The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases

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THE GOLDILOCKS APPROACH: FINDING THE “JUST RIGHT” LEGAL LIMIT ON NONDISCLOSURE AGREEMENTS IN SEXUAL HARASSMENT CASES

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ABSTRACT

Nondisclosure agreements have been used with little notice for decades to protect trade secrets and confidential business information. The #MeToo movement revealed the widespread use of nondisclosure agreements to silence the accusers in workplace sexual harassment and sexual assault claims. We read with horror about sexual predators who were enabled by nondisclosure agreements. What was once an innocuous provision in an employment contract became a silencing tool that cultivated cultures of harassment and allowed sexual predators to carry on in our workplaces. Given the understandable outrage at this use of contract law, many have called for a total ban on the use of NDAs. Several state legislatures responded with legislation that limits the use of nondisclosure agreements in sexual harassment cases. At the same time, advocates for accusers have argued that nondisclosure agreements are essential to protecting privacy and negotiating settlements. Although well-intended, the current legislative efforts fail to strike the proper balance of the competing needs of preventing serial workplace harassment and protecting the interests of accusers. Others have advocated for using the courts to limit enforcement of NDAs, relying on common law defenses to contracts such as unconscionability or the public policy exception. This paper examines why those common law defenses would be ineffective, compares efforts to limit nondisclosure agreements in securities regulation to provide policy context, and evaluates the many different

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approaches of the state legislatures, in order to recommend a multi-faceted legislative approach to limiting nondisclosure agreements.

INTRODUCTION

Gretchen Carlson was a successful television news anchor, first at CBS News and then as a co-host for Fox News’s hit morning show Fox & Friends starting in 2005.¹ In July 2016, Carlson filed a sexual harassment lawsuit against the chairman and C.E.O. of Fox News, Roger Ailes.² Carlson alleged that Ailes had sexually harassed her since she started work at Fox News.³ Ailes’s harassment began with comments on Carlson’s appearance, suggesting that she wear tight outfits when she was first hired.⁴ Later, Carlson complained to Ailes about her male co-host on the popular morning show Fox & Friends, telling Ailes that her 2009 co-host Steve Doocy was condescending.⁵ Ailes’s response was to call Carlson a “man hater” and to demote her in 2013 from Fox & Friends to hosting a show at an undesirable 2 p.m. time slot.⁶ Carlson decided to fight back and in 2014, she began recording her conversations with Ailes.⁷ She captured Ailes making harassing comments such as, “I think you and I should have had a sexual relationship a long time ago, and then you’d be good and better and I’d be good and better. Sometimes problems are easier to solve” that way,” and “I’m sure you can do sweet nothings when you want to.”⁸ Armed with this powerful evidence, Carlson filed her lawsuit against Ailes in 2016.⁹

Carlson knew that her experience with Ailes was not unique. Rumors abounded that Ailes asked female employees to “twirl” for him so he could evaluate their appearance and that he asked for sexual favors in return for opportunities for air time on the network.¹⁰ In fact, when Fox News launched an internal investigation, more than two dozen women told the outside counsel about harassment by Ailes.¹¹ Within days, Ailes

². Id.
³. Id.
⁴. Id.
⁵. Id.
⁶. Id.
⁷. Id.
⁸. Id.
⁹. Id.
¹⁰. Id.
¹¹. Id.
was fired by the owners of 21st Century Fox, the parent company of Fox News. But the problems at Fox News went beyond one person. Former anchor Andrea Tantaros, “who says she was demoted and smeared in the press after she rebuffed sexual advances from Ailes,” said of the Fox News culture: “behind the scenes, it operates like a sex-fueled, Playboy Mansion–like cult, steeped in intimidation, indecency and misogyny.”

Given the pervasive and long-lasting culture of harassment at Fox News, removing Ailes did not solve the network’s problems. 21st Century Fox agreed to settle the lawsuit with Carlson on behalf of Ailes, reportedly paying Carlson $20 million dollars and making an unprecedented public apology. In return, Carlson signed a non-disclosure agreement that prohibited her from discussing any of her experiences while working at Fox News. Carlson retained the right to discuss sexual harassment generally. Carlson’s story has been made into both a television mini-series and a film, but she is unable to speak to the creators of the projects, confirm whether the show or movie are accurate, or in any way discuss the way her own story is being portrayed for the public. Carlson now says she regrets signing the non-disclosure agreement, which she did long before #MeToo ignited a global dialogue about sexual harassment.

A non-disclosure agreement (hereinafter “NDA”) is a written form of a restrictive covenant that creates a confidential agreement between two or more parties that prevents sharing information without proper authorization. Historically used to protect corporate information and trade secrets, NDAs have morphed into a powerful tool for silencing

15. Id.
18. Id.
19. Id.
20. Id.
sexual harassment accusers. This use of NDAs – asking sexual harassment accusers to agree to silence in exchange for settlement payments – has allowed “sex-fueled, Playboy Mansion–like cult, steeped in intimidation, indecency and misogyny” cultures, like that of Fox News, to thrive for decades across many industries.

As Carlson notes in her New York Times Op-Ed calling for Fox News to release her from her NDA, the #MeToo movement has revealed this pernicious use of contract law. Carlson, along with many other advocates, is now calling for changes to the law to prohibit the use of mandatory NDAs and forced arbitration clauses (another way to silence accusers) in employment contracts. Others object to the use of NDAs in settlement agreements. Although there have been several bills introduced in Congress and many states have passed new legislation to address the use of NDAs in sexual harassment cases, those laws vary and there is little agreement on the best policy.

In an entirely different context, the Securities and Exchange Commission (hereinafter “SEC”) has banned the use of NDAs in securities regulation violations. Rather than banning the enforcement of an NDA, the SEC has made it illegal to merely ask an employee to enter into such an agreement. The SEC Rule 21F-17(a) acknowledges that the threat of litigation around an NDA, even if ultimately unenforceable, has the effect of chilling the reporting of wrongdoing. Thus, the SEC has enforced its rule against companies that never tried to enforce the NDA, but merely asked employees to sign the agreement.

Although the SEC’s total ban has its benefits, sexual harassment accusers may prefer NDAs because silence is their only leverage in a settlement negotiation and the accusers may want to protect their own privacy. Thus, a total ban on the use of NDAs in sexual harassment cases

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25. Id.
28. 17 C.F.R. § 240.21F-17(a) (2012).
29. Id.
31. Id. at 1-2.
is unlikely to solve the competing legal, policy, and ethical concerns that arise from the problem of workplace sexual harassment. Through evaluation of the new statutes regulating NDAs in sexual harassment cases and a comparison to the SEC’s efforts, this paper advocates for a multi-faceted approach to the legal, policy, and ethical challenge of the use of NDAs in sexual harassment cases. In Section I, this paper reviews the history of NDAs. Section II explains, using current examples from the news, the expansion of the use of NDAs into sexual harassment cases. Section III sets forth the legal framework for enforcement of NDAs, and evaluates the ability of accusers to use exceptions or defenses in contract law to invalidate those NDAs. In Section IV, this paper summarizes the recent legislative efforts to reform the use of NDAs in sexual harassment cases. The paper then explains the SEC’s rules prohibiting the use of NDAs in Section V, providing a comparison to the efforts in the sexual harassment context. Finally, in Section VI, this paper recommends a three-pronged approach of 1) limits on the use of NDAs in the sexual harassment context; 2) notification of all employees of their rights under the NDA laws; and 3) public reporting requirements for employers, to prevent the silencing of accusers that leads to the cultivation of cultures that allow workplace sexual harassment.

I. HISTORY AND EXPANSION OF NON-DISCLOSURE AGREEMENTS

The origin of NDAs is not easily pinpointed, however, their early media mentions began around the 1940s regarding maritime law and confidentiality. For example, in 1949 the Third Circuit Appeals Court upheld the authority of a confidentiality requirement for maritime admirals during interrogatory fact findings of whether prospective witness testimonies were obtainable under the United States Admiralty Rule 31.

33. See infra Section I.
34. See infra Section II.
35. See infra Section III.
36. See infra Section IV.
37. See infra Section V.
38. See infra Section VI.
Over time, NDAs popularized for their use in business to protect trade secrets.41 Trade secrets:

derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.42

The use of NDAs to protect trade secrets is one avenue to maintain or obtain an economic advantage over another business.43 But NDAs may not be necessary to protect trade secrets, as statutory protection exists; the misappropriation and theft of trade secrets are protected against by the 1979 Uniform Trade Secrets Act44 and the 2016 Defend Trade Secrets Act.45 Nonetheless, NDAs to protect trade secrets are frequently used in innovative sectors of business and technology.46

As NDAs moved beyond their original use for maritime admirals and into the business sector, these types of contracts have become increasingly common.47 The use of NDAs is prevalent across many industries and roles within a company.48 One study found that 87.1 percent of all CEO contracts prevent them from disclosing confidential information.49 Indeed, the study’s authors found NDAs more prevalent than noncompetition agreements because NDAs are easier to enforce.50 Although no study has been done regarding the prevalence of NDAs below the CEO level, the authors suggest that given the strong negotiation power of CEOs, it is likely they have more favorable contractual terms than other employees.51 Thus, we can speculate that NDAs may be at least

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41. Dean, supra note 39.
44. Peter J. Toren, Definition of a 'Trade Secret' Under the DTSA, IP WATCHDOG (May 24, 2016), http://www.ipwatchdog.com/2016/05/24/definition-trade-secret-dtssa/id=69262/.
46. See generally RRK Holding Co., 563 F. Supp. 2d at 834 (“Plaintiff alleged that Defendant breached the Non-disclosure Agreement (Count I) and mis-appropriated Plaintiff’s trade secret (Count II) by disclosing Plaintiff’s next generation combination power tool.”).
48. Id. at 3.
49. Id. at 4.
50. Id. at 21.
51. Id. at 3 n.1.
as or more prevalent below the CEO level. Although there are many legitimate uses of NDAs, recent cases involving sexual harassment\textsuperscript{52} illustrate that the use of NDAs has broadened beyond protection of trade secrets into an effort to keep illegal or unethical behavior quiet.\textsuperscript{53}

II. THE USE OF NDAS TO SILENCE SEXUAL HARASSMENT ACCUSATIONS

The #MeToo\textsuperscript{54} movement and its corresponding news stories have revealed the adverse effects of NDAs used for silencing whistleblowers and shrouding years of sexual harassment. Several recent examples are illustrative of this expansion of the use of NDAs into more nefarious territory than trade secrets.\textsuperscript{55} As discussed above, Gretchen Carlson, a former Fox News anchor, is unable speak about years of harassment by Ailes because of the NDA she signed to settle her sexual harassment lawsuit.\textsuperscript{56} McKayla Maroney, Olympic gold medalist and one of over 100 women who accused Larry Nassar, USA Gymnastics team doctor, of sexual abuse, was also forced into signing non-disparagement and confidentiality agreements to hide such abuse.\textsuperscript{57} As emphasized by these examples, NDAs have deviated from their conventional use of protecting trade secrets into suppressing victims of sexual harassment, assault, and abuse.\textsuperscript{58}

One example of the systematic use of NDAs to hide sexual misconduct was detailed in the Massachusetts Gaming Commission’s

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\textsuperscript{52} See discussion infra Section II. As the stories below illustrate, many of the cases that emerged in the #MeToo movement involved more than harassment and included allegations of assault and rape. Because it is the broader workplace issue relevant to the use of NDAs, and the conduct most legislative reform focuses upon, we will use the term sexual harassment throughout this paper. But this shortened reference is not intended to underestimate the severity of the conduct that NDAs have been used to silence.

