2021

Disclosing Discrimination

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DISCLOSING DISCRIMINATION[†]

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ABSTRACT

In the United States, enforcement of laws prohibiting workplace discrimination rests almost entirely on the shoulders of employee victims, who must first file charges with a government agency and then pursue litigation themselves. While the law forbids retaliation against employees who complain, this does little to prevent it, in part because employees are also responsible for initiating any claims of retaliation they experience as a result of their original discrimination claims. The burden on employees to complain—and their justified fear of retaliation if they do so—results in underenforcement of the law and a failure to spot and redress underlying structural causes of race and sex discrimination at work. By statutory design, government enforcement agencies play a crucial but limited role in litigating discrimination lawsuits, which makes significant expansion of the agencies' roles politically infeasible.

This Article considers compelled disclosure of employer information as a means of better enforcing antidiscrimination law. Information-forcing mechanisms have long been a part of securities law. The recent #MeToo and Time's Up social movements have brought the power of public exposure to the issues of sexual harassment and pay discrimination at work. Drawing on lessons from both contexts, this Article argues for imposing affirmative public disclosure requirements on employers that track the pay, promotion, and harassment of employees by their sex and race. It documents emerging disclosure models in some state and international laws meant to target workplace discrimination and highlights where existing U.S. federal law opens the door to such an approach. It also considers counterarguments raised by compelled disclosure, including privacy and free speech concerns. Requiring public disclosures on equality measures is an incremental yet important untapped mechanism that can shift

[*] Professor of Law, University of Florida Levin College of Law. For their helpful comments on presentations or drafts of this Article, my sincere thanks to Adam Feibelman, Richard Ford, Kristin Johnson, Ann Lipton, Helen Norton, Deborah Rhode, Norm Spaulding, Sandra Sperino, and participants in the 2020 Stanford-Harvard-Yale Junior Faculty Forum; the 2019 Murphy Institute Regulation Workshop Series at Tulane Law School; and the 2019 Berkeley Center on Comparative Equality and Anti-Discrimination Law Conference at Stockholm University. My thanks, as well, to Kendall Bopp and Desmond Nichols for their excellent research assistance.

some of the enforcement burden for U.S. antidiscrimination law off of employees and onto employers and responsible government agencies.

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INTRODUCTION

In the United States, if you experience discrimination or harassment at work based on your sex, race, or other protected characteristic, you—the victim of discrimination—are responsible for enforcing the law that ensures your right to be free from it.[1] If you complain of discrimination and your employer responds by taking further adverse action against you, you are then responsible for enforcing the law that ensures your right to be free from retaliation after complaining of discrimination.[2] The burden of enforcing U.S. antidiscrimination law thus rests nearly entirely on the shoulders of employee victims.

When Congress passed Title VII of the Civil Rights Act of 1964 ("Title VII" or the "Act")—the main federal law that prohibits employment discrimination, including harassment, on the basis of race, sex, and other protected characteristics—it created a federal enforcement agency to oversee the law, the U.S. Equal Employment Opportunity Commission ("EEOC").[3] But Congress also created a private right of action for employees, anticipating that the bulk of enforcement would be left to private actors.[4] The EEOC works actively to interpret the law, educate employers, and assist the tens of thousands of employees who contact it each year to report discrimination.[5] Its crucially important administrative and interpretive efforts should not be understated. Yet the agency has limited size and limited resources, much of which go to its gatekeeping function of granting employees who have filed charges the right to find their own lawyers and sue their employers in private lawsuits.[6]

The EEOC does not monitor employer behavior or conduct inspections or investigations of its own accord. Aside from a small group of attorneys tasked with developing class or "systemic" cases in certain industries known to be the

[1] *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, e-5; *infra* Section I.A.

[2] *Id.* § 2000e-3, e-5; *see also infra* Section I.A.

[3] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 705, 78 Stat. 241, 258-59 (codified at 42 U.S.C. § 2000e-4).

[4] *Id.* § 706(f).

[5] *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2019*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/7WJU-WVUB] (last visited Dec. 28, 2020) [hereinafter *Charge Statistics*]; *Overview*, EEOC, https://www.eeoc.gov/overview [https://perma.cc/TN5T-VJ84] (last visited Dec. 28, 2020).

[6] *What You Can Expect After You File a Charge*, EEOC, https://www.eeoc.gov/employees/process.cfm [https://perma.cc/4MYL-QKLC] (last visited Dec. 28, 2020). *See generally* Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (cataloguing reasons that the extant private Title VII litigation regime fails employees who face workplace discrimination); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (critiquing EEOC's current function as gatekeeper and proposing how it can reform this function to improve the Title VII litigation regime).

worst offenders,[7] the EEOC learns about employers that are violating the law only from employees who come forward to report themselves as victims of discrimination or harassment, and even then it very rarely intervenes.[8] Indeed, of the roughly 75,000 to 100,000 charges of discrimination and harassment it received in each of the past twenty years, the EEOC itself litigated only between 114 and 465 cases each year—or fewer than 0.5%.[9]

To those familiar with Title VII law and its enforcement mechanisms, it came as no surprise, then, when the #MeToo and Time's Up movements began to expose pervasive sexual harassment, sexual assault, and pay discrimination throughout U.S. workplaces that had gone unreported and unaddressed for decades.[10] The EEOC's own reports cite studies estimating that at least one in four women (and possibly as many as 85% of women) experience sexual harassment at work; 75% of harassment goes unreported; and, of those who do complain about their harassment, 75% then experience retaliation.[11] For some employers, a commitment to racial and gender equality leads to voluntary measures to prevent discrimination; for others, the fear of lawsuits provides the necessary motivation. But recent social movements have exposed the deep imperfections of a system that relies on voluntary compliance under threat of liability.

Worse still, a decade of precedent under Chief Justice Roberts's Supreme Court has made it more difficult for those employees who *are* willing to come forward with claims of harassment or discrimination to pursue private

[7] *See Systemic Discrimination*, EEOC, https://www.eeoc.gov/systemic-discrimination [https://perma.cc/3M5Q-XA76] (last visited Dec. 28, 2020).

[8] *EEOC Litigation Statistics, FY 1997 Through FY 2019*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm [https://perma.cc/82L9-Z5GP] (last visited Dec. 28, 2020) [hereinafter *Litigation Statistics*].

[9] *See infra* Section I.A. *Compare Charge Statistics*, *supra* note 5, *with Litigation Statistics*, *supra* note 8.

[10] *#MeToo: A Timeline of Events*, CHI. TRIB. (Sept. 17, 2020, 1:52 PM), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html [https://perma.cc/U3LJ-Y3WD]; *see also* Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements — and How They're Alike*, TIME (Mar. 22, 2018, 5:21 PM), https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/ [https://perma.cc/JWX2-47WH].

[11] CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8-9, 15-16 (2016) [hereinafter FELDBLUM & LIPNIC, HARASSMENT IN THE WORKPLACE], https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force /harassment/report.pdf [https://perma.cc/3JE8-VLQD]; *see also* Tara Golshan, *Study Finds 75 Percent of Workplace Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017, 9:00 AM), https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts [https://perma.cc/H8FZ-2CLX].

enforcement lawsuits when they do so.[12] Court decisions on civil pleading standards have raised the bar for what a plaintiff must allege in their original complaint to survive a motion to dismiss,[13] made it harder for plaintiffs to get a class action certified,[14] and upheld mandatory predispute arbitration agreements that force cases out of court entirely.[15]

This Article argues that the failure of U.S. law to adequately prevent and redress workplace discrimination and harassment is due, in large part, to an enforcement mechanism that is woefully out of balance, placing virtually all enforcement responsibility on employee victims. At the same time, it acknowledges that a dramatic shift toward greater public enforcement through increased agency-initiated investigation and litigation is politically unrealistic and financially infeasible. Instead, this Article proposes placing greater affirmative compliance responsibility on employers to show that they are taking active efforts to prevent harassment and discrimination in their own ranks. These employer efforts would be accompanied by a much smaller and less costly increase in public enforcement efforts: a governmental responsibility to collect, monitor, and publicly distribute compliance information produced by employers themselves.

To develop such a proposal, this Article draws upon lessons from two distinct contexts: securities law and feminist social movements. First, securities law offers lessons on the utility of legal disclosure regimes, as well as their limitations. Though designed to serve a different purpose, securities laws provide one example of information forcing through requiring some businesses to publicly report data to government regulators. Second, the #MeToo and Time's Up movements offer lessons on the power of publicly exposing harassment and discrimination as a means to influence behavior. Both securities law and feminist social movements provide the background upon which to consider the role that disclosure requirements can play in improving enforcement of antidiscrimination law.

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[12] *See* Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 141-53 (2014).

[13] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007) (replacing notice pleading standard with plausibility standard to determine whether plaintiff stated a claim to relief); Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (extending plausibility standard announced in *Twombly* to all civil actions in federal court); *see also* Bornstein, *supra* note 12, at 142-46.

[14] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349-52 (2011) (interpreting the "commonality" requirement for class certification under Federal Rule of Civil Procedure 23 to require not just common questions of law or fact but also common answers to those questions); *see also* Bornstein, *supra* note 12, at 151-53.

[15] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (holding that employees may be forced to waive their right to class relief, despite the National Labor Relations Act's right to "concerted activities"); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013) (rejecting the "effective vindication" doctrine); *see also* Bornstein, *supra* note 12, at 148-51.

Grounded in these contexts, this Article argues for imposing affirmative disclosure requirements on larger employers in the areas of unequal pay by sex and race, lack of promotion of women and racial minorities, and sexual and racial harassment—referred to here as "equality disclosures." Few legal scholars have considered the role of mandatory disclosures in the context of employment law.[16] While several scholars have explored the value of pay transparency as a means for increasing employee negotiating power in the arena of private law,[17] this Article instead argues in favor of regulation requiring reporting to government enforcement agencies as a way of unleashing the additional power of public law.[18] And while a handful of scholars have explored adding information on equality measures to existing securities law disclosure requirements governed by the Securities and Exchange Commission ("SEC"),[19] this Article instead proposes adding a new disclosure regime to antidiscrimination law governed by the regulatory authority of the EEOC, arguing that the EEOC is better suited to collect this information and use it to enhance antidiscrimination law enforcement.[20]

[16] The notable exception is Cynthia Estlund. *See, e.g.*, Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 357, 365-66 (2011) [hereinafter Estlund, *Just the Facts*] (making a broad theoretical case for mandatory disclosure to "improv[e] the efficiency of employment contracts and labor markets," encourage "compliance with existing substantive mandates," and "induc[e] employers . . . toward . . . good employment practices and standards of social responsibility," and proposing disclosures on work hours, job safety, job security, work-life balance, waiver of legal rights, and workforce demographics); Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781 (2014) [hereinafter Estlund, *Extending the Case*] (applying her general theory to pay disclosures); *see also* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 35-49 (2007); RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 132-79 (1976); Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN. L. REV. 177, 179-205 (2015).

[17] *See, e.g.*, Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 1001-15 (2011); Estlund, *Extending the Case*, *supra* note 16, at 783; Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 567-87 (2020); Gowri Ramachandran, *Pay Transparency*, 116 PENN. ST. L. REV. 1043, 1059-62 (2012). For a discussion of transparency around workforce diversity initiatives, see Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1723-30 (2019).

[18] *See infra* Section II.C.2.

[19] *See, e.g.*, NADER, GREEN & SELIGMAN, *supra* note 16; Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018); Elizabeth A. Aronson, Note, *The First Amendment and Regulatory Responses to Workplace Sexual Misconduct: Clarifying the Treatment of Compelled Disclosure Regimes*, 93 N.Y.U. L. REV. 1201 (2018).

[20] *See infra* Section III.C.2.

This Article looks to examples from antidiscrimination reporting requirements recently enacted in other high-income[21] countries and several U.S. states and then builds upon the limited data already collected in some areas of federal antidiscrimination law. Part I describes the current system of civil enforcement for discrimination and harassment claims under U.S. law and any retaliation that results from the original complaints. It identifies the severe gaps that currently exist in this system and highlights the impending crisis in access to private enforcement due to recent Supreme Court procedural jurisprudence. Part II provides the justification for imposing affirmative reporting requirements on employers as a means of antidiscrimination law enforcement. It draws lessons on information forcing from disclosure requirements in the securities-law context and lessons on the power of public exposure from the #MeToo and Time's Up movements. This Part then explains the role that disclosure requirements can play in antidiscrimination law, helping shift from reactive to proactive efforts, from secrecy to accountability, and from gatekeeping to more robust enforcing. Part III turns to specific mechanisms for forcing disclosure by employers, looking to legal models in European and other high-income countries and models recently enacted in several U.S. states. It then builds upon the limited data collection efforts already in place in other areas of federal antidiscrimination law to provide a path forward. Part IV concludes by considering counterarguments against disclosure requirements, including questions about their effectiveness, privacy concerns, and potential First Amendment implications as compelled speech.

Ultimately, this Article argues that imposing affirmative public reporting requirements on employers around equality measures is a justifiable, incremental, and necessary step to shift the burden of antidiscrimination law enforcement off of employee victims alone and more equally onto responsible institutions to reach persistent problems of workplace inequality.

I. THE LIMITATIONS OF ANTIDISCRIMINATION LAW ENFORCEMENT IN THE UNITED STATES

This Part explains the current process for enforcing U.S. antidiscrimination law, including protections against retaliation for reporting violations. Because enforcement relies nearly entirely on private lawsuits brought by employees who fear retaliation if they complain, only a fraction of discrimination and harassment claims are ever pursued, leaving significant gaps in enforcement. For those who are willing to complain, the past decade and a half of Supreme Court procedural jurisprudence has made it more difficult to pursue private lawsuits,

[21] The term "high-income countries" comes from World Bank classifications defining "high-income economies [as] those with a [gross national income] per capita of $12,536 or more." *World Bank Country and Lending Groups*, WORLD BANK: DATA, https://datahelpdesk.worldbank.org/knowledgebase/articles/906519 [https://perma.cc/66HZ-ZAZE] (last visited Dec. 28, 2020).

exacerbating the problem of underenforcement. As this Part documents, the burden of enforcing Title VII falls disproportionately on discrimination victims themselves—those with the least power and resources to prevent and redress discrimination.

A. *The Process for Enforcing U.S. Antidiscrimination Law*

Under federal antidiscrimination law and its state law equivalents, employees are primarily responsible for recognizing, reporting, and pursuing discrimination and harassment complaints. By congressional design, Title VII has a hybrid enforcement system in which the statute is enforced by both a public agency, the federal EEOC, and by private plaintiffs, who may pursue their own private rights of action.[22] Yet the burden of this hybrid system is not equally shared; the EEOC plays a vitally important but very limited role in enforcement litigation.[23] And virtually no enforcement can happen without an employee who is willing to speak up and file a complaint against their employer.[24]

On the public side of the hybrid enforcement system, the EEOC has a small unit of systemic litigators that seek out, develop, and pursue law-reform litigation.[25] They devote their limited resources to a small proportion of cases that need them the most: those that set new precedent, affect significant employers, or target particular industries in which workers are unlikely to be able to find private representation.[26] In extremely rare circumstances, the EEOC may choose to intervene and agree to represent an employee based on a filed charge.[27] Yet the primary role of EEOC enforcement is to pursue those cases that the agency itself deems a priority and develops.[28] The cases the EEOC does choose to pursue are often designed for maximum impact with limited resources by creating visible examples of advancement in the law or seeking results against the largest employers.[29] But while their impact may be important, the miniscule number of enforcement actions pursued by the EEOC[30] leaves most employees on their own to pursue their claims through private litigation.

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[22] *See* 42 U.S.C. §§ 2000e-2 to -5.

[23] *See* Bornstein, *supra* note 12, at 126-41.

[24] *Filing a Charge of Discrimination*, EEOC, https://www.eeoc.gov/employees/charge.cfm [https://perma.cc/S3J2-RLRY] (last visited Dec. 28, 2020); *Filing a Lawsuit*, EEOC, https://www.eeoc.gov/employees/lawsuit.cfm [https://perma.cc/2B9T-F7N5] (last visited Dec. 28, 2020).

[25] *See Systemic Discrimination*, *supra* note 7.

[26] *Litigation Procedures*, EEOC, https://www.eeoc.gov/litigation-procedures [https://perma.cc/Y2HR-GUUJ] (last visited Dec. 28, 2020).

[27] *See* Bornstein, *supra* note 12, at 130 (illustrating "small number of cases" where EEOC initiates litigation "from a plaintiff's charges filed with the agency").

[28] *See id.* (explaining that EEOC litigation also results from "agency's own investigation and enforcement priorities").

[29] *See Litigation Procedures*, *supra* note 26.

[30] *See Litigation Statistics*, *supra* note 8.

Comparing the number of antidiscrimination lawsuits pursued by the EEOC to the number pursued privately paints a stark picture. In each one of the last twenty-two years, the EEOC has received between 72,675 and 99,947 charges of discrimination on the basis of sex, race, or another protected class.[31] In each one of those years, the EEOC filed only between 114 and 465 lawsuits—meaning they represented between 0.1% and 0.6% of all charge filers.[32] The agency resolved another 5% to 15% of charges each year through settlements or conciliation.[33] That leaves the remainder of the enforcement—for at least 85% and up to 95% of all charge filers to the EEOC—to the filers' own devices to obtain private representation. Indeed, in the past decade, private attorneys filed between 13,000 and 22,000 employment discrimination lawsuits in federal courts annually—roughly forty to sixty-five times as many cases as the EEOC;[34] likely thousands more were filed in state courts.

Moreover, every single charge filed began with an employee who was willing and able to file a complaint. An employee must first understand that what happened to them at work constituted protected-class discrimination or harassment—a challenge given that a mere 10.3% of the U.S. workforce (and only 6.2% of the private-sector workforce) is represented by a union that might provide legal information.[35] The employee must then decide that they are willing to take the risk of complaining, despite fear of retaliation or potential costs to their personal and professional lives.[36] If so, they must figure out how to file a charge of discrimination or harassment with the federal EEOC or state equivalent within either 180 or 300 days from the adverse employment action.[37] In the vast majority of cases, after an agency investigation, the EEOC will issue the employee a "right to sue letter," which gives the employee the right to find a private plaintiff's attorney willing to take their case on a contingency fee or

[31] *Charge Statistics*, *supra* note 5.

[32] *Litigation Statistics*, *supra* note 8.

[33] *All Statutes (Charges Filed with EEOC) FY 1997 - FY 2019*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm [https://perma.cc/4BAM-DK6J] (last visited Dec. 28, 2020).

[34] *See* Bornstein, *supra* note 12, at 130.

[35] Press Release, Bureau of Lab. Stat., Union Members — 2019, at 5 tbl.1, 7 tbl.3 (Jan. 22, 2020), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/8RFH-MK3T].

[36] *See infra* Section I.B.

[37] At the state level, the enforcement mechanisms largely mirror those of the federal law. All but three states—Alabama, Arkansas, and Mississippi—have their own state fair-employment-practice agencies that accept complaints and conduct investigations. 29 C.F.R. § 1601.74 (2020) (listing state and local fair-employment-practice agencies); *see also Fair Employment Practice Agencies (FEPAs) and Dual Filing*, EEOC, https://www.eeoc.gov/fair-employment-practices-agencies-fepas-and-dual-filing [https://perma.cc/2Q9Y-TNNA] (last visited Dec. 28, 2020); *Time Limits for Filing a Charge*, EEOC, https://www.eeoc.gov/time-limits-filing-charge [https://perma.cc/55QC-UE6C] (last visited Dec. 28, 2020).

for the prospect of attorneys' fees, despite the low success rate of plaintiffs in employment discrimination lawsuits.[38]

There is no doubt, then, that the EEOC and state agencies play a critically important role in issuing regulations and pursuing the hundreds of systemic or law-reform cases they pursue each year. Yet without employees' willingness to publicly pursue actions against their employers, private businesses are rarely, if ever, held accountable for any discrimination or harassment that occurs in their midst.

