THE END OF FORCED ARBITRATION OF SEXUAL VIOLENCE AND THE UNCERTAIN FUTURE

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INTRODUCTION

In December 2014, Andowah Newton was offered the position of Director of Litigation Counsel for the American Affiliate of LVMH Moët Hennessy Louis Vuitton, a prestigious French corporation.[1] Ms. Newton was thrilled at the offer to work for the renowned conglomerate that owns brands such as Dior and Givenchy.[2] "I was ecstatic. It was my dream job. I attempted to negotiate several aspects of my employment agreement, but LMVH made it clear that no aspect—including the forced arbitration clause was—negotiable. It was a take it or leave it offer."[3] Ms. Newton accepted the position and signed the employment agreement as it was, feeling as though she had no other choice if she was to work for LVMH.[4] After she assumed her new role, Ms. Newton excelled and was quickly recognized for her outstanding performance.[5] Her boss, the U.S. General Counsel, wrote "Andowah reflects the highest degree of honesty and ethics in all she does."[6]

[1] House Committee on the Judiciary, *How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows*, YOUTUBE (Nov. 16, 2021), https://youtu.be/JC5y1GbfUVk.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

Following multiple glowing performance reviews, Ms. Newton was promoted to Vice President of Legal Affairs.[7]

While Ms. Newton's growing career at LVMH seemed like a dream, the reality of her experience at LVMH was more like a nightmare.[8] All the while, Ms. Newton was being sexually harassed by LVMH's Director of Property and Facility Operations, Lloyd Doran.[9] Mr. Doran was a man thirty years Ms. Newton's senior who reported directly to a Senior Vice President and was a member of the senior executive's inner circle.[10] Notably, Mr. Doran is a "white male" who was in a position of power within LVMH above Ms. Newton, who is herself a Black woman. [11]

When Mr. Doran began sexually harassing Ms. Newton, she barely knew him.[12] He would leer at her whenever he saw her, and walk past her office slowly, skimming the doorway.[13] This is how the harassment started.[14] Emboldened, Mr. Doran began lurking outside of Ms. Newton's office for such excessive periods of time that another colleague confronted Mr. Doran about his behavior.[15] Unfortunately, even this confrontation did not stop Mr. Doran; at work gatherings, he would publicly leer at Ms. Newton, and as soon as she would enter a room, suddenly Mr. Doran would appear near her.[16] From here, Mr. Doran's harassment only continued to escalate.[17]

> I repeatedly rebuffed his advances, but that had no effect. One day, he entered my office with the excuse of hanging artwork. Suddenly, without warning, he lunged toward me, thrusting his pelvic area into my face as I sat at my desk. He pinned his body horizontally on top of mine. I exclaimed in shock while trying to unpin my body from under his. After I was able to stand up, he pretended he had done nothing wrong despite my protests. This left me constantly agitated and distressed, preoccupied with avoiding the trauma of encountering him. I listened out for the ding of the elevators, avoided the stairwells or working very late in the office. And when I had to, I barricaded myself inside my office to try to feel safe.[18]

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7 *Id.*
8 *See id.*
9 *Id.*
10 *Id.*
11 *See id.*
12 *Id.*
13 *Id.*
14 *See id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*

The harassment did not stop.[19] Mr. Doran continued to prowl outside Ms. Newton's office, his presence hovering over her as she worked.[20] Ms. Newton became anxious and stressed by his "persistent, disruptive, and suffocating" harassment, making it difficult for her to concentrate and affecting her ability to work.[21] Ms. Newton reported the harassment, thinking it would finally end the nightmare she had been experiencing.[22] She was sadly mistaken, and "was about to receive a horrifying lesson on the power of forced arbitration."[23]

Forced or mandatory arbitration consistently denies survivors of sexual violence the justice they are owed.[24] The term "sexual violence" is an umbrella term that includes sexual harassment, sexual exploitation, unwanted sexual touching, exposing one's naked body to another without consent, public masturbation, sexual assault, and rape, among other acts.[25] In this Note, the term sexual violence is used to encompass all these acts, without subtracting from the severity of trauma experienced by each survivor of an act of sexual violence.[26]

In Part I, this Note introduces alternative dispute resolution, arbitration, how mandatory arbitration in employment contracts impact legal claims of workplace sexual violence, and the issues inherent to the arbitration of these claims. Part II of this Note discusses the Federal Arbitration Act ("FAA"),[27] and the introduction of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") that amends the FAA.[28] Part III of this Note focuses on a provision within the EFAA regarding its application that has been the subject of litigation following the Act being signed into law, and how this provision and the EFAA as a whole interacts with Title VII of the Civil Rights Act of 1964 ("Title VII").[29] Finally, in anticipation of future scrutiny to continue interpreting the EFAA, Part IV proposes a better and fairer interpretation of the EFAA's terms, suggesting that either Congress or federal appellate courts will soon be tasked with interpreting the EFAA's

[19] *Id.*

[20] *See id*.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See* Matthew DeLange, *Arbitration or Abrogation: Title VII Sexual Harassment Claims Should Not Be Subjected to Arbitration Proceedings*, 23 J. GENDER RACE & JUST. 227, 251–56 (2020).

[25] *What is Sexual Violence? Fact Sheet*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Factsheet_What-is-sexual-violence_1.pdf (last visited Oct. 5, 2022).

[26] *See Effects of Sexual Violence, RAINN*, https://www.rainn.org/effects-sexual-violence (last visited Nov. 26, 2022).

[27] 9 U.S.C. §§ 1-16.

[28] 9 U.S.C §§ 401-02 (2022).

[29] *Id.*; Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

unclear language. In addition, Part IV analyzes what the new legal landscape may still look like for plaintiff employees in the wake of the EFAA.[30] Ultimately, this Note proposes that new legislation be passed to ensure that all forms of workplace discrimination are protected from forced arbitration.

PART I

A. Alternative Dispute Resolution

Not all legal disputes are resolved through litigation or through settlement agreements intended to avoid (or in some cases end ongoing) litigation procedures.[31] Since the first "Pound Conference" in 1906, where an attorney named Roscoe Pound raised the argument that the American public was "popular[ly] dissatisfied with the [current] administration of justice,"[32] many American judges and attorneys have recognized the need for alternatives to litigation for resolving legal disputes.[33] The American civil court system can be confusing, expensive, outdated, and disorganized, and has been historically mistrusted.[34] As put by Mr. Pound, "[o]ur administration of justice is not decadent. It is simply behind the times."[35] It was not until 1976, during the second Pound Conference, that the American Bar Association tasked itself to explore non-judicial dispute resolution and to improve the current judicial system to be faster and more efficient.[36] The American Bar Association released a thirty-seven-page report following this conference, detailing its recommendations to incorporate new methods of dispute resolution into current practices.[37] From this, "ADR," an acronym for "alternative dispute resolution," referring to any method of settling a legal dispute outside of a courtroom (sometimes referred to as "appropriate dispute resolution"),[38] entered popular legal discourse.[39]

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[30] 9 U.S.C §§ 401-02 (2022).

[31] Alternative dispute resolution: "Any procedure for settling a dispute by means other than litigation, as by arbitration or mediation." *Alternative dispute resolution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[32] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906).

[33] *See* Lara Traum & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677 (2017).

[34] *Id.* at 681–82; Pound, *supra* note 32.

[35] Pound, *supra* note 32, at 744.

[36] Traum & Farkas, *supra* note 33, at 685.

[37] *American Bar Association Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159 (1976).

[38] *Appropriate dispute resolution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[39] *Id.*; Krystyna Blokhina Gilkis & Tala Esmaili, *Alternative Dispute Resolution*, LEGAL INFO. INST. (June 8, 2017), https://www.law.cornell.edu/wex/alternative_dispute_resolution.

B. Arbitration

Arbitration is a form of ADR that happens outside of the courtroom but within the judicial system.[40] Arbitration is private and legally binding, with a trained arbitrator acting as the person who settles a dispute or has ultimate authority in each given dispute.[41] In practice, this means that by agreeing to arbitration, the parties are waiving their constitutional right to a trial by jury.[42] Instead of heading into the courtroom for litigation, parties agree to head behind closed doors, where neither a judge nor a jury will be present.[43] After the parties enter arbitration, they cannot change their legal course to have a *de novo* trial.[44] Arbitration decisions cannot be appealed,[45] except in limited circumstances, such as when parties preemptively agree that the decision would be non-binding, or where evidence of fraud is discovered following a binding arbitration proceeding.[46]

C. Forced Arbitration, Employment Contracts, and Workplace Sexual Violence

Employment contracts commonly contain pre-dispute arbitration clauses requiring mandatory arbitration for any legal disputes between the employer and the employee.[47] This was not always a commonplace practice, but in the last thirty years, it has become routine for employers to include mandatory arbitration clauses in employment contracts.[48] In addition, these contracts frequently contain a non-disclosure agreement, also known as an "NDA," essentially contractually obligating both parties to silence regarding any disputes or proceedings.[49] Many employees in these situations typically do not realize that, after being sexually harassed or discriminated against in

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[40] *Arbitration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[41] *Arbitration Defined: What is Arbitration?*, JAMS ARB. SERV., https://www.jamsadr.com/arbitration-defined/ (last visited Oct. 5, 2022).

[42] *Id.*

[43] *See id.*

[44] *Id.* Cases that have been sent to arbitration have been heard on their merits by the arbitrator and cannot be heard again on their merits by a judge, jury, or any other factfinder under the doctrines of collateral estoppel and *res judicata*. *See* James M. Westerlind, *The Preclusive Effect of Arbitration Awards*, 28 MEALEY'S LITIG. REP.: REINSURANCE 1 (2010).

[45] *Arbitration Defined: What is Arbitration?*, *supra* note 41.

[46] *Binding vs. Non-Binding Arbitration: What's the Difference?*, BREAKTHROUGH MEDIATION (Jan. 19, 2021) https://www.btmediation.com/difference-between-binding-and-non-binding-arbitration/.

[47] *See* ADR Times, *A Predispute Arbitration Clause – Arbitration Agreement Explained*, ADR TIMES (Mar. 17, 2021), https://www.adrtimes.com/predispute-arbitration-clause/.

[48] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015).

[49] *See Non-Disclosure Agreements and Arbitration Clauses in the #MeToo Era*, MSLAW BLOG, (Aug. 28, 2019) https://www.mslaw.com/mslaw-blog/non-disclosure-agreements-and-arbitration-clauses-in-the-metoo-era.

their workplace, they will not see their day in court or enjoy their Seventh Amendment right to a civil trial by jury.[50] The reason for this misunderstanding is likely less due to their lack of legal education and more due to a commonsense assumption of what "justice" is supposed to mean.[51]

When compelled to arbitration, survivors of workplace sexual violence are fundamentally retraumatized: they are once again in a situation outside of their control, where they are disadvantaged, and where their employer, who is protecting the abuser, has the most power.[52] The confidential nature of arbitration shields employers' misconduct from public scrutiny, and in doing so, helps to perpetuate the cycles and behaviors of workplace sexual violence and discrimination.[53] While arbitration has been lauded as a less expensive alternative to litigation, expenses for representation in arbitration alone can cost plaintiff employees hundreds of thousands of dollars that the defendant employer can more readily afford.[54] As a result, litigation may often be far more favorable than arbitration for the plaintiff employee, being no more financially burdensome than arbitration and providing the plaintiff employee with both visibility for their case and the ability to appeal, which arbitration cannot offer.[55] Despite this, where an employment contract contains a mandatory arbitration clause, the employee is denied the ability to make this decision for themselves.

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[50] U.S. CONST. amend. VII.

[51] Black's Law dictionary defines justice several ways, including as "[t]he fair treatment of people," "[t]he legal system by which people and their causes are judged," and "[t]he fair and proper administration of laws." *Justice*, BLACK'S LAW DICTIONARY (11th ed. 2019). At face value, the first definition would seem to prevail, and the following definitions support the fair treatment of people. However, our legal system emphasizes the latter definition and concerns itself primarily with the administration of laws, including the FAA.

[52] *See* Negar Katirai, *Retraumatized in Court,* 62 ARIZ. L. REV. 81 (2020).

[53] Meagan Glynn, *#Timesup for Confidential Employment Arbitration of Sexual Harassment Claims*, 88 GEO. WASH. L. REV. 1042, 1055-57 (2020).

[54] Benny L. Kass, *Second Thoughts About Arbitration: It Can Be More Expensive Than Litigation in Contract Disputes*, WASH. POST (May 18, 2002), https://www.washingtonpost.com/archive/realestate/2002/05/18/second-thoughts-about-arbitration-it-can-be-more-expensive-than-litigation-in-contract-disputes/2fbdf4df-a90a-484a-8ffe-c5bfcd255838/. Potential costs include filing fees, hearing fees, administration fees, administrative expenses, hearing room rental, arbitrator and/or mediator fees, discovery costs, and attorneys' fees. *How Much Does Arbitration Cost?* ADR TIMES (Apr. 30, 2021), https://www.adrtimes.com/how-much-does-arbitration-cost/#:~:text=Arbitrator%20fees%20are%20%241500%20for,involved%2C%20depending%20on%20the%20number. Three arbitrators may be necessary when the stakes are high, which can be the case if the defendant employer is protecting a high ranking or important employee that is responsible for sexual violence, or when specified in the mandatory arbitration clause. *Id*.

