

WORKPLACE POWER

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Abstract: The unsustainable power imbalance between corporations and their employees has resulted in the physical and emotional abuse of workers. This power disparity has existed for decades. Congress has stepped in on several occasions to address the problem. Workplace law is at another apex where the power disparity between companies and employees has grown too large. The current failure of our political system has left Congress unable to act. A different approach to workplace power is necessary, and this Article offers a much-needed proposal that addresses existing employer abuses.

INTRODUCTION

There is a demonstrable—and unsustainable—power imbalance between workers and employers. As a society, we value the fluidity of employment in the workplace.¹ The ability to choose our own career path is at the backbone of the way we approach work, and the practice of doing so is as old as the United States itself.²

Unlike much of the rest of the world, work in the United States revolves around an employment-at-will approach, which gives employers the right to fire workers at any time for any reason.³ Symmetrically, employees may leave

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¹ See Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 151–64 (2005) (describing the nature of employment at will in the United States); see also Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 962–77 (1984) (describing the utility of employment at will).

² See Bird, *supra* note 1, at 158–64 (discussing the history of employment doctrine). See generally *Labor Movement*, HISTORY, <https://www.history.com/topics/19th-century/labor> [<https://perma.cc/X3ZT-E4ER>] (Mar. 31, 2020) (examining the early origins and evolving history of the labor market in the United States).

³ See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65–66 (2000) (examining the uniquely American doctrine of employment at will).

their job at any time as well.⁴ Though these rights to fire or quit at any time seem balanced, they have proven to be anything but fair over the years.⁵ The Great Depression saw countless examples of worker exploitation.⁶ Worker mistreatment during this era led to the creation of the Fair Labor Standards Act, which provided a basic minimum wage for employees, extra pay for overtime work, and protections against excessive child labor.⁷ Workplace safety concerns and a general disregard for employee health in subsequent years resulted in the passage of the Occupational Safety and Health Act, a federal law that established minimum standards for workplace safety.⁸

Over the decades, employers have repeatedly abused their power by horrifically discriminating against workers on the basis of race, sex, national origin, and religion. During the Civil Rights Movement of the 1960s and in subsequent years, various laws were passed to protect workers from such egregious discrimination.⁹ Even more recently, concerns over employers' attempts to manipulate hiring on the basis of genetic information resulted in a federal law prohibiting such practices.¹⁰

These are just a handful of examples of employer abuse, which has extended well beyond these areas.¹¹ To be sure, employers have not upheld their end of the bargain of at-will employment, and the ability to fire workers at any time for any reason has created a path for businesses to manipulate the workforce. Since this country's inception, employers have repeatedly demonstrated a willingness to overstep in their mistreatment of workers. This has led to a patchwork of necessary employment laws—both state and federal—that limit employer power.¹² This assortment of laws, however, is wholly insufficient.

⁴ See discussion *infra* Part I (discussing the principles and application of the employment-at-will approach).

⁵ See discussion *infra* Part II (highlighting the reality of a power gap between employees and employers that has contributed to various instances of workplace abuse).

⁶ See *infra* notes 75–117 and accompanying text (discussing workplace abuses during the Great Depression).

⁷ See Fair Labor Standards Act (FLSA), 29 U.S.C. § 202 (outlining certain protections created for the workplace); discussion *infra* Part II.B.1 (discussing how certain workplace abuses were addressed through the enactment of the Fair Labor Standards Act).

⁸ See Occupational Safety and Health Act (OSH Act), 29 U.S.C. §§ 651–678 (providing for health and safety regulations in the workplace); discussion *infra* Part II.B.1 (discussing the OSH Act).

⁹ See *infra* notes 75–138 and accompanying text (addressing the history of the enactment of Title VII of the Civil Rights Act of 1964); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 328–37 (1990) (codified as amended at 42 U.S.C. §§ 12101–12111) (prohibiting discrimination in the workplace based on disability).

¹⁰ See Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of U.S.C. Titles 29 & 42) (regulating the use of genetic information in employment decisions).

¹¹ See discussion *infra* Part II (discussing various employer abuses over the past century).

¹² See *infra* notes 71–197 and accompanying text (addressing various state and federal law exceptions to employment at will); see, e.g., Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat.

Freedom to contract is, at its core, the basic principle of employment law, but the principle has been manipulated for unfair purposes.¹³ Unfortunately, the law has been far too slow to respond in recent years. Indeed, as detailed in this Article, and as I have highlighted previously, there are numerous examples of employers abusing their power that are quite alarming.¹⁴ More recently, employers have used an initial power advantage during the COVID-19 pandemic to oppress workers and limit the ability of employees to respond to emergency family responsibilities.¹⁵

We thus find ourselves at a familiar point in time where there is a demonstrated need to strengthen worker protections. The question of *how* we build out additional protections is much more complicated and fraught with difficulty, and this Article addresses this core issue. I have previously argued for congressional action to help address this issue by adopting a more reasoned and nuanced approach to at-will employment.¹⁶ Unfortunately, the existing political failures and gridlock make the typical legislative solution difficult to attain in the currently divisive political environment—though such a legislative approach would certainly be preferable.¹⁷ If legislative compromise cannot be reached, other solutions must be considered to properly address the power gap that so clearly pervades the workplace. Without congressional assistance in this area, more individualized answers are needed. Just as states and local governments have acted in other contexts, they must similarly seek to prevent the types of workplace power abuses that have had devastating effects on workers and their families.¹⁸

This Article proposes a way of addressing this existing problem. This solution combines five factors with the goal of recalibrating the power gap between

745 (codified as amended in scattered sections of U.S.C. Titles 11, 15, 18, 28 & 29) (establishing transparent reporting requirements and financial regulations for corporations).

¹³ See *infra* notes 47–70 and accompanying text (examining contract principles that form workplace law doctrine).

¹⁴ See *infra* notes 139–181 and accompanying text (exploring the current status of sexual harassment in the workplace and detailing various studies on hostile work environments). See generally Joseph A. Seiner, *Sensible Just Cause*, 103 B.U. L. REV. 1295 (2023) (addressing current employer mistreatment of employees in the workplace).

¹⁵ See *infra* notes 139–181 and accompanying text (detailing employer abuses during the pandemic); Seiner, *supra* note 14, at 1311–17 (addressing employment issues arising during the COVID-19 pandemic); Joseph A. Seiner, *Time, Equity, and Sexual Harassment*, 12 U.C. IRVINE L. REV. 573, 575 (2022) (same). See generally JOSEPH A. SEINER, *THE VIRTUAL WORKPLACE* (2021) (examining the shift in society's conception of the workplace as a result of the COVID-19 pandemic).

¹⁶ See generally Seiner, *supra* note 14 (outlining current workplace mistreatment and arguing for legislative intervention to address workplace concerns and employment-at-will status).

¹⁷ *Id.* at 1338; see *infra* notes 182–197 and accompanying text (addressing the failures of the political system to solve the workplace power imbalance).

¹⁸ See discussion *infra* Part III (proposing alternative sources of reform to more effectively combat the power imbalance between workers and businesses).

employers and their workers.¹⁹ These different sources of reform must act together through what this Article identifies as the doctrine of *at-will in-part*. This proposed doctrine offers a framework to overcome the political failures in our system and to establish the protections necessary for employees to prevent further workplace abuses.²⁰ Though a modest proposal, *at-will in-part* would provide the basic framework necessary to establish these new, much-needed parameters and to recalibrate the growing power disparity in the workplace.

The proposed doctrine of *at-will in-part* suggests the adoption of five narrowly and carefully tailored reforms to the doctrine of employment at will.²¹ First, this Article addresses the need to revisit the basic principles of employment at will and to integrate some additional protections for workers against unfair discharge.²² Second, this Article advocates for a modified union approach, where unionization is more flexible and accessible to both employers and employees.²³ Third, this Article discusses the wholly inadequate and outdated damages scheme currently available to victims of discrimination and addresses the changes required to modernize this much-needed relief.²⁴ Fourth, this Article looks at the negative impact of nondisclosure agreements and suggests a different approach that provides more transparency in the workplace.²⁵ Finally, this Article examines relevant recent Supreme Court doctrine and proposes a way in which courts could interpret workplace cases to rebalance the existing power differential.²⁶ Through these five different areas of consideration, this Article seeks to provide more equity to the workplace through additional employee protections.

This Article proceeds in four parts. Part I addresses the troubled history and existing controversy regarding employment at will in this country.²⁷ Part II examines the inadequacies of a market-driven employment system that offers misplaced reliance on the ability to contract.²⁸ This Part further examines how this reliance and the failure of politics has historically—and presently—resulted in an unsustainable power imbalance between companies and their workers. Part III offers a five-element proposal to help recalibrate this power imbalance and con-

¹⁹ See discussion *infra* Part III (exploring these factors in more detail).

²⁰ See discussion *infra* Part III.

²¹ See discussion *infra* Part III (proposing a new doctrine to address workplace power imbalance).

²² See *infra* notes 209–225 and accompanying text.

²³ See *infra* notes 226–248 and accompanying text.

²⁴ See *infra* notes 249–271 and accompanying text.

²⁵ See *infra* notes 272–291 and accompanying text.

²⁶ See *infra* notes 292–324 and accompanying text. See generally Seiner, *supra* note 14, at 1300–06 (outlining the history of employment at will).

²⁷ See *infra* notes 31–43 and accompanying text.

²⁸ See *infra* notes 44–197 and accompanying text.

siders the implementation of such a proposal.²⁹ In Part IV, this Article concludes by discussing some of the many implications of this proposal.³⁰

I. THE CRUX OF THE PROBLEM: EMPLOYMENT AT WILL

Employment at will has a long and storied history in this country that still thrives today.³¹ The doctrine has evolved over centuries and is largely limited to the United States.³² Indeed, workers can be dismissed at any time, and employees can leave their jobs for any reason, in most American workplaces.³³ Approximately 125 million of the roughly 167 million workers in this nation fall under the precepts of employment at will.³⁴ Almost every state follows this

²⁹ See *infra* notes 198–326 and accompanying text.

³⁰ See *infra* notes 327–334 and accompanying text.

³¹ See Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMPAR. LAB. L. 85, 85–86 (1982) (discussing the origins of employment at will in the United States); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 107 (1997) (“[T]he vast majority of nonunion, private sector workers are employed at will.”).

³² See STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 65–80 (6th ed. 2017) (describing the evolution of employment at will in England and the United States); Mark Harcourt, Helen Lam & Maureen Hannay, *Employment at Will Versus Just Cause Dismissal: Applying the Due Process Model of Procedural Justice*, 64 LAB. L.J. 67, 71 (2013) (“The United States remains the last major industrialized country without comprehensive just cause protections . . .”). See generally Seiner, *supra* note 14, at 1305–06 (providing a brief comparative analysis of employment doctrine across countries); Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343 (2014) (comparing employment laws in many countries); Joseph A. Seiner, *Understanding the Unrest of France’s Younger Workers: The Price of American Ambivalence*, 38 ARIZ. ST. L.J. 1053, 1061–64 (2006) (discussing French employment laws); Bird, *supra* note 1, at 160–61 (“Even though the law of employment at will assumes laissez-faire conditions, equal bargaining power, and contractual freedom, employment practice still retains much of its master-servant roots.”); Elaine Clark, *Medieval Labor Law and English Local Courts*, 27 AM. J. LEGAL HIST. 330, 339–40 (1983) (addressing employment laws during the Medieval Era); Ley Federal del Trabajo [LFT], art. 47, Diario Oficial de la Federación [DOF] 01-04-1970, últimas reformas DOF 12-06-2015 (Mex.) (establishing Mexico’s labor laws).

³³ See Harcourt et al., *supra* note 32, at 71 (“[T]he overwhelming majority of American workers in the non-union, private-sector have worked under a modified form of employment-at-will (EAW), where the employment relationship may be terminated at any time by either side . . .”).

³⁴ See *Monthly Civilian Labor Force in the United States from September 2021 to September 2023*, STATISTA (Oct. 2023), <https://www.statista.com/statistics/193953/seasonally-adjusted-monthly-civilian-labor-force-in-the-us/> [<https://perma.cc/VM3N-9ZEM>] (recording that there are roughly 167 million people in the American workforce); *At-Will Employment*, BETTERTEAM (2022), <https://www.betterteam.com/at-will-employment> [<https://perma.cc/FZY4-WJ6S>] (stating that about three-fourths of American workers are at-will employees). See generally Drew DeSilver, *10 Facts About American Workers*, PEW RSCH. CTR. (Aug. 29, 2019), <https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/> [<https://perma.cc/2BSP-Z93K>] (discussing trends in employment participation and unionization in America); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816 (1980) (“[A]pproximately two-thirds of the American work force is governed by a common law rule that presumes their employment to be terminable at will . . .”).

doctrine with the exception of Montana, which offers workers some “just cause” protections—though even these have become more limited in recent years.³⁵ Along with local jurisdictions, there are other jurisdictions, including Puerto Rico and the Virgin Islands, that offer just cause protections in some circumstances.³⁶

Despite the popularity of employment at will, legislatures have written numerous exceptions into law, and courts have identified other exceptions.³⁷ Employment at will is thus very much driven by the existing exceptions to the doctrine. Where no exception can be found, an employee can be terminated without cause or justification.³⁸ Although many states and local jurisdictions intervene to curb the full impact of employment at will, there is no federal law

³⁵ See Jacob Bruner, Nathan Schacht & Megan Uren, *Back to Work: Montana Enacts Pro-Employer Changes to Wrongful Discharge Law While Becoming the First State to Protect Employees Based on Vaccination Status*, JD SUPRA (May 28, 2021), <https://www.jdsupra.com/legalnews/back-to-work-montana-enacts-pro-4551313/> [<https://perma.cc/QDM2-AX7BJ>] (discussing the changes to Montana’s employment laws that benefit employers and cut back on employee protections); *At-Will Employment—Overview*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/labor-and-employment/at-will-employment-overview> [<https://perma.cc/3W6J-FU5X>] (Apr. 15, 2008) (stating that all fifty U.S. states have employment at will as the default approach to employment relationships, except Montana); J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 371–73 (1995) (addressing Montana law and approaches to employment at will in the United States). “Just cause” protections, referred to as “good cause” by Montana law, requires that employee termination be based on unsatisfactory performance or legitimate business decisions, among other reasons. See Bruner et al., *supra* (explaining how changes to Montana employment law clarified what constitutes “good cause” for termination).

³⁶ See Seiner, *supra* note 14, at 1302–04 (discussing exceptions to the employment-at-will doctrine); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1503–05 (1996) (“[N]o court has ever abolished the employment at will doctrine. Only Montana, the Virgin Islands, and Puerto Rico have done so by statute.”).

³⁷ See, e.g., Harcourt et al., *supra* note 32, at 73 (“In some states, the at-will doctrine remains virtually unchanged, while in others the courts have created exceptions, and in still others the state has passed laws providing legislative exceptions to at-will employment.”); Lisa J. Bernt, *Wrongful Discharge of Independent Contractors: A Source-Derivative Approach to Deciding Who May Bring a Claim for Violation of Public Policy*, 19 YALE L. & POL’Y REV. 39, 43–55 (2000) (describing that, although employment at will is the default in almost every state, courts and legislatures have formulated exceptions to the doctrine); Jeremy Hendon, Comment, *Combatting Legal Theft: Arguments for Shareholder/Employees Terminated from Close Corporations*, 77 OR. L. REV. 735, 747 (1998) (noting that “[i]n Oregon, there are legislative, contractual, and constitutional exceptions to the employment-at-will doctrine”). See generally GINA, 42 U.S.C. § 2000ff-1(a) (establishing that an employer cannot discriminate against an employee or prospective employee on the basis of genetic information); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (holding that employers cannot make employment decisions based on an employee’s political affiliation); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 565 (1968) (holding that an employee’s dismissal after he wrote a critical letter about his employer was unconstitutional); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 981–83 (2008) (discussing federal law protections for whistleblowers in the financial sector).

³⁸ See Harcourt et al., *supra* note 32, at 71 (explaining the employment-at-will doctrine).

prohibiting the broader application of this doctrine.³⁹ Therefore, the default rule in the United States is that no reason is needed for a worker's discipline or dismissal.⁴⁰ Although countless exceptions do exist on the local, state, and federal levels, employees must identify an applicable exception before bringing a cause of action.⁴¹

Accordingly, under the current state of the law, employees may be fired at any time or for any reason, unless state or federal courts, or state or federal legislatures, have intervened to create an exception to this general rule.⁴² Similarly, workers may leave their employment at any time.⁴³ These principles are the bedrock of the uniquely American approach to employment law.

II. THE INADEQUACIES OF A MARKET-DRIVEN SYSTEM AND THE FREEDOM TO CONTRACT

The current workplace inequities that we see today are, in part, a product of centuries-old, misplaced reliance on the free market and politics. Section A of this Part examines the inherent shortcomings of the employment-at-will doctrine as applied to our free-market society.⁴⁴ Section B highlights both historical examples of government intervention and examples of current workplace abuse to illuminate the issue of workplace imbalance.⁴⁵ Section B also considers how the failure of politics to step in and address workplace abuses has greatly contributed to the dramatic power disparity we see today.⁴⁶

A. The Fallacy of the Free Market in Employment Doctrine

There are many benefits to employment at will, although most of these benefits are realized by employers.⁴⁷ The system of employment at will offers tremendous flexibility for corporations that may hire and fire workers as need-

³⁹ See Bernt, *supra* note 37, at 43–54 (discussing exceptions to employment at will).

⁴⁰ See, e.g., *At-Will Employment—Overview*, *supra* note 35 (stating that employment at will is the default approach to employment in America). See generally WILLBORN ET AL., *supra* note 32, at 65–201 (discussing the role of employment at will and its limitations in the United States).

⁴¹ See Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 227–33 (explaining what evidence may be necessary to overcome the presumption of employment at will); Bernt, *supra* note 37, at 43–54 (discussing various exceptions to the employment-at-will doctrine).

⁴² Bernt, *supra* note 37, at 41, 43.

⁴³ See *id.* at 42 (highlighting that the employment-at-will doctrine also includes the mirrored ability of employees to quit their employment at any time, for any reason).

⁴⁴ See *infra* notes 47–70 and accompanying text.

⁴⁵ See *infra* notes 71–197 and accompanying text.

⁴⁶ See *infra* notes 71–197 and accompanying text.

⁴⁷ See Epstein, *supra* note 1, at 962–77 (discussing the benefits of the employment-at-will doctrine to both employers and employees).

ed for the ebb and flow of business demands.⁴⁸ This flexibility also translates into certain benefits for workers, as employers feel less constrained in hiring employees on a trial basis if there are no employment guarantees that come along with that initial hiring.⁴⁹ Employers need not worry about aggressively hiring if the consequences for doing so are limited.⁵⁰ In other countries, where employers need cause to fire a worker or are required to provide a pension even where cause exists,⁵¹ employers may be more hesitant to hire employees in the first instance.⁵² Thus, employers in the United States enjoy more flexibility with respect to the employment of workers than much of the rest of the world.⁵³

Employment at will is often viewed as part of a free-market system, echoing the core values of this country.⁵⁴ In a free market, the economy will dictate

⁴⁸ See Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment at Will*, 30 AM. BUS. L.J. 441, 454 (1992) (explaining the benefits to employers of at-will employment); Epstein, *supra* note 1, at 982 (“The flexibility afforded by the contract at will permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted . . .”).

⁴⁹ See Epstein, *supra* note 1, at 972 (explaining how the discharge of one employee usually creates an employment opportunity for another worker); see also Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 83 (2008) (describing that, in a just cause regime, because discharging “even an unproductive or misbehaving employee[] is so costly, employers are less likely to hire ‘risky’ employees”).

⁵⁰ See Seiner, *supra* note 14, at 1304 (discussing benefits and drawbacks of employment at will and noting that “[i]f employers do not have to search for a rationale to fire workers, they may even be more likely to take a chance on employing workers in the first place”). See generally BARRY D. ROSEMAN, AM. CONST. SOC’Y FOR L. & POL’Y, JUST CAUSE IN MONTANA: DID THE BIG SKY FALL? 1 (2008), https://www.acslaw.org/issue_brief/briefs-2007-2011/just-cause-in-montana-did-the-big-sky-fall/ [<https://perma.cc/E7ZW-KWF8>] (“One of the arguments for employment at will is an economic one, that just cause for termination of employment leads to higher unemployment rates and lower job growth rates.”); U.S. Unemployment Rate 1991–2023, MACROTRENDS (2023), <https://www.macrotrends.net/countries/USA/united-states/unemployment-rate> [<https://perma.cc/7VAZ-HH32>] (comparing unemployment rates between the United States and other industrialized countries over time).

⁵¹ See, e.g., Seiner, *supra* note 32, at 1063 (“An employee who is dismissed is entitled to considerable severance benefits under French law, even if the termination is for just cause.”).