\textsuperscript{53} See discussion infra Section II.


\textsuperscript{55} See, e.g., Carlson, supra note 17 (highlighting how a non-disclosure agreement prevented Gretchen Carlson from being able to speak about the repeated sexual harassments committed by Fox News anchor Roger Ailes).


\textsuperscript{57} Mahita Gajanan, Chrissy Teigen Just Offered to Pay McKayla Maroney’s Potential Fine For Discussing Sexual Abuse, TIME (Jan. 16, 2018), http://time.com/5104941/chrissy-teigen-mckayla-maroney-nda-fine/.

\textsuperscript{58} See Dean, supra note 39 (recognizing that over time non-disclosure agreements moved from the technology industry and into the business landscape, in order to shield misdeeds from public view).
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report on Wynn Resorts, made public on April 30, 2019. That report summarized the Commission’s investigation and hearing regarding allegations of repeated sexual harassment and rape by Steve Wynn, founder and former CEO of Wynn Resorts. The investigation began in response to a January 2018 article in the Wall Street Journal that detailed numerous allegations of sexual harassment and rape by Mr. Wynn against Wynn Resorts employees. In one such allegation, a manicurist at the resort in Las Vegas stated that after she gave Mr. Wynn a manicure in 2005, he forced her to have sex with him on the massage table he kept in his office suite. She later made a complaint to the human resources department. Within days of an internal investigation, Mr. Wynn entered into a settlement with the manicurist and her husband that included a retraction, an NDA and a structured payment schedule for the $7.5 million settlement. A year later, a former cocktail server at Wynn Las Vegas made a similar allegation against Mr. Wynn, which again resulted in a settlement that included an NDA and payment of $975,000. The report detailed many similar stories in the years following: allegations that Mr. Wynn sexually assaulted or raped service employees at the Wynn Resorts, each allegation followed by a quick settlement that included an NDA and often a structured payment schedule to enforce the NDA over time. The management and Board of Directors of Wynn Resorts knew of these allegations and settlements, never informed the Commission, and instead took steps to conceal the allegations against Mr. Wynn. The Commission concluded that the company’s efforts at secrecy made it impossible for regulators to do their jobs. Although the Commission concluded that Wynn Resorts was entitled to maintain its casino license,
the company was fined $35 million and subject to several conditions. 69 Wynn Resorts CEO Matthew Maddox was fined $500,000. 70

Perhaps the use of NDAs to hide sexual harassment that brought most attention to this issue was by Harvey Weinstein and the Weinstein Company, the movie production company owned by Weinstein and his brother. 71 To date, more than seventy women have accused Weinstein of sexual harassment, assault, or rape. 72 Weinstein was convicted in a New York state court of first-degree criminal sexual act and third-degree rape of two of those women in February 2020, and later sentenced to twenty-three years in prison. 73 Weinstein and the Weinstein Company used NDAs to silence his accusers for more than twenty years before journalists brought the pattern of abuse to light. 74

The Weinstein NDAs were extremely restrictive, going to great lengths to prevent disclosure of the allegations. 75 Most prevented the accuser from keeping a copy of the NDA itself. 76 In one settlement, Fillipina – Italian model Ambra Battilana Gutierrez, agreed to remain silent about an incident during which “Weinstein groped her breasts and tried to stick his hand up her skirt,” and she was required to destroy any and all copies of audio recordings of Weinstein admitting to the groping. 77 The NDA also required that Gutierrez surrender her phone, passwords to

69. See Steph Solis, The $35M fine was just part of the deal; Here are the conditions Wynn Resorts has to fulfill to run Encore Boston Harbor, MASSLIVE (May 1, 2019), https://www.masslive.com/casinos/2019/05/the-35m-fine-was-just-part-of-the-deal-here-are-the-conditions-wynn-resorts-has-to-fulfill-to-run-encore-boston-harbor.html. The Gaming Commission required that Wynn keep the CEO and chairman position separate as long as the license agreement lasts. Id. Wynn was also asked to make changes to its human resource policies, the use of outside attorneys, as well as the use of NDAs. Id. Wynn was also required to notify the agency of any civil or criminal complaint. Id. Finally, it had to pay for an independent monitor to oversee the company’s adherence to these changes. Id.

70. See id.


74. See Farrow, supra note 71.

75. Id.


77. See Farrow, supra note 71. Gutierrez initially reported the incident to the police, who asked her to record conversations with Weinstein in an effort to obtain evidence of his harassment. Id. The New York District Attorney ultimately decided not to prosecute Weinstein, and Weinstein insisted that Gutierrez destroy all of her copies. Id.
her e-mail account and any other form of digital communication to a private-security firm retained by Weinstein.\(^78\) Finally, the NDA included a “sworn statement, pre-signed by Gutierrez, [] attached to the agreement, to be released in the event of any breach. It states that the behavior Weinstein admits to in the audio tape never happened.”\(^79\)

Some Weinstein NDAs required silence beyond the accuser.\(^80\) Zelda Perkins, a former assistant to Weinstein, threatened legal action after the assistant Perkins hired “emerged from her first meeting alone with Weinstein distraught, saying that he had sexually assaulted her in his hotel room.”\(^81\) After a lengthy negotiation, the women agreed to settle for two hundred and fifty thousand British pounds (split between them evenly), which came from Weinstein’s brother’s personal bank account to hide the payment from the Weinstein Company board.\(^82\) The settlement included an NDA that required the women to have “any of their lawyers, accountants, and therapists who might become aware of the settlement sign their own nondisclosure agreements.”\(^83\) The NDA further required that the women personally make calls “to tell [them] to shut up.”\(^84\)

When Bill O’Reilly, former Fox News commentator, settled multiple sexual harassment lawsuits against him, the settlements included similarly restrictive NDAs.\(^85\) The O’Reilly NDAs required that the accusers “turn over all evidence, including audio recordings and diaries, to Mr. O’Reilly.”\(^86\) At least one woman was further “required to disclaim the materials ‘as counterfeit and forgeries’ if [the evidence] ever became public.”\(^87\)

The use of NDAs in response to claims of sexual harassment is not limited to the entertainment industry. At least half a dozen female entrepreneurs seeking funding accused Silicon Valley venture capitalist Justin Caldbeck of sexual harassment.\(^88\) One of the accusers, Stitch Fix

\(^{78}\) See Farrow, supra note 71.

\(^{79}\) See id.

\(^{80}\) See generally id. (discussing the nondisclosure agreement which Harvey Weinstein’s formal assistant signed).

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id.

\(^{84}\) Id.


\(^{86}\) Id.

\(^{87}\) Id.

\(^{88}\) See generally Minda Zetlin, Stitch Fix Founder Katrina Lake Was Coerced Into Silence Over VC Justin Caldbeck’s Sexual Harassment, INC. (Jul. 2, 2017), https://www.inc.com/minda-
founder Katrina Lake, reported that when she complained about Caldbeck’s harassment and asked for him to be removed from Stitch Fix’s board of directors, the venture capital firm that employed Caldbeck at the time presented her with a non-disparagement agreement but did remove him.\textsuperscript{89} Also in Silicon Valley, venture capital firm Kleiner Perkins offered to settle former employee Ellen Pao’s sexual harassment lawsuit only if she signed an NDA, according to Pao’s reports.\textsuperscript{90} Pao refused to settle and ultimately lost her claim at trial.\textsuperscript{91} Even academia is not immune from the use of NDAs.\textsuperscript{92} In Britain, the BBC found that United Kingdom universities spent 87 million pounds on settlements of sexual harassment claims with NDAs from 2017 through April 2019.\textsuperscript{93}

The use of NDAs also goes beyond settlement of sexual harassment claims.\textsuperscript{94} All of the Weinstein Company’s employees signed NDAs that included an unusual provision restricting disclosure of information “concerning the personal, social or business activities” of Weinstein and his brother as co-Chairmen.\textsuperscript{95} While it is typical for employment contracts to include NDAs to protect company trade secrets and confidential business information, these contracts are rarely used to hide information about executives’ personal lives.\textsuperscript{96} Like the Weinstein Company, President Donald Trump has also used NDAs to prevent prior private and government employees from disparaging him or his family.\textsuperscript{97}

We only know about the use of NDAs in sexual harassment cases because the #MeToo movement has encouraged victims of workplace sexual harassment to expose the use of NDAs to compel their silence.\textsuperscript{98}


\textsuperscript{93} See Matthew Garrahan, \textit{Harvey Weinstein: how lawyers kept a lid on sexual harassment claims}, FIN. TIMES (Oct. 23, 2017), https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589.
Several public figures spoke out against their harassers and about the NDAs that tried to force their silence.99 Rose McGowan was one of the first to speak out against Weinstein.100 McGowan received an $100,000 settlement in response to her accusation that Weinstein raped her in 1997, but the settlement did not include an NDA.101 In 2017, days before multiple women would come forward accusing Weinstein of harassment, rape, and assault, Weinstein reached out with an offer of $1 million in exchange for McGowan signing an NDA.102 McGowan countered, asking for $6 million, but then withdrew the counteroffer within a day of The New York Times publishing its first article about Weinstein’s decades of alleged harassment.103 Zelda Perkins, another one of Weinstein’s accusers, has also spoken out in defiance of her NDA to highlight the ethical illegitimacy of NDAs and to advocate for a ban on NDAs in sexual harassment cases.104 After years of silence, Perkins decided to publicly break her NDA in a 2017 interview with the Financial Times.105 Emboldened by the many other accusers and by Weinstein’s firing, Perkins detailed the exhausting, lengthy, and intense negotiation sessions where the then-24-year-old, feeling isolated and intimidated, eventually signed the NDA.106 Since breaking her NDA Perkins has advocated in public, including in testimony before British Parliament for a ban of NDAs in sexual harassment cases.107 Although Gretchen Carlson has been careful not to violate her NDA with O’Reilly, she has become an advocate against the use of mandatory arbitration clauses and NDAs in sexual harassment cases.108 Eliza Dushku, an actress in the CBS television show “Bull,” risked violating her NDA with CBS when she wrote a Boston Globe article exposing the sexual harassment she suffered on set by her co-star, Michael Weatherly, and the $9.5 million settlement with CBS that followed.109

100. Id.
101. Id.
102. Id.
103. See id.
104. Garrahan, supra note 98.
105. Id.
106. Id.
107. Perman, supra note 56.
108. See Garrahan, supra note 98.
109. See Eliza Dushku, Eliza Dushku: I worked at CBS. I didn’t want to be sexually harassed. I was fired, BOSTON GLOBE (Dec. 19, 2018), https://www2.bostonglobe.com/opinion/2018/12/19
These stories, and so many others from the #MeToo movement, have exposed the use of NDAs to protect more than trade secrets. These simple contracts have become tools to silence accusers in sexual harassment cases, which has enabled the harassers, and the toxic cultures around them, to continue their illegal and unethical conduct. The costs of silencing sexual harassment accusers are difficult to quantify. Allowing harassment to continue unabated is "an organizational stressor that has significant, negative outcomes." In their paper about "Hushing Contracts," David Hoffman and Eric Lampmann set out the negative externalities of silencing harassment: increased turnover, increased sick leave, and decreased productivity. As the public has learned more about the use of NDAs, many have questioned how these contracts can be legally enforceable. In fact, as will be described below, the enforcement of NDAs is a straightforward application of basic contract law.