[55] *See also Kass*, supra note 54.

D. Issues Inherent to Arbitrating Sexual Violence Claims

1. Arbitration Lacks Diversity

Mandatory arbitration is particularly problematic for workplace sexual violence and sex discrimination cases, especially for women and people of color.[56] Marginalized identities, and especially intersectional identities, encounter additional discrimination and bias in arbitration.[57] Pre-existing societal issues of sexism and racism are woven into the arbitration process, where one or several individuals are handpicked to determine a case.[58] While organizations like the American Arbitration Association's ("AAA") International Centre for Dispute Resolution have implemented mandatory implicit bias training,[59] there is not enough research to support the claim that these trainings are effective.[60] In fact, these trainings have been shown to sometimes backfire and induce anger and frustration in trainees.[61]

In many cases, arbitrators are appointed by the AAA or JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.) from lists each organization maintains of qualified top judges, legal executives, and notable figures in the ADR world.[62] Women and people of color are less frequently chosen to serve as arbitrators, as systemic racism and sexism have prevented women and people of color from advancing far enough in their legal or professional careers to qualify, or are inexplicably and consistently passed over to decide more "complex" cases.[63] When women and people of color are chosen to sit on arbitration panels, it is rare to see more than one.[64] In 2018, thirty-eight percent of women in the U.S. claimed they had been victims of workplace sexual harassment, compared to thirteen percent of

[56] Alexia Fernández Campbell, *The House just passed a bill that would give millions of workers the right to sue their boss*, VOX (Sept. 20, 2019, 11:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act.

[57] *See* Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG., 2012.

[58] *See id.* at 22-26.

[59] *Diversity and Inclusion*, AM. ARB. ASS'N, https://www.adr.org/Careers/diversity-and-inclusion (last visited Nov. 26, 2022).

[60] Tiffany L. Green & Nao Hagiwara, *The Problem with Implicit Bias Training*, SCI. AM. (Aug. 28, 2020), https://www.scientificamerican.com/article/the-problem-with-implicit-bias-training/.

[61] *Id.*

[62] David C. Singer, *An Arbitration Primer for Litigators*, NY STATE BAR ASSOC. (2015), https://nysba.org/NYSBA/Sections/Dispute%20Resolution/Dispute%20Resolution%20PDFs/DR%20Arbitration%20pamphlet2015.pdf (last visited Oct. 5, 2022). *Arbitration: A Powerful Tool for Achieving Fair, Expeditious Resolution*, JAMS, https://www.jamsadr.com/arbitration#:~:text=In%2Dperson%2C%20virtual%20or%20hybrid,complex%2C%20multi%2Dparty%20arbitrations (last visited Nov. 25, 2022) ("As the world's largest private ADR provider, JAMS administers an average of 18,000 cases in person and online every year, including thousands of complex multi-party arbitrations.").

[63] Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG., 2012, at 22-26.

[64] *Id.*

men.[65] A report from 2021 found that 25.9% of LGBTQIA+ people have reported being sexually harassed in the workplace.[66] Yet, an AAA report from 2019 found that only twenty-six percent of arbitration cases had rosters including arbitrators from diverse backgrounds, and thirty percent of arbitration cases utilized diverse arbitrator appointments.[67] This is enormously troubling, especially considering how alienating it is to be a plaintiff employee and not see representation among arbitrators, and how much integrity and legitimacy diversity brings to the ADR field.[68]

The intersection of gender and race remain prevalent and visible bases for discrimination that permeates workplace sexual violence, such as what happened to Ms. Newton, a Black woman who was targeted for sexual violence by a white man with greater power in the corporate structure of LVMH.[69] The lack of representation of similar diverse and intersectional identities on an arbitration panel contributes to the further marginalization of plaintiff employees with intersectional identities.[70] When a plaintiff's identity is diluted to indicate only one of several important aspects of their identity, as in only their gender or only their race, they fail to see full representation in the arbitrators assigned to their case.[71] The increasing emphasis on gender parity in arbitration is important but does not erase the need to bring greater diversity to arbitration panels.[72]

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[65] *The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Assault*, STOP STREET HARASSMENT (Feb. 2018), https://stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf.

[66] Brad Sears, Christy Mallory, Andrew R. Flores, & Kerith J. Conron, LGBT PEOPLE'S EXPERIENCES WORKPLACE DISCRIMINATION & HARASSMENT 2 (The Williams Institute, University of California, Los Angeles, 2021).

[67] Armeen G. Mistry, *Lack of Diversity Continues to Hurt Alternative Dispute Resolution*, TROUTMAN (May 26, 2020), https://www.troutman.com/insights/lack-of-diversity-continues-to-hurt-alternative-dispute-resolution.html.

[68] *Id.*

[69] House Committee on the Judiciary, *supra* note 1.

[70] Tania Gupta**,** *Intersectionality in Appointment of Arbitrators: The 'Grey' Approach to Highlighting Invisibilities in Feminism*, RMLNLU ARB. L. BLOG (July 21, 2020), https://rmlnluseal.home.blog/2020/07/21/intersectionality-in-appointment-of-arbitrators-the-grey-approach-to-highlighting-invisibilities-in-feminism/; Joshua Karton & Ksenia Polonskaya, *True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity*, KLUWER ARB. BLOG (July 10, 2018), http://arbitrationblog.kluwerarbitration.com/2018/07/10/true-diversity-is-intersectional-escaping-the-one-dimensional-discourse-on-arbitrator-diversity/.

[71] *See* Gupta, *supra* note 70; Karton, *supra* note 70.

[72] "Intersectionality brings to light the idea that our discussion should revolve not just around the question of whether 'enough' women are being appointed as arbitrators, but it should involve a good amount of thought on 'which' women are being appointed as arbitrators." Gupta, *supra*, note 70. "[T]he concept of intersectionality gives meaning to the banal observation that diversity is not one-dimensional. People with overlapping backgrounds may experience unique obstacles that prevent them from entering the field as arbitrators, and they would also bring with them unique perspectives should they be appointed." Karton, *supra* note 70.

Racial diversity remains a critically important and under-represented area of arbitration that cannot be replaced by an emphasis on another area of diversity in arbitration.[73] Plaintiff employees such as Ms. Newton, whose identity is not simultaneously singularly 'Black' and 'female,' are not represented by an all-white, gender diverse arbitration panel. Professor Michael Green of the Texas A&M University School of Law published an essay in 2006 that challenged the racially biased selection process of arbitrators for employment discrimination claims.[74] In it, Professor Green commented:

> [W]hen arbitration agreements coerce [B]lack employees into a private dispute resolution system where employers may apply racial stereotypes with little regulation, it raises concern about the integrity of that system . . . . the lack of diversity in the arbitrator pool may cause [B]lack employees to not pursue their discrimination claims out of a feeling that it would be futile in such a questionable system.[75]

The lack of diversity in arbitration remains a significant obstacle and alienating factor that makes arbitration an inaccessible and unjust solution for many survivors of workplace sexual harassment and other forms of discrimination.[76] Implicit bias still maintains a stronghold in both the judicial and arbitral arenas and failing to see a familiar face on an arbitration panel is as bad a sign as failing to see one among a jury.[77]

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[73] Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4:1 J. AM. ARB. 1, 4 (2005).

[74] *Id.*

[75] *Id.*

[76] For more insight into this conclusion, *see* Justin D. Levinson, Huajian Cai, & Danielle Young., *Guilty by Implicit Racial Bias: The Guilty/not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 188 (2010); *see also* Green, *supra* note 73.

[77] *See* Levinson, *supra* note 76. At trial, juries at least provide the opportunity for diverse decision-makers, although there remain inherent issues with diversity in jury selection, despite the legal community's general (and empirically proven) consensus that diverse juries are better, fairer juries with positive impacts on both justice and greater societal perceptions of the judicial system and its actors. *See Jury Diversity and its Impact on Case Outcomes*, JURY ANALYST (Oct. 6, 2020), https://juryanalyst.com/blog/jury-diversity-impact/ ("A diverse jury is not a luxury but is a right for minority defendants to have a fair trial among a jury of their similar race and gender peers."); *Courts Seek to Increase Jury Diversity*, U.S. COURTS (May 9, 2019), https://www.uscourts.gov/news/2019/05/09/courts-seek-increase-jury-diversity ("A heightened awareness of the importance of diverse juries has prompted some federal courts to evaluate their selection processes to ensure that the age, race, and socio-economic status of juror pools reflect the courts' communities."); Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, AMER. BAR ASSOC. (Sept. 1, 2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/ (discussing why jury diversity is important, and the repercussions of racially nondiverse juries, which the article identifies as an "endemic American problem."); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple*

2. The Repeat Player Effect

"Why would an arbitrator cater to a person they will never see again?" asked Victoria Pynchon, a Los Angeles arbitrator.[78] This question embodies another concern that employees can have with arbitration: that the preexisting relationship between arbitrators and defendant employers inevitably favors the employer, and not the employee who has survived workplace sexual violence.[79] Ideally, arbitrators must disclose any and all relationships they have with the defendant employer or their counsel, especially in situations where the arbitrator has a financial interest in the employer and/or the outcome of the arbitration proceedings.[80] However, when large corporate employers frequently arbitrate allegations of discrimination or sexual violence, because the number of arbitrators that the AAA or JAMS will provide remains limited to those who qualify, there tends to be second, and maybe third or fourth, introductions between employers and arbitrators.[81] This is the "repeat player": the employer who is repeatedly engaged in arbitration against employees.[82] Employers gain an advantage when they are repeat players.[83] Familiarity, friendliness, and budding or established relationships can sway arbitrators in favor of the employer(s) and counsel they see more frequently.[84] Consequently, employers win statistically significantly more often when they are repeat players.[85] Within the current arbitral system, it is advantageous for the employer not to address any internal problems and to continue dragging employees into arbitration.[86]

Effects of Racial Composition on Jury Deliberations, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006) (identifying "specific advantages of racial heterogeneity for group decision making and demonstrates the influence of race-relevant jury selection questions on subsequent trial judgments" in a study where "[p]articipants deliberated on the trial of a Black defendant as members of racially homogeneous or heterogeneous mock juries.").

[78] Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

[79] *Id.*; Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS & EMP. POL'Y J. 189, 195 (1997).

[80] *See* Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145 (1968) (wherein the arbitration award was set aside on appeal by the Supreme Court due to an undisclosed financial relationship between the arbitrator and the prevailing party, and therefore the supposedly neutral member of the arbitration panel was guilty of fraud and bias.).

[81] Bingham, *supra* note 79.

[82] *Id.* at 189, 190-191.

[83] *Id.*

[84] *Id.* at 189, 214.

[85] *Id.* at 189, 208.

[86] *Id.* at 189, 214.

3. Civil Litigation Benefits Survivors More Than Arbitration Does

Even beyond the failures of the arbitral system, there are many reasons why civil litigation may be a survivor's best avenue toward justice.[87] Between civil and criminal law routes, reporting sexual violence to law enforcement does not guarantee that a survivor's immediate needs (physiological and psychological) will be met in the same way that a civil suit could meet those needs,[88] which is an important factor that survivors will likely consider as they decide what next steps are best for them. In addition, the criminal legal system may not ever deliver the kind of justice that a survivor would desire from it.[89] Five out of one thousand perpetrators of sexual assault are convicted,[90] and coupled with such an overwhelmingly unfavorable likelihood of conviction, three out of every four sexual assaults are not reported.[91] The top three reasons survivors do not report to law enforcement are fear of retaliation, belief that law enforcement would not do anything to help them, and belief that it was a personal matter.[92] Applied to the realm of employment related claims, these fears are also reasons why an employee would be hesitant to report their employer to Human Resources,[93] let alone to law enforcement. A 2019 study on workplace harassment revealed that thirty-nine percent of employees do not believe their harassment

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[87] *See* Annie Kerrick, *Justice Is More Than Jail: Civil Legal Needs of Sexual Assault Victims*, 57 ADVOC. 38 (2014). *See also The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Oct. 5, 2022).

[88] Annie Kerrick, *supra* note 87, at 39.

> The civil legal system is better suited to address the immediate needs of victims of sexual assault. It can provide victims with access to resources for counseling and health care, accommodations with employers and schools, protection of privacy, access to public benefits, and more. When victims' basic needs are met, victims who choose to report are more likely to be able to fully participate with the criminal justice system in the prosecution of assailants.

Id.

[89] *Id.* at 38-39.

> In reality, reports of rape are difficult to prove under the criminal legal standard either due to lack of severity of physical injury or the victim's apparent lack of credibility. Therefore, it is often very difficult for prosecutors to successfully hold rapists accountable through prosecution. . . . reporting to law enforcement may assist with meeting part of the physiological and safety needs of a victim, especially if there is an expectation that the perpetrator will be arrested. However, cases can take years to be resolved and ultimately, criminal conviction is highly unlikely.

