

NOTE

#TimesUp For Confidential Employment Arbitration of Sexual Harassment Claims

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ABSTRACT

It is the unfortunate reality that sexual harassment is still a common occurrence in the American workplace. Thanks to the #MeToo and #TimesUp movements, this problem has moved to the forefront of public discourse. In an effort to eradicate this behavior, academics and legal practitioners have identified predispute, mandatory arbitration agreements and, more specifically, confidentiality provisions shielding employer misconduct and biased arbitration procedures, as obstacles to eliminating harassment in the workplace. Since the 1990s, lawmakers in Congress have recognized the problems associated with mandatory employment arbitration, but legislative proposals to limit or ban this practice have been unsuccessful. The Supreme Court has taken the opposite position, continually rendering pro-arbitration decisions that have significantly expanded the use of these agreements among employers. In light of these obstacles, the most viable source of reform is legislation, though a new approach is needed. Rather than attempting to eliminate arbitration agreements, this Note proposes an amendment to the Federal Arbitration Act providing that the employee has the sole discretion to determine the scope of confidentiality in arbitration over sexual harassment claims. Additionally, the employee may exercise this right only after the misconduct has occurred. By placing this decision solely within the employee's hands, the employer faces a realistic possibility that any misconduct and unfair arbitration procedures will be exposed to the public, likely resulting in significant reputational harm. The threat of such harm will ideally incentivize employers to change harmful employment practices and controversial arbitration policies, ultimately leading to both a harassment-free workplace and a more equitable arbitral forum.

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INTRODUCTION

The #MeToo and #TimesUp movements¹ have shed light on the long-standing problem of sexual harassment in the American work-

¹ The #MeToo movement was founded by activist Tarana Burke in 1997. See Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2510–11 (2018). Following news of producer Harvey Weinstein’s abusive conduct in October 2017, the movement gained national attention when actress Alyssa Milano posted a tweet encouraging individuals to respond “me too” if they were also survivors of sexual harassment or assault. See *id.* Within the first 24 hours of the posting, the hashtag “#MeToo” appeared in over 500,000 tweets and more than 12 million Facebook posts. See *More than 12M “Me Too” Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017, 6:26 PM), <https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/> [<https://perma.cc/PK2G-DVEF>]; Natalie Jarvey, *Sexual Assault Movement #MeToo Reaches Nearly 500,000 Tweets*, HOLLYWOOD REP. (Oct. 16, 2017, 11:25 AM), <https://www.hollywoodreporter.com/news/metoo-sexual-assault-movement-reaches-500000-tweets-1049235> [<https://perma.cc/ZZ6R-MFH2>]. The purpose of the movement is to convey a message to victims of sexual misconduct that they are not alone and to encourage them to speak up about their abuse in an effort to “disrupt the systems that allow for the . . . proliferation of sexual violence.” *About: History & Vision*, ME TOO MOVEMENT, <https://metoomvmt.org/about/#history> [<https://perma.cc/E4KR-89E4>]. In response to the #MeToo movement, a group of more than 300 women in the entertainment industry founded the #TimesUp movement in 2018. See *The 300+*

place. Although significant strides have been made since 1986 when sexual harassment was first recognized as a form of discrimination under Title VII of the Civil Rights Act of 1964,² there is clearly still work that needs to be done. According to a study conducted by the U.S. Equal Employment Opportunity Commission (“EEOC”),³ sexual harassment affects at least 25% of working women and is largely unreported.⁴

In the wake of these movements, employers’ business practices have been heavily scrutinized in an effort to address the prevalence of harassment in the workplace.⁵ One such practice has been singled out as a barrier to eradicating this behavior: predispute, mandatory arbitration agreements.⁶ By signing these agreements, which are routinely inserted in employment contracts as a condition of employment, em-

Original TIME’S UP Signatories, TIME’S UP NOW (Oct. 21, 2019), <https://timesupnow.org/times-up-the-300-original-signatories/> [<https://perma.cc/7GWB-VM33>]. In addition to raising awareness about the prevalence of sexual misconduct, the #TimesUp movement strives to create a safe and equitable workplace for women by focusing on passing legislation and changing workplace policies. See Alix Langone, *#MeToo and Time’s Up Founders Explain the Difference Between the 2 Movements—And How They’re Alike*, TIME (Mar. 22, 2018), <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/> [<https://perma.cc/V6S6-9B7P>].

² 42 U.S.C. §§ 2000e–2000e-17 (2018); see *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

³ The EEOC is a federal agency charged with enforcing federal laws that prohibit discrimination against a job applicant or an employee because of the individual’s race, color, religion, sex, national origin, age, disability, or genetic information. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/overview/> [<https://perma.cc/LJ73-A6WL>]. Because it is not restricted by employer-employee arbitration agreements, the EEOC can initiate a lawsuit on behalf of an employee subject to mandatory arbitration who filed a timely charge of discrimination with the agency. See *Recission [sic] of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/newsroom/wysk/recission_mandatory_arbitration.cfm [<https://perma.cc/TH2R-K6CH>] [hereinafter *Recission [sic] of Mandatory Binding Arbitration*].

⁴ See CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T. OPPORTUNITY COMM’N, *REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE* 8–9, 15–16 (2016). For fiscal year 2018, the EEOC reported that it received 7,609 charges alleging sexual harassment, which represented a 13.6% increase in charges filed from fiscal year 2017. *Charges Alleging Sex-Based Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [<https://perma.cc/NZ6K-AJP8>]. More recently, for fiscal year 2019, the EEOC received 7,514 sexual harassment charges—a 1.2% decrease from fiscal year 2018. *Id.* Despite this drop, 2019 had the third-highest number of sexual harassment charges since 2012. See *id.*

⁵ See, e.g., John Utz, *Addressing Workplace Misconduct with Exec Compensation*, LAW360 (Nov. 5, 2018, 12:23 PM), https://www.law360.com/articles/1096712/addressing-workplace-misconduct-with-exec-compensation?ts_pk=c51cd7c6-2902-4e38-bbd6-b7d1419fb15d&utm_source=user-alerts&utm_medium=email&utm_campaign=tracked-search-alert [<https://perma.cc/3YZA-FB2X>].

⁶ See Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 134–36, 142 (2018).

employees are compelled to arbitrate any work-related disputes, thereby relinquishing their right to pursue that claim in court.⁷ In addition to agreeing to arbitration, employees agree to any arbitration procedures outlined in the agreement, which are typically selected solely by the employer.⁸ These agreements also frequently include confidentiality provisions precluding employees from disclosing specified information, such as the allegations, identities of the parties, and the procedural rules designated by the contract.⁹

Although it may seem like employees have the option to negotiate the terms of the arbitration agreement, in practice, employers offer these contracts on a take-it-or-leave-it-basis, providing employees essentially no bargaining power.¹⁰ Specifically, employees face the “choice” of agreeing to arbitration and the employer-chosen procedures or foregoing the job opportunity entirely.¹¹ Often, employees are unaware that they are subject to mandatory arbitration as these agreements are commonly hidden beneath boilerplate language within employment contracts.¹² And even when they are aware, many employees sign the agreement without fully understanding the rights being waived.¹³

The use of mandatory arbitration agreements in employment contracts has significantly increased over the last decade.¹⁴ A recent study conducted by the Economic Policy Institute (“EPI”) estimated that roughly 56% of nonunion, private-sector employees are subject

⁷ See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 683 (2018).

⁸ See ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION* 3 (2017), <https://files.epi.org/pdf/135056.pdf> [<https://perma.cc/QC7N-ULCK>].

⁹ See Laurie Kratky Doré, *Public Courts versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 466 (2006); Bryan Benard, *FAQs about Implementing Arbitration Agreements and Class Action Waivers*, HOLLAND & HART (July 19, 2018), <https://www.hollandhart.com/faqs-about-implementing-arbitration-agreements-and-class-action-waivers> [<https://perma.cc/JH2G-4GRH>].

¹⁰ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting); Nicolette Sullivan, *The Price Is (Not) Right: Mandatory Arbitration of Claims Arising Out of Sexual Violence Should Not Be the Price of Earning a Living*, 21 VAND. J. ENT. & TECH. L. 339, 363 (2018) (“In certain industries, employees are viewed as a disposable commodity—if an employee attempts to negotiate contractual terms, there are hundreds, if not thousands, of others lining up for the offered position.”).

¹¹ See Sullivan, *supra* note 10, at 362–63.

¹² See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE ARBITRATION EPIDEMIC* 4–5 (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/8CXF-DSBY>].

¹³ See Sullivan, *supra* note 10, at 362–63.

