The assumption that women will become pregnant and leave the labor force, a House Report stated, is at the root of the discriminatory practices [they encounter].") (quoting H.R. REP. NO. 948, 95th Cong., 2d Sess. 3 (1978)).

46. Mason, *supra* note 1, at 4.

47. *See generally* Ginsburg, *supra* note 17.

48. *See* 42 U.S.C. § 2000e(k).

49. Ginsburg, *supra* note 17, at 377.

50. Williams, *supra* note 34, at 327.

preferential treatment of women employees, therefore arguing the MMLA is preempted by federal law.[51]

Specifically, the MMLA, at the time, made it unlawful for an employer to (1) terminate a woman's employment because of her pregnancy; and (2) refuse to grant a reasonable leave of absence for such pregnant employees.[52] The plaintiff-employer had a facially neutral leave policy that entitled all full-time employees who had been with the company for one-year up to five days of sick leave with pay, and granted such employees leaves of absence in cases of extended illness.[53] Ms. Buley was employed by plaintiff-employer for approximately one-month before she was terminated because of work absences due to morning sickness from her pregnancy, and, subsequent to her discharge, Ms. Buley filed a complaint with the Montana Commissioner of Labor and Industry asserting that her termination violated the MMLA.[54]

Feminists in the legal community hotly contested whether the MMLA and other similar state laws creating special treatment for pregnant women should be supported, as opponents to this approach feared a resurrection of "*Muller*-type" protective legislation, which would only reinforce gendered stereotypes and therefore inhibit, rather than aid, women's opportunities in the workforce.[55] In contrast, supporters of special treatment legislation urged that the unique experience of pregnancy and its impact on women's employment opportunities demands the need for special, legislative safeguards, to achieve true equality between the sexes.[56] The Supreme Court in *California Federal Savings & Loan Association v. Guerra*, agreed with the latter's perspective; holding that a California law requiring employers to provide women employees unpaid pregnancy disability leave and a qualified right to reinstatement was not preempted by Title VII as amended by the PDA, but, rather, found the law to be consistent with the legislative intent behind Congress's enactment of the PDA.[57]

The Court concluded that the California statute, by taking pregnancy into consideration, "allows women, as well as men, to have families without losing their jobs."[58] It is important to note that the Court emphasized the California statute's distinction from the "*Muller*-type" protective labor legislation of the past, highlighting California's narrow application, *i.e.*, that coverage applies only to the period of when a woman experiences *actual* physical disability because of or relating to her

51. Miller-Wohl Co., Inc. v. Comm'r of Lab. & Indus., 515 F. Supp. 1264, 1265–66 (D. Mont. 1981), *vacated*, 685 F.2d 1088, 9th Cir. (1982); *see also* Williams, *supra* note 34.

52. *Miller-Wohl Co.*, 515 F. Supp. at 1266; *see also* Williams, *supra* note 34, at 328 ("Thus for the time in a decade that pregnancy cases had been brought before federal courts, a case involved a challenge to a provision that singled out pregnancy for favorable rather than unfavorable treatment.").

53. *Miller-Wohl Co.*, 515 F. Supp. at 1265–66.

54. *Id.* at 1265; Williams, *supra* note 34, at 328 (highlighting although the Montana District Court determined that the MMLA was constitutional and did not conflict with Title VII and the PDA, the Ninth Circuit vacated the decision on the grounds the district court lacked subject matter jurisdiction; however, *Miller-Wohl Company, Inc.* further roused the legal debate of special and equal treatment).

55. Williams, *supra* note 34, at 328; Ginsburg, *supra* note 17, at 377.

56. Ginsburg, *supra* note 17, at 377; Williams, *supra* note 34, at 326.

57. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288 (1987) ("Title VII, as amended by the PDA, and California's pregnancy disability leave statute share a common goal. The purpose of Title VII is to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of … employees over other employees.") (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)).

58. *Id.* at 289.

pregnancy.[59] The Court reiterated the EEOC's previous determination: statutes reflecting archaic or stereotypical notions, such as those found in historic protective labor laws, are not permissible under Title VII, as amended by the PDA, nor do such laws comport with its purpose – to ensure and promote equal employment opportunities.[60] Thus, the Court, in *California Federal Savings & Loan Association*, provided reassurance to opponents of special consideration, pacifying fears of a possible *Muller* legislation revival with Title VII and the PDA standing firmly on its grave.[61]

With the PDA in effect, women employees nevertheless continued to encounter problems unique to pregnancy and employment.[62] Even though California's statute providing job-protected leave to pregnant employees was deemed *permissible* by the Court in 1987, no such federal leave policy existed at the time.[63] The consequence of the PDA's failure to create a qualified right to reinstatement of employment for pregnant women was severely felt by those who were not afforded protection by state statutes such as California's, leaving pregnant and working mothers to the mercy of their employer's policies.[64] With the issue of job-protected leave unchecked by the PDA, organizations began lobbying to introduce legislation that would provide women the guaranteed right to return to their jobs after childbirth to Congress – and in 1984 and 1985, the FMLA was drafted based on these recommendations.[65]

C. The History of the Family Medical Leave Act & Its Disproportionate Impact on Women

The initial House Report to the FMLA highlighted a crises unfolding for American families, and the continuance of the crises pertaining to the treatment of pregnant and working mothers.[66] In 1983 to 1984, the Select Committee on Children, Youth, and Families (the "Select Committee") generated a report which included a nationwide assessment of families in the United States and found that, *inter alia*, parents were struggling to support and care for their children while working full-time jobs.[67] The report attributed this crisis in part to the immense shift in the demographic of the nuclear family happening at the time, with mothers entering the workforce at record rates.[68] Specifically, the Select Committee noted:

Never before have so many mothers with infants been in the workforce… [and] [b]y 1990, it is anticipated that fully half the labor force will be comprised of women, and 80 percent of those women will be of child bearing age. Ninety-three

59. *Id.* at 290.
60. *Id.*
61. *See Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 272–92.
62. Craig, *supra* note 7, at 53.
63. *See id.* at 52–54.
64. *See id.* at 54–55 (underscoring that not all states offered the accommodating protections found in California, such as Georgia, which had not passed a family or medical leave statute applicable to private employees even in 1995).
65. *Id.* at 55–56.
66. *See generally* H.R. REP. NO. 98-1180 (1984).
67. *Id.* at iii, 7 ("The United States is one of the few industrialized countries without a national parental leave policy. As a result, many families, who must find care for their infants while they are at work, face added barriers.").
68. *Id.* at 1 ("In 1970, only 26 percent of married women with children under three were in the labor force. By 1984, that figure had grown to 48 percent, *an 85 percent increase*.") (emphasis added).

percent will become pregnant at some point during their work lives. As a result, there will continue to be a large and growing need for infant care.[69]

Additionally, the Select Committee found the majority of new workers entering the labor force to be women of childbearing age, and determined, despite the current policies in place (such as the PDA), women "*still* risk losing their job or substantial income if they give birth and stay home for a short period of time with their infant."[70] Further, the report found that the option for a parent to stay home full-time to care for their newborn child was often not a feasible option because of the economic need for dual, continuous incomes, and job security; however, the extremely high cost of child care made it difficult for families to find and afford out-of-home care for their young children.[71] In response to the issue of inadequate child care options for parents, witnesses suggested paid parent leave policies as an approach to remedy this inadequacy.[72]

