The Impact of Banning Confidential Settlements on Discrimination Dispute Resolution

*Blair Druhan Bullock**
*Joni Hersch***

The #MeToo movement exposed how workplace harassment plagues employment in the United States. Several states responded by passing legislation aimed at curbing harassment and employment discrimination in the workplace. One of the most common legislative efforts was to ban confidentiality provisions in certain settlement agreements. These bans, in part, attempted to stop "secret settlements" by shining light on workplace discrimination and exposing serial harassers as a means to motivate firms to actively deter workplace discrimination.

But do bans on confidentiality agreements deter the bad act? For these laws to have a deterrent effect, claims must be revealed in a public forum. The onus is therefore on victims to go public, and understandably, many victims are wary of doing so. After all, even from a pro-victim perspective, if employers cannot require confidentiality in settlement, claimants could be made worse off through a lower likelihood of settlement and a lower ultimate payout. In this situation, unless victims' allegations are made public, bans on secret settlements may not deter discrimination.

At the time states enacted confidentiality bans, there was no empirical evidence supporting these bans' deterrent effects. This Article offers the first empirical assessment of laws barring confidentiality provisions in employment discrimination settlements. Using data on large samples of employment disputes, we leverage the variation in state legislation to empirically test the effects of these bans on filing and disposition of discrimination claims in

* Assistant Professor of Law, University of Arkansas School of Law, bbullock@uark.edu.

** Cornelius Vanderbilt Professor of Law and Economics, Vanderbilt Law School, joni.hersch@vanderbilt.edu.

We thank participants at the 17th Annual Colloquium on Scholarship in Employment and Labor Law, the 93rd Annual Meeting of the Southern Economics Association, and the 33rd Annual Meeting for the American Law and Economics Association for helpful feedback. We also thank Delaney Beck, Colton Cronin, Fernando Mendoza Lopez, and Elizabeth Strickland for outstanding research assistance. We especially thank Jessica Clarke, Shahar Dillbary, and G. Alexander Nunn for their extraordinarily helpful comments.

arbitration and courts. Our results suggest an increase in the filing of claims in federal court, which is encouraging evidence of the overall deterrence value of the laws. However, the results also show a small decrease in settlement in federal court and arbitration, which may weaken the deterrence value of confidentiality bans unless plaintiffs are more likely to prevail. To achieve a higher deterrent effect, legislatures should couple these bans with additional measures, such as increasing the likelihood that a victim prevails in court and increasing the amount of damages that a victim can be awarded.

INTRODUCTION

Despite being illegal as a form of sex discrimination for almost forty years,[1] workplace sexual harassment is pervasive.[2] For most of those forty years, the only efforts to end sexual harassment have been courts modifying standards for proving employer liability following a victim's filing of a claim.[3] Those efforts have proven ineffective, as the #MeToo movement graphically revealed. The #MeToo movement's exposure of this failure led to new initiatives at both the state and federal levels, often aimed at ways to further expose the problem. Congress passed the Speak Out Act in 2022, banning nondisclosure agreements ("NDAs") signed as a condition of employment that precluded employees from speaking about claims of sexual harassment or assault.[4] Senator Lindsey Graham praised the bipartisan legislation, stating, "The more we know, the more we deter."[5] State legislatures have relied in part on the same deterrence-from-exposure justification to go even further and ban confidentiality provisions in settlement agreements that resolve allegations of discrimination and prohibit victims from discussing their claims in the future (what we will often

1. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (defining sexual harassment as actionable under Title VII of the Civil Rights Act).

2. Statistics on the prevalence of workplace sexual harassment vary widely depending on the methodology used to quantify its prevalence. The primary methodologies are described in JONI HERSCH, IZA WORLD OF LAB., SEXUAL HARASSMENT IN THE WORKPLACE (2015), https://wol.iza.org/uploads/articles/188/pdfs/sexual-harassment-in-workplace.pdf?v=1 [https://perma.cc/9TT9-ZZK8]. For two examples that indicate the wide range of prevalence rates, see OFF. OF POL'Y & EVALUATION, U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN FEDERAL WORKPLACES: 2021 UPDATE 2 (2023), https://www.mspb.gov/studies/researchbriefs/Sexual_Harassment_in_Federal_Workplaces_2021_Update_2039216.pdf [https://perma.cc/9DKE-J4EY] (reporting a sexual harassment rate in 2021 of 7.8% for men and 17.5% for women among federal employees who responded to the survey); and CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [https://perma.cc/8KH5-NG7Q] (estimating the sexual harassment rate of women in the workplace to range from 25% to 85%).

3. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998) (defining employer liability for harassment); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (same).

4. 42 U.S.C. § 19403.

5. *Gillibrand, Blackburn, Hirono, Graham Introduce Bill to Prohibit Non-disclosure Agreements in Cases of Sexual Misconduct*, KIRSTEN GILLIBRAND: U.S. SENATOR FOR N.Y. (July 13, 2022), https://www.gillibrand.senate.gov/news/press/release/gillibrand-blackburn-hirono-graham-introduce-bill-to-prohibit-non-disclosure-agreements-in-cases-of-sexual-misconduct [https://perma.cc/7U77-WDCV] (internal quotation marks omitted).

refer to as "settlement NDAs,"[6] consistent with the legislation and media coverage).[7]

Though one important and commendable goal of this legislation is to deter employment discrimination,[8] banning settlement NDAs may only have a deterrent effect if victims' claims are made public such that others are inspired to bring claims or the claims result in reputational and financial costs to employers. But consideration of both employer and victim behavior raises doubts about whether banning settlement NDAs will result in increased reporting in a public forum and, correspondingly, in increased public awareness. What is clearer is that bans on settlement NDAs reduce the attractiveness to the employer of a private settlement agreement.[9] If settlement becomes less likely because settlement NDAs are banned, deterrence will need to come from victims going forward with their claims outside of the firm. This puts a hefty burden on the victim, who might prefer to settle internally within the company but might not be offered that option if confidentiality is not part of the agreement.[10] If the victims do not come forward, the harassment is still kept secret, victims are not compensated, and the employer is not deterred.[11]

---

6. We think it is appropriate to reference these confidentiality provisions as NDAs, as both the media and state legislatures have, because these agreements not only keep the details of the settlement confidential but also the facts underlying the alleged wrong.

7. *See infra* Table 1 (providing descriptions of the following laws); CAL. CIV. PROC. CODE § 1001 (West 2022); 820 ILL. COMP. STAT. ANN. 96/1–97 (West 2022); NEV. REV. STAT. § 10.195 (2019); N.J. STAT. ANN. § 10:5-12.8 (West 2019); N.M. STAT. ANN. § 50-4-36 (West 2020); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019); OR. REV. STAT. ANN. § 659A.370 (West 2023); WASH. REV. CODE ANN. § 49.44.211 (West 2022); ME. REV. STAT. ANN. tit. 26, § 599-C (2022).

8. *See* KIRSTEN GILLIBRAND: U.S. SENATOR FOR N.Y., *supra* note 5 ("But until we eradicate all legal obstacles that prevent workers' voices from being heard, employees remain vulnerable to inappropriate behavior and toxic work environments." (internal quotation marks omitted) (quoting Gretchen Carlson, Co-founder, Lift Our Voices)).

9. *See infra* Part II (discussing how confidentiality is an important incentive to employers in coming to a settlement).

10. *See* Jill Basinger & Michael L. Smith, *How California's NDA Restrictions Cause More Harm than Good for Survivors*, HOLLYWOOD REP. (Feb. 25, 2020, 6:30 AM), https://www.hollywoodreporter.com/business/business-news/how-californias-nda-restrictions-cause-more-harm-good-survivors-guest-column-1280922/ [https://perma.cc/LL3E-9BYC] ("[California's restriction on NDAs] harms survivors of sexual harassment and assault by removing their choice and forcing them to endure the hardship and uncertainty of a public trial . . . .").

11. We are not the first to postulate that bans will make victims worse off by making settlement less likely and by lowering the likelihood that the victim is compensated. *See* Debra S. Katz & Lisa J. Banks, *The Call to Ban NDAs Is Well-Intentioned. But It Puts the Burden on Victims*, WASH. POST (Dec. 10, 2019, 2:58 PM), https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html [https://perma.cc/3HJM-N28K] (asserting that many victims may not chose to pursue litigation to maintain their privacy, even where NDA bans leave litigation as their only avenue for relief); *see also* Mark Hudspeth, *Gretchen Carlson and the Complicated Truth About NDAs*, CBS NEWS (Mar. 1, 2020, 9:18 AM), https://www.cbsnews.com/news/gretchen-carlson-and-the-complicated-truth-about-ndas/ [https://perma.cc/7U3F-

In this Article, we provide the first empirical evidence on whether banning settlement NDAs is likely to deter harassment or discrimination by analyzing the effect these laws have on the filing of discrimination and harassment lawsuits and the outcome of those cases. Our empirical strategy draws on state variation in legislation to examine the impact that banning settlement NDAs has on victims' filing behavior and on litigation outcomes in both court and arbitration.[12] Our research strategy is especially relevant and timely, as it provides unique evidence of the likely efficacy of any current or future state or federal legislation aimed at deterring sexual harassment by moving claims to the public eye.[13]

The movement to ban NDAs—particularly confidentiality agreements in employment discrimination settlements—began as the #MeToo movement exposed serial harassers like Harvey Weinstein, Les Moonves, Bill O'Reilly, and Roger Ailes.[14] Not only did their history of

---

VN9B] (describing view of attorney Debra Katz that "if a company is unable to keep the details secret, it will be less likely to settle a complaint out of court, meaning victims would be forced to file a public lawsuit and might think twice about coming forward").

12. We consider arbitration claims as well as court claims because nearly 60% of workers are subject to mandatory arbitration of employment claims and thereby lack access to courts for recourse. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers*, ECON. POL'Y INST. (Sept. 27, 2017), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ [https://perma.cc/G6BF-58CB] (showing that 56.2% of private sector, nonunion employees are subject to mandatory arbitration). This barrier to the justice system underlies the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act passed in March 2022. *See* 9 U.S.C. § 402(a) ("[A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement . . . shall be valid . . . .").

13. Congress passed the Speak Out Act in 2022, a bill that bans NDAs signed as a condition of employment that preclude employees from speaking about claims of sexual harassment or assault. Speak Out Act, Pub. L. No. 117-224, 136 Stat. 2290 (2022). Congress continues to entertain a federal ban on settlement NDAs. The Accountability for Workplace Misconduct Act was proposed in the House on June 17, 2022. H.R. 8146, 117th Cong. (2022). This bill would prevent employers from using NDAs to restrict a worker's ability to report harassment, bias, or retaliation to federal agencies or Congress. *Id.*

14. Harvey Weinstein's exposure as a serial sexual predator is credited with launching the #MeToo movement in October 2017, though its origins predated the events. *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/7VN2-4VFA] (discussing the details of "allegations against Mr. Weinstein stretching over nearly three decades"); Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017, 11:27 AM), https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/ [https://perma.cc/7M2W-MBM7] (listing all of Harvey Weinstein's accusers); Ronan Farrow, *Les Moonves and CBS Face Allegations of Sexual Misconduct*, NEW YORKER (July 27, 2018), https://www.newyorker.com/magazine/2018/08/06/les-moonves-and-cbs-face-allegations-of-sexual-misconduct [https://perma.cc/VJ9C-CNFD] (describing allegations by "[s]ix women who had professional dealings with [Les Moonves]"); Michelle Ruiz, *Bill O'Reilly's Sexual Harassment Settlements Are Even Uglier than We Thought*, VOGUE (Apr. 5, 2018), https://www.vogue.com/article/bill-oreilly-sexual-harassment-settlement-news [https://perma.cc/7UF5-BS87]

sexual harassment become widely known, but it was also revealed that they or their employers had settled numerous claims of sexual harassment with their victims for large sums of money, generally in exchange for silence.[15] For example, Gretchen Carlson, who reportedly settled her sexual harassment claim with Fox News for around $20 million after filing a lawsuit in federal court, signed a confidentiality agreement as a condition of her settlement that prevented her from discussing her allegations.[16] In the wake of #MeToo's exposure of these agreements, many access to justice advocates, including Justice Ruth Bader Ginsburg, expressed that courts should not approve settlement agreements that contain NDAs,[17] and several state legislatures subsequently banned their enforcement.[18]

Few would dispute that increasing knowledge of harassment claims, particularly those exposing serial harassers, could deter harassment by providing external motivation for employers to fix the problem and encouraging other victims to bring claims. Without public information on the likelihood of success and award amounts, victims will not be able to conduct a complete assessment of whether they should file a claim when the risks of retaliation or psychological harm may be salient. The lack of information also affects firms' decisions about the level of effort to exert to deter harassment. Further, the

(discussing terms in NDAs signed by O'Reilly's accusers, including a requirement to turn over all evidence to O'Reilly and to "disclaim the materials as 'counterfeit and forgeries' if they ever became public"); Emily Crockett, *Here Are the Women Who Have Publicly Accused Roger Ailes of Sexual Harassment*, VOX (Aug. 15, 2016, 1:00 PM), https://www.vox.com/2016/8/15/12416662/roger-ailes-fox-sexual-harassment-women-list [https://perma.cc/9DJZ-FJZC] (discussing the harassment allegations of at least twenty women against Roger Ailes, some of whom had signed NDAs).

15. *See, e.g.*, Rachel Stockman, *Exclusive: Fox News Settled with Fmr. Anchor Who Claimed Bill O'Reilly and Fox President Sexually Harassed Her*, LAW & CRIME: A DAN ABRAMS PROD. (Jan. 9, 2017, 4:22 PM), https://lawandcrime.com/high-profile/exclusive-fox-news-settled-with-fmr-anchor-who-claimed-bill-oreilly-and-fox-president-sexually-harassed-her/ [https://perma.cc/R73G-PNZA] (discussing the details of the Fox News settlement with Juliet Huddy).

16. Sarah Ellison, *Fox Settles with Gretchen Carlson for $20 Million—and Offers an Unprecedented Apology*, VANITY FAIR (Sept. 6, 2016), https://www.vanityfair.com/news/2016/09/fox-news-settles-with-gretchen-carlson-for-20-million [https://perma.cc/NHJ6-LMWJ]; Claire Duffy, *Gretchen Carlson Fights Back Against Nondisclosure Agreements like the One She Signed with Fox News*, CNN (Dec. 1, 2019, 4:26 PM), https://www.cnn.com/2019/12/15/media/gretchen-carlson-fox-news-nda-reliable-sources/index.html [https://perma.cc/C38R-Q3PQ]. Carlson became an influential proponent of eliminating these provisions. She founded an initiative, Lift Our Voices, to support the movement, which ultimately led to the proposed Speak Out Act. *Our Federal Legislative Victories*, LIFT OUR VOICES, https://liftourvoices.org/legislative-work (last visited Dec. 11, 2023) [https://perma.cc/GB4T-UC49].

17. Maryclaire Dale, *Ginsburg, in Book, Questions Confidential #MeToo Agreements*, ASSOCIATED PRESS (Nov. 7, 2019, 12:07 AM), https://apnews.com/article/entertainment-arts-and-entertainment-courts-ruth-bader-ginsburg-philadelphia-f7dfcb037ff241fe9ac01ad9ce3175c6 [https://perma.cc/QP3H-N27A] (citing JEFFREY ROSEN, CONVERSATIONS WITH RBG: RUTH BADER GINSBURG ON LIFE, LOVE, LIBERTY, AND LAW (2019)) (discussing Justice Ginsburg's criticisms of NDAs).

18. *See infra* Table 1 (displaying legislative action aimed at prohibiting NDA enforcement).

potential for reputational harm is one rationale for private settlements that contain NDAs and is correspondingly one argument in support of legislation banning secret settlements. But private settlements also have deterrence value because of the direct compensation paid to victims.[19] For bans on settlement NDAs to provide greater deterrence than private settlement agreements, the incentive for increased deterrence must come from higher expected costs, including direct compensation to victims (as well as to additional victims who may be encouraged to file because of the increased exposure) and loss from reputational effects. Importantly, both effects depend on victims going forward with their claims in a public forum. If internal settlement decreases as a result of the bans, to be successful deterrents, bans on settlement NDAs must cause an increase in the number of claims filed or experiences publicly aired such that the external costs—increased exposure coupled with reputational harm or increased compensation, or both—outweighs the decrease in the value of internal payouts.

This possibility of a null effect or negative effect on deterrence does not consider the private value or costs to the victim. There is private value to bans on secret settlements that is difficult to measure, including the victim's ability to discuss their harm with others. But it is also possible that a decrease in settlement could leave the victim with no compensation or recourse.[20] If the victim chooses not to go forward with their claim after internal settlement fails, the victim will not receive compensation and could still be subject to retaliation.[21] Further, even if the victim decides to go forward by filing their claim in a public forum, the victim may still be less likely to receive a payout depending on their chance of prevailing in court. Ultimately, any decrease in expected compensation from reporting a claim internally could further limit the deterrent effect of settlement NDA bans as future claimants

19. *See* John Wilson & Rebecca Richardson, *Silence Has a Place in Workplace Sexual-Harassment Claims*, LEXOLOGY (Oct. 30, 2019), https://www.lexology.com/library/detail.aspx?g=f26cf694-5d76-4ffd-9d64-a9de1f521ad5 [https://perma.cc/3G3M-5P35] (arguing that a ban on NDAs would remove incentives to settle and pay victims).