¹⁴ See COLVIN, *supra* note 8, at 3.

to mandatory arbitration agreements.¹⁵ Previously, the predominant estimate was approximately 20%.¹⁶ The EPI study also revealed that these agreements are “more common in industries that are disproportionately comp[rised] of women workers” and that larger companies are more likely to adopt mandatory arbitration policies than smaller companies.¹⁷ In light of the Supreme Court’s most recent pro-arbitration decision in *Epic Systems Corp. v. Lewis*,¹⁸ and its longstanding history of supporting this practice,¹⁹ it is likely that mandatory arbitration will become even more widespread. Smaller companies in particular will be incentivized to adopt this practice as they see firsthand how effective these agreements are in protecting larger employers from legal liability.²⁰

In the context of sexual harassment claims, predispute, mandatory arbitration agreements are especially problematic because they contribute to the proliferation of harassment in the workplace.²¹ More specifically, the adhesive quality of these agreements, the biased arbitration procedures, and the confidential nature²² of the proceed-

¹⁵ See ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION* 5 (2018), <https://files.epi.org/pdf/144131.pdf> [<https://perma.cc/GCX3-EPR7>] (expanding upon 2017 report). Interestingly, the EPI forecasts that more than 80% of private-sector, nonunion workers will be subject to arbitration agreements by 2024. ECON. POLICY INST., *UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK* 1 (2019), <https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf> [<https://perma.cc/9LMA-XUS5>].

¹⁶ See Estlund, *supra* note 7, at 689.

¹⁷ COLVIN, *supra* note 15, at 2.

¹⁸ 138 S. Ct. 1612 (2018).

¹⁹ See Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 *BROOK. L. REV.* 1309, 1317 (2015).

²⁰ See COLVIN, *supra* note 8, at 6; see also Braden Campbell, *Backlash Has Some Employers Rethinking Forced Arbitration*, *LAW360* (Mar. 1, 2019, 8:18 PM), https://www.law360.com/articles/1134492/backlash-has-some-employers-rethinking-forced-arbitration?ts_pk=c51cd7c6-2902-4e38-bbd6-b7d1419fb15d&utm_source=user-alerts&utm_medium=email&utm_campaign=tracked-search-alert [<https://perma.cc/E95Z-U9AB>] (“‘Many more employers are rolling out agreements, many more employers are updating their programs,’ said Murray, whose firm notably released a DIY arbitration tool for employers the day the Supreme Court decided *Epic Systems*. ‘I would say [there’s been] an explosion of interest.’” (quoting Interview by Braden Campbell with Christopher Murray, Co-Chair, Arbitration and Alternative Dispute Resolution Group, Ogletree Deakins Nash Smoak & Stewart PC (alteration in original))).

²¹ See Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 *PENN ST. L. REV.* 463, 506–12 (2018).

²² This Note uses “confidential arbitration” or “confidential nature” to refer to arbitration that is subject to a confidentiality clause. Notably, there is a difference between the “confidentiality” and the “privacy” of arbitration in that the latter concerns the public’s ability to attend the proceedings, not the parties’ ability to disclose information about the dispute. See Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 *Y.B. ARB. & MEDIATION*

ings diminish the victim's chance of prevailing and hide the misconduct from public view, allowing the offender to potentially evade accountability and continue the harassment.²³ Many scholars sharply criticize mandatory arbitration agreements as being adhesive contracts in that employees are unable to negotiate the contract terms.²⁴ Rather, employers hold most, if not all, of the bargaining power and frequently take advantage of their superior position by choosing employer-favoring arbitration procedures, such as limited discovery and expansive confidentiality provisions.²⁵ Recent studies have shown the taxing effects of such procedural rules, finding that employees are less likely to win in arbitration than in court and, even when they do, they receive smaller monetary awards.²⁶ Besides its impact on the individual employee, forced arbitration harms the public as well.²⁷ Employers' reliance on confidentiality robs the public of an educational opportunity about the illegality of certain workplace behavior and prevents an arbitration decision from serving as strong deterrent to future violators.²⁸ Moreover, these confidential proceedings undermine the refinement of employment discrimination law as well as the "develop[ment] and reinforce[ment of] cultural norms that abhor invidious discrimination."²⁹ For these reasons, the current state of mandatory arbitration is ill-suited for resolving sexual harassment claims in an equitable manner and ultimately perpetuates the continuation of toxic work environments.

Lawmakers and the Supreme Court have taken divergent stances on forced arbitration.³⁰ As early as the 1990s, lawmakers in Congress

28, 30–31 (2015); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260 (2006) (explaining the difference between the privacy and confidentiality of arbitration proceedings).

²³ See E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 595–96 (2009).

²⁴ See George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 684 (2013).

²⁵ See COLVIN, *supra* note 15, at 3; Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1093 (2009); Doré, *supra* note 9, at 466.

²⁶ See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 6–7 (2011) (finding that employees in employment arbitration cases win at a rate of 21.4% and award amounts were 5–10 times smaller than in cases decided at trial); Estlund, *supra* note 7, at 688.

²⁷ See Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 47 (2010).

²⁸ See Spitko, *supra* note 23, at 614–16.

²⁹ *Id.* at 614.

³⁰ See Padis, *supra* note 24, at 668.

have been critical of mandatory arbitration agreements in the employment context and have repeatedly proposed legislation to ban or limit the use of these agreements through an amendment to the Federal Arbitration Act (“FAA”).³¹ Despite these efforts, no such legislation has been enacted.³² Recently, lawmakers approached this issue from a different angle by proposing the Mandatory Arbitration Transparency Act of 2017 (“MATA”).³³ Rather than imposing a restriction on the use of these agreements, the MATA would have prohibited the inclusion of confidentiality provisions within arbitration agreements pertaining to employment, consumer, and civil rights disputes.³⁴ This proposal was also unsuccessful, likely due to its sweeping prohibition on confidentiality agreements in a broad number of contexts.³⁵ The Supreme Court has taken an opposite approach, consistently issuing decisions that endorse mandatory employment arbitration through broad interpretations of the FAA.³⁶ Consequently, most courts will uphold arbitration agreements as enforceable and will rarely disturb an arbitrator’s decision.³⁷

Because of the Supreme Court’s pro-arbitration stance, any arbitration reform will likely have to come from Congress. However, Congress’s prior legislative failures demonstrate that future proposals focused on prohibiting or limiting when arbitration agreements can be used are unlikely to succeed. Instead, this Note argues that a more viable focus would be on a specific feature of arbitration, namely its confidential nature, similar to the MATA’s approach.³⁸ This Note proposes an amendment to the FAA that states that the employee has the sole discretion to determine the scope of confidentiality in arbitration over sexual harassment claims. Additionally, the employee may exercise this right only after the misconduct has occurred. This proposal would prohibit employers from including within predispute arbitration agreements confidentiality clauses pertaining to sexual harassment claims, though employers would be free to continue doing so for other work-related disputes. By limiting confidentiality in this manner, the

³¹ 9 U.S.C. §§ 1–16 (2018); see Spitko, *supra* note 23, at 597–98.

³² See Padis, *supra* note 24, at 690.

³³ H.R. 4130, 115th Cong. (2017).

³⁴ *Id.*

³⁵ See Alexia Fernández Campbell, *Google Employees Fought for Their Right to Sue the Company—And Won*, VOX (Feb. 22, 2019, 4:10 PM), <https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees> [<https://perma.cc/WH8Z-WXWJ>].

³⁶ See Ramona L. Lampley, “Underdog” Arbitration: A Plan for Transparency, 90 WASH. L. REV. 1727, 1729 (2015).

³⁷ See STONE & COLVIN, *supra* note 12, at 6–10.

³⁸ See H.R. 4130.

employer risks that any misbehavior and biased arbitration procedures, which are both commonly shielded by confidentiality provisions, will be disclosed to the public, likely resulting in significant reputational harm. Consequently, the employer will ideally be incentivized to proactively refine workplace policies and set fairer procedural rules. This proposal has a stronger likelihood of enactment than Congress's prior attempts to amend the FAA because it is not plagued by the flaws of those proposals—it does not affect the employer's ability to enter into arbitration agreements as a condition of employment and is significantly narrower in scope, focusing strictly on workplace sexual harassment claims. And, it relies on the threat of reputational harm as a means of influencing employer behavior.

Part I of this Note provides an overview of the arbitration process and outlines the arguments for and against mandatory arbitration in the employment context, ultimately concluding that the current state of arbitration is unfit to effectively and fairly resolve sexual harassment claims. Part II describes the legal landscape of employment arbitration, including the scope of the FAA as interpreted by the Supreme Court, as well as legislative proposals by Congress to limit employment arbitration. This Part also analyzes the criticisms of those legislative proposals. Finally, Part III proposes a solution to the problems discussed in prior sections in the form of an FAA amendment that restricts the use of arbitration confidentiality provisions for workplace sexual harassment claims.³⁹

I. MANDATORY ARBITRATION IN THE EMPLOYMENT CONTEXT

Today, mandatory employment arbitration is a widespread practice with over 60 million American workers barred from pursuing their legal claims in court.⁴⁰ This Part begins by providing an overview of the arbitration process.⁴¹ It then presents common arguments advanced by proponents and opponents of arbitration and ends with an explanation as to how arbitration contributes to the proliferation of workplace sexual harassment.⁴²

³⁹ This Note focuses on the problems of arbitrating workplace sexual harassment claims and proposes a modest solution tailored to those specific claims. In limiting its scope in this manner, this Note does not suggest that sexual harassment deserves special treatment over other forms of discrimination. Instead, it proposes a targeted solution to fix one issue that could later be expanded to other discrimination claims if it is successful.

⁴⁰ See COLVIN, *supra* note 15, at 2.