The Select Committee went on to discuss the three major categories of parental leave policies available at the time of the report, which included disability leave, paid leave, and unpaid leave.[73] First, subsequent to the passage of the PDA, disability leave provided, *inter alia*, paid leave for biological mothers during the period a woman became medically disabled because of her pregnancy.[74] Second, paid leave policies pertained to leave other than disability, affording working parents the benefit of staying home with their newborn child for a certain amount of time without losing their income.[75] Lastly, previously only offered to mothers, but becoming increasingly available to both parents, unpaid leave could be offered alone or in tandem with one or both of the previous leave options.[76] A nationwide survey of guaranteed job-protected parental leave policies in place at 384 of the top U.S. industrial, financial, and service companies at the time found that ninety-five percent of the participating companies had fully paid or partially paid short-term disability leave policies, with the majority providing partially paid leave between five and eight weeks.[77] The companies offering "paid leave" often did so through the use of accrued vacation time, as opposed to offering a specific parental leave policy.[78] The survey found that out of the 384 participating companies, twenty-five offered paid leave to women, and nine offered it to their male employees.[79] Lastly, over half of the participating companies had unpaid leave policies for women, with two-thirds offering unpaid leave for a period of one week to three months, and over a third provided such leave to men for similar amounts of time.[80] Although finding men to be increasingly covered by employer leave policies, the survey also revealed that in practice, only a small portion of male employees utilized such leave benefits –

69. *Id.* at 1–2.
70. *Id.* at xv (emphasis added).
71. *Id.* at 5–7 (noting some families are willing to make financial sacrifices, such as forgoing one parent's income in order to have them stay home with the child, but the economic reality for many parents prohibited the loss of a second or only paycheck).
72. H.R. REP. NO. 98-1180, at 7.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 8.
78. H.R. REP. NO. 98-1180, at 8.
79. *Id.*
80. *Id.* at 8–9 (stating there had been a recent and sudden increase in the number of companies offering unpaid leave to new fathers).

whereas, over forty-five percent of the companies reported their female employees to take, on average, three to eight weeks of leave.[81] Thus, faced with the reality of the changing composition of parental roles within the American family, as *both* fathers and mothers were now often employed full-time, and the exacerbation of this reality by the lack of affordable childcare options for working parents, the Select Committee recommended Congress to work with members of the private sector to improve the current leave and personnel policies in place, and further develop such policies to not penalize families for giving birth or staying home for a period to care for a newborn child.[82]

In 1993, the Subcommittee on Children, Family, Drugs and Alcoholism (the "Subcommittee") conducted hearings which included women testifying about the challenges they faced in trying to meet family needs while managing their jobs due to unaccommodating employer leave policies.[83] For example, Ms. Beverly Wilkinson testified about losing her job of five years when she took two-weeks of vacation and five-weeks of maternity leave for the birth of her child, as permitted under her employer's policy.[84] A week before Ms. Wilkinson was to return to work, she received a call informing her that her job had been eliminated, with the employer failing to offer her another position.[85] Ms. Rebecca Webb, testified that seven months into her pregnancy, her employer decided to rescind her previously promised three-month leave.[86] Ms. Webb stated, "[t]he company claimed that they did not want to set a precedent for maternity leave because there were four other pregnant women working at the time."[87] Thus, Ms. Webb was forced to choose between employment and her child, effectively forcing her to quit.[88] Unfortunately, Ms. Wilkinson's and Ms. Webb's experiences were not rare occurrences for working mothers.[89] Accordingly, the legislative history of the FMLA unveils the pitfalls inherent in the PDA, *i.e.*, the statutes failure to protect pregnant women against rampant employment discrimination.[90]

The FMLA was proposed to Congress every year from 1984 to 1993, and met with opponents blocking the bill repeatedly.[91] Various debates regarding whether to provide special treatment for women, or enact a gender-neutral law to allow men and women the same leave policies surrounded the early proposed bills.[92] However the equal treatment approach gained popularity among the FMLA's supporters, with proponents using the law's proposed "benefit to men and children as a major selling point, indicating that its importance to women was not valuable enough to warrant

81. *Id.* at 9.
82. *Id.* at xv.
83. S. REP. NO. 103-3, at 7 (1993).
84. *Id.* at 8.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See* Mason, *supra* note 1, at 46 (asserting women who became pregnant were often expected to quit or faced termination by their employers, and if allowed to return, the job would often encompass an inferior role, with little possibility for advancement).
90. *See generally* S. REP. NO. 103-3 (1993); H.R. REP. NO. 98-1180 (1984).
91. *History of the FMLA: A story of passion, patience and persistence: The nine-year fight to make the FMLA the law of the land*, NAT'L P'SHIP FOR WOMEN & FAMS., https://nationalpartnership.org/economic-justice/family-medical-leave-act/history-of-the-fmla/# (last visited Apr. 7, 2024).
92. Deborah J. Anthony, *The Hidden Harms of the Family and Medical Leave Act: Gender-Neutral Versus Gender-Equal*, 16 J. GENDER SOC. POL'Y & L. 459, 470 (2008).

its passage, but instead required demonstration of how useful the law would be for everyone else."[93] Further, other arguments for equal treatment claimed that male employees were being discriminated against by current family leave policies because such policies were more likely to apply to women.[94] Thus, the early debates regarding special consideration versus equal treatment approaches to proposed FMLA legislation highlights, according to Deborah Anthony, "an important dynamic[,] that where women suffer from gender inequality, measures aimed to reduce its effects cannot pass without reference to the benefits expected by men. At times, equal treatment for women is interpreted as discrimination against men."[95]

Adversaries to a federally mandated leave policy mainly consisted of employers who were concerned with being burdened by excessive costs and government regulation.[96] Interestingly, opponents further argued that such a federal leave policy would "actually increase gender discrimination since employers would be disinclined to hire women due to the presumption that women are more likely to take such leave."[97] Lastly, opponents to the FMLA believed that some workers must tolerate inequality as part of the tradeoff in protecting business interests.[98] Predictably, the majority of workers incurring such treatment would be women, with employers still perpetuating a male standard by favoring employees who were not responsible for caregiving or family needs, *i.e.*, men.[99]

The House and the Senate passed leave legislation in 1990 and 1992, but, both times, then President George H.W. Bush vetoed the bills.[100] The proposed FMLA of 1990 would mandate public and private employers with fifty or more employees, and the Federal Government, to provide employees with leave under certain situations.[101] Strikingly, President Bush prefaced his veto of the 1990 legislation by stating his belief that "time off for a child's birth or adoption or for family illness is an important benefit for employers to offer employees."[102] Despite this declaration, President Bush strongly opposed the Federal Government mandating leave policies for the U.S. workforce, and proclaimed America to be facing "its stiffest economic competition in history," determining that "[i]f [the] Nation's employers are to succeed in an increasingly complex and competitive global marketplace, [employers] must have the flexibility to meet both this challenge and the needs of their employees."[103] President Bush's veto message posited that the U.S labor force must continue under its existing policies that had generated millions of jobs, determining the

93. *Id.* ("In fact, a major selling point amongst Congressional Republicans was the idea that the FMLA would reduce abortions because, if women didn't have to lose their jobs to have babies, they would be less likely to abort a pregnancy.").