Id.

[90] *The Criminal Justice System: Statistics*, *supra* note 87.

[91] *Id.*

[92] *Id.*

[93] Deb Muller, *Workers Report Behavior But Fear Retaliation and Doubt It Will Be Investigated*, TLNT (Nov. 7, 2019), https://www.tlnt.com/workers-report-behavior-but-fear-retaliation-and-doubt-it-will-be-investigated/.

claims will be fairly addressed if they report them, and forty-six percent fear retaliation.[94] In 2017, seventy-one percent of workplace sexual harassment allegations included charges of retaliation or other adverse conduct from employers.[95] These retaliation complaints constitute almost half of all Equal Employment Opportunity Commission ("EEOC") complaints.[96] The belief that law enforcement would not do anything to help is another reason why an employee would seek to file a civil suit against their employer instead of pursuing criminal charges,[97] especially if they quit or were terminated and are seeking financial recompense. If a contractual mandatory arbitration clause is enforced, the case is "buried in the basement of arbitration"[98] and subject to the inherent flaws of the arbitration process.[99] Enforceable mandatory arbitration clauses can be, and have been, understood as a perpetuating force that protects and even encourages ongoing workplace sexual violence.[100] The assured confidentiality and implicit non-disclosure agreements ensure that stories of workplace sexual violence remain untold and create the perfect storm for workplace sexual violence to become rampant and unchecked.[101]

Due to its secretive nature, empirical data regarding arbitration results are hard to come by.[102] However, some states, including California, have passed laws requiring arbitration providers to disclose some information about the cases they oversee.[103] The AAA has also welcomed external examination into its cases for academic purposes, while maintaining individual confidentiality, to release quantitative data regarding arbitration proceeding results generally.[104] Available empirical research has

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[94] *Id.*

[95] Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR. FOR AM. PROGRESS (Nov. 20, 2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/.

[96] Press Release, EEOC, EEOC Releases Fiscal Year 2017 Enforcement And Litigation Data (Jan. 25, 2018), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2017-enforcement-and-litigation-data.

[97] *See The Criminal Justice System: Statistics*, *supra* note 87.

[98] USSenLindseyGraham, *Graham Discusses Landmark Forced Arbitration Legislation On Senate Floor*, YOUTUBE (Feb. 10, 2022), https://www.youtube.com/watch?v=84frKFrJz4k&t=156s.

[99] *See* Bingham, *supra* note 79, at 195.

[100] Brian Farkas, *The Life and Death of CPLR 7515: New York's Attempt To Prohibit Mandatory Arbitration of Sexual Harassment Claims*, 14 N.Y. DISP. RESOL. L. 18 (Sept. 2, 2021), https://nysba.org/new-york-dispute-resolution-lawyer-vol-14-no-2/.

[101] *Id.*

[102] *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 681 (2018); *see also Arbitration*, BLACK'S LAW DICTIONARY, *supra* note 40.

[103] Estlund, *supra* note 102, at 687–88.

[104] *Id.*; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (examining outcomes of employment arbitration

consistently found that arbitration renders generally unfavorable results for plaintiff employees alleging claims of workplace sexual violence, as compared to the kinds of results that litigation renders for Title VII sexual discrimination claims.[105] A study analyzing data from 1991-1997 found that in over ninety percent of cases, the arbitrator failed to engage in any legal analysis, and in less than five percent of cases did the arbitrator provide evidence of having engaged in a legal analysis at all.[106] Another study analyzing reports filed by the AAA in California between 2001 and 2007 found that plaintiff employees prevailed in only 21.4% of arbitration cases, lower than the rate found in employment litigation trials, and that there was strong evidence of the repeat player effect.[107] In yet another study analyzing data from the AAA in California between 2003 and 2013, plaintiff employees prevailed in less than twenty percent of arbitration proceedings with a median award of $36,500, compared to nearly thirty percent plaintiff employee successes in federal Title VII litigations with a median award of $176,426.[108] The data demonstrates that civil litigation is a far more successful means of justice for plaintiff employees than arbitration.

E. Forced Arbitration in Practice: Ms. Newton, Continued

Ms. Newton's plight against her employer, LVMH, as was introduced above, illustrates what frequently happens when a plaintiff employee reports workplace sexual violence to their employer.[109] Following Ms. Newton's verbal and written reports about the sexual violence she was experiencing at the hands of Mr. Doran, LVMH failed to effectively or reasonably intervene.[110] Instead, LVMH instructed Ms. Newton to personally confront Mr. Doran and express her concerns to him directly.[111] LVMH was so unsupportive of Ms. Newton's struggle that Ms. Newton's own supervisors reported her for confronting Mr. Doran and opened an investigation into *her* behavior.[112] LVMH also fully disregarded the testimony of the colleague

through data from reports filed the AAA, recognizing in the Introduction that "[d]espite the intensity of focus on public policy issues relating to employment arbitration, solid empirical data on this topic has proven slow and difficult to gather.").

[105] *See* DeLange, *supra* note 24. Title VII of the Civil Rights Act of 1964 bans employment discrimination and harassment on the basis of race, color, religion, sex, and national origin. Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

[106] John D. Shea, *An Empirical Study of Sexual Harassment/discrimination Claims in the Post-Gilmer Securities Industry: Do Arbitrators' Written Awards Permit Sufficient Judicial Review to Ensure Compliance with Statutory Standards?*, 32 SUFFOLK U. L. REV. 369, 412-13 (1998).

[107] Colvin, *supra* note 104; *see* Bingham, *supra* note 79.

[108] Estlund, *supra* note 102.

[109] House Committee on the Judiciary, *supra* note 1.

[110] *Id.*

[111] *See id.*

[112] *Id.*

who had witnessed Mr. Doran's inappropriate behavior.[113] LVMH management even suggested Ms. Newton should *apologize* to Mr. Doran, blaming Ms. Newton for misinterpreting the leering, constant hovering, and attempted assault.[114] LVMH called it "mere flirtation" and proposed that Ms. Newton misunderstood French culture—even though Mr. Doran is not French and is American like Ms. Newton.[115] While in any country and in any culture, such sexual harassment is unacceptable, LVMH apparently did not agree, telling Ms. Newton that "this is what executives do in a French company."[116]

After repeatedly rejecting Ms. Newton's requests for an experienced, unbiased investigator, LVMH changed course and brought in an outside investigator.[117] However, this investigator told Ms. Newton that she should be flattered by the harassment, and asked her if she wanted to keep her job.[118] The investigator warned Ms. Newton that she was making herself look like a troublemaker and a "son of a bitch."[119] Before the investigation was complete, LVMH promoted Mr. Doran and publicly announced this promotion to all LVMH employees.[120] When the investigator did finally complete the investigation, she first recommended an internal restraining order.[121] However, after a meeting with LVMH, this final report was modified to no longer include these recommendations, and Ms. Newton found Mr. Doran outside of her office more than ever before.[122]

Following the release of the modified final report, Ms. Newton's performance reviews and evaluation ratings began to suffer.[123] After telling Ms. Newton that she would be "keeping an eye on [her,]" Ms. Newton's boss began excluding her from high-profile projects.[124] Finally, Ms. Newton filed a lawsuit, which LVMH immediately tried to force into arbitration, threatening Ms. Newton's attorney and jeopardizing Ms. Newton's career by seeking personal sanctions against her.[125] The CEO of LVMH emailed all LVMH employees to refute Ms. Newton's claims, essentially calling her a liar, denying any retaliation, and misrepresenting both LVMH's knowledge

113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *See id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*

and the results of the investigation.[126] Ms. Newton's health and well-being have been negatively impacted by the trauma and stress of this nightmare she has experienced and continues to experience.[127]

On November 16, 2021, Ms. Newton testified before the U.S. House Committee on the Judiciary to expound the deeply problematic nature of forced arbitration for cases involving sexual violence.[128] Under the power of subpoena, Ms. Newton was able to share her story and the details of the horrors that happened to her.[129]

> I have witnessed firsthand some of the numerous ways [forced arbitration] is biased and unjust against survivors. Forced arbitration and the power it provides to employers seems to have emboldened LVMH, who ramped up their retaliation, gaslighting me and inferring that the sexual assault and harassment were figments of my imagination. . . . Because of forced arbitration confidential settlements, I may never know the extent to which [Mr. Doran] . . . . sexually assaulted or harassed others. Or, if LVMH retaliated against others as they did me. Thank you for unsilencing me[.][130]

Since April 2020, Mr. Doran is retired.[131] Ms. Newton continues her pursuit of justice.[132] In July 2020, Justice Louis L. Nock of the New York County Supreme Court ruled in favor of allowing Miss Newton to pursue litigation over her claims of sexual harassment and attempted sexual assault.[133] However, the New York Appellate Division, First Department reversed this holding and shunted Ms. Newton's case back into arbitration.[134] This left Ms. Newton in a place where she was forced to continue fighting against her former employer and their relentless tactics to silence and discredit her.[135] As Ms. Newton recounted, the process of forced arbitration is fraught with obstacles for the plaintiff employee, while remaining an advantageous process for the defendant employer.[136]

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126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 Lloyd Doran, LINKEDIN, https://www.linkedin.com/in/lloyd-doran-93162766/ (last visited Dec. 28, 2021).

132 House Committee on the Judiciary, *supra* note 1.

133 Newton v. LVMH Moët Hennessy Louis Vuitton Inc., 2020 N.Y. Slip Op. 32290(U), 1, 2020 WL 3961988 (N.Y. Sup. Ct., July 10, 2020).

134 *Id.*

135 House Committee on the Judiciary, *supra* note 1.

136 *Id.*

PART II

A. The Federal Arbitration Act

Arbitration is governed by the FAA.[137] The FAA was enacted in 1925,[138] during a shift in the American judiciary towards non-courtroom proceedings and away from its longstanding hostility to arbitration agreements.[139] The FAA was also intended to give arbitration agreements the same weight as other contracts and contractual clauses.[140] The FAA allows written arbitration clauses into "any maritime transaction or a contract evidencing a transaction involving commerce,"[141] and is exercised federally through the Commerce Clause.[142] Section 1 of the FAA stipulates that it does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[143] Section 2 of the FAA gives arbitration clauses and agreements their preemptive power, holding that "an agreement in writing to submit to arbitration an existing controversy arising out of . . . . a contract . . . . shall be valid, irrevocable, and enforceable[.]"[144]

In 1984, the Supreme Court reinforced Section 2's preemptive powers in *Southland Corp. v. Keating* by holding that Section 2 of the FAA was a substantive rule under the Commerce Clause of the Constitution, and that the FAA is enforceable and binding on the states and preempts state laws on arbitration issues.[145] With this ruling, the Supreme Court expanded the reach of the FAA, leading to a sharp rise in popularity of mandatory arbitration clauses in employment contracts.[146]

1. Federal Courts Historically Enforced the FAA for Workplace Sexual Violence Claims

In recent decades, there has been substantial case law examining the enforcement of mandatory arbitration clauses in cases of workplace sexual

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[137] 9 U.S.C. §§ 1-16; *Arbitration*, BLACK'S LAW DICTIONARY, *supra* note 40.

[138] Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 153 (2012).

[139] *Id.* (quoting *Equal Emp't Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002)).

[140] Sergeant, *supra* note 138.

[141] *See* 9 U.S.C. § 2 (2022).

[142] *Id.* (affecting contracts of "maritime transaction or evidencing a transaction involving foreign or interstate commerce"); U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[143] 9 U.S.C. § 1 (1947).

[144] 9 U.S.C. § 2 (2022).

[145] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[146] Stone & Colvin, *supra* note 48.

violence.[147] For example, in the 1991 case of *Gilmer v. Interstate/Johnson Lane Corp.*, the plaintiff filed an age discrimination charge with the EEOC, claiming a violation of the Age Discrimination in Employment Act of 1967 ("ADEA").[148] In its holding, the Supreme Court stated that Section 1 of the FAA did not exempt employment contracts.[149] The Supreme Court further held that the plaintiff failed to show that Congress intended to preclude arbitration for discrimination claims under the ADEA.[150] The Court then held that arbitration claims under the ADEA, while remaining under the scope of the EEOC, will not be determined only by adjudication; this decision cemented arbitration clauses in employment contracts as firmly applicable to employment-related discrimination disputes, rendering these disputes unremovable to trial, regardless of concerns of bias or power imbalance between parties.[151]

In 1995, the Supreme Court gave its landmark ruling in *Allied-Bruce Terminix Cos. v. Dobson.*[152] There, the Court interpreted Section 2 of the FAA to accept that if a "transaction" merely "involve[s]" interstate commerce, the FAA does apply, regardless of if the parties involved realized there was an interstate commerce involvement.[153] Today, the inclusion of arbitration agreements and clauses are standard practice in employment agreements.[154] In the 1996 case of *Austin v. Owens-Brockway Glass Container*, the plaintiff alleged claims under both Title VII and the Americans with Disabilities Act ("ADA"). [155] In its decision, the Fourth Circuit rejected the EEOC's argument that the Civil Rights Act of 1991 demonstrated legislative intent to prohibit pre-dispute agreements to arbitrate Title VII claims.[156] Three years later, the Fourth Circuit heard *Hooters of Am., Inc. v. Phillips.*[157] There, the plaintiff alleged claims of sexual harassment by her employer and violations of her rights under Title VII.[158] While rendering a decision in favor of the plaintiff's wish to bring her case to trial, the Fourth Circuit clearly articulated that this decision was not in

147 *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996); Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

148 *See Gilmer*, 500 U.S. at 20.