⁴¹ See *infra* Section I.A.

⁴² See *infra* Sections I.B–.C.

A. *Overview of the Arbitration Process*

Arbitration is an informal, private proceeding through which a neutral third party, ideally designated by both parties, considers the evidence presented and makes a binding decision.⁴³ The parties need not comply with the formal evidentiary or procedural rules of traditional litigation,⁴⁴ and there is no requirement that the proceedings be recorded or transcribed.⁴⁵ When rendering a decision, arbitrators do not create legal precedent.⁴⁶ The arbitrator's decision, which does not need to be publicly filed, may take the form of a simple statement of the party that won and the amount awarded or a written explanation of the ruling.⁴⁷ The parties have limited ability to appeal the arbitral ruling and have it overturned by a court.⁴⁸

The structure of arbitration proceedings vary based on the procedures outlined in the agreement.⁴⁹ These agreements may specify, among other matters, the arbitration service provider, the arbitrator selection process, the cost allocation between the parties, the degree of discovery allowed, the length of any statute of limitations period, and whether certain relief is barred.⁵⁰ In practice, because mandatory arbitration is made a condition of employment, the procedures are usually determined by the employer with no involvement by the employee.⁵¹ Employers are free to either adopt the procedures used by arbitration service providers or invent their own.⁵²

A common component of predispute arbitration agreements is a confidentiality provision.⁵³ These provisions preclude the employer, employee, and arbitrator from disclosing specified information about the arbitration proceeding.⁵⁴ Although the scope of confidentiality provisions vary, they generally cover the allegations, the identities of

⁴³ See STONE & COLVIN, *supra* note 12, at 5.

⁴⁴ *Id.*

⁴⁵ See Doré, *supra* note 9, at 485.

⁴⁶ Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 403 (1999).

⁴⁷ See STONE & COLVIN, *supra* note 12, at 5; Doré, *supra* note 9, at 485–86.

⁴⁸ See STONE & COLVIN, *supra* note 12, at 5; Moohr, *supra* note 46, at 402–03; *infra* text accompanying notes 122–26.

⁴⁹ See STONE & COLVIN, *supra* note 12, at 17.

⁵⁰ See Sternlight, *supra* note 19, at 1314–15.

⁵¹ See STONE & COLVIN, *supra* note 12, at 4–5.

⁵² See Estlund, *supra* note 7, at 681.

⁵³ See Doré, *supra* note 9, at 483; Braden Campbell, *Dems Launch Legislative Broadside at Mandatory Arbitration*, LAW360 (Feb. 28, 2019), <https://www.law360.com/articles/1133745> [<https://perma.cc/ZGF6-9254>] (recognizing that it is common practice for employers to “include a confidentiality provision in their agreements with workers.”).

⁵⁴ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1648 (2018) (Ginsburg, J., dissenting).

the parties, the evidence presented during the proceedings, the resolution, the terms of the arbitration agreement (including the selected procedures), and even the existence of the agreement.⁵⁵

B. *Rationales For and Against Mandatory Arbitration*

The use of predispute, mandatory arbitration agreements in employment contracts has been a frequent subject of legal commentary. This Section outlines commonly cited arguments in support of and against this practice and demonstrates that, in the context of workplace sexual harassment claims, the benefits of the arbitral forum are significantly outweighed by its shortcomings.

1. *Pro-Arbitration Arguments*

In support of forced employment arbitration, proponents highlight a number of its unique and purportedly advantageous features. For example, because of the informality of arbitration, parties are able to resolve their disputes faster and less expensively than through litigation.⁵⁶ The expeditious resolution of these disputes may also allow for the preservation of an employment relationship that would otherwise be harmed by prolonged court proceedings.⁵⁷ Moreover, because arbitrators are not bound by precedent, they have the ability to craft awards that benefit both parties.⁵⁸ Advocates also point to the confidential nature of arbitration as a benefit not only for the employer, but for the employee as well.⁵⁹ They argue that the publicity of a lawsuit can dissuade victims from coming forward and that confidential arbitration allows the parties to prevent disclosure of embarrassing or sensitive information.⁶⁰

Beyond the unique features of arbitration, advocates commonly argue that if arbitration was not mandatory, employers may only agree to arbitrate claims they deem litigation worthy.⁶¹ For those “un-

⁵⁵ See Doré, *supra* note 9, at 466; Benard, *supra* note 9.

⁵⁶ See Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment*, 5 PSYCHOL. PUB. POL'Y & L. 693, 705 (1999); Spitko, *supra* note 23, at 605–08.

⁵⁷ See Spitko, *supra* note 23, at 606–07.

⁵⁸ See Padis, *supra* note 24, at 691–92.

⁵⁹ See *A Case For Confidentiality: Why Recent Arguments Against Arbitration Anonymity May Be Misguided*, FISHER PHILLIPS (Jan. 31, 2020), <https://www.fisherphillips.com/resources-newsletters-article-a-case-for-confidentiality-why-recent-arguments> [https://perma.cc/N956-3BPR].

⁶⁰ See Ann-Elizabeth Ostrager & Jacob Singer, *The Limitations of NY's Anti-Sexual Harassment Law*, LAW360 (Sept. 12, 2018), <https://www.law360.com/articles/1082204/the-limitations-of-ny-s-anti-sexual-harassment-law> [https://perma.cc/A45B-TBB5].

⁶¹ See FitzGibbon, *supra* note 56, at 722.

worthy” claims, employees are left with two unappealing options: filing a complaint with the overworked EEOC or finding an attorney willing to take on the case in court, which can prove to be especially difficult.⁶² Additionally, proponents reason that courts have the ability to police the adequacy of arbitration agreements through the savings clause of the FAA, which permits invalidation of an agreement based on state contract defenses such as fraud, duress, or unconscionability.⁶³ Finally, proponents highlight that the EEOC is not restricted by mandatory arbitration agreements and thus can file a lawsuit on behalf of an employee who has agreed to arbitration.⁶⁴

2. *Anti-Arbitration Arguments*

Opponents of mandatory employment arbitration focus on the adhesive quality of the agreements; the unfair, employer-promulgated procedures; and the confidentiality surrounding the proceedings. Turning to the first issue, because mandatory arbitration agreements are routinely inserted in employment contracts and offered on a take-it-or-leave-it basis, employees are compelled to agree to arbitration in order to obtain employment.⁶⁵ In doing so, employees forcibly relinquish one of the basic principles of American democracy: that everyone is entitled to their day in court.⁶⁶ These agreements also strip employees of any bargaining power.⁶⁷ Consequently, workers not only agree to arbitration, but they agree to arbitration that is the product of the employer’s design.⁶⁸ While acknowledging that arbitration may be faster than traditional litigation in certain circumstances, opponents argue that this efficiency does not justify the fact that arbitration can be an inequitable forum for resolving disputes.⁶⁹

⁶² See *id.* (noting that experienced attorneys frequently reject discrimination cases, reasoning that it is not worth their time to litigate such cases); see also Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (discussing the difficulties of winning employment discrimination cases).

⁶³ See 9 U.S.C. § 2 (2018); Padis, *supra* note 24, at 686.

⁶⁴ Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 786 n.19 (2008).

⁶⁵ See Padis, *supra* note 24, at 684.

⁶⁶ See Press Release, Office of Rep. Johnson, Rep. Johnson, Sen. Blumenthal Introduce Legislation to End Forced Arbitration and Restore Accountability for Consumers, Workers (Feb. 28, 2019), <https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-blumenthal-introduce-legislation-end-forced-arbitration> [<https://perma.cc/6N3P-MEC2>].

⁶⁷ See Doré, *supra* note 9, at 514.

⁶⁸ See Padis, *supra* note 24, at 684.

⁶⁹ See Bales & Irion, *supra* note 25, at 1084.

A second issue with forced arbitration is that employers may take advantage of their superior bargaining power by choosing procedures that are more favorable to them.⁷⁰ Such procedures may include shorter statute of limitations periods, limited discovery, unaffordable arbitrator fees, a biased arbitrator pool, and limitations on remedies.⁷¹ Limited discovery is especially problematic for the employee, but beneficial for the employer, because most documents and witnesses relevant to the dispute are typically in the employer's possession.⁷² Thus, restricting access to this information will likely weaken an employee's case.⁷³ Additionally, steep arbitrator fees and other costs unique to arbitration may prevent employees from pursuing their rights against employers.⁷⁴ Critics argue that these expenses may render arbitration a more costly means of dispute resolution than traditional adjudication.⁷⁵

Further, when selecting an arbitrator, it can be expensive and challenging to discern whether any conflicts of interest are present given that the proceedings are usually private and arbitrators are not required to issue or publicly file written opinions.⁷⁶ But, because the employee plays effectively no role in setting the procedures,⁷⁷ the costs and difficulties associated with the arbitrator selection process are of lesser concern. Instead, the bigger concern is that employers are selecting biased arbitrators that tend to "favor the party that is more likely to produce repeat business" (i.e., the employer) given that most arbitrators are paid based on the number of hours worked and cases handled.⁷⁸ This issue is referred to as the "repeat player effect."⁷⁹

⁷⁰ See Estlund, *supra* note 7, at 700–01.

