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Sexual Harassment

INSIGHT: The Societal Reckoning Caused by the #MeToo Movement Must Now Translate Into Legal Reform

BY DEBRA S. KATZ AND MATTHEW LAGARDE

It has been 12 years since Tarana Burke, the social activist and community organizer, first empowered women by using the phrase ''Me Too'' to build empathy towards and community among survivors of sexual abuse. Over seven months have passed since the #MeToo movement exploded into the mainstream after actress Alyssa Milano used the hashtag on Twitter to encourage women to come forward with their own stories in the aftermath of the Harvey Weinstein allegations. Since then, reforms aimed at addressing pervasive sexual harassment have begun to take shape in a number of industries, from entertainment to politics. But companies across all industries should position themselves on the right side of history and proactively revoke mandatory arbitration agreements that restrict the ability of employees to pursue claims of sexual harassment, and indeed all forms of illegal workplace harassment and discrimination, in the courts.

The practice of restricting employment claims through mandatory arbitration agreements has increased dramatically over the past two decades. According to a September 2017 paper by Alexander Colvin at the Economic Policy Institute (EPI), in 1995, just 7.6 percent of companies subjected employees to mandatory arbitration agreements. By 2003, a study found the number had risen to 14 percent. As of the summer of 2017, the EPI found that over 56 percent of private-sector nonunion workers were subject to mandatory arbitration agreements, a quadrupling of the usage of such agreements in under 15 years. As Dr. Colvin explained, ''this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.'' With women comprising approximately 47 percent of the workforce, this means that over 28 million American women are disempowered from using the courts to pursue claims of workplace sexual harassment.

In June 2016, the U.S. Equal Employment Opportunity Commission (EEOC) released the Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, a ''must-read'' for anyone interested in understanding the causes and effects of sexual harassment and what can be done better to prevent it. The task force found that depending on how the question was framed, between 25 and 85 percent of women reported having experienced workplace sexual harassment. In short, when asked if they had experienced ''sexual harassment'' in the workplace, without defining the term, roughly one in four women reported that they had. But when women were asked whether they had experienced ''one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion,'' the incidence rate rose dramatically. Whatever the precise figure, the EEOC study confirms that tens of millions of American women have experienced workplace

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sexual harassment. Despite that, the EEOC consistently reports receiving fewer than 13,000 charges per year alleging sex-based workplace harassment.

In considering this data, one could assume that the millions of American women that experience workplace sexual harassment but decline to file an EEOC charge are pursuing their claims within confidential arbitral tribunals. But the reality is that a sizable percentage are likely declining to pursue such claims altogether because of structural barriers to achieving a just outcome created by forced arbitration. One of the primary ways in which arbitration advantages employers over workers is secrecy. Because arbitral proceedings are confidential, potential witnesses who might otherwise hear about an employee's allegations and testify on her behalf never learn of the claim. Future victims of a repeat offender have no way (other than through rumor) to learn of past allegations against the accused.

As the decades of allegations against Roger Ailes and Bill O'Reilly made clear, employers use mandatory arbitration agreements to muzzle credible accusations of sexual harassment against even the most high-profile individuals at an organization. It was not until Gretchen Carlson made the gutsy decision to file suit against Ailes in state court (rather than file a claim against Fox through arbitration) that the public learned of his long history of sexual misconduct. The publication of these misdeeds led to real consequences: Ailes resigned from Fox within weeks and the network fired O'Reilly nine months later. Similarly, Harvey Weinstein, Charlie Rose, and Matt Lauer faced relatively swift and meaningful consequences in the wake of the public airing of allegations against them. But in these and other cases, the perpetrators were empowered to continue their predation for inexcusably long periods by using mandatory arbitration agreements and other mechanisms to keep their misdeeds confidential.

Another significant advantage for employers in arbitration is the ''repeat-player advantage.'' In a 2015 paper by Dr. Colvin and Mark Gough, the authors reported that a study of cases administered over an 11-year period by the American Arbitration Association (AAA) showed that an employer becomes far more successful in cases with an arbitrator the more frequently the employer appears before the arbitrator. Specifically, the study found that an employer who appeared before the same arbitrator 25 times or more was approximately four times as likely to prevail as an employer appearing before an arbitrator for the first time.

Employers have a leg up when facing arbitration claims as a result of the background of arbitrators: according to a 2015 EPI paper authored by Katherine Stone and Dr. Colvin, roughly 59 percent of employment arbitrators worked at some point in their career as legal counsel representing employers, whereas just 36 percent had at some point represented employees or unions.

These and other advantages translate to significantly worse outcomes for employees in arbitration cases as compared to employees who bring their claims in court. Stone and Colvin found that employees whose claims were subject to arbitration prevailed roughly half as often as those that brought their claims in federal courts and about one-third as often as in state courts. And those who do win in arbitration receive far less compensation than successful court litigants: the median award for successful arbitration claimants is just 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts. Combining these figures, the authors found that ''the average outcome in mandatory arbitration is only 16 percent of that in the federal courts and 7 percent of that in state courts.'' Likely because of this massive disparity in outcomes, Stone and Colvin's research discovered that attorneys were about half as likely to agree to represent an employee whose claim is subject to a mandatory arbitration agreement.