III. ENFORCEABILITY OF NDAs

Non-disclosure agreements require the essential elements of contracts to be enforceable. In the American legal system, a contract is enforceable if it has four elements: offer, acceptance, capacity, and consideration. Typically, in an NDA the employer offers specific terms of employment, severance, or a settlement payment, in exchange for the

/eliza-dushku-responds-what-happened-cbs-took-job-and-because-objected-being-sexually-harassed-was-fired/OCh7h0pwg4Aq7xfwOUasyO/story.html?p1=BGMenu_Article.
10. See id.; see also Perman, supra note 56; Garrahan, supra note 98.
11. See Dushku, supra note 109; see also Perman, supra note 56; Garrahan, supra note 98.
13. See id. at 178. (citing U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 22 (June 2016) (quantifying those costs as $327.1 million over two years)). Hoffman and Lampmann also identify the "deprivation of survivors’ ability to openly and honestly talk about their experiences and to form coalitions with other survivors" as a cost of NDAs. Id. at 179. The popularity of the #MeToo Movement confirms the impact of sharing stories of harassment and abuse. Id.
14. See id. at 167.
16. Id.
promise to remain silent.118 Generally, acceptance is the agreement to the terms of the contract offered and returned in a specified manner.119 The employee (or former employee) accepts the terms of an NDA by agreeing, typically by signing a written agreement, to remain silent in exchange for either employment, severance, or a settlement payment.120 Consideration for an enforceable contract is the exchange of value between parties.121 The bargained for exchange in an NDA is rarely in doubt: the employee gives up the legal right to speak in exchange for benefits of employment, severance, or a settlement payment.122 Finally, enforceability relies on the capacity to enter a contract. Capacity requires that a person must be of minimum age and a sound mind.123 Corporations are also entitled to enter contracts, as contract law provides that they have the capacity to offer and accept contractual terms.124 As these basic rules of contract formation illustrate, most NDAs will have all of the elements of a properly formed contract and are easily enforceable under contract law.125

Given the history of their use, the question of NDA enforceability has focused on cases involving the disclosure of trade secrets. At least one court has ruled that NDAs should be subject to the same reasonableness standard as a non-competition agreement.126 Indeed, NDAs and noncompetition agreements are often grouped together by employers and thus arise together in case law. The more newsworthy and troubling uses of NDAs — to limit whistleblowers, to hide sexual harassment claims — have yet to be tested in the courts.127 We can look, therefore, at cases involving trade secrets or non-competition agreements

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118. Perman, supra note 56.
119. Corbin, supra note 117.
120. Perman, supra note 56.
122. Id.
127. See Sinead Baker, Judge tosses out Stormy Daniels’ lawsuit to tear up the NDA to stop her from talking about her alleged affair with Trump, BUSINESS INSIDER (Mar. 8, 2019), https:// www.businessinsider.com/stormy-daniels-hush-money-lawsuit-trump-tossed-2019-3. Stormy Daniels did challenge the validity of the NDA she signed that prohibited her from discussing her affair with President Trump in exchange for $130,000. Id. President Trump had already announced that he would not enforce that NDA against her (after dropping an earlier lawsuit for $20 million for violation of the NDA). Id. The Court ultimately dismissed the case as lacking subject matter jurisdiction. Both sides claimed victory, and there was no precedent formed. Id.
to understand how courts would likely view NDAs used to maintain the secrecy of other workplace actions.

In order to enforce a trade secret NDA, the owner of the trade secret(s) must take reasonable steps to keep the information confidential. The information cannot already be in the public domain. Wright Well Control Services, Inc. (hereinafter "WWCS") lost its claim against its business partner, Oceaneering International, Inc., when Oceaneering International used confidential information protected by an NDA between the parties to develop a new product. The information had previously been filed in WWCS’s patent application; doing so put the information in the public domain, making it publicly available and not confidential. Therefore, the court refused to enforce their NDA. As seen in WWCS’s case, the secrecy of the disclosed information is essential to the confidential nature and enforceability of an NDA. Although in most sexual harassment cases, the wrongdoing is kept secret, it is worth noting that should the information emerge publicly, the NDA would no longer be enforceable.

Enforceability of an NDA also relies on the specificity and scope of the agreement. As with noncompetition agreements, NDAs must be written with specificity; “catch-all clauses” should be avoided to ensure enforceability. In Duo-Fast Carolinas, Inc. v. Scott Hill Hardware & Supply Co., Scott Hill Hardware sought to restrict Duo-Fast Carolinas from sharing customer contact information using an NDA in an employment agreement; the NDA was invalidated because its definitions of use and disclosure were overbroad. The NDA lacked a time or geographic restriction, and enforcement would result in a total ban on use of customer contact information. The language used in NDAs must be clear as to the exact information covered and conduct required to guarantee enforceability.

133. See id.
Cases involving trade secrets also demonstrate that the scope of an NDA must be precise and reasonable.\textsuperscript{135} For example, the Illinois Trade Secrets Act requires the geographic and chronological terms be reasonable in order for an NDA protecting against the misappropriation of trade secrets to be enforceable.\textsuperscript{136} NDAs in Illinois must specify a chronological term, most often amounting to a time period less than forever.\textsuperscript{137} To the contrary, in Kentucky, the existence of an NDA without a chronological restriction was not addressed in a case where a company sought an injunction against a former employee seeking employment with a competitor.\textsuperscript{138} Some states also require geographical reasonableness for an NDA to be enforceable.\textsuperscript{139} For example, Illinois requires careful scrutiny of the residual effects of chronological and geographical conditions to determine reasonableness,\textsuperscript{140} however the Georgia Supreme Court has recognized the necessity of only a chronological term.\textsuperscript{141}

NDAs may also be invalidated on the basis of common law exceptions to the enforcement of contracts such as duress, unconscionability, or as against public policy.\textsuperscript{142} Justice Ginsburg of the United States Supreme Court suggested in an interview about the #MeToo movement that "we will see an end to the confidentiality pledge . . . I hope those agreements will not be enforced by courts."\textsuperscript{143} All of these exceptions, however, would require an accuser to litigate the enforceability of the NDA.\textsuperscript{144} The expense, time, and risk involved in litigation make reliance on these common law defenses a poor choice for limiting the negative uses of NDAs.

Duress extends beyond persuasion and attempts to overcome an offeree's right to decline an offer, often through threats or coercive

\textsuperscript{135} See id.


\textsuperscript{137} RESTATEMENT (SECOND) OF CONTRACTS § 515 (AM. LAW INST. 1981).


\textsuperscript{139} Id.


\textsuperscript{142} Id.

\textsuperscript{143} JEFFREY ROSEN, CONVERSATIONS WITH RBG: RUTH BADER GINSBURG ON LIFE, LOVE, LIBERTY, AND LAW 190 (2019).

behavior.\textsuperscript{145} This coercion can be physical or economic.\textsuperscript{146} A contract is void due to duress when parties were not on equal terms and the party seeking to void the contract had no choice but to enter the contract, money paid or other value parted with, under such pressure, is not regarded as a voluntary act.\textsuperscript{147} Mere conditioning employment on entering into an NDA is not enough to establish duress.\textsuperscript{148} Stories from the #MeToo movement do suggest the use of duress in negotiation of the NDA.\textsuperscript{149} In particular, the grueling multiple-day negotiation between Zelda Perkins, her former assistant, and Weinstein attorneys, has evidence of duress.\textsuperscript{150} The NDA was reached “after several rounds of negotiations, including one session that finished at 5 a.m. after 12 hours of debate.”\textsuperscript{151} Perkins said by the end of the negotiations there was a “siege mentality.”\textsuperscript{152} Not only was the negotiation lengthy and exhausting, but Perkins and her young assistant were brought into a room with Weinstein, who had allegedly sexually assaulted the assistant, to sign the NDA in his presence.\textsuperscript{153} Although these facts certainly suggest the NDA was involuntary, duress has not been tested in court as a defense to the enforcement of an NDA.\textsuperscript{154}

An unconscionable contract lacks fundamental fairness between the parties and will not be enforced.\textsuperscript{155} Unconscionability is found from the oppression and surprise of the offeror to the offeree.\textsuperscript{156} Oppression occurs when one party uses its power over the weaker party and the weaker party

\textsuperscript{145} \textit{Restatement (Second) of Contracts}, \textit{supra} note 137, § 175.
\textsuperscript{146} Hall v. Ochs, 817 F.2d 920, 923 (1st Cir. 1987); Oskey Gasoline & Oil Co. v. Continental Oil Co., 534 F.2d 1281, 1286 (8th Cir. 1976).
\textsuperscript{147} \textit{Restatement (Second) of Contracts}, \textit{supra} note 137, § 175.
\textsuperscript{148} Litig. Reprographics & Support Servs., Inc. v. Scott, 599 So. 2d 922, 923 (La. Ct. App. 1992) (holding that noncompetition agreement was not signed under duress because it was made a condition of at-will employment).
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} See Watt, \textit{supra} note 76.
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} See generally Vasundhara Prasad, \textit{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, 2537 (2018) (implying that courts do not scrutinize NDAs to “determine if they were made under duress”).
\textsuperscript{156} See Hume v. U.S., 132 U.S. 406, 411 (1889) (defining unconscionability to be a contract which “no man and his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”).
is therefore unaware of the agreement’s consequences. Unconscionability can be procedural: occurring during the contract’s formation, or it can be substantive: relating to the contract’s content. For example, an employee’s arbitration agreement and NDA with Airtouch Communications was procedurally enforceable but its confidentiality provision was substantively unconscionable because it hindered the employee from proving discrimination patterns and from using information from past arbitrations to do so. As it was written, the confidentiality clause solely benefited Airtouch. Therefore, the employee was able to invalidate the NDA on the basis of unconscionability. No court has analyzed whether an NDA used in a sexual harassment case was unconscionable. It may be difficult to convince a court that an NDA used to settle a sexual harassment lawsuit solely benefits the accused or employer – benefits to the accuser may include a payment to the accuser and protection of the accuser’s privacy. The accuser may have a stronger procedural unconscionability argument given the significant imbalance of power in negotiation of most NDAs. Invalidating an NDA on the basis of procedural unconscionability is fact-specific and would require litigation of this defense.