B. *Retaliation Protections*

To encourage employees to pursue discrimination and harassment complaints, Title VII prohibits retaliation against any employee for complaining or participating in another employee's complaint.[39] Yet this does not stop retaliation from occurring, further undermining the strength of existing antidiscrimination law enforcement.

Under Title VII, it is unlawful to take an adverse action against an employee "because he has opposed any practice" unlawful under the Act or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the Act.[40] The Supreme Court has interpreted protections against retaliation more broadly than those against discrimination to encourage employees to help enforce Title VII.[41] The Court held that, while discrimination is only actionable where it results in an "adverse employment action" at work—for example, a denial of promotion or something that impacts pay—retaliation is actionable when it results in any "materially adverse" action that would "dissuade a reasonable worker from making or supporting a charge of discrimination."[42] This may include actions taken outside of work[43] or actions taken against a very close third party (like the original complainant's fiancé) meant to punish the complainant.[44] Yet the Court has also placed limitations on this breadth, holding that retaliation must be the but-for cause of the materially adverse action[45] and limiting the reach of protections to require a "reasonable, good faith belief" that the underlying action violated the law when the employee complains internally (rather than to a state or federal agency).[46]

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[38] *See What You Can Expect After You File a Charge*, *supra* note 6.

[39] *See* 42 U.S.C. § 2000e-3(a).

[40] *Id.*

[41] *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006).

[42] *Id.* at 57.

[43] *Id.* at 57, 64.

[44] *See* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 175 (2011).

[45] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362-63 (2013).

[46] Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (per curiam) (quoting Breeden v. Clark Cnty. Sch. Dist., No. 99-15522, 2000 WL 991821, at *1 (9th Cir. July 19, 2000)).

The fact that retaliation is also prohibited under Title VII has not stopped employers from retaliating. Indeed, over the past two decades, the number of retaliation charges filed with the EEOC has steadily increased nearly every year.[47] In 1997, a claim of retaliation was filed in 22% of charges filed with the EEOC; by 2019, that number had more than doubled to 53.8%, meaning that more than half of those who filed a discrimination or harassment charge in 2019 also experienced retaliation for doing so.[48] Of course, the cause of the increase in retaliation charges is not clear; it could either be due to an increase in the incidence of retaliation or in the knowledge of the issue and the ability to add it to one's underlying discrimination charge. Regardless, it is safe to say that retaliation is not occurring *less* often than in the past, despite increased awareness of the problem.

Legal scholars attribute the persistence of retaliation despite its legal proscription to a number of causes. As Deborah Brake has noted, retaliation is so difficult to root out because it "performs important work in institutions," helping to "suppress challenges to perceived inequality."[49] Employees engage in a cost-benefit analysis before complaining of discrimination and often perceive reporting "to entail high costs," including "[f]ear of provoking retaliation."[50] As Nicole Porter has explained, the seemingly broad standards created by the Supreme Court are actually more difficult to meet than they seem.[51] In particular, Sandra Sperino has documented how lower courts have applied precedent narrowly, excluding many consequences that employees fear (for example, reprimands, schedule or assignment changes, or ostracism) from the definition of "materially adverse" action required to trigger antiretaliation protections.[52]

In the end, enforcement of Title VII's antiretaliation protections suffers from the same limitations as enforcement of its discrimination and harassment protections. Any retaliation that occurs after a complaint of discrimination can only be redressed in the same way as the underlying discrimination—by an employee willing to file a charge with the EEOC and, almost always, able to find a plaintiff's attorney to represent them in a private lawsuit.[53] Given that now more than half of those willing to file a discrimination charge with the EEOC

[47] *Charge Statistics*, *supra* note 5.

[48] *Id.*

[49] Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 36, 37-39 (2005).

[50] *Id.* at 37.

[51] Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 54-55 (2018); *see also* Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 135-64 (2014).

[52] Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2041-42 (2015); *see also* Porter, *supra* note 51, at 55, 57.

[53] *See* 42 U.S.C. § 2000e-3.

also experience retaliation, employees' fears that they will be penalized for complaining are not just warranted but are, in fact, rational.

C. *Enforcement Gaps and Diminishing Access to Courts*

Under the existing hybrid enforcement system for Title VII, private plaintiffs' lawsuits account for the vast majority of enforcement actions, and justifiable fear of retaliation impedes employees from complaining. This reality leads to two troubling implications. First, there is a significant gap between the prevalence of discrimination, harassment, and retaliation in the workplace and the frequency with which they are reported and successfully redressed. For example, studies estimate that between 25% and 85% of women are sexually harassed at work,[54] and approximately 70% of those who experience harassment do not report it.[55] This is not surprising given that 75% of those who do complain report then experiencing retaliation for their complaint.[56]

Second, to the extent that Title VII relies on private litigation for enforcement, any deterrent effects are now hampered by a jurisprudential trend toward limiting private access to the courts. While private litigation was a cornerstone of Title VII enforcement for the first four decades after its enactment in 1964, "litigation reform" efforts and procedural decisions in the past two decades pose a threat to its efficacy. Since the early 2000s, and particularly under Chief Justice Roberts's Supreme Court, a series of decisions on arbitration agreements and class actions stands to limit enforcement goals.[57] A full analysis of the vast body of scholarship documenting this trend is outside the scope of this Article,[58] but two developments bear mentioning.

On class actions, Supreme Court precedent reining in class certification, including the 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*,[59] has made it harder and more costly for plaintiff's attorneys to pursue class actions on behalf of victims of discrimination.[60] This means that employees—particularly those who earn lower wages—are less likely to be able to find representation. On arbitration agreements, a series of cases upheld the enforceability of mandatory

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[54] FELDBLUM & LIPNIC, HARASSMENT IN THE WORKPLACE, *supra* note 11, at 8.

[55] *Id.* at 15-16; *see also* Golshan, *supra* note 11.

[56] FELDBLUM & LIPNIC, HARASSMENT IN THE WORKPLACE, *supra* note 11, at 16; *see also* Golshan, *supra* note 11.

[57] *See* Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811, 845-46 (2019); Bornstein, *supra* note 12, at 141.

[58] *See* Bornstein, *supra* note 12, at 142-54 (citing scholarship and analyzing the impact of intensified pleading standards, increased mandatory individual arbitration, and limited class action employment discrimination claims on civil lawsuits).

[59] 564 U.S. 338 (2011).

[60] *Id.* at 359-60 (rejecting class certification under Rule 23(a)(2), concluding that plaintiffs could not demonstrate commonality without definitive evidence of "companywide discriminatory pay and promotion," and rejecting claims for backpay under Rule 23(b)(2) because "monetary relief [was] not incidental to the injunctive or declaratory relief").

predispute arbitration agreements that force employees out of the courtroom,[61] culminating in 2018's *Epic Systems Corp. v. Lewis*,[62] in which the Court upheld even arbitration agreements that waive any and all class claims, forcing employees into individual arbitration.[63] Data shows that mandatory arbitration agreements that include class action waivers are on the rise. One study estimated that in 2018, 56.2% of the nonunionized, private-sector workforce was covered by arbitration agreements, nearly one-third of which barred class actions.[64]

As a result of these trends, not only will fewer antidiscrimination cases be litigated by private attorneys but also those that are pursued may be forced into arbitration and largely shielded from public view, weakening their signaling power to deter other violations and strengthen compliance.

II. THE CASE FOR DISCLOSURE AS A MEANS OF ANTIDISCRIMINATION LAW ENFORCEMENT

This Part provides the theoretical basis for moving beyond existing U.S. enforcement mechanisms to require businesses to affirmatively produce information on their own compliance with antidiscrimination law. Information-forcing mechanisms have been a required part of federal securities law for decades, offering one example of the benefits and limitations of a disclosure regime. More recently, the #MeToo and Time's Up movements have demonstrated the power of public exposure of harassment and discrimination complaints, suggesting a need for greater transparency in workplace equality measures. Both contexts provide rationales for imposing mandatory public disclosure requirements as part of antidiscrimination law enforcement. Drawing on these examples, this Part argues that compelled disclosure can improve antidiscrimination law enforcement by increasing prevention ex ante, fostering employer accountability, and expanding the government enforcement role beyond gatekeeping for private lawsuits.

A. *The Lessons of Disclosure from Securities Law*

For nearly a century, securities law has imposed mandatory disclosure requirements on companies. Federal securities regulation began in the wake of the Great Depression to serve the "national public interest" of restoring investor faith in the stock market by protecting investors to, in turn, spark growth.[65] To curb the speculation and unchecked promises that had led to the 1929 stock

[61] *See* Bornstein, *supra* note 57, at 845-46; Bornstein, *supra* note 12, at 141.

[62] 138 S. Ct. 1612 (2018).

[63] *Id.* at 1622-23 (enforcing arbitration agreement that waived employee's right to pursue class claims despite the National Labor Relations Act's protection of "concerted activity").

[64] ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/B2YL-JVAS].

[65] Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1047-48 (2019) (quoting Securities Exchange Act of 1934, 15 U.S.C. § 78(b)).

market crash, Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934.[66] The Acts created the SEC as the federal regulatory agency overseeing federal securities law and required periodic disclosures.[67] Both Acts required companies that sell public securities like stocks and bonds to provide "truthful information" on the risks associated with investing, creating a national disclosure regime.[68]

As it applies today, securities law requires disclosure of key information reported up front at the company's initial stock issuance and updated at regular intervals. These disclosures are supported by an antifraud rule that requires that the information disclosed is accurate and without material omissions.[69] Disclosure requirements apply to certain covered entities—according to a recent estimate, about 3,700 companies today.[70] While the range of entities that must comply with federal periodic disclosure requirements has evolved over time,[71] the law today covers "all firms with securities traded on a national exchange," "most firms . . . once they execute[] a public securities offering," and all firms with over $10 million in assets and 2,000 shareholders.[72]

Federal securities law requires covered entities to make both public and nonpublic disclosures to the SEC.[73] To issue securities available for purchase by the public, companies are required to publicly disclose information material to the stock value, "including financial statements, business risks and prospects, a

[66] *See* Securities Act of 1933, 15 U.S.C. § 77a; 15 U.S.C. § 78a.

[67] *See* 15 U.S.C. § 78(d); *see also* Michael D. Guttentag, *Patching a Hole in the JOBS Act: How and Why to Rewrite the Rules that Require Firms to Make Periodic Disclosures*, 88 IND. L.J. 151, 163-164 (2013); *What We Do*, SEC, https://www.sec.gov/Article/whatwedo.html#create [https://perma.cc/TPG7-TWQJ] (last updated Dec. 18, 2020).

[68] *See* EVA SU, CONG. RSCH. SERV., SECURITIES DISCLOSURE: BACKGROUND AND POLICY ISSUES 1 (2019), https://fas.org/sgp/crs/misc/IF11256.pdf [https://perma.cc/KD9R-YR5D].

[69] *See* 17 C.F.R. § 240.10b-5 (2020); *see also* Sale, *supra* note 65, at 1048 ("The investor protection goal is met on the front end with disclosure requirements that address required disclosures and omissions.").

[70] Editorial Board, *Where Have All the Public Companies Gone?*, BLOOMBERG (Apr. 9, 2018, 7:00 AM), https://www.bloomberg.com/opinion/articles/2018-04-09/where-have-all-the-u-s-public-companies-gone.

[71] *See* Guttentag, *supra* note 67, at 164-71 (describing changes to what entities must comply with disclosure requirements enacted through additional legislation passed in 1936, 1964, 1999, and 2012).

[72] *Id.* at 152-53, 164, 169 n.98 (citing Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 601, 126 Stat. 306, 326 (2012) (codified at 15 U.S.C. § 78*l*(g)(1)(B)); 17 C.F.R. § 240.12g-1 (2020)) (discussing how, in 2012, the Jumpstart Our Business Startups Act raised threshold shareholder level to 2000 shareholders "so long as at least fifteen hundred . . . are accredited investors" excluding "employees who received shares through a distribution exempt from public offering requirements"); *Exchange Act Reporting and Registration*, SEC, https://www.sec.gov/smallbusiness/goingpublic/exchangeactreporting [https://perma.cc/H8TV-MYQ8] (last updated Oct. 24, 2018) (explaining which firms are required to comply with disclosure requirements).

[73] *See* SU, *supra* note 68, at 1-2.

description of the stock to be offered for sale, and the management team and their compensation."[74] Public disclosures are accessible to the public through the SEC's EDGAR online database.[75] Covered entities must also provide nonpublic disclosures to the SEC to allow the agency to monitor additional issues, with the option to "release certain information in the aggregate [or] use the information in enforcement actions."[76] When entities fail to comply with disclosure requirements or to do so honestly, the SEC can enforce the law through litigation seeking civil and criminal penalties.[77]

Notably, the disclosure of correct information is the only goal of the disclosure regime; investors are left to make their own choices about an investment's risk or worthiness using that information.[78] And while, in the past, disclosure requirements focused on individual consumer investors, the disclosure regime is largely now understood by scholars to provide information to more sophisticated "information traders," with the goal of efficiency in financial markets and the economy overall.[79]

The system of securities disclosure requirements is not without its critics. It has "detractors and counterarguments" and has been subject to "calls for changes and overhauls."[80] Some commentators argue that existing regulations are either not effective enough to be worth their cost[81] or not rigorous enough to prevent

[74] *Id.*; *see also* 15 U.S.C. §§ 78m, 78o(d).

[75] *See About EDGAR*, SEC, https://www.sec.gov/edgar/about [https://perma.cc/W9DY-T4W5] (last updated Aug. 24, 2020).

[76] *See* SU, *supra* note 68, at 1-2.

[77] *See* 15 U.S.C. §§ 77t(b), (d)(1); *What We Do*, *supra* note 67.

[78] *See* Sale, *supra* note 65, at 1048-49 ("Indeed, the regulatory choice was to provide investors with accurate information, not to develop a regime where regulators determined the merits of the securities or entity.").

[79] Zohar Goshen & Gideon Parchamovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 713-14 (2006).

[80] Sale, *supra* note 65, at 1051 (citing John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795 (2011); Paul G. Mahoney, *Technology, Property Rights in Information, and Securities Regulation*, 75 WASH. U. L.Q. 815 (1997); and Adam C. Pritchard, *Self-Regulation and Securities Markets*, REG., Spring 2003, at 32); *see also infra* Part IV.

[81] For example, after eight years of fighting over how to implement the Dodd-Frank pay-ratio rule (Section 953(b)), and related SEC regulations on executive compensation and compensation ratios between the CEO and median employee, early evidence showed that data was hard to compare and had little impact on investment recommendations or limitations on CEO pay. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953, 124 Stat. 1376, 1903-04 (2010) (codified at 15 U.S.C. § 78n(i)); SU, *supra* note 68, at 2 (noting that SEC studies costs and benefits of 10-Q quarterly reporting); Peter Eavis, *The Highest-Paid Executives Keep Getting Richer*, N.Y. TIMES, May 26, 2019, at BU4; Deb Lifshey, *The CEO Pay Ratio: Data and Perspectives from the 2018 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 14, 2018), https://corpgov.law.harvard.edu/2018/10/14/the-ceo-pay-ratio-data-and-perspectives-from-the-2018-proxy-season/ [https://perma.cc/3D42-SU7X].

market failures.[82] Others argue that they are too investor oriented and propose greater expansion of disclosures requirements to cover environmental, social, and governance issues ("ESG"), such as environmental sustainability, political activities, consumer protections, and labor relations.[83] Countercriticism of ESG-oriented disclosure expansion suggests that it is driven by special interest groups with limited appeal to investors and limited relevance to the original purpose of disclosures.[84] Nevertheless, as Hillary Sale argues, the securities disclosure regime provides enough utility in its primary objectives to reduce fraud and stabilize the market and, despite its critics, "the system has remained firmly in place."[85]

Setting aside possible criticisms for the moment,[86] this Section details the main benefits of classic, traditional financial disclosure regimes as a point of comparison for adopting disclosure in the separate regulatory scheme of antidiscrimination law. The goal of required securities disclosures is not to change corporate behavior. As such, it offers limited direct applicability to an antidiscrimination regime. Yet, as part of a more comprehensive enforcement scheme, some scholars of financial disclosure law identify several features that may apply to imposing disclosure requirements in other contexts: (1) correcting "information asymmetries," (2) affecting the behavior of those responsible for reporting, and (3) the impact of "publicness."[87]

1. Correcting Information Asymmetry

The defining feature of securities disclosure requirements is that they provide a level playing field by correcting information asymmetry between those inside the company who know about the inner workings of the company and those

[82] Sale, *supra* note 65, at 1051 n.47.

[83] *See* Ann M. Lipton, *Mixed Company: The Audience for Sustainability Disclosures*, 107 GEO L.J. ONLINE 81, 82-86 (2018) [hereinafter Lipton, *Mixed Company*]; Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499, 501-04, 561-72 (2020) [hereinafter Lipton, *Not Everything*]; *see also* Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 609 (2016); Hemel & Lund, *supra* note 19, at 1669-70; Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1289 (1999).

[84] One example is what is known as the "conflict minerals rule." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (codified as amended at 15 U.S.C. § 78m(p)) (requiring disclosures about conflict materials in or near Democratic Republic of the Congo). For more on criticism of this rule, see Hemel & Lund, *supra* note 19, at 1668; David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 330-31 (2011).

[85] Sale, *supra* note 65, at 1051.

[86] For discussion of and responses to these criticisms, see *infra* Sections III.B-C, IV.A.

[87] *See, e.g.*, Sale, *supra* note 65, at 1049-51; Lipton, *Not Everything*, *supra* note 83, at 519-26; *see also infra* Section IV.A.

outside either buying stock or impacted by the sale of its stock.[88] The law aims to protect investors and the efficiency of the market by providing information important to investor decision-making that investors would otherwise lack.[89] Placing the requirement to disclose this information on the companies themselves is efficient; without it, countless investors and advisors would duplicate efforts to search for the information they need to make informed decisions—information that it is less costly for the firm itself to provide.[90]

Having a disclosure regime that requires information to be produced according to set guidelines also ensures that the information produced and published is standardized, which makes the information more useful for comparisons. Investors, advisors, and the public can then compare investment opportunities and risks.[91] Because disclosed information is standardized and made public, companies can also compare themselves to competitors, which may motivate them to consider how they look "relative to [their] peers."[92]

An analogous problem of information asymmetry occurs between employees or applicants and employers, supporting the concept of creating affirmative disclosure requirements in the context of antidiscrimination law. Employment law scholars have long studied how employees' lack of information negatively affects their ability to bargain individually for protections related to job security.[93] More specifically, a lack of information about pay structures and what other employees are paid has posed a particular problem that has contributed to the racial and gender pay gaps.[94] Indeed, employers often discourage their

[88] Sale, *supra* note 65, at 1045-46.

[89] *See* Hemel & Lund, *supra* note 19, at 1667-70; Sale, *supra* note 65, at 1047-50.

[90] *See* Goshen & Parchamovsky, *supra* note 79, at 738 ("Mandatory disclosure duties reduce the cost of searching for information. Absent mandatory disclosure duties, information traders would engage in duplicative efforts to uncover nonpublic information. The cost of these efforts would be extremely high because information traders, as outsiders, lack access to the management of the firm. Disclosure duties pass these costs to the individual firm. For the firm, the cost of obtaining firm-specific information is rather minimal; indeed, it is a mere by-product of managing the firm." (footnote omitted)).

[91] *See id.* (noting that "securities regulation mandates a specific format for disclosure, which further reduces the costs of analyzing information and comparing it to data provided by other firms" (footnote omitted)); Sale, *supra* note 65, at 1049.

[92] Sale, *supra* note 65, at 1050.

[93] *See, e.g.*, Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1786-91 (1996) (describing "contractual assymmetries" in employment relationship negotiations); 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, 106 (1997) (providing "empirical evidence contradicting the assumption of full information" and documenting that "workers appear to systematically overestimate the protections afforded [them] by law").