⁵² See Porter, *supra* note 49, at 83 (noting that a just cause approach to employment in France is partially to blame for a high unemployment rate among the country’s minority populations); Epstein, *supra* note 1, at 972 (discussing the numerous drawbacks of just cause employment).

⁵³ Constance Sorrentino, *International Unemployment Rates: How Comparable Are They?*, 123 MONTHLY LAB. REV. 3, 3 (2000) (“The standardized rates . . . all show a similar result: a significant gap in unemployment rates between the United States, on the one hand, and Canada and Europe, on the other.”); Pietro Garibaldi & Paolo Mauro, *Job Creation: Why Some Countries Do Better*, INT’L MONETARY FUND (Apr. 2000), <https://www.imf.org/external/pubs/ft/issues/issues20/> [<https://perma.cc/BQ2H-6BA7>] (explaining how the United States is more effective at creating jobs and promoting employment than other industrial countries). See generally Seiner, *supra* note 14, at 1305–06 (discussing different approaches to employment law in other countries); Seiner, *supra* note 32 (comparing certain aspects of U.S. and French employment laws).

⁵⁴ See Bird, *supra* note 1, at 159–61 (discussing the relationship between employment at will and American individualism).

the appropriate levels of pay, hours worked, and working conditions.⁵⁵ The more influence an individual employee has in that system, the better overall working arrangement that worker will be able to negotiate.⁵⁶ As a basic matter of contract, under this type of free-market system, workers who are more in demand can negotiate better terms, conditions, and privileges of employment.⁵⁷ As Horace G. Wood initially recognized, part of employment at will is that workers and employers are free to contract around this concept.⁵⁸ Thus, where a worker does not wish to be subject to employment at will, they may attempt to negotiate a contract with the employer over more specific employment terms.⁵⁹

⁵⁵ See Nassim Sadik, *Free Market Economics and Its Impact on Employment*, LINKEDIN (Apr. 10, 2023), <https://www.linkedin.com/pulse/free-market-economics-its-impact-employment-nassim-sadik/> [<https://perma.cc/VQ42-62TK>] (considering the implications of a free-market approach to the labor market); Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 298 (2005) ("State courts praise the common law rule as 'essential to free enterprise' and 'central to the free market' . . .").

⁵⁶ See Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1411–12 (1967) ("Only the unusually valuable employee has sufficient bargaining power to obtain a guarantee that he will be discharged during a specified term of employment only for 'just cause.'"); see also Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1061–72 (2012) (addressing how factors such as societal standards, gender, race, and national origin influence worker compensation and salaries).

⁵⁷ See Carol M. Kopp, *Terms of Employment: Definition and Examples*, INVESTOPEDIA, <https://www.investopedia.com/terms/t/terms-of-employment.asp> [<https://perma.cc/J5N9-CPCL>] (Aug. 4, 2023) (considering how workers with in-demand skills can negotiate more favorable employment terms); Bird, *supra* note 1, at 160 ("Employment at will rode on the coattails of the rising prominence of contract."); Moss, *supra* note 55, at 298, 300 (highlighting the relationship between employment at will and the free market).

⁵⁸ See Moss, *supra* note 55, at 299 ("The 'antidote' to the potential for unfairness in employment-at-will 'is an employment contract' . . .") (quoting *Bammert v. Don's Super Valu, Inc.*, 646 N.W.2d 365, 370 (Wis. 2002)); Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 457–60 (1995) (describing employment at will as a concept formulated by Horace G. Wood and the doctrine's modern applications and limitations). See generally WILLBORN ET AL., *supra* note 32 (explaining employment at will and the early approach of Horace G. Wood); HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 306 (1877) (discussing employment law and the employer-employee relationship).

⁵⁹ See William Homer, *Just Cause for Trust: Honoring the Expectation of Loyalty in the At-Will Employment Relationship*, 45 FLA. ST. U. L. REV. 833, 838 (2018) ("The at-will default allows for a prospective employee to bargain for the terms and conditions of employment . . ."); Moss, *supra* note 55, at 320 (noting that "if employees want job security against unfair terminations just before their compensation due date, they can negotiate appropriate contract terms"); Kim, *supra* note 31, at 106 (stating that "absent a contract of employment for a fixed term, an employer may discharge its employees at will").

Such a contract, with proper consideration, would generally be enforceable in a court of law.⁶⁰

In practice, however, employment at will has not played out in a truly free-market manner. This is because most employers and workers are not on level footing in the employment relationship.⁶¹ Indeed, employment at will undermines a free-market system by granting employers the flexibility to simply fire workers who begin to make too many demands.⁶² This has resulted, over the decades and centuries, in notable periods where employers egregiously abused their workforces, often resulting in the severe economic and psychological devastation of the American worker.⁶³ The ability to fire without cause provides employers with a unique level of power that cannot be matched by any individual worker alone. As one scholar correctly summarized decades ago:

Employment at will is the ultimate guarantor of the capitalist's authority over the worker. The rule transformed long-term and semi-permanent relationships into non-binding agreements terminable at will. If employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor.⁶⁴

There are certain exceptions to this power dynamic, however, and where employees are uniquely in demand, these workers may demand better working

⁶⁰ See Homer, *supra* note 59, at 845 (“[E]mployment agreements are treated just as any other contract.”); Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 427–40 (2016) (describing judicial treatment of the role of consideration in employment contracts).

⁶¹ See generally Harcourt et al., *supra* note 32, at 72 (“[E]mployees often have limited information about current and future employers, especially the dismissal practices of specific managers or departments, and limited options, given high unemployment, to quit . . .”).

⁶² See generally Bird, *supra* note 1, at 161 (illuminating an employer's disproportionate power over workers, which can be attributed in large part to workers' dependency on their employer for income and, in turn, their socioeconomic status).

⁶³ See *id.* at 162 (“[T]he employer can cause enormous psychological and societal damage when it fires even one person. . . . [I]t condemns that person to an increased likelihood of depression, alcohol and drug abuse, physical illness, and even suicide.”).

⁶⁴ Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 132–33 (1976).

conditions.⁶⁵ Similarly, workers with unique skills or talents may be able to negotiate employment contracts to their benefit.⁶⁶

Nonetheless, for the vast majority of workers, there is little ability to negotiate with their employers on anything close to a level playing field.⁶⁷ The failure of the free-market system can be seen through repeated employer abuses over time.⁶⁸ These abuses have come in almost every variety over decades, including physical, emotional, financial, and even sexual abuse.⁶⁹ Where these abuses have caught the public's attention, the legislatures have intervened to equalize the playing field between companies and workers. Thus, where the power differential has grown too substantial, the states and federal government have helped to reset working norms.⁷⁰

B. The Power Gap

This Section seeks to illuminate the power gap that defines the employer-employee relationship.⁷¹ Subsection 1 of this Section addresses some of the higher-profile historical instances of governmental intervention in the workplace.⁷² This type of intervention helps clarify that a free-market system alone

⁶⁵ See *infra* notes 71–197 and accompanying text (illuminating various state and federal law exceptions to employment at will); Kopp, *supra* note 57 (noting that in-demand workers can better negotiate working conditions); see also Kim, *supra* note 31, at 142 (suggesting that more legally informed workers may better negotiate for or seek favorable employment terms). See generally Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding the Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 109–10 (1997) (discussing incentives and implications of employing higher-skilled workers over low-skilled workers).

⁶⁶ See Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 118 (2002) (“[T]he highly skilled employee may also be a repeat player when negotiating contracts.”). See generally *Brown v. Pro Football, Inc.*, 518 U.S. 231, 249 (1996) (“[F]ootball players often have special individual talents, and . . . often negotiate their pay individually . . .”); WILLBORN ET AL., *supra* note 32, at 81–133 (addressing the creation of employment contracts and the limitations they pose on employment at will).

⁶⁷ See Homer, *supra* note 59, at 851–52 (discussing the power imbalance that results from employment at will); Blades, *supra* note 56, at 1404–10 (explaining that employees lack an equivalent power to that held by employers).

⁶⁸ See *infra* notes 75–181 and accompanying text (raising numerous examples of workplace abuse taking place over decades).

⁶⁹ See, e.g., Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 170–71 (2015) (“Low-wage workers experience unlawful harassment and violence in the workplace at alarming rates. . . . [B]etween 50 and 80% of women experience sexual harassment at work . . .”); David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 485 (2000) (“Most of the fifteen studies of work-related abuse examined . . . showed that very high percentages of respondents reported being targets of some type of emotional abuse . . .”).

⁷⁰ See *infra* notes 75–181 and accompanying text.

⁷¹ See *infra* notes 72–197 and accompanying text.

⁷² See *infra* notes 75–138 and accompanying text.

is not enough to regulate this area. Subsection 2 demonstrates how the power gap has manifested itself in the modern workplace.⁷³ Subsection 3 also considers, however, the current *failure* of the government to effectively intervene to address the problems in today's workplace.⁷⁴

1. The Power Gap, Historically

There are numerous instances in which the workplace power gap has grown to an unsustainable level in the history of the nation, but three examples come readily to mind and are worth highlighting here: legislative responses to the Industrial Revolution, the Great Depression, and the Civil Rights Movement.⁷⁵

The Industrial Revolution gave rise to tremendous economic prosperity in the United States.⁷⁶ Broadly considered, this era spanned much of the eighteenth and nineteenth centuries.⁷⁷ During this time, there was an increase in workplace-related injuries that occurred in factories, on assembly lines, and in other industrial settings.⁷⁸ Both young and old workers alike were frequently severely incapacitated, and lives were often lost.⁷⁹ For example, “[a] contemporary newspaper account described the grisly injuries suffered in 1830 by millworker Daniel Buckley, whose left hand was caught and lacerated, and his fingers crushed before his coworkers could stop the equipment.”⁸⁰ He ultimately died from the incident.⁸¹ In other circumstances, workers suffered short- and

⁷³ See *infra* notes 139–181 and accompanying text.

⁷⁴ See *infra* notes 182–197 and accompanying text.

⁷⁵ See generally Seiner, *supra* note 14, at 1302 (discussing at-will exceptions and noting that “[o]ver the years, numerous exceptions have evolved to the concept of employment-at-will, which have worked to erode some of the policy behind this doctrine”).

⁷⁶ See, e.g., Roberta M. Harding, *Rubbing the Rabbit's Foot: Gallows, Superstitions and Public Healthcare in England During the Eighteenth and Nineteenth Centuries*, 25 B.U. PUB. INT. L.J. 359, 395 (2016) (“The economic prosperity experienced during the eighteenth and nineteenth centuries in England, the Industrial Revolution, and the ensuing industrialization and urbanization caused an unprecedented number of rural inhabitants to relocate to cities.”).

⁷⁷ See *id.* at 378 n.150 (stating that the Industrial Revolution spanned from approximately 1750 to 1850).

⁷⁸ See G. Gregg Webb, Note, *The Law of Falling Objects: Byrne v. Boadle and the Birth of Res Ipsa Loquitur*, 59 STAN. L. REV. 1065, 1102 (2007) (highlighting the “increasing accident rates during the Industrial Revolution—due to the proliferation of factory machines and mass transportation”).

⁷⁹ See Patrick J. Kiger, *7 Negative Effects of the Industrial Revolution*, HISTORY, <https://www.history.com/news/industrial-revolution-negative-effects> [<https://perma.cc/H9SZ-76SE>] (Aug. 9, 2023) (“[F]actories of the Industrial Revolution could be horrifyingly hazardous.”).

⁸⁰ *Id.*

⁸¹ *Id.*

long-term disabilities, and the loss of a limb in these settings was also quite common.⁸²

When workers suffered these injuries, it often left families destitute or in severely disadvantageous economic circumstances.⁸³ Employees therefore risked poverty when working in these hazardous environments. In response to this situation, many states passed workers' compensation legislation.⁸⁴ This legislation did not assign fault for workplace injuries, but instead provided minimum levels of subsistence for injured workers, regardless of the circumstances of the accident.⁸⁵ Many of these state laws, which were enacted around the turn of the century, insulated employers from tort-based negligence claims.⁸⁶ They also provided workers some level of financial subsistence—in addition to healthcare coverage—during periods of workplace-related injuries.⁸⁷ The purpose of these laws was to protect both individual workers and society from industrial harms and to encourage employers to establish safer working environments, while incentivizing employees to remain healthy.⁸⁸

⁸² See Edward Slavishak, *Artificial Limbs and Industrial Workers' Bodies in Turn-of-the-Century Pittsburgh*, 37 J. SOC. HIST. 365, 367 (2003) ("Incidents in which workers crushed their arms, usually between moving cars, between other pieces of machinery, or between billets of steel, were the second-most common type of injury.").

⁸³ See Barbara N. McLennan, *Product Liability in the Workplace: Product Liability Legislation and Worker Compensation Laws*, 34 LAB. L.J. 160, 163 (1983) ("Workers' injuries resulted in heavy court loads and numerous impoverished families at a time when few public benefits were available to the poor, disabled, and unemployed.").

⁸⁴ See Michael C. Duff, *Can Workers' Compensation "Work" in a Mega-Risk World?: The COVID-19 Experiment*, 35 A.B.A. J. LAB. & EMP. L. 17, 19 (2020) ("Because workers' compensation was originally a nineteenth-century construct, it was designed with an eye to nineteenth-century 'traumatic' industrial accidents. . . ."); Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171, 180 (1995) ("Most states have workers' compensation statutes that provide the exclusive remedy for injuries which arise out of the course and scope of employment.").

⁸⁵ Jonathan Barry Forman, *The Income Tax Treatment of Social Welfare Benefits*, 26 U. MICH. J.L. REFORM 785, 792 (1993) ("Workers' compensation programs provide monetary and medical benefits to workers disabled on the job and to survivors of workers who are killed by work-related accidents or illness.").

⁸⁶ See Duff, *supra* note 84, at 17 ("In the United States, policy makers . . . conceptualized workers' compensation as an exchange of rights in which employees and employers relinquished negligence rights in exchange for statutory rights to benefits and damages limitations."); Levin, *supra* note 84, at 180–81 (addressing the details of potential causes of action under workers' compensation laws); Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641 (1983) ("The advent of state workers' compensation laws after 1910 marked the removal from the tort system of most suits by injured workers against employers.").

⁸⁷ See Levin, *supra* note 84, at 180–81 (discussing workers' compensation laws as a potential source of liability for employers); Forman, *supra* note 85, at 792–93 (detailing workers' compensation benefits that are paid out to employees injured on the job).

⁸⁸ See Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 181 (1994) ("[I]t is hoped that the payment of the costs by the employer will ultimately result in the minimization of both total costs and human suffering by

These laws addressing workplace safety were not without controversy. Indeed, the U.S. Supreme Court addressed the constitutionality of this type of legislation in the seminal case of *Lochner v. New York*.⁸⁹

Decades later, Congress designed a national commission to evaluate state workers' compensation legislation, though the issue remains very much a state-regulated area.⁹⁰ Workplace safety was regulated as a more general matter in 1970 through the passage of the Occupational Safety and Health Act (OSH Act), which created a powerful administration to oversee workplace conditions.⁹¹ In response to decades of employer neglect and abuse in this area, the power gap between workers and employees required intervention to assure worker safety—this time, on a federal level.⁹² The OSH Act has done much to protect workers from workplace injuries and to develop standards for not only industrial settings but all workplace environments.⁹³

Nonetheless, the OSH Act is often criticized as having very weak penalties, even where death has resulted from an employer's gross negligence.⁹⁴ The OSH

providing the necessary incentive to prevent injuries.”); *Exceptions to the Exclusive Remedy Requirements*, *supra* note 86, at 1641 (“[T]he transition from a common law remedy to an exclusive remedy under the statutes was not a great sacrifice for workers: the common law would have left most of their injuries uncompensated.”).

⁸⁹ See 198 U.S. 45, 52–53, 64 (1905) (holding that a state labor law that limited the number of hours an employee could be required to work in one day was unconstitutional), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁹⁰ See U.S. DEP'T OF LAB., DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS? 1 (2016), <https://www.dol.gov/sites/dolgov/files/OASP/files/WorkersCompensationSystemReport.pdf> [<https://perma.cc/ZQN3-PK8Z>] (“In 1970, Congress created the National Commission on State Workmen's Compensation Laws”); cf. Devon P. Groves, *ERISA Waivers and State Health Care Reform*, 28 COLUM. J.L. & SOC. PROBS. 609, 621 (1995) (“There is some room for state health reform efforts in the area of insurance regulation, workers' compensation, unemployment compensation, and disability insurance”). See generally WILLBORN ET AL., *supra* note 32, at 891–989 (discussing the evolution of workers' compensation law in the United States and history of law in this area).

⁹¹ See OSH Act, 29 U.S.C. §§ 651–678 (establishing duties for both employees and employers in the creation and maintenance of health and safety in the workplace).

⁹² Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 501–04 (2009) (examining how the origins of the Occupational Safety and Health Administration (OSHA) are rooted in a shift from state regulations for workplace safety to a call for more comprehensive federal oversight). “OSHA [is] the federal agency charged with protecting the nation's workers. OSHA's core responsibilities are to establish and enforce laws and regulations related to workplace safety and health.” *Id.* at 501.

⁹³ See *id.* at 501 (“The [OSH] Act . . . marked the culmination of nearly a century of organized activism related to workplace safety and health in the United States.”); Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT'L L.J. 373, 376 (2000) (“OSHA sets standards, conducts workplace inspections, and issues citations and proposed penalties for violations of workplace safety and health standards.”).

⁹⁴ See Rathod, *supra* note 92, at 534 (“[T]he agency has faced criticism for its limited civil penalties, its frequent reductions of penalty amounts, and its rare prosecutions.”); Daniel B. Klaff, *Evaluating Work: Enforcing Occupational Safety and Health Standards in the United States, Canada and*

Act remains a controversial statute and was even relied upon recently as the basis for COVID-19 vaccine mandates in the private sector.⁹⁵ These mandates, however, were ultimately rejected by the Supreme Court.⁹⁶ As it stands today, the OSH Act remains the primary federal law governing workplace health and safety, and it is a clear example of legislation reining in employers.⁹⁷

The Great Depression in the late 1920s and 1930s led to an unprecedented disparity of wealth and economic fortunes in this country.⁹⁸ Millions of families found themselves in financial ruin and dire economic circumstances in the wake of a stock market crash.⁹⁹ Countless Americans lost their jobs, and little work could be found for anyone in the economy.¹⁰⁰ In light of these circumstances, employers were in a uniquely powerful situation: jobs were almost impossible to come by, and workers were willing to take any type of employ-

Sweden, 7 U. PA. J. LAB. & EMP. L. 613, 614 (2005) (“From a total of 2,197 cases inspected by OSHA involving work-related deaths, ‘employers faced [only] \$106 million in civil OSHA fines and jail sentences totaling less than 30 years.’” (quoting David Barstow, *A Culture of Reluctance: U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003, at A1)); Note, *A Proposal to Restructure Sanctions Under the Occupational Safety and Health Act: The Limitations of Punishment and Culpability*, 91 YALE L.J. 1446, 1446, 1456–59 (1982) (addressing OSHA’s weaknesses in remedies and enforcement capabilities). See generally Jaime Rigel & Alexi T. Poulianos, Note, *Take Your Paws Off Me: An Argument in Favor of Revising the Occupational Safety and Health Act and the Protecting America’s Workers Act*, 28 HOFSTRA LAB. & EMP. L.J. 183, 210–12 (2010) (examining Western Australia’s penalty regime for deaths resulting from employer gross negligence and arguing that OSHA should be revised to similarly incorporate such a standard).

⁹⁵ See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA, 595 U.S. 109, 118 (2022) (“The Solicitor General does not dispute that OSHA is limited to regulating ‘work-related dangers.’ She instead argues that the risk of contracting COVID-19 qualifies as such a danger.”); OSHA, OSHA 4162-12, EMERGENCY TEMPORARY STANDARD: COVID-19 VACCINATION AND TESTING ETS 2 (2021), <https://www.osha.gov/sites/default/files/publications/OSHA4162.pdf> [<https://perma.cc/2Q6Y-ZTJ9>] (“The [Emergency Temporary Standard] requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy . . .”).

⁹⁶ See Nat’l Fed’n of Indep. Bus., 595 U.S. at 117 (holding that the OSH Act does not authorize the imposition of a COVID-19 vaccine mandate on all workers and employers).

⁹⁷ See generally David Rosner & Gerald Markowitz, *A Short History of Occupational Safety and Health in the United States*, 110 AM. J. PUB. HEALTH 622 (2020) (tracking the history that led to the enactment of the OSH Act to hold employers accountable for maintaining safe working conditions and protecting workers); Eugene Scalia, *Inspection and Enforcement Strategies at the U.S. Department of Labor*, 7 U. PA. J. LAB. & EMP. L. 529, 530–32 (2005) (addressing health and safety standard enforcement in the workplace).

