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Arielle Inveen-Lai*

I. INTRODUCTION

The Federal Arbitration Act (FAA) and the United States Supreme Court's interpretation of the FAA's authority have made it difficult for states to enact laws prohibiting the use of mandatory arbitration in employment disputes about sexual harassment or sex discrimination.[1] The FAA strongly favors enforcement of arbitration agreements,[2] and the federal statute "is not easily displaced by state law."[3] However, states should still endeavor to overcome the FAA because "any change in employment laws regarding mandatory arbitration will likely only be resolved in state legislat[ure]s."[4] The likelihood of federal preemption merely means that Washington State will have to be creative in its efforts to rid itself of forced arbitration of sexual harassment claims.

The United States Supreme Court made clear in *Epic Systems Corp. v. Lewis* that arbitration agreements will be found to be enforceable, and the Supreme Court is, at least for the time being, significantly pro-arbitration.[5]

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1 *See* Epic Systems Corp. v. Lewis, 138 U.S. 1612 (2018).

2 Marsha Levinson, *Mandatory Arbitration: How the Current System Perpetuates Sexual Harassment Cultures in the Workplace*, 59 SANTA CLARA L. REV. 485, 497 (2019).

3 Latif v. Morgan Stanley & Co. LLC, No. 18 Civ. 11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019).

4 Jonathan Ence, *I Like You when You Are Silent: The Future of NDAS and Mandatory Arbitration in the Era of #MeToo*, 2019 J. DISP. RESOL. 165, 179 (2019).

5 *Epic Systems Corp.*, 138 U.S. at 1612 (2018); Erin M. Morrissey, *#MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TUL. L. REV. 177, 196 (2018).

Section 2 of the FAA declares that arbitration awards are "valid, irrevocable, and enforceable";[6] therefore, Washington State's focus should be on efforts to first prevent the implementation of mandatory arbitration agreements in employment contracts. In addition, Washington should explore other ways of changing the culture that breeds forced arbitration and nondisclosure agreements so that Congress will follow by amending the FAA.

To that end, this article will first consider the history of arbitration and how mandatory arbitration clauses became increasingly present in employment contracts. Second, it will detail the harm mandatory arbitration causes to employees and set out the current state of the law. Last, this article will suggest ways in which Washington State can limit the use of mandatory arbitration for employees in the state and ultimately protect the rights of employees who have been sexually harassed.

II. BACKGROUND

A. History of Arbitration and How It Made Its Way into Employment Contracts

Arbitration is a form of Alternative Dispute Resolution (ADR). "ADR complements the judicial system by making methods available for resolution of some disputes more economically or efficiently than can be done by the courts."[7] In arbitration, an impartial person or persons, selected by the parties, hears evidence from each party and makes a decision on the merits.[8] This decision is typically binding.[9] Unlike in judicial proceedings, "[u]nless the parties agree to the contrary, the arbitrator is not bound to follow the law, but

[6] Federal Arbitration Act, 9 U.S.C. § 2 (1947).
[7] Jay E. Grenig, *Evolution of the Role of Alternative Dispute Resolution in Resolving Employment Disputes*, 71 DISP. RESOL. J. 99, 100 (2016).
[8] *Id.*
[9] *Id.*

may base the decision on business custom and practice, technical insight, or broad principles of equity and justice."[10]

The FAA was passed and signed into law in 1925.[11] The FAA "made arbitration clauses as enforceable as any other contract provision, subject to the same defenses as applied to other contracts."[12] Today, in accordance with the U.S. Supreme Court's holdings, the FAA is substantive law that preempts state arbitration laws regardless of whether a claim was brought in state or federal court.[13] When first enacted, the FAA was not meant to apply to employment disputes.[14] The Chair of the ABA Committee on Commerce, Trade and Commercial Law testified, "[It] is not intended that this shall be an act referring to labor disputes at all."[15] The Act was meant to be "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it."[16] Initially, the courts declined to apply the FAA to disputes between employers and employees.[17] It was not until the 1991 Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.* that arbitration started to become a common means of employment dispute resolution.[18] In *Gilmer*, the Court held that "arbitration of claims of illegal age discrimination is not inconsistent with the Age Discrimination in Employment Act,"[19] and that as long as the prospective litigant may bring her statutory cause of action in the arbitral forum, the "[ADEA] will continue to serve its remedial and deterrent function."[20]

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[10] *Id.* at 100–01.
[11] Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925).
[12] Grenig, *supra* note 7, at 110.
[13] *Id.* at 112.
[14] *Id.* at 110.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 120.
[18] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Grenig, *supra* note 7, at 126.
[19] Grenig, *supra* note 7, at 121; *see also Gilmer*, 500 U.S. at 20.
[20] *Gilmer*, 500 U.S. at 28.

In the early nineties, employers began increasingly requiring their employees to sign mandatory, pre-dispute arbitration agreements.[21] This rise closely followed the important 1991 United State Supreme Court case, *Gilmer v. Interstate/Johnson Lane Corp.*, which upheld the enforceability of such arbitration agreements.[22] By signing these agreements, employees began waiving their access to the courts to settle claims of rights violations, including sexual harassment.[23] By 2018, the amount of workers subject to mandatory arbitration exceeded fifty-five percent—more than double the rate seen in the early 2000s.[24] Employees of companies with 1,000 or more employees are most likely to be subject to forced arbitration, at a rate of about sixty-five percent.[25] Also, forced arbitration is more common in low-wage workplaces, industries disproportionately composed of female workers, and industries disproportionately composed of African–American workers.[26] In 2018, 60.1 million American workers could no longer access the courts to protect their employment rights and instead were forced into arbitration.[27] The prevalence of mandatory arbitration varies across industries, but industry and demographic trends position women and African–Americans as the workers most likely to be subject to mandatory arbitration.[28] A striking illustration of this fact is the contrast between arbitration statistics in the construction industry and the education and health industries. Construction, which has "a predominately male workforce, has the lowest rate of imposition of mandatory arbitration," whereas the female dominated fields of education and health have the highest rate of imposition of mandatory