[94] *See infra* Section II.B.

employees from discussing pay in an effort to maintain negotiating leverage,[95] despite the fact that doing so is prohibited by the National Labor Relations Act.[96] Requiring certain employers to provide information about racial and gender distribution of pay and promotion opportunities and about the occurrence of harassment or discrimination settlements can provide applicants and current employees with information they otherwise lack. This may help applicants make informed choices about where to work or may help those in a position to negotiate pay to do so with an employer based on that employer's data or that of a competitor. Information on a peer entity's equality measures may spur an employer to further improvement as a competitive advantage. Employees and enforcement entities have a great deal to gain by correcting information asymmetries around pay, promotion, and harassment.

2. Behavior-Forcing Effects

While the stated goal of securities disclosure requirements is investor protection, a secondary feature of such requirements is the impact that having to produce disclosures has on the behavior of regulated parties—what Sale and colleagues have described as "the information-forcing-substance theory."[97] As Sale describes it, by focusing on disclosure rather than trying to regulate for "fairness," securities laws and regulations "create incentives for directors to engage in a dialogue with management about the basis for any disclosures."[98] The requirement to collect and produce information in turn may generate "substantive behavior—discourse with officers and management and potentially, changes in policies and procedures—on the part of directors."[99] Because they are required to produce accurate disclosures for which they can be held accountable, company leadership may consider changing their actions—for example, as Sale suggests, by making different decisions about how to invest capital that could serve the company's goals.[100]

Combining disclosure requirements with enforcement mechanisms further strengthens these effects. Various provisions in securities law allow investors to sue companies and their directors for "affirmative misstatements and omissions."[101] One provision in particular, Section 11 of the Securities Act,

[95] *See, e.g.*, INST. FOR WOMEN'S POL'Y RSCH., QUICK FIGURES: PAY SECRECY AND WAGE DISCRIMINATION 1 (2014), https://iwpr.org/wp-content/uploads/2020/09/Q016.pdf [https://perma.cc/642K-SK7C] ("About half of all workers . . . report that the discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment.").

[96] 29 U.S.C. §§ 157, 158(a); *see also infra* Sections II.C.2, III.A.

[97] Sale, *supra* note 65, at 1046-47.

[98] *Id.* at 1047.

[99] *Id.*

[100] *Id.* at 1050.

[101] *See, e.g.*, Securities Act of 1933, 15 U.S.C. §§ 77j(b), 77k(a), 77*l*(a)(2).

imposes strict liability on directors who mislead, subject to affirmative defenses for due diligence or acting with "candor."[102] These defenses provide further incentives for a company's directors to both ensure that management is making accurate disclosures in the first place and to inform the SEC if management does not.[103] As a result, the duty to produce accurate periodic disclosures encourages self-policing by directors and reduces "monitoring costs" for stockholders.[104]

Drawing an analogy for the purposes of considering equality disclosures, the "information-forcing-substance" effects of disclosure requirements may arguably be even stronger in the context of antidiscrimination law than for securities law. First, many employers may be unaware of their own gender and racial pay gaps or lack of diverse leadership until they are forced to collect entity-wide data and see in the aggregate what are often made as a series of discretionary decisions. As one business adage suggests, you treasure what you measure;[105] without an incentive to track pay and promotion differences by gender and race, some employers may be unaware that they have an inequality problem.[106] Having to produce data on pay and promotion rates by protected category may also expose unexamined patterns of bias or discrimination that could open employers up to investigation by the EEOC or private lawsuits by employees. Moreover, being confronted by such data because of a duty to produce the disclosures has great potential to spark internal discussions and possible policy change within an organization—either out of a commitment to being more equitable, increased fear of liability, or the consequences of any inequity being exposed publicly.

3. "Publicness" Effects

Compelled disclosures in the securities context provide a related but separate third value from what Sale calls their "publicness."[107] SEC-covered entities

[102] Securities Act of 1933, Pub. L. No. 73-22, § 11, 48 Stat. 74, 82-83 (codified as amended at 15 U.S.C. 77k); *accord* Sale, *supra* note 65, at 1059.

[103] Sale, *supra* note 65, at 1059-61 (explaining that the candor defense "urges directors to push back internally and, when unsuccessful, to make a noisy exit through resignation").

[104] *Id.* at 1050-51.

[105] *See* Dave Lavinsky, *The Two Most Important Quotes in Business*, GROWTHINK, https://www.growthink.com/content/two-most-important-quotes-business [https://perma.cc/G25N-5N2X] (last visited Dec. 28, 2020) (crediting business management expert Peter Drucker with saying, "If you can't measure it, you can't improve it").

[106] Anecdotally, this was a result of several companies that expressed surprise at their own data once required to produce it under new U.K. pay-data reporting requirements. *See infra* Section III.A.1.

[107] Sale, *supra* note 65, at 1065 ("Publicness is a concept that encompasses the interplay between the inside players in the corporation (directors and officers) and outsiders—like media and analysts—who cover the company."); *see also* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337, 374 (2013); Lipton, *Not Everything*, *supra* note 83, at 510. Arguments around

produce disclosures that are published and accessible to third parties like the media and financial analysts; those who are in "the zone of publicness" then help contribute to accountability for businesses.[108] For example, media coverage of concealment or omissions in financial disclosures can lead to shareholder lawsuits, state attorneys general investigations, and public-relations consequences.[109] Because of this, business managers who ignore the public nature of their responsibilities to disclose required information accurately do so at their peril.[110]

To the extent that any compelled equality disclosures are published,[111] the "publicness" effects may be even stronger than in the context of required securities disclosures. Public exposure to the media and other interested third parties may translate into additional legal and public-relations consequences for employers with truly poor records of gender and racial equity and repeated reports of harassment. For example, plaintiff's attorneys may be more willing to represent employees against an employer with a public record demonstrating a significant racial or gender pay or promotion gap. Of course, the existence of a gap in no way proves that discrimination, rather than real demographic or performance differences, caused any individual pay or promotion decision;[112] but, such data may indicate an employer's blind spot for which a private attorney may be willing to intervene. Media coverage of data that indicates egregious pay or promotion gaps may also spur public activism, particularly for consumer-facing businesses—for example, a call to boycott or divest from a company.[113]

"publicness" are also consistent with scholars who have studied the reputational effects of public exposure through litigation. *See, e.g.*, Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 913 (2018) (describing the "information-transmission function of litigation: litigation as a mechanism to disseminate information in society at large"); Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1196 (2016) (arguing that information about litigation against a company forces "the company's stakeholders [to] update their beliefs about the company and assess whether they want to continue doing business with it"). Relatedly, a recent study documented that simply having a regulatory agency publicize legal violations significantly improved compliance by both the violating entity and its peers. *See* Matthew S. Johnson, *Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws*, 110 AM. ECON. REV. 1866, 1866-69 (2020) (documenting that, when the U.S. Occupational Safety and Health Administration issued press releases about employer violations, "it led other facilities to substantially improve their compliance" and led "to substantial improvements in workplace safety and health" overall).

[108] Sale, *supra* note 65, at 1065-67.

[109] *Id.* at 1065-68 (discussing consequences faced by Exxon and Wells Fargo for failing to disclose problems related to climate change and legal issues, respectively).

[110] *Id.*

[111] This is an open question based on Title VII's confidentiality requirements. *See infra* Part III, Section IV.B.

[112] *See infra* Section II.C.2, Part IV.

[113] *See, e.g.*, Joanne Moseley, *Calls to Boycott Company with 64.8% Gender Pay Gap*, IRWIN MITCHELL (Jan. 18, 2018), https://imbusiness.passle.net/post/102eoby/calls-to-

Thus, the public relations impact of any compelled equality disclosures may spark additional reforms.

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Compelled disclosures in securities law serve a particular purpose and are not directly applicable outside of the financial context. Nevertheless, the regime provides useful theoretical underpinnings for this Article's proposal to compel employer disclosures under antidiscrimination law. Properly constructed, equality disclosures could correct information asymmetry between employers and employees and spur greater compliance efforts by employers faced with having to produce such disclosures and experience their public consequences. While securities disclosure law is neither a panacea for regulating business entities nor directly applicable to the antidiscrimination context, it suggests several strong rationales for the utility of a disclosure regime to combat employment discrimination.

B. *The Lessons of Exposure from #MeToo and Time's Up*

While securities law provides the theoretical arguments for bringing a disclosure regime to antidiscrimination law, the #MeToo and Time's Up movements demonstrate the overwhelming normative need to do so. Originally founded in 2007 by advocate Tarana Burke as a movement to support survivors of sexual assault, the #MeToo movement took on a new life when actress Alyssa Milano used the hashtag #MeToo in a Twitter post in October 2017, calling for people who had experienced sexual harassment or assault to respond "me too."[114] Within 24 hours, the hashtag was used 12 million times.[115] Within two years, thousands of people had shared their stories of sexual harassment and assault, and the issue of sexual harassment at work became a major public concern.[116] Public outcry over stories of egregious sexual harassment by men in

boycott-company-with-64-8-gender-pay-gap [https://perma.cc/ADH6-A9GZ] (describing how, after "the BBC reported on a number of high profile organisations that . . . revealed gender pay gaps considerably above the national average," British politician Jess Phillips "call[ed] on her Twitter feed for women to 'vote with their feet' and boycott" retailer Phase Eight, which was "singled out as the firm with the biggest gender pay gap (so far) - with a 64.8% lower mean hourly rate for female staff"); *see also* Jess Phillips MP (@jessphillips), TWITTER (Jan 7, 2018, 2:21 AM), https://twitter.com/jessphillips/status/949918947398299648 [https://perma.cc/ZJK2-6LRD].

[114] Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html; Alyssa Milano (@Alyssa_Milano), TWITTER (Oct 15, 2017, 4:21 PM), https://twitter.com/alyssa_milano/status/919659438700670976 [https://perma.cc/YW4G-B6T7].

[115] Garcia, *supra* note 114.

[116] Frances Perraudin, *#MeToo Two Years On: Weinstein Allegations 'Tip of Iceberg', Say Accusers*, GUARDIAN (Oct. 14, 2019, 1:00 AM), https://www.theguardian.com/world

leadership positions within the entertainment industry led to the ousting of hundreds of men considered sexual predators at work, including Harvey Weinstein, Matt Lauer, Charlie Rose, Mario Batali, Les Moonves, and more.[117]

As a result of the massive outpouring of stories of women's exploitation at work, a group of advocates launched a second organization, Time's Up, to focus on the issues of unequal pay and gender inequality in hiring and promotion.[118] Again, public exposure of stories of unequal pay for female movie stars including Jennifer Lawrence and Michelle Williams sparked policy changes by agencies and movie studios, such as commitments to hiring more women.[119] Both movements also inspired legislative reforms across the country.[120]

These social movements suggest two compelling arguments for the need to adopt disclosure requirements in the antidiscrimination law context. First, they provide an unprecedented level of documentation of the pervasive underreporting of sexual and racial harassment and unequal pay and promotion along racial and gender lines. While those who study discrimination have long known that many incidents go unreported, the two movements showed, for the first time, the massive scope of the problem and the widely pervasive fear of retaliation and professional consequences that suppress reporting. Two books by the investigative reporters who broke the story of the Harvey Weinstein harassment and assault allegations document one example of the complex institutional structures and systems of secrecy designed to protect powerful executives accused of sexual harassment and the extreme forms of retaliation that harassment accusers may face.[121] Over three years after Alyssa Milano encouraged use of the #MeToo hashtag—and over thirteen years after Tarana

/2019/oct/14/metoo-two-years-weinstein-allegations-tip-of-iceberg-accusers-zelda-perkins-rosanna-arquette [https://perma.cc/D99T-NP3C].

[117] Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

[118] *Our Story*, TIME'S UP, https://timesupnow.org/about/our-story/ [https://perma.cc/P9TK-ZVSD] (last visited Dec. 28, 2020).

[119] *See* Carlsen et al., *supra* note 117; Yohana Desta, *Michelle Williams Says Pay-Gap Controversy "Paralyzed" Her*, VANITY FAIR (Apr. 3, 2019), https://www.vanityfair.com/hollywood/2019/04/michelle-williams-wage-gap-paycheck-fairness-act [https://perma.cc/78KD-SP7B]; Jennifer Lawrence, *Why Do I Make Less Than My Male Co-Stars?*, LENNY (Oct. 13, 2015), https://us11.campaign-archive.com/?u=a5b04a26aae05a24bc4efb63e&id=64e6f35176&e=1ba99d671e#wage [https://perma.cc/W5BK-LLCE].

[120] *See #MeToo, Time's Up and the Legislation Behind the Movement*, BILL TRACK 50 (Feb. 15, 2018), https://www.billtrack50.com/blog/social-issues/civil-rights/metoo-times-up-and-the-legislation-behind-the-movement [https://perma.cc/P6W3-DS9D].

[121] RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS (2019); JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT (2019).

Burke started the movement—there is simply no question that placing near-total responsibility for pursuing harassment and discrimination complaints on individual employees has a deeply chilling effect on antidiscrimination enforcement.

Second, the severe consequences for sexual harassers whose victims finally felt supported to report shows the power of public exposure of discrimination. Once disclosed, the stories of inequality and exploitation led to swift, remedial action. Only one year after the popularization of the #MeToo hashtag, the *New York Times* reported that the movement had "brought down" over 200 "powerful men."[122] Yet while public exposure led to a groundswell that shocked many entities into action where passivity had otherwise set in, it did so in an ad hoc way that was subject to criticism by some commentators for failing to meet comport with due process.[123]

Regardless of individual procedural concerns, whether or not warranted,[124] it is accurate to say that the public exposure impacts of the #MeToo and Time's Up movements were massive and powerful but uncomprehensive and individualized. Thus taking the power of exposure but systematizing it—channeling it into a concrete and routinized disclosure regime that requires employers to provide comparable information—offers a mechanism to harness the power of sunshine with clear process protections.

C. *A Role for Disclosures in Antidiscrimination Law*

In response to concerns over pervasive, unaddressed harassment and pay discrimination, legal scholars have focused primarily on strengthening antiretaliation protections and increasing pay transparency to encourage employees to pursue private discrimination claims.[125] This Section makes the case that, while necessary, private ordering efforts are not sufficient; antidiscrimination law enforcement requires a public law component to move from reactive to proactive and from increasing transparency to fostering accountability. Moreover, given chronic levels of underenforcement, the U.S. government has an obligation to do more to protect citizens from workplace discrimination than serve as a mere gatekeeper for victims to enforce the law themselves—an obligation that a disclosure regime can help achieve.

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[122] Carlsen et al., *supra* note 117.

[123] *See* Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 37-40 (describing due process criticisms).

[124] *Id.* at 40-41 (arguing that not every #MeToo decision is procedurally sound but that high-profile cases are safeguarded by extralegal norms).

[125] *See infra* Section II.C.1.

1. Retaliation Protections Are Not Enough: From Ex-Post to Ex-Ante Action

To increase discrimination reporting, and in the wake of the #MeToo and Time's Up movements, some legal scholars have focused on increasing discrimination complaints by strengthening antiretaliation law. Porter and Sperino have suggested, among other reforms, extending retaliation protections to cover complaints based on a "good faith" rather than a "reasonable" belief that the law has been violated and broadening what constitutes a "materially adverse action" to include a wider array of retaliatory harms.[126] Brake has proposed that, particularly in light of a growing backlash against harassment complaints in the wake of #MeToo, retaliation law's "expressive force" can help set norms for "appropriate, non-retaliatory responses to sexual harassment complaints."[127]

While strengthening antiretaliation protections would be necessary and warranted to improve antidiscrimination enforcement, it is not sufficient. When employees are solely responsible for reporting harassment and discrimination, they will always fear reprisals despite even the most robust antiretaliation protections. As Porter explains, "the fear of retaliation is often enough to stop an employee from reporting harassment"; despite believing that they could win a retaliation lawsuit, most employees would "still choose to avoid the negative consequences of retaliation in the first place."[128]

Focusing on the problem of retaliation ex post, after discrimination remains backward-looking and maintains near-total reliance on employee victims to pursue complaints. Instead, the law should shift some reporting and compliance requirements onto employers directly to reduce discrimination ex ante.

2. Information Forcing in a Time of Secrecy: From Transparency to Accountability

Likewise, to increase enforcement around pay discrimination, some legal scholars and legislators have focused on the value of pay transparency[129]—the idea that requiring employers to provide information to employees about available pay and who is paid what can reduce gender-based pay gaps and discrimination. For example, Cynthia Estlund has argued that pay transparency

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[126] *See* Porter, *supra* note 51, at 56-58; Sperino, *supra* note 52, at 2062-63.

[127] *See* Deborah L. Brake, *Coworker Retaliation in the #MeToo Era*, 49 U. BALT. L. REV. 1, 5 (2019).

[128] Porter, *supra* note 51, at 58 (emphasis omitted).

[129] *See, e.g.*, Eisenberg, *supra* note 17, at 986-98 (discussing the consequences of pay secrecy); Estlund, *Extending the Case*, *supra* note 16, at 783 ("[M]andatory disclosure of meaningful salary information . . . tend[s] to produce less discrimination . . . and probably somewhat lower disparities overall"); Lobel, *supra* note 17, at 548-50 (discussing the power of correcting knowledge disparities on pay); Ramachandran, *supra* note 17, at 1062 (proposing pay transparency to help correct discrimination).

can both "enhance employees' bargaining power"[130] and "aid in the enforcement of antidiscrimination law" because "[n]o one can know whether she is the victim of pay discrimination without comparing her pay to that of others."[131] Orly Lobel has suggested that pay transparency reforms can "structurally change the ways in which salaries are negotiated, determined, and, subsequently, detected, and contested," providing "a central innovation" of reversing information flows in the wage market to correct information asymmetries.[132]

As this Article envisions it, a mandatory disclosure regime would be an expansion of existing efforts to increase pay transparency. But, importantly, while pay transparency is often raised in the context of private law and individual negotiation, applying mandatory disclosures to a public regulatory agency go beyond a private law scheme toward a more comprehensive approach that can lead to greater public accountability.[133] A chief goal of current pay transparency efforts is their private ordering effects of information sharing to support plaintiffs' efforts at negotiation or to bring private lawsuits—for example, as discussed in Part III, new state laws that require employers to provide salary pay ranges to employees who request them when hired.[134] A more comprehensive public disclosure requirement can lead to greater accountability across employers and industries as well as beyond individual actors.

In addition, compelled disclosure will address the particular need for public reporting in an era when employment discrimination and harassment complaints are increasingly resolved through confidential settlement and hidden arbitration. If pay transparency's main effect is to help individual employees discover discrimination so that they can pursue litigation, its benefits to others are entirely lost for any such claim covered by a mandatory arbitration agreement or that results in a confidential settlement.[135]

3. Enforcement Role of the State: From Gatekeeper to Enforcer

Lastly, the chronic underenforcement of antidiscrimination law indicates a deeper problem at which a disclosure regime is aimed: U.S. law must do more to enforce the rights of victims of discrimination and harassment than merely facilitate their ability to sue privately. As legal scholars have documented, a

[130] Estlund, *Extending the Case*, *supra* note 16, at 788.

[131] *Id.* at 785.

[132] Lobel, *supra* note 17, at 549.

[133] *See* Estlund, *Extending the Case*, *supra* note 16, at 783-85; Estlund, *Just the Facts*, *supra* note 16, at 373-75; Lobel, *supra* note 17, at 600-05; *infra* Section III.B.

[134] *See* Lobel, *supra* note 17, at 558-62 (noting how changes in hiring information impact efforts to close the gender pay gap); *infra* Section III.A.1.

[135] Nancy Modesitt, *Why Pay Transparency Alone Won't Eliminate the Persistent Wage Gap Between Men and Women*, CONVERSATION (Mar. 28, 2019, 4:12 PM), https://theconversation.com/why-pay-transparency-alone-wont-eliminate-the-persistent-wage-gap-between-men-and-women-113975 [https://perma.cc/AW92-4VDL].

great deal of EEOC resources go to a mostly gatekeeping role,[136] and enforcement suffers when employees are left to their own devices to enforce the federal laws that protect them from discrimination.[137] Given fear of retaliation[138] and U.S. models of litigation financing,[139] relying on employees' private lawsuits as our main enforcement mechanism for civil rights law is not enough. Both employers and the EEOC can and should play a larger role in ensuring that workplaces are free from discrimination and harassment.