94. *Id.* at 471 (noting the Supreme Court in *Nev. Dep't of Human Res. v. Hibbs*, employed this argument, determining that men in the workforce received "notoriously discriminatory treatment in their requests for such leave," and States' employing unconstitutional and gender-based discriminatory leave policies justified the enactment of the FMLA); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

95. Anthony, *supra* note 92, at 471.

96. *Id.*

97. *Id.* (reasoning that if this proposition were true, it highlights a systemic problem of gender inequality in society, therefore confirming the need for antidiscrimination policies and societal change regarding archaic views of gender).

98. *Id.*

99. *Id.*

100. *See* H.R. Doc. No. 101-209 (1990); S. Doc. No.102-26 (1992).

101. H.R. Doc. No. 101-209, at 1.

102. *Id.*

103. *Id.* (alteration in original).

FMLA of 1990 to be "fundamentally at odds with this crucial objective," as the bill "ignore[d] the realities of today's work place and the diverse needs of workers."[104]

The proposed FMLA of 1992 removed the Federal Government as an employer under the bill, mandating, as the previous 1990 legislation had, that public and private employers with fifty or more employees provide such employees leave under specific circumstances.[105] Again, and for the same reasons stated in the previous 1990 veto, President Bush strongly objected against the implementation of a federal leave policy.[106] However, President Bush, in his 1992 veto proposed alternative legislation that would incentivize small and medium-sized companies to offer family leave to their employees by creating a "flexible family leave plan…based on a refundable tax credit for businesses that establish nondiscriminatory family leave policies for all their employees."[107]

Thereafter, the Senate met on September 24, 1992 to consider the President's second veto of the FMLA, with the Senator of Connecticut beginning the session by voicing his disappointment in the President "den[ying] a very basic standard of human decency to millions of working families throughout [the] country …"[108] Other members expressed their unwavering support for the FMLA, reiterating the dire need for a federal leave policy to address the reality that most parents are employed full-time while simultaneously caring for their children or family members.[109] With a historic vote, sixty-eight Senators voted to override the Presidential veto of the FMLA.[110] This victory appeared to be short-lived, with the House killing the Senate's override and sustaining the President's veto of the FMLA on September 30, 1992, seemingly quashing any hope of obtaining bipartisan support for federal family leave.[111]

However, less than five months after the House sustained the Presidential veto of the FMLA, Congress finally passed the bill and on February 5, 1993, President William J. Clinton signed the FMLA of 1993 into law.[112] The enacted FMLA states, "Congress finds that: (1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasingly significantly; [and] (2) it is important for the development of children and the family unit that fathers, and mothers be able to participate in early childrearing…"[113] In its finality, the FMLA mandates private and public employers with fifty or more employees to provide *both* men and women eligible employees the right to take up to twelve workweeks of unpaid leave during any twelve-month period for the following circumstances: (1) the birth of a child; (2) the adoption of a child; (3) to care for a sick family member; and (4) because of a serious health condition that inhibits an employee from performing their employment duties.[114] Despite the legislative

104. *Id.* (alteration in original).
105. S. Doc. No. 102-26, at 1.
106. *Id.*
107. *Id.*
108. 138 CONG. REC. 27494 (1992).
109. *Id.* at 27510.
110. *Id.* at 27513.
111. 138 CONG. REC. 29140 (1992).
112. Presidential Statement on Signing the Family and Medical Leave Act of 1993, 5 WEEKLY COMP. PRES. DOC. 29 (Feb. 3, 1993) ("American workers will no longer have to choose between the job they need and the family they love.").
113. 29 U.S.C. § 2601.
114. *Id.* § 2611 (defining "eligible employee" to cover only those employed for at least one year by their employer).

history of the FMLA illustrating the consequences of the PDA's failure in adequately protecting pregnant and working mothers from employment discrimination, while finding, on average, women to value and utilize family benefits more than men, Congress approached the issue of guaranteed leave with the same equal treatment "solution" found in the PDA.[115] Respectively, Congress enacted gender-neutral legislation through its passage of the FMLA, providing the same leave benefits to women and men.[116] Thus, the statute does not accord special treatment to pregnant women, rather, pregnancy is classified as one of many serious health conditions covered under the Act.[117]

Again, the historical debate between equal treatment and special consideration approaches to achieve gender equality in the workplace continues after the passage of the FMLA.[118] Proponents of special consideration argue that the equal treatment afforded under the FMLA disadvantages and disproportionately impacts women employees because the law fails to account for the specific biological and social burdens that mothers encounter.[119] For example, a pregnant woman may be forced to take medical leave prior to birth because of a pregnancy-related health condition, and could expend a good portion of her twelve weeks before the child is even born.[120] Women who end up using the majority of their FMLA leave prior to childbirth are left little to no time to physically recover or bond with their newborn, despite the FMLA's purpose to "guarantee fathers and mothers *equal time to bond with their child before returning to work*."[121] With the FMLA providing fathers the same amount of leave offered to mothers, coupled with the fact that fathers do not experience pregnancy related health conditions or physical disabilities, a father may be able to take his full twelve weeks to stay at home and bond with his child.[122]

Equal treatment proponents and supporters of the FMLA's gender-neutrality reiterate that Congress intended to curtail sex-based employment discrimination by guaranteeing leave for eligible medical conditions experienced by both men and women, while simultaneously providing much-needed security for families under the equal treatment approach.[123] Moreover, the congressional findings under the FMLA highlight Congress's understanding that the employees who generally suffered the most from a lack of family leave policies were working women; and Congress, in passing the FMLA, therefore strived to remedy this disparate impact created by the absence of such policies by providing guaranteed leave to all eligible employees.[124] However, "[a] law that refuses to take gender into account is effective only if the private social structure does not *itself* perpetuate women's inequality,

115. *See* Anthony, *supra* note 92, at 468–69 (stating a survey reported forty percent of mothers believed family benefits were more important than any other employment benefit, compared to only twenty-one percent of fathers agreeing with the sentiment).
116. Craig, *supra* note 7, at 56.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 56–57 (emphasis added).
122. Craig, *supra* note 7, at 57.
123. Anthony, *supra* note 92, at 472–73 (highlighting while the equal treatment approach of the FMLA "overlooks the social reality that a greater share of the burden of caregiving is placed on women, there is a compelling argument for the gender-neutrality of leave policies: granting parental leave only to women implicitly assumes–and reinforces–that childcare is women's work only.").
124. *Id.*

regardless of what the law says."[125] And according to Bethany Anthony, "[t]he United States is nowhere near that point."[126] Thus, with gender inequality still present in the United States today, Congress's gender-neutral approach to tackling the issue of federal leave overlooks a critical point, according to Bethany Anthony: "if the *lack* of parental leave for *either* gender is seen as a sex discrimination issue for women due to socially imposed rules, then why is Congress convinced that *providing* gender-neutral parental leave on limited terms produces gender equality when those socially imposed roles are still present?"[127] The benefits offered to employees under the FMLA of course should not be discounted entirely, as "any leave policy is better than none," but, it cannot be ignored that the FMLA's limitations due to its gender-neutral policy disproportionately harms pregnant and working mothers.[128]