[21] ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION, ECON. POL'Y INST. 1 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/6N6D-WXS4].
[22] *Gilmer*, 500 U.S. at 20.
[23] COLVIN, *supra* note 21.
[24] *Id.*
[25] *Id.* at 2.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 9.

arbitration.[29] Further, people in low-wage jobs are more likely to be subject to mandatory arbitration, which is particularly problematic considering that women in low-wage jobs "experience high levels of harassment because they do not have bargaining power to push back."[30]

B. Arbitration Hurts Employees

Companies are most often the beneficiaries of mandatory arbitration, and so are increasingly including arbitration clauses in employment contracts.[31] With mandatory arbitration policies in place, employers are less likely to face claims from employees.[32] When employers do face claims, they do so with the benefit of dictating the arbitration process and procedures.[33]

1. Employers Have the Power

Employers can gain a significant advantage by controlling the arbitration process—including choosing the applicable procedures and selecting the arbitrator.[34] By dictating the procedures, employers can implement different evidentiary and procedural standards "that complicate the employee's ability to prove her case."[35] Further, because employers usually choose the arbitrator, there are often repeat employer–arbitrator pairings, which leaves

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[29] *Id.* at 8.
[30] Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation when They Spoke Up*, VOX (Oct. 15, 2017), https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts [https://perma.cc/E4UJ-9HTK].
[31] COLVIN, *supra* note 21.
[32] *Id.* at 10.
[33] Morrissey, *supra* note 5, at 197.
[34] Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2659 (2019).
[35] Morrissey, *supra* note 5, at 197.

room for potential biases.[36] In fact, there is evidence of a direct advantage to employers when they use a repeat arbitrator.[37]

In other forms of arbitration, arbitrators understand that they will only continue to receive business if both sides deem the arbitrator fair and impartial.[38] For example, in labor arbitration, both the union and management must believe that the arbitrator is fair and impartial.[39] However, "[in] employment arbitration, it is the employer, as a repeat player, that usually pays for the arbitrator."[40] Because of the lack of a need to show fairness and impartiality to both sides, employment arbitrators may consciously, or unconsciously, be biased in favor of the employer.[41]

In addition, studies suggest that employees are less likely to bring claims to mandatory arbitration than they are to bring claims to court.[42] Part of the reason for this discrepancy is that attorneys are less likely to take clients that are subject to mandatory arbitration because the "claims are less likely to succeed than claims brought to court, and, when damages *are* awarded, they are likely to be significantly smaller than court-awarded damages."[43] Few employees are capable or willing to bring employment law claims without an attorney.[44] Nationally, about 5,758 mandatory employment arbitration cases are filed per year.[45] Considering the finding that 60.1 million workers in the United States are subject to these procedures, this means that "only 1 in 10,400 employees subject to [forced arbitration] actually files a claim [in arbitration] each year."[46] These findings are significant given that "if

[36] McCullough, *supra* note 34.
[37] Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 30–31 (2011).
[38] Grenig, *supra* note 7, at 132.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] COLVIN, *supra* note 21, at 10.
[43] *Id.* (emphasis in original).
[44] *Id.*
[45] *Id.* at 11.
[46] *Id.*

employees covered by mandatory arbitration were filing claims at the same rate as in court, there would be between 206,000 and 468,000 claims filed annually," which is thirty-five to eighty times the rate currently observed.[47]

2. Secrecy

Arbitration is frequently coupled with nondisclosure agreements (NDAs), which can limit the information available to fellow employees as well as investigators[48] and can help protect repeat sexual harassment offenders.[49] "NDAs are a key component of most settlements resolving a legal dispute. In cases of sexual harassment in the workplace, NDAs prohibit the victim from disclosing details about the settlement or facts which led to the settlement."[50] One of the many negative impacts that come from silencing victims is that their coworkers who may be experiencing similar harassment "cannot use their collective information to identify repeat offenders, who then go undetected for a long period of time."[51] In addition, "[t]he privacy of settlement agreements also reduces the overall accuracy and availability of the statistics regarding settlement figures and the characteristics of sexual harassment claims."[52] In effect, "NDAs [have] not only restricted survivors from sharing their story cathartically, but [have] also given abusive men a path to legally harass women while simultaneously holding onto positions of power."[53] The secrecy provided by NDAs prevents necessary changes from taking place to avoid future sexual misconduct in the workplace.[54] A recent example of this occurred at Fox News, where "[t]he network settled cases for years without making the systemic and cultural changes necessary to stop

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[47] *Id.*
[48] Margaret Ryznar, *#MeToo & Tax*, 75 WASH. & LEE L. REV. ONLINE 53, 55 (2018).
[49] *Id.* at 54.
[50] Ence, *supra* note 4, at 167.
[51] Ryznar, *supra* note 48, at 55.
[52] *Id.*
[53] Ence, *supra* note 4, at 166.
[54] Morrissey, *supra* note 5, at 197.

sexual harassment."[55] Confidentiality agreements in settlements have ramifications beyond the case at hand. Secret settlements "hinder the ability of plaintiffs' counsel to assess a fair settlement value and the viability of a contingency fee arrangement, reducing access to representation."[56] Ironically, the lack of access to representation is the most commonly cited reason to continue the practice of mandatory arbitration.[57] Confidential settlements also "hinder judges' abilities to facilitate settlements by limiting their access to information on the range of reasonable outcomes."[58] Further, serious harm can occur from keeping discrimination claims out of the public eye by "creating an inaccurately limited public perception of the extent of discrimination in the workplace."[59]