⁷¹ See *id.*

⁷² See Spitko, *supra* note 23, at 610.

⁷³ See STONE & COLVIN, *supra* note 12, at 4 ("In certain types of cases, such as employment discrimination claims [which include sexual harassment claims], it is practically impossible to win without the right to use extensive discovery to find out how others have been treated.")

⁷⁴ Spitko, *supra* note 23, at 609.

⁷⁵ See *id.*; see also Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 815 (2008) (noting that although overall costs of arbitration and litigation involve a number of variables, upfront costs in arbitration are often higher than in litigation).

⁷⁶ See Doré, *supra* note 9, at 490–91.

⁷⁷ See *id.* at 514.

⁷⁸ Estlund, *supra* note 7, at 686; see Campbell, *supra* note 20; AM. ARBITRATION ASS'N, COSTS OF ARBITRATION 2, https://www.adr.org/sites/default/files/document_repository/AAA228_Costs_of_Arbitration.pdf [<https://perma.cc/64KF-9ZVF>].

⁷⁹ Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 191 (1999).

There is a strong incentive for employers to set inequitable arbitration procedures given the lack of any downside risk in doing so and the effect on the outcome of the case. When a party challenges the fairness of an arbitration provision, the issue is usually directed to the arbitral forum where the arbitrator typically strikes the provision if unfair, rather than invalidating the entire agreement.⁸⁰ This allows employers to reap the benefits of mandatory arbitration despite any questionable terms and encourages employers to “go for it” by “includ[ing] knowingly unfair . . . provisions that are likely to discourage many complainants and their attorneys from pursuing a case at all, with little or no downside risk in case the overreach is detected and corrected.”⁸¹ Moreover, the use of employer-favoring arbitration procedures has a substantial effect on the outcome of the case. Recent studies have shown that employees are less likely to win in arbitration compared to traditional adjudication and, when they do prevail, the average recoveries are significantly lower.⁸² Given this reality, attorneys are less likely to represent employees in arbitration proceedings, especially considering that a smaller award directly impacts the attorney’s fees.⁸³

A third source of criticism is related to confidentiality provisions. Critics dismiss the argument that confidentiality invariably benefits the employee, arguing that it prevents an employee from learning about the existence of other similarly situated victims, which could both encourage other victims to come forward and allow individual employees to build a stronger case.⁸⁴ In other words, confidentiality provisions isolate employees and force them to resolve their disputes individually in a secluded manner, weakening their cases and making it easier for employers to avoid liability.⁸⁵ Furthermore, by enabling

⁸⁰ See Estlund, *supra* note 7, at 701–02.

⁸¹ *Id.*

⁸² See Alexander Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 79–80 (2014); see also Alexander Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019, 1028 (2015) (showing employee settlement and win rates and median award amounts across several arbitration-related variables).

⁸³ See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 Harv. C.R.-C.L. L. Rev. 155, 179 (2019) (arguing that mandatory arbitration “suppresses claims by making it even harder for employees to retain attorneys than it otherwise would be”).

⁸⁴ See Doré, *supra* note 9, at 487 (noting that prohibiting the sharing of information can impede an employee from proving a pattern of discrimination).

⁸⁵ See *id.*; see also Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1235 (2006) (“[C]onfidentiality provisions generally benefit companies who

the employer to hide misconduct, these provisions are also detrimental to the public, preventing an opportunity to “refine[] the law, educate[] the public, and shape[] public opinion.”⁸⁶

In addition to these three criticisms, opponents also note that courts are heavily restricted in their ability to police the fairness of both the arbitration agreement and the decision.⁸⁷ As discussed further below,⁸⁸ the Supreme Court has severely limited the circumstances under which a court may invalidate an arbitration agreement such that most challenged agreements are upheld.⁸⁹ Additionally, a court’s power to overturn an arbitrator’s decision is reduced to the four grounds listed in the FAA.⁹⁰ Moreover, the EEOC’s ability to resolve employment disputes bound by arbitration agreements is similarly limited. Although the EEOC may pursue a lawsuit on behalf of an employee subject to mandatory arbitration,⁹¹ the reality is that the agency is severely overburdened and underfunded.⁹² Consequently, most employees who file a charge of discrimination do not receive a resolution through the EEOC.⁹³

C. Confidential Arbitration Fosters the Continuation of Workplace Sexual Harassment

As evidenced by the flood of news reports and personal accounts about inappropriate workplace behavior, the current state of the arbitral system presents an ineffective forum for resolving sexual harassment claims.⁹⁴ Specifically, by forcing employees with harassment claims into a private forum governed by a confidentiality clause and

routinely arbitrate their disputes, even when the provisions appear neutral.”); *infra* text accompanying notes 101–04.

⁸⁶ Plass, *supra* note 27, at 47.

⁸⁷ See Estlund, *supra* note 7, at 701.

⁸⁸ See *infra* Section II.A.

⁸⁹ See STONE & COLVIN, *supra* note 12, at 9–10, 14 (“[Courts] enforce arbitration agreements in all but the rarest circumstances, no matter how much advantage they give to the stronger parties.”).

⁹⁰ See 9 U.S.C. § 10 (2018); *infra* text accompanying note 126.

⁹¹ See St. Antoine, *supra* note 64, at 786; *Recission [sic] of Mandatory Binding Arbitration*, *supra* note 3.

⁹² See FitzGibbon, *supra* note 56, at 714–15, 722; Stacy A. Hickox & Michelle Kaminski, *Measuring Arbitration’s Effectiveness in Addressing Workplace Harassment*, 36 HOFSTRA LAB. & EMP. L.J. 293, 301–02 (2019) (providing statistics showing that the EEOC is overworked).

⁹³ See FitzGibbon, *supra* note 56, at 714–15.

⁹⁴ See, e.g., Debra S. Katz, *30 Million Women Can’t Sue Their Employer over Harassment. Hopefully That’s Changing*, WASH. POST (May 17, 2018, 4:55 PM), https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d_story.html?noredirect=on&utm_term=.85cce2900f5a [https://perma.cc/893K-EBDG].

procedures favoring the employer, victims are robbed of a fair proceeding and, ultimately, the justice they deserve.⁹⁵ Besides the effect on the individual victim, this practice also frustrates the public goal of eliminating workplace sexual harassment.⁹⁶ In fact, the problem of confidential arbitration is highlighted by the prevalence of workplace harassment in conjunction with the increasing use of mandatory arbitration agreements among employers.⁹⁷

The confidential nature of mandatory arbitration fosters the continuation of workplace sexual harassment in a number of ways. For example, by including confidentiality provisions, the employer unjustly silences the victim, prohibiting the employee from telling fellow coworkers and the general public about the harassment.⁹⁸ This may allow the offender to continue the harassing behavior, focusing on new, unsuspecting victims.⁹⁹ These provisions may also encourage similarly victimized employees, who would have reported the misconduct had they been aware of the other victims, to remain silent.¹⁰⁰ And even when victims find the courage to report, confidentiality provisions may prohibit the sharing of relevant information and documents, hindering a victim's ability to build a strong case.¹⁰¹ This is especially problematic given that procedures governing arbitration typically favor the employer, making it challenging for claimants to prevail.¹⁰² By discouraging employees from reporting misconduct and making it more difficult to prove their claims, confidentiality clauses may allow the offender to avoid liability and continue the harassment.¹⁰³

Additionally, confidential arbitration enables workplace harassment by reducing the deterrence effect of antidiscrimination laws.¹⁰⁴ When an employer is held accountable and punished through public

⁹⁵ See Estlund, *supra* note 7, at 700–01.

⁹⁶ See Moohr, *supra* note 46, at 431–32, 435–39.

⁹⁷ See COLVIN, *supra* note 8, at 1, 3; FELDBLUM & LIPNIC, *supra* note 4, at 8–10.

⁹⁸ See Bryce Covert, *How Corporations Create a Culture of Impunity for Sexual Harassers*, NEW REPUBLIC (Nov. 2, 2017), <https://newrepublic.com/article/145606/corporations-create-culture-impunity-sexual-harassers> [<https://perma.cc/NEV8-L8A4>].

⁹⁹ See Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314–15 (2018); Prasad, *supra* note 1, at 2509, 2515–18 (explaining how Harvey Weinstein's use of confidentiality clauses in settlement agreements allowed him to continue his abusive behavior for decades and noting that “[a]llowing victims to speak out . . . encourages others similarly situated to come forward with their own claims.”).

¹⁰⁰ See Prasad, *supra* note 1, at 2509.

¹⁰¹ See Doré, *supra* note 9, at 487–88.

¹⁰² See *supra* text accompanying notes 70–73.

¹⁰³ See Doré, *supra* note 9, at 487–88; Prasad, *supra* note 1, at 2509.