D. A Look at Mandatory Arbitration Clauses in Employment Law: Arbitrating Statutory Rights

Another major legal development in the area of employment law concerning the statutory rights and protections of employees, especially those regarding women workers, is the use of mandatory arbitration clauses or agreements in employment contracts.[129] A mandatory arbitration agreement refers to a binding contract between an employer and an employee, where such parties agree to arbitrate any future disputes that may arise in the course of employment, typically involving parties trading statutory protections for monetary benefits.[130] Specifically, such agreements require employees, as a condition of their employment, to forego all access to a jury trial and use arbitration in place of a judicial forum for resolving statutory and contractual claims against their employer.[131] Generally, mandatory arbitration agreements are entered into before an employee begins employment, and before any dispute has occurred; further, such agreements leave employees minimal bargaining power because of employers' unwillingness to negotiate the arbitration requirement.[132]

During the 1990's a massive increase in the use of arbitration occurred, with companies utilizing mandatory arbitration as an inexpensive and low-risk alternative to litigation.[133] The explosion of the use of mandatory arbitration in the following years spurred legal challenges to the validity and enforceability of such clauses in employment contracts.[134] The Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, proved to be a seminal case in the advancement of mandatory arbitration.[135] In *Gilmer*, the Court determined that a claim under the Age Discrimination in Employment Act of 1967 ("ADEA") could be subject to

125. *Id.* at 473.
126. *Id.*
127. *Id.* at 473–74.
128. *Id.* at 474.
129. *See* LeRoy, *supra* note 10.
130. Martha Nimmer, *The High Cost of Mandatory Arbitration*, 12 CARDOZO J. CONFLICT RESOL. 183, 185 (2010).
131. *Id.*
132. *Id.*
133. *Id.* at 187.
134. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
135. *See id.* at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.").

mandatory arbitration imposed by an employment contract, pursuant to the Federal Arbitration Act ("FAA").[136] The Court stated the purpose of the FAA, which was enacted in 1925 and subsequently reenacted and codified in 1947 as Title 9 of the United States Code, "was to reverse the longstanding judicial hostility to arbitration agreements … and to place arbitration agreements upon the same footing as other contracts."[137] The Court then recounted previous cases which recognized that a party's agreement to arbitrate a statutory dispute does not result in the party surrendering their substantive rights provided under the statute, rather, the party has only agreed to resolve the dispute in the forum of arbitration.[138] Concluding that a party who freely enters into an agreement to arbitrate "should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," the Court determined that petitioner failed to meet this burden in showing such an intention under the ADEA.[139]

And in 2001, the Supreme Court in *Circuit City Stores, Inc. v. Adams*, held that the FAA, found to compel judicial enforcement of written arbitration agreements, applies to all employment contracts, except those involving workers engaged in transportation that crosses state lines.[140] Section 2 of the FAA, until recently, provided "that arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[141] In 2018, the Court in *Epic Systems Corp. v. Lewis*, answered the following loaded questions: "[s]hould employees and employers be allowed to *agree* that any disputes between them will be resolved through one-on-one arbitration? Or should employees *always* be permitted to bring their claims in class or collective actions, *no matter what they agreed with their employers*?"[142] Justice Gorsuch, writing for the majority, held that, notwithstanding the National Labor Relations Act or the FAA's saving clause, the FAA instructs "federal courts to enforce arbitration agreements according to their terms–including terms providing for individualized proceedings."[143] Therefore, employers may lawfully require employees to "agree" to individual arbitration of any future employment-related claim, lawfully requiring such employees to forgo their right to litigate or join in a class action with other similarly circumstanced workers.[144]

Accordingly, the Supreme Court has determined that the operation of the FAA, in light of parties' rights to contract freely, allows for the use of mandatory arbitration in most employment agreements, and such provisions may compel arbitration of statutory rights.[145] Now, over *sixty million* American workers are subject to mandatory arbitration; previously a rare employer practice affecting around two percent

136. *Id.* at 23–35.
137. *Id.* at 24 (alteration in original).
138. *Id.* at 26.
139. *Id.* at 26–35 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).
140. *See generally* Circuit City Stores v. Adams, 532 U.S. 105 (2001).
141. *Id.* at 111–12.
142. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502 (2018) (emphasis added).
143. *Id.*
144. *Id.* at 497–541.
145. *See id.; see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); *see also Circuit City Stores*, 532 U.S. 105 (2001).

of the workforce during the early 1990's, mandatory arbitration has grown to encompass *fifty-six percent of all non-union private sector employees*.[146]

The Supreme Court's broad and sweeping interpretation of the FAA's substantial reach, and the rise in the use of mandatory arbitration agreements, is not without consequence.[147] "By trading the public function of judicial decision-making for the efficiency gains of private ordering, … we risk undermining the law itself."[148] In other words, the wide use of mandatory arbitration as an alternative forum for resolving legal disputes sparks deep concern for the preservation of certain areas of jurisprudence.[149] With the use of predispute mandatory arbitration covering any type of claim that may arise becoming common practice in the U.S. labor force, Professor Myriam Gilles states: "Today, we must ask: What happens if entire areas of the law were shunted off into the black box of arbitration, where the proceedings are confidential and non-precedential?"[150] An area subject to this concern is employment law, where employment contracts "are easily fitted with arbitration requirements, and employers are highly motivated to add these terms in order to avoid costly discrimination, wage-and-hour and other cases."[151] Additionally, the "legal doctrine in the employment area is constantly evolving and provides the *content* of the law itself. It is judge made rules that define permissible conduct under Title VII, the FLSA, and state employment laws."[152] Thus, the private arbitration of such employment disputes permits employers "to disregard federal civil rights statutes," while simultaneously stunting the laws' ability to evolve in its approach to resolving employment disputes.[153]

The common occurrence of employers requiring employees to sign predispute mandatory arbitration agreements as a non-negotiable condition of employment "embod[ies] an attempt by employers to reduce their liability for gender and race discrimination without correspondingly reducing the amount of discrimination in their workplaces."[154] Women who enter into predispute mandatory arbitration employment agreements are forced to give up their right to litigate their claims before a jury of their peers.[155] Moreover, women claimants restricted to resolving their disputes through arbitration "face a lack of procedural protections and an arbitrator pool that is demographically unrepresentative in terms of gender and race."[156] Such predispute mandatory arbitration has been argued to provide employers a "get out

146. Seema Nanda, *Mandatory Arbitration Won't Stop Us from Enforcing the Law*, U.S. DEP'T LAB. BLOG (March 20, 2023), https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law (emphasis added).

147. *See generally* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016) (arguing that the wide use of mandatory arbitration endangers certain areas of the law to cease to exist).