20. Victims may not necessarily want financial compensation. Instead, victims may be seeking other remedies, such as forcing the harasser to stop the harassment, to leave the workplace, or to apologize. Firms may not offer even nonfinancial compensation unless confidentiality is guaranteed.

21. Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 704–05 (2021) (conducting analysis showing that harassment victims still experience retaliation when they do not report harassment, even if their likelihood of experiencing harassment increases if they do report). As acknowledged in Section I.D, *infra*, settlement NDAs also have costs for the victims, as some prohibit them from discussing their claims with family members or perhaps even therapists. *E.g.*, Julie Macfarlane, *Buying Silence with a Bluff: How NDAs Exploit Litigants, with and Without Counsel*, NAT'L SELF-REPRESENTED LITIGANTS PROJECT (June 23, 2021), https://representingyourselfcanada.com/buying-silence-with-a-bluff-how-ndas-exploit-litigants-with-and-without-counsel/ [https://perma.cc/QAL8-WRC9].

realize internal settlement is less likely and become less likely to report altogether, and as firms realize that victims are unlikely to file their claim in a public forum. This situation would have the perverse and unintended consequence of indicating a decline in sexual harassment when in fact it is only reporting that has declined.

But these laws—the bans on settlement NDAs—were well intended. And they could work as deterrents in addition to offering private benefits. If the bans do increase internal or external filings, the increase in awareness could encourage other victims to report as well as impose reputational consequences on firms. Further, if the bans increase reporting and the likelihood of receiving compensation in court or arbitration is high, then the bans could additionally have an overall net positive effect on victim compensation.

This theoretical debate about whether bans on settlement NDAs will benefit or harm victims is not new. In fact, it is what allegedly prompted some legislators in the states that have passed the bans to oppose the legislation and prompted responses even from the plaintiffs' bar expressing concern about these well-intended laws.[22] This healthy debate often comes down to the resolution of a set of empirical questions that have not been answered, including how the inability to include NDAs in settlement agreements affects the likelihood of settlements and the filing of claims in other forums where compensation can be awarded. We provide the first empirical evidence answering those questions.

Our empirical strategy is as follows. Outside of victims discussing their claims through informal networks, which may encourage future claims or result in reputational harm, the net deterrent effect of these bans first depends on an increase in the filing of claims in an arena where the public can learn of the allegations and where the victim can receive compensation that is higher than that expected to be received in an internal settlement. Accordingly, we begin with an analysis of how state legislation that banned NDAs in employment discrimination settlements affected the *number* of charges alleging harassment or employment discrimination filed in federal court or arbitration.[23] Our focus is on the states that have passed

22. *See, e.g.*, Susan Dunlap, *A Bill to Prohibit Requiring NDAs for Sexual Harassment Settlements Headed to Guv's Desk*, N.M. POL. REP. (Feb. 20, 2020), https://nmpoliticalreport.com/2020/02/20/a-bill-to-prohibit-ndas-for-sexual-harassment-settlements-headed-to-guvs-desk/ [https://perma.cc/V9L5-2S94] (discussing debate among New Mexico senators over whether to pass an NDA-banning law); *see also infra* Section I.D.

23. State court data is extremely limited, and, as seen in Table 2, *infra*, many employment discrimination claims end up in federal court as plaintiffs file claims under Title VII of the Civil Rights Act.

legislation banning NDAs in employment discrimination settlement agreements as of 2023.[24] The specific provisions of these bans vary considerably. Many of these states passed additional legislation, including bans on NDAs covering allegations of harassment and signed as a condition of employment.[25] Other states passed comprehensive legislation requiring mandatory harassment training and at times expanding coverage of the state antidiscrimination legislation.[26] One state—New Mexico—only passed legislation banning settlement NDAs and took no other actions.[27] New Mexico's unique status allows us to isolate the effect of a state ban on settlement NDAs by comparing filings in New Mexico before and after the ban to filings in states that passed no legislation tackling settlement NDAs during our time period of analysis.

Our empirical results provide evidence that settlement NDA bans increased filing of allegations of employment discrimination in federal court, the most public forum.[28] This is good news for the deterrent effect of the bans. But this is also consistent with a decrease in settlement within the firm or Equal Employment Opportunity Commission ("EEOC"), so it does not guarantee that there was an increase in publicity encouraging the filing of claims not directly affected by a change in settlement behavior, which would clearly indicate an overall net positive effect. Accordingly, we also analyze the effect of the bans on the *outcome* of charges filed in arbitration and federal court—particularly the probability that a claim settles or that the plaintiff prevails early in the litigation.

When isolating the New Mexico legislation, the results provide evidence of a decrease in the likelihood of settlement and a decrease in the likelihood that a plaintiff prevails early in the litigation, suggesting some concern that fewer victims might be compensated following the adoption of a settlement NDA ban. However, analysis of the impact of the legislation on settlement behavior and the probability that the plaintiff prevails in states that took additional actions to curb

24. *See* KIRSTEN GILLIBRAND: U.S. SENATOR FOR N.Y., *supra* note 5; *see also infra* Table 1 (outlining the states' relevant legislation).

25. ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 8–10 (2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report.pdf [https://perma.cc/E7U6-GFSE] (summarizing the laws as of 2020).

26. For example, New York passed legislation expanding the coverage of its antidiscrimination law to independent contractors and expanded its statute of limitations. *See* S. 6577, 2019 Leg., Reg. Sess. (N.Y. 2019).

27. N.M. STAT. ANN. § 50-4-36 (West 2020).

28. Our difference-in-differences empirical strategy nets out the effects of any state or national trends, such as variations in unemployment rates. *See infra* Section III.B.

workplace harassment and discrimination, such as California and New York, suggests an increase in the probability that the plaintiff prevails. Recognizing that victims will be more likely to go forward with a claim when they are more likely to prevail or receive high damages in litigation, we call on state legislatures to follow New York and other states and adopt additional measures when passing settlement NDA bans, such as increasing the damages a victim can receive and closing current loopholes in sexual harassment liability law.

Although the focus of this Article and our empirical study is the banning of NDAs in settlement agreements, this study has much broader implications for the scholarly debate regarding the downside of ever allowing secret settlements and for the effectiveness of transparency laws.[29] This Article highlights that even when victims are willing to go forward with litigation following the failure of an internal settlement negotiation, in a world where the victim is unlikely to prevail in court due to a number of barriers—including loopholes in the liability regime or tort reform measures that reduce damages awards—the deterrent effects of bans on settlement NDAs may be limited. Indeed, from a private law viewpoint, in a regime where the law disfavors the plaintiff, banning secret settlements may do more harm to some plaintiffs than good. But from a public law viewpoint, this Article highlights that despite a federal regime unfavorable to employment discrimination plaintiffs, banning confidential settlements might lead to increased publicity and awareness.

This Article proceeds as follows. Part I provides a discussion of the current legal regime addressing NDAs, settlement agreements, and allegations of harassment, as well as the movement toward the settlement NDA bans and the debate surrounding the bans. Part II discusses how bans on settlement NDAs could theoretically impact the settlement of discrimination allegations and the reporting of those allegations. Part III then provides the data, analysis, and results of our empirical study. Finally, Part IV draws on our empirical findings to call for more thorough discussion of the effect of these bans. In doing so, it seeks to encourage the adoption of comprehensive antidiscrimination law reform along with the bans.

29. *See infra* Section I.C (discussing several states' approaches to addressing the #MeToo movement); *see, e.g.*, Jeffrey Steven Gordon, *Silence for Sale*, 71 ALA. L. REV. 1109, 1125 (2020) ("Since the early 1990s, secret settlements constantly have been the subject of news reporting and academic commentary. . . . Critics respond with arguments centering on the public good of adjudication and the interest in access to information of public concern." (footnotes omitted)).

I. THE SETTLEMENT NDA AND MOVEMENT TOWARD ITS BAN

A. Workplace Harassment and Antidiscrimination Law

Title VII of the Civil Rights Act of 1964 makes employers liable for workplace discrimination on the basis of sex, race, national origin, color, and religion.[30] Sexual harassment was not specifically prohibited in the statute but became recognized as an unlawful form of sex discrimination as a series of cases made their way through the federal courts. In the 1986 case *Meritor Savings Bank v. Vinson*, the Supreme Court defined workplace harassment in part as harassment that is both motivated by the plaintiff's membership in a protected class and severe or pervasive such that it interferes with an employee's ability to do their job.[31] In later cases, the Supreme Court defined the limited circumstances where employers are liable for such harassment, carving out an affirmative defense such that employers are not liable for most forms of harassment if they have taken measures to prevent the harassment—such as the creation of internal reporting mechanisms—and the victims did not take advantage of those measures.[32] And broadly speaking, state courts with antidiscrimination laws interpreted their statutes similarly and followed federal case law in interpreting Title VII.[33] Even before the #MeToo movement, legal scholars criticized the limitations of this liability regime and several other loopholes for employer liability for workplace harassment under federal law and

30. 42 U.S.C. §§ 2000e, 2000e-2.

31. 477 U.S. 57, 65–67 (1986). Several subsequent Supreme Court cases have applied this definition of workplace harassment. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998).

32. *Ellerth*, 524 U.S. at 764–65 ("The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."); *Faragher*, 524 U.S. at 807 (same); *see also* Bullock, *supra* note 21, at 676 (discussing the implications of *Ellerth* and *Faragher*).

33. *See, e.g.*, Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 332 (6th Cir. 2008) ("Ohio courts have held that federal caselaw interpreting Title VII of the Civil Rights Act of 1964 (Title VII) 'is generally applicable' to cases involving sexual harassment claims under state law." (citing Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726, 731 (Ohio 2000))). Notably, the affirmative defense does not apply to all state antidiscrimination statutes. *See, e.g.*, H.D. 679, 2019 Leg., 439th Sess. (Md. 2019) (Maryland's law limiting the affirmative defense); Zakrzewska v. New Sch., 620 F.3d 168, 170 (2d Cir. 2010) (stating the New York's highest state court held that the *Faragher*/*Ellerth* defense does not apply to harassment claims brought under its state statute); State Dep't of Health Servs. v. Superior Ct., 79 P.3d 556, 563–64 (Cal. 2003) (California's highest court holding that the *Faragher*/*Ellerth* defense does not apply to harassment claims brought under its state statute and acknowledging that the defense is applicable for damages purposes).

encouraged state legislatures to reform their statutes to provide protection beyond that provided by Title VII and federal case law.[34]

Yet despite being illegal for almost forty years, workplace sexual harassment is common. A 2016 EEOC Task Force review of the literature suggests that 25% to 85% of women workers have experienced sexual harassment in the workplace.[35] In light of the #MeToo movement launched in October 2017, it became undeniable that existing laws were inadequate to deter harassment. A number of serial harassers in influential positions were identified.[36] New efforts, such as those launched by Gretchen Carlson calling for the banning of NDAs that prohibit victims from speaking about their allegations of harassment, were initiated.[37] States began to implement certain measures, such as passing legislation requiring mandatory harassment training or even requiring employers to report any harassment settlement or claim to the state Fair Employment Practices Agency ("FEPA").[38] And as further expanded on in Section I.C, states began to

---

34. *See, e.g.*, Susan Grover & Kimberley Piro, Essay, *Consider the Source: When the Harasser Is the Boss*, 79 FORDHAM L. REV. 499, 514 (2010) (arguing that additional considerations, such as the source of the harasser, need to be considered when determining whether harassment is severe or pervasive); Evan D.H. White, *A Hostile Environment: How the "Severe or Pervasive" Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 869–71 (2006) (recognizing the dilemma of requiring that harassment be pervasive but also requiring that reporting be prompt for actionability); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 42–43 (2018) ("Victims of harassment should have the same recourse to the legal system as other victims of discrimination."); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 237 (2018) ("[C]ourts may relax their application of the 'severe or pervasive' requirement and impose more exacting standards on employers seeking to establish the *Faragher/Ellerth* defense."); John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1436 (2002) (observing that, according to post-*Ellerth* circuit case law, "anti-harassment policies and procedures that include a harassment-complaint mechanism" are "virtually guaranteed safe harbor[s] against claims of supervisory harassment"). *But see* James Concannon, *Actionable Acts: "Severe" Conduct in Hostile Work Environment Sexual Harassment Cases*, 20 BUFF. J. GENDER L. & SOC. POL'Y 1, 31–32 (2012) (suggesting that courts properly interpret "severe" or "pervasive").

35. *See* FELDBLUM & LIPNIC, *supra* note 2, at 8. To investigate whether there has been a change in the prevalence of sexual harassment following the #MeToo movement, we looked at data collected by the U.S. Merit Systems Protection Board, which reports data from federal employees collected in 2016 (before the #MeToo movement) and in 2021 (after the #MeToo movement, but during the Covid period). The surveys show a slight decline, with 20.9% of women and 8.7% of men reporting that they experienced sexual harassment behavior in the previous two years in the 2016 survey, and 17.5% of women and 7.8% of men in reporting the same in 2021. OFF. OF POL'Y & EVALUATION, *supra* note 2, at 3–4.

36. *See* sources cited *supra* note 14.

37. *See* Duffy, *supra* note 16 (discussing Gretchen Carlson's Lift Our Voices movement and support for the Speak Out Act).

38. *See, e.g.*, Assemb. 8421, 2019 Leg., Reg. Sess. (N.Y. 2019); ANDREA JOHNSON, KATHRYN MENEFEE & RAMYA SEKARAN, NAT'L WOMEN'S L. CTR., PROGRESS IN ADVANCING ME TOO

pass legislation tackling confidentiality agreements and NDAs thought to silence harassment victims.[39]

Under Title VII and almost all state antidiscrimination laws, before filing a claim in state or federal court alleging workplace sexual harassment, a victim must first file a claim with the EEOC or the corresponding state FEPA.[40] But as previously mentioned, because employers' liability for harassment is limited unless they have knowledge of the claims, employees are encouraged under federal law and in many employment handbooks to first report allegations of harassment internally within the workplace.[41] Despite this encouragement, it is estimated that only 30% of harassment victims actually report the harassment internally or externally.[42] And one reason victims are believed to not report is the fear of retaliation, which is prevalent and expected to be even higher when victims do report and when victims report harassment from their supervisors as compared to their coworkers.[43] Other theories of underreporting point to the emotional and psychological consequences of discussing the harm.[44]

WORKPLACE REFORMS IN #20STATESBY2020 8–9 (2019), https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf [https://perma.cc/EP6T-RJKK] (describing laws in Illinois, Maryland, and Vermont regarding transparency about harassment claims).

39. *See also infra* Table 1.

40. *See* EQUAL EMP. OPPORTUNITY COMM'N TRAINING INST. RSCH. GUIDE, EEOC'S RELATIONSHIP WITH STATE & LOCAL FAIR EMPLOYMENT PRACTICES AGENCIES Q-6 (2008) (discussing the EEOC's worksharing agreements with various FEPAs); *see also* EEOC v. Com. Off. Prods. Co., 486 U.S. 107, 110 (1988) ("As a general rule, a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice." (citing 42 U.S.C. § 2000e-5(e))).

41. *See, e.g.*, Rachael L. Loughlin & O'Hagan Meyer, *Tips for Avoiding Sexual Harassment Claims*, VA. EMP. L. LETTER, Mar. 2018, at 4:

> Your employee handbook should also clearly spell out your company's procedures for reporting and investigating claims of harassment. Employees need to understand that they are required to report harassment, and they should be aware of your reporting procedure. It's a good idea to require employees to report sexual harassment in writing to their supervisor, HR, or some other management-level employee with whom they feel comfortable.

42. FELDBLUM & LIPNIC, *supra* note 2, at 11 (40% of women reporting behavior to officials and only 28% of men). Even with such a low reporting estimate, the EEOC and corresponding FEPAs receive approximately eight thousand allegations of sexual harassment annually. *See Sexual Harassment in Our Nation's Workplaces*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 2022), https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces [https://perma.cc/5N8T-WQV9].