A contract, including an NDA, may be invalidated if it is contrary to the purpose of public policy. Like the use of unconscionability, the public policy exception is rare. Courts have warned against the use of public policy going back as far as 1824. In Richardson v. Mellish, the court invalidated a contract selling a captain position for an East India Company ship because of fraudulent consideration and a violation of the English public policy prohibiting the sale of offices of trust. In Judge Burrough’s dissent he warned against heavy reliance on public policy for invalidating a contract. Public policy is “a very unruly horse, and when

158. *Id.* at 57-58.
160. *Id.*
161. *Id.* at 769.
163. *Id.* at 2538.
165. *Prasad*, *supra* note 154, at 2528.
166. *See Bandera v. City of Quincy*, 344 F.3d 47, 52 (1st Cir. 2003) (explaining that “a settlement agreement might (rarely) be invalid as against public policy”).
168. *Id.* at 236-37.
169. *Id.* at 252 (Burrough, J., dissenting).
once you get astride it, you never know where it will carry you."170 In an 1828 case, Stoddard v. Martin, the public policy exception expanded to contracts that have a "tendency to a mischievous consequence."171 Martin Stoddard and Wheeler Martin placed a wager on whether Ashur Robbins, a candidate for the 1862 U.S. Senate, would win the Rhode Island election.172 When Martin refused to follow through with the wager, Stoddard sued.173 The Rhode Island Supreme Court held that of the wagers deemed illegal, there are those "against a sound policy, or of immoral tendency, which may affect the feelings, interest or character of a third party, or tend to disturb the peace of society."174 The validity of a contract against public policy is determined by the strength of that policy from legislation or judicial decisions, the likelihood that its enforcement would limit a public policy, the seriousness or deliberateness of the conduct, and the proximity of the misconduct to the contract.175 The balancing of these factors aims to "protect some aspect of the public welfare."176 Courts have invalidated contracts contrary to public policy so as not to contradict the "good of the people" that legislation, government, and similar policies aim to foster.177 In 1975, the Supreme Judicial Court of Massachusetts emphasized the illegality of a contract violating public policy where a woman sued the executor of a will for an oral agreement that created the presumption of an exchange between his property and sexual intercourse with her.178 In a very different case, Allied-Lyons PLC, who sought to acquire Dunkin' Donuts, entered into an agreement to pay the senior vice president of Dunkin' Donuts a finder's fee should Allied make the acquisition.179 Their contract interfered with the senior vice president's ability to carry out his fiduciary duty to Dunkin' Donuts and was ruled unenforceable as against public policy.180

We have very few examples of NDAs being invalidated as against public policy. To invoke a public policy exception against the enforcement of NDAs and noncompetition agreements, courts will look for well-stated or already settled case law to do so – likely to avoid the

170. Id.
172. Stoddard, 1 R.I. at 1.
173. Id.
174. Id. at 2.
175. RESTATEMENT (SECOND) OF CONTRACTS, supra note 137, §178(3).
176. Id. § 179(b).
180. Id. at 1336.
"unruly horse" that was cautioned in Richardson.\textsuperscript{181} California's public policy favoring open competition invalidated an employee's NDA and noncompetition agreement with Arthur Anderson, LLP., because the NDA prevented him from practicing his profession.\textsuperscript{182} In this case, the court specifically cited California Civil Code supporting the legislative intent for open competition.\textsuperscript{183} In Erhart v. Bofi Holding., Inc., whistleblowers appropriated documents from their employer in the course of whistleblowing to the Securities and Exchange Commission ("SEC").\textsuperscript{184} The defendants argued that the NDAs should be unenforceable as against the public policy of the Dodd-Frank Wall Street Reform and Consumer Protection Act.\textsuperscript{185} The court found the jury could decide that the public policy exception applied, noting the strong public policy interest articulated in Dodd-Frank in whistleblowing can outweigh the business interest in an NDA.\textsuperscript{186} The Alaska Supreme Court held that a private agreement that prevented a woman from presenting evidence to court in a domestic violence case was unenforceable as against the essential public policy of preventing additional violence.\textsuperscript{187} Although preventing domestic violence is a different public policy concern than sexual harassment, the increased awareness of the prevalence of sexual harassment, or worse, in the workplace, may allow courts to draw a similar conclusion.

To date, there is just one case invalidating an NDA that prevented disclosure of facts related to a sexual harassment case on the basis of public policy.\textsuperscript{188} Long before the #MeToo movement, the First Circuit invalidated an NDA that prevented cooperation with the EEOC in its investigation of sexual harassment claims.\textsuperscript{189} In EEOC v. Astra USA, Inc., the EEOC's investigation of Astra was impeded by several employees who were unable to cooperate with the investigation because of settlement agreements that prohibited employees from aiding the EEOC.\textsuperscript{190} The court ruled that those provisions were invalid as against public policy and

\textsuperscript{181} Richardson v. Mellish, 2 Bing. 229, 303 (1824).
\textsuperscript{182} Edwards v. Arthur Andersen, LLP., 189 P.3d 285, 292 (Cal. 2008).
\textsuperscript{183} Edwards, 189 P.3d at 291 (citing California Business and Profession Code §16600).
\textsuperscript{185} Id. at *4.
\textsuperscript{186} Id. at *14.
\textsuperscript{187} Lana C. v. Cameron P., 108 P.3d 896, 901-02 (Alaska 2005) (invalidating an NDA in a custody agreement while citing statistic that approximately thirty percent of women murdered in the United States in a given year lose their lives to husbands or boyfriends in support of the public policy concerns).
\textsuperscript{188} EEOC v. Astra USA, Inc., 94 F.3d 738, 740-41 (1st Cir. 1996).
\textsuperscript{189} Id.
\textsuperscript{190} Id. at 741.
affirmed a preliminary injunction against the company.\textsuperscript{191} The court balanced the “significant public interest in encouraging communication with the EEOC against the minimal adverse impact that opening the channels of communication would have on settlement.”\textsuperscript{192} Although \textit{Astra} is a helpful precedent for any accuser attempting to invalidate an NDA on the basis of public policy, it could be limited to cases where the EEOC is impeded by the NDA.\textsuperscript{193} The public policy concern relied on in \textit{Astra} was limited to the ability of the EEOC to conduct investigations.\textsuperscript{194} It is not as clear that a court would find an individual plaintiff’s sexual harassment lawsuit or an accuser’s desire to go to the press as compelling a public policy.

If courts were willing to interpret \textit{Astra} broadly and find that the use of NDAs in sexual harassment cases brought by private plaintiffs (not the EEOC) is a violation of public policy, using this common law defense is not a realistic policy solution.\textsuperscript{195} The public policy exception to enforcement of NDAs requires a court ruling, which inherently requires litigation.\textsuperscript{196} So many of the stories we have learned through the #MeToo movement involve NDAs signed as a result of an internal complaint.\textsuperscript{197} None of Weinstein’s accusers sued him before signing an NDA.\textsuperscript{198} At Fox News, several of Bill O’Reilly’s accusers settled prior to filing lawsuits.\textsuperscript{199} Steve Wynn’s accusers signed NDAs after filing internal

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{191} \textit{Id.} at 747.
\item \textsuperscript{192} \textit{Id.} at 744–45; see also Saini v. Int'l Game Tech., 434 F. Supp. 2d 913, 921 (D. Nev. 2006) (refusing to invalidate confidentiality agreement on public policy grounds when employee disclosed trade secrets in part because “[w]hile there is certainly a public interest at stake in uncovering the sale of defective products, we find that public policy is not as high a priority as enforcement of sexual harassment law by the EEOC”).
\item \textsuperscript{193} \textit{Astra USA, Inc.}, 94 F.3d at 745 n.6.
\item \textsuperscript{194} See id.
\item \textsuperscript{195} But see Hoffman & Lampmann, supra note 112 (explaining how the public policy defense may be effective).
\item \textsuperscript{196} See generally Bandera v. City of Quincy, 344 F.3d 47, 52 (1st Cir. 2003) (explaining that settlement agreements are rarely found invalid on public policy grounds).
\item \textsuperscript{198} See Farrow, supra note 71.
\item \textsuperscript{199} See Steel & Schmidt, supra note 197 (citing several settlements that were entered after the accusers’ attorneys contacted the company).
\end{enumerate}
\end{footnotesize}
complaints. The EEOC’s Report on Workplace Harassment found that only “6% to 13% of individuals who experience harassment file a formal complaint.” Unlike other forms of litigation, sexual harassment plaintiffs must first go through the EEOC before they can file a lawsuit in court, adding another procedural burden to an already reticent accuser. Those who endure sexual harassment may also be deterred from filing a complaint due to the bleak chances of success in court: only about four percent of cases end up awarding damages to victims.

Relying on a judge to find that the negative externalities of sexual harassment are a strong enough public policy interest to find an NDA unenforceable is risky, given how negatively judges have viewed sexual harassment lawsuits. The risk is greater considering the demographics of our judiciary. Only twenty-seven percent of the federal judiciary is female. The state judiciary is only slightly more diverse; as of 2019, thirty-four percent of state judges were female. An article analyzing sexual harassment appeals in 1999-2001 found that plaintiffs were twice as likely to win their appeal with a female judge on the panel. The narrow view of sexual harassment in the judiciary demonstrates how difficult it would be for accusers to invalidate NDAs on the basis of public policy.

In addition to the common law exceptions that might limit NDAs, there are statutory exceptions to the enforceability of NDAs. Under Title VII of the Civil Rights Act, an NDA may not be used to prevent an

200. See generally MASS. GAMING COMM., supra note 59, at 26-132 (describing settlement agreements between Wynn MA LLC and Mr. Wynn’s accusers).
202. Id.
204. See id. (“Only about four out of 100 job discrimination lawsuits that aren’t settled or voluntarily dismissed end up providing any kind of relief for workers.”).
205. Id.
209. See Campbell, supra note 203.
210. Lobel, supra note 144.
employee from assisting in official agency investigations, including filing charges with or assisting the EEOC in its investigations.\textsuperscript{211} Section 7 of the National Labor Relations Act (hereinafter "NLRA") gives all employees the right to engage in concerted activities, including the right to discuss the terms and conditions of their workplace.\textsuperscript{212} Section 8(a) of the NLRA makes it an unfair labor practice for employers to violate the Section 7 rights of any employee, including those who are not unionized.\textsuperscript{213} Courts have found that NDAs signed as a term of employment violate the NLRA to the extent that those NDAs prevent employees from discussing the workplace.\textsuperscript{214} Although the NLRA does not provide a defense to the enforceability of NDAs signed as part of settlement agreements, it would prohibit the enforcement of any general NDAs that include discussion of workplace incidents, such as sexual harassment.\textsuperscript{215} Finally, the Defend Trade Secrets Act provides a narrow statutory exception to enforcement of an NDA by providing immunity for whistleblowers that must disclose trade secrets or violate an NDA in the course of reporting wrongdoing to the government.\textsuperscript{216}

Other than the patchwork of exceptions above, NDAs are enforced like any other contract under most states' laws.\textsuperscript{217} Despite the recent willingness of accusers and witnesses to speak out as part of the #MeToo movement, NDAs remain a powerful tool of silence.\textsuperscript{218} Employers can use the threat of expensive and labor-intensive legal battles regardless of whether the NDAs would be unenforceable.\textsuperscript{219} The threat of litigation compels the whistleblowers or accusers to settle, therefore avoiding the potential for courts to question NDA enforceability.\textsuperscript{220} Most employees are uninformed about their rights with regard to NDAs and the broad language of the NDAs may chill protected speech.\textsuperscript{221} In addition to broad language, the NDAs often include liquidated damages clauses that allow

\textsuperscript{211} Id.
\textsuperscript{213} 29 U.S.C. § 158(1).
\textsuperscript{215} Hafiz, supra note 26.
\textsuperscript{217} Prasad, supra note 154; at 2513.
\textsuperscript{218} Id. at 2509.
\textsuperscript{219} Id. at 2515.
\textsuperscript{220} Id. at 2517 (discussing the example of the Roman Catholic Archdiocese of Albany's confidential settlement agreement with a victim in order to silence the long-standing abuse endured and thus avoiding litigation).
for a high pre-determined amount of damages without any proof of harm for any breach of the NDA. For example, in exchange for a $130,000 payment, Stephanie Clifford (also known as Stormy Daniels) entered into an NDA with President Trump in 2016 in which she agreed to conceal their affair. The NDA included a liquidated damages clause that provided for damages of $1 million for every breach – each time Daniels disclosed the affair. Regardless of whether they are enforceable, liquidated damages clauses are likely to chill speech and prevent victims from coming forward with allegations of harassment or abuse.

The statutory protections in place are often too narrow to be helpful and accusers are often unaware of their rights. The common law exceptions to enforcement of a contract require expensive, time-consuming, and risky, litigation. Consequently, the enforcement of NDAs has been a powerful corporate tool for protecting secrets – for both legitimate and illegitimate business purposes. The ease by which wrongdoers can use NDAs to protect themselves and the patterns of harassment that have been enabled by NDAs, call for a reexamination of the legal standards for enforceability of these contracts beyond their use to protect a legitimate business interest in trade secrets.

