SHEDDING LIGHT

on Arbitration Clauses and Nondisclosure Agreements

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The #MeToo movement has led to the accountability of multiple powerful perpetrators of sexual abuse, harassment and misconduct, forcing them out of some of the largest companies and most visible positions in America. But the #MeToo Movement also has made important strides in another area — employment policies.

As a result, the public and the news media are now paying close attention to the culture of silence that has protected serial violators. New light is shining on the use of arbitration clauses and nondisclosure agreements, which prevent victims from accessing their day in court or publicly discussing their experiences. Historically, these legal tools have pushed sexual misconduct further into the shadows by discouraging victims to come forward, all the while permitting perpetrators to continue the abuse with little incentive for companies to fire or discipline the perpetrators.

A few years ago, the majority of Americans might have never heard the terms "arbitration" or "nondisclosure," or thought about the consequences of these types of employment contracts. Now, the media is showing how these tools are used to cover up and bury stories of harassment, silence victims and perpetuate sexual harassment.

A catalyst

The dangers of mandatory arbitration agreements are well-known among the plaintiffs' bar. These agreements require employees to waive their right to a jury trial, are entered by employees often with little to no bargaining power, contain one-sided terms, require employees to pay attorney fees and the costs of arbitration, require the case to be decided by non-judicial and biased decision-makers, and often prevent employees from obtaining necessary discovery to prove their case. These challenges make it more difficult for employees to find attorneys to represent them when an arbitration agreement may be enforceable. Furthermore, and most relevant to sexual misconduct cases, arbitration agreements often require the proceedings remain confidential.[1] As explained below, the "secrecy" involved in arbitration proceedings has become a matter of public concern in the #MeToo era.

The pitfalls associated with arbitration agreements garnered little attention from the media until July 2016, when Gretchen Carlson filed a lawsuit against Roger Ailes, the former chairperson and chief executive for Fox News, alleging sexual harassment and retaliation.[2] Ailes attempted, but failed, to force Carlson to arbitrate her claims and keep the proceedings confidential.[3] Carlson was able to avoid the clause by suing Ailes individually, rather than Fox News.[4] The media and public strongly criticized Ailes' attempt to keep Carlson out of court.[5] As a result, Carlson became a public advocate against arbitration clauses in sexual harassment cases. Carlson criticizes arbitration clauses because they "benefit employers," "employees are less likely to win arbitration cases than cases that go to trial," and they are not public and often prohibit employees from discussing the case. Carlson urges corporations to end the use of arbitration agreements, which she explains "protect serial harassers by keeping other potential victims in the dark and minimizing

pressure on companies to fire predators."[6]

Other leaders of the #MeToo movement have become advocates for the end of forced arbitration in sexual harassment cases, including former Uber software engineer Susan Fowler, who complained of sexual harassment at the ride-hailing company. Fowler claims that ending forced arbitration is the "single most important thing a company can do" to end sexual harassment in the workplace, because forced arbitration deprives employees of their constitutional rights "and it forces employees who have been treated unlawfully to keep silent about what they have experienced."[7]

Considering the nature of arbitration clauses, it is no surprise the majority of Americans oppose their use.[8] Public pressure has mounted for corporations to end the use of forced arbitration in light of the #MeToo movement and, as a result, some large corporations, including Microsoft, Uber and Lyft, have voluntarily ceased using arbitration agreements in sexual harassment cases.[9] Although these companies are still using forced arbitration in other contexts, their voluntary decision to end forced arbitration in the sexual harassment context reveals the #MeToo movement has been able to accomplish what lawyers have not — ending forced arbitration in certain contexts. Though the impact is limited at this time, the movement is bringing attention to the issue and enacting change.

In addition to voluntary change by some corporations, there is a strong push for Congress to pass legislation prohibiting the use of arbitration clauses in sexual harassment cases. A bipartisan bill to end forced arbitration in sexual harassment claims was introduced in both the U.S. House and Senate in December. The legislation would prevent the use of "predispute" arbitration agreements (any agreement to arbitrate a dispute that has not yet risen) for disputes arising out of conduct that would form the basis of a Title VII employment claim based on sex.[10] Rep. Cheri Bustos (D-IL), a co-sponsor of the House bill, stated the legislation would "help root out bad actors by preventing them from sweeping this problem under the rug."[11]

On February 12, 2018, the Attorneys General of all 50 states, the District of Columbia, and five U.S. territories, wrote a letter to Congress supporting the bill. The letter notes:

> While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process.
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> Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims.[12]

Although change is in the beginning stages, it is undeniable the #MeToo movement has at least brought arbitration agreements, and the dangers associated with them, into the national conversation. Although the concerns currently are focused on secrecy in sexual harassment cases, other dangers have been brought forward through the movement, including procedural and access to justice concerns. Publicizing these concerns, which are present in all forced arbitration cases, is an important first step toward ending the use of mandatory arbitration agreements.

#MeToo and nondisclosures

In addition to arbitration agreements, nondisclosure agreements (NDAs) play a significant role in perpetuating sexual harassment by silencing victims, keeping the harassment in the shadows and permitting predators to continue the abuse without any real consequences. Yet these agreements are boilerplate clauses in nearly all settlement agreements, especially those involving sexual harassment and discrimination cases.