43. Bullock, *supra* note 21.

44. *See, e.g.*, Katz & Banks, *supra* note 11:

> Our clients have often struggled for months, sometimes years, to manage the effects of being sexually harassed at work before making the difficult decision to seek legal advice. Almost uniformly, they have suffered anxiety, depression, insomnia or other hardships while trying to avoid their harasser, redirect his behavior, navigate a dysfunctional corporate complaint process and avoid retaliation;

But factors in addition to fear of retaliation and psychological consequences also acted to silence victims of harassment. In October 2017, the #MeToo movement gained momentum, encouraging women to come forward with their workplace harassment experiences and encouraging firms to investigate their workplace cultures.[45] Through this exposure and attention from the media and politicians, what we already knew about harassment—that it was prevalent, costly, and underreported and that fears of retaliation were real—was brought to light. But we also learned a good bit more, particularly about large firms—specifically large media conglomerates—and their practices that may have silenced victims.[46] As women began to speak out about their experiences, others remained silenced or were unable to reveal the details of their experiences due either to agreements signed at the start of their employment or, more commonly, agreements signed during settlement negotiations of their harassment claims.[47] As discussed in more detail below, these agreements included NDAs signed at the start of employment and broadly interpreted to preclude an employee from discussing details of the workplace, including workplace harassment. Confidentiality provisions found in settlement agreements were also highlighted as precluding the victim from disclosing not just the settlement itself but also the underlying allegation.[48]

B. Defining the Settlement NDA, Its Prevalence, and Its Legality

NDAs and confidentiality agreements come in several different forms, have many different purposes, have survived many legal challenges, and have failed others. At their heart, these agreements are a creature of contract, and the purpose of the contract is to prevent one party from disclosing information that the other (or in some cases both parties) wishes to keep confidential. Like all contracts, there must be mutual assent and consideration.[49] With an NDA signed at the start of

Hudspeth, *supra* note 11 (discussing effects of NDAs, such as the "psychological harm that results from agreeing to not tell the story of your own life").

45. *See, e.g.*, Kantor & Twohey, *supra* note 14 (detailing claims against Harvey Weinstein); Tippett, *supra* note 34, at 230–33 (summarizing the movement).

46. *See, e.g.*, Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/NUE5-6TDE] (discussing how NDAs are "routinely included in standard employment contracts upon hiring" and that over one-third of the U.S. workforce is bound by an NDA).

47. *Id.*

48. *See infra* Table 1; Duffy, *supra* note 16 (discussing Gretchen Carlson's Lift Our Voices movement).

49. *See* Jingxi Zhai, *Breaking the Silent Treatment: The Contractual Enforceability of Non-disclosure Agreements for Workplace Sexual Harassment Settlements*, 2020 COLUM. BUS. L. REV.

employment and as a condition of it, that consideration is generally employment; with an NDA found in a settlement agreement, that consideration is generally compensation.

As with NDAs generally, NDAs in the employment context serve different purposes and come in different forms. A recent study found that more than 50% of employees are bound by an NDA signed at the outset of their employment.[50] Generally, these agreements are thought to preclude employees from disclosing confidential business information, such as trade secrets, but the language is often quite broad.[51] For example, the confidentiality agreement required by the Weinstein Company, LLC prohibits disclosure of "any confidential, private, and/or nonpublic information obtained by Employee during Employee's employment with the Company concerning the personal, social, or business activities of the Company, the Co-Chairmen, or the executives, principals, officers, directors, agents, employees of, or contracting parties . . . with, the Company."[52]

NDAs that prohibit employees from disclosing information about workplace conditions can be challenged as not legally valid.[53] Grounds for challenges include that the contract was invalid due to public policy considerations, unenforceable due to being overly broad, or void because it violates federal law.[54] Specifically, the National Labor Relations Act prohibits employers from chilling concerted employee activity, which has served as a possible vehicle for striking an NDA that prohibits employees from discussing conditions in their workplace.[55] Other courts

396, 406 ("While NDAs provide benefits to both contracting parties in the form of mutually agreed upon consideration . . . .").

50. Natarajan Balasubramanian, Evan Starr & Shotaro Yamaguchi, Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters 1, 2 (Mar. 2021) (unpublished manuscript), https://extranet.sioe.org/uploads/sioe2021/balasubramanian_starr_yamaguchi.pdf [https://perma.cc/SXQ7-CBS5].

51. Lobel, *supra* note 46.

52. Jason Sockin, Aaron Sojourner & Evan Starr, *Non-disclosure Agreements and Externalities from Silence* 1, 7 (Upjohn Inst., Working Paper No. 22-360, 2023) (alteration in original) (emphasis omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900285 [https://perma.cc/D9RC-JU7B].

53. *See* Lobel, *supra* note 46 ("NDAs cannot lawfully prohibit employees from officially reporting illegal conduct.").

54. Neda Dadpey, *Issues Enforcing Nondisclosure Agreements (United States)*, ASS'N OF CORP. COUNS. (Apr. 7, 2017), https://www.acc.com/resource-library/issues-enforcing-nondisclosure-agreements-united-states [https://perma.cc/5H87-67KF].

55. Joan C. Williams, Jodi Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 218. The NLRB recently invalidated NDAs and nondisparagement clauses in severance agreements. *Board Rules That Employers May Not Offer Severance Agreements Requiring Employees to Broadly Waive Labor Law Rights*, NAT'L LAB. RELS. BD. (Feb. 21, 2023), https://www.nlrb.gov/news-outreach/news-story/board-rules-that-employers-may-not-offer-severance-agreements-requiring [https://perma.cc/DNK3-GRNR].

have held that NDAs similar to the Weinstein Company NDA cited above are overly broad and thus unenforceable if interpreted to cover allegations of discrimination as the employees who entered into the contract would not know what they are agreeing to.[56] Nonetheless, the breadth of employment NDAs has been highlighted as potentially covering employment conditions such as workplace harassment, even when the harassing behavior violates the law.[57] Although it is likely that these agreements would not survive legal challenges if used to prohibit employees from discussing discrimination in the workplace,[58] it is also likely that an employee not well-versed in the law will assume the agreement is enforceable and, seeking to avoid expensive litigation and damages, will not violate it out of fear that the employer will attempt to enforce it.[59] For this reason, and the fact that properly constructed NDAs are enforceable, concern about the chilling effect of these agreements rose, eventually leading to legislation aimed at banning them—the Speak Out Act.[60]

Our primary interests in this Article are confidentiality agreements following a dispute and settlement related to workplace sexual harassment or employment discrimination. As the #MeToo movement revealed, confidentiality provisions in settlement agreements resolving harassment disputes are common.[61] Employers

---

56. *See* Williams et al., *supra* note 55, at 200–01. For a recent example of a case holding a similar NDA overly broad, *see* Wagging Tails Prods., Inc. v. Coakley, No. LA CV22-09329, 2023 WL 4316777, at *10 (C.D. Cal. Feb. 21, 2023).

57. *See* Lobel, *supra* note 46 (describing NDAs as "often broadly worded" and "demand[ing] silence"); Rex N. Alley, Note, *Business Information and Nondisclosure Agreements: A Public Policy Framework*, 116 NW. U. L. REV. 817, 868 (2021).

58. *See 4 Things You Should Know About Non-disclosure Agreements*, THOMSON REUTERS (Mar. 11, 2022), https://legal.thomsonreuters.com/en/insights/articles/4-things-to-know-about-non-disclosure-agreements [https://perma.cc/TQ92-NKJJ] (providing an overview of the legal challenges discussed above).

59. Recent empirical literature on noncompete clauses highlights that employers continue to keep illegal provisions in their contracts and that employees believe them to be valid. *See, e.g.*, Tito Boeri, Andrea Garnero & Lorenzo G. Luisetto, *The Use of Non-compete Agreements in the Italian Labour Market,* FONDAZIONE ING. RODOLFO DEBENEDETTI 1, 6, 46 (2022), https://www.frdb.org/wp-content/uploads/2022/05/Boeri-Garnero-Luisetto-Non-compete-agreements-Italy_FINAL.pdf [https://perma.cc/7XW7-SR5J] (stating that "more than half of the clauses appear to be unenforceable" and that "workers, even those who are sure to have signed one and have read it carefully, are not aware of [noncompete clauses'] content").

60. 42 U.S.C. § 19401.

61. Unfortunately, given the nature of a confidential settlement, it is very difficult to know how common NDAs are in agreements settling discrimination cases. Even cases settled in court do not provide the settlement agreement itself, so it is unclear whether there is an NDA in an agreement. Estimates based on whether the record is sealed would not fully capture the prevalence either. *See, e.g.*, Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1, 11, 16–17 n.57 (2022) (citing ROBERT TIMOTHY REAGAN, SHANNON R. WHEATMAN, MARIE LEARY, NATACHA BLAIN, STEVEN S. GENSLER, GEORGE CORT & DEAN MILETICH, FED. JUD. CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 (2004)) (describing how "secret

who agree to settle a dispute, particularly one about an allegation of employment discrimination (and more so if the allegation is of workplace harassment), have every incentive to want to keep it quiet.[62] These settlement NDAs do not just prohibit discussion of the settlement itself but of the underlying allegations and any detail related to them. For example, Gretchen Carlson is on record saying she is unable to verify any details of the harassment she allegedly experienced because she signed an NDA after filing a claim in federal court[63]—even publicly acknowledging the fact that she had alleged harassment may have been barred had she signed an agreement before filing a public action.

It is difficult for victims to make successful legal challenges to the enforceability of settlement NDAs. The clauses are generally narrow—covering the facts of the claim—and often there is a bargained-for exchange in which the victim receives consideration for silence and for not filing a lawsuit, although often the consideration is not directly tied to silence.[64] But concerns such as the lack of attorney representation, the lack of additional consideration for silence, and the emotional state of the victim at the time of signing could lead to an unconscionability or public policy challenge to the contract's validity. The public policy concerns particularly focus on the external effect such confidentiality may have on keeping future victims in the dark about a serial harasser or the prevalence of harassment and toxic workplace

settlements" are counted); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 113 (2007) (recognizing the difficulty of determining how many cases settle due to voluntary dismissals and confidentiality provisions).

62. *See* Bradford J. Kelley & Chase J. Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, BUS. L. TODAY (Oct. 17, 2018), https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/ [https://perma.cc/U5RP-QMMS] (stating various benefits to employers of confidentiality provisions in settlement agreements).

63. *See, e.g.*, Lynette Rice, *Gretchen Carlson Opens Up About* Bombshell*: 'It's Frustrating I Can't Partake*,*'* ENT. WKLY. (Oct. 13, 2019, 1:26 PM), https://ew.com/tv/2019/10/13/gretchen-carlson-bombshell-nicole-kidman/ [https://perma.cc/8YHS-7842] ("It's a strange and frustrating reality that I can't partake in any of these projects based on my settlement . . . .").

64. Even if the nondisclosure agreement—as a condition of employment or as part of a settlement agreement—might not be enforceable, the agreement may still silence the employee.

cultures more broadly.[65] These concerns are not new.[66] Scholars have recognized that, absent legislation, legal challenges to settlement NDAs are unlikely to be successful.[67] For the same reasons, a few legislatures previously passed laws banning secret settlements resolving claims in "public hazard" tort cases.[68] It took a national movement highlighting serial harassers to prompt such legislation in employment discrimination allegations.[69]

C. The Catalyst for Change: The #MeToo Movement and State Legislation

Soon after the #MeToo movement gained momentum, state legislatures began acting to try to tackle the problem of workplace sexual harassment.[70] A variety of legislation was proposed, including banning NDAs as conditions of employment and settlement NDAs.[71] Some states passed sweeping legislative changes, and others passed more targeted proposals.[72] As of 2023, more than twenty states have

65. *See* Maureen A. Weston, *Buying Secrecy: Non-disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 529 ("[V]iolation of public policy is the strongest grounds to invalidate NDAs where nondisclosure leaves others vulnerable and at risk."); Marjorie Corman Aaron, *Reflections on Untethered Philosophy, Settlements, and Nondisclosure Agreements*, 38 ALTS. TO HIGH COST LITIG. 121, 123 (2020) (suggesting "[l]egislation stating the NDAs are unenforceable as against public policy when the nondisclosure creates realistic danger of significant harm to other members of the public" as an "option[ ] for preventing or mitigating potential harm from settlements and NDAs"); David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 220 (2019) ("We have argued that courts should generally refuse to enforce contracts which create particularly egregious third-party harms. As a case study, we turned to hush contracts, arguing that, especially when created by organizations who are blinding unpaid third parties to abusers, such contracts violate public policy.").

66. Gordon, *supra* note 29, at 1125.

67. Weston, *supra* note 65 (gathering cases describing the very limited success of legal challenges to settlement NDAs).

68. Richard Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know* Can *Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 122–23 (1999) (discussing laws passed in California, Texas, and Washington); *see also* Gilat Juli Bachar, *A Duty to Disclose Social Injustice Torts*, 55 ARIZ. ST. L.J. 41, 48–49 (2023) (discussing laws governing settlements for environmental and public health hazards).

69. *See infra* Section I.C.

70. *See* Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, A.B.A. (May 8, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/ [https://perma.cc/227E-VSSR] (examining the "new state laws intended to address sexual harassment and assaults in the workplace").

71. *See*, *e.g.*, Hannah Albarazi, *One by One, States Are Banning NDAs to Protect Workers*, LAW360 (Apr. 1, 2022, 8:15 PM), https://www.law360.com/articles/1476428/one-by-one-states-are-banning-ndas-to-protect-workers [https://perma.cc/8EBY-88JQ] (discussing various state laws aimed at dismantling methods of silencing complainants).

72. *Compare States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/ [https://perma.cc/3VSW-VQX6] (stating that a Vermont law prohibits

passed workplace harassment reform following the #MeToo movement.[73]

The first state to act was New York. In July 2018, only nine months after the launch of the #MeToo movement, New York passed comprehensive legislation addressing sexual assault and harassment allegations by requiring a number of training protocols by employers, expanding the statute of limitations for sexual assault claims, and banning NDAs as a condition of employment.[74] At that time, New York also banned NDAs in settlement agreements resolving claims of sexual assault or harassment claims.[75]

Many other states also took action to ban NDAs. As of 2023, more than a dozen states have banned NDAs that bar employees from discussing harassment (or, in some cases, all employment violations) as conditions of employment.[76] Congress also passed the Speak Out Act in 2022, banning employment NDAs, stating, "With respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be

---

employers from requiring workers to sign NDAs as a condition of their employment but allows voluntary NDAs in settlements), *with* Tiffany Stecker, *California Strengthens Nondisclosure Agreement Ban in New Law*, BLOOMBERG L. (Oct. 7, 2021, 8:41 PM), https://news.bloomberglaw.com/daily-labor-report/california-strengthens-nondisclosure-agreement-ban-in-new-law [https://perma.cc/U5HF-CJSY] (describing a California law outright banning NDAs concerning workplace harassment).

73. Amanda Ottaway, *5 Years in, #MeToo Has Inspired Dozens of New State Laws*, LAW360 (Oct. 7, 2022, 5:38 PM), https://www.law360.com/employment-authority/articles/1538012/5-years-in-metoo-has-inspired-dozens-of-new-state-laws [https://perma.cc/M6G2-ZCCW]; *see also* JOHNSON ET AL., *supra* note 25, at 8–10.

74. GARY D. FRIEDMAN, SAMANTHA A. CAESAR & ISABELLE L. SUN, WEIL, GOTSHAL & MANGES LLP, LEGISLATING #METOO: TURNING A HASHTAG INTO LAW 1, 3 (2018), https://www.weil.com/~/media/mailings/2018/q3/july_2018_employer_update.pdf [https://perma.cc/CB8B-4B6F].

75. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019) (expanding the scope of the 2018 law in the 2019 amendments). New York would take further action later, including expanding protections to independent contractors and amending the statutes to cover all allegations of workplace discrimination.

76. CAL. GOV'T CODE § 12964.5 (West 2022); HAW. REV. STAT. ANN. § 378-2.2 (West 2022); 820 ILL. COMP. STAT. ANN. 96/1-25 (West 2021); ME. REV. STAT. ANN. tit. 26, § 599-C (2022); MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018) (precluding employment agreements that waive any reporting right for retaliation claims); N.J. STAT. ANN. § 10:5-12.7 to 12.8 (West 2019); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019); OR. REV. STAT. ANN. § 659A.370 (West 2023); TENN. Code ANN. § 50-1-108 (West 2021) (limited to sexual harassment); VT. STAT. ANN. tit. 21, § 495h(h)(1)(2)(A) (West 2017); VA. CODE ANN. § 40.1-28.01 (West 2023) (limited to sexual harassment); WASH. REV. CODE. ANN. § 49.44.211 (West 2022); *see also* Chris Marr, *States Expand Bans on Nondisclosure Pacts Beyond #MeToo Claims*, BLOOMBERG L. (July 7, 2022, 4:00 AM), https://news.bloombergtax.com/daily-labor-report/states-expand-bans-on-nondisclosure-pacts-beyond-metoo-claims [https://perma.cc/W2GB-H8TC] (examining the states' expansion of NDA bans).

judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law."[77]

Fewer states have banned a form of settlement NDA that bars claimants from discussing the facts underlying a claim of harassment or employment discrimination.[78] More detailed information about the nature of the bans in these states is listed in Table 1. Each of these states ban settlement NDAs in all claims of employment discrimination under its current legislation, with the exception of Nevada, which limits its ban on settlement NDAs to claims of sex discrimination.[79] California's and New York's original legislation were limited to confidentiality bans in settlement agreements only for harassment claims, but these states have since amended their statutes to cover all claims alleging employment discrimination.[80] As Table 1 demonstrates, there is considerable variation by state in other provisions. Some statutes have exceptions for confidentiality provisions that are requested by the employee, but there is variation even within that limited type of law.[81] For an exception to apply, some states require an affirmative statement about the claimant's right to have a lawyer, and others require a waiting period before the confidentiality provision can go into effect.[82] Certain states require consideration to be offered for the

77. 42 U.S.C. § 19403(a). This bill passed in the Senate as S. 4524. Speak Out Act, 42 U.S.C. §§ 19401-19404.