IV. LEGISLATIVE ALTERNATIVES FOR LIMITING NDA'S

Given the policy and ethical concerns about the use of NDAs to prevent accusers and whistleblowers in sexual harassment cases from testifying, providing evidence, speaking with the press, or warning other employees, many have called for legislation to limit the use of NDAs. In the wake of the #MeToo movement, several states have passed such legislation, although the limits on NDAs vary widely. Below is a review of state laws, pending state bills, and a proposed federal law, regulating the use of NDAs in sexual harassment cases.

222. Prasad, supra note 154, at 2516.
224. Id.
225. See Harris, supra note 27.
226. See Campbell, supra note 203.
228. See Nondisclosure Agreement, supra note 21.
229. Id.
230. See Harris, supra note 27; see also Lobel, supra note 144.
231. See Harris, supra note 27.
A. State Laws

As of January 2020, twelve states had passed statutes regulating the use of NDAs.232 All were passed in response to the #MeToo movement and concerns about the ability of sexual harassment to continue because of NDAs.233 The states take different approaches and few go so far as to completely ban NDAs in cases of sexual harassment.234 The competing concerns that most legislators articulated were preventing continued harassment versus the desire of a victim to remain confidential.235 The narrowest statutes prohibit only the use of an NDA to prevent testimony by a victim in a criminal proceeding, while others ban the use of an NDA to prohibit participation in employment discrimination, harassment or retaliation cases.236 Some statutes address only general NDAs – those included in employment agreements.237 Others ban NDAs in settlement agreements of sexual harassment claims, unless the victim requests the NDA.238 Many statutes addressed both NDAs and mandatory arbitration agreements, as employers often pair these agreements to ensure confidentiality in process and outcome.239 The current state laws are detailed below.

1. Arizona

Arizona’s statute, passed in April 2018, prohibits the use of an NDA to prevent a victim of sexual assault or harassment from testifying in a criminal proceeding or responding to a prosecutor’s inquiry.240 This narrow construction would likely allow for the enforcement of an NDA to prevent testimony in a civil case and certainly to prevent the accuser from speaking with the press.241 The law also prevents government officials from using public money to settle a sexual harassment or misconduct claim.242 The current version of the statute differs from its original,

232. Harris, supra note 27.
233. Id.
234. Id.
235. Id.
236. Id.
239. See generally Dean, supra note 39 (discussing the history of NDAs and the purported purposes they serve employers).
241. See id. § 12-720(A)(1-2).
242. Id. § 12-720(D).
unamended bill, which included a prohibition of NDAs in all incidences of sexual harassment or misconduct, including civil cases.\textsuperscript{243} The reasoning offered for the change was the desire of some victims to have NDAs in place to protect their confidentiality.\textsuperscript{244}

2. California

California’s law, effective January 1, 2019, prohibits a provision in a settlement agreement that bars the disclosure of factual information related to a civil or administrative claim regarding either: 1) an act of sexual assault, 2) an act of sexual harassment, an act of workplace harassment or discrimination based on sex, 3) retaliation against a person for reporting sexual harassment, 4) harassment or discrimination based on sex by owner of a housing accommodation.\textsuperscript{245} Because the law requires that a claim be filed to invoke this protection, it would not address situations where the accuser has only complained at the workplace.\textsuperscript{246} For example, although Gretchen Carlson would have been protected under this California law because she filed a lawsuit against Roger Ailes, the two dozen other women who complained about Ailes’s sexual harassment during Fox News’s internal investigation would not be protected.\textsuperscript{247} The California statute addresses the concern for victim confidentiality by including a provision that allows an NDA to be included in a settlement agreement with regard to the victim’s identity at the request of that victim.\textsuperscript{248} Finally the statute allows a judge to consider a claim for money damages for a violation of the NDA ban.\textsuperscript{249}

3. Illinois

The Illinois Workplace Transparency Act bans all nondisclosure or non-disparagement clauses in agreements between employers and

\begin{footnotes}
\item 244. Id.
\item 245. CAL. CIV. PROC. CODE § 1001(a)(1-4) (West 2019).
\item 246. See id.
\item 247. See id.
\item 248. Id. § 1001(c).
\item 249. Id. § 1001(f).
\end{footnotes}
employees (defined to include independent contractors and the like). 250 It also makes it illegal for an employer to enforce or attempt to enforce such a clause or retaliate against an employee for assisting in the investigation of harassment or discrimination. 251 Effective January 1, 2020, the statute also provides that for NDAs entered prior to that date, those contracts may be voidable if the party can show duress, incompetency or impairment at the time of agreement, or that they were a minor. 252 The Illinois law has an exception for settlement agreements, allowing NDAs if the clauses are “mutually agreed upon and mutually benefit both the employer and the employee.” 253 The employee must have twenty-one days to consider the agreement before it is executed and then seven days to revoke. 254

4. Maryland

Effective October 1, 2018, Maryland voided any provision in an employment contract that waives any “substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment.” 255 The statute also prohibits retaliation against an employee who refuses to enter into an agreement that asks for such a waiver. 256 If an employer attempts to enforce such a provision, it will be liable for the employee’s attorney fees and costs. 257

Although this statute does not explicitly include NDAs, they are likely to be included in the statute’s broad language. Indeed, the law is entitled: “Disclosing Sexual Harassment in the Workplace Act of 2018.” 258 The statute only applies to NDAs signed as part of employment agreements, so it does not limit the ability of an employer to enter into a settlement agreement that includes an NDA. 259 It also only applies to employment relationships, so it would not impact NDAs with independent contractors, vendors, customers, or other third parties. 260

251. Ill. Workplace Transparency Act § 1-10(b).
253. Id. § 1-25.
254. Id.
255. MD. CODE ANN. LAB. & EMPL. § 3-715(a) (2019).
256. Id. § 3-715(b)(1).
257. Id. § 3-715(c).
258. Id. § 3-715.
259. Id. § 3-715(a).
260. Id.
In addition to the prohibition of the waiver of rights, the Maryland statute imposes reporting requirements on employers that have fifty or more employees.\(^{261}\) Those large employers must report to the Maryland Commission on Civil Rights the number of settlements entered after allegation of sexual harassment by an employee, “the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment,” and the number of settlement agreements that required confidentiality.\(^{262}\)

The Maryland statute includes the language “except as prohibited by federal law” in order to address concerns about preemption by federal law.\(^{263}\) The implications of this exception will be most impactful on arbitration clauses that are waivers of the right to a jury trial.\(^{264}\) The U.S. Supreme Court held in AT&T Mobility LLC v. Concepcion\(^{265}\) and then again in Epic Systems Corp. v. Lewis\(^{266}\) that the Federal Arbitration Act (FAA) strongly favors the enforcement of arbitration clauses.\(^{267}\) Thus, if an employment agreement contains a mandatory arbitration clause covered by the FAA, then the FAA will likely preempt the Maryland statute, and allow enforcement of the arbitration clause.\(^{268}\) There is no federal law on NDAs, so preemption is not a concern.\(^{269}\)

5. Nevada

Nevada has banned NDAs from settlement agreements if the NDA “restricts a party from disclosing factual information relating to a claim in a civil or administrative action” related to conduct that could constitute a criminal sexual offense, employment discrimination on the basis of sex, or retaliation by an employer or landlord for reporting sex discrimination.\(^{270}\) The Nevada law, effective July 1, 2019, renders all

\(^{261}\) MD. CODE ANN. LAB. & EMPL. § 3-715(a) (2019).


\(^{263}\) MD. CODE ANN. LAB. & EMPL. § 3-715(a).


\(^{265}\) Id.


\(^{267}\) Id.

\(^{268}\) See id. at 1619 (“Congress has instructed federal courts to enforce arbitration agreements according to their terms.”).

\(^{269}\) See generally MD. CODE ANN. LAB. & EMPL. § 3-715 (2019) (limiting the scope of the statute to “except as prohibited by federal law”).

\(^{270}\) NEV. REV. STAT. § 10.195(1) (2019).
such NDAs in settlement agreements void and unenforceable.\textsuperscript{271} There are exceptions in the Nevada law only at the request of the claimant, for privacy related to the identity of the claimant, or any facts that could reveal the claimant’s identity.\textsuperscript{272}

6. New Jersey

New Jersey passed a reform of its Law Against Discrimination that bars enforcement of NDAs for all contracts entered into, renewed, modified or amended on or after March 18, 2019.\textsuperscript{273} The statute includes a broad prohibition against NDAs, stating that any “provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment” is “deemed against public policy and unenforceable” against the employee or former employee.\textsuperscript{274} If the employee reveals “sufficient details of the claim so that the employer is reasonably identifiable” then the NDA is also unenforceable against the employer.\textsuperscript{275} All settlement agreements must include a notice as to the consequences of the employee’s public revelation of the facts of the claim.\textsuperscript{276} Particularly broad is a provision that deems any waiver of a “substantive or procedural right or remedy” unenforceable.\textsuperscript{277} The limits of this provision have not yet been tested, but it likely prohibits arbitration agreements, as they waive the employee’s right to a jury trial.\textsuperscript{278} This provision would conflict with federal precedent on preemption discussed above that upholds the enforceability of arbitration agreements.\textsuperscript{279} Finally, the New Jersey law provides for damages if the employer retaliates against the employee for refusing to sign an NDA or for disclosing information subject to an NDA.\textsuperscript{280}

\textsuperscript{271} Id.; § 10.195(2).
\textsuperscript{272} Id. § 10.195(4).
\textsuperscript{273} N.J. STAT. ANN. § 10:5-12.7 (2019).
\textsuperscript{274} Id. § 10:5-12.8.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
\textsuperscript{277} Id. § 10:5-12.7.
\textsuperscript{278} See generally AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011) (“The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury.”).
\textsuperscript{280} N.J. STAT. ANN. § 10:5-12.10.
7. New York

New York’s approach to its NDA law, passed in 2018, is to set forth the procedures by which a valid NDA may be entered, requiring that it be the “complainant’s preference.” The statute prohibits the use of NDAs in settlement agreements in sexual harassment claims unless it is the claimant’s preference. It also requires a 21-day period for the claimant to consider the NDA and seven days to revoke the agreement.

8. Oregon

The most recent entrant into this statutory arena is Oregon. Effective October 1, 2020, it is illegal in Oregon for an employer to enter into an NDA with an employee or applicant that prevents the discussion of discrimination or sexual assault that occurred at work or between employees. Employees or applicants may file administrative complaints or lawsuits for violations of the ban on NDAs. Thus, rather than merely render NDAs unenforceable, Oregon has made their entrance an unlawful employment practice.

Like many other states, Oregon has included an exception to allow for NDAs in settlement or severance agreements under two circumstances: 1) the employee claiming discrimination or assault requests the NDA and has seven days to revoke the agreement; or 2) the employee is the individual who engaged in the unlawful discrimination or assault according to the employer’s good faith determination.