C. Current State of the Law

Recent Supreme Court decisions construe the FAA broadly and are significantly pro-arbitration.[60] The Supreme Court construes the FAA to require arbitration of "statutory claims that were created decades after the FAA was passed, such as claims under Title VII of the Civil Rights Act of 1964 ("Title VII") and the ADEA."[61] Sexual harassment claims are included under Title VII and are currently subject to forced arbitration.[62]

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[55] Kate Webber Nunez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law,* 122 PENN STATE L. REV. 463, 513 (2018).
[56] *Id.*
[57] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008).
[58] Nunez, *supra* note 55, at 513.
[59] *Id.*
[60] McCullough, *supra* note 34, at 2682; s*ee also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); AT&T Mobility LLC. v. Concepcion, 563 U.S. 333 (2011); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017).
[61] McCullough, *supra* note 34, at 2666.
[62] 42 U.S.C. § 2000e (2012); AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 352 (2011) (holding the FAA preempts state law that is an "obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA).

1. United States Supreme Court Cases

Recent U.S. Supreme Court cases have demonstrated that the FAA's policy favoring the enforcement of arbitration agreements is not easily displaced by state law. State law will be preempted "to the extent it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA."[63] Moreover, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[64]

In 2011, the Supreme Court decided *AT&T Mobility LLC. v. Concepcion*, in which it found that the FAA preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration procedures.[65] The decision was significant in strengthening and widening the reach of the FAA because the Court held that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[66] The Court focused its opinion on the "saving clause," which states that arbitration agreements are invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."[67] Ultimately, the Court found that the saving clause "preserves generally applicable contract defenses" but does not "preserve state-law rules" that stand in the way of the enforcement of arbitration agreements.[68] The Court held that any state law that prevents the enforcement of arbitration agreements is unenforceable and complicates states' ability to disallow mandatory arbitration.

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[63] *Lamps Plus, Inc.*, 139 S. Ct. at 1415.
[64] Latif v. Morgan Stanley & Co. LLC, No. 18 Civ. 11528, 2019 WL 2610985, at *2 (S.D.N.Y. June 26, 2019).
[65] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[66] *Id.* at 343.
[67] *Id.* at 339 (quoting 9 U.S.C. § 2).
[68] *Id.* at 343.

In 2017, the Court made clear that the FAA preempts both state law and rules that discriminate against arbitration.[69] In *Kindred Nursing Centers Ltd. Partnership v. Clark*, the Court held that the FAA preempted a Kentucky State law that required a clear statement in the power of attorney agreement allowing the attorney-in-fact to bind her principal to an arbitration agreement.[70] The Court found that rules that apply only to arbitration agreements—or "covertly" discriminate against arbitration by disfavoring contracts that have "defining features" of arbitration agreements—violate the FAA because arbitration agreements must be on equal footing with other contracts.[71] In other words, states may not undermine the express purpose of the FAA.[72] *Kindred Nursing* effectively makes it more difficult for states to implement laws that disfavor arbitration in any way, including forced arbitration.

Most recently, in 2018, the Supreme Court reaffirmed its commitment to upholding forced arbitration in *Epic Systems Corp. v. Lewis*.[73] The Court held that employers may require employees, as a condition of employment, to waive their right to court as well as their right to pursue even private arbitration in common with other employees making the same claim.[74] The decision in *Epic Systems* involved wage and hour claims, "[b]ut the Court's decision impacts all employment disputes—whether claims involve overtime pay, sexual harassment, or discrimination in the workplace."[75] This is in part because "[t]he Court's decision is likely to encourage more employers to require individual arbitration as a condition of employment."[76]

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[69] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 U.S. 1421, 1426 (2017).
[70] *Id.* at 1427.
[71] *Id.* at 1424.
[72] *See id.*
[73] Epic Sys. Corp. v. Lewis, 138 U.S. 1612 (2018).
[74] *Id.*
[75] Stephanie Greene & Christine Neylon O'Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—#TimesUp on Workers' Rights*, 15 STAN. J. C.R. & C.L. 43, 45 (2019).
[76] *Id.*

2. Federal Law

Because of the high risk of federal preemption, the only guaranteed way to prohibit employers from subjecting their employees to forced arbitration is to enact federal laws that disallow mandatory arbitration of employment disputes. However, such laws that have been introduced have faced heavy opposition from Republicans and the business community.[77]

In a possible display of the energy brought on by the #MeToo movement, the Ending Forced Arbitration of Sexual Harassment Act was introduced in both the House and the Senate at the end of 2017 with bipartisan support.[78] The bill provides: "[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a sex discrimination dispute."[79] However, the bill "has not yet made it out of committee in either the House or Senate due to opposition from Republicans and the business community."[80]

Another of these bills, the Forced Arbitration Repeal Act, or the FAIR Act, "prohibits a predispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute."[81] The bill passed the House in September of 2019 but has yet to pass the Senate.[82] Supporters of this bill argue that corporations are evading accountability by preventing working people from using the courts to enforce laws meant to protect them from abuse.[83] Because corporations can require

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[77] Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 206 (2019).
[78] Ending Forced Arbitration of Sexual Harassment Act of 2017, S.B. 2203, 115th Cong. (2017); Sternlight, *supra* note 77.
[79] Ending Forced Arbitration of Sexual Harassment Act of 2017, S.B. 2203, 115th Cong. (2017).
[80] Sternlight, *supra* note 77.
[81] Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).
[82] *Id.*
[83] Vanita Gupta & Kristine Lucius, *Support the Forced Arbitration Injustice Repeal Act (FAIR Act), H.R. 1423*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (Sept. 5, 2019), https://civilrights.org/resource/support-the-forced-arbitration-injustice-repeal-act-fair-act-h-r-1423/ [https://perma.cc/5QE4-DE29].

employees to arbitrate their claims, employers have the benefit of "select[ing] the arbitrators, prevent[ing] workers from asserting claims together, pick[ing] the rules under which arbitration takes place, choos[ing] the state in which the proceedings will occur, and decid[ing] the payment terms."[84] Although the FAIR Act may face resistance from Republicans in the Senate, it is still significant that the bill was pushed through the house. The FAIR Act is the first bill aimed against forced arbitration to make it past the House.[85] If passed, employers would no longer be able to require an arbitration agreement as a condition of employment. The employer and employee would be able resolve their claims in arbitration only if both parties agreed to the forum after the dispute.