148. *Id.* at 409 (discussing Owen Fiss's article, *Against Settlement*, which "warned that the private settlement of disputes could eventually weaken the ability of public adjudication to articulate and apply commonly held legal rights.").

149. *Id.*

150. *Id.*

151. *Id.* at 420; *See also* Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 FORDHAM URB. L.J. 311, 313 (1999) (asserting "that arbitration statistically favors the employer ….").

152. Gilles, *supra* note 147, at 420.

153. *Id.* at 421.

154. Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267, 268 (1998).

155. *Id.* at 269.

156. *Id.*

of jail free card" by allowing them to evade federal laws that afford employees protections against invidious employment discrimination.[157] Notably, "[t]he majority of sexual harassment and discrimination [claimants] are women."[158] Therefore, because women are disproportionately affected by discrimination and sexual harassment, for such causes of action, woman employees are forced to go to arbitration more frequently than their male co-workers.[159]

E. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act: An Exemption to Mandatory Arbitration

The FAA remained undisturbed for over seventy years, with its potent interpretation by the Supreme Court in the 1990s unchallenged by congressional action; that is, until recently.[160] On March 3, 2022, President Joe Biden signed the Ending Forced Arbitration Act into law, amending the FAA with respect to the arbitration of sexual assault and harassment disputes.[161] Prior to the enactment of the Ending Forced Arbitration Act, when an employee, bound by a forced arbitration clause in their employment contract, sued their employer "after being raped, assaulted, or harassed at work, the company [was] entitled, under the [FAA], to force the suit into arbitration."[162] The support for a narrow ban of forced arbitration of sexual misconduct claims gained momentum in 2005, when the case of Jaimie Leigh Jones, an employee of Halliburton, who was drugged and raped by multiple coworkers, made national headlines.[163] When Mrs. Jones sued Haliburton, the employer attempted to enforce the arbitration clause in her employment contract.[164] In 2016, the #MeToo movement furthered the cause against predispute mandatory arbitration when allegations pertaining to workplace sexual assault and harassment revealed that perpetrators of such conduct were able to potentially avoid liability, committing repeat offenses because of the confidential and private forum of arbitration.[165]

In 2019, the Congressional House Committee on the Judiciary held a hearing to discuss the impact of forced predispute arbitration on the fundamental rights of American workers and its impact on the judicial system.[166] The opening statement to the congressional hearing included the following powerful testimony by the

157. *Id.* at 270.

158. *Id.* at 299 (alteration in original); *see also EEOC Data Highlight No. 2 Sexual Harassment in Our Nation's Workplaces,* U.S. EEOC (Apr. 2022), https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces (finding that between 2018 and 2021, 78.2% of sexual harassment charges were filed by women, and, further, that 62.2% of all harassment charges were filed by women).

159. Cherry, *supra* note 154, at 301 (underscoring that EEOC statistics show white male employees to rarely bring claims arising under Title VII).

160. *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. 1 (2022).

161. *Id.*

162. H.R. REP. NO. 117-234, at 1 (2022) (alteration in original).

163. Horton, *supra* note 160, at 8.

164. *Id.* (stating although the trial court denied the motion to arbitrate in part, the case's national recognition inspired discussions of forced arbitration).

165. *Id.* at 8–9 ("Forced arbitration is a sexual harasser's best friend: It keeps proceedings secret, findings sealed, and victims silent.").

166. *Justice Denied: Forced Arbitration and the Erosion of Our Legal System: Hearing Before the Subcomm. on Antitrust, Commercial and Administrative Law of the H. Comm on the Judiciary*, 116th Cong. 1 (2019) (statement of Rep. Cicilline, Member, H. Comm. on the Judiciary).

Chairman of the Subcommittee on Anti-trust, Commercial and Administrative Law, the Honorable David Cicilline:

When forced arbitration is combined with non-disclosure agreements, it effectively silences the victims of rampant corporate misconduct. For example, according to a disturbing report by the Washington Post, hundreds of former female workers of Sterling Jewelers, the massive jewelry chain that owns Kay Jewelers and Jared were, and I quote, "routinely groped, demeaned, and urged to sexually cater to their bosses to stay employed." According to numerous sworn statements, male executives and supervisors at all levels of the company engaged in a widespread pattern of abuse, harassment, and discrimination. This conduct included forcing women to perform sexual favors to receive better jobs or higher pay and retaliating against women who reported abuse within the company.[167]

When the women employees attempted to hold the company, Sterling Jewelers, accountable in a class action suit, the company hid its abuse and evaded liability by forcing its employees to arbitrate their claims.[168] "These arbitration proceedings were conducted in private, the outcome was sealed, and any settlements with the company were bound by confidentiality clauses."[169] Therefore, this "massive coverup," allowed by arbitration, insulated Sterling Jewelers from public accountability and inhibited other employees who had experienced assault and harassment from speaking out until years later, when stories of the atrocious conduct were finally made public.[170] The corporate wrongdoing found in Sterling Jewelers "is not an isolated incident … [t]housands of women across the country have suffered similar pain and humiliation. They were isolated by predatory companies, they were silenced by forced arbitration clauses, and they were unable to hold wrongdoers accountable by having their day in court."[171] In conclusion, Mr. Cicilline pronounced that forced predispute arbitration "is nothing short of a corporate takeover of our nation's system of laws, and the American people have had enough."[172]

However, not every participant shared this same belief with Mr. Cicilline.[173] A Ranking Member of the subcommittee, the Honorable Jim Sensenbrenner, painted a different picture of arbitration in his testimony, stating, "[e]liminating arbitration achieves one thing: it enriches trial attorneys. It does not help claimants."[174] Mr. Sensenbrenner pointed to research finding claimants to be more successful in arbitration compared to litigation, and further raised the issue of cost and timeliness inherent in litigation proceedings, noting that arbitration provides an accessible and affordable forum to plaintiffs.[175] Further, Mr. Sensenbrenner expressed concern that ending arbitration will result in harm to businesses, increasing litigation costs "which will inevitably be passed on to the consumer."[176]

The congressional hearing continued by calling multiple distinguished witnesses before the subcommittee regarding their research and findings on the subject of forced arbitration, including their written statements and oral testimony

167. *Id.* at 1–2.
168. *Id.* at 2.
169. *Id.*
170. *Id.*
171. *Id.*
172. Committee on the Judiciary, *supra* note 166, at 2.
173. *See id.* at 3.
174. *Id.*
175. *Id.*
176. *Id.*

summarizing such statements.[177] The first witness called, Mr. Deepak Gupta, began by recounting the heinous case of Irene Morissette, an eighty-seven-year-old Catholic nun who was raped and assaulted in her assisted living facility in Alabama.[178] When Sister Irene's family brought suit against the assisted living facility, the case resulted in dismissal after the facility exercised the forced arbitration clause in their contract.[179] In summary, Mr. Gupta provided three main arguments supporting a ban of forced arbitration: (1) the practice of forced arbitration is unavoidable; (2) forced arbitration poses a threat to democracy and constitutional rights by replacing laws with private legislation authored by employers, and requiring the waiver of a trial by jury; and (3) Mr. Gupta asserts, in square contradiction to Mr. Sensenbrenner's position, that forced arbitration effectively "kills people's claims entirely."[180] Specifically looking to Mr. Gupta's first point that the practice of forced arbitration is unavoidable for American workers, his findings include the fact that forced arbitration is more common in lower-paid workplaces and "in industries that are *disproportionately composed of women*[.]"[181]