78. CAL. CIV. PROC. CODE § 1001 (West 2022); 820 ILL. COMP. STAT. ANN. 96/1-25 (West 2021); NEV. REV. STAT. § 10.195 (2019); N.J. STAT. ANN. § 10:5-12.8 (West 2019); N.M. STAT. ANN. § 50-4-36 (West 2020); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019); OR. REV. STAT. ANN. § 659A.370 (West 2023); WASH. REV. CODE ANN. § 49.44.211 (West 2022); ME. REV. STAT. ANN. tit. 26, § 599-C (2022).

79. *See* statutes cited *supra* note 78. These laws are generally not retroactive, though Washington's law is retroactive as to NDAs signed as a condition of employment. WASH. REV. CODE ANN. § 49.44.211 (West 2022).

80. *See* CAL. CIV. PROC. CODE § 1001(a)(3) (West 2022) (prohibiting settlement NDAs for claims alleging any "act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination"); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019) ("[N]o employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination . . . ."). Nevada expanded legislation to prohibit bans that limit a victim from testifying in a later case or investigation to cover all claims of discrimination and retaliation. NEV. REV. STAT. § 10.195 (2019).

81. *Compare* OR. REV. STAT. ANN. § 659A.370 (West 2023) (allowing employment NDAs when an employee alleging workplace discrimination, including sexual assault, requested to enter the NDA), *with* 820 ILL. COMP. STAT. ANN. 96/1-25(c) (West 2022) (exempting agreements that "in writing, demonstrate[ ] actual, knowing, and bargained-for consideration from both parties, and acknowledges the right of the employee" to report a good faith allegation of unlawful conduct, participate in legal proceedings, and receive confidential legal advice), *and* N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019) (barring prevention of disclosure "unless the condition of confidentiality is the complainant's preference").

82. OR. REV. STAT. ANN. § 659A.370 (West 2023); 820 ILL. COMP. STAT. ANN. 96/1-25(c) (West 2022).

confidentiality provision itself, in addition to the other terms of the settlement.[83] And most that do not have an exception for employee preference allow provisions that keep confidential the total amount of the settlement and information that can identify the claimant.[84] For example, the text of New York's legislation banning settlement NDAs follows:

> § 5-336. Nondisclosure agreements. 1. (a) Notwithstanding any other law to the contrary, no employer, its officers or employees shall have the authority to include or agree to include in any settlement, agreement or other resolution of any claim, the factual foundation for which involves discrimination, in violation of laws prohibiting discrimination . . . any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference.[85]

The impact of bans could differ based on the nature of the exceptions to the ban—particularly the exception when the claimant requests the confidentiality provision. Further, the enforcement regimes are not all equivalent. Some simply make the settlement NDAs unenforceable in court.[86] Others go further and allow the victim to file a claim and seek damages if a confidentiality provision is proposed by the employer.[87] Finally, Table 1 does not include every state to have touched NDAs in some form. There are a few states that have banned settlement and employment agreements that prohibit employees from discussing their claims during a later investigation or court proceeding or that apply only to public employees.[88] Due to the very limited nature of these laws, they are not the focus of our analysis.

---

83. *See* 820 ILL. COMP. STAT. ANN. 96/1-30(a)(3) (West 2019) (allowing settlement agreements that include promises of confidentiality so long as "there is valid, bargained for consideration in exchange for the confidentiality").

84. *See* CAL. CIV. PROC. CODE § 1001(c) (West 2022) ("[A] provision that shields the identity of the claimant and all facts that could lead to the discovery of the claimant's identity, including pleadings filed in court, may be included within a settlement agreement at the request of the claimant."); NEV. REV. STAT. § 10.195 (2019) ("[U]pon the request of the claimant, the settlement agreement must contain a provision that prohibits the disclosure of: (a) [t]he identity of the claimant; and (b) [a]ny facts relating to the action that could lead to the disclosure of the identity of the claimant.").

85. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019).

86. *See, e.g.*, *id.* (providing that any provision preventing disclosure about discrimination is "void and unenforceable").

87. OR. REV. STAT. ANN. § 659A.370(5) (West 2023) ("An employee may file a complaint under ORS 659A.820 for violations of this section and may bring a civil action under ORS 659A.885 and recover a civil penalty of up to $5,000 and relief as provided by ORS 659A.885 (1) to (3).").

88. Several other states took actions addressed at NDAs that were much narrower and outside the scope of this Article. Louisiana passed legislation that only applied to settlement agreements with public officials. LA. STAT. ANN. § 9:2717 (2018). Vermont and Arizona laws only prohibit agreements that do not inform victims that they have the right to testify about a claim in court or participate in an investigation of a later filed claim. VT. STAT. ANN. tit. 21, § 495h(h)(1)(2)(A) (West 2017); ARIZ. REV. STAT. ANN. § 12-720(A) (2018). Tennessee has also passed legislation limited to certain public settlements. TENN. CODE ANN. § 49-2-131 (West 2018).

TABLE 1: STATE SETTLEMENT NDA BANS

State	Effective Date	Details	Citation
California	January 1, 2019	Limited to harassment and sex discrimination claims until 2022 amendment expanded to all employment discrimination claims (effective January 1, 2023); can shield identity of victim and amount paid; also prohibits provisions that preclude the employee from applying to work for the employer again[89]	CAL. CIV. PROC. CODE § 1001 (West 2022)

In July 2022, Hawaii amended its legislation prohibiting NDAs signed as a condition of employment to exclude the term "condition of employment," but the statute does not explicitly reference settlements. HAW. REV. STAT. ANN. § 378-2.2 (West 2022).

89. California's law makes "a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action" illegal, suggesting there may be an argument that it does not cover settlements entered into before a claim is filed. CAL. CIV. PROC. CODE § 1001(a) (West 2022). Similar language appears in the Nevada law as well. NEV. REV. STAT. § 10.195 (2019); Rick Roskelley & Katy Branson, *Settlement Agreements Cannot Prevent Nevada Employees from Disclosing Workplace Sex Discrimination or Harassment*, LITTLER (June 19, 2019), https://www.littler.com/publication-press/publication/settlement-agreements-cannot-prevent-nevada-employees-disclosing [https://perma.cc/AKF9-6SXZ].

Other statutes reference "claim" only. *See, e.g.*, N.J. STAT. ANN. § 10:5-12.8 (West 2019). It is early in the enforcement of these laws, so it is unclear if they will cover settlements of allegations not yet filed in court or with an administrative agency. Many defense bar blogs reference the "claim" language in a much broader fashion to cover all allegations of harassment but apply the Nevada and California language more narrowly. *Compare* Erin O. Sweeney, *Oregon's New Workplace Fairness Act Limits the Use of Nondisclosure Agreements, Requires Written Antiharassment Policies, and Extends the Time for Filing Claims*, LITTLER (June 24, 2019), https://www.littler.com/publication-press/publication/oregons-new-workplace-fairness-act-limits-use-nondisclosure-agreements [https://perma.cc/X5MU-B9W9] (discussing Oregon's statute), *and* Patrick F. Clark, *New Mexico Prohibits Nondisclosure Agreements Related to Sexual Harassment, Discrimination, and Retaliation Claims*, OGLETREE DEAKINS (Mar. 6, 2020), https://ogletree.com/insights/new-mexico-prohibits-nondisclosure-agreements-related-to-sexual-harassment-discrimination-and-retaliation-claims/ [https://perma.cc/4KDQ-Z9BQ] (discussing New Mexico's statute), *with* Roskelley & Branson, *supra* (discussing Nevada's statute). For a discussion recognizing that defendants may get around NDA bans by settling before a claim is filed in court, see also Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1481 (2006).

Some language is quite clear that it covers all allegations, such as Washington's statute, which covers "settlement[s] involving conduct, that the employee reasonably believed under Washington state, federal, or common law to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy, is void and unenforceable." WASH. REV. CODE ANN. § 49.44.211(1) (West 2022). Illinois's statute defines a settlement agreement as "an agreement, contract, or clause within an agreement or contract entered into between an employee, prospective employee, or former employee and an employer to resolve a dispute or legal claim between the parties that arose or accrued before the settlement agreement was executed." 820 ILL. COMP. STAT. ANN. 96/1-15 (West 2020). Further, because in all of these states, claims must first be filed in the EEOC or state FEPA,

State	Effective Date	Details	Citation
Illinois	January 1, 2020	Covers all workplace discrimination and retaliation claims; exception if both parties prefer, extra consideration is offered, claimant is told they can have attorney, and a twenty-one-day waiting period is honored	820 ILL. COMP. STAT. ANN. 96/1-25 to -30 (West 2022)
Maine	August 8, 2022	Covers all workplace discrimination and retaliation claims; exception if additional consideration is provided, employee requests the provision, both parties are bound, and the employer maintains the agreement for six years	ME. REV. STAT. ANN. tit. 26, § 599-C (2022)
Nevada	July 1, 2019	Can protect victim identity; covers sex discrimination, retaliation, and sexual harassment claims; amount can be kept confidential	NEV. REV. STAT. § 10.195 (2019)
New Jersey	March 18, 2019	Covers all workplace discrimination and retaliation claims	N.J. STAT. ANN. § 10:5-12.7 to 12.8 (West 2019)
New Mexico	May 20, 2020	Covers all workplace discrimination and retaliation claims; exceptions for employee request, employee identification, and amount of settlement	N.M. STAT. ANN. § 50-4-36 (West 2020)
New York	July 9, 2018	Covered only harassment claims until 2019 amendment (effective October 11, 2019); exception for victim preference with twenty-one-day waiting period	N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2019)
Oregon	September 10, 2019	Covers all discrimination and retaliation claims; also prohibits provisions that preclude the employee from applying to work for the employer again; exception for employee preference	OR. REV. STAT. ANN. § 659A.370 (West 2023)
Washington	June 9, 2022	Covers most allegations of unlawful employment practices; amount can be kept confidential	WASH. REV. CODE ANN. § 49.44.211 (West 2022)

these laws would affect settlement before a claim is filed in court or arbitration as analyzed in this Article.

D. Opposition to the Movement

Despite many states successfully passing legislation banning settlement NDAs, the bans did not receive a warm reception from all and were not unanimously passed. Proponents of the legislation highlighted the need to expose serial harassers so they cannot harm again in the future, citing statistics estimating high percentages of harassment involving repeat offenders.[90] The argument that secret settlements go against public policy because they prevent the public from learning of harms that others could have already been exposed to or may be exposed to in the future is not new, particularly in the toxic tort and class action context.[91] Other arguments in favor of banning settlement NDAs are more specific to the harassment context and recognize the psychological benefit of victims discussing their experiences with others, including family members.[92]

Critics of the bans argue that taking confidentiality off the table will decrease the likelihood of settlement and victim compensation.[93] In the context of #MeToo legislation, state legislators opposing the legislation expressed concern about the impact the bans could have on settlement behavior. For example, Republican senators from New Mexico expressed the following concerns: "We make it more difficult for employees to come forward because employers will be more resistant to this kind of settlement." "I struggle with the bill. I worry there will be unintended consequences . . . . It could have the opposite effect . . . . [It could] discourage settlements."[94] While it may be tempting to cite

---

90. *See* Dunlap, *supra* note 22 ("According to Christopher Papalco, a University of New Mexico law student, 38 percent of sexual harassment claims in New Mexico involve repeat offenders.").

91. *See, e.g.*, David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1225 ("A regime that fails to meet these deterrence and compensation goals is normatively unattractive, even if it is characterized by a very high rate of quick settlements."); Gordon, *supra* note 29, at 1125 (footnotes omitted):

> Since the early 1990s, secret settlements constantly have been the subject of news reporting and academic commentary. The debate has raged about confidentiality in civil settlements and criminal settlements. Advocates of secrecy have been arguing since the very beginning that parties are more likely to settle if confidentiality is assured;

Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 945–50 (2006) (discussing consequences of secret settlements, including underestimating discrimination and limiting the ability to properly negotiate).

92. *See, e.g.*, Macfarlane, *supra* note 21 (stating that NDAs "regularly include a ban on speaking to family, friends, or therapists").

93. Saul Levmore & Frank Fagan, *Semi-confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 311, 322 (2018) ("A plaintiff who can assess a defendant's vulnerability to future claims can extract a large enough settlement to provide substantial deterrence, and at a much lower cost to the legal system.").

94. Dunlap, *supra* note 22 (internal quotation marks omitted).

partisan divides when discussing such opposition, those divides cannot be all to blame. Prominent employment plaintiffs' attorneys also recognized that "[w]hile well-intentioned, the call to ban NDAs improperly places the burden on victims to protect other workers by insisting that women make their experiences public."[95]

Particularly in the context of settling workplace discrimination and harassment claims, the possibility of decreased compensation or no compensation at all for victims is concerning due to estimates that workplace harassment is more prominent in industries with more low-wage workers.[96] But as we have noted previously and will continue to highlight in this Article, decreased compensation for victims also means decreased payouts made by employers and therefore decreased deterrence value for a victim's initial report of harassment.[97] This decreased payout could have a particular impact on smaller firms with less resources.[98] We next recap and build on the theoretical arguments for why settlement might be affected by settlement NDA bans and how that change can in turn affect deterrence and reporting. As proponents of the bans have recognized, "[T]here is no empirical evidence demonstrating that settlement rates decrease without guaranteed confidentiality."[99] This is one void in the literature that is addressed in this Article.

II. HOW SETTLEMENT NDAS THEORETICALLY IMPACT SETTLEMENT AND LITIGATION

A number of antidiscrimination laws prohibit discrimination and harassment in the workplace.[100] These laws give aggrieved employees or applicants the right to file a claim against an employer when they experience adverse actions in the workplace on the basis of their membership in a protected category (sex included).[101] These laws depend on victims of workplace discrimination coming forward, and for

95. Katz & Banks, *supra* note 11.

96. Bachar, *supra* note 61, at 12.

97. Levmore & Fagan, *supra* note 93, at 311.

98. We have analyzed data received through a Freedom of Information Act ("FOIA") request of all charges filed with the EEOC since 1990 and found that over 53% of harassment charges are filed against firms with less than five hundred employees.

99. Bachar, *supra* note 61, at 14.

100. *See, e.g.*, 42 U.S.C. §§ 2000e to 2000e-17 (defining the terms of the statute for employers and employees); *id.* §§ 12101-12213.

101. *See* 42 U.S.C. §§ 2000e to 2000e-17.

harassment claims, victims must first report internally for liability to be triggered.[102]

But research has shown that many victims, particularly victims of harassment, do not come forward. Reasons for the failure to come forward are believed to include fears of retaliation or even greater harassment, a belief that the wrong will not be fixed, and expected negative attention and psychological harms.[103] Victims who do come forward may be presented with an opportunity to be compensated for the past wrong before filing the claim in litigation or an administrative agency. Filing a claim outside of the firm (particularly in public) comes with additional costs and fears.[104]

How do bans on settlement NDAs and NDAs as a condition of employment affect this process? Presumably bans on NDAs as conditions of employment remove one fear of internal or external reporting. Bans on settlement NDAs make it possible for victims who do come forward to share their experience and expose wrongdoers, encouraging other victims to come forward as well.[105] But these bans also impact the probability of internal settlement, which may make it less likely that a victim receives compensation, unless the victim who does not settle then goes forward to litigation or an administrative agency and receives compensation there.[106] The impact on compensation may affect harassment deterrence and the possibility that victims file claims altogether.

---

102. *See, e.g.*, *id.* § 2000e-5 (providing the enforcement provisions for Title VII); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998) (providing an affirmative defense for employers in harassment cases when "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (same); *see also* Bullock, *supra* note 21, at 676–77 (discussing the implications of *Ellerth* and *Faragher*).

103. Bullock, *supra* note 21, at 674 n.6; FELDBLUM & LIPNIC, *supra* note 2; OFF. OF POL'Y & EVALUATION, *supra* note 2, at 15 (reporting survey responses for victims not filing discrimination charges in the federal workplace).

104. *See The Hidden Costs of Sexual Harassment: The Costs for Business*, UNIVERSAL CLASS, https://www.universalclass.com/articles/business/the-hidden-costs-of-sexual-harassment.htm (last visited Dec. 11, 2023) [https://perma.cc/GQU5-ZLXV] (providing a list of financial and psychological costs imposed on the victim).

105. Ing-Haw Cheng & Alice Hsiaw, *Reporting Sexual Misconduct in the #MeToo Era*, 14 AM. ECON. J.: MICROECON. 761 (2022) (showing that raising public awareness can encourage reporting).

106. *See* Rebekah Giles & Danny King, *A Ban on Victims Selling Their Silence Will Have Unintended Consequences*, SYDNEY MORNING HERALD (Dec. 8, 2021, 5:30 AM), https://www.smh.com.au/politics/federal/a-ban-on-victims-selling-their-silence-will-have-unintended-consequences-20211206-p59fak.html [https://perma.cc/YCK3-6UJB] (stating that banning NDAs would stifle "painless resolution of complaints and . . . fast access to compensation" with an increased incentive for employers to defend through formal litigation).