3. State Law

Washington State, New York, and California have each attempted to protect workers from mandatory arbitration.

a) Washington State Senate Bills 6313 and 5996

The Washington State legislature has recognized that between twenty-five and eighty-five percent of women have experienced sexual harassment in the workplace.[86] In response, the legislature has begun to craft laws that attempt to protect women.[87]

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[84] *Id.*

[85] Alexia F. Campbell, *The House Just Passed a Bill that Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/M7PN-9ZB8].

[86] CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/92K6-7VU3].

[87] Michael A. Griffin & Kira J. Johal, *Washington State Enacts New Laws Addressing Sexual Harassment in the Workplace*, JACKSON LEWIS (Apr. 3, 2018), https://www.jacksonlewis.com/publication/washington-state-enacts-new-laws-addressing-sexual-harassment-workplace [https://perma.cc/4P9H-HSSR].

Senate Bill (S.B.) 5996 encourages "the disclosure and discussion of sexual harassment and sexual assault in the workplace."[88] Employers are prohibited from requiring employees to "sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace."[89] However, the bill does not prevent confidentiality provisions in settlement agreements, even as they relate to sexual assault or harassment allegations.[90]

Another bill introduced in the Washington Senate, S.B. 6313, is meant to preserve "an employee's right to file a complaint or cause of action for sexual harassment or sexual assault."[91] This law aims to "bar any agreement that requires an employee to resolve claims of discrimination in a confidential dispute resolution process," including arbitration.[92] However, practitioners note that "[i]t seems likely that [the law] may be preempted by the Federal Arbitration Act, as interpreted by the U.S. Supreme Court in *AT&T Mobility LLC. v. Concepcion*."[93]

b) New York Statute § 7515

In 2018, New York Governor Andrew Cuomo signed into law a number of new measures that expand current state anti-sexual harassment protections, including legislation that prohibits the mandatory arbitration of sexual harassment claims.[94] Section 7515(b) is one such attempt.[95]

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[88] S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
[89] *Id.*
[90] *Id.*
[91] S.B. 6313, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
[92] Griffin & Johal, *supra* note 87.
[93] Griffin & Johal, *supra* note 87.
[94] JAMES HWANG & ANDREW REICH, PAUL WEISS, NEW ANTI-SEXUAL HARASSMENT MEASURES IN NEW YORK STATE AND NEW YORK CITY (May 10, 2018), https://www.paulweiss.com/media/3977781/10may18harassment.pdf [https://perma.cc/CUL9-34AX].
[95] N.Y. C.P.L.R. § 7515 (McKinney 2019). Section 7515(b) includes:

Justice Ruth Bader Ginsburg cited § 7515 in her dissenting opinion for *Lamps Plus* as an example of state action that "endeavor[s] to safeguard employees' opportunities to bring sexual harassment suits in court" and "ameliorate[s] some of the harm . . . occasioned" by recent Supreme Court decisions.[96] Unfortunately, § 7515 was found to be preempted by the FAA in *Latif v. Morgan Stanley & Co. LLC*.[97] The Court stated that "[s]ection 7515 renders agreements to arbitrate sexual harassment claims null and void '[e]xcept where inconsistent with federal law.' Here, application of Section 7515 to invalidate the parties' agreement to arbitrate Latif's claims would be inconsistent with the FAA."[98] It was largely expected that the state law would be preempted;[99] however, there has not yet been a case involving the application of § 7515 to intrastate commerce.

c) California Assembly Bill 3080

Advocates for workers' rights in California brought a bill that

> [p]rohibits a person from conditioning employment, the receipt of any employment-related benefit or as a condition of entering into a contractual agreement, on an employee or applicant waiving any right, forum, or procedure for a violation of any provision the California Fair Employment and Housing Act or the Labor Code,

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> (i) Prohibition. Except where inconsistent with federal law, no written contract, entered into on or after the effective date of this section shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section.
> (ii) Exceptions. Nothing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon.
> (iii) Mandatory arbitration clause null and void. Except where inconsistent with federal law, the provisions of such prohibited clause as defined in paragraph two of subdivision (a) of this section shall be null and void. The inclusion of such clause in a written contract shall not serve to impair the enforceability of any other provision of such contract.

N.Y. C.P.L.R. § 7515(b) (McKinney 2019).

[96] Lamps Plus, Inc. v. Varela, 139 U.S. 1407, 1422 (2019) (Ginsburg, J., dissenting).

[97] Latif v. Morgan Stanley & Co. LLC, 2019 WL 2610985 (S.D.N.Y. June 26, 2019).

[98] *Id.*

[99] *See* HWANG & REICH, *supra* note 94.

> and prohibits a person from threatening, retaliating, or discriminating against any applicant or employee because of their refusal to agree to such a waiver.[100]

Proponents of the bill argue that because of the "recent revelations of widespread sexual harassment," policy is needed to protect victims' access to the courts and to hold perpetrators accountable.[101] The bill does not call for the end of arbitration, and the author acknowledges that "arbitration is a highly effective dispute resolution method when both parties chose it freely."[102] However, the key to effective arbitration is that both parties choose it freely. Indeed, arbitration "is far less successful when the more powerful party forces the other to accept the terms."[103]

III. How Washington Can Protect the Rights of Employees Who Have Been Sexually Harassed

To prevent the use of mandatory arbitration for sexual harassment claims, Washington State should focus on preventing the implementation of such policies. Therefore, Washington should incentivize companies to forgo forced arbitration, as well as continue to implement state laws aimed at preventing forced arbitration. Washington State may also protect workers' rights by acting to prevent companies from keeping claims involving sexual harassment confidential.