Gretchen Carlson, a journalist and former news anchor, testified about how her own experience of enduring sexual harassment while employed at Fox News became public in 2016 led her to advocate for women across the country who have been subjected to such workplace abuse.[182] Ms. Carlson prefaced her support for a ban of forced arbitration by stating such legislation "is about the thousands and thousands of women across th[e] country who reached out to [Ms. Carlson] after [her] story became public, making [her] realize that almost every woman in this country has a story."[183] Ms. Carlson further testified:

Over the past two-and-a-half years, these women have shared their pain and their humiliation with me, and what is the number-one thing that they tell me? That they have been mostly *silenced* because that is what forced arbitration helps to do. It turns out silencing all of these women in our country ends up being the harasser's best friend.[184]

Additionally, Ms. Carlson's testimony included a hypothetical explaining what a woman employee who has been subjected to harassment in the workplace endures where she has agreed to predispute arbitration and wishes to assert a claim against her employer.[185] The hypothetical included the following scenario: where forced arbitration is present, a woman employee's claim will be put in the private and secret forum of arbitration, where "there are limits on discovery, evidence gathering,

177. *See id* at 7–9.
178. Committee on the Judiciary, *supra* note 166, at 9.
179. *Id.* ("90 percent of nursing home chains across the country have forced arbitration clauses in their contracts. This means not only that families like Sister Irene's get denied justice, but it also means that patterns of wrongdoing don't come to light because arbitration mandates secrecy.").
180. *Id.* at 9–10. ("If you remember only one thing from my testimony, I hope it is this: Forced arbitration does not do what its proponents say it does. It does not channel claims into some alternative system that is better, faster, or cheaper at resolving disputes. Instead, it makes sure that most consumers' and workers' claims simply disappear.").
181. *Id.* at 13 (emphasis added) (asserting forced arbitration is also more common in industries disproportionately composed of African-American workers).
182. *Id.* at 31, 68 (highlighting Ms. Carlson's sexual harassment case became public by suing her alleged perpetrator individually, not her employer).
183. *Id.* at 31–32 (alteration in original).
184. Committee on the Judiciary, *supra* note 166, at 32 (emphasis added).
185. *Id.*

[and] limits on witnesses."[186] Moreover, under the forum of arbitration there are no appeals, and in numerous cases the arbitrator is chosen by the employer accused of the wrongdoing.[187] A woman claimant who comes forward may become "blacklisted, demoted, and[/or] fired from her job," and her coworkers will likely never be privy to the actions taken against her by the employer, with the perpetrator of such abuse able to continue the harassment.[188] Ms. Carlson's hypothetical "is not unique" and states the reality women claimants face when attempting to hold employers accountable for abuse, *i.e.*, mandatory predispute arbitration effectively silences survivors of workplace harassment and allows for such conduct to continue.[189]

Lastly, Professor Myriam Gilles's testimony before the subcommittee highlights the consequences of forced arbitration's vast and sweeping expansion over the millions of American workers subject to the practice.[190] According to Professor Gilles, the consequence of forced arbitration "systematically strips us of our legal rights" effectively forcing employees to abandon their claims and allowing the employer to "draf[t] for itself … a get-out-of-jail-free card[,] [as] [t]here is no accountability, no liability."[191] Additionally, Professor Gilles states that a vast majority of employers, through their use of forced arbitration clauses in employment contracts, "explicitly highlight federal statutes that they are denying their workers the right to enforce in court."[192] For example, "alleged violations of the Civil Rights Act of 1964, the Family Medical Leave Act, the American with Disabilities Act, and the Age Discrimination in Employment Act," can be subject to mandatory arbitration under an employment contract and therefore requiring workers seeking to vindicate their rights in the confidential forum of arbitration.[193] Moreover, Professor Gilles posits that the practice of mandatory arbitration "perpetuates the exploitation of women in the workplace by shunting victims into a private system where each is unaware of the other and where the arbitration provider (who is chosen and paid by the employer) lacks authority to remedy systemic and recurring workplace abuse."[194]

In late January of 2022, the Committee on the Judiciary submitted a report recommending to Congress proposed legislation which would amend the FAA by prohibiting the use of forced arbitration in cases regarding sexual assault and harassment.[195] The purpose and summary of the proposed legislation stated that "[b]ecause arbitration lacks the transparency and precedential guidance of the justice system, there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process," and due to the widespread use of forced arbitration clauses, many individuals who are subjected to sexual abuse are "often unable to seek justice in a court of law, enforce their rights under state and federal legal protections, or even simply share

186. *Id.* (alteration in original).
187. *Id.*
188. *Id.* (alteration in original).
189. *Id.*
190. Committee on the Judiciary, *supra* note 166, at 49.
191. *Id.* (alteration in original).
192. *Id.* at 54.
193. *Id.*
194. *Id.* at 56.
195. H.R. REP. NO. 117-234, at 1, 3 (2022).

their experience."[196] Moreover, the proposed legislation highlights the advantages forced arbitration grants employers, as, in many cases, companies are entitled to choose the arbitrator, the rules of procedure and evidence, and the distribution of costs in the arbitration, all of which is kept secret because of the confidential forum.[197]

Pursuant to the 2022 committee's report describing the background and need for the proposed Ending Forced Arbitration Act, the findings iterate two main points: (1) recent case law ignores the legislative intent of the FAA; and (2) forced arbitration results in the degradation of consumer and employee statutory rights.[198] To summarize the first point, the report finds that the FAA "was intended to narrowly apply to disputes between merchants, not between a business and its consumers or workers."[199] Accordingly, the FAA's legislative history "ma[kes] clear that arbitration was not appropriate for substantive questions of law," nor does the practice provide the appropriate mechanism for determining disputes of "constitutional questions or policy in the application of statutes."[200] Therefore, the report finds the Supreme Court's expansive interpretation of the FAA allows companies to disregard "the congressional intent of arbitration as a voluntary process agreed to between parties of equal bargaining power."[201] Lastly, the second point from the 2022 committee report discusses the impact forced arbitration has on consumers and workers.[202] The report explains:

According to a 2017 report by the Economic Policy Institute, 60.1 million workers—the majority of non-union employees in the private sector—have signed away their rights through forced arbitration clauses. As this report notes, this trend has "weakened the position of workers whose rights are violated, barring access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.[203]

Moreover, "[w]hen employees work under forced arbitration clauses, they are less likely to win in disputes with their employers, or even to bring them at all. Workers that do enforce their rights in the workplace receive less in damages in arbitration than would have been available in court."[204] Further, such forced arbitration clauses in employment agreements often include non-disclosure agreements, which provide "minimal scrutiny of corporate misconduct."[205] Thus, in consideration of the concerns regarding forced arbitration and the practice's impact on worker and consumer rights, "a coalition of state attorneys general from all fifty states, the District of Columbia, and several U.S. territories – have written Congress in support of ending forced arbitration in workplace disputes involving claims of sexual harassment."[206]

196. *Id.* at 3.
197. *Id.* at 4.
198. *Id.* at 7–11.
199. *Id.* at 7.
200. *Id.* (alteration in original) (quoting Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 11 n.67 (2019)).
201. H.R. REP. NO. 117-234, at 8.
202. *Id.* at 8–11.
203. *Id.* at 9.
204. H.R. REP. NO. 116-204, at 10 (2019).
205. *Id.* at 11.
206. *Id.* at 4–5.