Adding a disclosure requirement is far from a comprehensive increase of resources and public enforcement, but it does offer an incremental step. First, it requires more of employer entities, forcing them to engage in public self-policing that may improve their behavior. Second, systematic collection of information on the problem can help the EEOC and private enforcers target their resources more effectively. Third, the information itself will help document the scope of the problem in a verified, comprehensive way that tweets and individual stories cannot, which may increase public awareness of the problem and political support for a future increase in resources for public enforcement. Particularly in an era of increasing mandatory arbitration clauses and confidential settlements, public documentation is essential to exposing racial and gender discrimination and harassment, which remain systemic problems with structural components that we have failed to adequately redress.[140]

III. MODELS FOR FORCING DISCLOSURE OF DISCRIMINATION

This Article has provided both the normative case for the need to rebalance enforcement responsibility for antidiscrimination law and the theoretical case for using compelled disclosures on equality measures as a means of doing so. This Part now turns to the practical challenge of crafting affirmative disclosure requirements for employers under federal law, focusing on three key areas of persistent racial and gender inequality: pay, promotion, and harassment.[141] To

[136] *See, e.g.*, Engstrom, *supra* note 6, at 646-52.

[137] *See, e.g.*, Brake & Grossman, *supra* note 6, at 861-62 (noting that "at many different junctures" of the rights-claiming process, "employees are stymied and deterred in their efforts to take [the] initiative" to come forward to enforce antidiscrimination laws). *See generally* ELLEN BERREY, ROBERT L. NELSON, & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017) (documenting the limitations of an adversarial approach to workplace discrimination law that relies on employee-initiated litigation).

[138] *See supra* Section I.B.

[139] *See supra* Section I.A.

[140] *See* Hemel & Lund, *supra* note 19, at 1678 ("[I]f securities law forces publicly traded companies to disclose large sexual harassment settlements or allegations against executives, those revelations—insofar as they supply further evidence of the problem's prevalence—may add further fuel to the push for legal reform.").

[141] Notably, as explained previously, this Article focuses on mandatory reporting requirements to governmental regulators. As such, this Part does not discuss the role of

do so, this Part looks to examples of similar disclosure laws recently enacted in other high-income countries, as well as emerging models in some U.S. state laws. It then proposes a framework for requiring disclosures under U.S. federal law, identifying and building upon equality-related data already collected by some federal government agencies. As this Part argues, creating a cohesive mandatory disclosure scheme under federal antidiscrimination law does not require starting from scratch but rather expanding and improving current efforts, with the potential to vastly improve enforcement.

A. *Pay Data to Close Gender and Racial Pay Gaps*

Pay inequality by gender and race is a persistent, seemingly intractable problem that current antidiscrimination law has failed to solve, as underscored by the Time's Up movement. It has been nearly six decades since federal law prohibited discrimination in pay by sex and race,[142] yet significant gender and racial pay gaps remain.[143] In the most recent data, when comparing all women to all men working full time all year, women earned only eighty-two cents on the dollar to men, an 18% pay gap.[144] For women of color, the pay gap is even greater: Black women make sixty-two cents and Latinx women fifty-four cents to each dollar earned by White men, 38% and 46% gaps respectively.[145] The racial pay gap between White men and men of color is also stark; in recent data comparing median pay, Black and Latinx men earned just seventy-one cents on the dollar compared to White men, a whopping 29% gap in average pay.[146] Most troublingly, both gender and racial pay gaps have been stuck at close to these ratios for over two decades.[147] Of course, a significant portion of both racial and gender pay gaps are caused not by discrimination but by actual demographic differences, including differences in experience and education (for racial pay gaps) and working hours (for gender pay gaps).[148] Yet even after adjusting the

voluntary disclosures by business entities either to the public or to their own employees—topics that are beyond the scope of this Article's focus on public enforcement efforts to relieve the enforcement burden on individual employees. For more on private law arguments, see sources cited *supra* note 17.

[142] *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 247 (codified at 42 U.S.C. § 2000e).

[143] *See* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 590-92 (2018).

[144] AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP: FALL 2019 UPDATE 1 (2019) [hereinafter THE SIMPLE TRUTH], https://ww3.aauw.org/aauw_check/files/2016/02/Simple-Truth-Update-2019_v2-002.pdf [https://perma.cc/6QM5-SB5F].

[145] *See* Bornstein, *supra* note 143, at 591-92.

[146] *Id.*

[147] *Id.*

[148] *Id.* at 592-93.

data to account for all such differences, pay gaps remain.[149] Economists now attribute between one-third and one-half of both gender and racial pay gaps to workforce segregation and discrimination,[150] causes that antidiscrimination law should be able to reach and remedy.

A mandatory disclosure requirement that collects and publishes pay data by race and gender stands to have a dramatic effect on exposing and rooting out the portion of the racial and gender pay gaps that result from discrimination. Recent data shows that the gender pay gap is smaller when salary information is transparent and known like, for example, in the federal public sector.[151] Yet sharing information among employees and within an individual employer is only the first step.[152] Reaping the full benefit of pay transparency requires a comprehensive approach in which employers are required to report pay data publicly and in a consistent fashion to force greater internal accountability and provide comparable data for employees, enforcers, and the public.[153]

1. Current Comparative Examples

The move to combat the gender pay gap globally has sparked a number of pay data collection laws. Over the past decade, spurred by their own persistent gender pay gaps and a 2014 recommendation by the European Commission to member states,[154] over a dozen European and other high-income countries have enacted some form of pay-data reporting requirements on large employers.[155]

[149] *Id.* at 594.

[150] *Id.* at 585, 587-88.

[151] *See, e.g.*, THE SIMPLE TRUTH, *supra* note 144, at 3 ("The pay gap is smaller for workers in sectors where pay transparency is mandated: For example, federal government workers experience a 13% pay gap between men and women; in the private, for-profit sector, that number jumps to 29%."). Notably, both union and federal-sector workers also have banded pay ranges, which are a large part of why their pay gaps are smaller. *See* Bornstein, *supra* note 143, at 638.

[152] *See* Modesitt, *supra* note 135; *supra* Section II.C.2.

[153] *See supra* Sections II.A, II.C.2.

[154] Lynne Bernabei & Kristen Sinisi, *Gender Pay Data: Impact of European Laws in the US*, LAW360 (May 11, 2018 11:40 AM), https://www.law360.com/publicpolicy/articles/1041706.

[155] As of April 2019, these include Australia, Austria, Belgium, Chile, Denmark, Finland, France, Germany, Iceland, Italy, Japan, Norway, Sweden, and the United Kingdom. *See* WORKPLACE GENDER EQUAL. AGENCY, AUSTL. GOV'T, INTERNATIONAL GENDER EQUALITY REPORTING SCHEMES 11 (2019) [hereinafter INTERNATIONAL REPORTING SCHEMES], https://www.wgea.gov.au/sites/default/files/documents/2019-04-4%20International%20reporting%20schemes_Final_for_web_0.pdf [https://perma.cc/P3U3-2ZCF]. Some provinces of Canada and India have related laws as well. *See* DLA PIPER, GENDER PAY REPORTING: AN INTERNATIONAL SURVEY (SEPTEMBER 2018), at 11-19, 32-35 (2018), https://www.dlapiper.com/~/media/files/insights/events/2018/11/international_gender_pay_gap_report_2018_us.pdf [https://perma.cc/Y7H4-LJC7]; *see also* EUR. COMM'N, PAY TRANSPARENCY: TIME TO SEE THE GAP! 4 (2019), https://ec.europa.eu/info/sites

These reporting schemes range from imposing light to moderate to robust obligations on employer entities.[156] As such, they provide a variety of approaches from which U.S. law could draw.

On the lightest touch side of this spectrum, several countries require that employers collect and report data on gender pay gaps internally to representatives from unions or employee "councils," who then "monitor the status" of gender pay equality at the firm.[157] For example, Austria requires employers of 150 or more employees to provide a report on "gender composition and income data" to internal "work council[s]" or, if none, all employees every two years.[158] While such an approach offers pay transparency, it relies on a robust system of unions or work councils, which the United States lacks,[159] or private enforcement, with its challenges described previously.[160]

On the opposite end of the spectrum, Iceland requires even small companies to certify that their pay structures comply with government standards for equal pay, representing the strongest equal pay protection laws to date.[161] In 2017, Iceland enacted requirements that all employers of twenty-five or more employees conduct a pay audit in accordance with government standards to receive an official equal pay "certification" from the government.[162] Employers

/info/files/factsheet-pay_transparency-2019.pdf [https://perma.cc/N9PZ-GR66]; *The Gender Pay Gap Situation in the EU*, EUR. COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en#differences-between-the-eu-countries [https://perma.cc/D4YX-C9VG] (last visited Dec. 28, 2020).

[156] INTERNATIONAL REPORTING SCHEMES, *supra* note 155, at 5. In a recent report, the Australian Government's Workplace Gender Equality Agency analyzed these laws as falling into five categories (listed here from weakest to strongest): (1) "[l]imited external transparency," requiring reporting of gender pay gaps to "internal work councils"; (2) "[c]omprehensive," requiring submission of data on multiple indicators to a federal agency; (3) "[t]ransparency," requiring reporting on gaps to a government agency for publication; (4) "[t]ransparency and accountability," requiring public reporting plus "demonstrate[d] actions to close gender pay gaps"; and (5) "[l]egislation," requiring certification of compliance with government equal pay standards. *Id.*

[157] *Id.* at 11.

[158] *Id.* at 12; *accord* BUNDES-GLEICHBEHANDLUNGSGESETZ [B-GBG] [FEDERAL EQUAL TREATMENT ACT] BUNDESGESETZBLATT [BGBL] No. 100/1993 (Austria).

[159] Eric Morath, *U.S. Union Membership Hits Another Record Low*, WALL ST. J. (Jan. 22, 2020, 1:19 PM), https://www.wsj.com/articles/u-s-union-membership-hits-another-record-low-11579715320 (explaining that in 2019, only 10.3% of U.S. workforce and 6.2% of private sector employees are union members according to the Bureau of Labor Statistics).

[160] *See supra* Part I, Section II.C.1.

[161] INTERNATIONAL REPORTING SCHEMES, *supra* note 155, at 9.

[162] ÞORSTEINN VÍGLUNDSSON, REGULATION: THE CERTIFICATION OF EQUAL PAY SYSTEMS OF COMPANIES AND INSTITUTIONS ACCORDING TO THE ÍST 85 STANDARD, No. 1030, art. 7 (2017), https://www.government.is/library/04-Legislation/Regulation_CertificatinOfEqualPaySytems_25012018.pdf [https://perma.cc/PW8Y-PQX4]; VELFERÐARRÁÐUNEYTIÐ MINISTRY OF WELFARE, ACT ON EQUAL STATUS AND EQUAL RIGHTS OF WOMEN AND MEN, NO. 10/2008, AS AMENDED BY ACT NO. 56/2017, art. 19 (2014),

must submit their pay data to a third-party "accredited auditor" that reviews and certifies that their compensation system complies with the government's "Standard ÍST 85."[163] Certification demonstrates "that wages paid by the company . . . are at all times determined in the same way for women and men, and that the considerations on which decisions on wage are based do not involve discrimination on grounds of gender."[164] Companies that fail to submit their data within four years of the law's effective date of January 2018 may be subject to daily fines for noncompliance.[165] While certainly the most likely to correct any discrimination in pay, such a heavy-handed policy that interferes with employer discretion about pay setting is likely to be a nonstarter in the United States.[166]

Toward the middle of this spectrum, several countries impose a moderate requirement, combining transparency with accountability through government

https://www.government.is/library/04-Legislation/Act%20on%20equal%20status%20and%20equal%20rights%20of%20women%20and%20men%20no%2010%202008%20as%20amended%200101%202018%20final.pdf [https://perma.cc/Y6D6-CBBK]; *Equal Pay Certification*, GOV'T ICE., https://www.government.is/topics/human-rights-and-equality/equal-pay-certification/ [https://perma.cc/DZ9C-7UGV] (last visited Dec. 28, 2020); *see also* Lauren Collins, *What Women Want*, NEW YORKER, July 23, 2018, at 34, 42 ("The law is innovative because it makes employers actively justify their policies, rather than relying on regulators to seek out violations. It doesn't change the law so much as enforce it.").

[163] *Equal Pay Certification*, *supra* note 162.

[164] *Id.* (click "03. What is equal pay certification?").

[165] Jon Henley, *'Equality Won't Happen By Itself': How Iceland Got Tough on Gender Pay Gap*, GUARDIAN (Feb. 20, 2018, 3:22 AM), https://www.theguardian.com/world/2018/feb/20/iceland-equal-pay-law-gender-gap-women-jobs-equality [https://perma.cc/8TRC-T68L].

[166] *See* Lauren B. Edelman, Linda H. Krieger, Scott R. Eliason, Catherine R. Albiston & Virginia Mellema, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOCIO. 888, 894 (2011) (documenting how "judges simply defer to the [organizational] structure, assuming that the mere presence of the structure means that the organization is complying with civil rights law"); Jordain Carney, *McConnell Pledges to Be 'Grim Reaper' for Progressive Policies*, HILL (Apr. 22, 2019, 2:43 PM), https://thehill.com/homenews/senate/440041-mcconnell-pledges-to-be-grim-reaper-for-progressive-policies [https://perma.cc/2ZD3-UX2F]. However, one U.S. state comes close to something of this sort in its public contracting. In Minnesota, employers of 40 or more who seek to obtain a contract from the state government for a value of $500,000 or more must complete an Equal Pay Certification from the state that requires the employer to certify, inter alia,

> that the average compensation for its female employees is not consistently below the average compensation for its male employees within each of the major job categories in the EEO-1 employee information report for which an employee is expected to perform work under the contract, taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors.

MINN. STAT. § 363A.44(2)(a)(2) (2020); *see also Equal Pay Certificate*, MINN. DEP'T OF HUM. RTS., https://mn.gov/mdhr/certificates/apply-renew/equal-pay-certificate/ (last visited Dec. 28, 2020).

publication—a model likely most appropriate for informing U.S. federal law. In 2016, the United Kingdom passed new regulations to its Equality Act requiring private employers of 250 or more to report gender pay gap data annually.[167] The Act went into effect on April 6, 2017, with the first reporting required one year later in April 2018.[168] Covered companies must collect data as a "snapshot" every April 5 on hourly and bonus pay and on earnings ranges by gender.[169] They must then follow instructions to calculate and produce data on six measures: mean and median pay gaps by gender in both hourly and bonus pay, proportion of each gender receiving a bonus, and proportion of each gender earning each quartile of pay.[170] Once complete, employers must publish these six calculations along with a written statement describing their results on their own "public-facing website" and report their data to the U.K. government's "gender pay gap reporting service," where it is also made public.[171] Any failure to produce accurate data on time may be subject to "legal action from the Equality and Human Rights Commission (EHRC), leading to court orders and fines."[172] The law goes beyond pay transparency for employees' and applicants' own information; by "increasing public scrutiny" of each company's gender pay disparities,[173] it creates accountability likely to spur internal change.[174]

While only recently enacted, data on the impact of the British approach has been stark. Anecdotally, in the months after the first reports were due in April 2018, companies that discovered their own significant gender pay gaps only after complying with the reporting requirements promised to improve gender equality.[175] After reporting the largest average gender pay gap in the country's media industry—37%—despite having three times more female than male

[167] The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, art. 2 (U.K.).

[168] Amie Tsang, *New Rule Aims to Close Pay Gap in British Companies*, N.Y. TIMES, Apr. 7, 2017, at B2.

[169] The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172, art. 2 (U.K.); *see also* Collins, *supra* note 162, at 40.

[170] *Guidance: Gender Pay Gap Reporting: Make Your Calculations*, GOV.UK, https://www.gov.uk/guidance/gender-pay-gap-reporting-make-your-calculations [https://perma.cc/Y7DY-R24Y] (last updated Mar. 25, 2020).

[171] *Search and Compare Gender Pay Gap Data*, GOV.UK, https://gender-pay-gap.service.gov.uk [https://perma.cc/6Z84-VUX6] (last visited Dec. 28, 2020); *Guidance; Gender Pay Gap Reporting: Overview*, GOV.UK [hereinafter *UK Overview*], https://www.gov.uk/guidance/gender-pay-gap-reporting-overview [https://perma.cc/2K95-KP3N] (last updated Mar. 25, 2020) (summarizing reporting requirements for covered U.K. companies).

[172] *UK Overview*, *supra* note 171.

[173] Collins, *supra* note 162, at 40; *see also* Liz Alderman, *Britain Aims to Close Pay Gap with Transparency and Shame*, N.Y. TIMES, Apr. 5, 2018, at B1.

[174] *See supra* Section II.A.

[175] Collins, *supra* note 162, at 41.

employees,[176] publishing giant Condé Nast promised to correct the significant gap in their top quartile of earnings due in part to male-dominated leadership.[177] After disclosing a nearly 52% mean gender pay gap, the CEO of the airline EasyJet took a voluntary £34,000 pay cut to reduce his pay to that earned by his female predecessor, reflecting his "'personal commitment' to equality."[178]

Quantitative data showed that, at the first-year reporting deadline of April 2018, 80% of approximately 10,000 employers reporting had a gender pay gap, nearly one-third of which reported a pay gap over the United Kingdom's 18.4% national median.[179] One year later, little had changed, with the same 80% of employers reporting a pay gap and "negligible" improvement in the average gap, shrinking from 9.7% in 2018 to 9.6% in 2019.[180] This was largely attributable to the lack of women in the highest paid quartile, another statistic that moved in miniscule fashion from 2018 to 2019, from 37% to 38% of earners in reporting employers' top pay quartiles.[181] Those working on pay-gap issues anticipated that change would not happen overnight and instead that trends would improve after several years.[182]

Yet there is no doubt that collecting and publishing the data is starting to have an impact, particularly on high-profile individual employers. For example, the Guardian News and Media group committed to increasing gender diversity in the leadership ranks of their organization and successfully reduced their gender

[176] Corinne Purtill, *Condé Nast Has More Women than Men at Every Pay Grade and Still Has a Gender Pay Gap*, QUARTZ AT WORK (Apr. 5, 2018), https://qz.com/work/1245980/conde-nast-uk-gender-pay-gap-men-still-earn-more-than-women-at-every-level/#:~:text=Cond%C3%A9%20Nast%20has%20more%20women,has%20a%20gender%20pay%20gap&text=Almost%2080%25%20of%20reporting%20employers,their%20female%20co%2Dworkers%20do [https://perma.cc/778C-QQU5]; *see also* Charlotte Tobitt, *Gender Pay Gap Figures in Full: Conde Nast, Telegraph and Economist Groups Among Worst Offenders for Pay Disparity in UK Media*, PRESS GAZETTE (Apr. 5, 2018), https://www.pressgazette.co.ukv/gender-pay-gap-figures-in-full-conde-nast-telegraph-and-economist-groups-among-worst-offenders-for-pay-disparity-in-uk-media/ [https://perma.cc/S94K-74KG].

[177] Collins, *supra* note 162, at 40; Tobitt, *supra* note 176.

[178] Collins, *supra* note 162, at 40.

[179] Alexandra Topping, Caelainn Barr & Pamela Duncan, *Gender Pay Gap Figures Reveal Eight in 10 UK Firms Pay Men More*, GUARDIAN (Apr. 4, 2018, 2:14 PM), https://www.theguardian.com/money/2018/apr/04/gender-pay-gap-figures-reveal-eight-in-10-uk-firms-pay-men-more [https://perma.cc/76PR-XJ6D].

[180] Caelainn Barr, Niko Kommenda & Caroline Davies, *Gender Pay Gap: What Did We Learn This Year?*, GUARDIAN (Apr. 5, 2019, 1:00 AM), https://www.theguardian.com/world/ng-interactive/2019/apr/05/gender-pay-gap-what-did-we-learn-this-year [https://perma.cc/JW5W-MDGT].