A. The Law and Other Contracts Surrounding Employment Discrimination Litigation and Reporting

Title VII of the Civil Rights Act prohibits discrimination and harassment on the basis of sex, color, national origin, religion, and race.[107] Other federal antidiscrimination laws include the Americans with Disabilities Act, prohibiting discrimination against individuals with disabilities,[108] and the Age Discrimination in Employment Act, prohibiting discrimination against older workers.[109] Harassment on the basis of any of these protected categories is actionable discrimination.[110] Many states also have antidiscrimination statutes that prohibit the same conduct and sometimes have broader protections.[111] Victims of harassment or any workplace discrimination have several legal channels and potential bases to file a claim after internal settlement fails (or if they decide to skip an internal report).[112]

As of 2018, more than 50% of employees were bound by mandatory predispute arbitration agreements that would require a victim of workplace discrimination to file their federal and state law claims against an employer in private arbitration instead of court.[113] In contrast to claims filed in federal court, arbitration claims are not immediately accessible to the public. But they are confidential if the parties have entered into a confidentiality agreement noting that all proceedings filed in arbitration would be kept confidential (or if they

---

107. 42 U.S.C. § 2000e-2.

108. *Id.* § 12112.

109. 29 U.S.C. § 623.

110. *See, e.g.*, 42 U.S.C. §§ 2000e to 2000e-17 (making it unlawful for an employer "otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin"); *id.* §§ 12101-12213 (describing various means by which an individual may be discriminated against on the basis of disability); 29 U.S.C. §§ 623-634 (making it unlawful for employers to discriminate on the basis of age).

111. *See Employment Discrimination Laws: 50-State Survey*, JUSTIA, https://www.justia.com/employment/employment-laws-50-state-surveys/employment-discrimination-laws-50-state-survey/ (last updated Sept. 2022) [https://perma.cc/4VUJ-Y94B] (providing the current legal landscape of antidiscrimination laws in employment settings).

112. Regardless of whether a settlement NDA ban increases or decreases internal settlement, it is still in a victim's best interest to report harassment internally before filing a claim outside of the workplace. Under current harassment law, the victim is much more likely to prevail if the victim internally reports the harassment such that the employer is aware of it. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 806–07 (1998).

113. Colvin, *supra* note 12. Congress recently amended the Federal Arbitration Act such that, as of February 2022, employees are not bound by mandatory predispute arbitration agreements even if they signed them when filing a sexual harassment claim (but they are bound by all other employment discrimination predispute arbitration agreements). Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, 9 U.S.C. § 402(a).

enter into a settlement agreement stating such during arbitration).[114] In addition to being arguably quicker and more private, arbitration is generally thought to be more employer friendly due to less stringent discovery rules and the fact that employers are repeat players in the arbitration arena.[115] Presumably motivated by the private nature and the belief that the forum does not provide adequate protection to workers, Congress passed the Ending Forced Arbitration and Sexual Harassment Act on February 10, 2022.[116] This Act was signed into law by President Biden on March 3, 2022.[117] The Act makes mandatory predispute arbitration agreements for sexual harassment and assault claims unenforceable at the victim's request.[118] The recency of this Act and the fact that the Act preempts any conflicting state law, such as state laws passed in the wake of #MeToo to ban predispute arbitration agreements, means that it does not affect any claims analyzed in this study.

Accordingly, during much of the time period of this study (November 2017 to December 2022 for arbitration claims), a workplace discrimination victim bound by a predispute arbitration agreement would be required to file their claim in arbitration. If not bound by an arbitration agreement, a victim could choose to file a claim in federal or state court. A claim under the federal antidiscrimination statutes can be filed in state or federal court, as those courts have concurrent jurisdiction over federal claims.[119] If the plaintiff files a state law claim and a federal claim in state court, the employer can remove the claims to federal court.[120] A state law claim against an employer can only be filed in federal court without a federal claim if the parties are from different states, which is required for federal jurisdiction of a state claim.[121] All claims filed in federal court and many claims filed in state

114. *See* E. Gary Spitko, *Arbitration Secrecy*, 108 CORNELL L. REV. 1729, 1734–35 (2023) ("Arbitration confidentiality refers to the right of the parties to an arbitration, by means of an arbitration confidentiality agreement, to prevent nonparties to the arbitration from learning of or obtaining access to materials produced in arbitration discovery, testimony presented in the arbitration hearing, and the arbitration award itself.").

115. There is some debate on that subject matter as well. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 480–83 (2016) (discussing "the fiercely contested empirical work on repeat [employer] players" in asking whether "arbitrators favor repeat-playing employers"); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 58 (2019) ("[S]cholars have long suspected that arbitration favors repeat-playing defendants.").

116. 9 U.S.C. § 402(a).

117. *Id.*; Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26.

118. 9 U.S.C. § 402(a).

119. 28 U.S.C. §§ 1331-1332.

120. *Id.* § 1441.

121. *Id.* §§ 1331-1332.

court are automatically published on a website accessible by the public, including the media.[122]

As noted previously, before a plaintiff can file a claim under the federal antidiscrimination statutes (and before the plaintiff can file a claim in state court under most states' antidiscrimination statutes), the plaintiff must first file the claim with the EEOC or a corresponding state FEPA.[123] These Agencies arguably act as gatekeepers, as their role includes investigating the claim and giving the parties an opportunity to mediate before the claim is filed in either federal or state court. The charging party (plaintiff) who files either in the EEOC or state FEPAs cannot file the claim in federal court until the Agency issues a right to sue letter, which indicates whether the Agency found cause or not, but the charging party can file a claim even if the Agency did not find cause.[124] Similar to arbitration, a claim filed in the EEOC is not automatically public. In fact, the EEOC does not release any information about which employers have claims against them.[125] State FEPAs follow these same procedures and are similarly "private."[126]

---

122. Some information about sexual harassment may reach the public even when settlement NDAs are enforceable because internal reporting and settlements may, to some extent, become public through word of mouth or posting to websites. But by far, the most public forum for exposing harassment is through claims filed externally, with claims filed in federal court being the most public.

123. *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/time-limits-filing-charge (last visited Dec. 11, 2023) [https://perma.cc/QR4T-J8FR] (describing the time limits for filing a discrimination charge with the EEOC).

124. *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit (last visited Dec. 11, 2023) [https://perma.cc/2H65-XDVZ]. Generally, states with antidiscrimination statues follow similar procedural requirements for filing state claims and require a right to sue letter from the state FEPA for claims filed only with the state FEPA and not with the EEOC. However, New Jersey does not have an exhaustion requirement. William R. Amlong & Karen Coolman Amlong, *Representing the Age Discrimination Plaintiff: Charges of Age Bias in the Workplace Are Increasing as Baby Boomers Reach Their 60s. While These Cases Have Broad Jury Appeal, They Can Challenge Even Seasoned Trial Lawyers*, TRIAL, Aug. 2008, at 36, 42 (citing N.J. STAT. ANN. § 10:5-13 (West 2019)); Jordan v. Sch. Bd. of Norfolk, 640 F. Supp. 3d 431, 448–49 (E.D. Va. 2022) (discussing the requirement to receive a right to sue letter in Texas and Virginia, particularly with claims only filed under state law). Further, those filing charges under the ADEA must file a charge with the EEOC, but they do not have to wait to receive a Notice of Right to Sue and instead can file a claim in federal court sixty days later. *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge (last visited Dec. 11, 2023) [https://perma.cc/2XK8-U5EC].

125. *See Confidentiality*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/confidentiality (last visited Dec. 11, 2023) [https://perma.cc/Q3J3-UEQD] ("By law, the EEOC must keep charge information confidential and will not disclose information related to a charge to the public.").

126. *See, e.g.*, *About Civil Rights Department (CRD)*, STATE OF CAL.: C.R. DEP'T, https://calcivilrights.ca.gov/aboutcrd/ (last visited Dec. 11, 2023) [https://perma.cc/PT7J-BTZ8]; *Processing a Discrimination Claim with the FCHR*, PRINTY L. FIRM (Jul. 14, 2020), https://printylawfirm.com/employment-discrimination-discr-process/ [https://perma.cc/U5UK-P3CG]. A search of the FEPA webpages confirms no data is publicly available. Links to those webpages can be found on the EEOC website for each local EEOC office. *EEOC Field Offices*, U.S.

Even if settlement NDAs are banned, an employer has an additional chance to keep an allegation quiet, if it does not settle the claim internally, by settling the claim in the EEOC or state FEPA (or in arbitration if the employee is bound by a mandatory arbitration agreement).[127] A ban on settlement NDAs should therefore lower the likelihood of settlement within the relevant administrative agency or arbitration, as the lack of a confidentiality provision makes settlement less attractive. A settlement NDA ban should lower the likelihood of settlement in the EEOC even though there is a chance that the charging party goes public by filing a claim in court—an employer might take its chances and see if the charging party files the claim in court since it cannot silence the victim who has filed a claim with the EEOC with a settlement NDA. That decrease in settlement, as well as the decrease in settlement internally after a report, should lead to an increase in litigation (both in federal and state court). Given that state and especially federal court filings are already public, we think settlement behavior in federal court may be less likely to be directly affected by the settlement NDA bans, but because future silence is still valuable, the bans may have some impact beyond affecting what types of claims are filed, as discussed in more detail below.

B. How Settlement NDA Bans May Impact Internal Settlement and Reporting

Laws governing mandatory arbitration provisions and NDAs shape the opportunities and incentives of both employers and employees to pursue dispute resolution either by public law or through private means. From the social welfare standpoint, publicly aired discrimination lawsuits have value that is unavailable when disputes are resolved through arbitration or confidential settlements.[128] Without public information about the prevalence of workplace sexual

EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/field-office (last visited Dec. 11, 2023) [https://perma.cc/4QT8-FSKW]; *see also* Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 292 (2021) (recognizing the lack of publicity for discrimination claims).

127. When the EEOC finds that it is reasonable to believe discrimination has occurred, it issues both parties a "Letter of Determination." This letter "invites the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation." *What You Should Know: The EEOC, Conciliation, and Litigation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-conciliation-and-litigation (last visited Dec. 11, 2023) [https://perma.cc/VM5A-MMAZ].

128. *See Four Years Later, Most Believe Women Have Benefited from the #MeToo Movement*, ASSOCIATED PRESS & NORC (Oct. 15, 2021), https://apnorc.org/projects/four-years-later-most-believe-women-have-benefited-from-the-metoo-movement/ [https://perma.cc/2LK5-M9ZT] ("Most Americans think the #MeToo movement is leading to more people speaking out and more companies taking action to prevent it.").

harassment and assault, the extent of the problem remains under the radar and is easily ignored, and victims of serial harassers are not encouraged by earlier or later lawsuits to come forward. Without public information on damages awards, there is little knowledge for victims to draw from about expected damages awards that would allow them to determine whether it is worthwhile to file charges and risk retaliation. The paucity of information also affects firms' decisions about the level of effort to exert to deter harassment. If firms assume that damages awards are low—a reasonable assumption in the absence of information and in light of damages caps under current law—employers will have little incentive to deter harassment by sanctioning harassers, especially if the harasser is a high performer.[129]

Thus, if the public policy goal motivating a settlement NDA ban is to deter harassment through publicity, both mandatory arbitration and NDAs would be prohibited for claims of sexual harassment or assault. But the benefit of the public forum depends on victims reporting harassment, and one concern is that bans on settlement NDAs may in fact disincentivize reporting of harassment (or at least not incentivize reporting) by decreasing the possibility of settlement.[130] As we demonstrate in our model presented below, employers will be less likely to settle claims that are filed internally when confidentiality—one of the primary benefits of settlement—cannot be a provision of the settlement agreement. That is, settlement becomes less attractive when employers can no longer keep the details of the allegation and the fact that there was an allegation quiet by settling early.[131] As discussed in Section I.D, this is a concern that legal scholars have recognized when debating the role of the settlement NDA and that legislators

129. *See* Joni Hersch, *Efficient Deterrence of Workplace Sexual Harassment*, 2019 U. CHI. LEGAL F. 147, 159–62 [hereinafter Hersch, *Efficient Deterrence*] (describing limited action by firms against high performers and the sometimes adverse consequences to firms of taking action); Joni Hersch, *Valuing the Risk of Workplace Sexual Harassment*, 57 J. RISK & UNCERTAINTY 111, 112 (2018) (using a statistical model demonstrating that the maximal damages award under current law is far too low to provide organizations with the financial incentive for efficient deterrence of sexual harassment).

130. The social benefits of confidentiality in settlement agreements are explored more generally by Levmore and Fagan. *See* Levmore & Fagan, *supra* note 93, at 313:

> This novel point suggests that there are cases where law, counterintuitively, ought to allow or even welcome confidential agreements to settle disputes—even where the matter arises because one of the parties is a serious and repeat wrongdoer. Deterrence may be obtained in place of sunshine as a disinfectant. Information is valuable, to be sure, but the higher price a party pays for secrecy might deter misbehavior as successfully as any legal remedy, and the latter normally comes at a greater social cost.

Levmore and Fagan recognize that the value of banning settlement NDAs depends on victims filing claims and cite the costs of litigation as a reason some victims of a wrongdoing might not do so. *Id.*

131. *See* Marr, *supra* note 76 (reporting that some employees want a guarantee of confidentiality, which can be used as a bargaining chip in settlement negotiations).

highlighted when debating the passage of settlement NDA bans.[132] By the same reasoning, bans on settlement NDAs that decrease settlement within the firm should also decrease settlement within the EEOC or state FEPA as well. There is no guarantee that a victim who internally reports or reports to the EEOC will then file a lawsuit, particularly given the increased financial and social costs of doing so. Without confidentiality as a major benefit of settlement, the employer may take its chances and see if the victim files an action before offering a settlement that would remove the risk of losing in court. As the likelihood of settlement decreases, so too might the likelihood that a victim internally reports the harassment.

The question we address is how banning settlement NDAs affects reporting decisions relative to the situation in which confidentiality is enforceable. We recognize that the settlement decision depends on both the employer's and victim's behavior. However, the most important decision rests with the victim, who decides whether to complain or to remain silent and whether to file a lawsuit. If the victim remains silent, there is no need for action on the employer's part. It is only after the victim complains that the employer will be faced with a decision to settle or not.

We also recognize that information asymmetries about the existence and enforcement of settlement NDAs are likely.[133] A firm's human resources staff will likely know the law, but individual employees are far less likely to be familiar with employment laws or to know what provisions they may have agreed to upon accepting employment.[134] However, we do not consider information asymmetries about settlement NDAs to be an important concern. Victims who are

---

132. *See supra* Section I.D; Gordon, *supra* note 29, at 1125 ("The debate has raged about confidentiality in civil settlements and criminal settlements. Advocates of secrecy have been arguing since the very beginning that parties are more likely to settle if confidentiality is assured."); Bachar, *supra* note 61, at 11 (footnote omitted):

> Specifically, some argue that the secrecy of a settlement can be of great value to a company and should that benefit be removed from the negotiation, settlement may become less attractive from that company's perspective. In extreme instances, a company's inability to negotiate for secrecy may result in the decision not to offer a settlement at all, rendering trial as the only avenue for victims to seek recourse;

Scott Altman, *Selling Silence: The Morality of Sexual Harassment NDAs*, 39 J. APPLIED PHIL. 698, 706 (2022) (recognizing the impact on settlement as an important empirical question).

133. *See* Jenny R. Yang & Jane Liu, *Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship*, ECON. POL'Y INST. (Jan. 19, 2021), https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/ [https://perma.cc/2H5K-CHKX] (noting "[d]ramatic asymmetries of information and resources between employers and employees" which "create insurmountable hurdles for workers to defend their rights").

134. *See id.*

sufficiently motivated to consider filing a complaint about discrimination of any kind, including harassment, may research the process for filing a complaint. This may start with informal approaches such as discussions with friends or coworkers and a review of websites. And many have recognized that even with settlement NDAs, employees may learn about settlements through attorney networks.[135] Ultimately, victims who are motivated to make a formal complaint often consult a lawyer or the local FEPA, at which stage they will learn about their legal options, including whether a settlement NDA ban is in effect and what that ban means.

Reflecting on the fact that the victim's decision is primary, our theoretical model below begins by illustrating the victim's decision process. Let *R* denote the victim's decision to report, and *NR* denote the victim's decision to not report. The victim will choose the option with the highest expected payoff. Each payoff is comprised of costs and benefits. The costs include changes in health, including mental health, which can be affected by suffering a loss in reputation or the conscious pressure to report. We assume that the change in health from reporting is affected equally whether settlement NDAs are banned or not.

There are two stages that are relevant: the decision to report internally and the decision to file a lawsuit (starting with a charge in the EEOC). Because the victim's failure to file an internal complaint offers firms an affirmative defense against liability for many harassment claims in federal court and most state courts, we assume many victims will include internal reporting in their decision process.[136]

Victims will report if their expected payoff EP_R from reporting is greater than their expected payoff from not reporting EP_{NR}—that is, a victim will report if $EP_R > EP_{NR}$. Our model below primarily focuses on monetary payoff, but victims may also consider the likelihood that their claim deters later harassment as a payoff—this too, though, may depend on how likely they are to prevail. Other more personal considerations, such as the likelihood the bad actor is punished for the act, may be at play as well.