Finally, the epidemic of retaliation against those who do come forward creates strong incentives not to come forward with claims of workplace sexual harassment. The EEOC task force cited studies showing that as many as 75 percent of employees who reported workplace mistreatment experienced some form of retaliation. As Professor Mindy E. Bergman told the EEOC in her written testimony, ''It is actually *unreasonable* for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies and created further damage to people who had already been harassed.''

As a result of all of these factors disadvantaging women who pursue claims of workplace sexual harassment via mandatory arbitration proceedings, it is no surprise to learn, as the AAA reported to the Wall Street Journal in January 2018, that it had only received about 100 sexual harassment claims in 2016. Rather than facing odds so thoroughly stacked against them, many women understandably choose to just give up.

A number of states have introduced legislation or executive actions aimed at prohibiting the enforcement of mandatory arbitration agreements against claims of workplace sexual harassment. In March 2018, Washington state became the first state to enact legislation barring mandatory arbitration of claims involving sexual harassment or sexual assault. Nationally, the Arbitration Fairness Act introduced by Sen. Richard Blumenthal (D-Conn.) and Rep. Hank Johnson (D-Ga.) would address this problem. In December 2017, Sens. Kirsten Gillibrand (D-N.Y.) and Lindsey Graham (R-S.C.) announced a much more narrowly tailored bill entitled the *Ending Forced Arbitration of Sexual Harassment Act of 2017*, which proposed nullifying mandatory arbitration agreements that prohibited employees alleging sexual harassment from pursuing their claims in court. President Trump, however, has moved in the opposite direction: in March 2017, President Trump signed a resolution repealing the Fair Pay and Safe Workplaces Executive Order of 2014, which prohibited federal contractors from enforcing mandatory arbitration agreements in workplace sexual harassment claims. Moreover, the past several years have seen several Supreme Court decisions approving of the expanded use of mandatory arbitration agreements, including its May 21, 2018, decision holding that the National Labor Relations Act did not bar employers from using such agreements to prohibit employees from bringing collective actions against their employer.

The National Employment Lawyers Association (NELA), of which we are active members, has long advocated for the passage of the Arbitration Fairness Act so that employees can speak up and be heard in an open courtroom when they face sexual harassment on the job. According to Terry O'Neill, Executive Director of NELA, ''The #MeToo movement—and the explosion of stories that have come into the light of day—have

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made it crystal clear that forced arbitration always results in secrecy and claim suppression. We all know this is wrong. It is a terrible reflection on the business world that increasingly it seeks to hide pervasive, damaging mistreatment of employees, rather than address these issues openly and transparently *before* dozens or hundreds of workers are harmed.'' O'Neill emphasized that ''the #MeToo movement should tell us with certainty that the time to legislate an end to forced arbitration in employment is now.''

Unfortunately, given the political composition of Congress, there are no indications that the legislation referenced above is likely to become law in the near future. It is therefore incumbent on corporations to do the right thing and to end the use of such agreements voluntarily. Some large employers have already begun to do so. For example, in December 2017, Microsoft announced that it was eliminating the use of mandatory arbitration agreements for employees who make sexual harassment claims. More recently, Uber and Lyft announced that they will no longer require victims of sexual assault to submit to mandatory arbitration. Uber went a step further and lifted its mandatory arbitration requirement for those alleging sexual harassment, as well.

Several large law firms took similar steps in March 2018: Munger Tolles & Olson LLP, Orrick Herrington & Sutcliffe LLP, and Skadden Arps Slate Meagher & Flom LLP all announced in March that they would end the use of mandatory arbitration agreements for employees alleging workplace sexual harassment. Law students have joined the fight as well, with students at some of the country's top law schools successfully pressuring those schools to require that firms recruiting on campus disclose whether they will subject summer associates to mandatory arbitration agreements.

Allowing victims of sexual harassment access to the courts is not only a moral choice, but it is also a smart business decision. Studies show that consumer activism is at an all-time high, with over 60 percent of consumers having taken some form of positive or negative action in response to a company or brand's actions. Moreover, as reported by the EEOC task force, workplace harassment and conflict results in decreased morale and productivity and increased turnover. Companies who fail to alter their practices in response to the #MeToo movement do so at their own peril. It is clear that the moment has arrived for companies to abandon the use of mandatory arbitration agreements that silence women who have claims of sexual harassment and assault and allow harassers to remain in place. The status quo is bad for the victims of harassment, bad for the morale and productivity of workers, and ultimately bad for the Company's bottom line.

Debra S. Katz is a founding partner at Katz, Marshall & Banks, and specializes in sexual harassment, discrimination and whistleblower matters. Matthew LaGarde is an associate at the firm and practices in these areas.

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