[181] *Id.*

[182] *Id.* ("Helene Reardon Bond, gender pay gap consultant and former head of policy at the Government Equalities Office, said a big reduction in the gender pay gap of most organisations was unlikely. 'It will take a few years for the trends to appear and for meaningful action and good practice to kick in,' she said.").

pay gap from 12.1% in 2017 to 8.4% in 2018 and 4.9% in 2019, cutting their gap by more than half over just two years.[183] But Condé Nast and EasyJet, both shocked at the gaps they discovered when reporting in 2017, showed mixed results in 2018: Condé Nast decreased their average hourly wage gap from 37% to 31%,[184] but EasyJet's gap increased from 51.7% to 54%.[185] A lack of improvement spurred further action in some industries, including attracting signatories to the United Kingdom's Women in Finance Charter, to which over 330 companies in the financial services sector have pledged.[186] Indeed, the data collection and publication process will likely have its ups and downs and take several years to show real progress, but there is no doubt that the law has made a significant impact on measuring and beginning to address unequal pay. To date, the EU has not required the same data collection by race or ethnicity but has begun to explore the issue.[187] And more than a dozen top employers signed a pledge to voluntarily provide such data in the wake of the gender-pay-gap reporting requirements and assist others who wish to do so with a toolkit.[188]

[183] Charlotte Tobitt, *Gender Pay Gap Figures 2018: Telegraph, Reuters, ITN, Guardian, BBC and FT Publish Reduced Wage Gaps + Full List So Far*, PRESS GAZETTE (July 17, 2018), https://www.pressgazette.co.uk/gender-pay-gap-figures-2018-guardian-bbc-and-ft-first-media-organisations-to-publish-reduced-wage-gaps-full-list-so-far/ [https://perma.cc/F8HX-69RR]; Charlotte Tobitt, *Gender Pay Gap: Pay Disparity Increased at Six in Ten UK News Media Companies in 2019*, PRESS GAZETTE (Apr. 16, 2020), https://www.pressgazette.co.uk/gender-pay-gap-pay-disparity-increased-at-six-in-ten-uk-news-media-companies-in-2019/ [https://perma.cc/4N2F-8UKR].

[184] *Compare Conde Nast Publications Limited (The): Gender Pay Gap Report*, GOV.UK (Apr. 5, 2017), https://gender-pay-gap.service.gov.uk/Employer/ndQZEJnl/2017 [https://perma.cc/Q23B-QZE2], *with Conde Nast Publications Limited (The): Gender Pay Gap Report*, GOV.UK (Apr. 5, 2018), https://gender-pay-gap.service.gov.uk/Employer/ndQZEJnl/2018 [https://perma.cc /CJZ7-2QMU].

[185] *Compare EasyJet Airline Company Limited: Gender Pay Gap Report*, GOV.UK (Apr. 5, 2017), https://gender-pay-gap.service.gov.uk/Employer/EMxvV2qy/2017 [https://perma.cc/SX29-NXQV], *with EasyJet Airline Company Limited: Gender Pay Gap Report*, GOV.UK (Apr. 5, 2018), https://gender-pay-gap.service.gov.uk/Employer/EMxvV2qy/2018 [https://perma.cc/76EC-T3NM].

[186] HM TREASURY, WOMEN IN FINANCE CHARTER (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/519620/women_in_finance_charter.pdf [https://perma.cc/PQ8G-N2NL]; *see also* Barr, Kommenda & Davies, *supra* note 180 ("John Glen, economic secretary to the Treasury, said: 'Gender pay gap reporting has shone a light on the inequalities women experience, and it's clear that the financial sector needs to take swift action to get its house in order.'").

[187] *See* LORNA ADAMS, AOIFE NI LUANAIGH, DOMINIC THOMSON & HELEN ROSSITER, EQUAL. & HUM. RTS. COMM'N, RESEARCH REPORT 117, MEASURING AND REPORTING ON DISABILITY AND ETHNICITY PAY GAPS 23-45 (2018), https://www.equalityhumanrights.com/sites/default/files/measuring-and-reporting-on-ethnicity-and-disability-pay-gaps.pdf [https://perma.cc/4HWL-54NZ].

[188] *See* Cassie Werber, *15 UK Companies Have Volunteered to Report Their Ethnicity Pay Gaps*, QUARTZ AT WORK (Feb. 28, 2019), https://qz.com/work/1562321/15-uk-companies-will-report-their-ethnicity-pay-gaps/ [https://perma.cc/4DJA-ET9L].

While such global efforts may provide the best models for a U.S. federal law, some U.S. states have started to legislate in this area. To date, at least sixteen states have enacted pay transparency laws that prohibit employers from penalizing employees from sharing or inquiring about pay.[189] Notably, the federal National Labor Relations Act also protects covered employees in this matter.[190] At least seventeen states have also banned employers from asking job applicants about their prior salaries, which aims to improve pay equity in starting salaries.[191] Yet only three states have enacted salary-information-disclosure laws, all aimed at individual applicants. Colorado[192] requires job postings to disclose pay range and benefits; California[193] and Washington[194] require an employer to provide information on pay scale for a position offered upon the employee's request.

Lastly, New York has introduced[195] and California has recently enacted[196] legislation requiring more comprehensive pay data disclosure to state regulators. The California law, enacted in October 2020 and taking effect in March 2021, requires private employers of 100 or more employees—that are already

[189] *See Equal Pay and Pay Transparency Protections*, U.S. DEP'T LAB. WOMEN'S BUREAU, https://www.dol.gov/agencies/wb/equal-pay-protections [https://perma.cc/5QGD-4ZY6] (last visited Dec. 28, 2020) (providing that state pay-transparency protections are available for employees in California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Vermont, and Washington, D.C.).

[190] *See* National Labor Relations Act of 1935, Pub. L. No. 74-198, §§ 7-8, 49 Stat. 449, 452-53 (codified as amended at 29 U.S.C. §§ 157-158(a)).

[191] *See Your Guide to Salary History Laws by State and Locality*, SALARY.COM, https://www.salary.com/resources/guides/salary-history-inquiry-bans/ [https://perma.cc/5HP9-NCCK] (last visited Dec. 28, 2020) (listing seventeen "state-wide salary history bans"); *e.g.*, CAL. LAB. CODE § 432.3 (West 2020); 820 ILL. COMP. STAT. 112 (2019); N.Y. LAB. LAW § 194-a (McKinney 2020).

[192] S.B. 19-085, 72nd Gen. Assemb., Reg. Sess. (Colo. 2019); COLO. REV. STAT. § 8-5-201(2) (eff. Jan. 1, 2021).

[193] LAB. § 432.3(c) ("An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment. For purposes of this section, 'pay scale' means a salary or hourly wage range. For purposes of this section 'reasonable request' means a request made after an applicant has completed an initial interview with the employer.").

[194] WASH. REV. CODE § 49.58.110(1) (2020) ("Upon request of an applicant for employment after the employer has initially offered the applicant the position, the employer must provide the minimum wage or salary for the position for which the applicant is applying.").

[195] S.B. S4065, 2019-2020 Leg., Reg. Sess. (N.Y. 2019). In addition, a separate bill has been introduced to track pay data among New York state contractors. S.B. S1482, 2019-2020 Leg., Reg. Sess. (N.Y. 2019).

[196] S.B. 973, 2019-2020 Leg., Reg. Sess. (Cal. 2020).

compelled to provide some data to federal agencies[197]—to provide pay data by sex, race, and ethnicity in ten occupational categories to the state fair employment practices agency, which can make reports available to the state labor department when requested.[198] While data is not made public generally, the state agencies may, but are not required to, "develop, publish, . . . and publicize aggregate reports based on the data obtained . . . , provided that the aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person."[199] New York's proposed bill includes similar provisions.[200]

Thus, looking at a variety of international models and early movement in the states provides a rich background to support federal efforts around meaningful pay data collection.

2. Requiring Pay-Data Disclosures in U.S. Law

At the federal level, some limited data collection has been required of larger companies and those receiving federal contracts for decades. Since 1966, just after the enactment of Title VII, federal law has required certain employers to disclose basic data on employees by gender, race, and job category through its Standard Form 100 or Employer Information Report EEO-1 ("EEO-1").[201] The relevant section of Title VII states that every employer or entity subject to the statute "[s]hall . . . make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed . . . and . . . make such reports therefrom as the Commission shall prescribe by regulation or order . . . as reasonable, necessary, or appropriate for the enforcement of [Title VII]."[202]

Under the implementing regulations to this section, the EEOC is authorized to collect EEO-1 forms from all private employers with 100 or more employees.[203] Under Executive Order 11,246, the Office of Federal Contract Compliance Programs ("OFCCP") is authorized to collect EEO-1 forms from all private federal contractors with fifty or more employees that receive federal

[197] The California law applies to "a private employer that has 100 or more employees and who is required to file an annual Employer Information Report (EEO-1) pursuant to federal law." *Id.* § 3(a). Federal EEO-1 reports are discussed in the next section. *See infra* notes 201-09 and accompanying text.

[198] Cal. S.B. 973, § 3.

[199] *Id.* § 3(k); *see also Pay Data Reporting*, CAL. DEP'T FAIR EMP. & HOUS., https://www.dfeh.ca.gov/paydatareporting [https://perma.cc/JCQ9-T8QG] (last updated Nov. 23, 2020).

[200] N.Y. S.B. S4065, § 1.

[201] *See* 42 U.S.C. § 2000e-8(c); 29 C.F.R. §§ 1602.7-.14 (2020); *EEO-1: Who Must File*, EEOC, https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-who-must-file [https://perma.cc/36DY-7EYJ] (last visited Dec. 28, 2020).

[202] 42 U.S.C. § 2000e-8(c).

[203] 29 C.F.R. § 1602.7.

contracts worth $50,000 or more.[204] Covered entities must complete the form annually, providing a snapshot of racial and gender demographics of the workforce and identifying the gender (male or female) and race (from seven categories)[205] of employees in ten different job types.[206] The two agencies use this information internally to track compliance, inform investigations, and create periodic aggregated public reports about trends in workforce demographics.[207] Parties to litigation may seek to discover EEO-1 reports and use them either offensively (employees) or defensively (employers) to support or defend against claims of discrimination.[208] In addition, for federal contractors, the OFCCP conducts periodic "compliance evaluations," in which it can request "up-to-date, employee-level pay data from contractors," which "enables OFCCP to identify disparities in pay that may violate Executive Order 11,246 by comparing the pay of employees who are similarly situated under the contractors' pay practices."[209]

Given the persistence of gender and racial pay gaps, after several years of considering the option, in 2016, the EEOC under the Obama Administration used its regulatory authority[210] to expand data collected on the EEO-1 as a means

[204] Exec. Order No. 11,246, 3 C.F.R. § 339 (1965); 41 C.F.R. § 60-1.7 (2019); *see also* Pamela Wolf, *OFCCP Does Not Want Any EEO-1 Pay Data*, WOLTERS KLUWER (Nov. 25, 2019), https://lrus.wolterskluwer.com/news/employment-law-daily/ofccp-does-not-want-any-eeo-1-pay-data/99960/ [https://perma.cc/TX89-X78D].

[205] The seven racial categories are Hispanic or Latino, White, Black or African American, Asian, Native Hawaiian or Other Pacific Islander, American Indian or Alaskan Native, or Two or more races. *See* EEOC, EQUAL EMPLOYMENT OPPORTUNITY: EMPLOYER INFORMATION REPORT EEO—1 (2006) [hereinafter SAMPLE EEO-1], https://www.eeoc.gov/sites/default/files/migrated_files/employers/eeo1survey/eeo1-2-2.pdf [https://perma.cc/7CY3-7FMK]; *see also EEO-1 Instruction Booklet*, EEOC, https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm [https://perma.cc/83US-2Q6F] (last visited Dec. 28, 2020).

[206] These ten job types are Executive/Senior Level Officials and Managers, First/Mid-Level Officials and Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Laborers and Helpers, and Service Workers. SAMPLE EEO-1, *supra* note 205; *see also EEO-1 Instruction Booklet*, *supra* note 205.

[207] Robert W. Sikkel, *What EEO-1 Reports Really Tell Us*, PRAC. LITIGATOR, Sept. 2004, at 17; *see also, e.g.*, EEOC, CHARACTERISTICS OF PRIVATE SECTOR EMPLOYMENT (2003), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/statistics/reports/ceosummit/characteristics.pdf [https://perma.cc/A8ZN-ZM95]. In fact, the statute requires that individual data be kept confidential. *See infra* notes 226-31 and accompanying text.

[208] Sikkel, *supra* note 207, at 20-22.

[209] Intention Not To Request, Accept, or Use Employer Information Report (EEO–1) Component 2 Data, 84 Fed. Reg. 64,932, 64,933 (Nov. 25, 2019) (noting also that "OFCCP will continue to receive EEO–1 Component 1 data from covered contractors and subcontractors through the Joint Reporting Committee for purposes of reviewing their compliance with Executive Order 11246 and its implementing regulations, including the reporting requirements at 41 CFR 60–1.7"); *see also* Wolf, *supra* 204.

[210] 42 U.S.C. § 2000e-8(c); *see also* 29 C.F.R. § 1602.11 (2020) ("The Commission reserves the right to require reports, other than that designated as the Employer Information Report EEO–1, about the employment practices of individual employers or groups of

of improving enforcement efforts.[211] The EEOC held formal public hearings[212] and then went through the Notice and Comment process to amend the form, explaining,

> [P]ay discrimination persists as a serious problem that EEOC and OFCCP are statutorily required to address. The EEOC's mission is to stop and remedy unlawful employment discrimination. . . . [The agencies] now lack the employer- and establishment-specific pay data that, prior to issuing a detailed request for information or a subpoena, would be extremely useful in helping enforcement staff to investigate potential pay discrimination. Balancing utility and burden, the EEOC has concluded that the proposed EEO–1 pay data collection would be an effective and appropriate tool for this purpose . . . .
>
> Using aggregated EEO–1 data, . . . the EEOC expects to periodically publish reports on pay disparities by race, sex, industry, [and] occupational groupings . . . .
>
> The EEOC's publication of aggregated pay data, in conjunction with the employer's preparation of the EEO–1 report itself, may be useful tools for employers to engage in voluntary self-assessment of pay practices.[213]

As required under the Paperwork Reduction Act ("PRA"), the EEOC sought, and was granted, permission from the Office of Management and Budget ("OMB") to revise the standard EEO-1 form to add fields collecting summary pay data.[214] This data was referred to as "Component 2" data, while the

employers whenever, in its judgment, special or supplemental reports are necessary to accomplish the purposes of title VII . . . .").

[211] The Obama Administration also sought to expand pay transparency among federal contractors through two Executive Orders. First, Executive Order 13,665, which remains in effect, prohibits most federal contractors receiving $10,000 or more from firing or penalizing any applicant or employee for "inquir[ing] about, discuss[ing], or disclos[ing]" their or others' pay. Exec. Order No. 13,665, 79 Fed. Reg. 20,749, 20,749 (Apr. 11, 2014). Second, Executive Order 13,673 required that any entity receiving a federal contract for over $500,000 provide regular wage statements to workers and disclose any resolutions against them under Title VII or other labor laws in the prior three years; it also barred any contracts in excess of $1 million from requiring arbitration of Title VII claims or tort claims for sexual harassment or assault without voluntary consent by the claimant. Exec. Order No. 13,673, 79 Fed. Reg. 45,309, 45,309-14 (Aug. 5, 2014). Upon taking office, President Trump issued his own Executive Order 13,782, which revoked these provisions of Executive Order 13,673. Exec. Order No. 13,782, 82 Fed. Reg. 15,607, 15,607 (Mar. 30, 2017).

[212] *See, e.g.*, *Hearing of March 16, 2016 - Public Input into the Proposed Revisions to the EEO-1 Report*, EEOC, https://www.eeoc.gov/meetings/hearing-march-16-2016-public-input-proposed-revisions-eeo-1-report [https://perma.cc/6MGD-3YLA] (last visited Dec. 28, 2020).

[213] Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45,479, 45,483, 45,491 (July 14, 2016).

[214] *See id.* at 45,492.

traditional EEO-1 data collected on jobs by race and sex without pay information was referred to as "Component 1" data.[215] To collect Component 2 information, the EEO-1 form was revised in two ways. First, where employers already provided racial and gender data on employees in each of eleven job categories, it subdivided those listed in each category by pay, requiring each employee to be listed in one of twelve pay bands ranging from "$19,239 and under" to "$208,000 and over."[216] Second, using the same pay bands, job categories, and racial categories, it required employers to report work hours.[217] Thus without dramatically revising the form, it added a granular detail on both pay and work hours. In September 2016, the OMB approved the change, and the Component 2 addition to the EEO-1 reporting was set to take effect for reporting years 2017 and 2018.[218]

However, with the change in presidential administration came changes at both the OMB and the EEOC. In August 2017, the Trump Administration's OMB issued a stay of the collection of Component 2 data, claiming that it was "concerned that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."[219] In response, the National Women's Law Center ("NWLC") sued to enforce the properly enacted regulation, arguing that, by imposing the stay, the "OMB . . . violated the PRA and Administrative Procedure Act ("APA") and exceeded their statutory authority."[220] The District Court for the District of Columbia agreed, finding that the OMB's justification "rest[ed] on hyper-technical formatting changes that have no real consequences for employers"[221] and thus "provided inadequate reasoning to support its decision to stay the data collection."[222] In March 2019, the District Court vacated

[215] *Id.*

[216] The twelve pay bands were $19,239 and under, $19,240 - $24,439, $24,440 - $30,679, $30,680 - $38,999, $39,000 - $49,919, $49,920 - $62,919, $62,920 - $80,079, $80,080 - $101,919, $101,920 - $128,959, $128,960 - $163,799, $163,800 - $207,999, and $208,000 and over. FOLEY & LARDNER LLP, COMPONENT 2 EEO-1 ONLINE FILING SYSTEM SAMPLE FORM 1, https://www.foley.com/-/media/files/firm/comp2eeo1onlinefilingsampleform.pdf [https://perma.cc/3MF9-A7UF] (last visited Dec. 28, 2020).

[217] *Id.*; *see also* Jeffery S. Kopp, *Very Important Time-Sensitive New Requirements for EEO-1 Component 2 Filings*, FOLEY & LARDNER LLP (July 26, 2019), https://www.foley.com/en/insights/publications/2019/07/very-important-time-sensitive-eeo1-component-2 [https://perma.cc/9ESN-REG4].

[218] Press Release, EEOC, EEOC to Collect Summary Pay Data (Sep. 29, 2016), https://www.eeoc.gov/newsroom/eeoc-collect-summary-pay-data [https://perma.cc/7LTP-SP5E].

[219] Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget, 358 F. Supp. 3d 66, 74-75 (D.D.C. 2019) (citing Memorandum from Neomi Rao, Adm'r, Off. of Info. & Regul. Affs., to Victoria Lipnic, Acting Chair, Equal Emp. Opportunity Comm'n (Aug. 29, 2017)).

[220] *Id.* at 76.

[221] *Id.* at 92.

[222] *Id.* at 90.

the OMB's stay of the enacted regulation.[223] In a subsequent order on April 25, 2019 granting injunctive relief, the court held "that EEOC must immediately take all steps necessary to complete the EEO-1 Component 2 data collections for calendar years 2017 and 2018 by September 30, 2019"[224]—a task not "deemed complete . . . until the percentage of EEO-1 reporters that have submitted their EEO-1 Component 2 reports equals or exceeds the mean percentage of EEO-1 reporters that . . . submitted EEO-1 reports in each of the past four reporting years."[225]

The Trump Administration appealed[226] but also, in July 2019, began collecting 2017 and 2018 Component 2 data per the court order,[227] hiring the National Opinion Research Center ("NORC") at the University of Chicago to help do so.[228] Yet the victory was short lived. In September 2019, the EEOC announced that it would not extend Component 2 data collection past the two years of data covered by the 2016 regulation, and it sought renewal of collection of Component 1 data only.[229] As it had in its defense against the NWLC lawsuit, the Administration cited costs, stating that, in March 2019, new data staff at the EEOC "re-examined the methodology used to calculate the . . . burden for the collection of EEO–1 data" and concluded that the 2016 EEOC staff underestimated the cost significantly.[230] Moreover, in November 2019, the

[223] *Id.* at 93.