A. Incentives for Companies to End Employee Arbitration Policy

Washington should encourage companies to forgo forced arbitration policies by utilizing its marketplace power. Title II of the Model State Consumer and Employee Justice Act (Model Act) prohibits the state from contracting with any companies that use forced arbitration in employee

[100] Cal. Assemb. Floor Analysis, Assemb. B. No. 3080, 2017–2018 Leg., 2018 Reg. Sess. (Oct. 5, 2018).
[101] *Id.*
[102] *Id.*
[103] *Id.*

contracts or who contract with companies that use forced arbitration in their employee contracts.[104]

In the wake of the #MeToo movement's media attention, large companies began ridding themselves of forced arbitration,[105] indicating that they may be open to change. In December 2017, Microsoft voiced support for legislation invalidating arbitration clauses in cases of sexual harassment,[106] including an endorsement of the Ending Forced Arbitration of Sexual Harassment Act of 2017.[107] The company also "pledged to remove [mandatory arbitration requirements] in the few of its own employment contracts that still contained such a provision."[108] The company reasoned that "[a]s each new story about sexual harassment demonstrates, current approaches in this area have proven insufficient."[109] In addition, in November 2018, Google announced that the company would no longer require forced arbitration for sexual harassment and assault claims.[110] This announcement came about a week after "20,000 Google employees and contractors around the world walked off the job to protest the company's response to sexual harassment claims."[111] The employees' demands continued even after the announcement, causing

[104] Levinson, *supra* note 2.
[105] Morrissey, *supra* note 5, at 198; Alexia Fernandez Campbell, *Google Employees Fought for Their Right to Sue the Company – and Won*, VOX (Feb. 22, 2019), https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees [https://perma.cc/DU64-YW5C].
[106] Morrissey, *supra* note 5, at 198.
[107] Debra Cassens Weiss, *Give Victims of Workplace Sexual Harassment Access to Courts, 56 US Attorneys General Tell Congress*, ABA J. (Feb. 13, 2018, 10:22 AM CST), http://www.abajournal.com/news/article/give_victims_of_workplace_sexual_harassment_access_to_courts_56_us_attorney [https://perma.cc/Y2R3-WGLC].
[108] Morrissey, *supra* note 5, at 198.
[109] Jessica Guynn, *Microsoft Supports Bill that Would Allow Sexual Harassment Victims to Make Case in Court*, USA TODAY (Dec. 19, 2017), https://www.usatoday.com/story/tech/news/2017/12/19/microsoft-supports-bill-would-allow-sexual-harassment-victims-make-case-court/965571001/ [https://perma.cc/GK5M-NLCB].
[110] Campbell, *supra* note 105.
[111] *Id.*

Google to end all mandatory arbitration for employees in February of 2019.[112]

In addition to employee and public pressure, potential benefits for shareholders and corporations present further reasons for companies to do away with arbitration clauses. "Because the public is kept in the dark about claims of sexual misconduct, shareholders are unable to identify issues and pressure directors to make changes in the company culture" before the scandal is in the headlines and "the damage is already done."[113] It is difficult to undo the reputational harm that comes from a company becoming "national fodder for the #MeToo movement."[114] In other words, it is beneficial to shareholders if they are able to identify a problem before it grows and causes a massive media fallout. Earlier detection gives shareholders the opportunity to address concerns with the board and take steps to limit the impact and growth of sexual harassment.[115]

If Washington further tips the scale for companies by incentivizing them to end the use of mandatory arbitration of sexual harassment disputes, then it may be enough to push more companies to make the choice on their own. Every company that decides to end the use of mandatory arbitration aids in the important cultural shift that needs to happen to completely prohibit the forced arbitration of sexual harassment and sexual assault claims.[116]

B. Non-Disclosure Agreements (NDAs) in Settlement Agreements and General Data Disclosure

Washington State moved toward protecting employee rights by prohibiting employers from requiring employees to sign an NDA as a condition of employment.[117] However, employers are still able to write confidentiality

[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See* Levinson, *supra* note 2 at, 522.
[117] S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

provisions into settlement agreements with employees.[118] Therefore, Washington can improve its laws regarding NDAs by disallowing NDAs in settlement negotiations.

By allowing NDAs to factor into negotiations, employees are again required to make a choice between their rights and their financial interests, the first time being when they are forced to choose between a job and their access to the courts. When employers are allowed to offer a much higher settlement with an NDA than without, the claimant's autonomy is undermined by forcing her to choose "between a higher settlement or the capability of sharing her story."[119] Confidentiality provisions do not just hurt the victim, "confidential settlements of employment discrimination cases interfere with the important public function of trials in setting workplaces norms."[120]

New York's solution to the harms of confidentiality provisions is to prohibit NDAs in any settlement of a sexual harassment claim unless the complainant requests confidentiality.[121] Specifically, employers are prohibited from including "any term or condition that would prevent the discloser of the underlying facts and circumstances to the claim or action" in any settlement, agreement, or other resolution of any claim involving sexual harassment, unless the employee requests confidentiality.[122] Implementing a similar law in Washington would prevent employers from using an employee's right to share her story as a bargaining chip in settlement discussions. In other words, an employee will not be put in the situation where she has to choose between a higher settlement payment and her right to tell her story.

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[118] Ence, *supra* note 4, at 175.
[119] *Id.*
[120] Nunez, *supra* note 55, at 513.
[121] Ence, *supra* note 4, at 175; N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).
[122] N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).