⁹⁸ See *1930s High Society*, PBS (2014), <https://www.pbs.org/opb/historydetectives/feature/1930s-high-society> [<https://perma.cc/C9VU-6LVP>] (“The Great Depression was partly caused by the great inequality between the rich who accounted for a third of all wealth and the poor who had no savings at all.”).

⁹⁹ See Charles R.T. O’Kelley, *The Evolution of the Modern Corporation: Corporate Governance Reform in Context*, 2013 U. ILL. L. REV. 1001, 1024 (“Many Americans, adults and children, got leaner, much leaner, in body and in spirit. There was no work and no way to put food on the table.”).

¹⁰⁰ See *id.* at 1023 (“The great modern corporations [during the Great Depression] were no longer subject to market control. Rather than suffer lower profits, the modern corporations cut wages, reduced production, and laid off workers.”).

ment simply to provide food for their families.¹⁰¹ Despite the obvious challenges workers faced at the time, employers nonetheless took advantage of the situation, often using this tremendous power differential to establish and enforce overtly oppressive working conditions.¹⁰²

Minimal pay, excessive hours, and dangerous working conditions frequently faced an American workforce with little say at the time. As American workers grew increasingly dissatisfied with this situation, the political winds changed quickly as Franklin Delano Roosevelt became an enormously popular President with a broad social agenda enacted as part of the New Deal.¹⁰³ During this era, Congress passed numerous employment reforms to recalibrate the power disparity that employers had taken advantage of at the time.¹⁰⁴ Though legislation varied, two areas of focus were fair labor conditions and collective, concerted worker activity.¹⁰⁵ This focus led to the passage of the Fair Labor Standards Act (FLSA)¹⁰⁶ and the National Labor Relations Act (NLRA).¹⁰⁷

The FLSA helped close the unprecedented power gap between workers and employers through three different measures. First, the statute establishes a national minimum federal wage for almost all workers.¹⁰⁸ At the time, the minimum wage was \$0.25, compared to \$7.25 per hour today.¹⁰⁹ States often require higher amounts—the FLSA merely sets a floor, beneath which employers

¹⁰¹ See *id.* at 1023–24 (describing the Great Depression’s toll on Americans’ livelihood).

¹⁰² See Seiner, *supra* note 14, at 1325 (“During the Great Depression, workers faced enormous pressures to do whatever their employers asked, as they were simply happy to have any employment at all.”); cf. O’Kelley, *supra* note 99, at 1023–25 (describing how modern corporations responded to the Great Depression and contributed to poor working conditions).

¹⁰³ See WILLBORN ET AL., *supra* note 32, at 573–620 (describing the role of President Roosevelt and the New Deal in shaping workplace legislation and safety); O’Kelley, *supra* note 99, at 1033–35 (discussing President Roosevelt’s response to the Great Depression and his efforts to improve employment participation, wages, and working hours); *id.* at 1034 (“With respect to the modern corporation, the New Deal began with a radical departure from *laissez-faire* individualism . . .”).

¹⁰⁴ See Rachel A. Spector, “Dignified Jobs at Decent Wages”: Reviving an Economic Equity Model of Employment Discrimination Law, 36 BERKELEY J. EMP. & LAB. L. 123, 130 (2015) (noting the increase in government regulation and legislation passed as part of the New Deal Era).

¹⁰⁵ See *id.* (“The economic upheaval of the Great Depression and the Roosevelt administration’s regulatory response to it motivated major changes in thinking about the relationship between business, government, and workers . . .”); *infra* notes 107–117 and accompanying text (discussing two main laws passed during the New Deal era aimed at protecting workers).

¹⁰⁶ See FLSA, 29 U.S.C. §§ 201–219 (establishing a federal minimum wage, overtime protections, and child labor restrictions).

¹⁰⁷ See National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (providing workers the right to collectively unionize and promoting a level bargaining power between employer and employee).

¹⁰⁸ *Id.* § 206.

¹⁰⁹ *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938–2009*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/minimum-wage/history/chart> [<https://perma.cc/U8XL-5FAM>] [hereinafter *History of Federal Minimum Wage*]. See generally WILLBORN ET AL., *supra* note 32, at 573–620 (describing the provisions of FLSA and its development in law).

cannot pay workers without violating federal law.¹¹⁰ Second, the FLSA encourages employers to spread work across a greater number of employees and limits the possibility of oppressive working hours through comprehensive overtime protections for workers.¹¹¹ Under the statute, nonexempt employees are entitled to time-and-a-half pay for any work performed over forty hours a week.¹¹² Third, the FLSA prohibits forms of child labor because employers abused the power disparity to employ young workers, which often stripped families of the opportunity to educate their children.¹¹³ These child labor provisions restrict children under the age of sixteen from many employment opportunities and limit the number of hours children can work in a given week.¹¹⁴ The statute also restricts the type of work that can be done by all workers under the age of eighteen.¹¹⁵

Taken as a whole, these minimum wage provisions, overtime protections, and child labor restrictions helped reconfigure the concept of work in the United States. The enormous power gap and oppressive working conditions at the time forced this congressional intervention.¹¹⁶ As the power balance tipped too far in favor of corporations during the Great Depression, the FLSA helped recalibrate the disparity, and its provisions have endured for decades to provide the basic contours of fairness in the workplace.¹¹⁷

¹¹⁰ See 29 U.S.C. § 206 (establishing a *minimum* amount that employers must pay their workers).

¹¹¹ See *id.* § 207 (establishing regulations for employers who require an employee to work more than forty hours in one work week). See generally WILLBORN ET AL., *supra* note 32, at 573–620 (describing the development of FLSA in workplace law).

¹¹² 29 U.S.C. § 207.

¹¹³ See *id.* § 212(c) (prohibiting child labor); WILLBORN ET AL., *supra* note 32, at 602–11 (describing child labor prohibitions in the FLSA).

¹¹⁴ 29 U.S.C. §§ 203(l), 212(c).

¹¹⁵ *Id.*; see WILLBORN ET AL., *supra* note 32, at 602–11 (describing the FLSA's child labor provisions in workplace law).

¹¹⁶ See Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1003 (1999) (noting that, in passing the FLSA, the legislature sought to eradicate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” (quoting 29 U.S.C. § 202(a))). See generally Seiner, *supra* note 14, at 1302, 1325 (discussing the Great Depression, its effects on workplace law, and the legislative responses).

¹¹⁷ See WILLBORN ET AL., *supra* note 32, at 573–74 (describing the importance of FLSA in workplace law); Nathaniel Ruby & Ross Eisenbrey, *Celebrating 75 Years of the Fair Labor Standards Act*, ECON. POL’Y INST. (June 25, 2013), <https://www.epi.org/blog/celebrating-75-years-fair-labor-standards/> [<https://perma.cc/HG7E-692N>] (“President Roosevelt called [the FLSA], after the Social Security Act, ‘the most far-reaching, far-sighted program for the benefit of workers here or in any other country.’”); Goldstein et al., *supra* note 116, at 1003 (discussing the aims and goals of the FLSA).

During the Civil Rights Movement of the 1960s, employers again began to flex their muscles in a manner that was overtly oppressive.¹¹⁸ It was quite common for employers across the country to restrict certain types of jobs—or any employment at all—to only white male workers.¹¹⁹ It was also common for many corporations to operate in a way that was blatantly discriminatory, particularly on the basis of race.¹²⁰ An inequitable power dynamic emerged between corporations and their workers that permitted employers to engage in this type of oppressive conduct toward minority groups. Only through broad social outrage and protests as part of the Civil Rights Movement was change to this improper worker treatment possible.¹²¹

As the Civil Rights Movement prompted changes across voting, education, and other important social platforms, advocates sought to further address equality in the employment setting.¹²² Federal legislation was necessary to confront the issue, as change at the state level would have proven impossible.¹²³ The Civil Rights Act of 1964 guaranteed all Americans protections in a number of societal areas, regardless of race, color, sex, national origin, or reli-

¹¹⁸ See Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises That Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 631 (2005) (“[T]hroughout the country, discriminatory employment practices—including those based specifically on race or gender classifications—were the rule, not the exception.”); Stacy Kinlock Sewell, *The “Not-Buying Power” of the Black Community: Urban Boycotts and Equal Employment Opportunity, 1960–1964*, 89 J. AFR. AM. HIST. 135, 135–39 (2004) (discussing racial discrimination in the workplace in the 1960s).

¹¹⁹ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 425–28 (1971) (discussing overt discrimination that occurred at a power facility before Title VII was enacted).

¹²⁰ See Joseph A. Seiner & Benjamin N. Gutman, *Does Ricci Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181, 2189 (2010) (using *Griggs* as an example and highlighting that “[b]efore Title VII’s enactment, the Duke Power Company had ‘openly discriminated’ against black workers at a particular plant in North Carolina”). See generally Seiner, *supra* note 14, at 1302 (discussing the Civil Rights Movement and its impact in the workplace).

¹²¹ See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 109–14 (2007) (considering the factors that contributed to the success of the Civil Rights movement); *id.* at 112 (“In the 1950s and 1960s . . . [T]here was a common conception of civil rights that included, at a minimum, the absence of invidious discrimination on the basis of race.”).

¹²² See *id.* at 109–14 (addressing the scope of the Civil Rights Movement in the United States in the mid-twentieth century); *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/epilogue> [<https://perma.cc/9URV-D4FG>] (discussing the areas of change prompted by the Civil Rights Movement and subsequent legislation). See generally Seiner, *supra* note 14, at 1302 (“The rise of the civil rights era in the 1960s saw a number of additional limitations to employment-at-will.”).

¹²³ See Risa E. Kaufman, *State Eras in the New Era: Securing Poor Women’s Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN’S L.J. 191, 218 (2001) (“[F]ederal civil rights laws are necessary precisely because of the failure of state systems to provide adequate redress for civil rights violations.”).

gion.¹²⁴ Title VII of that statute specifically provided employment protections for minority groups.¹²⁵ This statutory provision prohibited discrimination in employment on the basis of a protected characteristic, and employers could not make hiring decisions or discriminate on the basis of any term, condition, or privilege of employment under the statute.¹²⁶ Subsequently, in the 1980s and 1990s, the Supreme Court interpreted Title VII to include protections against harassment or hostile work environments.¹²⁷

Similarly, subsequent federal legislation would protect older workers and those with disabilities from discriminatory acts.¹²⁸ More recent federal law prohibits discrimination on the basis of genetic characteristics or related information.¹²⁹ The Supreme Court has also read Title VII to include protection for sexual orientation and transgender identity status in the employment setting.¹³⁰ Although Title VII still has a long way to go to prevent discrimination from transpiring in the workplace, this federal law does provide an important exception to employment at will. Because of Title VII, workers can bring a cause of action if they believe an employer has treated them unfairly on the basis of a protected characteristic.¹³¹

¹²⁴ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of U.S.C. Titles 5, 13, 26, 28, 29, 42, 43, 45 & 50).

¹²⁵ See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (prohibiting discrimination in determining employment opportunities).

¹²⁶ *Id.*; cf. Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115, 1128–46 (2019) (discussing the prevalence of discrimination still present in the workplace). See generally Seiner, *supra* note 32, at 1077–78 (“[E]mployers are restricted from making employment decisions on the basis of race, color, religion, sex, or national origin by the clear terms of Title VII.”).

¹²⁷ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (establishing that employers are subject to vicarious liability for sexual harassment or hostile work environment claims and identifying the existence of an affirmative defense to such claims); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998) (same); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (recognizing hostile work environment claims under Title VII). See generally Joseph A. Seiner, *Plausible Harassment*, 54 U.C. DAVIS L. REV. 1295, 1302–04 (2021) (outlining the standard for sexual harassment or hostile work environment claims under Title VII and case law).

¹²⁸ See Americans with Disabilities Act of 1990 (ADA) § 101, 42 U.S.C. §§ 12101–12117 (prohibiting discrimination on the basis of disability); Rehabilitation Act of 1973 § 501, 29 U.S.C. § 791 (prohibiting discrimination against individuals with disabilities in federal employment and employment funded by the federal government); Age Discrimination in Employment Act of 1967 (ADEA) § 2, 29 U.S.C. §§ 621–634 (prohibiting discrimination against older workers). See generally Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 104–05 (2010) (noting that, in passing the ADA, Congress “acknowledged the propensity of our society to ‘isolate and segregate’ those with disabilities, including in the employment context”); Seiner, *supra* note 32, at 1082–83 (discussing the passage and specific provisions of the ADEA).

¹²⁹ GINA, 42 U.S.C. §§ 2000ff–2000ff-11.

¹³⁰ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (holding that firing an employee based on their sexual orientation or transgender identity is a violation of Title VII).

¹³¹ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (as amended).

It is worth noting that in more limited circumstances, power has shifted in the direction of employees and unions, and worker power has, on occasion, needed to be reined in as well. At the height of the labor union movement in the 1940s and 1950s, widespread corruption, mob influence, and union bosses undermined workers' rights in favor of more self-interested power.¹³² In these instances, Congress would again intervene, but this time to help defuse corruption in the union system and protect workers in collective agreement negotiations with businesses.¹³³

Over the decades, some workers have committed widespread fraud as part of the workers' compensation system and have taken advantage of disability benefits.¹³⁴ Millions of dollars continue to be lost each year to this type of worker fraud, and the federal government and states have tried to remedy the situation.¹³⁵ Nonetheless, such measures have been far from perfect.¹³⁶ Even in the wake of the September 11, 2001 tragedy, some workers took advantage of the benefits being provided and perpetrated fraud on the workers' compensation system.¹³⁷ Investigations revealed significant worker misconduct.¹³⁸ These examples demonstrate that corporations are not the only actors that need a

¹³² See Benjamin Levin, *Criminal Labor Law*, 37 BERKELEY J. EMP. & LAB. L. 43, 77 (2016) ("Congress enacted the [Labor Management Relations Act (LMRA)] . . . to curb abuses inimical to the integrity of the collective bargaining process." (quoting *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211, 1214 (11th Cir. 2012) (internal quotations omitted))).

¹³³ See *id.* (discussing the enactment of LMRA and the purpose of the statute). See generally DENNIS R. NOLAN, RICHARD A. BALES & RAFAEL GELY, *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* (7th ed. 2018) (describing the evolution of the NLRA and the role of federal law in the workplace).

¹³⁴ See, e.g., Tony Romm, *U.S. Watchdog Warns Unemployment Benefits Are at 'High Risk' of Fraud, Abuse*, WASH. POST, <https://www.washingtonpost.com/us-policy/2022/06/08/unemployment-fraud-risk-race/> [<https://perma.cc/AA8V-KKN5>] (June 7, 2022) ("[F]ederal authorities already have opened more than 38,000 'investigative matters' that potentially involve stolen funds during the pandemic."); *Workers' Compensation Fraud: Fraudsters Took Advantage of Injured Workers*, FBI (July 2, 2019), <https://www.fbi.gov/news/stories/workers-compensation-fraud-conspirators-sentenced-070219> [<https://perma.cc/MF4D-WXHQ>] [hereinafter *Fraudsters Took Advantage*] (discussing a "fraud ring [that] cheated the California workers' compensation system and private insurance out of more than \$200 million").

¹³⁵ See Romm, *supra* note 134 (addressing efforts to cut down on benefit-related fraud); *Fraudsters Took Advantage*, *supra* note 134 (same).

¹³⁶ See Romm, *supra* note 134 (discussing the failures and shortcomings of the current unemployment benefit system).

¹³⁷ See, e.g., Susan Candiotti & Ray Sanchez, *More NYC Police and Firefighters Indicted in PTSD Scam*, CNN, <https://www.cnn.com/2014/02/24/justice/new-york-ptsd-9-11-scam/index.html> [<https://perma.cc/F5L6-84B7>] (Feb. 25, 2014) ("New York prosecutors Tuesday announced the indictments of an additional 32 people in a multimillion-dollar Social Security fraud scheme that involved retired cops and firefighters who falsely claimed to have suffered from post-traumatic stress disorder after the 9/11 terrorist attacks.").

¹³⁸ See *id.*; see also Romm, *supra* note 134 (addressing investigations into pandemic-related employment fraud).

check on their power—occasionally, there is a power shift too far in favor of workers or unions, which has resulted in instances in which workers take advantage of the processes and systems provided to them.

2. The Power Gap, Currently

As history has demonstrated, Congress has needed to recurrently step in to check the power disparity between the employer and employee.¹³⁹ This check is most frequently necessary to put workers on a more level playing field with employers and to correct various abuses perpetrated against them. It may be tempting to view this power disparity as a vestige of the past given the numerous employment laws and rights provided to individuals over the past century.¹⁴⁰ In reality, however, we find ourselves at yet another point in time where this disparity has grown to an unsustainable level in favor of corporations.

Perhaps at the heart of this problem is that the unionization rate of the American workforce is at its lowest level in decades.¹⁴¹ The unionization rate has fallen from around 35% in the 1950s to about 10% in 2023.¹⁴² Collective activity is thus much reduced from what society saw at the height of the union movement decades ago.¹⁴³

By acting collectively, unions provide power to individual workers.¹⁴⁴ Given the at-will nature of the employment relationship, any individual worker has very little power in the typical working environment.¹⁴⁵ Indeed, employers can discharge individual workers for any reason at all, provided that it is not

¹³⁹ See *supra* notes 75–131 and accompanying text (discussing various laws passed to address workplace abuses and discrimination).

¹⁴⁰ See *supra* notes 75–131 and accompanying text (illustrating this history).

¹⁴¹ See Ted Van Green, *Majorities of Adults See Decline of Union Membership as Bad for the U.S. and Working People*, PEW RSCH. CTR. (Apr. 19, 2023), <https://www.pewresearch.org/short-reads/2023/04/19/majorities-of-adults-see-decline-of-union-membership-as-bad-for-the-u-s-and-working-people/> [<https://perma.cc/VR29-FR3J>] (highlighting that approximately 20% of Americans were part of a union in 1983, compared to a fallen participation rate of 10% in 2022); DeSilver, *supra* note 34 (“Over the past 35 years, the share of American workers who belong to labor unions has fallen by about half.”). See generally Seiner, *supra* note 14, at 1306 (“Reduced organizing rates and a lack of general collective activity in this country have allowed employers to use at-will employment to their advantage.”).

¹⁴² DeSilver, *supra* note 34; see Van Green, *supra* note 141 (discussing the downward trend in union participation and the working public’s concern with such decline).

¹⁴³ See Van Green, *supra* note 141 (highlighting the drastic change in union participation over the decades). See generally Clyde W. Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421, 430–31 (1963) (addressing how individual rights can be represented through collective agreements).

¹⁴⁴ See Summers, *supra* note 143, at 431–34 (addressing the nature of the collective bargaining agreement for individual rights).

¹⁴⁵ See *id.* at 427 (“The individual worker has relatively little bargaining power . . . and the employer is under strong pressure to apply uniform terms to all of his employees regardless of union membership.”).

illegal, and simply replace them with other applicants.¹⁴⁶ In contrast, workers have far more power where collective action is involved. Acting collectively, unions can negotiate greater employment protections, privileges, pay, and benefits.¹⁴⁷ The lower unionization rates in today's workplace are not a matter of coincidence—employers have orchestrated a widespread effort to minimize unions and enhance their own power.¹⁴⁸ Union avoidance campaigns are quite common and are often done openly across the country by most large corporations.¹⁴⁹ These efforts to decrease unionization have flattened unionization to an unprecedented level.¹⁵⁰ As a result, thousands of workers who were once represented now have no collective voice.¹⁵¹

Without the ability to act collectively, workers are often subject to the whims of their employers. Just as we saw in the 1930s during the Great Depression and in the 1960s during the Civil Rights Movement, employers have not used their power in an equitable manner. They have overstepped their bounds and abused workers in several different areas.¹⁵² For example, we have seen pensions go by the wayside and workers left to foot their own retirements and family leave arrangements.¹⁵³ Nonetheless, the abuse goes beyond lower pay and benefits. The type of abuse we have seen in recent years has demonstrated that employers are still willing to use their unprecedented power to exploit workers both physically and emotionally.¹⁵⁴

¹⁴⁶ See Bernt, *supra* note 37, at 41–42 (examining the doctrine of employment at will).

¹⁴⁷ See Asha Banerjee et al., *Unions Are Not Only Good for Workers, They're Good for Communities and for Democracy*, ECON. POL'Y INST. (Dec. 15, 2021), <https://www.epi.org/publication/unions-and-well-being/> [<https://perma.cc/RA2X-89N6>] (addressing the benefits of unions).

¹⁴⁸ See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 986 (1999) (“[U]nion busting, an aggressive and often unlawful form of employer resistance, is a widespread occurrence among employers.”).