If the victim reports, then the expected payoff is the weighted average of the settlement offer and the expected payoff at trial, where

---

135. Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 966–67 (2010) (reporting evidence from the author's survey that few attorneys found confidentiality clauses to be a barrier to learning about settlement behavior).

136. This defense does not apply to all discrimination cases, simply those alleging harassment. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). For a discussion of states where this defense does not apply to harassment claims, see *supra* note 33.

the weights are given by the probability that the firm makes a settlement offer and the victim accepts the offer. That is,

$$EP_R = q_s(bX - \mu_{vs}) + (1 - q_s)(pdX - c_v - \mu_{vl})$$

where

> X = the victim's total compensation for their current job;
> q_s = the probability of settlement before filing a lawsuit;
> p = the probability of the victim's success at trial;
> μ_{vs} = the victim's reputational costs of reporting internally;
> μ_{vl} = the victim's reputational costs of filing public litigation;
> c_v = the victim's litigation costs and opportunity costs; and
> b, d = multipliers for the award.[137]

If the victim does not report, we assume the victim keeps their job, so $EP_{NR} = X$.

To compare the victim's decision before settlement NDAs are banned to their decision after settlement NDAs are banned, we indicate the period in which settlement NDAs are enforced with the subscript 1 and the period in which settlement NDAs are banned with subscript 2 and correspondingly add subscripts to the probabilities and multiplier terms. Whether reporting will increase after settlement NDAs are banned depends on whether $EP_{R2} - EP_{NR2} > EP_{R1} - EP_{NR1}$.

Inserting the terms for EP and rearranging terms, reporting would increase if

$$(q_{s2}b_2X - q_{s1}b_1X) - (q_{s1} - q_{s2})(pdX - c_v - \mu_{vl}) > 0.$$

We assume that the probability of success at trial p, the trial award multiplier d, reputational costs μ_{vs} and μ_{vl}, and trial costs c_v do not depend on whether settlement NDAs are banned. Whether the probability that victims' reporting will increase if NDAs are banned will depend on how firms respond to internal reports. Intuitively, we expect that firms will have less incentive to settle internally if victims are free

137. We recognize that there are many factors that a victim might consider when determining whether to report internally or externally that are not taken into account in this model because it is difficult to estimate or to determine how such factors would be affected by settlement NDA bans. For example, the victim may consider the probability that reporting will lead to the harasser being punished or that they will receive an apology. Although these considerations will certainly influence an internal report, we think they are less likely to affect an external report, as in that circumstance the employer has already been alerted to the harm and has decided how to respond to the harasser.

to go public or that they will make lower settlement offers if victims can go public, or both. A lower settlement offer b_2 will correspond to a lower settlement probability q_{s2} because victims will be less likely to accept a low offer than a high offer. That is, we expect that $q_{s1} \geq q_{s2}$ or that $b_1 \geq b_2$, or both.

Under these assumptions, the first term in the above equation is negative; the second term is positive. This means that reporting will increase only if $pdX - c_v - \mu_{vl}$ is sufficiently large relative to the first term. That is, reporting is more likely when the probability of the victim's success is higher, total compensation X is larger (so higher-paid victims have more of an incentive to report), awards as a multiple of X are higher, or costs (including reputational or psychological costs of reporting in public litigation) are lower.[138]

To examine firms' decisions with and without settlement NDA bans, we assume that, conditional on an internal report of harassment, firms are indifferent between settling internally and litigating when the expected costs to the firm are equal. If a settlement NDA is binding, firms will be indifferent between settlement and trial when

$$b_1X = pdX + c_{fl} + \mu_{fl}.$$

If settlement NDAs are banned, then firms will be indifferent between settlement and trial when

$$b_2X + \mu_{fs} = pdX + c_f + \mu_{fl}$$

where

> X = the victim's total compensation for their current job;
> p = the probability of the victim's success at trial;
> μ_{fs} = the firm's reputational costs from the victim's internal report;
> μ_{fl} = the firm's reputational costs from public litigation;
> c_f = the firm's litigation costs; and
> b_1, b_2, and d = multipliers for the award.

The terms on the right-hand side of each equation identify the maximum settlement offer the defendant firm will make to avoid trial. The presence of the term μ_{fs} arising from reputational costs from a settlement NDA ban lowers the maximum settlement offer a firm is

138. Removing the consideration of an internal settlement reveals that the victim is more likely to file a claim after a failed settlement negotiation if they are more likely to prevail at trial and their emotional harm from filing such a claim is low.

willing to make relative to the situation in which NDAs are binding and firms can prevent reputational damage by internal settlement. The minimum offer that the victim is willing to accept is unchanged by the settlement NDA ban because they suffer the same reputational cost from filing internally whether or not they are able to go public with their claim. The reduction in the benefit to firms of internal settlement reduces the bargaining range and lowers the probability of settlement. One way to offset this decrease would be to increase the probability that the plaintiff prevails in litigation p or to increase the damages multiplier d.

To summarize, a settlement NDA ban is likely to decrease the probability of internal settlement, but it does not guarantee an increase in publicizing harassment either through internal reporting or in litigation unless the victim's expectation of receiving compensation outside of the firm greatly outweighs any costs of filing the claim, including emotional and psychological consequences. Because under Title VII compensatory and punitive damages awards are capped at $300,000 (and lower for smaller firms), banning settlement NDAs is likely to decrease reporting or to not increase litigation by high-earning victims because they risk job loss without a correspondingly high expected payoff from trial.[139] Banning settlement NDAs is also likely to decrease settlement and reporting in cases of less severe harassment because both the probability of prevailing at trial and the expected damages are likely to be low. It is also possible that victims with more severe harassment experiences would be less likely to file a public claim to avoid reliving their experience in a public arena. These hypotheses are consistent with research suggesting that banning settlement NDAs will only have a public benefit in circumstances where a plaintiff's incentives to file are low and the "facts of a dispute are obscure and courts cannot adjudicate claims accurately"[140]—or as put here, where the costs of filing are high and the likelihood of prevailing in court is low. Ultimately, whether settlement NDA bans increase the public reporting of claims, and in turn the litigation of claims, is an empirical question we address in the next Part.

139. *See Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination (last visited Dec. 11, 2023) [https://perma.cc/8H7R-JN5W].

140. Levmore & Fagan *supra* note 93, at 354.

III. EMPIRICAL ANALYSIS

A. Data Sources

There is a dearth of data that reports harassment in the workplace. Most public knowledge about sexual harassment prevalence is derived from survey data. Surveys themselves vary widely in how they ask about sexual harassment experiences and largely do not identify whether any experiences would reach the threshold for legal action.[141] Unsurprisingly, rates of sexual harassment reported in surveys span a broad range.[142]

Our interest in this paper is on the number of court and arbitration filings, and the outcomes of those filings, as a result of bans on settlement NDAs. Accordingly, we cannot review private settlements that occur within the firm, but we can look at data on workplace harassment and discrimination claims that enter the legal process through reports to an administrative agency or litigation. As discussed previously, before filing a lawsuit, claimants must first file a claim with the EEOC or corresponding state FEPA.[143] All claims filed with the EEOC are claims of employment discrimination. On its website, the EEOC publicly reports tallies of claims filed in numerous categories, such as by race, sex, claim, and state.[144] Most claims filed with the EEOC do not proceed to a lawsuit.[145]

In part, even harassment that is legally actionable will be underreported because there is no information about whether a claim

---

141. *See* HERSCH, *supra* note 2, at 2–4 (explaining that survey methodologies and estimates of sexual harassment vary widely); Hersch, *Efficient Deterrence*, *supra* note 129, at 153–54 (demonstrating the disconnect between the legal standard and survey evidence).

142. *Compare Share of Americans Who Have Been Victims of Sexual Harassment as of 2017, by Gender*, STATISTA (Nov. 9, 2022), https://www.statista.com/statistics/787997/share-of-americans-who-have-been-victims-of-sexual-harassment-gender/ [https://perma.cc/KZ68-ALMT] (finding that 42% of women had been victims of sexual harassment as of 2017), *with* Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018, 7:43 PM), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment [https://perma.cc/ZMM9-HUQP].

143. EQUAL EMP. OPPORTUNITY COMM'N TRAINING INST. RSCH. GUIDE, *supra* note 40; *see also* EEOC v. Com. Off. Prods. Co., 486 U.S. 107, 110 (1988) ("As a general rule, a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice." (citing 42 U.S.C. § 2000e-5(e))).

144. *See Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 (last visited Dec. 11, 2023) [https://perma.cc/V2XC-QRDG].

145. *See, e.g.*, *id.* (under the "EEOC Explore" figure, select the "Charge Resolutions" tab and filter the charge to "Harassment") [https://perma.cc/767F-R4NP]; Blair Druhan Bullock, *Frivolous Floodgate Fears*, 98 IND. L.J. 1135, 1161 (2023).

of workplace harassment is settled with the employer without filing a claim with the EEOC. And as discussed previously, the law encourages internal reporting to allow employers to correct the harasser's behavior.[146] One rationale for banning settlement NDAs is to overcome this information void. By publicizing incidents of discrimination, the expectation is that the threat of public exposure would act to deter discrimination.

Further limiting information, as discussed earlier, claimants can file discrimination claims under state law, federal law, or both.[147] Unlike federal claims and lawsuits that are tallied and reported on the EEOC website in aggregate form and reported on PACER once filed in court, information on the number of state claims is scarce, although information for some states is provided by the Court Statistics Project.[148]

The primary source of data for claims made under federal law that enter the litigation process is the Federal Judicial Center Integrated Database ("IDB"), which is compiled from reports on all federal court claims provided by federal court clerks on a quarterly basis.[149] The IDB data includes the date the case was filed; what court the case was filed in; the disposition of the case (how it was resolved); the damages that were awarded if the plaintiff prevailed; whether the plaintiff filed the claim pro se; whether the case was a class action; and the nature of suit ("NOS"), which is the type of claim that was filed in the action.[150] From the NOS, we can identify whether the case was an employment discrimination claim. Namely, in our analysis, we consider a case an employment discrimination case if the NOS is coded "Civil Rights Jobs" or "Civil Rights ADA Employment."

Because the NOS does not provide detailed information about the claim, we also analyze a dataset gathered from Lex Machina.[151] Lex Machina is a legal source that similarly codes all federal court cases but with finer detail by drawing on additional data reported in dockets that

146. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

147. *See* 28 U.S.C. §§ 1331-1332.

148. For example, California, but not Tennessee, provides data to the Court Statistics Project. *See State Court Organization Data*, STATE CT. ORG., https://www.ncsc.org/sco (last visited Dec. 11, 2023) [https://perma.cc/ATD7-TCHT].

149. *See The Integrated Database: A Research Guide*, FED. JUD. CTR., https://www.fjc.gov/research/idb (last visited Dec. 11, 2023) [https://perma.cc/85VU-57Z7] (select the downloadable PDF link).

150. *See id.*

151. Lex Machina is a LexisNexis company that provides legal analytics. *See* LEX MACHINA, https://lexmachina.com/ (last visited Dec. 11, 2023) [https://perma.cc/BN97-7YF5].

is not recorded in the IDB.[152] Most importantly, the coding for the type of case is much more narrowly defined and indicates whether the case includes a harassment charge, as well as other types of workplace discrimination that are alleged.[153] We find it important to analyze harassment claims separately from all other discrimination claims given that some settlement NDA bans only address harassment claims, and given the #MeToo movement, settlement NDA bans may have a different effect on harassment claims than other discrimination claims.

Finally, because almost 60% of possible employment discrimination claims might be barred from court and bound by a mandatory predispute arbitration agreement during the time period of our analysis,[154] we also analyze data from the American Arbitration Association ("AAA").[155] Often in a predispute arbitration agreement, the parties indicate what private forum will hear their claim. In accordance with several state laws, the AAA publishes quarterly data reporting information on all employment law and consumer claims filed with the Association.[156] Comparing the total number of claims reported by the AAA and its competitors, it is likely that the AAA occupies at least one-third of the market.[157] The available AAA data includes the date the demand is filed, how it is resolved, the amount awarded to the plaintiff if there is an award entered in the plaintiff's favor, the date of the resolution, and the state of the plaintiff's representative. We assume that the state of the plaintiff's representative correlates with the state law that would govern the dispute at hand. We do not think this is too strict of an assumption as we do not observe a discrepancy between arbitration filings and federal and state court filings, with the number of filings in a state-month combination in each forum being roughly equal.

Each of these data sources (the IDB, Lex Machina, and the AAA) provides key information necessary for us to analyze the effect of settlement NDA bans in those forums on the filing of claims, the settlement behavior of the parties once in those forums, and the probability that the plaintiff prevails. We know when the lawsuit was

152. *See Case List Analyzer*, LEX MACHINA, https://lexmachina.com/case-list-analyzer/ (last visited Dec. 11, 2023) [https://perma.cc/8G44-A9E6].

153. *See id.*

154. Colvin, *supra* note 12.

155. *See* Chandrasekher & Horton, *supra* note 115, at 32 (analyzing data reported by the AAA).

156. *Consumer and Employment Arbitration Statistics*, AM. ARB. ASS'N, https://www.adr.org/ConsumerArbitrationStatistics (last visited Dec. 11, 2023) [https://perma.cc/5Q8P-REVV].

157. *See* Chandrasekher & Horton, *supra* note 115, at 26 (comparing data reported by the AAA and other organizations).

filed, where it was filed (or a close proxy for where it was filed), when it was resolved, and how it was resolved (notably whether it settled and whether the plaintiff prevailed in a judgment).[158] Depending on the source, we also know whether it was an employment claim, employment discrimination claim, or harassment claim. This allows us to study the effect of those laws by taking advantage of the fact that settlement NDA bans were adopted in several states but not nationally.

To get an idea of the volume of employment discrimination claims filed in state and federal courts and in arbitration on an annual basis, Table 2 displays the number of employment discrimination (or employment law) claims filed in 2019 as reported in each of these three data sources, as well as the number of claims filed in state courts whenever that information is available. Because few claims filed with the EEOC or state FEPA proceed to litigation, the number of claims filed with these Agencies greatly outnumbers the claims recorded in the IDB or in state court. We also note that in most of the states in which the number of employment claims is reported, the number of federal IDB claims exceeds the number of state law claims, so we are able to observe a large percentage of litigation filings.[159] This is particularly likely because it is common for employment discrimination litigants seeking to take advantage of heightened state protections and higher damages awards to file both federal and state claims within one lawsuit.[160] These claims would be counted as only one charge in the EEOC data.

158. *See* FED. JUD. CTR., *supra* note 149 (providing "civil case and criminal defendant filings and terminations in the district courts, along with bankruptcy court and appellate court case information from 1970 to the present"); LEX MACHINA, *supra* note 152 (providing a dataset of federal court cases more detailed than the IDB); Chandrasekher & Horton, *supra* note 115, at 26 (comparing data reported by the AAA and other organizations). We do not know when the harassment occurred, but that information is not necessary for our analysis because although these bans do not apply retroactively, they apply to all claims that have been reported after the ban whether or not the harassment occurred before or after the ban.

159. There is no reason to expect that the banning of settlement NDAs would have an impact on the plaintiff's decision to file a claim in state versus federal court, given that federal courts enforce state laws.

160. *See* Michael D. Moberly, *Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation*, 18 WHITTIER L. REV. 499, 502 (1997) (asserting that victims can generally pursue both federal and state claims simultaneously). For an example, see recent amendments to the Virginia Human Rights Act that allow substantially greater recovery under state law than under federal law. S. 868, 161st Gen. Assemb., Reg. Sess. (Va. 2020).

TABLE 2: NUMBER OF EMPLOYMENT DISCRIMINATION OR EMPLOYMENT LAW CLAIMS FILED BY FORUM IN 2019

State	AAA	State Court	EEOC or State FEPA	IDB
Alabama	30		2,108	548
Alaska	0	12	60	18
Arizona	22	87	1,729	203
Arkansas	14	20	1,200	118
California	1,290		4,276	1,318
Colorado	10	65	1,322	253
Connecticut	25		288	196
Delaware	3		193	44
District of Columbia	73	106	548	241
Florida	328		5,990	891
Georgia	38		4,779	591
Guam	0		10	4
Hawaii	2		330	51
Idaho	2		38	42
Illinois	1,194		3,928	711
Indiana	46		1,880	507
Iowa	3	63	196	56
Kansas	9		771	221
Kentucky	15		687	157
Louisiana	16		1,316	309
Maine	1		38	42
Maryland	17	95	1,739	264
Massachusetts	47	246	379	125
Michigan	57	381	2,358	391
Minnesota	36	53	694	122
Mississippi	2		1,271	199
Missouri	327	768	1,486	324
Montana	0		36	13
Nebraska	2		108	46
Nevada	9	131	896	222
New Hampshire	2	20	54	31
New Jersey	31	1,801	1,480	553
New Mexico	4		398	51
New York	236		3,220	1,265

State	AAA	State Court	EEOC or State FEPA	IDB
North Carolina	32	91	3,345	274
North Dakota	1		70	16
Northern Mariana Islands	0		35	5
Ohio	140		2,392	524
Oklahoma	11		753	238
Oregon	15		191	129
Pennsylvania	74	107	4,312	1,427
Puerto Rico	8	29	329	62
Rhode Island	7	78	68	67
South Carolina	13	87	1,008	315
South Dakota	0		49	17
Tennessee	26		2,393	383
Texas	364		7,448	810
Utah	8	10	218	85
Vermont	0		36	16
Virgin Islands	7		12	3
Virginia	11		2,265	302
Washington	9		1,091	171
West Virginia	14		86	72
Wisconsin	18		897	114
Wyoming	0		36	10

Notes: The AAA reports whether the claim was an employment law claim, but does not separately identify harassment or employment discrimination claims. For state law, EEOC, and IDB data, state is where the claim was filed. For AAA data, state is the state of the plaintiff's representative. Blank cells mean no data are available. The IDB and state court data are limited to employment discrimination lawsuits.