¹⁰⁴ See Sternlight, *supra* note 83, at 181.

adjudication, future violators are educated about the illegality of certain workplace behaviors and discouraged from engaging in similar conduct.¹⁰⁵ In confidential arbitration, this strong deterrence is absent as employers are not held publicly accountable for their wrongdoings.¹⁰⁶ Plus, because the existence and resolution of these disputes are typically not publicized, arbitration does not further the development of the law or reinforce cultural norms about acceptable workplace conduct.¹⁰⁷ By focusing on the resolution of individual claims, arbitration fails to “address the broader workplace conditions that foster harassment in the first place,” undermining the public goal of eradicating this behavior.¹⁰⁸ As one commentator noted, workplace sexual harassment “cannot be eliminated by rooting out individual harassers one by one.”¹⁰⁹

II. THE LEGAL LANDSCAPE OF EMPLOYMENT ARBITRATION

This Part summarizes the legal landscape of employment arbitration. It first discusses the expansive scope of the FAA as interpreted by the Supreme Court.¹¹⁰ It then provides an overview of Congress’s legislative attempts to address the problem of mandatory employment arbitration and analyzes the shortcomings of these failed proposals.¹¹¹

A. *The Broad Scope of the Federal Arbitration Act*

In 1925, Congress enacted the FAA, which provides that “[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable”¹¹² The Act instructs courts to not

¹⁰⁵ See Spitko, *supra* note 23, at 613–16.

¹⁰⁶ See *id.*; Campbell, *supra* note 20 (highlighting that employers often find arbitration an advantageous method of avoiding harsh consequences that would otherwise force them to change internal practices and behaviors); Emily Martin, *Forced Arbitration Protects Sexual Predators and Corporate Wrongdoing*, NAT’L WOMEN’S L. CTR. (Oct. 23, 2017), <https://nwlc.org/blog/forced-arbitration-protects-sexual-predators-and-corporate-wrongdoing/> [https://perma.cc/6QUH-33FG].

¹⁰⁷ See Kathryn Meyer, Note, *Why Victims Deserve the Right to Choose How to Resolve Their Sexual Harassment Claims*, 10 *ARB. L. REV.* 164, 173–74 (2018); Spitko, *supra* note 23, at 614–16.

¹⁰⁸ Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 *STAN. L. REV. ONLINE* 17, 42 (2018).

¹⁰⁹ *Id.* at 45.

¹¹⁰ See *infra* Section II.A.

¹¹¹ See *infra* Section II.B.

¹¹² 9 U.S.C. § 2 (2018).

only enforce arbitration agreements, but to uphold the chosen procedures as well.¹¹³

Although the Supreme Court originally interpreted the FAA narrowly,¹¹⁴ the Court changed its approach in the 1980s after reinterpreting the statute to establish “a liberal federal policy favoring arbitration agreements.”¹¹⁵ In furtherance of this interpretation, the Court progressively expanded the scope of the FAA.¹¹⁶ For example, although the FAA was originally enacted to facilitate arbitration in the commercial context,¹¹⁷ the Court extended its applicability to almost all employment contracts.¹¹⁸ It also expanded the statute’s reach from contract disputes to most federal statutory claims.¹¹⁹ Moreover, the Court interpreted the FAA to apply to cases in both state and federal court and, relatedly, to supersede any state law that conflicts with the statute’s policy favoring enforceability of arbitration agreements.¹²⁰ Recently, in *Epic Systems Corp.*, the Court rendered another pro-arbitration decision, holding that employers may include class action waivers in mandatory arbitration agreements.¹²¹

In addition to expanding the reach of the FAA, the Supreme Court has made it more difficult for individuals to challenge arbitration agreements and to obtain judicial review of an arbitral decision.¹²² More specifically, in a number of decisions, the Court significantly limited the ability of individuals to avoid arbitrating their disputes on grounds that the contract is illegal, unconscionable, or otherwise unenforceable.¹²³ The Court also endorsed arbitration agreements that

¹¹³ *Id.* §§ 2–4; see also STONE & COLVIN, *supra* note 12, at 6–10.

¹¹⁴ From 1925 to the mid-1980s, courts interpreted the FAA as strictly applying to “commercial cases involving federal law that were brought in federal courts on an independent federal ground.” STONE & COLVIN, *supra* note 12, at 7.

¹¹⁵ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This federal policy led the Court to adopt a presumption favoring arbitration when there are doubts about whether a claim falls within the scope of the agreement. See *id.* at 24–25.

¹¹⁶ See STONE & COLVIN, *supra* note 12, at 6–10.

¹¹⁷ Notably, many scholars have argued that “Congress did not intend for the [FAA] to cover employees.” Sternlight, *supra* note 19, at 1316–17.

¹¹⁸ See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295–96 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

¹¹⁹ See *Gilmer*, 500 U.S. at 35; *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238, 242 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–28 (1985).

¹²⁰ See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

¹²¹ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

¹²² See STONE & COLVIN, *supra* note 12, at 4, 9–10.

¹²³ See *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010); *Buckeye Check*

delegate to arbitrators the determination of whether the contract is enforceable.¹²⁴ Unsurprisingly, arbitrators are not likely to find that the agreement is unenforceable.¹²⁵ As for judicial review, the courts' ability to overturn a decision is strictly limited to the four grounds enumerated in the FAA—the award “was procured by fraud, the arbitrator was biased, the arbitrator refused to hear relevant evidence, or the arbitrator exceeded his or her power as set out in the parties' arbitration agreement.”¹²⁶ Because of these restraints, courts will generally enforce arbitration agreements in almost all circumstances and will rarely disturb the arbitrator's decision.¹²⁷

B. Congressional Response to Mandatory Employment Arbitration

Since the 1990s, lawmakers in Congress have repeatedly proposed legislation to amend the FAA in an effort to prohibit or restrict predispute, mandatory arbitration agreements in employment contracts.¹²⁸ However, such legislation has never been enacted, suggesting an unwillingness within Congress as a whole to place any limitation on the use of these agreements.¹²⁹ Recently, lawmakers have approached this issue from a different angle. Instead of attempting to proscribe arbitration agreements altogether, lawmakers, in proposing the MATA, focused on restricting a particular feature of these agreements: the inclusion of confidentiality provisions.¹³⁰

Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

¹²⁴ See *Rent-A-Center*, 561 U.S. at 71–72.

¹²⁵ See *Sternlight*, *supra* note 83, at 178.

¹²⁶ *STONE & COLVIN*, *supra* note 13, at 6; see 9 U.S.C. § 10 (2018); see also *Doré*, *supra* note 9, at 491 (“[J]udicial review [of an arbitral award] . . . does not encompass misunderstanding or misapplication of the law or facts.”).

¹²⁷ See *STONE & COLVIN*, *supra* note 12, at 14.

¹²⁸ See Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 *HOFSTRA LAB. & EMP. L.J.* 405, 415–16 (2013).

¹²⁹ See *id.*

¹³⁰ See H.R. 4130, 115th Cong. (2017). Many states have also proposed, and in some cases enacted, similar legislation addressing both the use of arbitration agreements and confidentiality provisions. See Ostrager & Singer, *supra* note 60 (discussing recent state legislation addressing mandatory arbitration agreements); *The Latest Legislative Responses to #MeToo: New Requirements for Sexual Harassment Training, Arbitration and Settlement Agreements in New York and Evolving Legislation in Other States*, GIBSON DUNN (May 2, 2018), <https://www.gibsondunn.com/latest-legislative-responses-to-metoo-new-requirements-for-sexual-harassment-training-arbitration-settlement-agreements/> [<https://perma.cc/RF69-ML73>] (discussing state legislation targeting confidentiality agreements). But because the Supreme Court has established a broad federal preemption doctrine under the FAA, those laws will likely be preempted. See Bales & Irion, *supra* note 25, at 1085; Ostrager & Singer, *supra* note 60. For that reason, this Note focuses only on federal attempts to regulate arbitration.

This Section provides an overview of Congressional initiatives to address mandatory employment arbitration, dividing the proposed statutes into three general categories: (1) legislation banning predispute, mandatory arbitration agreements for *any* employment-related dispute;¹³¹ (2) legislation prohibiting predispute, mandatory arbitration agreements only as they relate to specified federal statutory claims;¹³² and (3) legislation restricting certain features of these agreements.¹³³ Notably, a majority of the proposals appear to fall within the first and second categories. The third category represents the most recent approach to arbitration legislation. After providing examples of legislation falling within each of these categories, this Section concludes with an analysis of the shortcomings of these failed proposals.

The first category of legislation represents those proposals advocating for a total ban on predispute arbitration agreements relating to any employment dispute.¹³⁴ One such example is the Arbitration Fairness Act (“AFA”),¹³⁵ which was initially proposed in 2002 and reintroduced numerous times in the last decade.¹³⁶ The AFA provides that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute.”¹³⁷ Because of its expansive scope, invalidating any predispute arbitration agreement between an employer and its employee, critics argued that the bill was too broad.¹³⁸ Specifically, the AFA would inhibit sophisticated parties with equal bargaining power, like high-ranking employees, from enjoying the benefits of arbitration.¹³⁹ Another example of legislation structured in this manner is the Restoring Justice for Workers Act,

¹³¹ See Spitko, *supra* note 23, at 617–18; see, e.g., Arbitration Fairness Act, S. 2591, 115th Cong. (2018).

¹³² See Spitko, *supra* note 23, at 617–18; see, e.g., Ending Forced Arbitration of Sexual Harassment Act, H.R. 1443, 116th Cong. (2019); Civil Rights Procedures Protection Act, H.R. 1489, 107th Cong. (2001).