¹⁴⁹ Celine McNicholas, Margaret Poydock, Samantha Sanders & Ben Zipperer, *Employers Spend More Than \$400 Million Per Year on 'Union-Avoidance' Consultants to Bolster Their Union-Busting Efforts*, ECON. POL'Y INST. (Mar. 29, 2023), <https://www.epi.org/publication/union-avoidance/> [<https://perma.cc/Z6B7-L8AC>].

¹⁵⁰ See Van Green, *supra* note 141 (discussing the drastic long-term downward trend in unionization); McNicholas et al., *supra* note 149 (noting how union avoidance efforts make it more difficult for workers to collectively bargain).

¹⁵¹ See Van Green, *supra* note 141 (discussing public opinion regarding the reduction of unionization rates from 20.1% in 1983 to 10.1% in 2022); McNicholas et al., *supra* note 149 (explaining the difficulty union avoidance campaigns pose for collective bargaining efforts).

¹⁵² See *supra* notes 75–138 and accompanying text (examining historical examples of workplace abuse).

¹⁵³ See William Serrin, *Misuse of Company Pension Funds Charged*, N.Y. TIMES (Feb. 25, 1984), <https://www.nytimes.com/1984/02/25/us/misuse-of-company-pension-funds-charged.html> [<https://perma.cc/JS4L-F2PE>] (addressing the corporate mishandling of pension funds); cf. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 19 (2016) (describing the role of unions in achieving better pensions and benefits).

¹⁵⁴ See *infra* notes 155–181 and accompanying text (examining modern examples of workplace abuse, from the #MeToo movement to COVID-19-related repercussions).

The most notable example of this mistreatment, and the most well-researched and empirically substantiated, is the lack of a meaningful corporate response to the #MeToo movement. As I have highlighted in previous scholarship, sexual harassment has a long history in this country¹⁵⁵ and continues to be a prevalent problem for all workers, particularly female employees.¹⁵⁶

Although the phrase #MeToo first appeared on a MySpace page, it came into the national spotlight in October 2017, when the well-known actress Alyssa Milano tweeted out the phrase.¹⁵⁷ It was retweeted by hundreds of thousands of others before the end of the day.¹⁵⁸ Within weeks, millions joined the #MeToo movement online—both men and women, spanning the United States and broader world.¹⁵⁹ The phrase is now a well-known addition to our culture and allows victims to stand with others in acknowledging that they have been sexually abused, harassed, or assaulted.¹⁶⁰ The term is also commonly applied to

¹⁵⁵ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (establishing an affirmative defense for employers in harassment cases); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998) (same); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (recognizing a cause of action for hostile work environments under Title VII); Seiner, *supra* note 14, at 1306–11 (describing the continued prevalence of sexual harassment in the workplace); Erin Ardale, Note, *Employer Liability for Sexual Harassment in the Wake of Faragher and Ellerth*, 9 CORNELL J.L. & PUB. POL’Y 585, 586 (2000) (“Imposing liability for sexual harassment under the law has a deterrent effect . . .”). See generally Seiner, *supra* note 15 (same).

¹⁵⁶ See, e.g., *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010—FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2021> [<https://perma.cc/ED7B-UFUS>] (detailing sexual harassment charge filings); see also Iris Hentze & Rebecca Tyus, *Sexual Harassment in the Workplace*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx> [<https://perma.cc/756L-V6R9>] (Aug. 12, 2021) (“More than 6,500 sexual harassment claims were filed with the EEOC in FY 2020.”); Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, HARV. BUS. REV. (May–June 2020), <https://hbr.org/2020/05/why-sexual-harassment-programs-backfire> [<https://perma.cc/7743-NC2G>] (“[S]ome 40% of women . . . say that they’ve been sexually harassed at work—a number that, remarkably, has not changed since the 1980s.”); Mary Pflum, *A Year Ago, Alyssa Milano Started a Conversation About #MeToo. These Women Replied.*, NBC NEWS (Oct. 15, 2018), <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246> [<https://perma.cc/3AS9-X7PA>] (“[T]he actress Alyssa Milano tweeted a request to her followers: ‘If you’ve been sexually harassed or assaulted write “me too” as a reply to this tweet.’”).

¹⁵⁷ See Pflum, *supra* note 156 (describing how the #MeToo movement took off); Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [<https://perma.cc/N73Z-CQFY>] (describing Tarana Burke’s role in initially using the “Me Too” phrase in connection with women’s experiences of sexual assault).

¹⁵⁸ Pflum, *supra* note 156.

¹⁵⁹ See Seiner, *supra* note 14, at 1308 (describing the #MeToo movement); Ohlheiser, *supra* note 157 (describing the evolution of the viral #MeToo movement).

¹⁶⁰ See #MeToo, DICTIONARY.COM (Feb. 27, 2020), <https://www.dictionary.com/e/gender-sexuality/metoo/> [<https://perma.cc/AUC9-KEFL>] (“#MeToo is a social movement originating among

the workplace setting, and there have been numerous instances where famous individuals have either harassed others or been harassed themselves.¹⁶¹ Taylor Swift, Lady Gaga, and Rose McGowan are just a few of the A-list celebrities that have acknowledged their own exposure to this terrible conduct.¹⁶² Harvey Weinstein, Les Moonves, and James Franco are among those who have been accused of such abuse during the #MeToo era.¹⁶³ Well beyond celebrities, however, this movement has penetrated all workplaces and areas of employment.¹⁶⁴ The #MeToo movement has highlighted that workers should not feel isolated when they are exposed to sexual harassment.¹⁶⁵ It is highly likely that where one individual has been harassed, others have also been exposed to a hostile work environment.¹⁶⁶

In light of the national publicity of the #MeToo movement, as well as employers' legal incentive to prevent this type of unlawful conduct, it would

women, advocating for survivors of sexual harassment or violence to speak out about their experiences in order to expose and combat various forms of sexual misconduct.”).

¹⁶¹ See Ohlheiser, *supra* note 157 (describing #MeToo terminology's origin, definition, and current popular connotation). See generally Seiner, *supra* note 127 (describing social science studies on the prevalence of harassment).

¹⁶² See Pflum, *supra* note 156 (“Among the celebrities who responded were Lady Gaga, Viola Davis, Javier Muñoz and Evan Rachel Wood.”); see also Allyson Chiu, *Rose McGowan, an Original Weinstein Accuser, Calls Hollywood's #MeToo Support 'a Band-Aid Lie,'* WASH. POST (Oct. 8, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/10/08/rose-mcgowan-an-original-weinstein-accuser-calls-hollywoods-metoo-support-a-band-aid-lie/> [<https://perma.cc/9CT5-BALP>] (“[A]ctress Rose McGowan became one of the first women to publicly accuse movie mogul Harvey Weinstein of sexual assault.”); Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *TIME Person of the Year 2017: The Silence Breakers*, TIME (Dec. 18, 2017), <https://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/8RAX-QUU7>] (describing Taylor Swift's role in the #MeToo movement). See generally Seiner, *supra* note 15, at 574 (“The #MeToo movement has made great strides in exposing the abuse and harassment that is taking place, and it has substantially raised awareness of this ongoing problem.”).

¹⁶³ See Samantha Cooney, *Here Are All the Public Figures Who've Been Accused of Sexual Misconduct After Harvey Weinstein*, TIME, <https://time.com/5015204/harvey-weinstein-scandal/> [<https://perma.cc/P64V-F9PS>] (Mar. 27, 2019) (describing those accused of sexual harassment, assault, and abuse). See generally Seiner, *supra* note 15 (discussing the history and evolution of the #MeToo movement in the United States).

¹⁶⁴ See Erik Anthony 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/9SJJ-37GW>] (“Since 2017 . . . 15 states have passed new laws protecting against sexual harassment in the workplace.”); Pflum, *supra* note 156 (describing sexual misconduct experienced by women in the United States).

¹⁶⁵ See Cooney, *supra* note 163 (describing the importance of the #MeToo movement); Pflum, *supra* note 156 (same); Zacharek et al., *supra* note 162 (same).

¹⁶⁶ See generally Seiner, *supra* note 15, at 598 (“Prior to this movement, women in all workplaces were largely unaware of the extent of the problem and many often felt isolated and alone when they were subjected to a hostile work environment.”); Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419 (2020) (describing the nature of sexual harassment and misconduct in the workplace).

be natural to assume that employers accelerated their efforts to identify and prevent workplace sexual harassment. The reality, however, is far from this expectation. Repeated empirical studies performed years after the start of the #MeToo movement reveal that women workers continue to be abused in alarming numbers despite a clear corporate awareness that this abuse occurs.¹⁶⁷

Not enough has been done to correct this obvious problem, and it is alarming that businesses would do so little to prevent sexual assault and abuse that is affecting so many women both physically and emotionally.¹⁶⁸ The fault lies beyond employer negligence—employers' across-the-board neglect in the face of this issue reveals the underlying power disparity that is now so stark between employers and employees. Millions of workers have joined this movement, courageously acknowledging their own experiences with workplace assault, only to have employers look the other way. The lack of remedial action taken by employers demonstrates that the workplace has reached another apex where the power disparity within it has grown to immense proportions.¹⁶⁹

Beyond the #MeToo movement, another recent example of employer abuse in the workplace has come to light during the COVID-19 pandemic. During the initial onset of COVID-19, many employers were uncertain of the economic consequences of the rapidly spreading virus. Thus, workers across

¹⁶⁷ See Seiner, *supra* note 14, at 1307–11 (discussing recent workplace studies on sexual harassment); Goldberg, *supra* note 166, at 421 (“[W]e have seen myriad stories of employer failures to respond in a meaningful way to sexual harassment allegations.”); Barbara Frankel & Stephanie Francis Ward, *Little Agreement Between the Sexes on Tackling Harassment*, *Working Mother/ABA Journal Survey Finds*, A.B.A. J. (July 24, 2018), https://www.abajournal.com/news/article/tackling_harassment_survey_women_men [<https://perma.cc/H4BP-FRTP>] (describing the results of extensive surveys on harassment in the workplace); Jugal K. Patel, Troy Griggs & Claire Cain Miller, *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html> [<https://perma.cc/W6TK-VM5U>] (describing the results of a study finding that about one in three men have engaged in behavior that would qualify as sexual harassment or questionable conduct); cf. *Devastatingly Pervasive: 1 in 3 Women Globally Experience Violence*, WORLD HEALTH ORG. (Mar. 9 2021), <https://www.who.int/news/item/09-03-2021-devastatingly-pervasive-1-in-3-women-globally-experience-violence> [<https://perma.cc/83AL-7CZ3>] (“Across their lifetime, 1 in 3 women, around 736 million, are subjected to physical or sexual violence by an intimate partner or sexual violence from a non-partner”); Laura Santhanam, *Poll: A Third of Women Say They’ve Been Sexually Harassed or Abused at Work*, PBS (Nov. 21, 2017), <https://www.pbs.org/newshour/nation/poll-a-third-of-women-say-theyve-been-sexually-harassed-or-abused-at-work> [<https://perma.cc/KQC3-9VGY>] (“A third of American women say they’ve been sexually harassed or abused in the workplace”).

¹⁶⁸ See Seiner, *supra* note 15, at 574 (“The #MeToo movement has made great strides in exposing the abuse and harassment that is taking place, and . . . has further provided us with a much better understanding of the extreme psychological and emotional toll that this type of workplace abuse can have on the victims of harassment.”); Dobbin & Kalev, *supra* note 156 (revealing the failures of minimal responses to sexual harassment in the workplace).

¹⁶⁹ See generally Seiner, *supra* note 127, at 1318 (“Sexual harassment in the workplace is a fact. . . . [T]he existing social science research and data . . . provide support for the fact that sex discrimination is pervasive in our current society.”).

the country feared that they would soon be unemployed.¹⁷⁰ This fear, just like the fear held during the Great Depression of the 1930s, gave employers enormous power in managing their employees.¹⁷¹ Because workers were thankful to have any employment in March and April 2020, they were reluctant to question or oppose their employers at the time.¹⁷² It was uncertain how the national economy and the employment market would respond to the chaos abruptly caused by this virus.¹⁷³ Just like during the Great Depression, employers failed to respond appropriately to the unraveling events and instead abused the power that they were given.¹⁷⁴

As I have written elsewhere, employees faced shifting and overly rigid expectations held by employers, who rarely demonstrated an understanding of

¹⁷⁰ See Seiner, *supra* note 14, at 1311–17 (describing pandemic-related employment issues, particularly the resulting increase in employee terminations); Seiner, *supra* note 15, at 575 (“[T]he events of the COVID-19 pandemic have only amplified the[] difficulties; the resulting economic concerns and complexities have given employers an additional purported legitimate rationale to use when disciplining workers, when their true motivation is to discriminate or retaliate against an employee.”). See generally SEINER, *supra* note 15 (examining the impact of COVID-19 on workplace issues and the transition to virtual employment).

¹⁷¹ See Bryan Robinson, *New Study: Pandemic Job Insecurity Taking Toll on American Worker Mental Health*, FORBES (Sept. 25, 2020), <https://www.forbes.com/sites/bryanrobinson/2020/09/25/new-study-pandemic-job-insecurity-taking-toll-on-american-worker-mental-health/?sh=5f8b37ab5d86> [<https://perma.cc/UQ7T-P2Y9>] (“For people still employed during the COVID-19 pandemic, job insecurity and financial concern are associated with greater symptoms of depression and anxiety”); David L. Blustein & Paige A. Guarino, *Work and Unemployment in the Time of COVID-19: The Existential Experience of Loss and Fear*, 60 J. HUMANISTIC PSYCH. 702, 705 (2020) (“During this COVID-19 crisis, massive unemployment has become the defining feature of work”).

¹⁷² See Jack Healy, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, N.Y. TIMES, <https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html> [<https://perma.cc/H9S6-YYKG>] (June 10, 2020) (explaining the dilemma workers were put in during the pandemic, namely whether to return to work and risk their health or go against their employers and risk losing their jobs).

¹⁷³ See Ranie Lin, Juan M. Londono & Sai Ma, *Global Real Economic Uncertainty and COVID-19*, FED. RSRV. (Feb. 18, 2022), <https://www.federalreserve.gov/econres/notes/feds-notes/global-real-economic-uncertainty-and-covid-19-20220218.htm> [<https://perma.cc/MTE3-K37R>] (“The increase in [real economic uncertainty] during the pandemic was, indeed, unprecedented”); cf. Linda Qiu, *Meatpackers Misled Public and Influenced Trump Administration During Covid, Report Says*, N.Y. TIMES (May 12, 2022), <https://www.nytimes.com/2022/05/12/us/politics/meatpackers-trump-covid.html> [<https://perma.cc/NM9R-RV5J>] (“The country’s largest meatpackers successfully lobbied . . . to keep processing plants open despite knowing the health risks to their workers”); Andrea Ordóñez & Arvinn Gadgil, *Pandemic Breeds Widespread Power Imbalance*, INT’L INST. FOR SUSTAINABLE DEV. (July 4, 2021), <https://sdg.iisd.org/commentary/guest-articles/pandemic-breeds-widespread-power-imbalance/> [<https://perma.cc/A2EX-4F3T>] (“As COVID-19 serves as an excuse to centralize and consolidate power, diminished trust in governance systems and weakening social contracts are spreading.”).

¹⁷⁴ See Seiner, *supra* note 14, at 1311 (“This combination of fear, uncertainty, and high unemployment gave companies an unusual amount of control over the workforce.”); *supra* notes 98–107 and accompanying text (explaining how the Great Depression was characterized by employer-imposed unsafe workplace conditions, excessive hours, and minimal pay).

the level of flexibility needed by working families to meet the challenges of the time.¹⁷⁵ There are numerous examples from the initial months of the COVID-19 pandemic where employers refused to give workers time off or provide flexible work schedules to help address family responsibilities.¹⁷⁶ In other instances, employers expressed disdain for employees who needed to care for ill family members or children who were home from school.¹⁷⁷ Vaccine requirements also posed unique challenges for workers, as some employ-

¹⁷⁵ See Seiner, *supra* note 14, at 1311–17 (describing various issues that workers faced during the pandemic, including the requirement to work amid a COVID-19 outbreak, denied paid leave, and wrongful termination); Christian Davenport, Abha Bhattarai & Jena McGregor, *As Coronavirus Spreads, So Do Reports of Companies Mistreating Workers*, WASH. POST (Mar. 31, 2020), <https://www.washingtonpost.com/business/2020/03/31/worker-retaliation-mistreatment-coronavirus/> [<https://perma.cc/ZF62-NA8C>] (“Since the viral pandemic started ravaging the country in recent weeks, workers, unions and attorneys are seeing a dramatic rise in cases they say illustrate a wave of bad employer behavior”); cf. Seiner, *supra* note 15, at 610 (“The COVID-19 pandemic has had a widespread impact on a variety of different legal and workplace-related issues.”).

¹⁷⁶ See Davenport et al., *supra* note 175 (describing one company that “instructed [workers] to report to work even after the state issued a stay-at-home order” during the onset of the pandemic). See generally Seiner, *supra* note 14, at 1311–17 (considering specific examples of wrongful terminations that caught public attention).

¹⁷⁷ See U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-2022-1, THE COVID-19 PANDEMIC AND CAREGIVER DISCRIMINATION UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (Mar. 14, 2022), <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment> [<https://perma.cc/4Y5V-RLTN>] (establishing that it may be illegal for an employer to discriminate against employees because of their caregiving responsibilities); Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH. CTR. (Mar. 9, 2022), <https://www.pewresearch.org/short-reads/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/#:~:text=Majorities%20of%20workers%20who%20quit,major%20reasons%20why%20they%20left.> [<https://perma.cc/7C3P-TW5B>] (“[T]hose who quit and are now employed elsewhere are more likely than not to say their current job has better pay, more opportunities for advancement and more work-life balance and flexibility.”); see, e.g., Susan Edelman & Rich Calder, *NYC Employees Fired for Not Getting COVID Vaccine Grows to More Than 1,750*, N.Y. POST, <https://nypost.com/2022/07/23/nyc-employees-fired-for-not-getting-vaccinated-reaches-1752/> [<https://perma.cc/6NXX-GMU9>] (July 23, 2022) (“More than 1,750 city workers have been fired for refusing to get a COVID-19 vaccination”); Katie Johnston, *No One Should Have to Go Through This’: A Fired Employee Sues Wayfair, Accusing It of Caregiving and Age Discrimination*, BOS. GLOBE, <https://www.bostonglobe.com/2021/02/11/nation/fired-software-engineer-sues-wayfair-mistreatment-over-caregiving-age/> [<https://perma.cc/W6MS-4LBN>] (Feb. 11, 2021) (“A number of employees sued after being denied paid leave to look after their children, or being fired or disciplined after taking it.”); see also Michael Lee, *Health Care Workers Fired Over Vaccine Mandate Awarded \$10 Million in Settlement*, FOX BUS., <https://www.foxbusiness.com/healthcare/healthcare-workers-fired-vaccine-mandate-awarded-10-million-settlement> [<https://perma.cc/N2FX-G8MD>] (Aug. 15, 2022) (“The settlement . . . will result in 473 employees of the system becoming eligible for compensation for being denied a religious exemption to the vaccine mandate”). See generally Seiner, *supra* note 14, at 1311–17 (addressing new issues that arose as employers navigated the pandemic’s effects on employees and the workplace).

ees were unsure about getting the vaccine given their individual health situations and often faced employer opposition to their decisions.¹⁷⁸

In the face of these challenges arising during the pandemic, employers frequently chose to abuse the power that they had over workers, sometimes even ridiculing these employees.¹⁷⁹ It is almost unthinkable that this type of behavior would occur given the decades of employment laws that have helped establish some parameters in the employment relationship.¹⁸⁰ Unfortunately, the examples discussed above are far from isolated, and numerous other instances of inequality exist in the workplace.¹⁸¹ We thus again find ourselves at a crux where new laws and rules must be considered to help prevent any further abuses.

¹⁷⁸ See Sarah Toy, *Why Some Healthcare Workers Would Rather Lose Their Jobs Than Get Vaccinated*, WALL ST. J. (Oct. 22, 2021), <https://www.wsj.com/articles/covid-19-vaccinations-healthcare-workers-refuse-risk-jobs-11634915929> [<https://perma.cc/A2AQ-3FCE>] (“[M]ore than 200 workers at Virginia and West Virginia-based Valley Health System . . . resigned or were fired over requirements that the company’s 6,200 employees be vaccinated.”); Erin Mulvaney, *Pregnant Workers Who Fear Vaccine Pose Challenge for Employers*, BLOOMBERG L. (Apr. 26, 2021), <https://news.bloomberglaw.com/daily-labor-report/pregnant-workers-who-fear-vaccine-pose-challenge-for-employers> [<https://perma.cc/4648-MFRE>] (“At least two women, a New York waitress and a Pennsylvania nurse, have told media outlets they were fired for refusing to take the vaccine due to health concerns for pregnancies.”). See generally Seiner, *supra* note 14, at 1311–17 (detailing how many employers disciplined women who, at first, did not want to receive the COVID-19 vaccine because of the initial lack of information about the vaccine’s impact on pregnancies).