However, the #MeToo movement has brought into question the continued use of NDAs in sexual harassment cases. After multiple women publicly accused Harvey Weinstein of sexual abuse and harassment, it became known that Weinstein routinely used NDAs and confidential settlement agreements to silence his alleged victims from speaking about reported harassment.[13] Weinstein's use of

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NDAs ultimately led to decades of further alleged abuse behind closed doors. Fowler and other #MeToo advocates have called for the end of the use of NDAs, or what Fowler has called "the practice of buying the employee's silence."[14] Fowler argues this practice unfairly targets the economically disadvantaged, such as women, minorities and others with families, because these groups often cannot afford to turn down a settlement and really have no choice but to sell their silence.[15] Other proponents agree, arguing that victims face a difficult decision — sign an NDA and receive monetary compensation — or engage in protracted and expensive litigation, which not all plaintiffs can afford. Finally, without silencing victims through NDAs, companies would work harder to end the harassment under pressure of publicity related to the sexual misconduct.[16]

But banning NDAs, at least in their entirety, may have unintended consequences. Without the ability to utilize NDAs, employers may have little incentive to settle claims early in order to keep them confidential and out of the public eye. Victims should at least be able to choose to enter an NDA, because the victim may not want to have the details of the harassment public, which may be personal and embarrassing to the victim.

Legislation recently enacted in New York seems to carefully balance the concerns of secrecy caused by NDAs, and victim choice. The New York statute prohibits companies from inserting nondisclosure clauses in settlement agreements in sexual misconduct cases, unless requested by the complainant. The law also applies only to nondisclosure of underlying facts and circumstances, meaning companies can still request nondisclosure of the amount of the settlement, which may be the most important aspect of confidentiality to companies.[17] Other states considering such legislation should follow this approach, which permits a plaintiff to choose to enter an NDA and use an NDA as a bargaining tool for early settlement should the plaintiff choose to do so.

Victims of sexual harassment should also be aware the recent tax amendments create a disincentive to companies to use nondisclosure agreements in such cases. Specifically, the new tax laws prohibit employers[18] from deducting as a business expense "(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."[19] Unfortunately, there is no exception for a victim's preference to enter an NDA, meaning defendants now may be less likely to settle claims early in exchange for confidentiality, because they cannot get the tax write-off related to the settlement of such claims. This ultimately could harm, not benefit, victims of sexual misconduct, who want to settle a claim and keep the facts confidential or bargain for a quick settlement in exchange for confidentiality.

Ending the silence

In conclusion, the #MeToo movement has shed light on legal tools long utilized by defendants to prevent employees from accessing the courtroom and to silence victims. Although positive change is limited to the arena of sexual misconduct at this time, public exposure to the dangers of forced arbitration and NDAs may be the first step in ending abuse of these procedures in all legal areas.

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[1] Forced Arbitration, American Association for Justice.

[2] J.K. Trotter, "Here is Gretchen Carlson's Sexual Harassment Complaint Against Roger Ailes, gawker.com (July 7, 2016, 10:49 a.m.).

[3] John Koblin, "Roger Ailes, Arguing Gretchen Carlson Breached Contract, Presses for Arbitration," NY Times (July 8, 2016).

[4] Jessica Guynn, "Sexual Harassment: Bill Would End Forced Arbitration that Silences Accusers," usatoday.com (Dec. 6, 2017, 12:06 p.m.).

[5] Erik Wemple, "Roger Ailes Opts for Secrecy, Cowardice in Face of Gretchen Carlson Suit," The Washington Post (July 9, 2016).

[6] Gretchen Carlson, "Gretchen Carlson: How to Encourage More Women to Report Sexual Harassment," NY Times (Oct. 10, 2017).

[7] Susan J. Fowler, "Five Things Tech Companies Can Do Better," susanjfowler.com (May 20, 2017).

[8] Sylvan Lane, "GOP Polling Firm: Bipartisan Support for Consumer Bureau Arbitration Rule," The Hill (Oct. 5, 2017, 5:29 p.m.); "National Study of Public Attitudes on Forced Arbitration," Emp. Rights Adv. Inst. for Law & Policy, (July 8, 2018).

[9] Nick Wingfield & Jessica Silver-Greenberg, "Microsoft Moves to End Secrecy in Sexual Harassment Claims," NY Times (Dec. 19, 2017); Greg Bensinger, "Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims," The Wall Street Journal (May 15, 2018, 6:00 a.m.).

[10] S.2203, 115th Cong. (2017-2018): "Ending Force Arbitration of Sexual Harassment Act of 2017," congress.gov; H.R. 4570, 115th Cong. (2017-2018): "Ending Forced Arbitration of Sexual Harassment Act," congress.gov.

[11] Jessica Guynn, "Sexual Harassment: Bill Would End Forced Arbitration that Silences Accusers," usatoday.com (Dec. 6, 2017, 12:06 p.m.).

[12] "Mandatory Arbitration of Sexual Harassment Disputes," Nat. Association of Attorneys General (Feb. 12, 2018).

[13] Hiba Hafiz, "How Legal Agreements Can Silence Victims of Workplace Sexual Assault," The Atlantic (Oct. 18, 2017).

[14] *Supra* n. 8.

[15] *Id.*

[16] Evan Gibbs, "Non-Disclosure Agreements in the MeToo Era," Above the Law (Feb. 20, 2018, 10:51 a.m.)

[17] McKinney's "Consolidated Laws of New York Annotated" § 5003-b.

[18] The plain language of the statute does not make clear whether this non-deduction would also apply to plaintiffs, even though the intent behind the amendment appears to be that it would apply only to employers. The IRS has not yet provided guidance regarding this provision, but such guidance will hopefully clarify the issue. It is therefore important to encourage plaintiffs to seek tax advice regarding any settlement involving a non-disclosure provision in a sexual misconduct case.

[19] 26 U.S.C. § 162(q)