9. Tennessee

Tennessee’s law focuses on NDAs in employment agreements. It states that an employer may not require that an employee or prospective employee enter into an NDA with respect to sexual harassment as a condition of employment. The law applies to employment agreements

283. Id.
285. Id.
286. Id.
287. Id.
288. Id. § 659A.370.
290. Id.
executed or renewed after May 15, 2018.\textsuperscript{291} Tennessee law does not prohibit settlement agreements that include NDAs in sexual harassment claims.\textsuperscript{292}

10. Vermont

Vermont has banned employers from asking employees to waive any substantive rights with regard to a sexual harassment complaint, except as permitted by state or federal law.\textsuperscript{293} The law also bans any agreement that prohibits an employee from "opposing, disclosing, reporting, or participating in an investigation of sexual harassment."\textsuperscript{294} Vermont’s law has broad application, going beyond employees to cover all persons hired to "perform work or services."\textsuperscript{295}

In addition to limiting an employer’s ability to include NDAs and other waivers in employment agreements, Vermont’s law explicitly provides that a settlement of a claim of sexual harassment cannot restrict the employee from working for the employer.\textsuperscript{296} The settlement agreements must explicitly state that the agreement does not prevent the claimant from lodging a complaint with the government, testifying in an investigation of harassment, or complying with a discovery request in a sexual harassment case.\textsuperscript{297}

11. Virginia

Virginia’s law prohibits employment agreements that have the “purpose or effect of concealing the details relating to a claim of sexual assault” as defined by Virginia law.\textsuperscript{298} Effective July 1, 2019, the Virginia law does not address sexual harassment or settlement agreements of such claims, although the original bill did include sexual harassment.\textsuperscript{299}

\textsuperscript{291} Id.
\textsuperscript{292} Id.
\textsuperscript{293} VT. STAT. ANN. tit. 21, § 495h(g)(1)(b) (West 2019).
\textsuperscript{294} Id. § 495h(g)(1)(a).
\textsuperscript{295} Id. § 495h(a)(2).
\textsuperscript{296} Id. § 495h(h)(1).
\textsuperscript{297} Id. § 495h(h)(2).
\textsuperscript{298} VA. CODE ANN. § 40.1-28.01 (2019).
12. Washington

Washington passed a law in March 2018 that prohibits employers from requiring that employees sign an NDA that prevents discussion of workplace sexual harassment or sexual assault as a condition of employment. Washington’s law covers discussion of harassment or assault that occurs at the workplace, any incidents at work-related events, between employees, or between employer and employee that take place outside of the workplace. Any such NDAs are void and unenforceable. It is illegal for a Washington employer to retaliate against an employee for disclosing or discussing sexual harassment or assault.

The Washington law does not prevent settlement agreements of sexual harassment claims from including an NDA. In a separate statute, however, Washington law provides that an NDA cannot prevent discovery in a sexual harassment or sexual assault civil or administrative proceeding. In those cases, the judge may impose an order to protect the identity of the victim, unless the victim consents to public disclosure.

B. Proposed State Legislation

Since the #MeToo movement began, bills limiting the use of NDAs in sexual harassment claims have been introduced in many other state legislatures and the U.S. Congress. Several additional states, including Connecticut, Florida, Hawaii, Iowa, Kansas, Massachusetts, Pennsylvania, Rhode Island, Texas, and West Virginia, are currently considering bills. Most of the proposed legislation echoes the laws discussed above by banning the use of an NDA in an employment

301. Wash. Rev. Code § 49.44.210(1).
302. Id. § 49.44.201(2).
303. Id. § 49.44.210(3).
304. Id. § 49.44.210(4).
305. Id. § 4.24.840(1).
306. Id.
agreement. Some provide exceptions to allow for confidential settlement agreements in sexual harassment cases; others explicitly ban those as well.

C. Other Statutory Options for Limiting NDAs: Sunshine in Litigation Laws

Many states already have “Sunshine in Litigation” statutes designed to encourage transparency in civil litigation. For example, Florida’s Sunshine in Litigation Act prohibits a court from entering an order or judgment for the purpose of concealing information related to a public hazard. The Sunshine in Litigation Act also voids any agreements that have the purpose of concealing information related to the public hazard. Commonly used in products liability cases to protect the public from safety hazards, some commentators suggest that these laws could be applied to the “public hazard” of a serial sexual predator. The Florida statute defines public hazard as “an instrumentality, including but not limited to any ... person ... that has caused and is likely to cause injury.” Although never tested in court, it is a valid legal argument that a serial sexual harasser is a person likely to cause injury. If so determined, a court would be prohibited by the Sunshine in Litigation Act from enforcing an NDA that limits a victim’s ability to talk about the harassment. This approach to limiting enforcement of NDAs would be reliant on a court defining each harasser as a public hazard. The unpredictable and extensive litigation required make this approach unlikely to have an impact on the use of NDAs. Accusers would be forced to come forward with their stories, wait to be sued for breach of their

310. See id.
311. See id.
312. See, e.g., DEL. R. CIV. P. RULE 26 (West 1997); FLA. STAT. ANN. § 69.081 (West 1990); Ind. Trial Procedure 26(c) (2020); N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1 (2018) (applying to “court records” only); N.C. GEN. STAT. ANN. § 132-1.3 (West 1989) (applying to settlements involving public sector defendants only); OR. REV. STAT. ANN. § 17.095 (West 2018) (applying to settlements involving public sector defendants only); WASH. REV. CODE § 4.24.611(2)(1994).
313. FLA. STAT. ANN. § 69.081(3).
314. Id. § 69.081(4).
315. Kaminsky, supra note 149.
316. FLA. STAT. ANN. § 69.081(2).
317. See Prasad, supra note 154, at 2542 (advocating for the expansion of Sunshine Laws to prevent secret settlements in sexual abuse cases).
318. Id. at 2548.
319. Id. at 2544.
NDA, and then use the Sunshine in Litigation Act as a defense.\textsuperscript{320} Alternatively, accusers would have to bring a sexual harassment lawsuit against the wrongdoer, and then have the court rule under the Sunshine in Litigation Act that they can provide evidence in that case without facing damages for the breach of their NDA.\textsuperscript{321} The expense and risk involved would be deterrents to almost all accusers.

\textit{D. Proposed Federal Law: EMPOWER Act}

In June 2018 a bipartisan group of senators introduced the EMPOWER Act: Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting.\textsuperscript{322} The bill makes it illegal for an employer to enter into an employment agreement that contains an NDA that covers workplace harassment and to enforce such a clause.\textsuperscript{323} Like many state laws, there would be an exception to allow an NDA in a settlement agreement.\textsuperscript{324} The EMPOWER Act was reintroduced in Congress in 2019.\textsuperscript{325}

The second part of the EMPOWER Act uses the tax code to modify treatment of payments related to workplace harassment and employment discrimination.\textsuperscript{326} The proposed law would prohibit taxpayers from taking a deduction for payments made pursuant to any judgment, expenses or attorney’s fees, or insurance covering the defense or liability, in litigation related to workplace harassment.\textsuperscript{327} As the current tax code stands, taxpayers may deduct payments made in relation to civil litigation.\textsuperscript{328} The EMPOWER Act would also exclude any settlement payments or awards that a plaintiff in a harassment suit wins from the taxpayer’s gross income.\textsuperscript{329}

\begin{itemize}
\item \textsuperscript{320} Id. at 2526.
\item \textsuperscript{321} See id. at 2518 ("NDAs are deliberately used by perpetrators to evade accountability for claims of sexual harassment and assault.").
\item \textsuperscript{322} EMPOWER Act, S.2994 115th Cong. (2018).
\item \textsuperscript{323} Id. § 4(a)(1).
\item \textsuperscript{324} Id. § 4(b)(1).
\item \textsuperscript{325} S.574, 116th Congress (2019-2020); H.R. Res. 1521, 116th Congress (2019-2020).
\item \textsuperscript{326} Id.
\item \textsuperscript{327} Id.
\item \textsuperscript{328} Anna Luczkow, \textit{Is your Lawsuit Tax Deductible? How to know when it is, and isn’t. deductible}, BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC (Nov. 8, 2019), https://www.jdsupra.com/legalnews/is-your-lawsuit-tax-deductible-how-to-7661/.
\item \textsuperscript{329} Ending the Monopoly of Power Over Workplace harassment through Education and Reporting Act, S.574, 116th Cong. (2019-2020); H.R. Res. 1521, 116th Congress (2019-2020).
\end{itemize}
In addition, the EMPOWER Act would ask the EEOC to set up a confidential tip-line for employees to report workplace harassment.\textsuperscript{330} It would also require that public companies disclose the number of settlements, judgments, or awards entered against the company relating to a harassment claim, and the amount paid as a result of those settlements or judgments.\textsuperscript{331} The law would also require disclosure of whether there have been three or more settlements or judgments entered related to a particular employee, without identifying that person by name.\textsuperscript{332}

The EMPOWER Act was referred to the judiciary and finance committees in the spring of 2019.\textsuperscript{333} No further action has been taken.

V. PROHIBITION OF NDAS THAT PREVENT REPORTING OF FINANCIAL VIOLATIONS

To evaluate the best approach for limiting NDAs in sexual harassment cases, it is helpful to look outside of the context of sexual harassment and misconduct, at the use of NDAs in cases of violations of securities laws. Just as the #MeToo movement revealed years of hidden sexual harassment, the financial crisis of 2008 revealed wrongdoing by banks and other financial institutions.\textsuperscript{334} The legislative response to the financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act, set out a policy goal of incentivizing whistleblowers within financial institutions.\textsuperscript{335} As the SEC explains:

Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal of the Securities and Exchange Commission. Through their knowledge of the circumstances and individuals involved, whistleblowers can help the Commission identify possible fraud and other violations much earlier than might otherwise have been possible. That allows the Commission to minimize the harm to investors, better preserve the integrity of the United States’ capital markets, and more

\textsuperscript{330} EMPOWER Act, S. 2994, 115th Cong. § 5 (2018).
\textsuperscript{331} Id. § 6.
\textsuperscript{332} Id. § 5.
\textsuperscript{333} EMPOWER Act, 166th Cong., Bill Tracking H.R. 1521 (2019).
swiftly hold accountable those responsible for unlawful conduct.\textsuperscript{336}

Acknowledging the powerful role that whistleblowers play in identifying fraud early, hence limiting harm, Congress created the Office of the Whistleblower.\textsuperscript{337} This Office has the authority to provide monetary awards to any whistleblower who provides original information that relates to possible violations of federal securities laws.\textsuperscript{338} If the SEC recovers a financial award or settlement in excess of $1 million as a result of the information, the whistleblower is entitled to payment of a percentage of the government recovery, ranging from 10-30 percent.\textsuperscript{339} Emphasizing the important role that whistleblowers play in preventing illegal conduct, Dodd-Frank regulations include protections for the whistleblower beyond these payments, including protection from retaliation and a ban on employer actions that impede whistle-blowing.\textsuperscript{340}

A. Dodd-Frank’s Ban on NDAs

Securities and Exchange Commission ("SEC") Rule 21F-17(a) prohibits "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications."\textsuperscript{341} This rule was adopted in 2011 as part of the SEC’s efforts to establish the whistleblower program.\textsuperscript{342} It was not until 2015, however, that the SEC began enforcing Rule 21F-17 through a series of cases against public companies that had provisions in employee separation agreements that prohibited or chilled employee communications with the SEC staff about possible violations of securities law.\textsuperscript{343} In none of these cases did the SEC find that an employee tried to report wrongdoing and was retaliated against or that any

\textsuperscript{337} Id.
\textsuperscript{338} 17 C.F.R. § 240.21F-2(a) (2012).
\textsuperscript{339} Id. § 240.21F-5(b).
\textsuperscript{341} 17 C.F.R. § 240.21F-17(a).
\textsuperscript{342} White, supra note 30, at 1, 8 n.2 ("The whistleblower program was established pursuant to Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6, which was added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 922, 111th Cong., 2d sess. (July 21, 2010).").
\textsuperscript{343} Id. at 1.
employees were prevented from communicating with the SEC. The mere act of asking employees to sign these NDAs was enough for SEC enforcement.