In addition to promoting public exposure through lack of NDAs, Washington can also model California's efforts to provide more transparency and accountability for companies through data exposure. For example, California added section 1281.96 to the California Arbitration Act,[123] which "requires that private arbitration companies publish, at least quarterly, cumulative reports compiling information over the past five years regarding their consumer arbitrations."[124] The identity of the complainants remains confidential, but a potential plaintiff or employee can search the reports to learn if the employer has been sued before.[125] Nondisclosure agreements can make this system less effective,[126] but coupled with Washington's laws prohibiting NDAs, these reports could help prevent companies from repeatedly giving "superstar" employees a slap on the wrist when they harass other employees.[127]

The disclosure of data related to mandatory arbitration has the potential to improve fairness for employees. The disclosure of data "enables media organizations, as well as consumer and employee advocacy groups, to highlight the practices of those arbitrators with records that are especially skewed in favor of business and reveal which companies are using the services of these unfair arbitrators."[128] Regulating arbitration would not be the first time data disclosure has been used as a means of industry regulation.[129] "Data disclosure is now being used as a means of regulation in a wide variety of fields."[130] And, where data disclosure programs have been

[123] CAL. CIV. PROC. CODE §§ 1280–1294.4 (West 2020).
[124] Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 136 (2018).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L. J. 2346, 2366 (2012).
[129] *See* Mark A. Cohen & V. Santhakumar, *Information Disclosure as Environmental Regulation: A Theoretical Analysis*, 37 ENV'T & RES. ECON. 599, 599–601, 616 (2007).
[130] Farmer, *supra* note 128, at 2365 n.66.

implemented, they have "often affected the underlying behavior of the regulated industry and [are] best used in situations such as this, where victims may be unaware of the costs being imposed on them."[131] Making this data public could also encourage companies to "try to avoid using arbitrators and arbitration providers that have been cast as particularly unfair, in order to avoid the potential public-relations disaster that might stem from such a situation."[132] In turn, arbitrators may have an increased incentive to remain impartial, which could counteract even unconscious bias.

C. Adaptation of California's A.B. 3080 – Criminalizing Opt-Out Arbitration Clauses

Washington should enact a version of California's A.B. 3080, which carries many benefits. First, the law would prohibit employers from requiring arbitration as a condition of getting a job, keeping it, or receiving benefits. Second, the law would forbid employers from retaliating against those who decline to sign. Lastly, the law would make violations of these prohibitions a crime.[133] This law should differ from other state attempts at prohibiting arbitration by focusing not on the enforceability of arbitration agreements, but on the ability to enter into mandatory arbitration agreements.

D. "Except Where Inconsistent with Federal Law"

Where Washington law cannot prevent mandatory arbitration agreements, it should assure that at a minimum, intrastate companies' mandatory arbitration agreements are not enforceable. Washington State S.B. 6313 states that

> an employment contract or agreement is . . . void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a [sexual harassment] cause of action . . . , or if it requires an

[131] *Id.*
[132] *Id.* at 2366.
[133] Assemb. B. No. 3080, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

> employee to resolve claims of discrimination in a dispute resolution process that is confidential.[134]

While this bill is consistent with what this article argues for, if challenged, "this statute would likely be preempted on the same grounds as the statute at issue in *Kindred Nursing*—both statutes disfavor arbitration agreements."[135] Even though S.B. 6313 does not explicitly reference mandatory arbitration, it clearly falls under what would be included in the waiver of employee rights.[136]

To make the law as useful as possible, Washington should look to newly enacted New York law, § 7515.[137] The New York law prohibiting mandatory arbitration includes the following key language: "[E]xcept where inconsistent with federal law."[138] The hope for the exception is that, if challenged, "the statute would be upheld for companies operating solely in New York because intrastate companies are not subject to the FAA."[139] In its current state, the Washington law will likely be preempted by the FAA. For the Washington law to serve its purpose, it should be amended to include New York's language: "[E]xcept where inconsistent with federal law."[140] Unfortunately, applying a prohibition against forced arbitration solely to intrastate companies will drastically limit the companies covered; however, the law is much more useful covering only intrastate companies than none at all.

It could be argued that in light of *Latif v. Morgan Stanley & Co. LLC*,[141] there would be no purpose to enact any part of New York's arbitration law because it was found to be preempted by the FAA. However, as stated above,

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[134] S.B. 6313, 65th Leg., 2018 Reg. Sess. (Wash. 2018).
[135] McCullough, *supra* note 34, at 2679.
[136] *Id.*
[137] *See* N.Y. C.P.L.R. § 7515 (McKinney 2019).
[138] *Id.*
[139] McCullough, *supra* note 34, at 2679.
[140] N.Y. C.P.L.R. § 7515 (McKinney 2019).
[141] Latif v. Morgan Stanley & Co. LLC, 2019 WL 2610985 (SDNY June 26, 2019).

Latif v. Morgan Stanley & Co. LLC does not address intrastate commerce.[142] To ensure that Washington law is not preempted in whole, lawmakers can write a law that applies solely to intrastate commerce, therefore avoiding the fate of New York's § 7515.

E. Encouraging Congress to Act

Unfortunately, U.S. congressional action is the only way Washington can ensure that no one in the state is forced to arbitrate their sexual harassment claims. Without an amendment to the FAA, most state actions related to mandatory arbitration will be subjected to scrutiny or preemption.[143] However, that does not mean that Washington should give up its fight to end forced arbitration of sexual harassment claims. In fact, Washington can encourage Congress to act by demonstrating the widespread state and public support for limitations on forced arbitration.