¹⁷⁹ See Allyson Waller, *Woman Says She Was Fired Because Her Children Disrupted Her Work Calls*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/drisana-rios-lawsuit-hub-international.html> [<https://perma.cc/2FQ7-UZAA>] (discussing a worker’s experience describing “that she was fired because her young children were making noise during business calls while she was working from home . . .”); Michael Grabell, Claire Perlman & Bernice Yeung, *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, PROPUBLICA (June 12, 2020), <https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants> [<https://perma.cc/K5HU-UP7H>] (noting that the CEO of Smithfield Foods ridiculed employees who wanted to practice social distancing by stating that such a precaution was “a nicety that makes sense only for people with laptops”).

¹⁸⁰ See, e.g., NLRA, 29 U.S.C. §§ 151–169 (providing workers the right to collectively unionize and promoting a level bargaining power between employer and employee); FLSA, *id.* §§ 201–219 (establishing a federal minimum wage, overtime protections, and child labor restrictions); OSHA, *id.* §§ 651–678 (establishing responsibilities for both employees and employers in the creation and maintenance of health and safety in the workplace); GINA, 42 U.S.C. § 2000ff-1 to -11 (establishing that an employer cannot discriminate against an employee or prospective employee on the basis of genetic information).

¹⁸¹ See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 548 (2021) (“Among the painful truths made evident by COVID-19 are the deep inequality of American society and the profound inadequacy of our social-welfare infrastructure.”).

3. The Failure of Politics

Perhaps the easiest fix for these types of ongoing employer abuses in the workplace would be congressional intervention. Establishing new laws—or amending existing laws—could address precisely the type of misconduct in which employers engage. Indeed, legislative intervention was the response at the federal level with the passage of the FLSA and NLRA during the Great Depression; the federal government also stepped in by enacting Title VII to address discrimination on the basis of protected status during the 1960s.¹⁸² I have previously argued for further congressional action on this partially-addressed, but not thoroughly-resolved, issue of workplace abuse.¹⁸³ Unfortunately, however, such a legislative fix may not be possible. The gridlock and failure of our political system create serious doubt as to whether our society will be able to address these types of power imbalances anytime soon.¹⁸⁴

One of the most glaring examples of Congress's failure to act is the currently stagnant federal minimum wage and the failure to establish federal paid family leave provisions. As previously discussed, the federal government created the minimum wage in the 1930s to provide workers with a minimum level of subsistence during the Great Depression.¹⁸⁵ That wage amount has remained static, however, and Congress has been unable to raise this level in well over a decade.¹⁸⁶ Indeed, Congress last raised the minimum wage in 2009 to its current level, which is \$7.25 an hour.¹⁸⁷ In the face of this congressional failure, some states—currently twenty-nine, along with the District of Columbia—and many cities and local jurisdictions have enacted legislation mandating that workers receive pay above the federal minimum.¹⁸⁸

¹⁸² See, e.g., Johnson & Hing, *supra* note 121, at 114 (“Effective political action is a critical ingredient of any agenda for social change, and can even assist in achieving success in the courts.”); *supra* notes 103–131 and accompanying text (discussing historical legislative responses to workplace abuse).

¹⁸³ See generally Seiner, *supra* note 14 (advocating for a different approach to the employment-at-will doctrine to better protect workers).

¹⁸⁴ See Andrias & Sachs, *supra* note 181, at 573 (highlighting “the problems for democratic and republican government posed by the current unresponsiveness of American government”).

¹⁸⁵ See discussion *supra* notes 98–117 and accompanying text (addressing the role of the FLSA during the Great Depression).

¹⁸⁶ See Gina Cummings, *The Federal Minimum Wage Hasn't Risen in Almost 13 Years and US Workers Are Paying the Price*, CNN (Mar. 22, 2022), <https://www.cnn.com/2022/03/22/perspectives/oxfam-federal-minimum-wage/index.html> [<https://perma.cc/QBM3-24NM>] (noting that Congress last raised the minimum wage in 2009); *History of Federal Minimum Wage*, *supra* note 109 (displaying the trend of a static minimum wage over the years).

¹⁸⁷ See Cummings, *supra* note 186 (“The federal minimum wage has lost at least 21% of its value since Congress last raised it in 2009.”); *History of Federal Minimum Wage*, *supra* note 109 (detailing the federal minimum wage since the inception of the FLSA).

¹⁸⁸ See *Inventory of US City and County Minimum Wage Ordinances*, U.C. BERKELEY LAB. CTR., <https://laborcenter.berkeley.edu/inventory-of-us-city-and-county-minimum-wage-ordinances/> [<https://>

Similarly, Congress has yet to establish federal paid family leave protections. As part of the Family and Medical Leave Act (FMLA), in the early 1990s, Congress granted covered workers twelve weeks of unpaid leave to address personal health concerns, health-related issues for a close family member, or the care of a newborn or adopted child.¹⁸⁹ Nevertheless, the United States remains the only industrialized country that does not provide *paid* leave for family-related time off.¹⁹⁰ The threshold for required unpaid leave coverage in the United States also remains at businesses with fifty workers, which carves out almost fifty percent of American workers.¹⁹¹ Again, many states and local jurisdictions have stepped in to fill this gap and to provide paid leave to workers in these family-centered situations.¹⁹²

What is notable about these two examples is that raising, or even doubling, the minimum wage and providing paid family leave are both widely popular ideas that much of the population supports.¹⁹³ Although Congress has increased the federal minimum wage numerous times in the past and provided workers *unpaid* family leave, the federal government currently remains at a standstill in further legislating in these areas despite the popular support to do

perma.cc/U7RK-CQB4] (July 6, 2023) (listing all cities and counties that have enacted minimum wage ordinances).

¹⁸⁹ See Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2611–2612 (requiring that certain employers provide at least twelve weeks of unpaid sick leave).

¹⁹⁰ See Gretchen Livingston & Deja Thomas, *Among 41 Countries, Only U.S. Lacks Paid Parental Leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/short-reads/2019/12/16/u-s-lacks-mandated-paid-parental-leave/> [https://perma.cc/826Z-DTUT] (comparing the number of weeks provided for paid leave across a number of countries and stating that the United States is the only country, among forty-one countries, that does not require paid family leave for new parents).

¹⁹¹ See Annie Nova, *A Paid Family Leave Policy Could Be Coming to the U.S. Here's What It Would Look Like*, CNBC, <https://www.cnbc.com/2021/09/16/workers-may-soon-be-entitled-to-paid-family-leave-here-are-details-.html> [https://perma.cc/8PKF-9A4N] (Sept. 16, 2021) (“[C]ompanies with 50 employees or more are required to provide up to 12 weeks of unpaid time off”); Taylor Bleistein, *The United States’ “Most Inclusive” Paid Parental Leave Policy Pales in Comparison to Foreign Countries Policies*, 41 WOMEN’S RTS. L. REP. 52, 52 (2019) (“[T]he United States ranks last among industrialized countries for mandated paid leave”).

¹⁹² See *State Family and Medical Leave Laws*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/labor-and-employment/state-family-and-medical-leave-laws> [https://perma.cc/ML4P-64ZJ] (Sept. 9, 2022) (“11 states—California, Colorado, Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, Oregon, Rhode Island, and Washington—and the District of Columbia currently offer paid family and medical leave.”).

¹⁹³ Amina Dunn, *Most Americans Support a \$15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), <https://www.pewresearch.org/fact-tank/2021/04/22/most-americans-support-a-15-federal-minimum-wage/> [https://perma.cc/QFG6-A3YP] (“U.S. adults (62%) say they favor raising the federal minimum wage to \$15 an hour”); Juliana Menasce Horowitz, Kim Parker, Nikki Graf & Gretchen Livingston, *Americans Widely Support Paid Family and Medical Leave, but Differ Over Specific Policies*, PEW RSCH. CTR. (Mar. 23, 2017), <https://www.pewresearch.org/social-trends/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/> [https://perma.cc/4GKN-JNYU] (discussing survey results assessing American support for paid leave and finding “that Americans largely support paid leave”).

so.¹⁹⁴ The failure and inability of the political system are readily apparent when it comes to these employment issues. Accordingly, workers can no longer rely on the federal government to step in to address existing power disparities.

Though federal law has served as the bedrock to shaping employment relationships over time,¹⁹⁵ workers must now look elsewhere to secure much-needed change.¹⁹⁶ For the foreseeable future, federal law is simply an unlikely mechanism of reform.¹⁹⁷ Fortunately, as the rest of this Article proposes, there are numerous alternative avenues available to change the workplace and correct the power imbalance within it.

III. THE FIX: AT-WILL IN-PART

As addressed throughout this Article, there is a demonstrable—and unsustainable—power gap that currently exists in the workplace. Worker abuse and mistreatment is an existing reality.¹⁹⁸ In the past, when this power differential has grown too large and led to similar employer-perpetrated abuses, Congress stepped in to alleviate the abuse by enacting statutory and regulatory reform.¹⁹⁹ The existing political failures, however, make this typical solution unrealistic today.²⁰⁰ To resolve the current power gap that so clearly pervades the American workforce, other solutions are necessary.

This Article proposes a new way of addressing this existing problem. The new approach requires society to pursue the sources of reform discussed below

¹⁹⁴ See Lorie Konish, *As More States Take Up Paid Family Leave, Here's Where the Push for a National Policy Stands*, CNBC, <https://www.cnbc.com/2022/05/16/as-states-take-up-paid-family-leave-heres-where-congress-stands.html> [<https://perma.cc/6ML5-FULT>] (May 16, 2022) (“Efforts to put a federal paid family and medical leave policy in place have stalled”); Emily Cochrane & Catie Edmondson, *Minimum Wage Increase Fails as 7 Democrats Vote Against the Measure*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2021/03/05/us/minimum-wage-senate.html> [<https://perma.cc/E793-XUL9>] (“The Senate rejected a bid by Democrats to advance an increase [of] the federal minimum wage”).

¹⁹⁵ See, e.g., Ariana R. Levinson, Alyssa Hare & Travis Fiechter, *Federal Preemption of Local Right-to-Work Ordinances*, 54 HARV. J. ON LEGIS. 457, 464 (2017) (noting that “[t]he rationale behind having a federal statute [the NLRA] is that labor relations rules will be consistent across state lines”).

¹⁹⁶ See Kaufman, *supra* note 123, at 218 (“The recent zeal for strict interpretations of doctrines of federalism has resulted in the curtailment of federal remedies for civil rights violations and Congress’ ability to enforce federal equality guarantees”).

¹⁹⁷ See Seiner, *supra* note 14, at 1338 (discussing the failures of the political system to solve the workplace power imbalance due to political gridlock).

¹⁹⁸ See discussion *supra* Part II (addressing recent employer abuses in varying factual scenarios).

¹⁹⁹ See *supra* notes 75–138 and accompanying text (discussing federal employment protections provided to workers in previous decades).

²⁰⁰ See Seiner, *supra* note 14, at 1338 (“[A] federal statute would have more heft and would cut across state lines, providing greater unanimity and worker protection. However, such a provision is unlikely to be adopted in the face of the current gridlock in Congress.”).

in combination with one another, through what can best be called the proposed doctrine of *at-will in-part*. This *at-will in-part* proposal provides the basic framework necessary to establish new and much-needed employment reform and to recalibrate the growing power disparity in the workplace.²⁰¹ By following this framework, society may be able to overcome the political failure of our legislative system and establish the protections necessary for employees. There are five primary areas where additional worker protections are necessary, and only a holistic and flexible approach to these areas can establish the right workplace balance. Each of these factors should be carefully examined when addressing existing power disparities and in helping to overcome the political failures of our system.

This Part addresses, in detail, each of the five elements of the proposed *at-will in-part* doctrine.²⁰² Section A of this Part advocates for a shift from at-will employment to an incorporation of a just cause approach to discharge.²⁰³ Section B considers the need to improve and modernize unions as a collective worker voice.²⁰⁴ Section C urges the need to revisit the inadequate damages available to worker-plaintiffs today.²⁰⁵ Section D highlights the extent to which nondisclosure agreements damage the workplace and worker protections.²⁰⁶ Section E examines Supreme Court precedent to raise additional judicially-created hurdles faced by workers.²⁰⁷ Finally, Section F presents details on the actual implementation of the *at-will in-part* doctrine.²⁰⁸ The effective reform in these five areas would fundamentally alter the doctrine of employment at will, which currently dominates workplace law and contributes to the state of workplace abuse today.

A. Reading “Just Cause” into the Employment Relationship

The single biggest source of power disparity between workers and management is the doctrine of employment at will.²⁰⁹ Employers have used this doctrine to abuse workers in a variety of ways, often in times of economic distress or social turmoil.²¹⁰ As a result of the precarious relationship between at-

²⁰¹ See *infra* notes 209–324 and accompanying text (discussing how the *at-will in-part* doctrine can help advance employment reform).

²⁰² See *infra* notes 209–324 and accompanying text.

²⁰³ See *infra* notes 209–225 and accompanying text.

²⁰⁴ See *infra* notes 226–248 and accompanying text.

²⁰⁵ See *infra* notes 249–271 and accompanying text.

²⁰⁶ See *infra* notes 272–291 and accompanying text.

²⁰⁷ See *infra* notes 292–324 and accompanying text.

²⁰⁸ See *infra* notes 325–326 and accompanying text.

²⁰⁹ See *supra* notes 31–70 and accompanying text (discussing the flaws of employment at will and how they contribute to a power imbalance).

²¹⁰ See, e.g., Bird, *supra* note 1, at 161, 162 (noting that employment at will “retains much of its master-servant roots” and that employees are “vulnerable to the whims of their employer”); Feinman,

will employees and employers, workers may be reluctant to raise concerns of abuse perpetrated by other workers or supervisors. It is common for even legitimate whistleblowers to face retaliatory conduct when they complain of abuse.²¹¹

Only a handful of local jurisdictions have established limits on employers' ability to take action against workers without cause.²¹² Furthermore, only around ten percent of the U.S. workforce is unionized and enjoys some protection against at-will employment.²¹³ Employers must demonstrate employees' unsatisfactory work performance or other justifiable factor before they can discipline or terminate them.²¹⁴ Typically, in those environments where just cause is needed to justify discipline or discharge, there are four different bases that define *satisfactory* employee conduct.²¹⁵ First, workers must regularly show up to work in a timely manner.²¹⁶ Second, workers cannot engage in insubordination where reasonable work rules have been established.²¹⁷ Third, employees

supra note 64, at 133 (“[T]he employment at will rule assured that as long as the employer desired it . . . the employee's relation to the enterprise would be precarious.”); *supra* notes 31–70 and accompanying text (illuminating how employment at will has prompted a growing workplace power disparity, which has resulted in frequent worker abuses).

²¹¹ See Tanya M. Marcum & Jacob Young, *Blowing the Whistle in the Digital Age: Are You Really Anonymous? The Perils and Pitfalls of Anonymity in Whistleblowing Law*, 17 DEPAUL BUS. & COM. L.J. 1, 2 (2019) (“Under the best of circumstances, those who report wrongdoings at their place of employment often run a high risk of retaliation once they report the wrongdoing.”). See generally Moberly, *supra* note 37 (discussing federal law protections for whistleblowers in the financial sector). One need look no further than to the Enron and WorldCom scandals for clear examples of this retaliation. See Mengqi Sun, *Former Enron Executive: SEC Whistleblower Program Is a Game Changer*, WALL ST. J. (July 7, 2021), <https://www.wsj.com/articles/former-enron-executive-sec-whistleblower-program-is-a-game-changer-11625662801> [<https://perma.cc/H58R-HYGS>] (“[T]he Enron Corp. executive who warned management about fraud[] said not having confidentiality and protection for whistleblowers can have a cost.”); Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 363 (2003) (“[W]histleblowers are underappreciated by corporate managers.”); Michael Orey, *‘Whistler-Blowers’ to Still Face Retribution, Despite New Law*, WALL ST. J. (Oct. 1, 2002), <https://www.wsj.com/articles/SB1033422837411305793> [<https://perma.cc/C79G-Y8TC>] (“Last year, Kim Emigh sued WorldCom Inc., alleging that the company directed him to falsify financial records and fired him for failing to go along.”).

²¹² See McGinley, *supra* note 36, at 1503–05 (“[N]o court has ever abolished the employment at will doctrine. Only Montana, the Virgin Islands, and Puerto Rico have done so by statute.”).

²¹³ See Van Green, *supra* note 141 (setting forth unionization rates in the United States over time); DeSilver, *supra* note 34 (examining the decline in unionization among American workers).

²¹⁴ See discussion *supra* notes 35–36 (addressing the approaches to employment in Montana, Puerto Rico, and the U.S. Virgin Islands); Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1955 n.1 (1996) (“[I]n the union setting, many of these [workplace] norms (most significantly, the norm of just-cause termination) are expressly embodied in contract terms . . .”).

²¹⁵ See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594, 597 (outlining the four elements of “satisfactory work”).

²¹⁶ See Seiner, *supra* note 14, at 1317–20 (discussing elements of satisfactory workplace performance); Abrams & Nolan, *supra* note 215, at 597 (same).

²¹⁷ See Abrams & Nolan, *supra* note 215, at 597 (addressing standards for satisfactory worker performance in a unionized environment).

must perform their job well in terms of quality and quantity of work.²¹⁸ Finally, employees must not engage in conduct outside of their job that would cause substantial disruption to the business.²¹⁹

It is not onerous to require all employers to provide a justifiable reason to discipline or fire a worker. Thus, to help recalibrate the power differential, all companies should be required to provide such justification. If there is an economic downturn or a particular company faces sudden financial constraints due to loss of a contract or other unforeseen factors, companies should still be permitted to adjust their workforce accordingly.²²⁰ Employers should not be permitted, however, to discipline workers simply because they feel like it—there must be more reasoning. Without any requirement that an adverse employment action be supported with a reasonable rationale, workers are left in a uniquely disadvantageous and vulnerable position, and are reluctant to bring legitimate complaints to their supervisors.

This Article cannot perform an extensive review of all the parameters of a proposed just cause requirement for adverse actions. Indeed, other research has deeply probed this area.²²¹ Whether such a requirement would be limited simply to termination or would require enhanced severance benefits for all workers should be left to the particular business industry and governing jurisdiction.²²²

²¹⁸ *See id.*

²¹⁹ *See id.*

²²⁰ *See* KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 37 (Jan. 2021), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3951&context=faculty_scholarship [<https://perma.cc/F7KL-N56B>] (“[A] just cause statute would not prevent employers from . . . laying off workers during periods of economic distress.”); Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 36 (2010) (“Economic downturns, the need for newer skills, and changes in market direction have always been and would continue to be just cause for termination.”). *See generally* Seiner, *supra* note 14 (proposing a new standard for workplace claims).

²²¹ *See generally* ANDRIAS & HERTEL-FERNANDEZ, *supra* note 220 (highlighting the failures of America’s employment-at-will regime and both the advantages and drawbacks of a just cause approach); Porter, *supra* note 49 (proposing a statute that finds a balance between at-will and just cause employment); Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L. REV. 89 (2008) (arguing that having numerous different employment laws does not effectively protect workers); Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007) (considering how just cause employment might disproportionately disadvantage racial minorities); Edwin Robert Cottone, Comment, *Employee Protection from Unjust Discharge: A Proposal for Judicial Reversal of the Terminable-at-Will Doctrine*, 42 SANTA CLARA L. REV. 1259 (2002) (exploring the difficulty in leaving behind the employment-at-will doctrine); Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN’S L. REV. 141 (1998) (advocating for federal action to alter employment at will); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988) (examining the arguments in favor and against employment at will).

²²² *See generally* Arnow-Richman, *supra* note 220 (addressing employment doctrine in the United States and offering a proposal to “facilitate[] transition” after termination). *But see* Hirsch, *supra* note

Perhaps the easiest way to implement a just cause requirement for discipline would be for the courts to read this reasonableness requirement into the employment contract at issue. Irrespective of whether there is a written employment contract in the workplace, state courts could interpret the existence of the employment relationship to form a reasonable requirement for the treatment of all workers. Legislative action would not necessarily be needed in this area if the courts were willing to act in the same manner as arbitrators in the union setting.²²³ Almost all arbitrators require cause to justify an adverse action against unionized workers.²²⁴ If the courts followed a similar approach, much of the power disparity could be eliminated from the employment relationship.