[224] Order at 1, *Nat'l Women's L. Ctr.*, 358 F. Supp. 3d 66 (No. 17-cv-2458) [hereinafter Apr. 2019 Order].

[225] *Id.* at 2; *see also* Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45,479, 45,483-89 (July 14, 2016).

[226] Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget, No. 19-5130, 2020 U.S. App. LEXIS 18144 (D.C. Cir. June 9, 2020). The appeal was granted in part and dismissed as moot based on the parties agreement that the government "substantially complied with the district court's post-judgment orders." *Id.*

[227] Reinstatement of Revised EEO–1: Pay Data Collection, 84 Fed. Reg. 18,383 (May 1, 2019); *see also* Lisa Nagele-Piazza, *Employers Must Submit EEO-1 Pay Data by Sept. 30*, SHRM (Apr. 30, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/eeo-1-report-hearing.aspx [https://perma.cc/E96Q-ZNYC].

[228] Press Release, EEOC, EEOC Opens Calendar Years 2017 and 2018 Pay Data Collection (July 15, 2019), https://www.eeoc.gov/newsroom/eeoc-opens-calendar-years-2017-and-2018-pay-data-collection [https://perma.cc/KNT5-RXLS].

[229] Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48,138, 48,138 (Sept. 12, 2019).

[230] *Id.* at 48,138-40. These were shockingly different figures, with the Obama EEOC estimating $54 million total in costs to business for data collection for 2017 and 2018 combined, and the Trump EEOC estimating $614 million in 2017 and $622 million in 2018—a difference of nearly $1.2 billion. *What You Should Know About EEOC and the Publication of the Notice of Information Collection Regarding the EEO-1.*, EEOC [hereinafter *EEO-1 Collection Information*], https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-publication-notice-information-collection-regarding-eeo-1 [https://perma.cc/D5QZ-XQ8Z] (last visited Dec. 28, 2020).

OFCCP announced that it would not collect EEO-1 Component 2 data from federal contractors at all;[231] because Executive Order 11,246—not Title VII—provides the OFCCP with its EEO-1 authority, the OFCCP was not required to comply with the court's order.[232]

Then, on February 10, 2020, a mere seven months after first opening its portal to collect EEO-1 Component 2 data, the Trump Administration went back to the D.C. District Court to argue that it had met the terms of the court's April 25, 2019 order.[233] In a joint status report, the parties stated that 89.2% of all covered private employers had submitted their Component 2 pay data for 2017 and 2018,[234] thus meeting the condition for completion that the court had set to meet their duties under the reinstated 2016 regulation.[235] This condition satisfied, the court granted the order holding that the collection was complete.[236] Immediately the EEOC announced that it would be ending Component 2 data collection and shutting down the portal within a matter of days.[237]

As this history shows, the mechanism to create and enforce a mandatory pay-data reporting requirement in U.S. federal law already exists and can be utilized. Indeed, the state law recently enacted in California was explicitly modeled on the federal effort to collect EEO-1 Component 2 data,[238] meaning that all covered employers in California will already have to compile this information starting in March 2021. And despite the Trump Administration's arguments to the contrary, 90% of the 60,000 covered employers nationwide were able to comply despite any anticipated costs in as little as seven months.[239] As one attorney for the plaintiffs said, "The [Trump] administration said it was too burdensome for employers to collect equal pay data, and we proved them wrong."[240] At a minimum, the data collection already established under

[231] Intention Not to Request, Accept, or Use Employer Information Report (EEO–1) Component 2 Data, 84 Fed. Reg. 64,932, 64,933 (Nov. 25, 2019); *see also* Wolf, *supra* note 204.

[232] Wolf, *supra* note 204.

[233] Apr. 2019 Order, *supra* note 224.

[234] Joint Status Report at 1, Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget, 358 F. Supp. 3d 66 (D.D.C. 2019) (No. 17-cv-02458).

[235] Apr. 2019 Order, *supra* note 224, at 1-2; *see also* Adam Lidgett, *Judge Accepts EEOC Request to Close Out Pay Data Survey*, LAW360 (Feb. 10, 2020, 6:56 PM), https://www.law360.com/articles/1242409/judge-accepts-eeoc-request-to-close-out-pay-data-survey.

[236] Feb. 2020 Order at 2, *Nat'l Women's L. Ctr.*, 358 F. Supp. 3d 66 (No. 17-cv-02458).

[237] *2019 Component 1 EEO-1 Survey*, EEOC, https://www.eeoc.gov/employers/2019-component-1-eeo-1-survey [https://perma.cc/8V8S-MU7J] (last visited Dec. 28, 2020).

[238] S.B. 973, 2019-2020 Leg., Reg. Sess. § 1(d)-(e) (Cal. 2020) (discussing the Obama Administration's EEO-1 expansion efforts, halted by the Trump Administration, and stating that "[i]t is the intent of the [California] Legislature, in enacting this bill, to ensure that this pay data will continue to be compiled and aggregated in California").å

[239] Lidgett, *supra* note 235.

[240] *Id.* (alteration in original).

expanded Component 2 of EEO-1 should continue beyond the initial three-year requirement. Once the costs have been sunk and the processes established, there is simply no valid reason to stop pay-data collection. Indeed, any costs from startup would be amortized over a longer period of time, making it a better proposition for business entities.

Should a new administration decide to reinstate the data collection for future years, the next step would be to consider whether greater data collection or publication would be warranted. The enforcement power of pay-data collection could be expanded in three ways. First, collection could be expanded to smaller employers—that is, those with fewer than 100 employees. While this would expose potentially unfair pay disparities occurring at a significantly larger number of U.S. employers, it is not without its costs. To require companies that have never before filed an EEO-1 to do so would impose an administrative burden on companies that may be less able to absorb the costs—a much greater burden than requiring current EEO-1 filers to simply provide more types of data.[241] And the statistical significance of any conclusions drawn from pay patterns by race or sex may be impacted by sample size where an employer has fewer than 100 employees. Incrementally, then—and without seeing the effect of new data collection efforts on larger employers—it may strike a better balance not to extend mandatory EEO-1 data collection to smaller companies but to issue guidelines for their voluntary tracking and compliance.

Second, EEO-1 filers could be required to provide greater analysis of their own data. Notably, while the U.S. regulation requires collection and production of raw data, some European data collection models, including the U.K. model, require employers to actually calculate the gender pay gap in their own institutions and provide a narrative report explaining their results.[242] This would likely enhance the behavior-forcing effects of existing disclosure requirements by forcing employers to not only collect pay data but also actually confront the situation in their workplace and analyze any causes of gender and racial disparities.[243] While doing so would impose additional costs on employers, it could provide greater compliance and data for enforcement to the EEOC at no additional public cost to the federal government. Importantly, any U.S. business with employees in the United Kingdom is already required to produce this data for their employees located there,[244] posted on both the U.K. government's and the company's own websites. For example, Google, Facebook, Bank of America, American Airlines, and other large U.S businesses have already compiled reports for their U.K. employees.[245] Yet to require data in a meaningful way that can be compared across companies, the EEOC would have to create

[241] *See supra* Section IV.A.1.

[242] *See Overview*, *supra* note 5.

[243] *See supra* Section II.A.2.

[244] *UK Overview, supra* note 171.

[245] *See Search and Compare Gender Pay Gap Data*, *supra* note 171.

and provide calculation instructions as the U.K. government has done. Also, the U.K. requirement applies to employers of 250 or more, which are likely more able to absorb the additional costs of the analysis.

Third, and likely the least costly and most powerful means for expanding current EEO-1 requirements, would be to engage in greater public exposure of the data already being collected. Current EEO-1 reporting is provided only to the EEOC and is not published. With very little financial cost, the EEOC could make these reports publicly available online, for example, by creating a searchable database like that maintained in the United Kingdom. This would immediately enhance both the ability to correct for information asymmetry and the "publicness" values of pay-data disclosure,[246] as current and future employees, journalists, attorneys, and the public could all see the data the EEOC receives.

Yet, while there would be little financial cost to this expansion, this would require both a statutory change and a shift in employer expectations. A specific subsection of Title VII requires the EEOC to keep its compliance data, including EEO-1 forms, confidential; a violation of this provision is a criminal misdemeanor.[247] The EEOC may share EEO-1 information publicly—for example, in response to a request under the Freedom of Information Act ("FOIA")[248]—only after it institutes a "proceeding under Title VII involving the EEO-1 data."[249] The statute "allow[s] the EEOC to publish only aggregated data, and only in a manner that does not reveal any particular filer's or any individual employee's personal information."[250] As discussed further in Part IV, there would likely be significant opposition from the business community based on privacy concerns. Indeed, in its initial efforts to expand EEO-1 data collection to add Component 2 data, the Obama-era EEOC anticipated such concerns and stated that all collected data on the expanded EEO-1 would remain confidential.[251]

Again, evidence of pay or promotion gaps by gender or race do not prove discrimination, as many legitimate nondiscriminatory reasons (differences in

[246] *See supra* Sections II.A.1, II.A.3.

[247] 42 U.S.C. § 2000e-8(e) (prohibiting "any officer or employee of the Commission [from] mak[ing] public in any manner whatever any information obtained by the Commission pursuant to its authority . . . prior to the institution of any proceeding under this subchapter involving such information"); *see also* Equal Emp. Opportunity Comm'n v. Associated Dry Goods Corp., 449 U.S. 590, 598 (1981); *EEO-1 Instruction Booklet*, *supra* note 205.

[248] *See* 5 U.S.C. § 552.

[249] *See EEO-1 Instruction Booklet*, *supra* note 205; *accord Freedom of Information Act*, EEOC, https://www.eeoc.gov/eeoc/foia/index.cfm [https://perma.cc/3EWG-7Z87] (last visited Dec. 28, 2020).

[250] *EEO-1 Instruction Booklet*, *supra* note 205.

[251] Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45,479, 45,491-92 (July 14, 2016); *see also infra* Section IV.B.

qualifications, experience, seniority, and the like) could explain disparities. As a result, publication of raw data without an explanatory analysis or narrative could lead to misinterpretation by the public. Yet while such data does not prove discrimination, it can help expose the structural causes of pay gaps, both at an individual employer level and on a societal level. An employer who, after being required to collect pay data, realizes that there are far more women in lower paying roles may reflect upon its pay-setting and promotion procedures and consider training and retention policies of lower-level employees. And a public which sees that, across all employers, certain job categories are much more heavily filled by racial minorities may gain the political will to tackle the causes of workforce job segregation. Short of publishing individual employer data under the U.K. model, the EEOC could publish more aggregated data by industry or employer type as a first step in this process.

B. *Promotion Data to Break Through Glass Ceilings*

Closely related to the problem of persistent gender and racial pay gaps is the stall in progress to break through gender and racial glass ceilings. While many U.S. workplaces have diverse workforces overall, women and racial minorities are still significantly underrepresented in leadership positions within institutions and industries. Recent statistics show that little progress has been made since the enactment of Title VII in diversifying top leadership. For example, among Fortune 500 companies, only 1% of CEOs are Black, 2% are Latinx, and 5% are women.[252] Additionally, women lead only 167 of the top 3,000 businesses, just over 5.5%.[253] Studies have also documented that those who do make it to CEO face a "glass cliff" followed by a "savior effect": women and racial minorities are more likely to be promoted to CEO of weak performing firms and then replaced by White men if their performance slips.[254] Diversity is lacking not just in top leadership positions but also in the middle and upper-middle levels of leadership that pave the way to top positions. Among the Fortune 500, "[o]nly

[252] *Where's the Diversity in Fortune 500 CEOs?*, DIVERSITYINC (Oct. 8, 2012), https://www.diversityinc.com/wheres-the-diversity-in-fortune-500-ceos/ [https://perma.cc/NYU4-KBND]; *see also* Te-Ping Chen, *Why Are There Still So Few Black CEOs?*, WALL ST. J. (Sept. 28, 2020, 10:16 AM), https://www.wsj.com/articles/why-are-there-still-so-few-black-ceos-11601302601 (noting that Black professionals make up only 1% of executive positions in the top 500 companies, with Black women having least representation).

[253] Vanessa Fuhrmans, *Where Are All the Women CEOs?*, WALL ST. J. (Feb. 6, 2020, 10:34 AM), https://www.wsj.com/articles/why-so-few-ceos-are-women-you-can-have-a-seat-at-the-table-and-not-be-a-player-11581003276.

[254] *See generally* Alison Cook & Christy Glass, *Above the Glass Ceiling: When Are Women and Racial/Ethnic Minorities Promoted to CEO?*, 35 STRATEGIC MGMT. J. 1080, 1081-82 (2014).

22 percent of senior vice presidents are women . . . [and w]omen are 18 percent less likely to be promoted to manager than their male peers."[255]

Outside of the business sector, these patterns remain consistent, particularly in other traditionally white-collar, higher-paying fields. For example, despite earning 59% of all master's degrees—and many professional degrees, such as 48.5% in law and 47.5% in medicine—and despite holding nearly 52% of all managerial and professional jobs, women hold only about 10-20% of leadership positions, such as law firm equity partnerships, medical school deanships, or senior management positions in S&P 1500 companies.[256] Statistics also show a profound racial glass ceiling—only three of the Fortune 500 CEOs are Black,[257] and corporate leadership remains even less diverse than corporate board membership.[258] This doubly impacts women of color, who compose more than 18% of the U.S. workforce and employees of S&P 500 companies, yet hold just 4.7% of senior management positions in the S&P 500 and 0.4% (two) of CEO positions in the Fortune 500.[259]

While statistics alone do not prove discrimination, the repeated patterns of statistical overrepresentation by women and racial minorities in lower-level positions and underrepresentation in higher-level positions demonstrate systemic problems that remain nearly sixty years after Title VII was passed. As with pay data, requiring employers to track and analyze their own patterns of promotion and leadership can help identify structural causes of such disparities, whether due to, for example, lack of training or mentoring opportunities, flawed systems for assigning work or making promotion decisions, or the operation of unexamined bias.

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[255] Claire Cain Miller, *The Number of Women at the Top Is Falling*, N.Y. TIMES, May 27, 2018, at BU4; *see also* Sarah Coury, Jess Huang, Ankur Kumar, Sara Prince, Alexis Krivkovich & Lareina Yee, *Women in the Workplace 2020*, MCKINSEY & CO. (Sept. 30, 2020), https://www.mckinsey.com/featured-insights/gender-equality/women-in-the-workplace-2019# [https://perma.cc/4GFC-K8RW].

[256] Judith Warner, Nora Ellmann & Diana Boesch, *The Women's Leadership Gap: Women's Leadership by the Numbers*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:04 AM), https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/ [https://perma.cc/QQV3-XXB5].

[257] Ellen McGirt, Commentary, *raceAhead: Only Three Black CEOs in the Fortune 500*, FORTUNE (Mar. 1, 2018, 1:37 PM), https://fortune.com/2018/03/01/raceahead-three-black-ceos/.

[258] Susan E. Reed, *Corporate Boards Are Diversifying. The C-Suite Isn't.*, WASH. POST, Jan. 6, 2019, at B2.

[259] Warner, Ellmann & Boesch, *supra* note 256.

1. Current Comparative Examples

As with collection of pay data, and inspired by a lack of women and people of color in leadership positions throughout the world,[260] international and U.S. state-level public policies provide models for tracking gender and racial diversity in leadership upon which U.S. federal law could be based. Again, existing efforts range from a light to a strong touch, with some governments inferring leadership data from pay scale data, others requiring disclosures on corporate leadership, and some mandating diversity from firms, for example, in their board membership.[261]

On the lighter touch side of the spectrum, the United Kingdom's pay-data disclosures provide data by pay-band ranges that can be used to infer data about diversity in organizational leadership.[262] For example, in its 2018 disclosures to comply with the U.K. pay-data directive, Google was forced to report the gender makeup of employees in each of four quartiles of earnings.[263] The pay-gap disclosure showed a lack of gender diversity in leadership and promotional opportunities.[264] Further, over half of Google's lowest-paid employees were women, and the proportion of women in each quartile of earnings steadily declined as pay rose: women were 51% of employees in the lowest-paid quartile, 38% of the lower middle, 24% of the upper middle, and only 21% of the highest.[265]

Because U.K. law requires a narrative analysis to accompany the report, Google itself recognized the possibility of a gender glass ceiling in its operations, noting that, while it had "no statistically significant pay differences . . . based on gender, when accounting for role, performance and other factors," its roughly 20% pay gap between men and women "is driven by a representation gap"[266] in higher paid positions. As the report explained,

> The underrepresentation of women in senior leadership and engineering roles is a global and long term challenge, and we are committed to addressing this. The data for this report reflects representation as of April

[260] *See, e.g.*, *The Glass-Ceiling Index: The Latest Data Suggest Progress for Women at Work Has Stalled*, ECONOMIST (Mar. 8, 2019), https://www.economist.com/graphic-detail/2019/03/08/the-glass-ceiling-index.

[261] *See supra* Section III.A.1.

[262] *See* Paulina Pielichata, *U.K. Disclosure Reports Put Spotlight on Compensation*, PENSIONS & INVS. (Apr. 30, 2018, 1:00 AM), https://www.pionline.com/article/20180430/PRINT/180439997/u-k-disclosure-reports-put-spotlight-on-compensation [https://perma.cc/4ZNU-WVL2]; *see also supra* notes 167-73 and accompanying text.

[263] *See* GOOGLE, GOOGLE UK: GENDER PAY REPORT 2 (2018), https://static.googleusercontent.com/media/diversity.google/en//static/pdf/Google_UK_2018_Gender_Pay_Report.pdf [https://perma.cc/LCK6-C9TX].

[264] *Id.* at 1.

[265] *Id.* at 2.

[266] *Id.* at 1.

> 2018. Since then, we've added dedicated staffing teams to focus on senior engagement and hiring, as well as launched inclusive hiring guidelines to support those involved in the process.
>
> . . . .
>
> And because we know that hiring alone isn't enough, we've launched new retention initiatives, including a sponsorship programme that pairs high-potential women directors with vice presidents who provide coaching and advocacy to advance their careers.
>
> . . . .
>
> Over the past year, we've begun sharing ownership for our diversity, equity, and inclusion goals with our most senior leaders in order to accelerate progress.[267]

Google's reaction demonstrates that simply collecting pay data by quartile is enough to provide information on demographics in leadership and to inspire greater efforts toward promotion of diverse candidates.

Relatedly, other countries have taken a much stronger approach to diversifying corporate boards. Since 2002, when Norway became the first, at least fifteen countries have enacted laws requiring specific diverse membership on boards of publicly traded corporations.[268] These so-called "gender quota" laws range from requiring one female board member, like in the UAE and India, to a full 50% female membership, like in Israel, Greenland, and Quebec, with most countries in the 30-40% range.[269] Consequences for failing to comply range from none to fees; denial of public contracts; refusal to register the board; or even, as in Norway, dissolving the company.[270]

At the U.S. state level, one state, California, enacted a similar law in 2018, which it expanded in 2020. The Act requires all publicly held corporations "whose principal executive offices . . . are located in California"[271] to have a minimum of one female member of its board of directors by the end of 2019; by the end of 2021, boards of five or more members must raise this to two and six or more members to three female directors.[272] Corporations that fail to comply may be fined $100,000 for a first violation and $300,000 for any subsequent

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[267] *Id.* at 2-3.

[268] *See* Siri Terjesen & Ruth Sealy, *Board Gender Quotas: Exploring Ethical Tensions from a Multi-Theoretical Perspective*, 26 BUS. ETHICS Q. 23, 39 (2016); Siri Terjesen, Ruth V. Aguilera & Ruth Lorenz, *Legislating a Woman's Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors*, 128 J. BUS. ETHICS 233, 235 (2015).