149 *Id.* at 25, n.2.

150 *Id.* at 35.

151 *See id.* at 35.

152 *See Dobson*, 513 U.S. 265.

153 *Id.* at 273-77.

154 Sergeant, *supra* note 138.

155 *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).

156 *Id.*

157 Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

158 *Id.*

opposition to federal policy favoring arbitration, nor was it purporting that issues concerning the nature of arbitration should be reviewed by anyone other than the arbitrator.[159] Lastly, in 2001, in *Circuit City Stores v. Adams*, the Supreme Court made it clear that the FAA applies to almost all labor and employment contracts.[160] In an opinion written by Justice Kennedy, the Court held that the exemption within Section 1 of the FAA containing the language "engaged in . . . . commerce" referred only to employees of the transportation industry did not extend to other commercial actors and employees.[161] These cases demonstrate that the federal courts have been steadfast in favoring arbitration for employment disputes, regardless of if such claims are based in allegations of discrimination or sexual violence.

2. States Efforts to Circumvent the FAA

Following the revelatory tumult of the #MeToo movement,[162] lawmakers and politicians responded by proposing legislative reform.[163] During this movement, the public realized the extent to which sexual predators with social, political, and financial power were enabled by current laws to commit acts of sexual violence.[164] Among these laws, the FAA stood out as a mechanism to force legal disputes concerning workplace sexual violence into private arbitration behind closed doors, out of the public eye.[165] Several states responded to the #MeToo movement with legislative avenues around forced arbitration for sexual violence cases, including California, Washington, Massachusetts, and New York.[166]

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159 *Id.* at 941.

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

161 *Id.* at 114.

162 Started by activist Tarana Burke in 1997, this movement was popularized in the mainstream by actress Alyssa Milano on Twitter in 2017. Following news of film producer Harvey Weinstein's history of sexual abuse and his secret settlements deals to silence them, Milano tweeted that if other women had experienced sexual harassment and assault, they should respond on Twitter with #MeToo. The movement went viral and highlighted the prevalence of sexual assault and harassment in the entertainment industry and generally in American society. #MeToo encouraged other survivors to come forward and talk about the sexual abuse and harassment they had suffered and call out the public figures who had abused and harassed them. 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, 2510–12 (2018).

163 Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo-and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653 (2019); *Non-Disclosure Agreements and Arbitration Clauses in the #MeToo Era*, MSLAW BLOG, (Aug. 28, 2019). https://www.mslaw.com/mslaw-blog/non-disclosure-agreements-and-arbitration-clauses-in-the-metoo-era.

164 McCullough, *supra* note 163.

165 *See* 9 U.S.C. §§ 1-16.

166 McCullough, *supra* note 163.

a. New York and Section 7515

New York is where Harvey Weinstein famously committed several acts of sexual violence over several decades, going as far back as the 1990s, by wielding his power and influence in the filmmaking industry.[167] It is also the state where Weinstein was prosecuted for his actions.[168] New York lawmakers found themselves in the unique position to make positive policy change for New Yorkers and, at the same time, send a message to predators in similar positions of power as Weinstein: "Time's Up."[169]

In 2018, the New York State legislature enacted Section 7515 to prohibit pre-dispute mandatory arbitration in cases of sexual violence, later expanding the Section to encompass all discrimination cases in 2019.[170] Section 7515 became effective in July 2018, and it expanded the visibility of these cases by allowing parties to choose the courtroom forum for their claims, despite having signed employment agreements containing mandatory arbitration clauses.[171] The law essentially nullified any agreements that would cause discrimination claims to require arbitration, including gender discrimination and sexual violence.[172]

Section 7515 faced significant hurdles to achieving its goals because the FAA is a federal law that regards most arbitration clauses as valid and enforceable.[173] The Supreme Court's holding in *Southland* continues to enforce the FAA as preemptive over state laws on arbitration issues, and therefore cut Section 7515 short of meeting its intended purpose.[174] Section 7515's language provides that the law applies to written contractual agreements "[e]xcept where inconsistent with federal law,"[175] a distinguishing point that has also greatly impacted its enforcement.[176] In the cases of workplace sexual violence following Section 7515's passage, federal

[167] Alan Feuer, *A Timeline of the Weinstein Case*, N.Y. TIMES (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-case-sexual-assault.html.

[168] *Id.*

[169] "Time's Up" refers to a campaign working alongside #MeToo to promote workplace equality and protecting women and people of color from workplace sexual harassment. The Time's Up Legal Defense Fund assists plaintiff employees with workplace sexual harassment claims. McCullough, *supra* note 163; *see Open Letter from Time's Up*, N.Y. TIMES (Jan. 1, 2018), http://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html.

[170] N.Y. C.P.L.R. § 7515 (McKinney 2019).

[171] Farkas, *supra* note 100.

[172] *Id.*

[173] *See* 9 U.S.C. § 2 (2022).

[174] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[175] N.Y. C.P.L.R. § 7515 (McKinney 2019).

[176] N.Y. C.P.L.R. § 7515.

courts agreed that the FAA preempts Section 7515;[177] Section 7515 was effectively displaced by the FAA.[178]

When Ms. Newton tried to remove her lawsuit out of arbitration, she looked to Section 7515 as the means by which she would be able to litigate her claims of workplace sexual violence.[179] In July 2020, the New York County Supreme Court ruled in favor of allowing Ms. Newton to remove her case out of arbitration and into the light of litigation, pursuant to Section 7515.[180] However, the New York Appellate Division, First Department reversed this decision on March 18, 2021, holding that Ms. Newton's employment agreement with LVMH was entered into before Section 7515 was enacted, and that Section 7515 has no provisions for retroactive application.[181] The First Department also wrote in its decision that, although the court need not answer the question of whether the FAA displaces Section 7515 in this case, "[the] FAA, which is expressly applicable to the employment agreement at issue here, is inconsistent with and therefore displaces [Section] 7515."[182] The First Department further rejected the lower court's considerable public policy arguments, holding that the "[p]laintiff can still pursue [] claims against defendant in arbitration and hold it accountable."[183]

3. Past Congressional Efforts to Amend the FAA

There have been several attempts to amend the FAA in Congress over the last five years, including efforts by Representatives Beto O'Rourke (D-TX 16), Cheri Bustos (D-IL 17), Henry Johnson, Jr. (D-GA 4), and Rashida Tlaib (D-MI 13), and Senators Richard Blumenthal (D-CT), Kirsten Gillibrand (D-NY), and Al Franken (D-MN).[184] However, years of work to

[177] Tantaros v. Fox News Network, LLC, 12 F.4th 135, 147 (2d Cir. 2021); Rollag v. Cowen Inc., 20-CV-5138 (RA), 2021 WL 807210, at *1 (S.D.N.Y. Mar. 3, 2021); Whyte v. WeWork Companies, Inc., 20-cv-1800 (CM), 2020 WL 4383506 (S.D.N.Y. July 31, 2020); Latif v. Morgan Stanley & Co. LLC, 18cv11528 (DLC), 2019 WL 2610985 (S.D.N.Y. June 26, 2019).

[178] *See Tantaros*, LLC, 12 F.4th at 147 (2d Cir. 2021); *Rollag*, 2021 WL 807210 at *1; *Whyte*, 2020 WL 4383506; *Latif*, 2019 WL 2610985; Farkas, *supra* note 100.

[179] Newton v. LVMH Moët Hennessy Louis Vuitton Inc., 2020 N.Y. Slip Op. 32290(U), 1, 2020 WL 3961988 (N.Y. Sup. Ct., July 10, 2020).

[180] *Id.*

[181] Newton v. LVMH Moet Hennessy Louis Vuitton Inc., 140 N.Y.S.3d 699 (N.Y. App. Div. 1st Dept., 2021).

[182] *Id.*

[183] *Id.*

[184] In 2017, Representative Beto O'Rourke and Senator Richard Blumenthal introduced the Mandatory Arbitration Transparency Act of 2017 to the House and Senate, respectively, but it never received a vote. H.R. 4130, 115th Cong. (2017); S. 647, 115th Cong. (2017). Also in 2017, Representative Cheri Bustos and Senator Kirsten Gillibrand introduced the Ending Forced Arbitration of Sexual

pass legislation that amended the FAA culminated in the Forced Arbitration Injustice Repeal ("FAIR") Act.[185] The FAIR Act was introduced in the House of Representatives by Representative Johnson[186] and in the Senate by Senator Blumenthal.[187] The FAIR Act sought to prohibit pre-dispute arbitration agreements from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute.[188] It promised to open the door for Title VII claims and sexual violence claims to be brought to trial if the employee chooses to do so.[189] The bill passed the House of Representatives on September 20, 2019, and died in the 116th Congress, idly waiting for Senate debate and discussion.[190] Despite this end, by being brought to a vote and passing the House, the 2019 FAIR Act came closer to becoming law than its predecessors.[191] The repeated failures to amend the FAA speak to how deeply ingrained this law had become within the American judicial system and how much farther legislators needed to go in order to finally overcome the FAA's stronghold, culminating in the EFAA.[192]

Harassment Act to their respective Congressional chambers, which also never received a vote. H.R. 4734, 115th Cong. (2017); S.2203, 115th Cong. (2017). 2017 also saw the introduction of the Arbitration Fairness Act by Representative Henry Johnson, Jr. in the House of Representatives and Senator Al Franken in the Senate, and it was later reintroduced to the Senate in 2018 by Senator Blumenthal. H.R. 1374, 115th Cong. (2017); S.537, 115th Cong. (2017); S. 2591, 115th Cong. (2018). Like its predecessors, the Arbitration Fairness Act did not see a vote. *Id*. The following year, Representative Bustos unsuccessfully introduced The Ending Forced Arbitration of Sexual Harassment Act of 2019. H.R. 1443, 116th Cong. (2019). In 2020, Representative Rashida Tlaib introduced the Justice for All Act, which too never received a vote. H.R. 8698, 116th Cong. (2020).

185 H.R. 1423, 116th Cong. (2019).

186 *Id.*

187 S. 610, 116th Cong. (2019).

188 H.R. 1423, 116th Cong. (2019).

189 *Id.*

190 *Id.* The only Republican to openly support H.R. 1423 (2019) was Representative Matthew Gaetz (R-FL 1), who did so as part of his political opposition to "big government." Karen Kidd, *Republican Gaetz:'On this issue, I'm with the Democrats,' in urging passage of bill to end consumer contracts arbitration*, FLA. RECORD (Sept. 17, 2019), https://flarecord.com/stories/513708213-republican-gaetz-on-this-issue-i-m-with-the-democrats-in-urging-passage-of-bill-to-end-consumer-contracts-arbitration.

191 *See* H.R. 1423, 116th Cong. (2019). On February 11, 2021, during the 117th Congress, Representative Johnson reintroduced the FAIR Act under H.R. 963 with 201 cosponsors. H.R. 963 117th Cong. (2021). Senator Blumenthal also introduced the FAIR Act to the Senate. S.505, 117th Cong. (2021). In the House of Representatives, the FAIR Act was immediately referred to the House Committee on the Judiciary. H.R. 963 117th Cong. (2021). It was then referred to the Subcommittee on Antitrust, Commercial, and Administrative Law on April 23, 2021. *Id*.

192 9 U.S.C §§ 401-02 (2022).

B. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

The EFAA made its debut in 2021 as H.R. 4445 with the support of numerous Congresspeople.[193] The EFAA had clear bipartisan backing, with Republican politicians finally joining the Democrats in large numbers due to a key difference between this Act and its predecessors: if, after experiencing workplace sexual violence, a plaintiff employee sought arbitration instead of litigation, that option is still available to them under the EFAA.[194]

The House Judiciary Committee reported on January 1, 2022, that the EFAA was agreeably amended and was ready to be voted on for passage.[195] The House of Representatives passed the EFAA on February 7, 2022, with 335 "Yeas" and 97 "Nays."[196] Three days later, on February 10, 2022, the Senate similarly passed the EFAA by voice vote.[197]

Turning to the language of the EFAA itself, Section 401 of the EFAA defines a sexual assault dispute as "a dispute involving a nonconsensual sexual act or sexual contact . . . . including when the victim lacks capacity to consent."[198] It defines a sexual harassment dispute as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[199] Section 402 asserts "no predispute arbitration agreement or predispute joint-action waiver 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."[200] Section 402 then places the onus of determining whether an arbitration clause is enforceable on a "*court, rather than an arbitrator*."[201]

Under this Act, plaintiff employees are no longer bound to arbitration and may choose to litigate their sexual violence claims in court.[202] Lacking

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193 In the House of Representatives, Representative Bustos introduced THE EFAA, alongside Representative Morgan Griffith (R-Va.-9th District), and with twenty-five cosponsors. H.R. 4445, 117th Cong. (2021). In the Senate, Senator Gillibrand introduced THE EFAA, alongside Senator Lindsey Graham (R-S.C.). S. 2342, 117th Cong. (2021).