¹³³ See, e.g., Mandatory Arbitration Transparency Act of 2017, H.R. 4130, 115th Cong. (2017).

¹³⁴ See Spitko, *supra* note 23, at 617–18.

¹³⁵ S. 2591, 115th Cong. (2018); H.R. 1374, 115th Cong. (2017).

¹³⁶ See STONE & COLVIN, *supra* note 12, at 25; Sternlight, *supra* note 19, at 1354 (advocating for the passage of the AFA).

¹³⁷ S. 2591, § 3. In addition to employment-related claims, it would have prohibited mandatory arbitration of consumer, antitrust, and civil rights disputes. *Id.*

¹³⁸ See, e.g., *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 3 (2007) (statement of Sen. Sam Brownback, Member, S. Comm. On the Judiciary) (“The bill does not distinguish between, on the one hand, the so-called fine print arbitration agreements that supporters attack as unfair and, on the other hand, fully negotiated contracts between sophisticated parties.”).

¹³⁹ See *id.*

which was introduced in 2018 and again in 2019.¹⁴⁰ It too would render predispute, mandatory arbitration agreements for employment disputes invalid and unenforceable while also outlawing class action waiver provisions.¹⁴¹ Commentators, in recognizing that Republican leaders showed no interest in previous sweeping proposals to limit mandatory arbitration,¹⁴² opined that the bill is unlikely to “become law in the current political environment or anytime soon.”¹⁴³

Legislation that falls within the second category includes proposals invalidating arbitration agreements only as they relate to specified federal statutory claims.¹⁴⁴ The Civil Rights Procedures Protection Act (“CRPPA”)¹⁴⁵ is formulated in this manner. The CRPPA was originally proposed in 1994 and reintroduced in 1995, 1997, 1999, and 2001.¹⁴⁶ It contemplated amending the FAA to preclude involuntary arbitration of certain federal employment discrimination claims.¹⁴⁷ In

¹⁴⁰ H.R. 7109, 115th Cong. (2018); H.R. 2749 116th Cong. (2019); S. 1491, 116th Cong. (2019).

¹⁴¹ See *id.* § 4. If enacted, the bill would overturn the Supreme Court’s decision in *Epic System*. See Press Release, Representative Jerrold Nadler, Ranking Members Nadler, Scott & Murray Release Bill to End Forced Arbitration in the Workplace, Restoring Critical Rights for American Workers (Oct. 30, 2018), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391617> [<https://perma.cc/LA4N-72SQ>].

¹⁴² See Alexia Fernández Campbell, *House Democrats Have a Sweeping Plan to Protect Millions of Workers’ Legal Rights*, VOX (Nov. 14, 2018, 1:40 PM), <https://www.vox.com/policy-and-politics/2018/11/14/18087490/mandatory-arbitration-house-democrats> [<https://perma.cc/C52H-PBNL>].

¹⁴³ Vin Gurrieri, *Dems Stake Out Their Turf with Bill Targeting Epic Systems*, LAW360 (Oct. 31, 2018, 7:56 PM) (quoting Interview by Vin Gurrieri with Marc Bernstein, Chair, New York Employment Law Department, Paul Hastings LLP), [https://www.law360.com/articles/1097517/dems-stake-out-their-turf-with-bill-targeting-epic-systems?ts_pk=c51cd7c6-2902-4e38-bbd6-b7d1419fb15d&utm_source=user-alerts&utm_medium=em\]ail&utm_campaign=tracked-search-alert](https://www.law360.com/articles/1097517/dems-stake-out-their-turf-with-bill-targeting-epic-systems?ts_pk=c51cd7c6-2902-4e38-bbd6-b7d1419fb15d&utm_source=user-alerts&utm_medium=em]ail&utm_campaign=tracked-search-alert) [<https://perma.cc/3JJT-CYGV>]; see also Andrew Buxbaum et al., *Democrats Unveil Legislation to End “Forced Arbitration” Against Consumers and Employees*, TROUTMAN SANDERS (Mar. 4, 2019), https://www.consumerfinancialserviceslawmonitor.com/2019/03/democrats-unveil-legislation-to-end-forced-arbitration-against-consumers-and-employees/?utm_source=reedburner&utm_medium=feed&utm_campaign=fded%3A+ConsumerFinancialServicesLawMonitor+%28Consumer+Financial+Services+Law+Monitor%29 [<https://perma.cc/7BNN-Y57W>] (noting that “it appears unlikely that President Trump will sign a bill reversing [*Epic Systems Corp v. Lewis*, which allowed employers to include class action waivers in arbitration agreements, as it was] written by his first nomination to the Supreme Court.”).

¹⁴⁴ Spitko, *supra* note 23, at 617–18.

¹⁴⁵ H.R. 1489, 107th Cong. (2001).

¹⁴⁶ See S. 2405 (103rd): *Civil Rights Procedures Protection Act of 1994*, GOVTRACK, <https://www.govtrack.us/congress/bills/103/s2405> [<https://perma.cc/3R3L-VVPH>].

¹⁴⁷ See H.R. 1489. Specifically, the CRPPA would have applied to claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2018); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2018); the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2018); the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12, 101–12,113 (2018); the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2018); and the

a congressional hearing, critics expressed concern that such an expansive limitation on arbitration would harm employees and society in general as claimants would be left with litigation as the only means of dispute resolution, which “is more costly, more time-consuming, and will overburden [an] already over-burdened court system.”¹⁴⁸ A more recent example of this type of legislation is the Ending Forced Arbitration of Sexual Harassment Act, which was originally proposed in 2017 and reintroduced in 2019.¹⁴⁹ If enacted, it would prohibit enforcement of predispute, mandatory arbitration agreements pertaining to sex discrimination claims.¹⁵⁰ Similar to the CRPPA, this bill received criticism for its potential far-reaching consequences in that, based on its broad language, if a contract requires arbitration of a sex discrimination dispute, the entire agreement could be deemed unenforceable.¹⁵¹ If courts were to accept this interpretation of the statutory text, critics warn that “the vast majority of existing employment arbitration agreements would likely be in jeopardy of being completely unenforceable in the event of any employer-employee dispute.”¹⁵² An additional concern was that the bill would increase the time and cost of resolving disputes if it “require[d] employees [with] both harassment and non-harassment legal claims to litigate some claims in court while simultaneously submitting other claims to arbitration.”¹⁵³

The third category of legislation represents Congress’s novel approach to arbitration reform that focuses on restricting certain features of arbitration agreements rather than the agreements themselves.¹⁵⁴ One such feature is the inclusion of confidentiality pro-

Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.). H.R. 1489, §§ 2–8.

¹⁴⁸ *Overview of Contractual Mandatory Binding Arbitration: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 66 (2000).

¹⁴⁹ See H.R. 1443, 116th Cong. (2019); *H.R. 1443: Ending Forced Arbitration of Sexual Harassment Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr1443> [<https://perma.cc/74HD-8NXX>].

¹⁵⁰ See H.R. 1443, § 2.

¹⁵¹ See, e.g., Sullivan, *supra* note 10, at 355; Helene Wasserman, *From Settlement Disclosures to Retaliation: A Summary of Sexual Harassment Legislation in 2018*, LITTLER (May 21, 2018), <https://www.littler.com/publication-press/publication/settlement-disclosures-retaliation-summary-sexual-harassment> [<https://perma.cc/MSJ9-Q6E5>].

¹⁵² *Could Congress Ban Arbitration of Sex Discrimination and Harassment Claims?*, FISHER PHILLIPS (Dec. 8, 2017), <https://www.fisherphillips.com/resources-alerts-could-congress-ban-arbitration-of-sex-discrimination> [<https://perma.cc/BQ4K-CZH8>].

¹⁵³ Joe Liburt & Allison Riechert Giese, *The Ending Forced Arbitration of Sexual Harassment Act: A Legislative Response to #MeToo*, ORRICK: EMP. L. & LITIG. (Dec. 14, 2017), <https://blogs.orrick.com/employment/2017/12/14/the-ending-forced-arbitration-of-sexual-harassment-act-a-legislative-response-to-metoo/> [<https://perma.cc/4VR6-7ZHW>].

¹⁵⁴ See, e.g., H.R. 4130, 115th Cong. (2017).

visions.¹⁵⁵ In 2017, Congress proposed the MATA, which would prohibit predispute arbitration agreements from containing a confidentiality clause “with respect to an employment dispute, consumer dispute, or civil rights dispute” that could be interpreted to “prohibit a party to the dispute from . . . reporting or making a communication . . . about (i) tortious conduct; (ii) otherwise unlawful conduct; or (iii) issues of public policy or public concern.”¹⁵⁶ If enacted, it would have ended the use of confidentiality clauses in both employment and consumer contracts unless a party “demonstrate[d] a confidentiality interest that significantly outweigh[ed] the private and public interest in disclosure,”¹⁵⁷ which may have been a high bar to meet. In addition to breadth of its prohibition, the MATA diminishes the fact that confidentiality can be a crucial feature of arbitration for certain victims. More specifically, it could have forced victims who desired confidentiality but were unable to satisfy the statutory bar to resolve their dispute without any guarantee that their sensitive information would not be disclosed.¹⁵⁸

These failed legislative proposals all suffer from a common flaw: an overly expansive scope. Criticism of legislation falling within the first two categories is mainly focused on the fact that such proposals would effectively end the practice of mandatory employment arbitration as to all or a significant number of workplace disputes.¹⁵⁹ This is problematic because arbitration can be a valuable means of dispute resolution in certain contexts, such as when mutually agreed to by equally sophisticated parties.¹⁶⁰ The third category of legislation, specifically the MATA, is similarly expansive in that it would automatically eliminate confidentiality clauses in employment and consumer arbitration contracts unless a contracting party demonstrated a sufficiently compelling confidentiality interest.¹⁶¹ In doing so, the MATA diminishes the fact that confidentiality can be a valuable feature of arbitration, especially for certain victims.¹⁶² The lesson to be learned

¹⁵⁵ *See id.*

¹⁵⁶ *Id.* § 2.