[269] Terjesen & Sealy, *supra* note 268, at 26.

[270] *Id.* at 39, 65.

[271] CAL. CORP. CODE § 301.3(a) (West 2020) (eff. Jan. 1, 2021).

[272] *Id.* § 301.3(f) (defining "Female" as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth," and defining "[p]ublicly held corporation" as "a corporation with outstanding shares listed on a major United States stock exchange").

violation.[273] Interestingly, the requirement is coupled with public disclosure by the California Secretary of State, who "shall publish a report on its Internet Web site" detailing the number of corporations covered, the number in compliance, and the number that either moved in or out of compliance or went private.[274] In 2020, California expanded the law to require that, by 2022, corporations have between one and three directors, depending on total board size, "from an underrepresented community," defined as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or . . . as gay, lesbian, bisexual, or transgender."[275]

Mandating board diversity is not the same as mandating diverse employee promotions, which would violate Title VII.[276] Mandating board diversity also does not necessarily translate to leadership diversity: one study of the richest 100 companies showed that the ten with the most diverse corporate boards (45% to 69% of members were women and/or racial minorities) had far less diverse executive-level employees (only 16% to 46%).[277] The remaining ninety firms—90% of the companies in the study—had fewer than 16% of executives who were women and/or racial minorities.[278] While studies document a correlation between more diverse corporate board membership and more diverse hiring overall,[279] tracking data on those holding corporate management positions would be a more direct approach to overcoming gender and racial glass ceilings.

Lastly, in a similar vein, a 2014 European Union ("EU") directive that applies to the EU's twenty-seven member nations required publicly held corporations to disclose nonfinancial information on a variety of social, labor, and environmental topics, including "treatment of employees" and "diversity on company boards (in terms of age, gender, educational and professional background)."[280] Similar to U.S. securities regulation, this directive applies to

[273] *Id.* § 301.3(e)(1).

[274] *Id.* § 301.3(c).

[275] A.B. 979, 2019-2020 Leg., Reg. Sess. § 3 (Cal. 2020).

[276] *See* 42 U.S.C. § 2000-e; United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979) (holding that racial affirmative action plan in employment was permissible because it did not "unnecessarily trammel the interests of the white employees," and "the plan [was] a temporary measure . . . to eliminate a manifest racial imbalance"); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 640-42 (1987) (holding that voluntary gender-based affirmative action programs are within ambit of Title VII and allowed because they are not absolute bar to male advancement).

[277] Reed, *supra* note 258.

[278] *Id.*

[279] *See id.*

[280] *Non-Financial Reporting*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en [https://perma.cc/LZW9-B6JX] (last visited Dec. 28, 2020); *see also* Directive 2014/95, of the European Parliament and of the Council of 22 Oct. 2014 on Amending Directive 2013/34

large publicly held corporations based in the EU. And while the directive requires disclosure of any diversity policy, it does not require one to be created, so long as an explanation is provided.[281]

2. Requiring Diversity-of-Leadership Disclosures in U.S. Law

As with pay data, imposing a federal mandatory-public-disclosure requirement on gender and racial makeup of leadership would be an incremental change, building upon structures that already exist. As described previously, at the U.S. federal level, existing EEO-1 requirements mandate that employers of 100 or more and federal contractors of fifty or more provide racial and gender data on their workers in ten different job categories.[282] The job category for officials and managers is subdivided into executive/senior and first/midlevel.[283] While it lasted, Component 2 data added twelve pay bands within each of these categories.[284]

In addition, while no U.S. federal law requires corporate board diversity, federal securities law has begun to consider diversity measures. In 2009, the SEC added a requirement that covered entities disclose "whether, and if so how, a nominating committee considers diversity in identifying nominees for director."[285] The SEC has recently interpreted this disclosure to include a description of "the self-identified diversity characteristics . . . (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background)" considered in making a board appointment and the role those characteristics played in the process.[286]

As with pay data, then, the easiest option at the federal level for expanding data collection on race and gender inequality in leadership would be to reinstate collection of Component 2 pay data, which would at least show pay quartile by gender and race. Propensity to be promoted across racial and gender lines can

as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) ¶¶ 18-19.

[281] Directive 2014/95, *supra* note 280, ¶ 19 ("The obligation to disclose diversity policies in relation to the administrative, management and supervisory bodies with regard to aspects such as, for instance, age, gender or educational and professional backgrounds should apply only to certain large undertakings. Disclosure of the diversity policy should be part of the corporate governance statement . . . . If no diversity policy is applied there should not be any obligation to put one in place, but the corporate governance statement should include a clear explanation as to why this is the case.").

[282] *See supra* notes 201-09 and accompanying text.

[283] *See supra* note 206 and accompanying text.

[284] *See supra* notes 210-17 and accompanying text.

[285] Proxy Disclosure Enhancements, Securities Act Release No. 9089, Exchange Act Release No. 61,175, Investment Company Act Release No. 29,092, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009).

[286] *Regulation S-K: Questions and Answers of General Applicability*, SEC, https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm [https://perma.cc/Z6T9-S5LA] (last updated Sept. 21, 2020).

be inferred from this information. It is possible that the combination of these two items could paint a useful picture of glass ceiling effects by race and gender. In the future, even more specific information could be added to the EEO-1 form—for example, a column identifying the leadership roles within each of the ten job categories. But, this would require another revision to the EEO-1. These changes would have to be designed to avoid redundancy, as two of the ten job categories encompass managers and officers already.[287] Another option would be to expand financial disclosure requirements on these topics to the SEC, but, for reasons discussed in Section III.C below, the EEOC is better equipped to use the collected data to recognize race and gender inequality that may be discriminatory.

While California has gone so far as to mandate corporate board diversity, a requirement of the sort would be unlikely at the federal level as anything perceived to be a sex or race "quota" generally lacks legislative support.[288] Indeed, the Pacific Legal Foundation filed a lawsuit against the Secretary of State of California alleging that the 2018 law is unconstitutional sex discrimination against men and seeking to enjoin the law from taking effect.[289]

C. *Harassment Settlements to Expose and Change Cultures*

A final area in which U.S. antidiscrimination law efforts have stalled—as the #MeToo movement has made clear—is redressing harassment. As described previously, despite being illegal for decades, sexual harassment in the workplace is still shockingly common and dramatically underreported,[290] and racial harassment charges to the EEOC have *increased* over the past decade.[291]

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[287] *See supra* note 206 and accompanying text.

[288] Notably, federal contractors are required to comply with affirmative action mandates that encourage racial and gender diversity in hiring. *Affirmative Action*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/hiring/affirmativeact [https://perma.cc/PC7X-WJCL] (last visited Dec. 28, 2020). These have been long established by Executive Order and are likely the cause of any pay and promotion equity among federal contractors. *See* Exec. Order 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965). Such measures, however, do not extend to private employers, for whom the law on affirmative action is different. A discussion of affirmative action in hiring is beyond this Article's scope.

[289] The case was dismissed for lack of standing, a decision that the plaintiffs have appealed. Meland v. Padilla, No. 2:19-cv-02288, 2020 WL 1911545, at *4 (E.D. Cal. April 20, 2020), *appeal docketed*, No. 20-15762 (9th Cir. April 23, 2020); *see also* Kayla Epstein, *This State Requires Company Boards to Include Women. A New Lawsuit Says That's Unconstitutional.*, WASH. POST (Nov. 14, 2019, 5:49 PM), https://www.washingtonpost.com/business/2019/11/14/this-state-requires-company-boards-include-women-new-lawsuit-says-thats-unconstitutional/.

[290] *See supra* Sections I.C, II.B.

[291] *Charges Alleging Race and Harassment (Charges Filed With EEOC) FY 1997 - FY 2019*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/race_harassment.cfm [https://perma.cc/XT8M-RLQK] (last visited Dec. 28, 2020) (showing low of 5,600 charges filed in 2005 and high of 9,656 charges filed in 2016).

As this Article has established, because of the very nature of harassment, victims are afraid to come forward to complain—a fear compounded by fear of retaliation. And employers, fearing negative public exposure, are more likely to force harassment claims into private arbitration or require a nondisclosure agreement as part of a settlement. All of these factors—stigma, fear of retaliation, and confidentiality—create a perfect storm of stagnation in rooting out sexual harassment. While employers often view harassment as a "one bad apple" individual problem, the structural components that allow for a culture of harassment to persist remain unaddressed. For all of these reasons, public disclosure requirements may have the greatest effect in documenting harassment claims that end in settlement or arbitration.

1. Current Comparative Examples

While less common than pay data and diversity reporting requirements, a handful of international and state models for harassment disclosures exist, again providing a variety of approaches from which U.S. federal law could draw. Whereas the United States operates under a common-law system, many EU member nations are civil-law systems (for example, Germany, France, and Spain), in which the judge plays a larger investigatory role, and government agencies do more to resolve cases, which reduces the volume of private litigation.[292] In the United Kingdom, the relevant equality commission has the power to investigate and order employer compliance itself.[293] Thus the need for reporting confidential settlements in the EU and the United Kingdom may be far less than the need in the United States.

There is no comprehensive EU directive on this topic, but some individual nations have developed their own reporting schemes. For example, government entities in both Sweden and Northern Ireland make public any discrimination settlements, including harassment settlements, in which the equality body is involved.[294] In Northern Ireland, the Equality Commission maintains a public

[292] *See* ISABELLE CHOPIN & CATHARINA GERMAINE, EUR. COMM'N, A COMPARATIVE ANALYSIS OF NON-DISCRIMINATION LAW IN EUROPE 84-94, 103-08 (2017), https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49316 [https://perma.cc/WGX6-GVB8].

[293] *Id.* at 105 ("In the United Kingdom, both the British Equality and Human Rights Commission and the Equality Commission for Northern Ireland are able to use their powers of formal investigation to investigate organisations they believe to be discriminating and, where they are satisfied that unlawful acts have been committed, they can serve a binding 'compliance notice' requiring the organisation to stop discriminating and to take action by specified dates to prevent discrimination from recurring. They also have the power to enter into (and to enforce via legal action if necessary) binding agreements with other bodies that undertake to avoid discriminatory acts and to seek an injunction to prevent someone committing an unlawful discriminatory act." (emphasis omitted)).

[294] Alysia Blackham & Dominique Allen, Lifting the Curtain on Equality Law: The Emerging Importance of Transparency in Promoting Equality 7-8 (June 17, 2019) (unpublished manuscript) (on file with the Boston University Law Review) (citing

database of cases and settlements.[295] The United Kingdom has begun to work toward legislation that would set limitations on confidentiality clauses in settlement agreements that seek to prevent disclosure of harassment and discrimination.[296]

In the United States, at least fifteen states have enacted laws to ban or limit nondisclosure agreements of harassment claims.[297] For example, California's law, enacted in 2018, prohibits any "provision within a settlement agreement that prevents the disclosure of factual information" related to a civil claim or administrative complaint involving sexual assault or sexual harassment, "workplace harassment or discrimination based on sex" or a "failure to prevent" it, or "an act of retaliation against a person for reporting harassment or discrimination based on sex."[298] In addition, seven states have passed laws

RIKSDAGSORDNINGEN [RO] [CONSTITUTION] (Swed.)) (noting that in Sweden, this is a product of the constitutionally guaranteed right to information from government bodies); *see also* Alysia Blackham, *Positive Equality Duties: The Future of Equality and Transparency?*, LAW IN CONTEXT (forthcoming 2021) (on file with the Boston University Law Review).

[295] *Id.* at 8; *see also Case Decisions & Settlements*, EQUAL. COMM. FOR N. IR., https://www.equalityni.org/cases [https://perma.cc/32LV-ZBVS] (last visited Dec. 28, 2020) (containing database of cases).

[296] Dominique Allen & Alysia Blackham, *Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom,* 43 MELBOURNE UNIV. L. REV. 384, 419-21 (2019). *See generally* WOMEN & EQUALITIES COMMITTEE, THE USE OF NON-DISCLOSURE AGREEMENTS IN DISCRIMINATION CASES: GOVERNMENT RESPONSE TO THE COMMITTEE'S NINTH REPORT OF SESSION 2017–19, 2019, HC 215 (UK); DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, CONFIDENTIALITY CLAUSES: RESPONSE TO THE GOVERNMENT CONSULTATION ON PROPOSALS TO PREVENT MISUSE IN SITUATIONS OF WORKPLACE HARASSMENT OR DISCRIMINATION. (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818324/confidentiality-clause-consultation-govt-response.pdf [https://perma.cc/Z7NF-C9TY].

[297] ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 8-10 (2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report.pdf [https://perma.cc/9SVE-VELL] (describing such laws in Arizona, California, Hawaii, Illinois, Louisiana, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington); Gena B. Usenheimer, Anne R. Dana, & Vlada Feldman, *#MeToo Inspires Legislative Changes Across the United States*, SEYFARTH (Mar. 28, 2019), https://www.seyfarth.com/news-insights/metoo-inspires-legislative-changes-across-the-united-states.html [https://perma.cc/FS5Y-B6TK] (describing such laws in California, New Jersey, New York, Tennessee, Vermont, and Washington); *see also* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 249-58 (2018).

[298] CAL. CIV. PROC. CODE § 1001 (West 2020). Then-Governor Jerry Brown, citing Supreme Court precedent, vetoed a related measure that would have prohibited applicants or employees from being forced to waive their right to litigate discrimination charges as a condition of employment or continued employment. *See* A.B. 3080, 2017-2018 Leg., Reg. Sess. (Cal. 2018); *AB-3080 Employment Discrimination: Enforcement*, CA. LEGIS. INFO. (2018), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB3080 [https://perma.cc/45QQ-NV8P] (providing status of bill and containing

limiting mandatory predispute arbitration agreements that include sexual harassment claims, although several are being challenged in federal court as violating the Federal Arbitration Act.[299]

Two states have gone further, enacting affirmative reporting requirements of confidential settlements to a government agency. In 2018, as part of reforms to better redress sexual harassment, Maryland enacted a law that requires employers to disclose settlements of sexual harassment claims to its state fair employment agency.[300] The law requires employers of fifty or more employees to submit a survey to the Maryland Commission on Civil Rights ("MCCR") two separate times, on or before July 1, 2020 and July 1, 2022, when the provision sunsets.[301] In the survey, the employer must report the number of settlements it has made to resolve a sexual harassment allegation, the number of times it paid a settlement against the same employee perpetrator in the prior ten years, and the number of such settlements that included a confidentiality provision.[302] Employers are allowed to detail in the survey any "personnel action" it took against the perpetrator employee.[303] The law establishes that the MCCR "shall publish and make accessible to the public . . . on the Commission's website" aggregate responses to the survey and create a report based on a random selection of surveys for the Governor "redacting any identifying information for specific employers."[304] However, the MCCR will also retain individual employer responses and make parts of them subject to public inspection upon request.[305]

Likewise, in 2019, Illinois enacted a significant package of legislation to update and strengthen its laws against sexual harassment, including a settlement reporting requirement.[306] Illinois's disclosure requirements are even more comprehensive, including all discrimination claims. Starting July 1, 2020, employers of one or more must disclose to the Illinois Department of Human Rights ("IDHR") on an annual basis any "adverse judgment or administrative ruling" in which there was a finding of unlawful discrimination, including sexual

Governor's veto message that "[t]his bill is based on a theory that the Act only governs the enforcement and not the initial formation of arbitration agreements and therefore California is free to prevent mandatory arbitration agreements from being formed at the outset. The Supreme Court has made it explicit this approach is impermissible").

[299] JOHNSON, SEKARAN & GOMBAR, *supra* note 298, at 11-12 (describing such laws in California, Illinois, Maryland, New Jersey, New York, Vermont, Washington, and legal challenges to the California, New Jersey, and New York laws).

[300] *See* H.B. 1596, 2018 Gen. Assemb., Reg. Sess. (Md. 2018); S.B. 1010, Gen. Assemb., Reg. Sess. (Md. 2018).

[301] Md. H.B. 1596; Md. S.B. 1010.

[302] Md. H.B. 1596; Md. S.B. 1010.

[303] Md. H.B. 1596; Md. S.B. 1010.

[304] Md. H.B. 1596; Md. S.B. 1010.

[305] Md. H.B. 1596; Md. S.B. 1010.

[306] 775 ILL. COMP. STAT. 5/2-108 (2020).

harassment.[307] The report must include the total number of adverse rulings under federal, state, or local law; any equitable relief that was ordered; and whether the claims involve sexual harassment or involve other discrimination on the basis of protected class.[308] The Act also allows IDHR investigators to request and receive information on past settlements in the course of an investigation and requires the IDHR to publish an annual aggregated report without identification of any particular employer, the filings of which are confidential and not subject to FOIA laws.[309]

2. Requiring Harassment-Settlement Disclosures in U.S. Law

At the federal level, while it is not as directly applicable as the EEO-1 is to pay and promotion data collection, the federal government collects some data on harassment in the context of federally funded education. Under Title IX of the Education Amendments of 1972,[310] all public and private educational institutions that receive federal funding must enforce prohibitions against sex discrimination, including sexual harassment and assault.[311] In addition, Title VI of the Civil Rights Act of 1964[312] and Section 504 of the Rehabilitation Act of 1973[313] require schools to prohibit discrimination on the basis of race, color, national origin, and disability. Federal laws and regulations authorize the Department of Education's Office for Civil Rights "to collect data that are necessary to ensure compliance with civil rights laws within [its] jurisdiction."[314] Since 1968, as part of this process, covered programs from early

[307] *Id.* 5/2-108(B).

[308] *Id.* Protected class bases tracked include sex; race, color, or national origin; religion; age; disability; military status; sexual orientation or gender identity; or other. *Id.* § 2-108(B)(3).

[309] *Id.* 5/2-108(C)-(E).

[310] 20 U.S.C. §§ 1681-1688.

[311] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2020)

[312] 42 U.S.C. § 2000d.

[313] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794(a)).

[314] 20 U.S.C. § 3413(c)(1); *accord* 34 C.F.R. § 100.6(b) (2019); *id.* § 104.61 (adopting procedural provisions applicable to Title VI to implement Section 504 of Rehabilitation Act of 1973); *id.* § 106.71 (adopting procedural provisions applicable to Title VI to implement Title IX of Education Amendments of 1972); *Civil Rights Data Collection (CRDC): Frequently Asked Questions*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crdc.html#crdc [https://perma.cc /LM4E-T9CK] (last updated Jan. 10, 2020) ("[The Office for Civil Rights ("OCR")]'s implementing regulations for each of these statutes require recipients of the Department's federal financial assistance to submit to OCR 'complete and accurate compliance reports at such times, and in such form and containing such information' as OCR 'may determine to be necessary to enable [OCR] to ascertain whether the recipient has complied or is complying' with these laws and implementing regulations." (second alteration in original) (quoting 34 C.F.R. § 100.6(b))).

education through the twelfth grade must complete the Civil Rights Data Collection survey every two years.[315] The survey includes a requirement that each entity report on incidents of "harassment or bullying" on the basis of sex, race, color, national origin, or disability—including data on reported allegations, students who were victims, and students who were disciplined as perpetrators.[316] Data are published in a searchable database online.[317]

In addition, under the Clery Act amendment to the Higher Education Act of 1965, colleges and universities that receive federal funds must collect and produce data reports annually on campus crime, including sexual assault, domestic or dating violence, stalking, and crimes "in which the victim is intentionally selected because of the actual or perceived race, gender, religion, national origin, sexual orientation, gender identity, ethnicity, or disability of the victim."[318] Covered entities must collect and disseminate reports on crime statistics to their local communities and provide the report annually to the Secretary of Education.[319]

In the past two legislative sessions, federal legislators have introduced bills in both chambers to expand reporting requirements under the Clery Act but without success to date. Both bills would require the Department of Education or the institutions themselves to publish online standardized, confidential, campus-level results of periodic surveys of students on intimate partner violence, sexual assault, stalking, and/or sexual harassment to allow "students [to] make an informed choice when comparing universities."[320] They would also require the Department to "publish the names of all schools with pending investigations, final resolutions, and voluntary resolution agreements related to Title IX with respect to sexual violence."[321]

Other legislation proposed that the Census Bureau, the Bureau of Labor Statistics, and the EEOC develop and conduct a "national prevalence survey on

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[315] *Civil Rights Data Collection (CRDC): Frequently Asked Questions*, *supra* note 314.