194 Paige Smith, *Senate Passes Landmark #MeToo Bill to Ease Workplace Lawsuits*, BLOOMBERG EQUALITY (Feb. 10, 2022), https://www.bloomberg.com/news/articles/2022-02-10/senate-passes-landmark-metoo-bill-to-ease-workplace-lawsuits.

195 H.R. REP. No. 117-234, at 1 (2022).

196 *Roll Call 33 | Bill Number: H.R. 4445*, THE CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES (Feb. 7, 2022, 07:24 PM), https://clerk.house.gov/Votes/202233.

197 168 CONG. REC. 621 (2022).

198 9 U.S.C § 401 (2022).

199 *Id.*

200 9 U.S.C § 402 (2022).

201 *Id.* (emphasis added).

202 9 U.S.C §§ 401-02 (2022).

any mandate on litigation, plaintiffs may still choose to arbitrate.[203] However, previously signed agreements and contracts that maintain arbitration as the only dispute resolution are no longer enforceable.[204] Plaintiffs may also band together as a class and institute a class-action lawsuit if deemed necessary or appropriate, regardless of any signed agreements waiving the right to collective legal action.[205] The hard work of outspoken and persistent plaintiffs and survivors of workplace sexual violence made this Act possible.

On March 3, 2022, President Joe Biden signed this Act into law.[206] Before this signing, the Executive Office of the President issued a Statement of Administrative Policy in support of H.R. 4445, declaring that "[t]his legislation advances efforts to prevent and address sexual harassment and sexual assault, strengthen rights, protect victims, and promote access to justice."[207] At the time of the Senate vote, Senate Majority Leader Chuck Schumer commented on the EFAA, saying it is "one of the most significant changes to employment law in years[.]"[208] The impact of the EFAA will not only have an enormous effect on how survivors of workplace sexual violence access justice, but will also confirm to the public that their voices have been heard. In the next section, however, this Note explores inherent limitations to this otherwise momentous act.[209]

PART III

A. Title VII and the EEOC

Title VII has been the preeminent federal law dictating lawsuits of workplace sexual harassment.[210] The EEOC has clarified that sexual harassment qualifies as a form of sex-based discrimination and is thereby illegal under Title VII.[211] Throughout the late 1970s and early 1980s, federal

[203] *Id.*; Smith, *supra* note 194; Tom Spiggle, *Congress Passes New Law Ending Forced Arbitration For Sexual Harassment And Assault Claims*, FORBES (Feb. 16, 2022, 9:46am), https://www.forbes.com/sites/tomspiggle/2022/02/16/congress-passes-new-law-ending-forced-arbitration-for-sexual-harassment-and-assault-claims/?sh=1253640f2289.

[204] 9 U.S.C § 402.

[205] *Id.*

[206] Morgan Chalfent, *Biden signs bill banning forced arbitration in sexual misconduct cases*, THE HILL (Mar. 3, 2022, 6:26 PM), https://thehill.com/homenews/administration/596815-biden-signs-bill-ending-forced-arbitration-in-sexual-misconduct-cases.

[207] EXECUTIVE OFFICE OF THE PRESIDENT, Statement of Administrative Policy H.R. 4445 – Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (February 01, 2022).

[208] Smith, *supra* note 194.

[209] *See infra*, Part III.

[210] Civil Rights Act of 1964 §7, 42 U.S.C. § 2000e et seq (1964).

[211] *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1449–50 (1984).

appellate courts issued several opinions that agreed with the EEOC's stance and held that sexual harassment constitutes disparate treatment under Title VII.[212]

Filing a charge under Title VII begins with the EEOC.[213] The plaintiff employee will first file a Charge of Discrimination with the EEOC within 180 days of the discriminatory act.[214] The EEOC will then alert the employer of this charge with a "Notice of Charge of Discrimination,"[215] and investigate the alleged claims to determine whether there is reasonable cause to believe discrimination has occurred and cannot be resolved through conciliation.[216] If the EEOC investigation does not conclude that a violation of the law took place, the complainant will receive a "Dismissal and Notice of Rights."[217] This document informs the complainant that they have the right to file a lawsuit in state or federal court.[218] The employer receives a copy of this document as well.[219] If the EEOC investigation concludes that there is reasonable cause to believe discrimination has occurred, both parties will be

[212] *See id.* at 1449–50; Huebschen v. Dep't of Health & Soc. Servs., 716 F.2d 1167 (7th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979); Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Bus. Prods., Inc., 552 F.2d 1032 (4th Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd on other grounds sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

[213] *Filing a Claim*, EEOC, https://www.eeoc.gov/fact-sheet/filing-charge#:~:text=Charges%20may%20be%20filed%20in,(%20TDD%20)%20for%20more%20information (last visited Dec. 18, 2022); *Filing A Charge of Discrimination*, EEOC, https://www.eeoc.gov/filing-charge-discrimination (last visited Dec. 18, 2022) ("A charge of discrimination is a signed statement asserting that an employer, union or labor organization engaged in employment discrimination. It requests EEOC to take remedial action.").

[214] *Id.*

[215] *What should I do if I receive an EEOC charge of discrimination?*, EEOC, https://www.eeoc.gov/employers/small-business/what-should-i-do-if-i-receive-eeoc-charge-discrimination#:~:text=The%20EEOC%20%22Notice%20of%20a,laws%20that%20the%20EEOC%20enforces (last visited Dec. 17, 2022) ("The EEOC "Notice of a Charge of Discrimination" informs you that a complaint[—]a 'charge of discrimination' or a 'charge'[—]has been filed against your business.").

[216] *Filing a Lawsuit*, EEOC, https://www.eeoc.gov/filing-lawsuit (last visited Dec. 17, 2022).

> The Letter of Determination invites the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation. Conciliation is a voluntary process, and the parties must agree to the resolution – neither the EEOC nor the employer can be forced to accept particular terms. The EEOC is required by Title VII to attempt to resolve findings of discrimination on charges through conciliation. . . . Conciliation is an efficient, effective, and inexpensive method of resolving employment discrimination charges.

What You Should Know: The EEOC, Conciliation, and Litigation, EEOC, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation (last visited Dec. 17, 2022).

[217] *What You Should Know: The EEOC, Conciliation, and Litigation, supra* note 216.

[218] *Id.*

[219] *Id.*

issued a "Letter of Determination" that informs them of this finding.[220] Both parties are then invited to conciliation.[221] If conciliation is unsuccessful, the EEOC considers whether it will file a suit on behalf of the aggrieved individual, weighing the strength of the evidence, the issues presented, and the wider impact that this lawsuit may have.[222] Regardless of whether or not there was a mandatory arbitration clause in the employment contract between the plaintiff and defendant, mandatory arbitration clauses do not bar the EEOC from pursuing litigation on behalf of an employee.[223] At the conclusion of the investigation (or earlier if requested), the EEOC will provide a Notice of the Right to Sue to allow the individual to also pursue litigation on their own in state or federal court.[224] Upon receiving notice, the plaintiff employee has ninety days to initiate their suit.[225] However, after the Supreme Court held that the FAA did not preclude arbitration for discrimination claims under the EEOC in *Gilmer*,[226] lawsuits under Title VII have been shunted into arbitration if there is a relevant mandatory arbitration agreement in place.[227]

In 1997, the EEOC issued a statement in support of its position that "agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles of employment discrimination laws."[228] On December 17, 2019, the EEOC voted two-to-one to rescind this view after considering Supreme Court rulings on the issue in the twenty-two years that had passed.[229] The EEOC wrote "the Policy Statement on Mandatory Binding Arbitration does not reflect current law, is rescinded, and should not be relied upon by EEOC staff in investigations or litigation."[230]

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[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

[224] *Filing a Lawsuit*, *supra* note 216.

[225] *Id.*

[226] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[227] *See* Monica L. Goodman, *Title VII and the Federal Arbitration Act*, 33 TULSA L.J. 665 (1997).

[228] Press Release, EEOC, EEOC Releases Policy Statement on Mandatory Binding Arbitration (July 10, 1997), https://www.eeoc.gov/newsroom/eeoc-releases-policy-statement-mandatory-binding-arbitration.

[229] Samia M. Kirmani, *EEOC Rescinds Policy Opposing Mandatory Arbitration of Employment Discrimination Claims*, JACKSON LEWIS P.C. (Dec. 18, 2019), https://www.jacksonlewis.com/publication/eeoc-rescinds-policy-opposing-mandatory-arbitration-employment-discrimination-claims; *Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, EEOC (2019), https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition.

[230] *Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, *supra* note 229.

The EFAA neglects to recognize its overlap with Title VII and codifies no interactions with Title VII or the EEOC.[231] The EEOC's administrative exhaustion requirement seems to serve a similar purpose to that of general ADR—to make the judicial system more efficient and to give parties every opportunity to achieve the best outcome possible. The EFAA ostensibly operates outside of Title VII's administrative framework. While the EFAA erases the barriers to individual litigation that *Gilmer* and *Circuit City* had put in place,[232] it fails to integrate itself further into Title VII, ignoring the existing structure for workplace sexual harassment claims and creating confusion and inconsistent application of the law across jurisdictions.[233]

B. Application Under the Statutory Note

When the EFAA was passed and signed, there was a popular consensus that this Act would have retroactive application[234] for parties not already engaged in legal action. The understanding was that any existing contract or agreement with a mandatory arbitration clause is rendered void unless arbitration has already begun; in which case, there cannot be re-litigation of a dispute that has already been resolved or is in the process of being resolved.[235] This was emphasized by Vice President Kamala Harris in her remarks at the signing of H.R. 4445 into law when she remarked that the new law "will apply retroactively . . . . invalidating every one of these [employment] agreements [containing mandatory arbitration clauses], no matter when they were entered into."[236] Plaintiff employees subsequently relied on this and similar assertions from political leaders such as President Biden, Representative Cheri Bustos, and Senators Kirsten Gillibrand, Lindsey Graham, and Chuck Schumer, believing that the EFAA would apply

231 *See* 9 U.S.C. §§ 401-02 (2022).

232 *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

233 *See* Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371, at *3–4 (W.D. Pa. July 22, 2022);); Newcombe-Dierl v. Amgen, CV222155DMGMRWX, 2022 WL 3012211, at *5 (C.D. Cal. May 26, 2022).

234 Black's Law Dictionary defines a retroactive law as: "A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect." *Retroactive Law*, BLACK'S LAW DICTIONARY (11th ed. 2019).

235 Spiggle, supra *note* 203.

236 Vice President Kamala Harris, Remarks at Signing of H.R. 4445, "Ending the Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," White House Briefing Room (Mar. 3, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/03/remarks-by-vice-president-harris-at-signing-of-h-r-4445-ending-the-forced-arbitration-of-sexual-assault-and-sexual-harassment-act-of-2021/.

to cases where workplace sexual violence took place before the law was signed.[237]

However, Section 401 contains a statutory note with important implications on the EFAA's application.[238] A statutory note is a "provision of law set out as a note following a Code section."[239] Statutory notes are as much a part of the law as the rest of the text but are placed after the text of a law is codified into the United States Code.[240] A statutory note of Section 401 regarding the EFAA's application reads the following: "This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act."[241] This piece of the law has been the subject of contentious scrutiny and litigation.[242]

This statutory note raises at least two issues: the first being how to define "claim," and the second issue being how to define "arises or accrues" and how that timeline is determined.[243] In Section 401, the EFAA defines sexual assault dispute and sexual harassment dispute, rendering the term "dispute" in the statutory note much easier to interpret.[244]

Before the EFAA was signed into law, this language was already subject to judicial interpretation. In the case of *Matthews v. Gucci*, decided on February 15, 2022—two weeks before President Biden signed the EFAA—the United States District Court for the Eastern District of

[237] *See* Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901, at 3 (S.D.N.Y. Aug. 25, 2022); Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371, at 4 (W.D. Pa. July 22, 2022). *See also* Press Release, Cheri Bustos, Representative, House of Representatives, Bustos' Bill to End Forced Arbitration Officially Sent to the White House (Mar. 2, 2022), https://bustos.house.gov/bustos-bill-to-end-forced-arbitration-officially-sent-to-the-white-house/ ("The *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* will void forced arbitration agreements in ***any*** contract if a sexual assault or sexual harassment claim is brought.") (emphasis added).

[238] Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat., 26 (2022).