Local legislatures also could help intervene in this area as necessary.²²⁵ In this way, the courts and legislatures, acting together, could require a legitimate reason, or a business or economic downturn, for any adverse worker treatment. With no fear of termination without justification, individual workers would regain much of the power they have lost over the decades. There is little reason that such a reasonableness requirement should not be read into the general employment relationship.

At-will employment has created too much uncertainty and fear in the workplace. It prevents good employees from complaining about bad conduct. It establishes a power differential with far too much disparity, as even excellent workers can be terminated for no reason at all. If the courts were willing to read a cause requirement into all employment relationships, doing so could completely recalibrate this power differential. Where courts are unwilling to do so, local legislatures must intervene. The precise contours of what a just cause requirement would look like should be left to specific jurisdictions and industries. At the end of the day, however, all employers should have a valid reason to fire or discipline a worker.

221, at 95–96 (arguing that having a wide range of hundreds of employment laws put forth by local, state, and federal governments is counterproductive).

²²³ See generally Abrams & Nolan, *supra* note 215 (addressing an arbitrator approach to satisfactory work performance of employees).

²²⁴ See ANDRIAS & HERTEL-FERNANDEZ, *supra* note 220, at 6 (“[J]ust cause is a common provision in union collective bargaining agreements . . .”); Arnow-Richman, *supra* note 220, at 17 (“[L]abor arbitrators have sometimes found an implicit promise of job security in collective bargaining agreements that contain no express limitation on employer discretion.”); Abrams & Nolan, *supra* note 215, at 595 (“[A]rbitrators are routinely required to apply the just cause standard . . .”).

²²⁵ See Seiner, *supra* note 14, at 1338 (“[I]ndividual states or local jurisdictions could fill the gap in the federal law by adopting their own sensible just-cause standards.”).

B. Unions Moderated

Since the inception of the right to unionize under federal law, employers have almost uniformly resisted collective bargaining in the workplace.²²⁶ That resistance continues to this very day, and we see ongoing battles with Starbucks, Amazon, Boeing, and other companies that spend large sums of money to prevent unionization.²²⁷ Much of this resistance comes from deeply held financial concerns that dealing with unions is costly, time-consuming, and inefficient.²²⁸ Additionally, there can be no doubt that, although unions often secure greater benefits, pay, and working conditions for their members, certain inefficiencies within the union system exist.²²⁹ Part of the problem may indeed be that there is no middle ground between at-will employment and an organized collective bargaining environment. If employers were not required to

²²⁶ See Bisom-Rapp, *supra* note 148, at 986–97 (discussing employers’ union avoidance efforts).

²²⁷ See Katie Tarasov, *Unions Are Forming at Starbucks, Apple and Google. Here’s Why Workers Are Organizing Now*, CNBC (Aug. 5, 2022), <https://www.cnbc.com/2022/08/05/why-starbucks-apple-and-google-are-unionizing-now-for-the-first-time.html> [<https://perma.cc/UYW4-5Y2Q>] (discussing anti-union efforts at Amazon, Apple, and Starbucks); John Logan, *Outlawered: How Starbucks Is Trying to Stop Its Workers Choosing Unions*, THE HILL (Feb. 20, 2022), <https://thehill.com/blogs/congress-blog/labor/595102-outlawered-how-starbucks-is-trying-to-stop-its-workers-choosing/> [<https://perma.cc/TZ7D-83T8>] (revealing that Starbucks “pay[s] a lot of money” to lawyers to aid in anti-union efforts); Dave Jamieson, *Amazon Spent \$4.3 Million on Anti-Union Consultants Last Year*, HUFFPOST, https://www.huffpost.com/entry/amazon-anti-union-consultants_n_62449258e4b0742dfa5a74fb [<https://perma.cc/A2WC-BLSU>] (Mar. 31, 2022) (“Faced with a wave of worker activism in its warehouses last year, Amazon paid anti-union consultants roughly \$4.3 million”); *Boeing Job Moves Take Aim at Unions*, FORBES (Oct. 2, 2020), <https://www.forbes.com/sites/zengernews/2020/10/02/boeing-job-moves-take-aim-at-unions/?sh=3ed7f52f7617> [<https://perma.cc/Y67X-L8FS>] (“‘They’ve spent millions just battling our unions on organizing efforts’”); Michael Sainato, *‘It’s Because We Were Union Members’: Boeing Fires Workers Who Organized*, THE GUARDIAN (May 3, 2019), <https://www.theguardian.com/us-news/2019/may/03/boeing-union-workers-fired-south-carolina> [<https://perma.cc/3XJJ-62R6>].

²²⁸ See Raisa Bruner, *American Companies Have Always Been More Anti-Union Than International Ones. Here’s Why*, TIME (Apr. 21, 2022), <https://time.com/6168898/why-companies-fight-unions/> [<https://perma.cc/8SDN-HS3N>] (“[C]ompanies view their bottom line and profits as property that needs to be protected from workers.”); Avery Hartmans, *Amazon Workers in Alabama Have a Few Hours Left to Vote on Whether to Join a Union. Here’s How Unions Work and Why Many Companies Oppose Labor Organizers.*, BUS. INSIDER (Mar. 29, 2021), <https://www.businessinsider.com/union-definition-why-companies-amazon-oppose-labor-organizing-workers-rights-2021-3> [<https://perma.cc/G28E-8QP7>] (“[B]usinesses are fearful that unions will ‘cost them more than they can afford.’”).

²²⁹ See generally Derek Thompson, *‘Unnecessary’ and ‘Political’: Why Unions Are Bad for America*, THE ATLANTIC (June 12, 2012), <https://www.theatlantic.com/business/archive/2012/06/unnecessary-and-political-why-unions-are-bad-for-america/258405/> [<https://perma.cc/8RUC-HRN4>] (highlighting the disadvantages of unions); Richard A. Epstein, *Why Labor Unions Are Inefficient Monopolists*, FORBES (Mar. 24, 2009), <https://www.forbes.com/2009/03/23/labor-unions-monopolists-opinions-columnists-efca.html?sh=6b5bc61c2d12> [<https://perma.cc/C2YC-CWRB>] (arguing that unions are inefficient).

deal with a full-scale union, they might be able to see some of the advantages that collective bargaining can bring to the working relationship.

Collective bargaining can help realize numerous efficiencies.²³⁰ Employers need only address worker concerns a single time, rather than repeatedly address various issues that can arise on an individual basis. More importantly, employers are able to learn and address worker concerns much more quickly and informatively.²³¹ Unions can express these concerns in a way that is free from retaliation where individual workers might be afraid to bring those same issues to their employer.²³² This prevents issues from bubbling up on an individual level and makes for a much more stable workforce. Employees are also more likely to raise legitimate safety concerns and any abuse occurring in the workplace, whether physical or emotional.²³³ Employers will therefore be able to address these concerns more quickly and avoid potential legal liability for having failed to uncover or remedy the situation.²³⁴ Coupled together, all these consequences allow for greater employee satisfaction with their jobs and treatment by employers.

²³⁰ See Guy Davidov, *Collective Bargaining Laws: Purpose and Scope*, 20 INT'L J. COMPAR. LAB. L. & INDUS. RELS. 81, 95 (2004) (“[C]ollective bargaining can correct a number of market failures that impinge on overall efficiency”); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 481 (1992) (“[W]orker organization may lead to production efficiencies and an increase in employment in organized firms.”); cf. Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1733, 1767–79 (2018) (discussing “potential advantages and disadvantages of quasi-unions in the technology sector . . .”).

²³¹ Cf. Oliver Denk, Andrea Garnero, Alexander Hijzen & Sébastien Martin, *The Role of Collective Bargaining Systems for Labour Market Performance*, OECD, <https://www.oecd-ilibrary.org/sites/068bb29d-en/index.html?itemId=/content/component/068bb29d-en> [<https://perma.cc/YLG2-K45S>] (2019) (“[C]ollective bargaining has a tendency to compress pay differences among workers.”).

²³² See, e.g., Aaron Sojourner & Jooyoung Yang, *Effects of Union Certification on Workplace-Safety Enforcement: Regression-Discontinuity Evidence*, 75 INDUS. & LAB. RELS. REV. 373, 399 (2022) (“Union certification appears to increase OSHA activity—inspection rates, violations cited, and penalties assigned—by approximately 7% of a standard deviation for each outcome.”); Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183, 212–13 (2006) (“[S]upport from coworkers and the union can play an important role in halting sexual harassment . . .”).

²³³ See CELINE McNICHOLAS ET AL., ECON. POL’Y INST., WHY UNIONS ARE GOOD FOR WORKERS—ESPECIALLY IN A CRISIS LIKE COVID-19 5 (Aug. 25, 2020), <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/> [<https://perma.cc/9VTX-CJYH>] (“[U]nionized workers have felt more secure speaking out about hazards.”). See generally Sojourner & Yang, *supra* note 232 (discerning the benefits of unions on the workplace).

²³⁴ See JOSH BIVENS ET AL., ECON. POL’Y INST., HOW TODAY’S UNIONS HELP WORKING PEOPLE 16–17 (Aug. 24, 2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/> [<https://perma.cc/WPD2-8B88>] (“Unions provide the means for workers to share their knowledge about what works and what doesn’t—without fear of retaliation.”).

Unions thus help recalibrate and balance the power differential in the workplace and even out the disparities that exist.²³⁵ Unionization rates, however, are at a historically low level, and there is little hope that these numbers will increase anytime soon.²³⁶ Employers are likely to continue resisting unionization given the downsides and financial concerns with which they typically associate these groups.²³⁷ But perhaps there can be a middle ground. If employers were able to avoid the inefficiencies and financial downsides of unions, but still reap the benefits of hearing workers' concerns on a collective level, both groups would benefit. Most importantly, a broader worker voice would help to quickly address the types of abuses that we see occurring in the workplace. Therefore, the adoption of a moderated union-light or quasi-union could enhance the working relationship for both parties by bringing employer abuses and concerns to the company's attention without succumbing to possible union inefficiencies.²³⁸

The exact contours of what a moderated union looks like would have to be worked out,²³⁹ but it would be something far less formally structured than what we see in today's unionized environment. This Article does not advocate for fewer unions under the NLRA, but instead takes the far more realistic approach that unionization is waning and a collective worker voice is still needed in whatever form possible.²⁴⁰ A moderated union that successfully amplifies workers' voices requires more than anonymous employee input; this union form would still require some type of enhanced power for the collective activity it-

²³⁵ See *id.* at 8 (“Working people in unions use their power in numbers to secure a fairer share of the income they create.”).

²³⁶ See Van Green, *supra* note 141 (addressing historical and current unionization rates in the United States); DeSilver, *supra* note 34 (same).

²³⁷ See Bisom-Rapp, *supra* note 148, at 986–87 (discussing employer resistance to unionization).

²³⁸ See Hirsch & Seiner, *supra* note 230, at 1727 (“[S]everal attempts have been made to create alternative ‘quasi-union’ or ‘alt-labor’ relationships between workers and employers.”); Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 609 (2016) (“Running parallel to the rise of private ordering and the forging of novel member pathways has been something commentators have labeled alternative labor, or ‘alt-labor’”); Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 843–50 (2014) (discussing secondary boycotts with respect to ALT-labor groups).

²³⁹ See Hirsch & Seiner, *supra* note 230, at 1732 (“[N]ontraditional unionization efforts are imperative if workers in the technology sector want any semblance of a collective voice.”).

²⁴⁰ Cf. Press Release, U.S. Bureau of Labor Statistics, Union Members Summary (Jan. 19, 2023), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/JT8P-5PPX>] (comparing unionization rates over time).

self.²⁴¹ This may mean implementing progressive discipline steps, allowing for a dispute resolution process, and permitting grievances in certain situations.²⁴²

It is time to rethink the definition of unionization and the role of collective activity in the workplace.²⁴³ With unionization rates at historic lows nationally, the NLRA is no longer fulfilling its promise.²⁴⁴ Although there is a recent increase in well-publicized unionization efforts at many Fortune 500 companies, these more individualized efforts have failed to dramatically alter national unionization trends—yet, these examples demonstrate the need for change in this area.²⁴⁵ Where the balance lies between a collective worker voice and employers’ willingness to engage in quasi-unionization is a question for particular industries or geographic regions. Be that as it may, some type of middle ground is clearly needed if collective activity is to return to the workplace and thrive.

How exactly a moderated union would be effectuated is a much more difficult question and would depend on which powers unions might be willing to relinquish while still carrying out their primary purpose of providing a collective voice for their members. A quasi-union or union-light environment would do much to bring the power dynamic back in line between workers and employers.²⁴⁶ It is no coincidence that the decline in unionization has been cou-

²⁴¹ See Hirsch & Seiner, *supra* note 230, at 1732–33 (“Navigating the existing attempts at quasi-union arrangements, this Article suggests the development of a modern union for the modern economy.”).

²⁴² See, e.g., LAURA HUNTER DIETZ, JOHN A. GEBAUER & TAMMY E. HINSHAW, 19 MICHIGAN CIVIL JURISPRUDENCE OFFICERS AND PUBLIC EMPLOYEES § 113 (2023) (“A union has discretion to decide which grievances will be submitted to arbitration and which will be settled . . .”); GAVRIELA M. BOGIN-FARBER, ELLEN J. MESSING, LAUREN E. DIGIOVINE & STEPHEN T. MELNICK, EMPLOYMENT CONTRACTS, EL MA-CLE 2-1, § 2.2.1(h) (5th ed. 2020 & Supp. 2022) (“Among other features, a [collective bargaining agreement] will typically impose a progressive discipline policy . . .”).

²⁴³ See, e.g., Hirsch & Seiner, *supra* note 230, at 1731–33 (discussing alternative approaches to unionization in the platform-based economy and proposing such an approach).

²⁴⁴ See generally Van Green, *supra* note 141 (addressing current trend against unionization); De-Silver, *supra* note 34 (same).

²⁴⁵ See Chris Isidore, *Despite Union Wins at Starbucks, Amazon and Apple, Labor Laws Keep Cards Stacked Against Organizers*, CNN BUS., <https://www.cnn.com/2022/09/05/business/union-organizing-efforts/index.html> [<https://perma.cc/V86K-M58D>] (Sept. 5, 2022) (“[D]espite successful organizing drives at such corporate powerhouses as Starbucks, Amazon and Apple, it’s still an uphill climb for unions seeking to sign up new members.”); Eric Rosenbaum, *The Amazon, Starbucks, Apple Union Push Is Capturing What a Majority of All American Workers Now Say They Want*, CNBC, <https://www.cnbc.com/2022/06/02/majority-of-american-workers-want-more-unionization-at-their-own-jobs.html> [<https://perma.cc/E99F-XARU>] (June 3, 2022) (“While union membership remains at a multi-decade low, a CNBC survey finds that a majority (59%) of workers across the U.S. and across all sectors say they support increased unionization in their own workplaces.”).

²⁴⁶ See Dayne Lee, Note, *Bundling “Alt-Labor”: How Policy Reform Can Facilitate Political Organization in Emerging Worker Movements*, 51 HARV. C.R.-C.L. L. REV. 509, 535 (2016) (“The alt-labor movement has emerged in response to the decline of traditional labor unions . . .”); Lydia DePillis, *The Strange Case of the Anti-Union Union at Volkswagen’s Plant in Tennessee*, WASH.

pled with the increase in workplace abuses that we have seen over the last several years.²⁴⁷ Even if unions never revisit their heyday, collective voice still can and must play an important role in the workplace.²⁴⁸ If successfully put into practice, this collective worker voice can help recalibrate the power gap that exists in the employment relationship.

C. The Damages Problem

The power disparity over the last few decades has continued to grow as the impact of statutory damages in existing employment laws has waned over time. For example, there are statutory caps in the damages provisions of Title VII that limit the relief available to plaintiffs.²⁴⁹ More specifically, the total amount of compensatory and punitive damages that a plaintiff could receive is restricted to \$300,000 combined, and this award is available only in cases brought against the nation's largest employers.²⁵⁰ For smaller employers, the statutory caps can be as low as \$50,000.²⁵¹

These statutory caps have remained static since 1991 and are not indexed to any inflationary metric.²⁵² As a result, these caps have not been raised in the three decades since their original implementation.²⁵³ Inflation has eaten away

POST (Nov. 19, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/11/19/the-strange-case-of-the-anti-union-union-at-volkswagens-plant-in-tennessee/> [https://perma.cc/2V4W-RVYP] (“[Volkswagen plant worker] Moss has helped create a quasi-union of his own at the plant here. . . . If it thrives within the plant, it could serve as a new model for organized labor in the American workplace.”). But see Ian Kullgren, *Google Union’s Future Likely Hinges on Tech Giant’s Response*, BLOOMBERG L. (Jan. 6, 2021), <https://news.bloomberglaw.com/daily-labor-report/google-unions-future-likely-hinges-on-tech-giants-response?campaign> [https://perma.cc/Z69D-XYJX] (“The quasi-union formed at Alphabet Inc.’s Google lacks the legal clout to force major changes at the tech powerhouse . . .”).

²⁴⁷ See Van Green, *supra* note 141 (noting the decline in unionization); DeSilver, *supra* note 34 (same); *supra* notes 75–181 and accompanying text (discussing workplace abuses).

²⁴⁸ See Hirsch & Seiner, *supra* note 230, at 1782–83 (“What we argue for here is a third option that can be attractive to both workers and companies—a more flexible, nontraditional labor model [in the technology sector].”).

²⁴⁹ See Civil Rights Act of 1964, 42 U.S.C. § 1981a(b) (setting punitive and compensatory damages standards for intentional discrimination claims in employment).

²⁵⁰ See *id.* § 1981a(b)(3)(D) (setting a cap on available damages from employers with more than five hundred employees). See generally Joseph A. Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473 (2012) (describing the damages provisions of Title VII and statutory caps).

²⁵¹ See Seiner, *supra* note 250, at 487 (describing damages in employment discrimination cases).

²⁵² See *id.* at 475, 493 (discussing the introduction and stagnation of statutory caps). See generally Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735 (2008) (discussing damages provisions in Title VII and the ADEA).

²⁵³ See 42 U.S.C. § 1981a(b) (setting forth Title VII’s damages provision); Seiner, *supra* note 14, at 1336 (“These caps have watered down the effectiveness of Title VII over the years, as they remained static for the last three decades.”); Seiner, *supra* note 250, at 493 (noting that the limits to

at the practical impact of these damages, and it would take well over \$600,000 in today's dollars to have the same impact as \$300,000 in 1991.²⁵⁴ These limited damages have undermined the centerpiece of employment discrimination litigation—Title VII, the primary law relied upon to prevent most types of discrimination in the workplace.²⁵⁵ Even where there is overt discrimination, and even where that discrimination is systemic and intentional, any individual worker is limited to no more than \$300,000 in punitive damages.²⁵⁶ Although still a substantial amount, the statute's deterrent effect on employers has dwindled and therefore does not adequately limit the widespread types of employment discrimination and sexual harassment pervading today's workplaces.²⁵⁷ The \$300,000 cap is also insufficient to compensate some of the more egregious forms of hostile work environment discrimination that have been in headlines in recent years. Yet, the limit on damages continues to apply in most instances.²⁵⁸

The failure of our political system is again partially to blame for the lack of progress in statutory damage awards. Congress has tried, with no success, to eliminate the statutory limits altogether.²⁵⁹ In failing to act at the federal level to keep the teeth in Title VII, Congress remains complicit in endorsing the power disparity between management and workers that continues to grow over time.²⁶⁰ As the real dollar damages available to plaintiffs are minimized, the

punitive awards “have remained static since the amendments went into effect”); cf. Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 124 (2015) (“Damages . . . differ broadly among discrimination claims.”).

²⁵⁴ See Seiner, *supra* note 14, at 1336 (“Inflation significantly eroded the deterrent effect of these types of damages . . .”). Three hundred thousand dollars in 1991 equaled \$664,216.94 in value in December 2022. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/CC8H-TQ7J>].

²⁵⁵ See *Title VII of the Civil Rights Act of 1964*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/laws-enforced-employment-litigation-section> [<https://perma.cc/WQT5-LSMW>] (June 15, 2023) (“Under Title VII, it is unlawful to discriminate in any aspect of employment . . .”); see also Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 861 (2008) (noting that Title VII is “the main federal employment discrimination statute”). See generally Seiner, *supra* note 252 (addressing problems with the damages provisions of Title VII).

²⁵⁶ See Civil Rights Act of 1964, 42 U.S.C. § 1981a(b)(3)(D) (establishing the highest cap for damages at \$300,000).

²⁵⁷ See Seiner, *supra* note 252, at 755–60, 774 (addressing shortcomings of the current approach to damages in Title VII employment discrimination cases).

²⁵⁸ See 42 U.S.C. § 1981a(b)(3) (providing Title VII's damages limits).

²⁵⁹ See, e.g., Seiner, *supra* note 252, at 783 n.272 (highlighting an attempt to pass federal legislation to eliminate caps on statutory damages related to anti-discrimination claims); see also *id.* at 781–83 (describing efforts to change the employment discrimination damages structure).