With the rise of the #MeToo movement and newfound media attention on forced arbitration, "now is the perfect time to lobby for change."[144] Incentivizing and encouraging companies in Washington to abandon forced arbitration will contribute to a necessary cultural shift by changing normal and expected company practices.[145] Individuals are encouraged to "continue to contact their state and federal representatives, initiate petitions, contact people running for elected positions, and voice their grievances."[146] However, individuals are not the only ones who can incite change. All fifty state Attorneys General signed a letter asking both Senate and House Representatives to support S.B. 2203.[147] The bill, like the Arbitration

[142] N.Y. C.P.L.R. § 7515(b) (McKinney 2019).
[143] Levinson, *supra* note 2, at 520.
[144] *Id.* at 522.
[145] *See id.*
[146] *Id.* at 523.
[147] Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. ("This bill prohibits a predispute arbitration agreement from being valid or enforceable if it requires arbitration of a sex discrimination dispute."); NAT'L ASS'N OF ATT'YS GEN., MANDATORY ARBITRATION OF SEXUAL HARASSMENT DISPUTES (2018),

Fairness Act,[148] has yet to make it out of committee in either the House or the Senate "due to opposition from Republicans and the business community."[149] However, with greater political action—such as continuing to pass state laws—there is a greater chance that the FAIR Act will eventually be passed by the Senate and signed by the President.[150] Washington State can contribute to that greater political action by taking steps to eliminate forced arbitration of sexual harassment claims in the state. In her dissent in *Lamps Plus, Inc. v. Frank Varela*, 139 S. Ct. 1407 (2019), Justice Ruth Bader Ginsburg stated, "developments outside the judicial arena" could "ameliorate some of the harm this Court's decisions have occasioned."[151] Washington State can be a part of those developments by enacting its own laws opposing forced arbitration.

In sum, Washington should: (1) encourage companies to forgo forced arbitration policies by prohibiting the state from contracting with any companies that use forced arbitration in employee contracts or who contract with other companies that use forced arbitration in their employee contracts;[152] (2) amend its laws on NDAs to look more similar to New York's by prohibiting "any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action," in any resolution of any claim involving sexual harassment, unless the employee requests confidentiality;[153] (3) ensure, as California has done, "that private

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https://www.manatt.com/Manatt/media/Documents/Articles/AGs-letter.pdf [https://perma.cc/HPY6-WYWE].

[148] Arbitration Fairness Act, H.R. 1374, 115th Cong. (2017) ("This bill prohibits a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute.").

[149] Sternlight, *supra* note 77, at 206.

[150] *See id.*

[151] Lamps Plus, Inc. v. Varela, 139 U.S. 1407, 1422 (2019) (Ginsburg, J., dissenting).

[152] DAVID SELIGMAN, NAT'L CONSUMER L. CTR., MODEL STATE CONSUMER & EMPLOYEE JUSTICE ENFORCEMENT ACT 31–38 (2015), https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf [https://perma.cc/SK5N-233D].

[153] N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).

arbitration companies publish, at least quarterly, cumulative reports compiling information over the past five years regarding their consumer arbitrations";[154] (4) enact a law forbidding employers from retaliating against employees who decline to sign mandatory arbitration agreements;[155] and (5) amend S.B. 6313 to apply only to intrastate commerce to avoid federal preemption.[156]

By taking these actions, Washington State can limit the number of employees in the state that are subject to mandatory arbitration and demonstrate to Congress that the states and the public want to do away with mandatory arbitration. The more companies that forgo forced arbitration, and the more employees who are not subject to forced arbitration, the more the culture will shift. In turn, the cultural shift and the momentum of the #MeToo movement will continue and lead to justice for employees who have been sexually harassed.

F. Criticisms and Rebuttal

1. Arbitration Is More Accessible than Court

Proponents of mandatory arbitration focus on the accessibility of arbitration to low-wage workers as a solution to expensive court proceedings.[157] These proponents argue that many employees cannot find legal representation because their potential dollar recovery would "not justify the investment of the time and money of a first-rate lawyer in preparing a court action."[158] For these employees, arbitration serves as a cheaper, simpler, and more feasible recourse because it will take an attorney much less time and effort to take a case to arbitration, and if unable to find

[154] *See* CAL. CIV. PROC. CODE §§ 1280–1294.4 (West 2020); Mizrahi, *supra* note 125, at 136.
[155] Assemb. B. No. 3080, 2017–2018 Leg., Reg. Sess. (Cal. 2018).
[156] S.B. 6313, 65th Leg., 2018 Reg. Sess. (Wash. 2018); *see* N.Y. C.P.L.R. § 7515 (McKinney 2019).
[157] Antoine, *supra* note 57, at 796.
[158] *Id.* at 792–93.

representation, claimants may represent themselves in this "much less formal and intimidating forum."[159]

While it is true that it can be difficult for employees to find legal representation for low dollar claims, it is also true that it is harder for a client subject to arbitration to find legal representation.[160] The premise of the argument for mandatory arbitration is that it is an easier and more accessible forum for bringing claims; however, there is considerable evidence that employees subject to mandatory arbitration are less likely to bring claims.[161]

Other popular arguments for mandatory arbitration include that arbitration is more cost effective and faster than litigation, and that arbitration has shrunk court dockets.[162] However, despite the frequency of these claims, no independent study has verified that arbitration "is usually faster, cheaper and more satisfying for the parties than traditional litigation, or that ADR has materially shrunk state or federal court dockets."[163] In fact, "[t]he little data (either anecdotal or empirical) that do[] exist support[] the position that arbitration may not be as big a savings in cost or time as proponents claim."[164] For instance, data gathered from experiments with arbitration of civil disputes in the federal courts point to the conclusion that "arbitration does not materially save time or expense in prosecuting civil cases, and the parties' satisfaction with this ADR device—to the extent that it can be accurately measured at all—does not appear to be so high as to outweigh its uncertainties."[165] Further, "a study of arbitrations involving a California health maintenance organization found that arbitrations typically took nearly