[239] *Frequently Asked Questions and Glossary*, OFF. L. REVISION COUNS., https://uscode.house.gov/faq.xhtml#:~:text=A%20statutory%20note%20is%20a%20provision%20of%20law%20set%20out,to%20the%20United%20States%20Code (last visited Oct. 1, 2022).

[240] Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. LIB. J. 213, 214 (2020).

[241] Pub. L. No. 117-90, 136 Stat., 26 (2022).

[242] Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901 (S.D.N.Y. Aug. 25, 2022); Steinberg v. Capgemini Am., Inc., CV 22-489, 2022 WL 3371323 (E.D. Pa. Aug. 16, 2022); Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371 (W.D. Pa. July 22, 2022); Newcombe-Dierl v. Amgen, CV222155DMGMRWX, 2022 WL 3012211 (C.D. Cal. May 26, 2022); Gibson v. Giles Chem. Corp., 1:20-CV-394-MOC-WCM, 2022 WL 1446805 (W.D.N.C. May 6, 2022); Matthews v. Gucci, CV 21-434-KSM, 2022 WL 462406 (E.D. Pa. Feb. 15, 2022).

[243] Pub. L. No. 117-90, 136 Stat., 26 (2022).

[244] 9 U.S.C. § 401 (2022). *See* discussion *infra* The Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021.

Pennsylvania addressed the EFAA in a footnote.[245] The plaintiff employee in *Matthews* had mentioned the EFAA in oral arguments, and the District Court laid out the first judicial interpretation of the statutory note, writing that the EFAA did not apply because "this case arose before [the EFAA's] enactment."[246] Here, the Eastern District of Pennsylvania construed "dispute or claim" to refer to a case, but does not specify its definitions of "case" and "arose" (i.e., whether the "case arose" when the initial act of sexual violence occurred, or when the lawsuit was filed), and goes as far as to address a bill that was not yet law in order to reject the future law's relevancy to this case.[247]

After the EFAA was signed into law, federal courts continued to interpret the language of the statutory note.[248] In *Gibson v. Giles Chemical Corporation*, the United States District Court for the Western District of North Carolina clarified on May 6, 2022 that the EFAA "applies to only any dispute or claim arising or accruing on or after the date of its enactment," and then that the plaintiff employee in that case's "claims arose well before March 3, 2022."[249] However, the District Court declined to further define "claim" or what it means to have "arose."[250] A few weeks after *Gibson* was decided,[251] the United Stated District Court for the Central District of California became the first court to embark on a significant reading into the EFAA's application, focusing on the statutory note's use of the term "accrues."[252] In *Newcombe-Dierl v. Amgen*, the plaintiff employee argued that her case accrued after the EEOC issued its Notice of Right to Sue on March 31, 2022.[253] The District Court held that the plaintiff employee's "claims accrued when the adverse employment action occurred and she was injured, which was no later than November 12 2021, the date of her termination."[254] Countering the plaintiff employee's assertions that her claim accrued after the EEOC issued its Notice of Right to Sue, the court expounded that "a claim accrues when the plaintiff knows of her injuries, not

[245] *Gucci*, 2022 WL 462406 at *1, n.8.

[246] *Id.*

[247] *Id.*

[248] *See* Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901 (S.D.N.Y. Aug. 25, 2022); Steinberg v. Capgemini Am., Inc., CV 22-489, 2022 WL 3371323 (E.D. Pa. Aug. 16, 2022); Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371 (W.D. Pa. July 22, 2022); Newcombe-Dierl v. Amgen, CV222155DMGMRWX, 2022 WL 3012211 (C.D. Cal. May 26, 2022); Gibson v. Giles Chem. Corp., 1:20-CV-394-MOC-WCM, 2022 WL 1446805 (W.D.N.C. May 6, 2022).

[249] *Gibson*, 2022 WL 1446805, at *1.

[250] *Id.*

[251] *Id.*

[252] *Newcombe-Dierl*, 2022 WL 3012211, at *5; Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat., 26, (2022).

[253] Newcombe-Dierl, 2022 WL 3012211, at *5.

[254] *Id.* (citing Coppinger-Martin v. Solis, 627 F.3d 745, 749 (9th Cir. 2010)).

when administrative remedies have been exhausted."[255] The District Court then held that because this claim accrued at the moment of injury, which predated when the EFAA was signed on March 3, 2022, the EFAA did not apply.[256]

Similar interpretations defining "accrual" have been established in subsequent decisions.[257] In *Zinsky v. Russin*, the United States District Court for the Western District of Pennsylvania held on July 22, 2022 that under the tort laws of several states (including Pennsylvania, the state in which this federal court sits, and Texas, the state designated in the contract in question's choice-of-law provision), accrual begins when an alleged injury is sustained, and the injured party can maintain an action for judicial remedy.[258] Because in that case, the injury was sustained prior to March 3, 2022, and further because the plaintiff employee filed a Charge of Discrimination with the EEOC on January 27, 2022, the plaintiff employee's claim did not accrue on or after March 3, 2022.[259] The District Court here went on to disavow the plaintiff employee's arguments regarding Congressional intent, based on the many public statements of politicians regarding the EFAA's retroactive application, by asserting that the EFAA "contains no language indicating that it should have a retroactive effect . . . . [its] plain language indicates no Congressional intent to apply [the EFAA] retroactively."[260]

In *Steinberg v. Capgemini Am., Inc.*, the United States District Court for the Eastern District of Pennsylvania offered a definition of "claim" and dispute" under the EFAA in its August 16, 2022 holding.[261] There, the plaintiff employee argued that a "dispute" arose under the EFAA not when the sexual harassment took place between 2019 and 2020, but rather when the case was filed in federal court on April 4, 2022.[262] The District Court "regrettably" held that "[a] plain reading of [the EFAA] makes clear the term 'claim or dispute' refers to a claim or dispute of sexual harassment—not a dispute regarding arbitrability."[263] Further, the District Court cites to the language of Section 402(a), where the EFAA states that "no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or

[255] *Id.* (citing Soto v. Sweetman, 882 F.3d 865, 871 (9th Cir. 2018)).

[256] *Id.*

[257] *See* Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901 (S.D.N.Y. Aug. 25, 2022); Steinberg v. Capgemini Am., Inc., CV 22-489, 2022 WL 3371323 (E.D. Pa. Aug. 16, 2022); Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371 (W.D. Pa. July 22, 2022).

[258] *Zinsky*, 2022 WL 2906371, at *3–4.

[259] *Id.*

[260] *Id.*

[261] *Steinberg*, 2022 WL 3371323, at *2.

[262] *Id.*

[263] *Id.* at *2–3.

State law *and relates to the sexual assault dispute or the sexual harassment dispute*."[264] Therefore, the EFAA did not apply to that case.[265]

In a decision issued on August 25, 2022, the United States District Court for the Southern District of New York weighed in on the language of the statutory note and further incorporated Section 7515 into its decision to determine how the EFAA interacts with this state law.[266] In *Walters v. Starbucks Corp.*, the District Court distinguished that the plaintiff employee's "claims accrued at the time she experienced discrimination, harassment, or retaliation, and at the latest by December 2021, when she left her job," and cited to several cases holding that under Title VII, the New York City Human Rights Law, and the New York State Human Rights Law, accrual is understood to begin at the last act or incident in question.[267] The plaintiff employee did not argue against this and instead argued that the EFAA applied to any claims *filed* after March 3, 2022, because of the language in the law that it "applies to any 'dispute,' not just any claim . . . . that either 'arises or accrues' after March 3, 2022."[268] The District Court rejected this argument, citing to *Zinsky* and *Newcombe-Dierl* for the proposition that the EFAA applies to claims that accrued after the law's enactment and concluding that the "statute's use of the term 'dispute' does not require a different construction."[269] Finally, regarding Section 7515, the District Court held that the state law was, once again, preempted by the FAA and that enforcing Section 7515 here would be inconsistent with federal law.[270]

In the cases that have come before federal courts since the EFAA became law, it is clear how much the statutory note on application has limited the EFAA in immediate cases and raises questions of why such an extremely significant part of the law, that has become the central concern of several

[264] *Id.* at *3 (citing 9 U.S.C § 402 (2022)).

[265] *Id.*

[266] Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901, at *2–3 (S.D.N.Y. Aug. 25, 2022).

[267] *Id.* at *2 (citing to McGullam v. Cedar Graphics, Inc., 609 F.3d 70, 75–76 (2d Cir. 2010); Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 238 (2d Cir. 2007); Flaherty v. Metromail Corp., 235 F.3d 133, 138 (2d Cir. 2000)).

[268] *Walters*, 2022 WL 3684901, at *3 (citing Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat., 26, (2022)).

[269] *Id.* at *3 (citing Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371, at *3–4 (W.D. Pa. July 22, 2022); Newcombe-Dierl v. Amgen, CV222155DMGMRWX, 2022 WL 3012211, at *5 (C.D. Cal. May 26, 2022)).

[270] *Starbucks Corp*., 2022 WL 3684901, at *2.

lawsuits since the EFAA was signed,[271] was tucked away in a statutory note.[272]

C. The Predatory Nature of the Statutory Note

The statutory note in Section 401 places significant limitations on the EFAA's retroactive application. As it is currently being interpreted by federal courts, the statutory note creates two classes of survivors; those who are free to litigate their claims of workplace sexual violence because they were not subjected to that sexual violence until after March 3, 2022, and those who are bound by mandatory arbitration clauses because the perpetrator subjected them to sexual violence before March 3, 2022.[273] This delineation is both unreasonable and unnecessary.

Collateral estoppel prevents plaintiff employees who have already arbitrated or litigated their claims from raising those claims again,[274] and so only plaintiff employees who have not sought judicial remedies would ever be able to bring their claims of workplace sexual violence to court.[275] The statutory note places an arbitrary stamp in time to determine which of these plaintiff employees may enter litigation under the EFAA.[276] This creates an inequity among survivors, and limits opportunities to choose what justice looks like for many.

The statutory note's limitations on retroactive application effectively create a divide between survivors based on when they were sexually assaulted or sexually harassed, assigning each class of survivors a different set of legal rights and different access to legal remedies. Survivors do not decide *when* they will be assaulted or harassed and are not responsible for any aspect of the trauma they endured, including when exactly that trauma took place. Now, the legal rights of survivors thereafter are determined by the timing of the acts of the assailant. The statutory note codifies a latent measure to retraumatize survivors of sexual violence by, once again,

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[271] *Id.;* Steinberg v. Capgemini Am., Inc., CV 22-489, 2022 WL 3371323 (E.D. Pa. Aug. 16, 2022); *Zinsky* 2022 WL 2906371; *Newcombe-Dierl*, 2022 WL 3012211; Gibson v. Giles Chem. Corp., 1:20-CV-394-MOC-WCM, 2022 WL 1446805 (W.D.N.C. May 6, 2022); Matthews v. Gucci, CV 21-434-KSM, 2022 WL 462406 (E.D. Pa. Feb. 15, 2022).

[272] *See* Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat., 26, (2022).

[273] *Id.; see also Walters*, 2022 WL 3684901; *Steinberg*, 2022 WL 3371323, *Zinsky*, 2022 WL 2906371; *Newcombe-Dierl*, 2022 WL 3012211; *Gibson*, WL 1446805; *Gucci*, 2022 WL 462406.

[274] James M. Westerlind, *The Preclusive Effect of Arbitration Awards*, 28 MEALEY'S LITIG. REP.: REINSURANCE 1 (2010).

[275] Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat., 26, (2022).

[276] *Id.*

stripping these survivors of autonomy, as well as the ability to make important decisions related to healing from that trauma.

This begs the question, then, whether the deleterious nature of this provision of the EFAA explains why it was tucked away into a statutory note, as opposed to being openly codified in the United States Code with the rest of the law. Because statutory notes are not placed with the rest of the text of the law in the United States Code sections—a seemingly illogical and unintuitive placement—they can cause confusion even for experienced legal researchers and practitioners.[277] The statutory note itself takes advantage of survivors' lack of autonomy in the sexual violence they were subjected to in order to limit the number of people who can benefit from the EFAA. Therefore, the decision to place such an important provision regarding the EFAA's application in a statutory note seems intentional and dishonest.

PART IV

A. Further Interpretation of the EFAA

Already, the plaintiff employee in *Newcombe-Dierl* argued that, under the EFAA, a claim or dispute arises or accrues when the EEOC issues its Notice of the Right to Sue.[278] The Central District of California rejected this argument, and held that a claim or dispute does not arise or accrue when a plaintiff has exhausted their administrative options.[279] However, in the Eastern District of Pennsylvania, the court in *Zinsky* pointedly noted that not only because the plaintiff employee experienced their injury before March 3, 2022, but *also because* the plaintiff employee filed a Charge of Discrimination with the EEOC before March 3, 2022, the plaintiff employee's claim did not accrue on or after that critical date.[280] Following this logic, had the plaintiff employee in *Zinsky* filed a Charge of Discrimination with the EEOC *after* March 3, 2022, the Eastern District of Pennsylvania might have held that their case was removable from arbitration under the EFAA.[281] These two federal courts seem to view the EEOC's relationship to the EFAA differently.[282] Due to these crucial differences, and the unfavorable outcomes to plaintiff employees, it seems likely that a federal appellate court will be next to rule on whether "accrual" of a claim begins when the incident of sexual violence takes place, when the process of

[277] Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 L. Lib. J. 213, 214 (2020).