The SEC's action against Merrill Lynch and its parent company Bank of America in 2016 is an example of such an enforcement action. Merrill Lynch entered into severance agreements with several employees that banned employees from disclosing confidential information or trade secrets "to any person or entity outside these entities except pursuant to formal legal process or unless the former employee first obtained the written approval of an authorized [Merrill Lynch] representative." The NDAs in the severance agreements essentially did not permit voluntary disclosure of confidential information to government agencies or courts. Given a clear violation of Rule 21F-17, Merrill Lynch admitted wrongdoing, paid a $415 million fine and revised its confidentiality agreements, policies, and procedures. Merrill Lynch and Bank of America also implemented a mandatory annual whistleblower-training program for all employees and agreed to "annually provide employees with a summary of their rights and protections under the SEC’s Whistleblower Program."

As evidenced by the Merrill Lynch example, the NDAs at issue in most SEC enforcement actions range from a direct prohibition of speaking with the SEC or other government agencies to limits on communications with the government (for example requiring a court order to allow the employee to speak). Many of the NDAs required employees to notify the company before speaking to the government. In the most extreme cases the agreements required that the employee waive the right to receive a monetary award for reporting to a government agency. The SEC found all of these NDAs to be in violation of Rule 21F-17(a), while

344. White, supra note 30, at 1-2.
345. Id. at 2.
347. Id. at 19.
348. Id.
349. Id. at 20, 22.
351. White, supra note 30, at 7.
352. Id.
explicitly acknowledging that there was no evidence of any employee being stopped from communicating with the government.  

Thus far, all of the companies charged with violations of Rule 21F-17(a) have settled with the SEC. In addition to agreeing to eliminate the violative NDAs from all employee agreements, many of the settlements required that the companies include an affirmative statement of the employee’s right to be a whistleblower in any separation agreement. This may be likely a response to cases such as that of SandRidge Energy, which settled charges of a violation of Rule 21F-17(a) in December 2016. SandRidge used a form separation agreement from August 2011 through April 2015 that prohibited a former employee from voluntarily cooperating with a government agency in any complaint or investigation of the company. The agreement included an NDA that prohibited disclosure of confidential information to any other person or organization, including any government agency. After Rule 21F-17(a) was adopted, several employees requested that the severance agreements be modified. SandRidge modified the language to comply with Rule 21F-17(a) only for those employees that specifically asked, but continued to use the problematic language with all other employees. In other words, if an employee was unaware of their right to be a whistleblower under Rule 21F, SandRidge took advantage and asked them to sign the NDA. The SandRidge case exemplifies one of the challenges of legislation prohibiting the use of NDAs: unless an employee is aware that the NDA is illegal, the employee’s willingness to report wrongdoing will be chilled by the mere fact of being asked to sign the NDA. If the public policy goal is to encourage employees to report wrongdoing by their employers, as it is in Dodd-Frank’s whistleblower program, any NDA law must require affirmative disclosure of the employee’s right to report wrongdoing.

353. White, supra note 30, at 1-2.
354. Id. at 1.
355. Id. at 7.
358. Id. ¶ 7.
359. Id. ¶ 9.
360. Id. ¶¶ 9-12.
361. Id.
362. See id.
VI. RECOMMENDATIONS

Although SEC Rule 21F offers a useful example of NDA regulation, NDAs relating to sexual harassment require a different approach because of concerns for accuser privacy and leverage in negotiation. Just as the SEC has emphasized the importance of whistleblowers in stopping current and future illegal activity, the ability of sexual harassment accusers to speak out is essential to preventing future workplace sexual harassment. The #MeToo movement has revealed too many serial harassers in workplaces across many industries. Yet, speaking out about sexual harassment is different from blowing the whistle on securities violations by your employer. Many sexual harassment accusers prefer that their stories remain confidential because of the social stigma attached to being a victim of harassment. Attorneys of accusers have noted that their clients would not have come forward without the promise of confidentiality. Many accusers never work in the same industry again. The #MeToo movement has encouraged victims of harassment to speak out, but the implications of doing so are still negative. A total ban on the use of NDAs that cover sexual harassment claims, akin to the ban on NDAs for securities regulation violations in Rule 21F-17(a) of Dodd-Frank, might reduce workplace harassment by repeat offenders by making every claim public. But given our current cultural norms around sexual harassment and accusers' interests, a more nuanced approach is required for NDAs that cover sexual harassment claims.

The best approach to balancing the need to prevent future wrongdoing with respect for accusers is three-pronged: 1) limits (but not a total ban) on the use of NDAs; 2) notification to all employees of their rights under the NDA laws; and 3) public reporting requirements for employers. Many of the new or proposed NDA laws require one or two

363. See Farrow, supra note 71.
364. See id. (stating that “victims may actually prefer such [NDA] agreements” because “some people don’t want their parents, their friends, members of their community to know”).
365. Id.
367. Ksenia Keplinger et al., Women at work: Changes in sexual harassment between September 2016 and September 2018, PLOS ONE (July 17, 2019), https://journals.plos.org/plosone/article/related?id=10.1371/journal.pone.0218313. A study comparing data collected from women in 2016 to women in 2018 did find decreased levels of stigma around being a victim of sexual harassment. Id. Women reported less self-blame and less shame. Id. The study did show increased occurrences of gender harassment when comparing 2016 to 2018. Id. Authors suggest this increase is due to a rise in hostility toward women as part of a backlash to #MeToo. Id.
of these aspects; none do all three. But without each, the others will be ineffective.

Before more explanation, a word on the best source of regulation. As discussed above, reliance on the courts alone to limit the use of NDAs is unrealistic.\textsuperscript{369} Most accusers never file lawsuits, and having NDAs in place has a chilling effect regardless of the enforceability of those contracts.\textsuperscript{370} Thus, a legislative approach would be more effective. Although contract law is a matter of state law, sexual harassment is prohibited under federal law.\textsuperscript{371} As Justice Ginsburg has noted, "[t]he laws are there, the laws are in place."\textsuperscript{372} If the goal of limiting NDAs is to prevent serial harassment, and not a critique of contract law more generally, then it makes most sense for the legislation to be part of the federal prohibition on sexual harassment under Title VII. Also, given the EEOC’s current role in enforcing regulations to make employees aware of their rights under Title VII (and other employment laws), that agency would be well situated to implement the notification prong of the recommended policy.\textsuperscript{373} Accordingly, this article refers to Congress below.

\section{Limits on the Use of NDAs in Sexual Harassment Claims}

Many states have recognized the use of NDAs in employment agreements that prohibit disclosure of sexual harassment claims is bad public policy.\textsuperscript{374} These blanket NDAs, signed upon entry into employment, allow predators to repeatedly victimize employees with little consequence.\textsuperscript{375} These expansive contracts prevent employees from filing litigation, administrative complaints, internal complaints, or speaking to the press, during employment or after.\textsuperscript{376} They also prohibit disclosure of wrongdoing by observers – those third parties who might otherwise act as

\begin{footnotesize}
\begin{itemize}
\item[368.] See OR. REV. STAT. § 659A.375 (2020) (prohibiting NDAs that prevent the discussion of discrimination or assault that occurred at work or between employees); CAL. CODE CIV. PROC. § 1001 (2019) (prohibiting NDAs that limit ability to participate in civil or administrative claim); VT. STAT. ANN. tit. 21 § 495h(g)(1) (2019) (requiring that settlement agreements clearly state that such agreements do not prevent party from making a complaint with the government).
\item[369.] See supra Section III.
\item[370.] See Farrow, supra note 71.
\item[371.] ROSEN, supra note 143.
\item[372.] See id. at 191 ("We have the legal reforms; we have had them for a long time. Title VII.").
\item[373.] Id.
\item[374.] Id.
\item[375.] Lobel, supra note 221.
\item[376.] Id.
\end{itemize}
\end{footnotesize}
whistleblowers. Following the SEC’s lead on protecting and incentivizing whistleblowers, Congress should ban NDAs that prohibit disclosure of facts or circumstances related to sexual harassment, sexual assault, rape, or discrimination, in any employment agreement. States such as New Jersey, Maryland, and Arizona have approached this issue by prohibiting the enforcement of such blanket NDAs. Although this prohibition is a start, mere entrance into NDAs chill speech, as acknowledged by the SEC’s approach. It is unlikely that an employee would be willing to go to court to prevent enforcement of NDA in order to disclose wrongdoing.

A better approach would be similar to that of Oregon. Oregon’s new law prohibits entry into an NDA that prevents the discussion of discrimination or sexual assault that occurred at work or between employees. Should an employer ask an employee to enter such an agreement, the law provides that the employee may seek damages. Oregon’s approach is similar to the SEC’s enforcement of Rule 21F-7(a) where the employer never tried to enforce the NDA against the employee. Banning the use of NDAs in employment agreements that cover sexual harassment, sexual assault, rape or discrimination, is required to avoid chilling the speech of accusers.

Relatedly, the media coverage of the Weinstein Company NDAs revealed a particularly invidious form of NDA: an employment agreement that prohibited disclosure of any information “concerning the personal, social or business activities” of Weinstein and his brother as co-Chairmen. NDAs play an important role in protecting business’s trade secrets and confidential information, but prohibiting disclosure of executives’ personal or social activities is merely a way to silence accusers. Any legislation prohibiting the use of NDAs in employment agreements must also prohibit agreements silencing information unrelated to business interests of the employer.

Many state laws prohibit the use of NDAs that limit disclosure of formal complaints and lawsuits. For example, in Arizona an NDA that

377. Id.
380. Id.
381. Id.
382. See id.
383. See Farrow, supra note 71.
prohibits participation in a criminal proceeding is illegal. California’s law is broader, prohibiting NDAs that limit your ability to participate in a civil or administrative claim. But many accusers never reach the courthouse or administrative hearing; they make an internal complaint with their employer first. A better approach is seen in Vermont and Washington, which prohibit agreements that limit “the discussion of” sexual harassment or sexual assault. The broader prohibition protects accusers’ rights to complain internally, talk to friends, family, medical professionals, and to report the wrongdoing to the media. One lesson of the #MeToo movement has been the powerful role of the media in revealing the extent of workplace harassment.