²⁶⁰ See Seiner, *supra* note 14, at 1338 (contending that federal legislation would be extremely helpful in remedying the current workplace power disparity but that such congressional actions are unlikely); Andrias & Sachs, *supra* note 181, at 573 (shedding light on the unresponsiveness of the federal government).

ability and incentive to bring valid claims and dissuade mistreatment are impeded. With these static statutory caps in place, it is more difficult for victims of employment discrimination to secure adequate representation, as the limited monetary relief available makes it economically difficult for attorneys to take on these types of claims at all.²⁶¹ Many of the best attorneys tend to seek the most profitable cases, and employment discrimination claims increasingly fail to fall into this category.²⁶² Accordingly, the power of individual workers to correct and deter employment discrimination is substantially weakened.

Further interfering with employment discrimination victims' ability to obtain just compensation, accessing these upper statutory thresholds is often a Herculean task for most plaintiffs. Indeed, a very small percentage of employment discrimination cases ever see a courtroom.²⁶³ Accordingly, it is highly unlikely that a jury will ever consider these claims.²⁶⁴ Familiar with these numbers, many attorneys may be reluctant to represent plaintiffs where successful litigation is demonstrably difficult and where damages are so severely limited.²⁶⁵ And sadly, this may even be true where overt discrimination has occurred.²⁶⁶

²⁶¹ See Jennifer Bennett Shinall, *Less Is More: Procedural Efficacy in Vindicating Civil Rights*, 68 ALA. L. REV. 49, 63 (2016) ("Employment discrimination scholars have repeatedly pointed to the difficulty of finding an attorney for a low-value discrimination claim.").

²⁶² See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 104 (2009) ("Jobs cases proceed and terminate less favorably for plaintiffs than other kinds of cases."); Vanessa Ruggles, Comment, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 150 (2006) ("[M]ost cases present too great a risk for the few employment discrimination attorneys who remain because attorneys' fees are available only when the plaintiff prevails.").

²⁶³ See, e.g., Joseph A. Seiner, *Women Frequently Experience Sexual Harassment at Work, Yet Few Claims Ever Reach a Courtroom*, THE CONVERSATION (Mar. 30, 2021), <https://theconversation.com/women-frequently-experience-sexual-harassment-at-work-yet-few-claims-ever-reach-a-courtroom-157551> [<https://perma.cc/TJN2-4SHL>] (considering factors that have contributed to the lack of worker abuse claims in court, including a perceived low likelihood of success, Supreme Court doctrine, and stringent pleading standards); Clermont & Schwab, *supra* note 262, at 104–05 (noting that victims of employment discrimination are bringing fewer cases to court).

²⁶⁴ See Pam Jenoff, *As Equal as Others? Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85, 85 (2012) ("Stringent statutory requisites as to covered employers, administrative exhaustion, and the limitations period create barriers to access . . ."); Ruggles, *supra* note 262, at 150 ("[T]he capital required to litigate a discrimination case when the collection of fees could be over five years away also puts many public interest and small law firms out of the market.").

²⁶⁵ See Ruggles, *supra* note 262, at 148–51 (explaining why lawyers might not take on employment discrimination cases); see also Jenoff, *supra* note 264, at 97 n.44 (discussing the special "futility of bringing suit against small businesses" and how an attorney might want to refrain from bringing such a suit).

²⁶⁶ See generally Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, 148 DÆDALUS 177, 187 (2019) ("[L]awyers for powerful clients facing opposition from weaker adversaries have proved all too willing to subvert the ideals of equal access to law . . .").

Moreover, class action and systemic litigation standards are also increasingly difficult to satisfy, limiting the financial ability of plaintiff-side attorneys to bring this type of employment discrimination litigation. The Supreme Court has substantially raised the bar for bringing class action litigation in the context of sex discrimination and employment.²⁶⁷ The Supreme Court has further acted to limit these types of class action claims in arbitration.²⁶⁸ In all, these standards create a legal environment in which the real damages available to employment discrimination plaintiffs have greatly decreased over time, and it is more difficult for workers to aggregate their claims in litigation. This difficult judicial environment for victims of discrimination contributes to the growing power differential between these workers and their employers.

With the failure of politics to intervene on the federal level, the answer to the problem of inadequate damages must come at a state or local level. This is not an impossible task; there are a number of notable examples where states have enacted their own version of anti-discrimination legislation that does not impose onerous limits on damage awards.²⁶⁹ There is no reason that, where this problem is made more widely known, other states cannot follow a similar path. Cities and local jurisdictions can also implement individualized employment discrimination laws that have no statutory caps in place. The answer to the issue at hand, then, must clearly come at a state or local level. Above all, some immediate action is needed if there are to be any serious efforts made to correct the power imbalance and abuse that we see between management and workers.

Although it is difficult to change the hearts of those who discriminate, real damages can impact conduct quickly.²⁷⁰ State and local jurisdictions should act to implement higher, more appropriate damages and help recalibrate the growing workplace power differential.²⁷¹ Until employers take discrimination just as seriously as their bottom line, it is unlikely that corporations will take the actions needed to prevent harassment or other forms of discrimination from occurring in the first place.

²⁶⁷ See Joseph A. Seiner, *Weathering Wal-Mart*, 89 NOTRE DAME L. REV. 1343, 1344–50 (2014) (describing the Supreme Court's interpretation of the commonality standard in employment cases, which raised the bar for class action plaintiffs to successfully state a cause of action despite company-wide discrimination or abuse).

²⁶⁸ See generally *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that a signed arbitration agreement waiving employees' ability to pursue class actions was valid).

²⁶⁹ See, e.g., *Employment Discrimination Laws: 50-State Survey*, JUSTIA, <https://www.justia.com/employment/employment-laws-50-state-surveys/employment-discrimination-laws-50-state-survey/> [<https://perma.cc/7XW3-7UTX>] (Sept. 2022) (outlining different states' anti-discrimination laws).

²⁷⁰ See Thomas G. Abram, *The Law, Its Interpretation, Levels of Enforcement Activity, and Effect on Employer Behavior*, 83 AM. ECON. REV. 62, 64 (1993) ("Title VII and the other antidiscrimination laws affect employer behavior by making actions branded as discriminatory more costly . . .").

²⁷¹ See, e.g., Seiner, *supra* note 14, at 1336 ("An effective statutory scheme for wrongful discharge must include powerful remedial relief.").

D. Nondisclosure Agreements

The #MeToo movement has also brought to light yet another troubling issue: the widespread use of nondisclosure agreements (NDAs) in the employment setting.²⁷² Where a union is not present, employers have increasingly relied upon the use of NDAs and arbitration clauses at the inception of a worker's employment.²⁷³ These provisions typically require a prospective employee to waive their right to bring a claim in federal court for discrimination or other employment wrongs and instead require that the worker have the matter heard before an arbitrator.²⁷⁴ Similarly, these agreements frequently require that an employee not disclose the claim to other workers or more broadly to the public and that the results of the arbitration be kept confidential even if the worker prevails on the claim.²⁷⁵

²⁷² See generally Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, ABA DISP. RESOL. MAG. (Winter 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/ [<https://perma.cc/K6AZ-N5AH>] ("In the wake of the #MeToo Movement, 16 states have introduced bills to address the enforceability of non-disclosure provisions relating to harassment."); Vasundhara Prasad, Note, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2513–20 (2018) (discussing the use of NDAs in the context of the #MeToo movement).

²⁷³ See Seiner, *supra* note 15, at 598 ("Through nondisclosure agreements, arbitration clauses, and out-of-court, non-public settlements, companies have been extremely effective in keeping claims of harassment quiet . . .").

²⁷⁴ See Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 300 (2021) (noting the Supreme Court has "upheld even arbitration agreements that waive any and all class claims, forcing employees into individual arbitration" and stating that such "mandatory arbitration agreements that include class action waivers are on the rise"); Marissa Ditkowsky, *#UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers*, 26 UCLA WOMEN'S L.J. 69, 77 (2019) ("[The practice of arbitration] forces all employees to waive their right to access the courts to be employed."); ALEXANDER J.S. COLVIN, ECON. POL'Y INST., *THE GROWING USE OF MANDATORY ARBITRATION* 1–2, <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [<https://perma.cc/JN2U-D35G>] (Apr. 2018) ("Among private-sector nonunion employees, 56.2 percent are subject to mandatory arbitration procedures.").

²⁷⁵ See Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2659 (2019) ("Mandatory arbitration may suppress meritorious claims and limit publicly accessible information due to nondisclosure agreements . . ."); Jonathan Ence, Comment, *"I Like You When You Are Silent": The Future of NDAs and Mandatory Arbitration in the ERA of #MeToo*, 2019 J. DISP. RESOL. 165, 167, 170 ("[A]rbitration prevents these cases from entering the public realm of knowledge, shrouding the process in secrecy."); *Examining Mandatory Arbitration and NDAs for Gender Discrimination Claims* (Law 808C), STAN. L. SCH., <https://law.stanford.edu/education/only-at-sls/law-policy-lab/practicums-2021-2022/examining-mandatory-arbitration-and-ndas-for-gender-discrimination-claims-law-808c/> [<https://perma.cc/CNE4-D9BK>] ("[W]ith claims resolved individually, in private, and settlements protected by NDAs, it is impossible to detect a pattern of wrongful behavior and to hold wrongdoers to account in the public square.").

There are a number of inherent problems with NDAs in the employment setting. As seen in the #MeToo movement, there is intrinsic value in making employment discrimination wrongs publicly known.²⁷⁶ Indeed, specifically in the sexual harassment context, Congress has recently intervened to prohibit these types of agreements.²⁷⁷ Without such legislation, those being harassed would likely remain unaware that others in the exact same workplace may be experiencing similar forms of abuse.²⁷⁸ This perceived isolation makes it less likely that the employee will complain at all.²⁷⁹

A broader awareness of *all* discriminatory acts against other workers is necessary and will make individuals more comfortable bringing their own similar claims to the attention of their employers.²⁸⁰ This increased confidence benefits both management and workers because employers will receive more notice of misconduct, prevent other employees from experiencing similar wrongs, and discipline those perpetrating the abuse.²⁸¹ Similarly, an important public knowledge function is lost when transparency is signed away through NDAs. Judicial rulings on employment matters are public and make all employers aware of widespread discrimination; thus, the public nature of these proceedings helps to prevent such wrongs from occurring at all.²⁸² The public knowledge has a deterrent effect on employers and provides an incentive for employers to prevent discrimination where they may not otherwise have been

²⁷⁶ See Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts> [<https://perma.cc/K7AP-LJE8>] (“When people do come forward . . . [it is] usually when others around them do—strength in numbers.”). See generally Seiner, *supra* note 15, at 598–99 (addressing public awareness and knowledge of sexual harassment claims).

²⁷⁷ See Speak Out Act, Pub. L. No. 117-224, 136 Stat. 2290 (2022) (codified as amended at 42 U.S.C. §§ 19401–19404); *PBS NewsHour*, PBS (Dec. 7, 2022), <https://www.pbs.org/newshour/show/december-7-2022-pbs-newshour-full-episode> [<https://perma.cc/82DL-SQ7K>] (discussing enactment of “legislation curbing the use of confidentiality agreements that block victims of sexual harassment from speaking publicly about misconduct in the workplace,” including “the bipartisan Speak Out Act, which bars the use of nondisclosure agreements that employees or contractors are required to sign, often as a condition of employment”).

²⁷⁸ See Minna J. Kotkin, *Invisible Settlements*, *Invisible Discrimination*, 84 N.C. L. REV. 927, 929 (2006) (“Invisible settlements make discrimination in the workplace invisible.”).

²⁷⁹ See, e.g., Golshan, *supra* note 276 (“These tactics can be effective in hiding the problem on two fronts: They keep victims feeling isolated, and . . . they insulate the perpetrator.”).

²⁸⁰ See *id.* (explaining how the transparency of instances of workplace discrimination encourages other victims of workplace abuse to come forward).

²⁸¹ Cf. *Examining Mandatory Arbitration and NDAs for Gender Discrimination Claims* (Law 808C), *supra* note 275 (addressing the drawbacks of nondisclosure agreements).

²⁸² See Kotkin, *supra* note 278, at 930 (“The whole thrust of equal employment legislation was that, by facilitating employee suits, discrimination would be brought to public attention and the litigation process would serve to deter . . .”). See generally LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* (4th ed. 2020) (discussing the use of alternative dispute resolution (ADR) in the employment setting).

aware of the pervasive nature of this conduct.²⁸³ When CEOs and other corporate representatives see headlines about widespread discrimination, they are more likely to act in their own businesses to stop such conduct from occurring. And when the same company officials see large damages being awarded in such cases, they are even more likely to act quickly.²⁸⁴ Outside of the company itself, the general public benefits from being aware of workplace discrimination and the damages that are awarded in these cases.

NDAAs make this type of valuable knowledge impossible, removing all transparency in the workplace and preventing other workers from understanding the nature of hidden discrimination and harassment.²⁸⁵ The fix in this area does not require legislative intervention—though Congress has already responded in the sexual harassment context, and jurisdictions could certainly enact laws prohibiting the use of these agreements.²⁸⁶ Rather, the judiciary can act to invalidate these agreements as unconscionable on their face. Given all that the public has learned in recent years, the courts should be free to reject NDAAs that are onerous, one-sided, or otherwise oppressive on the grounds that they are *unconscionable* under state law.²⁸⁷

Similarly, courts could find these agreements as a clear violation of public policy in some states, as they directly conflict with many state policies enacted against sexual abuse, assault, and harassment in the workplace.²⁸⁸ Finally, the

²⁸³ See Kotkin, *supra* note 278, at 930 (discussing the importance of public transparency).

²⁸⁴ See, e.g., Jim Wilson, *CVS Fires Regional Manager, Several Employees Over Harassment Allegations*, HUM. RES. DIR. (Mar. 15, 2022), <https://www.hcamag.com/us/specialization/employment-law/cvs-fires-regional-manager-several-employees-over-harassment-allegations/398700> [<https://perma.cc/98QM-RFG9>] (“Companies across the United States have adopted a zero-tolerance policy when it comes to sexual harassment in the workplace . . .”); Kotkin, *supra* note 278, at 930.

²⁸⁵ See Orly Lobel, *NDAAs 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/5ANQ-5YGT>] (“[NDAAs] demand silence, often broadly worded to protect against speaking up against corporate culture or saying anything that would portray the company and its executives in a negative light.”).

²⁸⁶ See *PBS NewsHour*, *supra* 277 (describing recent legislation on NDAAs and sexual harassment).

²⁸⁷ See, e.g., Catherine Baldo, Comment, *To Deduct or Not to Deduct: That Is the Question: The Impact of § 162(Q) of the Tax Cuts and Jobs Act in Texas in the Wake of the #MeToo Movement*, 52 TEX. TECH. L. REV. 581, 600 (2020) (“This unconscionability provision should also include language emphasizing that *all* sexual harassment agreements—both past and future—with a nondisclosure included will be considered null and void in Texas if the employee wishes.”).

²⁸⁸ See, e.g., N.J. STAT. ANN. § 10:5-12.7(a) (West 2023) (“A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.”); Chris Marr, *States Expand Bans on Nondisclosure Pacts Beyond #MeToo Claims*, BLOOMBERG L. (July 7, 2022), <https://news.bloomberglaw.com/daily-labor-report/states-expand-bans-on-nondisclosure-pacts-beyond-metoo-claims> [<https://perma.cc/3WX6-CW2A>] (“Washington lawmakers raised the bar yet higher this year, banning NDAAs related to all forms of workplace discrimination . . .”).

courts may reject these agreements on the basis that they may not satisfy the standard for contracts at all. For many workers, there may never have been a meeting of the minds if they were not given sufficient time to review the agreement.²⁸⁹ Additionally, workers may not have an adequate understanding of the implications of the agreements or may not have received sufficient consideration in exchange for the agreement itself.²⁹⁰ As state laws vary substantially with respect to enforcing contracts, how any specific court might choose to read such a provision will depend upon the particular jurisdiction. Nonetheless, the courts are completely free—in light of what we now know about the pervasiveness of abusive, discriminatory, and hostile work environments—to reject an NDA as unconscionable, a violation of public policy, or a failure to meet the standards for a contractual arrangement.²⁹¹ This judicial interpretation of NDAs would ensure more transparency in the working relationship and help rebalance the workplace power differential.

E. A Word About Twombly, Swierkiewicz, and Weingarten

Access to the courts remains an onerous hurdle for many plaintiffs to overcome, as so few employment discrimination cases ever find their way to trial.²⁹² These hurdles have only increased for workplace plaintiffs in recent years, as the Supreme Court has added additional procedural obstacles that make it far more difficult for these litigants to bring a cause of action.²⁹³ As a result, the already substantial power gap between workers and management continues to widen.

²⁸⁹ See Jane Flanagan & Terri Gerstein, “Sign on the Dotted Line”: How Coercive Employment Contracts Are Bringing Back the *Lochner* Era and What We Can Do About It, 54 U.S.F. L. REV. 441, 471 (2020) (“Courts should review one-sided coercive employment contracts with a careful eye, understanding the boilerplate nature of such contracts and the power disparity involved.”).

²⁹⁰ See Prasad, *supra* note 272, at 2539–40 (“[V]ictims also walk away with the psychological and mental scars of first being abused by someone in power, and second, being silenced by that person for fear of retaliation.”).

²⁹¹ See Jingxi Zhai, Note, *Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements*, 2020 COLUM. BUS. L. REV. 396, 421 (“Even if all elements of a valid contract are present, courts may deem such agreements ‘void as against public policy.’”).

²⁹² See Clermont & Schwab, *supra* note 262, at 104 (noting that victims of employment discrimination are bringing fewer cases to court).

²⁹³ See *infra* notes 294–324 and accompanying text (discussing Supreme Court doctrine on plausibility standards and unionized worker discipline that has posed barriers for worker-plaintiffs to successfully bring causes of action).

1. Plausibility

Perhaps the most dramatic change in workplace-plaintiffs' access to courts came with the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly* in 2007.²⁹⁴ In that case, the Supreme Court abrogated its decades-old holding from 1957 in *Conley v. Gibson*, which stated that a pleading should be dismissed only if there is "no set of facts" that would support a viable claim.²⁹⁵ In place of this "no set of facts" language, the Court in *Twombly* adopted a plausibility standard.²⁹⁶ Pursuant to this new standard, to survive dismissal, a plaintiff must set forth enough facts in the complaint to give rise to a plausible claim of relief.²⁹⁷ In *Ashcroft v. Iqbal*, decided in 2009, the Supreme Court further clarified that this plausibility standard was intended to apply to all civil cases.²⁹⁸

The adoption of the plausibility standard was widely seen as raising the bar for employment plaintiffs to bring civil rights claims.²⁹⁹ Accordingly, the plausibility standard has made it far more difficult for employment discrimination victims to successfully bring claims to court.³⁰⁰ Part of the problem, particularly for employment plaintiffs, is adequately showing an employer's discriminatory intent at the early stage of the proceedings.³⁰¹ This is especially a

²⁹⁴ See 550 U.S. 544, 570 (2007) (setting a new plausibility standard to support a claim).

²⁹⁵ See 355 U.S. 41, 45–46 (1957), *abrogated by Twombly*, 550 U.S. 544.

²⁹⁶ 550 U.S. at 569–70.

²⁹⁷ *Id.* at 570 (stating "enough facts" must be pleaded "to state a claim to relief that is plausible on its face").

²⁹⁸ 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions' . . ."). See generally Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179 (2010) (describing the impact of the Supreme Court's *Iqbal* decision on pleading standards).

²⁹⁹ See generally Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) ("*Twombly* and *Iqbal* are poised to have their greatest impact on civil rights cases, simply because those cases are by far the most likely type of case to be attacked by a 12(b)(6) motion."); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1029 ("The results of the analysis revealed a higher rate of dismissals in Title VII opinions issued after *Twombly*."); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008) (evaluating the impact of *Twombly* on civil rights claims).

³⁰⁰ See generally Seiner, *supra* note 128 (addressing pleading standards in disability cases following *Twombly* and *Iqbal*); Seiner, *supra* note 299 (performing an empirical analysis of pleading claims in employment discrimination cases after *Twombly*).