[278] *Newcombe-Dierl*, 2022 WL 3012211, at *5.

[279] *Id.*

[280] *Zinsky*, 2022 WL 2906371, at *3–4.

[281] *See id.*

[282] *Id.*; *Newcombe-Dierl*, 2022 WL 3012211, at *5.

pursuing an administrative remedy begins, or when that process ends in a Notice of Right to Sue. These inconsistent holdings between federal courts will necessitate clarification. [283]

Further, recent litigation has revealed the potential for different jurisdictions to rely on the context of the state in which the litigation sits to interpret the meaning of "accrual" and determine when the accrual period begins.[284] The Southern District of New York recently looked to a New York City law and a New York State law for a definition of "accrual" it could apply to the EFAA's statutory note.[285] In doing so, the District Court revealed how future courts in different state jurisdictions may continue to arrive at vastly different conclusions as to how "accrual" under the EFAA is determined. The FAA, and any amendments to it, preempts state law;[286] therefore, it is counterintuitive for federal courts to look to state law to define it, and it invites potential issues of forum shopping.[287] The outcome of a workplace sexual violence survivor's suit against their employer should not be determined by the state in which the violence took place. The current inconsistencies in how the EFAA is being interpreted by courts, and the potential for future inconsistencies varying state by state, require either controlling judicial interpretation or Congressional amendment.

As discussed previously, it is categorically unfair to limit the EFAA's application to those who were subjected to sexual violence on or after March 3, 2022.[288] In deciding how to construe the EFAA's application provisions, both Congress and the courts must remember that it is unreasonable to expect that a survivor is immediately able to identify that they have been sexually assaulted or sexually harassed.[289] Numerous studies have shown that many sexual assault survivors will not identify what they experienced as sexual assault, even though what they experienced meets the operational definitions

[283] Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901 (S.D.N.Y. Aug. 25, 2022); Steinberg v. Capgemini Am., Inc., CV 22-489, 2022 WL 3371323 (E.D. Pa. Aug. 16, 2022); *Zinsky*, 2022 WL 2906371; *Newcombe-Dierl v. Amgen*, 2022 WL 3012211; Gibson v. Giles Chem. Corp., 1:20-CV-394-MOC-WCM, 2022 WL 1446805 (W.D.N.C. May 6, 2022); Matthews v. Gucci, CV 21-434-KSM, 2022 WL 462406 (E.D. Pa. Feb. 15, 2022).

[284] *Walters*, 2022 WL 3684901.

[285] *Id.* at *2.

[286] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[287] Forum shopping: The practice of choosing the most favorable jurisdiction or court in which a claim might be heard. *Forum-shopping*, BLACK'S LAW DICTIONARY (11th ed. 2019). Forum shopping may arise only where multiple jurisdictions have concurrent jurisdiction over a claim, which deepens the inequities created by these inconsistent rulings. *Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[288] *See supra*, The Predatory Nature of the Statutory Note.

[289] *See* Zoe D. Peterson & Charlene L. Muehlenhard, *A Match-and-Motivation Model of How Women Label Their Nonconsensual Sexual Experiences*, 35 PSYCH. WOMEN Q. 558 (2011).

of sexual assault or rape.[290] In addition, it takes time to process trauma; RAINN (Rape, Abuse & Incest National Network) has identified depression, flashbacks, post-traumatic stress disorder, dissociation, and panic attacks as some of the many effects of sexual violence.[291] Therefore, it is irrational to embed into the EFAA the expectation that survivors of workplace sexual violence will immediately recognize that they have been sexually assaulted or sexually harassed, and that upon that realization, they will immediately seek a legal remedy.

1. Redefine the Term "Claim"

The EFAA does not define the term "claim," nor is it defined anywhere else in Title IX, where the EFAA is housed in the United States Code.[292] It is well-established that courts should interpret a law fairly and consistently with the legislative intention and historical background related to it.[293] Given the emphasis on retroactive application that surrounded the EFAA,[294] as well as the influence of the all-inclusive #MeToo movement on this legislation,[295] it does not make sense to construe the provisions of the EFAA in such a limited and restrictive manner.

When a statutory term is undefined, courts may look to dictionary definitions to guide their interpretations.[296] Black's Law Dictionary has several listed definitions for the term "claim."[297] It appears that the federal courts interpreting the EFAA have been using a definition of "claim" that aligns with the first listed definition by Black's Law Dictionary: "[a]

[290] *Id;* Vicki J. Magley & Ellen I. Shupe, *Self-Labeling Sexual Harassment*, 53 SEX ROLES 173 (2005); Bonnie S. Fisher, Leah E. Daigle, Francis T. Cullen, & Michael G. Turner, *Acknowledging sexual victimization as rape: Results from a national-level study*, 20 JUST. Q. 535 (2003); Renee A. Botta & Suzanne Pingree, *Interpersonal Communication and Rape: Women Acknowledge Their Assaults*, 2 J. HEALTH COMMC'N 197 (1997); Martha R. Burt, *Cultural myths and supports for rape*, 38 J. PERSONALITY AND SOC. PSYCH. 217 (1980).

[291] *Effects of Sexual Violence*, *supra* note 26.

[292] 9 U.S.C §§ 401-02 (2022).

[293] *E.g.*, C.I.R. v. Engle, 464 U.S. 206, 217 (1984) ("Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'") (quoting NLRB v. Lion Oil Co., 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)).

[294] Statement, Vice President Kamala Harris, *Remarks at Signing of H.R. 4445, "Ending the Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,"* WHITE HOUSE (Mar. 3, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/03/remarks-by-vice-president-harris-at-signing-of-h-r-4445-ending-the-forced-arbitration-of-sexual-assault-and-sexual-harassment-act-of-2021/.

[295] McCullough, *supra* note 163.

[296] *E.g.*, U.S. v. Johnson, 47 F.4th 535, 543 (7th Cir. 2022); Spencer v. Specialty Foundry Products Inc., 953 F.3d 735, 740 (11th Cir. 2020); City of Los Angeles v. Barr, 941 F.3d 931, 939 (9th Cir. 2019).

[297] *Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019).

statement that something yet to be proved is true."[298] However, it is more in line with the intention behind the law to use the definition of "claim" that states "[a]n interest or remedy recognized at law; the means by which a person can obtain a privilege, possession, or enjoyment of a right or thing."[299] In using this definition of claim, courts may extend the EFAA's application to include cases where the plaintiff employee began seeking a legal remedy for the sexual violence they endured in their workplace—including the determination of that case's arbitrability— and that process of seeking a legal remedy "arises or accrues" after the law was signed on March 3, 2022.[300] Defining "claim" this way is a viable option for courts that holds truer to the intention behind the EFAA than does the definition employed by federal courts in the months following the passage of the EFAA.

2. The Role of Administrative Remedies

It is necessary to consider how a "claim" would be defined in cases where the plaintiff employee initially pursued Title VII administrative remedies before pursuing litigation against their employer. In keeping with both the spirit of the EFAA and the above suggested definition of "claim," the most favorable understanding of when a claim "arises or accrues" under the EFAA in such cases is *after* a plaintiff employee has exhausted Title VII administrative remedies and is then pursuing litigation pursuant to a Notice of the Right to Sue. This is similar to the plaintiff's argument in *Newcombe-Dierl*,[301] except that in this proposal, the claim accrual date does not start when the Notice of the Right to Sue is issued, but rather when the plaintiff employee *initiates a lawsuit* within the ninety-day period following.[302] This understanding of a claim's accrual date is consistent with the definition of "claim" argued for above,[303] because it is further specifying that the "interest or remedy recognized at law"[304] within the context of the EFAA is the very same remedy at law that this new legislation protects: the right to litigate

[298] *Id*. *See* Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901 (S.D.N.Y. Aug. 25, 2022); Steinberg v. Capgemini Am., Inc., CV 22-489, 2022 WL 3371323 (E.D. Pa. Aug. 16, 2022); Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371 (W.D. Pa. July 22, 2022); Newcombe-Dierl v. Amgen, CV222155DMGMRWX, 2022 WL 3012211 (C.D. Cal. May 26, 2022); Gibson v. Giles Chem. Corp., 1:20-CV-394-MOC-WCM, 2022 WL 1446805 (W.D.N.C. May 6, 2022); Matthews v. Gucci, CV 21-434-KSM, 2022 WL 462406 (E.D. Pa. Feb. 15, 2022).

[299] *Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019); Vice President Kamala Harris, *supra* note 294.

[300] Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat., 26, (2022).

[301] *Newcombe-Dierl*, 2022 WL 3012211, at *5.

[302] *What You Should Know: The EEOC, Conciliation, and Litigation*, *supra* note 216.

[303] *See supra*, Redefine the Term "Claim".

[304] *Claim*, BLACK'S LAW DICTIONARY, *supra* note 299.

claims of workplace sexual violence.[305] Such an understanding maintains a narrower and more intentional understanding of the EFAA's application while allowing a larger amount of plaintiff employees to benefit from the EFAA if they wish to litigate their cases after pursuing administrative remedies through the EEOC.

There were seemingly no considerations of Title VII in the EFAA's drafting and passage. Expanding the definitions of critical language within the EFAA provides a belated opportunity to include Title VII considerations and incorporate the likely involvement of this administrative process. Ultimately, the most just and fair outcome is that both plaintiff employees who filed a claim with the EEOC before *and* after the signing of the EFAA may initiate litigation if they receive a Notice of the Right to Sue on or after March 3, 2022, both relating to their sexual assault or sexual harassment dispute and remaining within the EFAA's statutory note's provisions on applicability.[306]

B. Navigating the New Landscape

1. Bringing Sexual Violence Claims Out of Arbitration Without the EFAA

The above-mentioned courts have interpreted the EFAA to permanently allocate cases where the acts of workplace sexual violence take place before March 3, 2022, and the employment contract contains a mandatory arbitration clause, into forced arbitration. However, the United States Court of Appeals for the Eighth Circuit recently addressed whether, based on the language of a specific arbitration clause, arbitration is necessarily mandatory every time.[307]

The facts of *Anderson v. Hansen* detail that at a work conference, an American Family Life Insurance Company of Columbus ("Aflac") employee sexually assaulted an independent contractor of Aflac in August 2019.[308] After the plaintiff sued the Aflac employee for battery, assault, false imprisonment, and loss of consortium, the Aflac defendant claimed that the employment contract's mandatory arbitration clause applied because he was a third-party beneficiary under the arbitration agreement.[309] The employment contract's arbitration agreement in this case provided that "'any dispute arising under or related in any way to [the employment agreement] . . . . shall

[305] 9 U.S.C §§ 401-02 (2022).

[306] 9 U.S.C §§ 401-02 (2022).

[307] Anderson v. Hansen, 47 F.4th 711 (8th Cir. 2022).

[308] *Id.* at 714.

[309] *Id.*

be subject to mandatory and binding arbitration.'"[310] The United States District Court for the Eastern District of Missouri denied the Aflac defendant's motion to compel arbitration, holding that the terms of the employment contract only mandated arbitration for "claims 'arising under or related in any way to' the [employment agreement]," and that the plaintiff's claims did not fall under these parameters, nor was the incident in any way related to the plaintiff's role at Aflac.[311] The Eighth Circuit affirmed this holding, expanding its reasoning to define the language "arising under" for the purposes of the arbitration agreement.[312] The Eighth Circuit reasoned that "arising under or related . . . . to" meant that the plaintiff's "underlying factual allegations of sexual assault must have some 'direct relationship'" with the employment agreement, which the court held it did not.[313] The Eighth Circuit agreed with holdings from the United States Courts of Appeals for the Fifth and Eleventh Circuits, that even if a sexual assault "would not have occurred 'but for' the plaintiff's employment with the defendant company," that assault remains firmly outside the scope of the plaintiff's employment and therefore should not be compelled to arbitration.[314] The *Anderson* court decided that the FAA held no power in that case, and therefore did not call upon the EFAA to justify removal out of arbitration. As Professor David Horton recently noted, "[L]awmakers chose to plant the [EFAA] *within* the FAA. Accordingly, the [EFAA] only applies if the FAA applies."[315]

The reasoning of the *Anderson* court is not a new argument against the application of the FAA to workplace sexual violence.[316] Notably, similar reasoning was applied in the New York County Supreme Court's 2020 holding in *Newton v. LVMH*, where the court held that tortious conduct, such as sexual harassment and assault, fall outside of the scope of the relevant

[310] *Id.* at 718.

[311] *Id.* at 714.

[312] *Id.* at 718.

[313] *Id.*

[314] *Id*. (citing Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1207 (11th Cir. 2011); Jones v. Halliburton Co., 583 F.3d 228, 230 (5th Cir. 2009)).