Sources: The AAA, state court data from the Court Statistics Project (when available), the EEOC (which includes filings with state FEPAs due to a work-sharing provision between the EEOC and the FEPAs), and the Federal Judicial Center IDB.

In this Article, we test the effect of settlement NDA bans on the filing of harassment and employment discrimination claims in federal court and in arbitration. If settlement NDA bans are to work as legislatures expect them to by increasing awareness of discrimination, they must at least not deter the reporting of discrimination claims and should increase the filing of such claims in a public forum—namely in

court. Further, with the assumption that settlement NDA bans decrease internal settlement, for bans to not negatively affect the likelihood that a victim receives compensation, the claims must proceed to a forum where settlement is not negatively affected or where a judgment can be awarded.

B. Empirical Strategy

To isolate the effect that settlement NDA bans have on the filing of harassment or employment discrimination charges in federal court and arbitration, we use difference-in-differences ("DD") techniques and regression analysis.[161] The DD specification isolates the policy effect of settlement NDA bans by comparing outcomes in states in which the law changed to outcomes in states in which the law did not change.

To examine the number of charges, we estimate the following general specification where the dependent variable is either the number of employment discrimination, harassment, or employment law charges filed in a forum in a state-month-year combination:

$$Charges = \beta_0 + \beta_1 NDA\ Ban + \beta_2^{'} Z + \beta_3^{'} Y + \varepsilon. \qquad (1)$$

β_1 is the coefficient of interest—whether the observation is in a state-month-year combination where a settlement NDA ban law was in effect. If this estimate is positive and statistically significant, the settlement NDA ban increased the filing of charges in the given forum. Z is a vector of state fixed effects, and Y is a vector of year fixed effects.[162]

We estimate three separate equations using each of three data sources: the AAA, the IDB, and Lex Machina.[163] For AAA analyses, the dependent variable measures the number of employment charges filed

161. *See* JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION 227–43 (2009) (provides an in-depth explanation of the DD estimation procedure). It is widely recognized that the literature on DD estimation is rapidly evolving. *See, e.g.*, Jonathan Roth, Pedro H.C. Sant'Anna, Alyssa Bilinski & John Poe, *What's Trending in Difference-in-Differences? A Synthesis of the Recent Econometrics Literature,* 235 J. ECONOMETRICS 2218, 2218 (2023) ("The last few years have seen a dizzying array of new methodological papers . . . .").

162. We recognize recent research that explores limitations of two-way fixed effects models when treatment groups are treated at different times. *See generally* Andrew C. Baker, David F. Larcker & Charles C.Y. Wang, *How Much Should We Trust Staggered Difference-In-Differences Estimates?*, 144 J. FIN. ECON. 370 (2022). Due to those concerns, as discussed below, our specifications only analyze the impact of legislation passed in New Mexico, which would not be subject to these concerns.

163. Our estimation uses a linear probability model. For data sources, see FED. JUD. CTR., *supra* note 149; LEX MACHINA, *supra* note 152; and Chandrasekher & Horton, *supra* note 115, at 26 (comparing data reported by the AAA and other organizations).

in the AAA. For IDB analyses, the dependent variable measures the number of employment discrimination charges filed in federal court as noted by the NOS Civil Rights Jobs and the NOS ADA Employment codes. For Lex Machina, the dependent variable measures the number of harassment charges filed in federal court.

Using data on individual cases from each of our three data sources, we also estimate regressions analyzing the impact of settlement NDA bans on settlement behavior and on the probability that the plaintiff prevails using the following specifications:

$$Settled = \beta_0 + \beta_1 NDA\ Ban + \beta_2' Z + \beta_3' Y + \beta_4 Pro\ Se + \beta_5 Class\ Action + \varepsilon. \quad (2)$$

$$Plaintiff\ Prevailed = \beta_0 + \beta_1 NDA\ Ban + \beta_2' Z + \beta_3' Y + \beta_4 Pro\ Se + \beta_5 Class\ Action + \varepsilon. \quad (3)$$

Settled is equal to one in the IDB data if the disposition is recorded as "Settlement,"[164] in the Lex Machina data if recorded as "Dismissed-Likely Settlement," and in the AAA data if recorded as "Claim Settled." *Plaintiff Prevailed* is equal to one in each data set if a judgment for the plaintiff is recorded. Again, Z is a vector of state fixed effects, and Y is a vector of year fixed effects. *Pro Se* is an indicator variable equal to one if the victim filed the action without legal representation, and *Class Action* is an indicator variable equal to one if the victim filed the action on behalf of similarly situated individuals.

Each analysis estimating equations (1)–(3) is limited to cases filed after October 2017 (the start of the #MeToo movement) and before May 2023.[165] Because states that banned settlement NDAs often took a

164. Changing the definition to include voluntary dismissals in addition to settlements does not change the statistical significance of the results, although the magnitudes are slightly larger. For a discussion of the IDB data and how to properly measure settlement, see Bullock, *supra* note 145, at 1159–60 n.133 (citing Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1592–93 (2003)) (discussing the IDB data and how to properly measure settlement); and Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1298 n.69, 1309–11 (2005) (conducting an audit to determine dismissal rates by case type).

165. *See #MeToo: A Timeline of Events*, CHI. TRIB. (Feb. 4, 2021, 1:52 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [https://perma.cc/6PL4-5566] (establishing a timeline of the #MeToo movement). The time period for the IDB and AAA analyses is October 2017 to December 2022. The time period for the Lex Machina analysis is October 2017 to May 2023. Because the AAA only reports closed claims, for equation (1), the data is restricted to December 2021. Including the 2022 reported data would underrepresent the number of claims filed, given that the claims had to close in 2022 to be reported by the AAA.

number of measures at the same time, we isolate the impact by limiting the analysis to New Mexico's legislation. New Mexico is the only state that banned settlement NDAs and implemented no other measure (not even banning NDAs in employment agreements).[166] Because Colorado borders New Mexico but passed no legislation banning NDAs during the time period of our analyses, we run regressions limiting our analysis to a comparison of New Mexico and Colorado. We also run regressions comparing New Mexico to all other states that did not pass settlement NDA bans. New Mexico's ban was strictly a ban on settlement NDAs, so our analyses do not suffer from any concerns that other laws have tainted the effect.[167]

As our theoretical model demonstrates, we can make a few predictions. We summarize below our expectations and reasoning.

First, we expect that settlement NDA bans could have a positive effect on filings due to a decrease in internal settlement and settlement within the EEOC, which keeps settlement information private, and to potential awareness spillover to other victims. However, because this prediction depends on the victim going forward in the more public arena, which is costly (both financially and emotionally) and not guaranteed, that effect is unclear.

Second, if there is an increase in filing, it is unclear that there will be an increase in the likelihood that a plaintiff receives compensation in court, as confidentiality agreements could be valuable for both low-value and high-value cases. Employers are more likely to want to settle claims with merit due to the likelihood they will lose at trial and face the additional costs of litigation, but at the same time, confidentiality provisions are more important and valuable when a claim has merit, as public exposure will be more damning. Employers' decisions to settle low-value claims may also be affected by confidentiality bans because the claims still cause reputational harm and the employer may pay a low-value settlement amount to avoid that risk.

Third, the effect of settlement NDA bans on the probability of settlement before a trial verdict in federal court is less clear because of countervailing forces. On the one hand, the claim is already public, so a settlement NDA is less valuable; on the other hand, if there is an increase in filing, those claims that are filed after the ban are likely to

166. *See* N.M. STAT. ANN. § 50-4-36 (West 2020) (banning settlement NDAs).

167. Further, because the event is only one state passing a law, there are no econometric concerns with analyzing a treatment that occurred across time. Results reported in Table 2A include claims filed in Washington and Maine, which acted late in our analysis. Excluding claims filed in those states does not change the size or significance of the results.

be stronger, and the employer may settle before facing a jury. Further, future confidentiality may still be valuable to the firm.

C. Empirical Results

When isolating the effect of the bans by looking exclusively at the effect of the settlement NDA ban in New Mexico—both by comparing New Mexico to Colorado only (a border state that passed no legislation banning NDAs during the time period of our analyses) and by comparing New Mexico to all states that did not pass a settlement NDA ban—there is evidence of an increase in employment filings in federal court with more consistent effects for harassment claims.

As reported in column (1) of Tables 1A and 2A,[168] banning settlement NDAs in New Mexico increased the filing of harassment claims in federal court by approximately 0.7 to 1.8 claims a month, which is an increase of 12% to 30% for harassment claims.[169] Comparing New Mexico to Colorado, the ban also increased the filing of employment claims in federal court by approximately 2.7 claims a month, which is approximately a 23% increase given that approximately 12 employment claims are filed in federal court on average each month in both states. These results indicate that employment discrimination claims filed in federal court increased after settlement NDAs were banned. These results are also consistent with publicly available EEOC data; from 2019 to 2022, New Mexico employment discrimination filings with the state FEPAs decreased from 12%, but claims filed in Colorado decreased 25%.[170] Thus, the empirical results are promising for the overall effect of settlement NDA bans, at least in terms of advancing public disclosure.[171] The null effect

168. *See infra* Appendix.

169. On average, approximately six harassment claims and seventeen employment discrimination claims are filed in federal court in a given month in the states, excluding New Mexico, in our analysis.

170. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 144. The EEOC does not post resolution type by state, and a FOIA request to receive the data was denied, so we are unable to look at the impact on settlement outcomes within the Agency. Although our DD strategy nets out any concern that a national crisis, such as the COVID-19 pandemic, explains an increase in filings, antidiscrimination charges are thought to rise with unemployment, and there is no evidence that New Mexico experienced a higher change in the rate of unemployment during the pandemic than Colorado. *See State Unemployment Rates over the Last 10 Years, Seasonally Adjusted*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/charts/state-employment-and-unemployment/state-unemployment-rates-animated.htm (last visited Dec. 11, 2023) [https://perma.cc/HT8Z-9QSL] (providing seasonally adjusted state unemployment rates for the last decade).

171. One assumption of DD analysis is that New Mexico was not experiencing any trends in discrimination filings post-2017 that differ significantly from the trends in filings in the other states in our analysis. We limit our analysis to post-#MeToo in the expectation that any difference in how the movement affected filings is limited. But we also analyze pre-trends, and an analysis

on arbitration filings may be because internal settlement NDAs have less value when the next step is a confidential arbitration proceeding.

We turn now to the effect of settlement NDA bans on settlement within arbitration and federal court. These estimates provide some evidence of a decrease in settlement of claims (reported in Table 1A).[172] We did not expect settlement NDA bans to clearly have an impact on settlement in federal court, as it is already a public forum and confidentiality is less valuable,[173] but the results do suggest a decrease in settlement after a claim is filed in federal court, which could be a direct effect of the ban or spillover from a change in the type of cases filed (the increase in filing). Comparing New Mexico to Colorado or to other states that did not pass a settlement NDA ban, there is evidence of a decrease in settlement of approximately 10 percentage points for employment claims in federal court, 14 percentage points for harassment claims in federal court, and 34 percentage points in the AAA. This equates to approximately an 18.5% decrease in settlement for employment discrimination claims filed in federal court, a 20% decrease in settlement for harassment claims filed in federal court, and a 50% decrease in settlement for employment claims filed in the AAA.[174] This decrease is consistent with the employer placing value on the confidentiality of an agreement, but it could also be the result of a change in the types of cases that are filed post-ban, as discussed below.

There are two competing concerns that make it difficult to predict what claims (those with merit or without) are most likely to be affected in settlement negotiations by a ban on settlement NDAs. Claims with merit are the most valuable to keep quiet, so a settlement NDA ban may be more important to the employer when the claim is

---

of the pre- and post-trends between New Mexico and all other states that did not pass NDA bans suggests no significant trend in the differences of the average monthly filings in any forum until the enactment of the legislation. Changing the analysis from monthly analyses to yearly analyses also did not change the results. Comparing New Mexico to other similarly sized blue states also yielded similar results. Though there appears to be a trend in the difference in settlement behavior before the enactment, a downward shift in that trend is noticeable in each around the time of the treatment, particularly in the IDB settlement analyses.

172. *See infra* Appendix.

173. Federal court cases are available to the public through PACER. *See Find a Case (PACER)*, U.S. CTS., https://www.uscourts.gov/court-records/find-case-pacer (last visited Dec. 11, 2023) [https://perma.cc/WQ9M-TVAS].

174. Of the cases that terminate during our time period and are analyzed in our regressions, approximately 68% of harassment claims filed in federal court, 44% of employment discrimination claims filed in federal court, and 74% of employment claims filed in arbitration settled during our time period. If New Mexico is excluded from the analysis of the averages, the only percentage to change is that 67% of employment claims in arbitration settled during our time period. These results may be due to the increase in filing and change in the type of cases that are filed, or due to the unavailability of the confidentiality provision after the ban, or both, explaining these large effects.

thought to be meritorious. However, those claims are also the most likely to be filed in court because the probability of the victim's success at trial is higher, making the expected payoff from trial higher.[175] The employer may choose to settle high-merit claims even without confidentiality provisions instead of risking the potentially higher costs of trial. Further, as our theoretical model suggests, the change in settlement behavior may not affect the internal reporting of claims. Column (3) in Tables 1A and 2A provides evidence that, conditioned on the increase in filings,[176] employees are not more likely to prevail in federal court following bans on NDAs as a condition of employment. Column (3) also provides some evidence of a decrease in the probability that the plaintiff prevails.[177] This finding is consistent with the ban being more likely to affect those claims that are inherently less likely to prevail. That being said, these results are limited to claims that were resolved during our time period, generally meaning we are only looking at claims resolved before trial and early in the litigation process. As some claims remain open, and an even larger percentage remain open in New Mexico due to the decrease in settlement, it is possible that there was an increase in a plaintiff's likelihood of prevailing at trial. In addition, the results suggest that plaintiffs are more likely to prevail in arbitration following the ban, suggesting that this result is not consistent across venues and that it may not be consistent in state court either. Finally, as a comparison to states that passed settlement NDA bans along with more comprehensive legislation, isolating California as compared to all states that did not pass any settlement NDA ban shows an increase of 1.6 harassment claims a month and a 10 percentage point decrease in settlement but a 0.7 percentage point increase in the likelihood that the plaintiff prevails for harassment claims filed in federal court.[178]

The empirical results are consistent with settlement NDA bans changing settlement behavior and encouraging (or at least not

175. We recognize that psychological consequences of publicly reporting more severe experiences may deter some victims from pursuing litigation.

176. *See infra* Appendix.

177. These results are not conditioned on the failure to settle, which may explain the large effects. Approximately 1% of employment claims in arbitration, employment discrimination claims filed in federal court, and harassment claims filed in federal court end in a plaintiff victory.

178. California passed legislation that included expanding training procedures. More importantly for this analysis, California's legislation limited the ability of defendants to recover fees if they prevail, expanded liability to third parties, changed the definition of harassment to not require a tangible productivity decline, made clear that a single incident constitutes harassment and that a stray remark can constitute evidence of harassment, and advised courts that summary judgment is rarely appropriate. S. 1300, 2017 Leg., Reg. Sess. (Cal. 2018). Because the federal courts can hear state legal actions, these changes would apply in federal court as well.

deterring) external reports of harassment claims. As a means of deterrence, the findings are encouraging evidence that any change in settlement behavior is accompanied with an increase in filing in court and, as such, an increase in public awareness of harassment claims. But the likely decrease in settlement within the firm, followed also by a decrease in settlement in federal court and no clear evidence that the decrease in settlement results in an increase in the plaintiff prevailing following the filing of a lawsuit, raises concerns that fewer victims are being compensated. That being said, a rough calculation applying the results for the harassment claims indicates that the employer's payout might still increase. Before the ban, 6 harassment claims on average were filed in federal court each month in each state, and the results suggest an increase to 7.8 harassment claims a month. The results also suggest a decrease in settlement in court from 68% to 41%—suggesting that the amount of harassment claims settled in federal court went from approximately 4.1 to 3.2. For economic deterrence to have gone down, that one additional case that was not settled must have been likely to have been reported and settled internally or within the EEOC before the settlement NDA ban, or there must be no meaningful reputational consequences of those additional 1.8 cases filed. Though we cannot say with certainty whether this is true or not, we can recognize increased deterrence would be even more likely if the plaintiff were likely to prevail or settlement was unaffected.