B. Protection of Accusers’ Rights to Confidential Settlements

Although they hide illegal and unethical behavior, NDAs may help accusers in sexual harassment cases. First, privacy from an NDA allows accusers to avoid the stigma of discussing a sexual harassment incident. Claims of sexual harassment have different societal implications for accusers than those faced by other whistleblowers. Although it is a difficult choice to be a whistleblower in any context, the decision to report sexual harassment as a victim or a bystander is particularly fraught. Although it is unfair, these complaints often harm an accuser’s reputation as everything in the victim’s background becomes fair play. As attorney Lisa Bloom has noted, the scrutiny involved in a sexual harassment claim can include “public shaming and difficulty in gaining new employment.” Although many suggest that an NDA may reduce the difficulty of finding a new job, there are examples of women who

386. CAL. CODE. CIV. PROC. § 1001 (2019).
388. VT. STAT. ANN. tit. 21, § 495h(g)(1)(b) (2019); WASH. REV. CODE § 49.44 (2018).
389. VT. STAT. ANN. tit. 21, § 495h(g)(1)(b) (2019); WASH. REV. CODE § 49.44 (2018).
390. VT. STAT. ANN. tit. 21, § 495h(g)(1)(b) (2019); WASH. REV. CODE § 49.44 (2018).
392. See Redden, supra note 366.
393. Id.
394. See Perman, supra note 56.
395. Id.
signed NDAs but have still been “black-listed” due to whisper campaigns.\textsuperscript{397} Rudi Bakhtiar was a star of CNN Headline News before she had a successful career at Fox News.\textsuperscript{398} Then she accused Fox News anchor Brian of sexual harassment, was immediately fired and has never returned to television.\textsuperscript{399} Juliet Huddy, another Fox News anchor, accused former Fox News anchor Bill O’Reilly of sexual harassment that began in 2011.\textsuperscript{400} She was retaliated against after complaining, as she was demoted to a local news show.\textsuperscript{401} Huddy reportedly received a settlement from 21\textsuperscript{st} Century Fox as part of the company’s internal investigation of Gretchen Carlson’s complaint.\textsuperscript{402} In the settlement, “she agreed not to ‘disparage, malign or defame’ the parties; the company, on its behalf and on the behalf of Mr. O’Reilly and Mr. Abernethy, agreed not to ‘disparage, malign or defame’ Ms. Huddy.”\textsuperscript{403} Huddy’s NDA includes a liquidated damages clause that imposes a penalty of $500,000 per infringement.\textsuperscript{404} Huddy has not worked in television again, although she hosts a radio show.\textsuperscript{405} It is difficult to explain your job departure if you are prohibited from explaining the circumstances thereof. The most important benefit of an NDA may be that the employer’s primary incentive to pay a monetary settlement is confidentiality.\textsuperscript{406} Thus silence is often the accuser’s greatest bargaining chip in settlement negotiations.

Given the unique circumstances surrounding claims of sexual harassment, a blanket ban on all NDAs similar to that of SEC Rule 21F-7(a) could be harmful to accusers. An exception to the ban on use of NDAs should exist for settlement agreements, but only at the request of the victim. Although the EMPOWER Act includes an exception for the use of NDAs in settlement agreements, the NDA can be invoked by either

397. See id.
399. Id.; see also Megyn Kelly Presents: A Response to “Bombshell” — Full Discussion, YOUTUBE (Jan. 9, 2020), https://www.youtube.com/watch?v=MmSsz7HqkJ9s.
400. See Steel & Schmidt, supra note 197.
402. Id.
403. Id.
404. See id.
405. Megyn Kelly Presents: A Response to “Bombshell” — Full Discussion, supra note 399.
party.\textsuperscript{407} This would allow the employer, the party with more negotiating power in most cases, to pressure the employee to enter into the NDA or lose the settlement payment. A better approach would be akin to that of Oregon, where NDAs are allowed in settlement or severance agreements under two circumstances: 1) the employee claiming discrimination or assault requests the NDA and has seven days to revoke the agreement; or 2) the employee is the individual who engaged in the unlawful discrimination or assault according to the employer's good faith determination.\textsuperscript{408} Similarly, New York's law allows an NDA in a severance agreement only at the request of the victim.\textsuperscript{409} Like Oregon, to protect the victim from duress during contract negotiation as we saw in the negotiation between Perkins and Weinstein, the New York law requires a 21-day period for the claimant to consider the NDA and seven days to revoke the agreement.\textsuperscript{410} Given the power dynamics at play in any sexual harassment claim, protections against duress are essential.

To summarize, the most effective legislation would prohibit all employment agreement NDAs related to incidents of sexual harassment, but allow an exception for NDAs entered in settlement agreements at the request of the accuser, with time for consideration and revocation.\textsuperscript{411}

\textit{C. Notice for Employees}

Limits on the use of NDAs in sexual harassment cases are meaningless if employees are unaware of the law. If an employee does not know that an NDA would be unenforceable or illegal, the employer can chill the employee's speech by merely including the NDA in an employment agreement or offering it as a term of a settlement or severance. Employees will hesitate to spend the money or time to litigate the enforceability of the NDA. Where the NDAs would have been unenforceable under existing law – in the cases of testimony in court or reporting discrimination claims to the government – we have seen employees are unwilling to speak out when they have signed an NDA.\textsuperscript{412}

\textsuperscript{407} EMPOWER Act, S.2994, 115th Congress (2018).
\textsuperscript{408} OR. REV. STAT. § 659A (2020).
\textsuperscript{409} N.Y. GEN. OBLIG. LAW § 5-336 (Consol. 2018).
\textsuperscript{410} Id.
\textsuperscript{411} See generally id. (stating that New York law only allows NDAs at the request of the victim and requires a twenty-one-day period for the claimant to consider the NDA and seven days to revoke the agreement).
\textsuperscript{412} Johnson, supra note 378.
This chilling effect is particularly prominent where the NDA includes a liquidated damages provision.413

Some states, recognizing the need for employees to be aware of their rights, have required that any settlement or severance agreement explain any statutory limits on the enforceability of the NDA.414 For example, in Vermont, settlement agreements must explicitly state that the agreement does not prevent the claimant from lodging a complaint with the government, testifying in an investigation of harassment, or complying with a discovery request in a sexual harassment case.415 Echoing this policy are the settlements entered with the SEC in which companies accused of violating Rule 21F have agreed to include an affirmative statement of the right to be a whistleblower in all severance agreements.416 To the extent that laws in New York and Oregon allow the accuser time to consider the NDA before signing the agreement, and seven days to revoke after signing, there is at least an implicit requirement to make the employee aware of their rights under the statute.417 But waiting until the employee is faced with signing the agreement to obtain the settlement payment is insufficient to avoid chilling speech or duress. Although in New York an employer must distribute a sexual harassment policy and complaint form to employees, the state’s “model policy” does not reference the NDA law.418 Thus, if employers were to adapt the model policy, it is possible their employees would be unaware of their rights under the NDA law.419

Any law that limits the use of NDAs must require notice to all employees of their rights. For an example of how this works, consider Title VII.420 It requires an employer to post a notice describing the federal

413. See generally Romo, supra note 223 (explaining that where a victim is required to pay up to $1 million for a breach, it is safe to say that such a provision would keep the victim from speaking out as such sums are substantial).

414. See generally VT. STAT. ANN. tit. 21, § 495h(g)(1)(2018) (explaining requirements for settlement agreements).

415. Id.

416. White, supra note 30, at 7.


419. Id.

laws prohibiting discrimination.\footnote{421} This notice, called the “Equal Employment Opportunity is the Law” poster, is prepared by the EEOC and must be posted in a conspicuous location in the workplace.\footnote{422} As a result of these posters, as well as decades of cultural change, it may be presumed that a growing number of Americans are aware of their rights with regard to anti-discrimination laws.\footnote{423} Given the essential role of whistleblowers in preventing future sexual harassment, all statutes limiting the use of NDAs in these cases should require that employees be notified of their rights – before they become victims. As is the case for failure to post the “Equal Employment Opportunity is the Law” poster,\footnote{424} failure to post information about a whistleblower’s rights should result in a civil fine.\footnote{425}

\textbf{D. Public Reporting by Employer of Sexual Harassment Claims}

Large employers – those subject to Title VII – should be required to report annually, without any names, the number of sexual harassment complaints received. It is an abomination that the Weinstein Company knew about dozens of claims of sexual harassment and never had to report to any government agency.\footnote{426} It is equally offensive that Wynn Resorts, already highly regulated as a casino, failed to report multiple rape allegations by Mr. Wynn.\footnote{427} Increased transparency will not only encourage accusers to access the legal system, it will also allow market forces to encourage companies to address serial harassers. A negative report of excessive numbers of harassment claims could impact share price for public companies\footnote{428} and employee job satisfaction and retention

\footnote{421} Day, supra note 420.  
\footnote{422} Id.  
\footnote{423} Id.  
\footnote{424} Id. (“The Equal Employment Opportunity Commission (EEOC) has issued a final rule raising the penalty from $210 to $525 for failure to post the ‘Equal Employment Opportunity is the law’ poster.”).  
\footnote{425} Id.  
\footnote{426} See supra Section II.  
\footnote{427} See supra Section II.  
\footnote{428} Elizabeth Winkler, #MeToo Is Not a Buying Opportunity for Investors, WALL STREET J. (July 12, 2018), https://www.wsj.com/articles/metoo-is-not-a-buying-opportunity-for-investors-1531387801 (noting that it appears, so far, that share prices are only impacted in the short term by sexual harassment accusations against leadership); see also Samantha Cooney, Companies Are Losing Millions After #MeToo Allegations Like Kate Upton’s Claim Against Guess’ Paul Marciano, TIME (Feb. 2, 2018), https://time.com/5130340/kate-upton-guess-stock-price/.
for all companies. These market pressures may incentivize boards to prioritize prevention of harassment.

The EMPOWER Act incorporates the need for reporting by requiring that public companies disclose the number of settlements, judgments or awards entered against the company, the amount paid as a result of those settlements or judgments, relating to a harassment claim. The law would also require disclosure of whether there have been three or more settlements or judgments entered related to a particular employee, without identifying that person by name. Requiring these disclosures is not about shaming or denying due process to the accused. Disclosure of the aggregate numbers of harassment claims in a company would alert the EEOC to concerns about specific companies, allowing for investigation.

CONCLUSION

The #MeToo movement created a wave of legislation intended to bring sexual harassment out of the shadows. The use of NDAs, once a simple contract used to protect trade secrets, to silence accusers has enabled serial harassers and their enablers to carry on without repercussion for decades. Without increased transparency, serial harassers will be allowed to continue their unethical, illegal, and often criminal, behavior. The worst of this continued harassment is the harm caused to the accusers. But continued harassment creates collateral damage for all company stakeholders through decreased employee morale, loss of

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429. See Heather Antecol et al., Gender-biased behavior at work: Exploring the relationship between sexual harassment and sex discrimination, 30 J. ECON. PSYCHOL. 782, 783 (2009) (showing that sexual harassment decreases job satisfaction); Rebecca S. Merkin & Muhammad Kamal Shah, The impact of sexual harassment on job satisfaction, turnover intentions, and absenteeism: findings from Pakistan compared to the United States, 3 SPRINGERPLUS 215 (2014) (finding that sexual harassment is likely to increase turnover by reducing job satisfaction).

430. Id. at 784 (“[P]revious research concludes that workers’ perceptions of harassment and discrimination are closely related to their labor market behavior.”).


432. Id.

433. See id. (“[I]nformation obtained can be used only for the purpose of investigation related to the submitted complaint or complaints, in full compliance with applicable due process requirements.”).

434. See ME TOO, supra note 54.

435. See supra Section I.
employees, legal expenses, and when finally revealed, loss to the shareholders.

The legislative efforts to address the use of NDAs in sexual harassment claims are encouraging. But, a review of that legislation and comparison to other frameworks of whistleblower protection, like that of the SEC, demonstrates that no current or proposed law does enough to address the problem. Although limits on NDAs are needed, there are strong ethical and policy reasons for respecting the accuser’s desire for privacy. To balance the competing priorities, the best approach would be federal legislation that: 1) limits (but not a total ban on) the use of NDAs related to sexual harassment; 2) requires notification to all employees of their rights under the NDA laws; and 3) imposes public reporting requirements for employers. This balanced approach will stop companies from using contract law as a silencing tool in sexual harassment cases and empower accusers through knowledge of their rights.

436. See Winkler, supra note 428.
437. See Cooney, supra note 428. Even if the share prices only drop in the short term, shareholders may be unwilling to spend company funds on large settlements to enable the company executives to harass unfettered. Id. In the end, we are all replaceable. Id.
438. See supra Section IV.
439. See supra Section IV.
440. See Harris, supra note 27.
441. See supra Section VI.
442. See supra Section VI.