[315] David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. FORUM 1, 2 (2022).

[316] *Jones*, 583 F.3d at 239 (holding that in a case concerning an assault perpetrated by the plaintiff's coworker in employer-provided housing, a mandatory arbitration clause's "scope certainly stops at [plaintiff's] bedroom door"); *Hill v. Hilliard*, 945 S.W.2d 948, 952 (Ky. App. 1996) (holding that "rape does not ordinarily arise out of the employment context"). *Contra Abou-Khalil v. Miles*, G037752, 2007 WL 1589456, at *2 (Cal. App. 4th Dist. June 4, 2007) (holding that, while the law is clear that sexual assault is not normally within the course and scope of employment," insofar as the defendant's conduct was within the scope of their employment and connected with the employment, "those claims should be arbitrated").

employment contract and therefore were not governed by the FAA.[317] There, the court wrote, "such wrongdoing, having little to do with the commercial aspects, or contractual aspects, of the ordinary employer-employee relationship—the incidents of ***the job***. Rather, they have everything to do with wrongful acts entirely extrinsic of such contractual relationship."[318] Although that holding was overturned the following year,[319] the logic behind it has withstood the test of time.

Disturbingly, the EFAA is not mentioned in the positive *Anderson* majority holding for workplace sexual violence survivors, but rather in the dissent against it.[320] The dissent notes that the *Anderson* case does not raise questions related to the EFAA or to general public policy against forcing the arbitration of workplace sexual violence claims.[321] The dissent elaborates that if the plaintiffs in *Anderson* did bring up the EFAA, the law would not apply here because other courts have held that the EFAA does not apply retroactively.[322]

Anderson demonstrates that, depending on the language of arbitration agreements, there is a just way forward for plaintiff employees who experienced workplace sexual violence before March 3, 2022, even without the EFAA.[323] At the same time, however, the *Anderson* dissent demonstrates how the EFAA falls short of being able to meet its intended goal for all survivors of workplace sexual violence, and that in some cases, removal from arbitration may be only possible through the circumvention of the FAA, rather than through its amendment.

2. Class Action Lawsuits

With the ability to avoid mandatory arbitration clauses in their employment contracts, employees who have survived sexual violence in the same workplace can now band together and form a class action lawsuit against a particular employer.[324] Previously, in 2011, the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempts state laws regarding class action arbitration waivers unconscionable and unenforceable.[325] Thus, public class action lawsuits were out of the question

[317] Newton v. LVMH Moët Hennessy Louis Vuitton Inc., 2020 N.Y. Slip Op. 32290(U), 1, 2020 WL 3961988 (N.Y. Sup. Ct., July 10, 2020).

[318] *Id.*

[319] Newton v. LVMH Moet Hennessy Louis Vuitton Inc., 140 N.Y.S.3d 699 (N.Y. App. Div. 1st Dept., 2021).

[320] *Anderson*, 47 F.4th at 718.

[321] *Id.*

[322] *Id.* (citing Matthews v. Gucci, CV 21-434-KSM, 2022 WL 462406 (E.D. Pa. Feb. 15, 2022).

[323] *Id.* at 711.

[324] FED. R. CIV. P. 23 (governing class actions lawsuits).

[325] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 347 (2011).

for survivors of workplace sexual violence to hold their employers accountable. The EFAA changes this. A class action could challenge a policy that aids and abets a perpetrator of sexual violence, an employer's failure to monitor the perpetrator of sexual violence after a report is made (which makes the employer aware of the perpetrator's conduct), or the failure to discipline or fire the perpetrator of sexual violence.

A class action lawsuit would be especially poignant against a particular serial abuser within an institution whom the employer openly and obviously protects. Ms. Newton made her employer aware of what was happening to her,[326] yet LMVH did not respond with a reasonable level of diligence—instead, they delegitimized Ms. Newton's claims and retaliated against her professionally.[327] When sexual abusers know that their job is safe no matter how they act, such security can be emboldening. Now, employers can be held truly accountable by all employees whom they have made unsafe in their workplace: not for hiring a serial sexual abuser, because it is unreasonable to expect that an employer can anticipate that kind of behavior, but for not firing that serial sexual abuser as soon as the employer was made aware.

C. New Legislation for All Forms of Workplace Discrimination

Importantly, sexual violence and sexual and gender-based violence and discrimination are among the many forms of discrimination that occur in the workplace.[328] These forms of discrimination have been acknowledged repeatedly, most recently by both President Biden and Vice President Harris in their speeches before the EFAA became law.[329] Already, the EFAA has been called into question in a legal battle regarding a forced arbitration clause in an employment contract where the plaintiff employee's claim regarded age discrimination.[330] In that case, *Levy v. AT&T Services, Inc.*, the United States District Court for the District of New Jersey held that the EFAA did not apply because no acts of sexual assault or sexual harassment were being disputed.[331]

Voiding forced arbitration clauses in employment contracts pertaining to sexual assault and sexual harassment is the first step in creating a safer workplace for all Americans. Ageism, racism, ableism, and other forms of discrimination are rampant issues in employment nationwide. Congress

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[326] House Committee on the Judiciary, *supra* note 1.

[327] *Id.*

[328] *What is Employment Discrimination?,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/youth/what-employment-discrimination (last visited Oct. 5, 2022).

[329] NBC News, *Biden Signs Law Ending Forced Arbitration of Sexual Misconduct Cases,* YOUTUBE (Mar. 3, 2022), https://www.youtube.com/watch?v=t8vpJ4vOJhA&ab_channel=NBCNews.

[330] Levy v. AT&T Services, Inc., CV 21-11758 (FLW), 2022 WL 844440, at *1 n.1 (D.N.J. Mar. 22, 2022).

[331] *Id.*

cannot stop here. The Biden administration has made it clear that they are interested in and pushing for broader legislation to void all forced arbitration clauses and employment contracts concerning all forms of discrimination and points to conversations in Congress that reflect similar sentiments.

Legislation voiding forced arbitration clauses and employment contracts regarding all discrimination must pass. It may be more difficult than it was for the EFAA, especially given the momentum of the #MeToo movement that propelled that bill forward at such high velocity.[332] However, that does not mean it is impossible. The Black Lives Matter movement experienced momentous support beginning in June 2020 following the murder of George Floyd by Minneapolis police.[333] Similar to the impact the #MeToo movement had on the EFAA, the Black Lives Matter movement may have a similar impact on forced arbitration of workplace and employment race-based discrimination claims.[334] The Black Lives Matter movement and the righteous waves it has made can highlight the necessity of allowing plaintiff employees to remove their cases from arbitration and from the racial-bias still inherent to arbitration.[335]

A well-crafted piece of legislation that encompasses both workplace sexual violence and race-based discrimination should be introduced to include all forms of discrimination and put a blanket stop on forced arbitration of all discrimination and violence cases. The EFAA lays the foundation of what this legislation could look like. Lawmakers can substitute mention of sexual violence with broader language describing all forms of discrimination and violence. Such broader legislation would address all elements of violence and discrimination in employment. In order to make it possible for these survivors to truly hold unscrupulous employers—or actors protected by employers—accountable, Congress must end forced arbitration of all instances where a plaintiff employee survives unjust workplace discrimination and violence.

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[332] Eleanor Mueller, *Senate clears #MeToo bill banning mandatory arbitration*, POLITICO (Feb. 10, 2022, 12:35 PM), https://www.politico.com/news/2022/02/10/senate-bill-metoo-mandatory-arbitration-00007803.

[333] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, NY TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

[334] Jean Hyams & Hilary Hammell, *Black workers matter, so end forced arbitration*, WASH. POST (June 30, 2020), https://www.washingtonpost.com/opinions/2020/06/30/black-workers-matter-so-end-forced-arbitration/ ("In response to the #MeToo movement, many corporations got rid of forced arbitration. Perhaps companies moved by the Black Lives Matter movement will get serious not just about decrying white supremacy but also about allowing themselves to be held fully accountable.").

[335] *See id.*

CONCLUSION

Having examined the jurisprudence surrounding mandatory arbitration of workplace sexual violence claims, it is imperative to return to and center the survivors who have now been "unsilenced."[336] In her testimony, Ms. Newton walked the House Judiciary Committee through the excruciating and traumatizing details of what workplace sexual violence can look like, reminding Congress of the "persistent, disruptive, and suffocating" nature of sexual harassment.[337] Ms. Newton's experience after she brought this to LVMH's attention, including their shocking resistance to her ask for help and victim-blaming stratagem, highlights the critical importance of ensuring plaintiff employees may seek justice for workplace sexual violence in the manner of their choosing.[338]

Forced arbitration is the antithesis of justice in such cases. Outside of this context, arbitration is not without significant flaws, including its lack of diverse arbitrators and the inescapable "repeat player effect."[339] Furthermore, civil litigation is a significantly more favorable legal process for survivors of workplace sexual violence.[340] For decades, the FAA preempted any state measures to void mandatory arbitration clauses in employment contracts where the employee alleges experiencing sexual violence, but efforts did not stop here.[341] The massive public outcry of the #MeToo campaign changed the tides in Congress, and finally the EFAA was passed in February 2022 and signed by President Biden on March 3, 2022.[342]

But, what of this Act? A statutory note hidden within the law dramatically restricts the EFAA's application and the access that some plaintiff employees have for accessing justice through litigation.[343] This has been a subject of various lawsuits in the months following the EFAA

336 House Committee on the Judiciary, *supra* note 1.

337 *Id.*

338 *Id.*

339 Armeen Mistry Shroff, *Lack of Diversity Continues to Hurt Alternative Dispute Resolution*, TROUTMAN PEPPER (May 26, 2020), https://www.troutman.com/insights/lack-of-diversity-continues-to-hurt-alternative-dispute-resolution.html; Bingham, *supra* note 79.

340 Muller, *supra* note 93; Frye, *supra* note 95.

341 9 U.S.C. § 2 (2022); Southland Corp. v. Keating, 465 U.S. 1 (1984); *see* Tantaros v. Fox News Network, LLC, 12 F.4th 135, 147 (2d Cir. 2021); Rollag v. Cowen Inc., 20-CV-5138 (RA), 2021 WL 807210, at *1 (S.D.N.Y. Mar. 3, 2021); Whyte v. WeWork Companies, Inc., 20-CV-1800 (CM), 2020 WL 4383506 (S.D.N.Y. July 31, 2020); Latif v. Morgan Stanley & Co. LLC, 18-CV-11528 (DLC), 2019 WL 2610985 (S.D.N.Y. June 26, 2019).

342 McCullough, *supra* note 163.

343 Ending Forced Arbitration Act of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat., 26, (2022).

becoming law and will be the subject of litigation in the near and far future.[344] Further, the EFAA does not attempt to align itself with Title VII and the EEOC.[345] This Note examines the current stature of the EFAA and the legal options currently available to plaintiff employees, and crucially makes an argument for future judicial interpretation.

Of critical import is that legislation reshaping the validity of forced arbitration clauses in employment contracts must continue to encompass all forms of discrimination. In this Act's acknowledgment that forced arbitration is a miscarriage of justice for survivors of workplace sexual violence, it began to lay the blueprint for legislation that would end the same injustice to employees who have been discriminated against on the basis of race, sexuality, age, and disability, among other forms of bias.

At its core, arbitration is not an inherently bad or wrong method of solving disputes. As it was originally introduced, alongside other methods of ADR, it serves a purpose of broadening what dispute resolution looks like in our legal system.[346] However, in the words of Samuel Gompers: "Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb, in the morning, is found inside the lion. I believe in arbitration between two lions or two lambs."[347] A survivor of sexual violence suing their employer for committing that violence, or protecting the violent actor, has not nearly the power or resources of that employer, and does not benefit from forced arbitration. Survivors deserve the right to choose how their justice is achieved, and to be protected from further discrimination, trauma, and harm. Ending forced arbitration of workplace sexual violence does exactly that, and the EFAA began this process. The rest is to come.

[344] Walters v. Starbucks Corp., 22CV1907 (DLC), 2022 WL 3684901 (S.D.N.Y. Aug. 25, 2022); Steinberg v. Capgemini Am., Inc., CV 22-489, 2022 WL 3371323 (E.D. Pa. Aug. 16, 2022); Zinsky v. Russin, 2:22-CV-547, 2022 WL 2906371 (W.D. Pa. July 22, 2022); Newcombe-Dierl v. Amgen, CV222155DMGMRWX, 2022 WL 3012211; (C.D. Cal. May 26, 2022); Gibson v. Giles Chem. Corp., 1:20-CV-394-MOC-WCM, 2022 WL 1446805 (W.D.N.C. May 6, 2022).

[345] 9 U.S.C §§ 401-02 (2022); Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

[346] *See* Pound, *supra* note 32; Traum & Farkas, *supra* note 33.

[347] 2 SAMUEL GOMPERS, THE SAMUEL GOMPERS PAPERS 87 (Stuart B. Kaufman ed., 1987).