IV. INFORMING THE FUTURE OF SETTLEMENT NDAS

State legislatures acted in the wake of #MeToo with the well-intentioned goal of deterring workplace harassment. They responded to increased awareness of NDAs by banning their use, which was thought to prevent the discussion and knowledge of allegations of workplace harassment.[179] Although our analysis does not focus on banning NDAs as a condition of employment, we recognize that such NDAs could have a chilling effect on awareness of workplace harassment. Further, when such NDAs are interpreted to cover the discussion of harassment allegations, it is not clear what positive effect they could have on the employment relationship other than protecting the employer from disclosure of illegal activity. As such, the focus of this Article and this discussion is on the effect of banning settlement NDAs, particularly as opponents of this legislation and calls to ban "secret settlements" for public policy concerns have recognized that banning settlement NDAs

179. *See supra* Section I.C.

could come with the consequence of decreased internal settlement. And decreased internal settlement could mean decreased compensation for the victims and decreased deterrence unless the victims file claims in other forums and prevail there.

Our empirical analysis found that New Mexico's banning of settlement NDAs increased the filing of harassment or employment discrimination claims in federal court. This effect is consistent both with legislatures' hopes that banning such agreements would increase the awareness of harassment allegations and with our hypothesis that banning such agreements will decrease settlement within the firm (or within the EEOC before the claim is filed in federal court). Assuming that at least part of the result is a decrease in internal settlement, one concern is that for victims to receive more (or equivalent) compensation, and for firms to be incentivized to deter harassment by being forced to compensate victims, the increased filings must result in a payout (and potentially an increased payout) for the victim. Our empirical results show that following the adoption of the settlement NDA ban, there was a decrease in settlement in federal court and arbitration and some evidence of a decrease in the likelihood that the plaintiff prevails, at least early in the litigation. Unfortunately, this suggests that if the change was solely in settlement behavior within the EEOC or the firm, the accompanying increase in filings was not accompanied by a larger percentage of victims receiving compensation and firms paying out.

This decrease in settlement in federal court could be a product of the settlement NDA ban itself, as the inability to have a confidentiality agreement in a settlement claim even in federal court (which is not private) or arbitration (which is still private) could decrease the likelihood of settlement.[180] Alternatively, this effect could be a product of the nature of the allegations, which may have been less likely to settle within the firm or the EEOC following the settlement NDA ban, being those that are less likely to prevail in court.[181] Finally, the effect could be that the ban itself increased the total number of allegations made internally or externally and those also being less likely to prevail in court such that a firm is less likely to settle the claim at all. These last two scenarios combined with the decrease in settlement in arbitration and federal court are also consistent with the

180. Although there is an equivalent 14% effect for both arbitration and federal court settlement, isolating employment discrimination from all employment claims in arbitration may reveal a larger effect.

181. Or it could be that those with more severe claims are less likely to file a claim following the failure of internal settlement. *See supra* Part II (discussing the theoretical impacts of NDAs on settlement and litigation).

decrease in the likelihood that the plaintiff prevails in federal court following the settlement NDA ban.

No matter the exact nature of the effect, any decrease in the likelihood that the plaintiff receives a payout may offset any deterrent effect that may arise from an increase in awareness or reputational harm. This offset means that a ban on settlement NDAs may have a null or potentially negative effect on deterrence. Our results do show an increase in filings, which may indicate that increased awareness led to additional filings, the firing of a harasser, or reputational effects. Further, as calculated at the end of the empirical results section, we have reason to think any potential loss in deterrence due to simply a decrease in litigation payouts may be small. So, with that in mind, the bans as adopted could have the intended deterrent effect. But it is worth exploring potential middle grounds as well.

For a number of reasons, it is likely that the largest effect on settlement is before a plaintiff files a claim in court or arbitration. As seen in the theoretical model presented above, when a firm decides whether to settle before a claim is filed externally, the allegation has not been made public, so the confidentiality provision means the most.[182] Given that the confidentiality agreement is likely to have the greatest effect on settlement within the firm, legislatures could consider settlement NDA bans that only ban settlement NDAs after the victim has filed a claim outside of the firm. This consideration would also be consistent with the criticism of the legislation that it puts too much burden on the victim, who may have many reasons for wanting to resolve the allegation without going outside of the firm.[183] Although many of the statutes that ban settlement NDAs have an exception for the victim requesting the confidentiality provision, it is unclear how these exceptions work, particularly if the firm believes that it is unable to tell the victim about the option. Perhaps if the victim is represented by counsel, counsel will be aware of the option and how to document it. Because New Mexico's ban does have such an exception and the empirical results suggest a decrease in settlement following the settlement NDA ban, this "loophole" may not be big enough to prevent this unintended consequence.

---

182. This is also the case when a claim has been filed in arbitration, but due to recent action by Congress, mandatory arbitration bans are no longer enforceable for allegations of harassment. 9 U.S.C. § 402(a). Confidentiality agreements are also likely to be more valuable when settlement occurs in the EEOC or a state FEPA given the confidentiality of those claims. Further, at that point, the victim has already decided to file a lawsuit, so the overall probability that the victim prevails is higher.

183. *See* Bachar, *supra* note 68, at 82–83 (arguing for disclosure of facts once a victim has filed suit).

Gretchen Carlson has been very public about the fact that she signed a settlement agreement once her case was filed in federal court that has prohibited her from going forward with the details of her claim despite the fact that some of those details are contained in her publicly filed complaint.[184] At this point, despite the public allegations in the complaint, the firm still saw some value in a settlement NDA, and Carlson now sees some value in being able to speak about her claims after the settlement and in more detail.[185] Being able to do so would likely increase exposure of harassment allegations. And at this point, a plaintiff would have already decided that it is worthwhile to file the claim publicly and seemingly rejected a settlement offer that contained a confidentiality provision. Therefore, given the benefits of a settlement NDA ban at this stage and the lower likelihood of unintended consequences, if legislatures are going to continue to entertain settlement NDA bans, they could consider bans only on settlement agreements once the victim has filed a claim outside of the firm.[186] This in fact is the solution that Justice Ginsburg proposed more than five years ago.[187] This solution may actually be what some states like California and Nevada intended by limiting the ban to "a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action."[188]

One way to increase exposure without the potential cost of decreasing victim compensation and deterrence could be to allow the

184. *See supra* notes 11, 16, 63 and accompanying text.

185. *See supra* notes 11, 16, 63 and accompanying text.

186. Other proposed solutions to the benefit-versus-externality debate of settlement NDAs include allowing settlement NDAs in circumstances where the employer must report the settlement—such that serial harassers can later be prosecuted—and permitting agreements that allow victims to participate in such investigations. *See* Rachel S. Spooner, *The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases*, 37 HOFSTRA LAB. & EMP. L.J. 331, 377–78 (2020). Nevada has an exception for NDAs in settlements approved by their state agency. NEV. REV. STAT. § 10.195 (2019).

187. *See supra* note 17 and accompanying text. Scholars have similarly recognized:

> [C]onfidentiality in discrimination actions is wholly contrary to the legislative intent of the anti-discrimination statutes and also creates negative externalities, as discussed above. Transparency here does nothing to protect the employee since the complaint is already a matter of public record and can be easily discovered through a database search. It is only the employer who benefits from a confidential settlement.

Minna J. Kotkin, *Reconsidering Confidential Settlements in the #MeToo Era*, 54 U. S.F. L. REV. 517, 529 (2020); *see also* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 873 (2007) (providing that, though difficult to predict, there may be benefits to banning secret settlements postlitigation that overcome the decrease in compensation to the victim).

188. CAL. CIV. PROC. CODE § 1001 (West 2022). Similar language appears in the Nevada law as well. NEV. REV. STAT. § 10.195 (2019); Roskelley & Branson, *supra* note 89.

victim to breach a settlement NDA when a different claim has been filed against the same harasser in the EEOC. As much of the motivation behind banning settlement NDAs is to expose serial harassers, this would at least allow the victim who chose silence to piggyback on the victim who did not, such that the serial harasser is exposed. This solution is similar to one proposed by Ian Ayers,[189] where a settlement must be reported to an agency and is only made public when a second claim is made against a harasser. It is also similar to the Vermont legislature's call to the Human Rights Commission to develop mechanisms to void settlement NDAs when an alleged harasser is later adjudicated by a court or tribunal to have engaged in harassment.[190] Of course, this solution is not perfect—it does not encourage the filing of claims by future victims who may not know that they are not alone—but it does shine some light without putting all of the burden on every victim. Notably, some scholars have called for plaintiffs to simply breach the agreement, expecting that with very little case law on the matter, defendants may be unlikely to risk enforcing the breach and subsequent exposure in order to get the money back.[191]

Finally, it could be possible to decrease these bans' potential negative effects on deterrence by combining them with legislation that increases the likelihood that a victim prevails in court. It is beyond the scope of this Article to summarize the many ways that scholars and legislators have proposed increasing the likelihood of liability or damages received in harassment and discrimination litigation, but some of those include increasing the damages caps found in Title VII and state laws, removing loopholes for liability like the victim's failure to report, and broadening the definition of supervisor harassment.[192] In fact, in response to the #MeToo movement, New York adopted strict liability for supervisor harassment, removed the requirement that harassment be severe or pervasive, and increased damages.[193] California changed the definition of harassment to not require a tangible productivity decline, made clear that a single incident

189. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 79 (2018).

190. S. H.707, 2017 Leg., Reg. Sess. (Vt. 2018), https://legislature.vermont.gov/Documents/2018/Docs/BILLS/H-0707/H-0707%20Senate%20Proposal%20of%20Amendment%20Unofficial.pdf [https://perma.cc/68G6-D7YM]. This language was not adopted in Vermont's final law. VT. STAT. ANN. tit. 21, § 495h(h)(2)(A) (West 2017).

191. Mark Fenster, How Reputational Nondisclosure Agreements Fail (Or, in Praise of Breach) 5 (Jan. 20, 2023) (unpublished manuscript) (on file with author).

192. Schultz, *supra* note 34, at 47; Tippett, *supra* note 34, at 239; Bullock, *supra* note 21, at 721.

193. *See* S. 6577, 2019 Leg., Reg. Sess. (N.Y. 2019) (adopting strict liability for supervisor harassment, removing the requirement that harassment be severe or pervasive, and increasing damages).

constitutes harassment and that a stray remark can constitute evidence of harassment, and advised courts that summary judgment is rarely appropriate.[194] By increasing the likelihood that a victim prevails and increasing the amount a plaintiff can recover from litigation, confidentiality becomes a lower consideration to the employer who is also heavily weighing the risk of litigation.

CONCLUSION

Following the #MeToo movement, state legislatures began to take action to try to curb workplace harassment, primarily through measures aimed at deterrence. One of the most popular measures was aimed at deterring through publicity by increasing reporting of wrongdoing, increasing awareness of serial harassers, and raising the cost of harassment through reputational consequences. State legislatures (and now Congress) banned NDAs prohibiting the discussion of discrimination in workplaces that were signed as conditions of employment.[195] State legislatures also banned confidentiality provisions in settlement agreements addressing harassment that would prevent the claimant from discussing the underlying facts of the wrongdoing.[196]

As with many well-intentioned measures, there are potential unintentional consequences. The primary concern with a ban on settlement NDAs that many victims' advocates have highlighted is the fact that the impetus for such a ban relies on victims going forward with their claims, which may not happen. First, banning settlement NDAs may decrease the possibility of financial deterrence. As explored in the theoretical model presented above, banning settlement NDAs lessens the likelihood of settlement following an internal report before litigation. Because it lessens the possibility of settlement, the likelihood of financial payout—itself a deterrent, particularly for smaller firms—decreases unless the victim files a lawsuit. As the proponents of the settlement NDA bans hope, this unintentional consequence may be avoided if victims that do not settle internally go forward with their claims, but only in that circumstance. Further, the goal of these laws—to increase awareness and deterrence through publicity—is only achieved if the victims go forward to litigation or another public forum. For reasons discussed in this Article and many others, victims may be

194. S. 1300, 2017 Leg., Reg. Sess. (Cal. 2018).

195. *See supra* note 78.

196. *See supra* Table 1.

hesitant to go forward publicly if the likelihood of settlement declines, and these laws may therefore decrease deterrence.

Ultimately, whether these laws prompt more (or less) disclosure is an empirical question that this Article explores by analyzing the impact of these laws on the filing of harassment and employment discrimination claims in arbitration and federal court. The results of our empirical analysis suggest that the unintended consequence of a decrease in internal settlement might be occurring, but the results also provide an upside in that there may be an increase in deterrence through the increased filing of public claims. That is, there may be a potential benefit of settlement NDA bans shining a light on the problem, but this benefit might come with the consequence of fewer victims receiving compensation, thus reducing the likelihood that these laws truly deter.

But breaking the results down further suggests that any offset in litigation payout could be overcome if these bans come with additional reputational consequences or encourage additional filings. Of course, we also recognize additional private benefits of these laws and are unable to measure the reputational effect of the increase in filings of public claims. But given the complexities of changing settlement behavior, we encourage legislatures to consider passing these bans with more comprehensive antidiscrimination reform so that victims are more likely to prevail or receive higher compensation in court. This would have the effect of encouraging more victims who do not settle to go forward and also decreasing any adverse impact on settlement by requiring the employer to think twice about taking their chance in court.

APPENDIX

TABLE 1A: EFFECT OF SETTLEMENT NDA BAN ON MONTH-YEAR FILINGS, SETTLEMENT, AND THE PROBABILITY THAT THE PLAINTIFF PREVAILS IN COURT AND ARBITRATION, NEW MEXICO COMPARED TO COLORADO

Dataset	Dependent Variables		
	Month-Year-State Filings (1)	Settlement (2)	Probability Plaintiff Prevails (3)
IDB	2.721**	-0.101**	-0.006*
	(0.903)	(0.004)	(0.001)
N	126	1,185	1,185
Lex Machina (Harassment Claims)	1.757***	-0.139***	-0.051*
	(0.381)	(0.001)	(0.010)
N	134	392	392
AAA	0.106	-0.345**	0.097*
	(0.131)	(0.019)	(0.009)
N	102	85	85

Notes: Each cell reports the coefficient on "NDA Ban" from equations (1)–(3), where the dependent variable is indicated by the column heading and the dataset is indicated by the row heading. The coefficient on NDA Ban from nine separate regressions is therefore summarized in this Table. Each regression includes year and state fixed effects. Column (2) and (3)'s regressions also include controls for whether the plaintiff filed the claim pro se and whether the plaintiff filed the claim as part of a class action.

*, **, and *** indicate significance at the 10%, 5%, and 1% levels. Wild cluster bootstrap standard errors are reported in parentheses.

Datasets: Claims filed in New Mexico or Colorado. IDB: employment discrimination cases filed between October 2017 and December 2022; Lex Machina: employment harassment cases filed between October 2017 and May 2023; AAA: employment cases filed between October 2017 and December 2021 for column (1) and cases closed by December 2022 for columns (2) and (3). Columns (2) and (3) are restricted to claims that terminated during the reported time periods.

TABLE 2A: EFFECT OF SETTLEMENT NDA BAN ON MONTH-YEAR FILINGS, SETTLEMENT, AND THE PROBABILITY THAT THE PLAINTIFF PREVAILS IN COURT AND ARBITRATION, NEW MEXICO COMPARED TO STATES THAT DID NOT ENACT A SETTLEMENT NDA BAN

Dataset	Dependent Variables		
	Month-Year-State Filings (1)	Settlement (2)	Probability Plaintiff Prevails (3)
IDB	0.265	-0.102***	-0.008***
	(0.483)	(0.016)	(0.001)
N	3,087	43,269	43,269
Lex Machina (Harassment Claims)	0.713***	-0.110***	-0.049***
	(0.215)	(0.009)	(0.002)
N	3,283	13,665	13,665
AAA	-0.022	-0.338***	0.140***
	(0.821)	(0.046)	(0.043)
N	2,397	7,193	7,193

Notes: Each cell reports the coefficient on "NDA Ban" from equations (1)–(3), where the dependent variable is indicated by the column heading and the dataset is indicated by the row headings. The coefficient on NDA Ban from nine separate regressions is therefore summarized in this Table. Each regression includes year and state fixed effects. Column (2) and (3)'s regressions also include controls for whether the plaintiff filed the claim pro se and whether the plaintiff filed the claim as part of a class action.

*, **, and *** indicate significance at the 10%, 5%, and 1% levels. Robust standard errors clustered by state are reported in parentheses.

Datasets: Claims filed in every state but California, New Jersey, New York, Illinois, Nevada, and Oregon. IDB: employment discrimination cases filed between October 2017 and December 2022; Lex Machina: employment harassment cases filed between October 2017 and May 2023; AAA: employment cases filed between October 2017 and December 2021 for column (1) and cases closed by December 2022 for columns (2) and (3). Columns (2) and (3) are restricted to claims that terminated during the reported time periods.