During the Senate consideration and passage of the Ending Forced Arbitration Act in February of 2022, a senator clarified that the "bill should not be the catalyst for destroying predispute arbitration agreements in all employment matters," and that "[t]he language of [the] bill should be narrowly interpreted," applying only to workplace disputes concerning sexual assault and harassment claims.[207] Therefore, if a plaintiff has a claim pertaining to a violation of their workplace rights that does not concern or connect to a claim of sexual assault or harassment, then that claim will still be subject to the forum of arbitration.[208] Interestingly, the senator stated such claims concerning sexual abuse "are meaningfully different," and the proposed legislation "reflect[s] the specific challenges that victims of these particular allegations face."[209] The discussion highlighted that, "[a]t a time when nearly one in three women living today say they have experienced some form of physical or sexual violence, this Senate must be united in standing with survivors."[210] Lastly, the congressional record notes the disparate impact mandatory arbitration has on female employees.[211] Specifically, 57.6 percent of women workers are subject to the practice of forced, predispute arbitration, with the practice especially common in low-income fields, and workplaces containing "disproportionately high numbers of women of color" – leaving "women who … cannot afford to challenge their employers without recourse."[212] New York Senator Kirsten Gillibrand went on to declare, "[b]ut this affects *women* in *every* industry."[213]

Thus Congress, to combat employer's escaping liability while silencing survivors enduring sexual abuse, finalized the exemption of sexual misconduct disputes from the FAA's reach, passing the Ending Forced Arbitration Act with bipartisan support.[214] The Ending Forced Arbitration Act voids arbitration clauses in cases involving alleged sexual-misconduct.[215] Moreover, the Ending Forced Arbitration Act is the first major amendment to the FAA and provides the most significant alteration to employment law in decades.[216] Specifically, the Act provides two changes to the FAA: (1) it amends section 2 of the FAA to state that arbitration agreements in contracts that involve interstate commerce are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract *or as otherwise provided in chapter 4*"; and (2) it creates a new chapter 4 of the FAA which governs arbitration of sexual misconduct disputes.[217] Further, chapter 4 declares that "no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute."[218] Importantly, the statute defines "sexual assault dispute" and "sexual harassment dispute" broadly, and chapter 4 governs not only sexual misconduct claims

207. 117 CONG. REC. S625 (daily ed. Feb. 10, 2022) (alteration in original).
208. *Id.* at S625–26 (noting "for cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with their full case in court regardless of which claims are ultimately proven.").
209. *Id.*
210. *Id.*
211. *Id.* at S627.
212. *Id.*
213. 117 CONG. REC. S625 (daily ed. Feb. 10, 2022) (emphasis added).
214. Horton, *supra* note 160, at 9.
215. *Id.* at 10.
216. *Id.* at 1–2.
217. *Id.* at 10 (emphasis added).
218. *Id.*

but includes cases that relate to such claims or disputes.[219] Thus, the Ending Forced Arbitration Act provides security, justice, and fairness to employees in the workplace, giving claimants a choice to pursue legal recourse through court or arbitration, and therefore protecting worker's rights by combatting the employer-friendly practice of forced, predispute arbitration.[220]

III. DETERMINATION: CLAIMS ARISING UNDER THE FMLA SHOULD BE EXEMPT FROM MANDATORY ARBITRATION

A. FMLA Violations & Statistics

In general, two kinds of employer conduct can result in claims arising under the FMLA.[221] First, an employer's failure to provide leave when requested by an employee, and second, when an adverse employment action is taken against an employee following protected leave.[222] Pursuant to an analysis of patterns and characteristics pertaining to FMLA claims litigated in court, a survey found "that the vast majority of plaintiffs in [the] sample [were] women (eighty-six percent)."[223] Notably, the author found this revelation unsurprising, stating:

Despite the gender neutrality of the FMLA, women are most likely to suffer adverse employment outcomes due to work-family conflicts and, thus, have more frequent opportunities to benefit from the Act's protections. Indeed, the vast majority of birth or adoption cases under the FMLA involved either childbirth-maternity leave (70.3%) and/or health problems related to pregnancy (27.3%).[224]

Furthermore, the survey found that the most common adverse employment action taken against employees regarding FMLA rights was the failure by an employer to reinstate an employee after protected leave had ended.[225] Moreover, the results indicated that claimants often accompanied their FMLA actions with at least one other federal or state law claim, such as Title VII violations.[226] Notably, the most common substantive defense used by employers to justify their actions regarding FMLA claims included the business justification defense.[227] Specifically, employers most commonly argue that the adverse employment action incurred by an employee was not because of that employee taking FMLA leave, but, rather, for some other legitimate business reason.[228] The data generated from the survey included the discouraging finding that FMLA claims involving birth or adoption leave do not fare well in litigation, with "the vast majority of cases (sixty-eight percent) result[ing] in … summary judgement dismissing the charges of a FMLA violation."[229]

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219. *Id.*
220. Horton, *supra* note 160, at 10–11.
221. Rafael Gely & Timothy D. Chandler, *Maternity Leave Under the FMLA: An Analysis of the Litigation Experience*, 15 WASH. U. J.L. & POL'Y 143, 156 (2004).
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 157.
226. *Id.* at 159.
227. Gely & Chandler, *supra* note 221, at 160.
228. *Id.* at 160–61.
229. *Id.* at 162–63 (alteration in original) (highlighting the finding that employees were twice as likely as employers to prevail in cases decided after trial).