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[159] *Id.* at 792.
[160] COLVIN, *supra* note 21, at 10; s*ee also supra* Section II.B.1.
[161] COLVIN, *supra* note 21, at 11.
[162] Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L. J. 2346, 2352 (2012).
[163] Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L. J. 399, 422 (2000).
[164] *Id.*
[165] *Id.* at 424.

twenty-nine months to complete in comparison to the relevant trial court proceedings that lasted fifteen to nineteen months."[166]

2. Counterarguments to Model Laws

The California Chamber of Commerce argued against A.B. 3080, asserting that "[b]y banning arbitration, the only option left for employees to resolve many labor and employment claims is litigation."[167] However, as stated above, the bill does not attempt to ban arbitration, but rather prohibits requiring arbitration as a condition of employment.[168] Employees and employers may still choose to enter into arbitration to resolve a dispute when that dispute arises. The California Chamber of Commerce continued, stating that "[s]everal studies support this notion that access to civil courts is not a realistic option for low wage employees,"[169] again ignoring that low wage employees still have the option to resolve disputes in arbitration. A.B. 3080 does not affect post-dispute arbitration agreements and therefore, the Chamber's worries are unfounded. Thus, despite what the Chamber argues, there is a "viable alternative" to "so-called mandatory arbitrations,"[170] and that alternative is optional arbitration.

Ultimately, the Governor of California vetoed the measure under the impression that it violated the law.[171] The bill was "based on the theory that the Act only governs the enforcement and not the initial formation of arbitration agreements," and the governor stated that the Supreme Court "rejected the assertion that the Federal Arbitration Act has no application to contract formation."[172] The governor based this on the Court's assertion in

[166] *Id.* at 422–23.
[167] Cal. Assemb. Floor Analysis, Assemb. B. No. 3080, 2017–2018 Leg., Reg. Sess. 2 (Oct. 5, 2018).
[168] *See supra* Section III.C.
[169] Cal. Assemb. Floor Analysis, Assemb. B. No. 3080, 2017–2018 Leg., Reg. Sess. 2 (Oct. 5, 2018).
[170] *Id.* at 3.
[171] *Id.*
[172] *Id.* at 3.

Kindred Nursing that "the Act is not only about the enforcement of arbitration agreements, but also about their initial 'valid[ity]'–that is, about what it takes to enter into them."[173] However, the Court in *Kindred Nursing* cited *Concepcion,* in which "the Court noted the impermissibility of applying a contract defense like duress 'in a fashion that disfavors arbitration'" to establish that state law could not require a power of attorney agreement to expressly grant an attorney-in-fact the power to bind her principal to an arbitration agreement.[174] While the governor is right that *Kindred Nursing* covers the validity of the initial formation of an arbitration agreement, it is not clear from this case that it would be impermissible to prohibit employers from retaliating against employees or applicants who refuse to enter into an arbitration agreement.

A.B. 3080 does not propose banning arbitration agreements or making all arbitration agreements unenforceable. Rather, the goal is to prevent employees from having to choose between their job and their right to access the court system. This goal can be differentiated from *Kindred Nursing*, and while it is true that law could be preempted, there is reason enough to believe it may not be.

Arguments that the law would be preempted cite a line of federal cases that rely upon the FAA to uphold arbitration agreements imposed on a "take-it-or-leave-it" basis.[175] However, this law does not consider the validity of agreements entered into as a condition of being hired; rather, it focuses on the legality of requiring such agreements and retaliating against those who do not sign.

Considering that mandatory arbitration does not increase the accessibility of justice for low-wage workers, is not more cost effective for employers, is

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[173] *Id.*; Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 U.S. 1421, 1428 (2017).
[174] *Kindred*, 137 U.S. at 1424.
[175] Benjamin Ebbink, *Will He or Won't He? Employment Arbitration Ban Proposal Heads to Governor Brown*, FISHER PHILLIPS (Aug. 28, 2018), https://www.fisherphillips.com/california-employers-blog/will-he-or-wont-he-employment-arbitration [https://perma.cc/4SFT-PS2T].

not faster than litigation, and is not materially reducing the number of cases in the court system, one should wonder why mandatory arbitration is being used at all. If the supposed advantages to arbitration are not advantages at all, then employers have been mistaken in their use of arbitration, or the purported advantages are a mere mask of employers' true motive: to disproportionately advantage employers.

IV. CONCLUSION

Washington must continue to enact laws that prevent the use of mandatory arbitration for sexual harassment claims. While the path to changing the practice and culture surrounding mandatory arbitration will likely not be easy or clear, it is important that Washington protects the rights of employees. It may be particularly difficult if Congress continues to refuse to change federal law and the Supreme Court continues to interpret the FAA broadly; however, that does not mean that the state is without any course of action or that it has done all it can do. Washington needs to enact laws that try to prevent the implementation of mandatory arbitration, as California attempted to do with A.B. 3080, as well as take additional indirect approaches to eradicate this unfair practice. Washington can change the culture and the norms of employment in the state by incentivizing companies to reject mandatory arbitration clauses. Washington can also work to make current practices fairer by requiring a wide disclosure of arbitration data as well as disallowing NDAs in arbitration agreements. By changing the laws and the culture of Washington State employment, Washington will not only improve conditions for its workers, but also encourage Congress to act to prohibit mandatory arbitration for sexual harassment claims. Employers should not benefit at the expense of employees who have been sexually harassed.

Now, in the era of #MeToo, it is time for Washington State to take advantage of the energy surrounding preventing sexual harassment and assault in order to implement real change. Washington has acknowledged that between twenty-five and eighty-five percent of women have experienced

sexual harassment in the workplace.[176] Now, the state must continue to act in pursuit of justice and with a goal of changing the problematic culture of sexual harassment in the workplace. Sexual harassment must not be swept under the rug by confidential settlements and mandatory arbitration.

[176] FELDBLUM & LIPNIC, *supra* note 86.