¹⁵⁷ *Id.* § 3(b)(2)(A).

¹⁵⁸ *Id.*

¹⁵⁹ *See Sullivan, supra* note 10, at 355.

¹⁶⁰ *See, e.g.,* Amanda R. James, *Because Arbitration Can Be Beneficial, It Should Never Have to Be Mandatory: Making A Case Against Compelled Arbitration Based Upon Pre-Dispute Agreements to Arbitrate in Consumer and Employee Adhesion Contracts*, 62 *LOY. L. REV.* 531, 541 (2016) (recognizing that arbitration is advantageous “for parties who are aware of the stakes, familiar with the process, and are capable of negotiating the procedures to be used”).

¹⁶¹ *See* H.R. 4130, § 3(b)(2)(A).

¹⁶² *See* James, *supra* note 160, at 541.

from these approaches is that any future proposal to ban or limit mandatory arbitration in the employment context is unlikely to succeed, indicating that mandatory arbitration is here to stay. Rather, a legislative solution targeting certain features of arbitration, similar to the MATA, is likely a more viable approach. However, based on the flaws of the MATA, future legislation will need to be more narrowly tailored.

III. AN ALTERNATIVE LEGISLATIVE SOLUTION

Given the Supreme Court's unwavering pro-arbitration stance, it is unlikely that any significant judicial limitation will be imposed on mandatory employment arbitration in the near future.¹⁶³ Consequently, any legal solution must come from Congress. Although the number of failed attempts to amend the FAA may suggest that such a solution is a lost cause, these efforts actually demonstrate a persistent desire within Congress to address the problems of forced arbitration, indicating that legislation is still an avenue to reform. In addition, the shortcomings of these proposals, such as sweeping bans or limits on employment arbitration agreements, provide guidance on issues to avoid when drafting future legislation.

In recognition of the flaws of previous legislative proposals, this Note advocates for an amendment to the FAA that is similar to the MATA, though significantly narrower in scope.¹⁶⁴ Specifically, this amendment would provide that, in the context of sexual harassment disputes, the employee has the sole discretion to define the scope of confidentiality for the arbitration proceedings and that the employee may make this decision only after the misconduct has occurred. The purpose of this proposal is two-fold: to work towards eliminating sexual harassment in the workplace while also creating a more equitable arbitral forum. The latter goal is especially important given that mandatory arbitration is, at least presently, here to stay. By making the employee the sole decisionmaker as to confidentiality, the employer is forced to address the likelihood that any misconduct and unfair arbitration procedures will be publicized, likely resulting in significant reputational harm. In an effort to avoid such harm, employers will ideally be incentivized to act proactively in changing problematic workplace practices and selecting more neutral arbitration procedures.

¹⁶³ See *supra* Section II.A.

¹⁶⁴ H.R. 4130.

If this Note's proposed amendment is enacted, it would not impose any restriction on mandatory arbitration—employers may continue requiring employees to sign away their right to litigation as a condition of employment. It also would not prohibit predispute arbitration agreements from including confidentiality provisions that apply to disputes other than sexual harassment claims.¹⁶⁵ Instead, this amendment would only bar the inclusion of confidentiality provisions related to sexual harassment claims based on the proposal's requirement that the confidentiality decision is made after the dispute has arisen.

This Part first explains the significance of the proposed amendment's two requirements: the employee-decisionmaker requirement and the post-dispute requirement.¹⁶⁶ It then discusses the effectiveness of this solution as a means to change workplace culture and employer arbitration practices by analyzing the influence of reputational harm.¹⁶⁷ Finally, it addresses the proposed amendment's strong likelihood of enactment by distinguishing it from prior legislative proposals.¹⁶⁸

A. *The Significance of the Employee-Decisionmaker and Post-Dispute Requirements*

The FAA amendment proposed in this Note can be broken down into two requirements: the employee-decisionmaker requirement and the post-dispute requirement. Both of these requirements are equally essential to ensuring that the goals of a harassment-free workplace and more equitable arbitral forum are achieved. The first requirement, which places the confidentiality decision solely in the employees' hands, empowers employees to determine whether the arbitration of the harassment claim will be confidential and, if so, what information is, and is not, protected from disclosure.¹⁶⁹ For example, some employees may elect to keep their personal medical records confidential but deem the remaining information, such as the allegation, identity of the offender, and resolution, nonconfidential. By vesting

¹⁶⁵ It is also worth noting that this proposal would not affect confidentiality agreements that are offered on the condition that the employee signs a settlement agreement.

¹⁶⁶ See *infra* Section III.A.

¹⁶⁷ See *infra* Section III.B.

¹⁶⁸ See *infra* Section III.C.

¹⁶⁹ There would likely need to be an exception to keep certain financial information or trade secrets of the employer confidential even if relevant to the sexual harassment dispute. Further research is needed to precisely define the exception, but it is likely that other areas of law can guide lawmakers in producing the balanced yet powerful scope this Note calls for.

employees with absolute control, the employer is confronted with the possibility that any workplace misconduct and unfair arbitration procedures outlined in the agreement might be disclosed. Notably, given the sensitive nature of sexual harassment claims, it is possible that some victims may wish to keep the proceedings confidential.¹⁷⁰ One victim's decision to do so, however, does not eliminate the possibility that others may wish to publicize the harassment. Further, disclosure by just one sexual harassment survivor can have a powerful impact on shaping workplace culture and employer arbitration practices.¹⁷¹

The second requirement, mandating that the confidentiality decision be made post-dispute, ensures that public disclosure is a *realistic* possibility. Without this requirement, employers would likely require employees to define the scope of confidentiality upon signing the arbitration agreements, allowing the employer to utilize its superior bargaining power to pressure the employee to set favorable confidentiality terms. The post-dispute requirement is necessary to ensure that the employee is not bargained into effectively waiving this right.¹⁷² Together, these two requirements threaten the employer with a realistic possibility that any wrongdoings and unfair arbitration procedures will be exposed to the public, which would likely cause the employer significant reputational harm. The risk of such harm, which is discussed below, will ideally incentivize the employer to act proactively in taking steps to combat sexual harassment, working towards creating a more respectful workplace, and in selecting neutral arbitration procedures.

B. *The Influence of Reputational Harm*

This proposal relies on the threat of reputational harm as a means to effectuate change in workplace culture and in employer arbitration practices. Currently, many employers use confidentiality provisions in arbitration agreements to hide allegations of misconduct and the one-

¹⁷⁰ See Emma J. Roth, *Is a Nondisclosure Agreement Silencing You From Sharing Your 'Me Too' Story? 4 Reasons It Might Be Illegal*, ACLU (Jan. 24, 2018, 9:45 AM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too> [<https://perma.cc/EHW7-HTEA>].

¹⁷¹ See, e.g., Samantha Cooney, *Microsoft Won't Make Women Settle Sexual Harassment Cases Privately Anymore. Here's Why That Matters*, TIME (Dec. 19, 2017), <http://time.com/5071726/microsoft-sexual-harassment-forced-arbitration/> [<https://perma.cc/J8CJ-BRLD>] (explaining how news of one Microsoft employee's mistreatment led the company to end forced arbitration of sexual harassment claims for all employees).

¹⁷² See Doré, *supra* note 9, at 514 (arguing that, because employees are often forced to sign arbitration agreements, "[t]he assumption that ADR participants choose or self-determine confidentiality, then, does not necessarily hold true for many arbitrations today").

sided procedures for arbitrating those disputes.¹⁷³ The intended effect of this amendment is to bring, or threaten to bring, such information to the public's attention, likely resulting in significant damage to the employer's reputation.¹⁷⁴ Specifically, disclosure of this information could lead to difficulties retaining and attracting qualified employees and to reductions in customers or clients, threatening the economic viability of the employer's business.¹⁷⁵ To avoid such harm, employers will likely be motivated to address any problematic workplace practices and biased arbitration procedures.