The FMLA does not specifically provide for a right to trial by jury.[230] Moreover, the Court of Appeals for the Second Circuit has provided that courts look to "four factors in determining whether to stay a proceeding pending arbitration."[231] The four factors courts must address include: (1) whether the parties agreed to arbitration; (2) the scope of the arbitration agreement; (3) where federal statutory claims are at issue, whether Congress intended such federal claims to be nonarbitrable; and (4) where the court finds that some, but not all claims in the case are arbitrable, the court must "determine whether to stay the balance of the proceedings pending arbitration."[232] The court in *Martin v. SCI Mgmt. L.P.*, reiterated what other courts in the second circuit have determined; notably, the court stated that broad arbitration agreements encompassing "all disputes relating to any aspect of Employee's employment," are enforceable and "justifies a presumption of arbitrability."[233] Moreover, the court determined that "there is no indication that Congress intended any of the plaintiff's claims to be nonarbitrable," *i.e.*, the plaintiff's FMLA claim is arbitrable.[234] Thus, the second circuit has readily found that broad arbitration clauses which encompass statutory claims such as those arising under the FMLA to be enforceable and generally compel arbitration of employees' FMLA disputes.[235]

B. A Comparison: Forced Arbitration of FMLA Claims & Sexual Harassment

In summary, the practice of forced predispute arbitration has monstrously evolved into a weapon exploited by employers to escape legal accountability, with the practice commonly utilized in low-wage workplaces and in industries disproportionately composed of women.[236] Second, the FMLA's failure to afford pregnant and working mothers' special consideration of their unique biological and social needs regarding parental and maternity leave has resulted in a disproportionate number of claimants arising under the FMLA to be female.[237] The FMLA's equal treatment approach, coupled with companies using forced arbitration as a preferred forum for resolving legal disputes and stripping claimants of their right to class action suits, has effectively left the vulnerable group of pregnant and working mothers' statutory rights in the hands of their employers.[238]

The same concerns Congress took into account when passing the Ending Forced Arbitration Act, *i.e.*, that forced arbitration is now used as a mechanism to silence a group of individuals and escape legal and public accountability, are present in the forced arbitration of women claimants under the FMLA.[239] Specifically,

230. *See* 29 U.S.C. § 2601.
231. Martin v. SCI Mgmt. L.P., 296 F. Supp. 2d 462, 467 (S.D.N.Y. 2003).
232. *Id.* (citing Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987)).
233. *Id.* (quoting Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 76 (2d Cir. 1998)).
234. *Id.*
235. *See id.* (citing Steward v. Paul, Hastings, Janofsky & Walker, 201 F. Supp. 2d 291, 294 (S.D.N.Y. 2002)).
236. *See* Committee on the Judiciary, *supra* note 166; *see also* Verniers & Vala, *supra* note 3 (stating women employees are more likely to occupy lower-paid jobs).
237. *See* Gely & Chandler, *supra* note 221.
238. *See id.*; *see also* Committee on the Judiciary, *supra* note 166.
239. *See* Committee on the Judiciary, *supra* note 166.

pregnant and working mother's makeup a large population of the U.S. labor force.[240] Moreover, women are disproportionately impacted by forced arbitration because the practice is more common in low-wage workplaces, and such low-wage positions are statistically more likely to be occupied by women employees.[241] Lastly, most claimants asserting violations of their FMLA rights are women.[242] Thus, forced arbitration allows women claimants to be forced to a private and confidential forum, precluding them from discussing their FMLA violations with other pregnant and working mothers in their companies.[243] Additionally, women employees are precluded from banning together to face their employers because they are forced to waive their right to bring a class action suit.[244]

These issues arising under the forced arbitration of FMLA claims mirror those issues that were considered under the forced arbitration of sexual abuse and harassment disputes.[245] Specifically, the patterns arising under mandatory predispute arbitration of sexual harassment claims included: (1) most claimants were women; (2) employers used arbitration as a way to silence survivors while keeping their abuse private from other employees and the public; and (3) the practice effectively stripped women employees from acting in concert together by requiring individual arbitration of any grievances.[246] Therefore, Congress, to rectify the disproportionate treatment of pregnant and working mothers, must provide special consideration for women employees by enacting legislation banning forced arbitration under the FMLA, as they did before for forced arbitration of sexual harassment and abuse.[247]

C. Restoring Justice for Workers Act: Proposed Legislation Banning Predispute Arbitration Agreements in Employment Contracts

Some members of Congress are interested in taking a harder stance against the practice of forced arbitration.[248] Representative Jerrold Nadler introduced the Restoring Justice for Workers Act to the House on July 29, 2021.[249] The proposed "bill prohibits predispute arbitration agreements that require arbitration of an employment dispute."[250] The legislation would overrule the Supreme Court's decision in *Epic Systems v. Lewis*, where the Court allowed employers to continue to require employees, as a condition of their employment, to agree to predispute forced arbitration of any future claim, and further allowed for employers.[251] The proposed bill aims to restore power to workers by banning employers from utilizing mandatory

240. Christnacht & Sullivan, *supra* note 4.
241. *See* Committee on the Judiciary, *supra* note 166; *see also id.*
242. Gely & Chandler, *supra* note 221.
243. *See* Committee on the Judiciary, *supra* note 166, at 1–2 (discussing how the company of Sterling Jewelers utilized individual forced arbitration to get away with committing sexual abuse and harassment of its female workers, silencing and stripping their women employees of their right to sue or ban together in a class action).
244. *See id.*
245. *See id.*
246. *See id.*; *see also* U.S. EEOC, OFF. OF ENTERPRISE DATA & ANALYTICS, SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES (Apr. 2022).
247. *See* Committee on the Judiciary, *supra* note 166.
248. *See* Restoring Justice for Workers Act of 2021, H.R. 4841, 117th Cong. (2021–22).
249. *Id.*
250. *Id.*
251. *Nadler & Scott Reintroduce the Restoring Justice for Workers Act*, CONGRESSMAN JERRY NADLER (July 29, 2021), https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394713#.

arbitration "to deny employees a fair venue to seek recourse for wage theft, discrimination, or harassment."[252] Further, the legislation "would help restore employees' fundamental rights to have their day in court and join with their co-workers to hold employers accountable for unlawful conduct."[253] The Restoring Justice for Worker's Act was referred to the Subcommittee on Antitrust, Commercial, and Administrative Law in November of 2022, and there has yet to be a report or finding issued from the Subcommittee.[254]

IV. CONCLUSION

The legislative history of the FMLA and subsequent research on the Act's impact on woman claimants supports the conclusion that Congress should expand the current narrow exception to the FAA by prohibiting mandatory arbitration of FMLA disputes arising between an employee and employer.[255] Such a ban would provide further protection to pregnant and working mothers' statutory rights under the FMLA.[256] The Restoring Justice for Worker's Act provides hope that members of Congress understand the critical problems that forced predispute arbitration generates for millions of American workers.[257] However, the need for special consideration of pregnant and working mother's employment rights has consistently been disregarded.[258] Special consideration of women's FMLA rights is necessary to achieve equal treatment in the workplace.[259] By taking into account the unique needs of pregnant and working mothers by exempting FMLA claims from mandatory predispute arbitration, women will be able to properly vindicate their rights in a court of law, tipping the scale towards gender equality in the workforce.[260]

252. *Id.*
253. *Id.*
254. *See* Restoring Justice for Workers Act of 2021, H.R. 4841, 117th Cong. (2021–22).
255. *See The Family and Medical Leave Act of 1993: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the S. Comm. on Labor and Human Resources*, 103d Cong. 7 (1993); *see* LeRoy, *supra* note 10; *see* Gely & Chandler, *supra* note 221.
256. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90 (enacted Feb. 8, 2022).
257. *See* Restoring Justice for Workers Act of 2021, H.R. 4841, 117th Cong. (2021–22).
258. *See* 42 U.S.C. § 2000e(k); *see* 29 U.S.C. § 2601.
259. *See generally* Mason, *supra* note 1, at 45–48.
260. *See id.* at 48–50.