³⁰¹ See J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining the Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC's Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 773 (2011) ("[I]ts impact will be particularly severe on plaintiffs alleging employment discrimination and other civil rights violations where plausibly alleging a discriminatory state of mind—based on facts alone—can be difficult, and often impossible."); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 773 (1987) ("The task of proving intentional discrimination is a difficult task indeed.").

challenge for plaintiffs to show before discovery has even started.³⁰² The evidence supporting this element of the case will often be in the possession of employers, either in emails, employee files, or the testimony of company witnesses.³⁰³ Without access to this information until discovery, the court will not allow the case to proceed unless the worker is able to demonstrate discriminatory intent through some other means—which is frequently impossible.³⁰⁴ Prior to *Twombly*, the standard was much lower.³⁰⁵ In the Seventh Circuit's well-known 1998 decision in *Bennett v. Schmidt*, Judge Frank Easterbrook notably stated that “[b]ecause racial discrimination in employment is ‘a claim upon which relief can be granted’ . . . ‘I was turned down for a job because of my race’ is all a complaint has to say.”³⁰⁶ Under *Twombly* and *Iqbal*, such a pleading could now be considered far too conclusory to survive judicial scrutiny.

Given that *Twombly* and *Iqbal* undermined decades of established procedural law, the new plausibility standard remains an ill-defined work in progress subject to the particular interpretation of a federal court.³⁰⁷ This uncertainty makes it more difficult for workers to prosecute employment claims.³⁰⁸ And, as we have seen in so many other areas of workplace law, this uncertainty has contributed to the growing power differential between employers and

³⁰² See Pritchard, *supra* note 301, at 778 (“The impact of *Iqbal* is that more plaintiffs will no longer have the opportunity to utilize discovery to prove the falsity of conceivably legitimate, non-discriminatory explanations.”).

³⁰³ See Michael O’Neil, Note, *Twombly and Iqbal: Effects on Hostile Work Environment Claims*, 32 B.C. J.L. & SOC. JUST. 151, 170 (2012) (“Plaintiffs face problems in proving causal connections because employers typically have the information needed to provide evidentiary support, thus requiring discovery.”).

³⁰⁴ See, e.g., Joseph A. Seiner, *Plausibility and Disparate Impact*, 64 HASTINGS L.J. 287, 321 (2012) (“Establishing discriminatory intent prior to a motion to dismiss may be particularly difficult, as plaintiffs often do not have access to critical discovery that would help them demonstrate an employer’s animus.”).

³⁰⁵ See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (holding that a pleading need only show a set of facts that would support a viable claim), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

³⁰⁶ 153 F.3d 516, 518 (7th Cir. 1998).

³⁰⁷ See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 2 (2010) (“*Twombly* and *Iqbal* have destabilized both the pleading and the motion-to-dismiss practices as they have been known for over sixty years.”); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 162 (2008) (“[T]he door is open for those courts that are so inclined to screen out civil rights claims that might have made it through before.”).

³⁰⁸ See, e.g., Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 285 (2011) (“[F]ear of facing heightened pleading requirements may have a chilling effect, discouraging plaintiffs’ attorneys from agreeing to handle certain cases if they fear they will face the prospect of motions challenging the plausibility of their claims . . .”).

workers.³⁰⁹ As workplace-plaintiffs face additional obstacles in accessing the courts and bringing initial claims, employers find themselves in a far more powerful position. Because it is difficult to hold an employer accountable for its wrongs, employers have little incentive to prevent these types of workplace abuses at all.

A clear judicial answer and safe harbor to the plausibility dilemma for workplace plaintiffs lie in the Supreme Court's 2002 decision in *Swierkiewicz v. Sorema N.A.*³¹⁰ *Swierkiewicz* provides that workers need not plead a prima facie case of discrimination to survive a motion to dismiss.³¹¹ The typical prima facie case requires that workers show that they are members of a protected class, they are qualified for their position, they suffered an adverse action, and there is some other evidence of discrimination.³¹² As *Swierkiewicz* held that workplace plaintiffs need not plead all of these elements, the case created a safe harbor for litigants who are unable to articulate these factors.³¹³ Unlike under the amorphous standard from *Twombly*, employment discrimination plaintiffs have a more defined standard in *Swierkiewicz* that they can pursue to survive dismissal. Ultimately, however, it remains uncertain whether *Swierkiewicz* remains good law after *Twombly* and *Iqbal*.³¹⁴

Appellate courts have not provided a clear answer on this issue, although the current trend appears to favor the approach articulated in *Swierkiewicz*.³¹⁵ Courts must continue to follow the interpretation laid out in *Swierkiewicz*, as it creates a more definitive path for employment plaintiffs³¹⁶ and greater access

³⁰⁹ See *supra* notes 71–197 and accompanying text (addressing the power differential between employers and workers).

³¹⁰ See 534 U.S. 506, 508 (2002) (holding that employment discrimination cases need to “contain only ‘a short and plain statement of the claim showing that the pleader is entitled to relief’” (quoting FED. R. CIV. P. 8(a)(2))).

³¹¹ *Id.* at 510–12. See generally JOSEPH A. SEINER, THE SUPREME COURT’S NEW WORKPLACE 35 (2017) (arguing that “the holding of *Swierkiewicz* remains intact”).

³¹² See *Swierkiewicz*, 534 U.S. at 510–12 (citing and considering *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which established the prima facie case for employment discrimination cases).

³¹³ See 534 U.S. at 508; Seiner, *supra* note 298, at 222–23 (discussing *Swierkiewicz*’s safe harbor for workplace plaintiffs).

³¹⁴ See Lucas F. Tesoriero, Note, *Pre-Twombly Precedent: Have Leatherman and Swierkiewicz Earned Retirement Too?*, 65 DUKE L.J. 1521, 1533 (2016) (“The federal circuit courts of appeals that have confronted the issue have taken discordant views on the vitality of pre-*Twombly* precedents.”). See generally Seiner, *supra* note 299, at 1042 (discussing Supreme Court decisions and noting that “there are clear lessons to be taken from *Swierkiewicz* and *Twombly*”).

³¹⁵ See Tesoriero, *supra* note 314, at 1533, 1535–36 (highlighting circuit court decisions that rely on *Swierkiewicz*); Seiner, *supra* note 128, at 103 (“[T]he fate of *Swierkiewicz* remains an open question after *Bell Atlantic* and *Iqbal*, and significant uncertainty surrounds what a plaintiff must allege to sufficiently plead a claim of employment discrimination.”).

³¹⁶ See Seiner, *supra* note 298, at 223 (“*Swierkiewicz* . . . creates a safe harbor for Title VII litigants by providing a pleading floor for workplace claims.”).

to the courts for victims of discrimination. Given the differential in workplace power and difficulty with judicial access, if a court chooses not to follow *Swierkiewicz*, it should nonetheless apply the plausibility standard more leniently to employees bringing claims. Workers should also be permitted greater access to discovery to establish their claims, although, as in any civil case, there are certainly limits as to how much leeway should be given.³¹⁷

2. Worker Discipline and Discharge

A somewhat more practical, but equally important, Supreme Court decision addresses the way employees are disciplined in the workplace. In 1975, in *NLRB v. J. Weingarten, Inc.*, the Supreme Court held that unionized workers are entitled to representation if management is planning to discipline or terminate them or if the employer is investigating a matter that might lead to such action.³¹⁸ This is commonly referred to as a unionized worker's "*Weingarten* rights."³¹⁹

By comparison, it can be a recommended practice to include more than one *management*-level employee in an investigatory or disciplinary meeting with a worker.³²⁰ If there is a dispute as to what was said in that meeting or investigation, this practice gives management the ability to express multiple views as to what transpired.³²¹ Workers are at an immediate disadvantage, then, if they misunderstand what the disciplinary hearing is about or if there is a dispute regarding what occurred at that hearing when they have no representative present.

Currently, the *Weingarten* doctrine only expressly extends to unionized workers.³²² From a pure policy perspective, however, there is no reason not to extend this approach to *all* workers. Indeed, given what we now know with

³¹⁷ See generally 5 C.F.R. § 1201.73 (2024) (outlining general discovery guidelines and limitations).

³¹⁸ 420 U.S. 251, 253 (1975).

³¹⁹ See, e.g., Christine Neylon O'Brien, *The NLRB Waffling on Weingarten Rights*, 37 LOY. U. CHI. L.J. 111, 111 (2005) ("The *Weingarten* right allows an employee to request the presence of a union representative, or in some instances a co-worker, at an employer's investigatory interview when the employee reasonably believes that the interview might lead to disciplinary action.").

³²⁰ But see MERIC CRAIG BLOCH, GUIDE TO CONDUCTING WORKPLACE INVESTIGATIONS 15 (2008), https://assets.corporatecompliance.org/Portals/1/Users/169/29/60329/Workplace_Investigations_Guide.pdf [<https://perma.cc/K69N-4GP7>] (noting that "managers may want to participate in, or attend, interviews" that "can have a chilling effect," and recommending that employers conduct interviews without management present).

³²¹ See O'Brien, *supra* note 319, at 111 ("[T]he presence of a witness elevates the level of concern for fairness for both parties and places a non-manager in a position where he or she can provide substantiation during and after the interview.").

³²² See *Weingarten*, 420 U.S. at 260 ("[S]eeking to have the assistance of [a] union representative at a confrontation with [an] employer falls within the literal wording of [the NLRA].").

respect to the power differential between workers and management, and the way in which workers have been repeatedly abused, such a policy should be widely adopted. A worker should be permitted to have a representative present at any disciplinary or investigatory hearing, which could help ensure that nothing said runs afoul of the law. Workers should therefore have the ability to bring their own advocate for their individual workplace rights to these meetings and to have better documentation as to what occurred during the disciplinary process.³²³ Simply put, *Weingarten* rights should extend to all workers, whether unionized or not, and there are indications that such an approach is at least being considered now (as it has in the past).³²⁴

This seems like a simple fix to a very practical problem, but it is one that must be made. The time for such a transition is now, given what is occurring across the spectrum of workplaces. There is no reason that the courts cannot similarly adopt the approach initially set out in Supreme Court doctrine—providing *Weingarten* rights to all workers.

F. Implementation of At-Will In-Part

The elements of *at-will in-part* should be applied to workplaces across the country to help resolve the unsustainable power imbalance and abuse faced by workers. The proposal offered here is left intentionally flexible and should be approached by jurisdictions on an individualized basis. The balance that may work for one particular industry or geographic area might not be the right fit for another. Therefore, this Article proposes a holistic approach that relies on a balancing of different considerations. Each jurisdiction must find the right

³²³ See Max B. Roesch, Note, *Concerted Activity: A Call to Return to the Spirit of Weingarten*, 79 U. PITT. L. REV. 335, 335–36 (2017) (pushing back on the position of the NLRB that *Weingarten* rights apply only to unionized workers).

³²⁴ See David J. Pryzbyski, *Will Nonunion Employees Have Weingarten Rights in the Workplace Soon?*, NAT'L L. REV. (Aug. 8, 2022), <https://www.natlawreview.com/article/will-nonunion-employees-have-weingarten-rights-workplace-soon> [<https://perma.cc/V7FS-CL3L>] (“The [NLRB] recently released an advice memo in which it signaled it is evaluating whether to extend Weingarten rights to nonunion employers. . . . There was a brief period in the early 2000s in which the NLRB held nonunion employers—like their union brethren—had a duty to honor requests for representation in interviews that may lead to discipline.”); cf. Michael Burns, *Weingarten Rights Refresher for the Non-Union Employer*, AM. SOC’Y OF EMPS. (Sept. 27, 2022), <https://www.aseonline.org/News-Events/Articles/weingarten-rights-refresher-for-the-non-union-employer> [<https://perma.cc/QG2P-RUVC>] (“[T]his is not the first time these rights have been bestowed upon non-union employees. The NLRB did this back in 2000 where it decided a case ruling where a nonunion employer must allow an employee to have a coworker present at an investigatory interview. It was subsequently overturned”). See generally Steve Carlin, Note, *Extending Weingarten Rights to Nonunion Employees*, 86 COLUM. L. REV. 618 (1986) (arguing that the right to have assistance and representation at an investigatory meeting should be extended to nonunionized employees). But see generally Sarah C. Flannery, Note, *Extending Weingarten to the Nonunion Setting: A History of Oscillation*, 49 CLEV. ST. L. REV. 163 (2001) (arguing that *Weingarten* should not apply to the non-union context).

mixture of elements outlined above to help restructure the power differential that now exists. These balancing efforts may take time to get right, but that process must start quickly to help correct the existing inequities that are undeniably present in the workplace.

The application of the precise guideposts articulated in this proposal should be considered across the board in all workplaces in our society. We should closely consider implementing additional worker protections against discharge and discipline, encouraging better unionization, enhancing the availability of damages when wrongdoing does occur, and revisiting the questionable societal value of NDAs in the workplace. Focusing on these areas aims to address the core issues that have contributed to the power imbalance between workers and employers. Reform in each area must be considered to provide a healthier working environment and help prevent further workplace abuse.

Similarly, as discussed above, access to justice and worker representation issues are equally important considerations.³²⁵ Courts and local legislatures should place a renewed emphasis on these issues, considering the difficulty workers face in having their claims heard in court and in receiving adequate representation while in the workplace itself. Although each individual issue discussed above may not in and of itself present an insurmountable problem, the combination of these factors has led to the unfavorable environment that workers experience today. The solution to this problem should be multifaceted as well, and it should be proportionate in response to the particular challenges of each industry and jurisdiction.

The *at-will in-part* proposal would fundamentally shift the doctrine of employment at will in this country and would therefore require strong and coordinated efforts to fully and properly effectuate it.³²⁶ Such change is needed to address the very real problems and abuse now faced by all employees.

IV. IMPLICATIONS OF AT-WILL IN-PART PROPOSAL

There are numerous implications of the *at-will in-part* proposal set forth above, and these implications are worth addressing here. There are obvious benefits and drawbacks of this framework. Perhaps the most direct benefit of the proposal is that it helps rework the current power structure of the workplace, resulting in far fewer instances of worker abuse. As addressed throughout this Article, the power imbalance between management and employees has grown too large, and our political system has failed to address this problem.

³²⁵ See *supra* notes 276–307 and accompanying text (examining the issues that worker-plaintiffs face in addressing workplace abuses and bringing claims of such abuse to court).

³²⁶ Cf. Seiner, *supra* note 14, at 1337 (discussing the implementation of a proposed just cause standard).

Through the additional approaches proposed by *at-will in-part*, a more equitable workplace can be achieved. This change to the basic power dynamic is critical if we are to fully recognize the need to protect workers and acknowledge the mistreatment that continues to occur. The main advantage of this proposal, then, is that it corrects the pervasive problem of worker mistreatment that still pervades the workplace.³²⁷

The *at-will in-part* proposal also has the benefit of simplicity and is straightforward to apply. The five elements discussed in Part III are readily identifiable, and the additional reforms can be quickly adopted. In this way, the proposal has the advantage of avoiding the complexities of federal legislation. As noted, Congress has, over time, stepped in to rework the power imbalance between workers and businesses when doing so was necessary for health, safety, labor, and civil rights protections.³²⁸ As our political system has evolved and still failed to intervene and respond to current worker mistreatment, we can no longer rely upon congressional action as a viable solution. In sidestepping this approach, the proposal here identifies the weaknesses and impracticability of that solution in today's environment and offers a more straightforward resolution to the problem.

Additionally, the *at-will in-part* proposal has the advantage of flexibility. This flexibility is necessary, as different approaches may be required in different geographic regions and industries. Thus, no one-size-fits-all approach can work for a particular jurisdiction, and the model proposed here builds in much-needed adaptability. The proposal's adaptability has a substantial advantage over the possible, but unlikely, approach of congressional intervention. Such federal law tends to remain static. By looking to a more broad-based, comprehensive, and inclusive approach, the law can be quicker to act where necessary.

Finally, along these same lines, the *at-will in-part* proposal can be modified and tailored to fit our evolving workplace. Applying older employment laws to our changing environment is akin to being "handed a square peg and asked to choose between two round holes."³²⁹ The model that this Article proposes is dynamic and can evolve as necessary to fit the emerging nuances of the workplace. Employment law is never static and has changed dramatically in recent years as virtual work has become much more prominent.³³⁰ The *at-will in-part* approach allows society to respond quickly when the workplace

³²⁷ See discussion *supra* Part II (describing the existing power imbalance in the workplace).

³²⁸ See *supra* notes 71–197 and accompanying text (addressing past approaches to power imbalances between employers and employees).

³²⁹ See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015) (addressing the continued uncertainty regarding worker classification under increasingly obsolete employment laws).

³³⁰ See generally SEINER, *supra* note 15, at ix (examining how the COVID-19 pandemic changed the workplace and noting that "[t]he law, which often takes decades to refine with respect to employment doctrine, could not keep pace with these changes").

power imbalance grows too large and enables society to respond in a measured way that fits the particular workplace in question.

No proposal is without its drawbacks, and there are certainly concerns that must be addressed here as well. Perhaps the most significant concern to the proposed *at-will in-part* approach is its cost to employers. This cost has even greater implications, as any incurred costs will typically be passed along to consumers, shareholders, or to workers themselves in the form of reduced wages or other benefits.³³¹ There is little doubt that if workers achieve more power in the workplace, they will be more favorably positioned to negotiate better terms, conditions, and privileges of employment. This will assuredly have financial implications for employers. Some of these costs may be offset, however. Employee satisfaction aids in employee retention, which, in turn, reduces recruitment and training costs.³³² Similarly, if there is more transparency and less abuse in the workplace, it is less likely that employers will be subject to litigation by their workers. To the extent the model does prove more costly to businesses, it is an expense that must be borne and a reasonable alternative to subjecting employees to abuse in the workplace. It is also realistic, however, to expect that the proposed model will have financial and otherwise positive benefits associated with it that may ultimately outweigh these potential drawbacks.

Additionally, some may argue that the model is too complex to apply and has too many layers to prove successful. It is true that the five-part approach offered here involves more holistic considerations than simply enacting a single federal law to effectuate change. In this regard, it may involve more balancing efforts over time to help achieve the right power differential between workers and employers. Nonetheless, this multi-layered approach provides necessary flexibility and increases the likelihood of successfully balancing workplace inequities, unlike the failed efforts at federal legislation.³³³ Each of the five elements offered here can be tailored to the industry and jurisdiction, and can be targeted in the effort to resolve the persisting power gap. This model may indeed require the aid of different groups—including corporations, state legislatures, and the courts—to be properly implemented. Nevertheless, the proposed model is designed to remain nimble and be adjusted where necessary.

³³¹ See generally WILLBORN ET AL., *supra* note 32 (discussing an economic approach to increased costs to businesses).

³³² See Marc Holliday, *10 Benefits of Employee Retention for Businesses*, NETSUITE (Feb. 22, 2021), <https://www.netsuite.com/portal/resource/articles/human-resources/employee-retention-benefits.shtml> [<https://perma.cc/NLR5-AVVP>] (discussing the advantages of focusing on employee satisfaction and retention).

³³³ See *supra* notes 182–197 and accompanying text (addressing the political failures to properly address workplace power abuses).

Finally, some might argue that the *at-will in-part* proposal will open the floodgates of litigation and result in burdensome claims by employees. The model does offer increased protections for workers, and these employees may initially avail themselves of litigation to help enforce those protections. This approach, however, addresses head-on the problem of employer abuse in the workplace, and, where such gross mistreatment is properly remedied, employers will be subject to less overall legal exposure. As noted above, some jurisdictions—including Montana, Puerto Rico, and the Virgin Islands—already offer additional protections to workers, and no enhanced litigation costs have been experienced in these geographic areas.³³⁴ Like any model, there may be transition costs and initial increased litigation as the workplace responds to the new requirements, but it is doubtful that any sizable change in litigation will occur. In any case, an initial dramatic increase in litigation would quickly send the proper signal that businesses are not treating their workers properly.

The benefits of the *at-will in-part* model greatly outweigh the costs. A new approach to workplace power is needed to quickly remedy existing worker mistreatment. The *at-will in-part* proposal takes a holistic approach to resolving the problem and tackling this important issue.

CONCLUSION

The gross mistreatment of employees in the workplace must be addressed. The power imbalance between companies and workers has grown too large, and the failure of politics means that federal legislation can no longer be relied upon to address the problem. Although we have looked to Congress in the past to resolve the workplace power disparity, comprehensive and effective federal action remains difficult to achieve.

The model proposed here, *at-will in-part*, carefully outlines how the existing power imbalance can be resolved through a shift to a “just cause” approach to employee discharge, a modified union approach, updated damages provisions, changes to nondisclosure agreements, and the adoption of protections for worker discipline. The workplace has faced numerous challenges over the decades that have impacted worker health, safety, pay, and benefits. The workplace is now at another high point where the growing power disparity has resulted in the prevalent abuse of workers. A new approach is needed to help properly address this workplace power disparity. Thoughtful consideration and discussion are important in helping to craft a reasonable solution to the current imbalance and inequities of workplace power.

³³⁴ See *supra* notes 30–181 and accompanying text (offering alternative approaches to employment at will). See generally Seiner, *supra* note 14 (discussing benefits and drawbacks of a proposed just cause standard).