Reputational harm has been recognized as one of the “most powerful deterrents to illegal [and] legally questionable conduct.”¹⁷⁶ The effectiveness of such harm as a means to influence change is evidenced by a number of law firms' and technology firms' recent revisions to their employment contracts.¹⁷⁷ In the legal industry, these changes began in March 2018 when one law student tweeted a picture of Munger Tolles & Olson's summer associate employment contract, which contained a mandatory arbitration agreement and confidentiality clause.¹⁷⁸ Public outcry quickly ensued and, within 48 hours of the posting, Munger Tolles announced that it would end this practice for all employees.¹⁷⁹ A few days later, Orrick, Herrington & Sutcliffe eliminated mandatory arbitration agreements for its employees, noting that it was motivated by the public's negative response to Munger Tolles's arbitration policy.¹⁸⁰ Since then, a few other law firms have

¹⁷³ See Estlund, *supra* note 7, at 681; Spitko, *supra* note 23, at 614–16.

¹⁷⁴ See Harriet Taylor, *Fearing Future #MeToo Allegations, a Growing Number of Companies are Turning to Reputation Management Firms*, CNBC NEWS (Jan. 29, 2019, 12:15 PM), <https://www.cnn.com/2019/01/29/fearing-metoo-allegations-companies-turn-to-reputation-managers.html> [<https://perma.cc/89LX-9PF5>] (discussing companies' increasing reliance on reputation management firms in response to the rise in sexual harassment allegations).

¹⁷⁵ See FELDBLUM & LIPNIC, *supra* note 4, at 22–23.

¹⁷⁶ Estlund, *supra* note 7, at 681.

¹⁷⁷ See Campbell, *supra* note 20 (noting that an employer's arbitration decision is now a “public relations” decision (quoting Interview by Braden Campbell with David Garland, Chair, National Employment, Labor & Workforce Management Steering Committee, Epstein Becker & Green PC)).

¹⁷⁸ See Staci Zaretsky, *BigLaw Firm Tries to Force Summer Associates to Arbitrate Sexual Harassment Claims*, ABOVE THE LAW (May 26, 2018, 12:02 PM), <https://abovethelaw.com/2018/03/biglaw-firm-tries-to-force-summer-associates-to-arbitrate-sexual-harassment-claims/> [<https://perma.cc/Z4YD-KCQP>].

¹⁷⁹ See Natalie Rodriguez, *Munger Tolles Arbitration Dust-Up May Spark BigLaw Changes*, LAW360 (Mar. 26, 2018, 10:08 PM), <https://www.law360.com/articles/1026032?scroll=1> [<https://perma.cc/FY6G-Z636>]; see also Zaretsky, *supra* note 178 (“[The] tweet[] racked up hundreds of likes and retweets.”).

¹⁸⁰ See Rodriguez, *supra* note 179.

followed suit.¹⁸¹ Within the technology industry, a number of leading companies also revised their arbitration policies, beginning with Microsoft in 2017.¹⁸² Microsoft eliminated forced arbitration for sexual harassment claims a week after an article surfaced that one of its employees was sexually assaulted by a coworker and then required to continue working with the alleged offender while the company investigated her claim.¹⁸³ Google also changed its arbitration policy after more than 20,000 employees participated in a walkout protesting this practice.¹⁸⁴ Other technology companies that recently revised their mandatory arbitration policies with respect to sexual harassment include Facebook,¹⁸⁵ Airbnb,¹⁸⁶ eBay,¹⁸⁷ Uber,¹⁸⁸ and Lyft.¹⁸⁹

Although these changes by leading legal and technology firms are encouraging, they are unlikely to lead to permanent, nationwide arbitration reform. Commentators have suggested that such efforts are unlikely to motivate other companies to revise their employment practices, and that once public outcry has subsided, these leading companies may even reinstate their arbitration policies.¹⁹⁰ Thus, congressional action is needed.

¹⁸¹ For example, Skadden Arps Slate Meagher & Flom dropped its arbitration agreements, but only for non-partners, and Kirkland & Ellis ended mandatory arbitration for summer associates and associates. Meghan Tribe, *Not Everyone Cheers Kirkland's Move to End Associate Arbitration Policy*, AM. LAW. (Nov. 27, 2018, 9:58 AM), <https://www.law.com/americanlawyer/2018/11/27/not-everyone-cheers-kirklands-move-to-end-associate-arbitration-policy/> [https://perma.cc/7U9G-FYGF]; Stephanie Francis Ward, *Top Law Schools Ask Law Firms to Disclose Arbitration Agreements for Summer Associates*, ABA J. (May 17, 2018, 7:10 AM), http://www.abajournal.com/news/article/top_law_schools_ask_law_firms_to_disclose_arbitration_agreements_for_summer [https://perma.cc/H2QP-UM2M].

¹⁸² Emily Birnbaum, *Google Employees Join Lawmakers Pushing Bills to End Forced Arbitration*, HILL (Feb. 28, 2019, 2:14 PM), <https://thehill.com/policy/technology/432065-lawmakers-introduce-bills-to-end-forced-arbitration> [https://perma.cc/BEE5-CQQM].

¹⁸³ Cooney, *supra* note 171.

¹⁸⁴ Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More.*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html> [https://perma.cc/74MW-YFNX].

¹⁸⁵ *Id.*

¹⁸⁶ Braden Campbell, *Employers May Follow Tech Titans' Lead On Arbitration*, LAW360 (Nov. 16, 2018, 2:18 PM), <https://www.law360.com/articles/1102846/employers-may-follow-tech-titans-lead-on-arbitration> [https://perma.cc/373X-NC8M].

¹⁸⁷ *Id.*

¹⁸⁸ See Jamie Hwang, *Uber and Lyft End Mandatory Arbitration for Sexual Assault Claims*, ABA J. (May 15, 2018, 5:19 PM), http://www.abajournal.com/news/article/uber_and_lyft_end_mandatory_arbitration_clauses_for_sexual_assault_claims [https://perma.cc/5QXM-2NHQ].

¹⁸⁹ *Id.*

¹⁹⁰ See Birnbaum, *supra* note 182 (“[W]e can’t rely on everyone to do the right thing voluntarily. . . .” (quoting interview with Richard Blumenthal, U.S. Senator)); Campbell, *supra* note 20 (“[S]ome mandatory arbitration opponents are skeptical many more employers will do away

C. *The Likelihood of Enactment*

This Note's proposal differs from the previous attempts to amend the FAA by avoiding the flaws that contributed to their demise and thus has a stronger probability of enactment. With regard to the first two categories of legislation,¹⁹¹ the main distinguishing factor is that the amendment proposed by this Note accepts that mandatory arbitration agreements will, at least for the time being, continue to be a standard element of employment contracts. In other words, unlike the AFA and the Ending Forced Arbitration of Sexual Harassment Act, which were heavily criticized for their attempts to ban or limit arbitration agreements,¹⁹² this amendment does not impose any restriction on arbitration. If this proposal is enacted, employers will be able to continue using predispute arbitration agreements in employment contracts.

This proposal is also distinguishable from the third category of legislation, specifically the MATA. Although both the MATA and this Note's solution regulate confidentiality provisions within predispute arbitration agreements, the latter is distinct in two ways. First, this proposal is significantly narrower in scope, applying only to sexual harassment claims in the employment context. Conversely, the MATA affects all employment-related disputes as well as any consumer and civil rights disputes.¹⁹³ Second, this proposal allows the employee to control confidentiality rather than banning these provisions regardless of the parties'—more importantly, the victim's—interests in maintaining a confidential proceeding, which is the approach taken by the MATA.¹⁹⁴ In sum, because this proposal focuses on regulating confidentiality provisions, not arbitration agreements, and is narrowly tailored to apply only to workplace sexual harassment claims, it avoids the highlighted flaws of previous legislative proposals and thus has a better chance of enactment.

CONCLUSION

It is the unfortunate truth that sexual harassment remains pervasive in the American workplace. One factor contributing to the preva-

with existing agreements or hesitate to adopt them. 'If there is any slowdown, once companies feel the public scrutiny has subsided, I have no doubt they will revert to usage [of mandatory arbitration] again.'" (quoting Interview by Braden Campbell with Jeanne Christensen, Partner, Wigdor LLP).

¹⁹¹ See text accompanying notes 131–32.

¹⁹² See *supra* notes 135–39; 149–53 and accompanying text.

¹⁹³ H.R. 4130, 115th Cong. § 2 (2017).

¹⁹⁴ *Id.*

lence of this misbehavior is the use of mandatory arbitration agreements that include constrictive confidentiality clauses and set employer-favoring procedures to resolve disputes. Because the Supreme Court is unlikely to impose any judicial limitation on mandatory employment arbitration any time soon, congressional action is critical. Lawmakers in Congress have attempted to address the mandatory arbitration problem by proposing a number of FAA amendments to institute broad limitations on arbitration agreements and confidentiality provisions. But all such attempts have failed, indicating that future legislation should be significantly narrower and avoid imposing any restriction on the use of arbitration agreements. This Note proposes an amendment to the FAA that confers sole discretion to the employee to determine the scope of confidentiality in a sexual harassment arbitration and specifies that this discretion may only be exercised post-dispute. By restricting confidentiality in this manner, the employer faces the realistic possibility that any misbehavior and unfair arbitration procedures will be exposed to the public. To avoid the reputational damage caused by such a disclosure, employers will ideally be motivated to address any problematic workplace policies and arbitration practices, making progress towards a harassment-free workplace and an equitable arbitration forum.