[316] OFFICE FOR C.R., U.S. DEP'T OF EDUC., 2017-18 CIVIL RIGHTS DATA COLLECTION: LIST OF CRDC DATA ELEMENTS FOR SCHOOL YEAR 2017–18, at 3 (2018), https://www2.ed.gov/about/offices/list/ocr/docs/2017-18-crdc-data-elements.pdf [https://perma.cc/KYE5-E3V8].

[317] *Civil Rights Data Collection*, U.S. DEP'T EDUC., https://ocrdata.ed.gov/ [https://perma.cc/SVG7-TNWC] (last visited Dec. 28, 2020).

[318] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f)(1)(F)(ii) (footnote omitted).

[319] *Id.* § 1092(f)(3), (5).

[320] *The Campus Accountability and Safety Act*, KIRSTEN GILLIBRAND, https://www.gillibrand.senate.gov/campus-sexual-assault [https://perma.cc/P8QE-Y43P] (last visited Dec. 28, 2020); *see also* HALT Campus Sexual Violence Act, H.R. 3381, 116th Cong. § 5 (2019) (requiring Department of Education to develop biennial sexual violence climate survey and requiring institutions to publish results online).

[321] *The Campus Accountability and Safety Act*, *supra* note 320; *accord* H.R. 3381, § 2 (requiring Department of Education to publish online list of institutions under investigation and any sanctions, findings, or resolution agreements related to same).

the prevalence of prohibited harassment in employment" every three years to assess "beliefs, attitudes, and understanding of prohibited harassment in employment, and the extent to which such harassment is experienced or observed" in U.S. workplaces.[322] The data would be disaggregated by protected class, subtypes of sex-based harassment, and "industry and salary level, including across all wage bands."[323] These bureaus and the EEOC would then "jointly prepare and submit . . . a report on the results of that survey" to Congress, and the report "shall [also] be made publicly available on the [three agencies'] websites."[324]

A number of legal scholars have also proposed,[325] and federal legislators have introduced, bills that would limit or bar nondisclosure agreements or confidential settlements that include sexual harassment claims or discrimination claims on the basis of any protected class.[326] Scholars have also argued in favor of barring mandatory arbitration of sexual harassment claims,[327] and federal legislators proposed several bills that would do so as well.[328] In lieu of legislation, legal scholars David Hoffman and Erik Lampmann have argued that

[322] BE HEARD in the Workplace Act, H.R. 2148, 116th Cong. § 111(a)-(b) (2019).

[323] *Id.* § 111(c)(2)(B).

[324] *Id.* § 111(c)(1), (c)(4).

[325] *See, e.g.*, Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 47-48 (2018) ("Federal and state law should restrict the use in standard employment contracts of broad nondisclosure agreements . . . in the context of settling an employee's legal claims, enforcing them only where they meet certain requirements designed to permit disclosure of serial harassment or discrimination."); Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 79 (2018) (suggesting that some nondisclosure agreements should be subject to conditions and escrow requirements); Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 349-50 (2018) (arguing that limits on confidential agreements may encourage reporting and help reveal patterns of wrongdoing); Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change ("[E]fforts to ban secret settlements in the case of sexual harassment claims should be welcomed.").

[326] H.R. 2148, § 302 (prohibiting employers from entering into contracts or agreements with workers that contain certain nondisparagement or nondisclosure clauses); EMPOWER Act, H.R. 1521, 116th Cong. § 103 (2019) (prohibiting inclusion in employment contracts of nondisparagement or nondisclosure clauses that cover workplace harassment based on any protected class, unless mutually agreed upon and beneficial to both employer and employee).

[327] *See, e.g.*, Schultz, *supra* note 325, at 47; Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 899-904 (2020).

[328] *See, e.g.*, H.R. 2148, § 303 (prohibiting predispute but allowing postdispute arbitration agreement if employee enters into it voluntarily without coercion and is informed in writing of rights and protections); Restoring Justice for Workers Act, S. 1491, 116th Cong. § 5 (2019) (same); Ending Forced Arbitration of Sexual Harassment Act of 2019, H.R. 1443, 116th Cong. § 2 (2019) (prohibiting predispute arbitration agreements that require arbitration of sex discrimination disputes).

nondisclosure agreements that ban disclosure of sexual misconduct should be void under contract law as a violation of public policy.[329]

Short of banning nondisclosure agreements entirely and moving closer to a public agency disclosure model, Ian Ayres has proposed that, if certain nondisclosure agreements are to be allowed, they should involve EEOC oversight.[330] To be enforceable, Ayres suggests, a nondisclosure agreement must "explicitly describe the rights which the [employee] retains . . . to report the perpetrator's behavior to the [EEOC]," it must require the perpetrator not to misrepresent any "past interactions" with the employee, and the employee's allegations must be "deposited in an information escrow that would be released for investigation by the EEOC if another complaint is received against the same perpetrator."[331]

In a similar vein, Samuel Estreicher has proposed that the EEOC require employers to provide information on settlements with perpetrator identities protected so that, should a "pattern of repeated settlements emerge[]," the agency could intervene and investigate without the need for the employee to file a formal charge with the agency.[332] If the EEOC decides to pursue the claim, it could then "obtain discovery of all claims of abuse involving the particular employee," now seeking injunctive relief and substantial damages.[333] (In contrast, Ayres's proposals would allow identities to be released automatically for repeat offenders.[334]) Settlement information could be obtained, Estreicher suggests, through a simple add-on to data the EEOC already compels under its existing Title VII authority to collect reports like the EEO-1.[335] This could be a "one-liner" addition to existing reports that avoids the Paperwork Reduction Act challenges faced by Component 2 pay data reporting given how quickly an

[329] *See generally* David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165 (2019).

[330] Ayres, *supra* note 325, at 79.

[331] *Id.*; *see also* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 147 (2012).

[332] *See* Samuel Estreicher, Opinion, *How to Stop the Next Harvey Weinstein*, BLOOMBERG (Nov. 12, 2017, 10:00 AM), https://www.bloomberg.com/opinion/articles/2017-11-12/how-to-stop-the-next-harvey-weinstein; *see also* Ayres, *supra* note 325, at 86-87 (describing Estreicher's proposal and noting that "survivors, notwithstanding any settlement or [nondisclosure agreement], always remain free to cooperate with an EEOC investigation").

[333] Estreicher, *supra* note 332.

[334] Ayres, *supra* note 325, at 87.

[335] 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.11 (2020).

employer could complete it.[336] The EEOC could then monitor and intervene using its investigatory power for repeat offenders.[337]

In 2019, U.S. Representative Carolyn Maloney proposed a similar idea in the Ending Secrecy About Workplace Sexual Harassment Act[338]—the most directly in line with a model compelling disclosure to the EEOC. The bill would require every EEO-1-covered employer to include in its annual EEO-1 report "the number of settlements reached by the employer" that year to resolve sex discrimination complaints, including sexual harassment, "where anything of value is conferred to the individual raising the claim in return for such individual declining to further pursue the claim, any internal mediation or other workplace resolution that results in the individual declining to further pursue the claim."[339] It would also order the EEOC to report this data, as well as data on its own received charges of sex discrimination and resolution of those cases, to Congress annually[340] and would order the U.S. Comptroller General to "conduct a comprehensive study of claims of discrimination on the basis of sex, including . . . sexual harassment" and report to Congress the results of that study with "recommendations for legislation or other action for improving transparency and accountability regarding such claims."[341]

Beyond data collection, labor law scholars Sharon Block and Terri Gerstein have proposed requiring government agency notification or approval of any private settlement of sexual harassment claims.[342] They suggest that a court or relevant antidiscrimination agency be required to sign off on such settlements, pointing to similar requirements for settlements under the Fair Labor Standards Act, which requires "court approval or review by the federal labor department," and for settlements under the Class Action Fairness Act, which requires notice to the state attorney general or alternative.[343] Requiring approval, or even notice, they argue, would "create a public record of settlements, giving workers access

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[336] NYU School of Law, *Avoiding the Next Harvey Weinstein: Sexual Harassment & Non-Disclosure Agreements*, YOUTUBE, at 01:01:40-:02:15 (Feb. 8, 2018), https://www.youtube.com/watch?v=QTw-w9gnjjM; *see also* Ayres, *supra* note 325, at 86 (describing Estreicher's proposal).

[337] Ayres, *supra* note 325, at 86-87 (describing Estreicher's proposal).

[338] H.R. 1828, 116th Cong. § 2 (2019).

[339] *Id.* § 2(a)-(b).

[340] *Id.* § 4.

[341] *Id.* § 5.

[342] Sharon Block & Terri Gerstein, *We Need an Agenda for New Laws to Prevent Sexual Harassment*, GUARDIAN (Dec. 2, 2017, 10:18 AM), https://www.theguardian.com/commentisfree/2017/dec/02/agenda-new-laws-prevent-sexual-harassment [https://perma.cc/H2G2-TYDW]; Terri Gerstein, *Sexual Harassment: New Laws that Would Help*, ONLABOR (Dec. 6, 2017), https://onlabor.org/sexual-harassment-new-laws-that-would-help/ [https://perma.cc/2PMH-TAK8].

[343] Gerstein, *supra* note 342 (citation omitted); *accord* Block & Gerstein, *supra* note 342.

to important information and enabling the government to intervene when a clear pattern has emerged."[344]

Using a different reporting mechanism, securities law scholars and federal legislators have considered whether SEC disclosure requirements could be used to collect and publicize data on sexual harassment settlements. Daniel Hemel and Dorothy Lund have considered using corporate law structures themselves as a means of redressing sexual harassment, considering liability under federal securities law disclosure requirements and state corporate law fiduciary duties.[345] With regard to disclosures, they review existing disclosure requirements, ultimately concluding that under the Securities Exchange Act of 1934, Regulation S-K, and Rule 10b-5, "the argument that [they] mandate[] disclosure of sexual harassment claims is . . . questionable at best."[346] They also address the movement to encourage companies toward greater disclosure on ESG factors,[347] noting that "[s]exual harassment policies and procedures are likely to be the next frontier" in this area.[348]

Lastly, federal legislators have also proposed expanding the SEC's mandate in both of the past two legislative sessions without success. One bill, the Sunlight in Workplace Harassment Act, would have SEC-covered entities "disclose annually on Form 10–K, to shareholders . . . and to the public . . . the total number of settlements entered into" in the prior year by the entity and its contractors, subsidiaries, or executives "that relate to any alleged act of sexual abuse . . . harassment, or . . . discrimination" on the basis of any protected class, including sex and race, as well as "the total dollar amount paid with respect to [such] settlements."[349] In announcing their bill, the authors stressed the need for exposure to motivate change, noting that requiring public disclosures would "lead to greater transparency . . . and a more robust discussion of how to prevent workplace misconduct and hold people in power accountable" and arguing that "the amount of money that companies spend on [discrimination] settlements" directly impacts the financial health of the company as an investment.[350] A second proposal included a similar provision that would require any entity filing

[344] Block & Gerstein, *supra* note 342.

[345] *See* Hemel & Lund, *supra* note 19, at 1590-92.

[346] *See id.* at 1650-55.

[347] Brandon Boze, Margarita Krivitski, David F. Larcker, Brian Tayan & Eva Zlotnicka, *The Business Case for ESG*, STANFORD CLOSER LOOK SERIES, May 23, 2019, at 1, 2 (analyzing different approaches to incorporating ESG factors into the decision-making processes of corporations).

[348] *See* Hemel & Lund, *supra* note 19, at 1663-66.

[349] Sunlight in Workplace Harassment Act, S. 2454, 115th Cong. § 2 (2018).

[350] Press Release, Elizabeth Warren, Senator, U.S. Senate, Warren, Rosen Unveil Bicameral Legislation to End Secrecy in Workplace Harassment Settlements (Feb. 27, 2018), https://www.warren.senate.gov/newsroom/press-releases/warren-rosen-unveil-bicameral-legislation-to-end-secrecy-in-workplace-harassment-settlements [https://perma.cc/FC3R-VVLL].

a Form 10-K to include the number of settlements during the reporting period for workplace harassment on the basis of any protected class (including sex and race) and for retaliation; the total amount of "any judgments or awards (including awards through arbitration or administrative proceedings) . . . entered against the [entity] . . . or any payments made in connection with a release of claims."[351] The disclosure would also require notice of whether there were three or more such settlements or judgments "that relate to a particular individual employed . . . without identifying that individual by name." [352]

As these many ideas and legislative proposals demonstrate, there are many approaches the federal government could take to compel employers to disclose the existence of harassment in their ranks. Yet each varies in terms of its feasibility of being enacted and how well it serves the theoretical goals of compelled disclosure. Basic prohibitions of either nondisclosure agreements or arbitration of harassment claims would do a great deal to help with private, individual enforcement of sexual and racial harassment and discrimination claims. Yet their focus on transparency and secrecy achieves only so much given that they still rely on individual employees to speak out and to litigate publicly. While they increase transparency, they still rely entirely on an employee to overcome fear of stigma, retaliation, and loss of their own confidentiality to make the settlement public. Even though the employer may no longer hide behind confidentiality or unpublicized arbitrations, the employer bears no additional cost or motivation to prevent the harassment unless the employee is willing to risk retribution to attract publicity to the case.

Ayres's and Estreicher's proposals recognize that it may be impractical or unwise to ban all confidential settlements (which employees may prefer) and rightly engage the EEOC to pick up a greater role in the enforcement burden.[353] They also allow a path for adopting a disclosure requirement administratively rather than hoping for any piece of legislation to pass in the current polarized political environment.[354] Yet, in maintaining total confidentiality, neither reaches the full potential of the information-asymmetry-correcting, behavior-forcing, and publicness benefits that undergird the power of compelled disclosures.[355] This means that the EEOC—and only the EEOC, with its limited resources—must act to make a change. On the other hand, Block and Gerstein's proposal goes further toward harnessing the power of publicness, but it may go too far in limiting settlement options that plaintiffs may want or need, and it would require amending Title VII.[356]

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[351] Ending the Monopoly of Power Over Workplace Harassment Through Education and Reporting Act, H.R. 1521, 116th Cong. § 105(c)(1)(A)(ii) (2019).

[352] *Id.* § 105(c)(2).

[353] *See* Ayres, *supra* note 325, at 86-87; Estreicher, *supra* note 332.

[354] *See* Ayres, *supra* note 325, at 86-87; Estreicher, *supra* note 332.

[355] *See* Ayres, *supra* note 325, at 86-87; Estreicher, *supra* note 332.

[356] *See* Block & Gerstein, *supra* note 342.

Lastly, proposals to expand SEC disclosures are, not surprisingly, most aligned with the benefits of public disclosure, in that they would be public and identifiable and would truly compel employers to feel the economic pain of losing stock value due to exposure of harassment. Indeed, as Hemel and Lund suggest, the benefit of using securities law is that requiring public disclosures of sexual harassment claims and settlements would not only arm applicants and employees with information but "might encourage companies to do more to prevent workplace sexual harassment to avoid having to make such disclosures in the first place."[357]

Yet the SEC may not be the right entity to collect this information. First, disclosures to the SEC are only required of large, publicly traded companies—at last count only about 3,600 firms[358]—compared to the over 60,000 entities (employers of 100 or more and certain federal contractors) required to file EEO-1 reports.[359] This would greatly limit the reach and effectiveness of disclosure requirements. More importantly, the SEC is not currently in a position to do anything with that information other than make it public, whereas the EEOC can track, investigate, issue reports, and more as part of its duty to enforce antidiscrimination law protections. As Hemel and Lund identify, using the mechanism of SEC disclosures might be criticized for diverting securities law from "its principal objectives [of] maximizing shareholder value, protecting investors, and promoting the efficient allocation of capital" (yet subject to rebuttal that liability for "[w]orkplace-based sexual misconduct *does* reduce shareholder value [and] harm investors").[360] Incorporating harassment disclosures to the SEC might be just one piece of the larger project of increasing SEC disclosure requirements to reach ESG issues—a move that, as discussed in Part IV, has garnered some criticism.[361] While helpful in creating public exposure, the issue of harassment could get lost among a sea of priorities for investor audiences, rather than being the priority among disclosures to the EEOC. This could lead to what Hemel and Lund call the "discursive harm" of "[o]veremphasizing the harm to shareholders and to markets," thus treating a

[357] Hemel & Lund, *supra* note 19, at 1666-67.

[358] *Where Have All the Public Companies Gone?*, *supra* note 70.

[359] *See* Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45,479, 45,496 (July 14, 2016).

[360] Hemel & Lund, *supra* note 19, at 1668, 1671.

[361] *Id.* at 1663-66. The topic of ESG is monumental and well beyond the scope of this Article. *See generally, e.g.*, Lipton, *Mixed Company*, *supra* note 83, at 82-84 (examining ways that sustainability disclosures are relevant to corporate financial performance); Lipton, *Not Everything*, *supra* note 83, at 527-33 (analyzing the impact of prosocial corporate behavior on corporations).

discrimination problem with seriously harmed victims as mere "negative economic externalities."[362]

Given all of the options, the most immediately and directly implementable solution would likely be to require reporting to the EEOC as part of the EEO-1 or in a standalone requirement of confidential settlements or arbitration decisions. At the very least, this would allow the EEOC to better track where entities or industries experience repeated harassment or discrimination made otherwise untrackable due to confidential resolutions (though if a charge is filed before the settlement, the EEOC should have this information already). Even better would be to allow the public access to such information, either upon request as in the Maryland state model or posted publicly with other pay data, should Title VII be amended to allow public disclosure. The SEC model shows that we are willing to require public disclosure of many things that relate to the profitability of a public company. If we are serious about stopping harassment, we should not allow entities to hide its existence from other employees or the public.

IV. COUNTERARGUMENTS AND CONSTITUTIONAL CONSIDERATIONS

This Article has made the case from both normative and theoretical perspectives for mandatory public disclosures on equality measures, and it has proposed a framework for imposing such requirements on employers under U.S. federal law. Yet, as has been shown by similar efforts in other countries—and by efforts to expand disclosure requirements under U.S. securities law—any such proposal will face criticism. This Part raises and responds to likely arguments against imposing mandatory disclosure requirements as part of antidiscrimination law enforcement. It addresses economic and practical counterarguments to requiring employers to provide equality disclosures, as well as constitutional concerns rooted in privacy rights and the First Amendment. While there are certainly challenges to consider, this Part concludes that the need for greater antidiscrimination law enforcement and the benefits to be gained by imposing the proposed disclosure requirements outweigh costs.

A. *The Case Against Disclosing Discrimination*

This Section identifies and responds to the main economic and practical arguments against imposing a mandatory disclosure regime on equality measures. Criticisms of disclosure in the securities law context, business-centric arguments against existing antidiscrimination law data collection, and

[362] Hemel & Lund, *supra* note 19, at 1671. That said, they also suggest that "the availability of alternative mechanisms for addressing problems related to workplace sexual misconduct does not make corporate law an irrelevant—or undesirable—tool in the fight against sexual harassment," suggesting that "various tools may be complements rather than substitutes." *Id.* at 1678.

scholarship on civil rights law compliance suggest three main counterarguments: inefficiency, manipulability, and unintended consequences.

1. Cost/Benefit Concerns and Disclosure Overload

The most likely practical concern with imposing new equality disclosure requirements on U.S. businesses is that they are inefficient: producing such information is costly to businesses and does not return enough benefits.[363] While a general argument against any regulatory burden, arguments that costs outweigh benefits have been frequently raised in the context of securities disclosure requirements.[364] A related concern in the securities context is "disclosure overload"—the idea that SEC-reporting entities are required to produce so much information that what is produced becomes duplicative and unreadable, losing its utility to investors.[365] Such concerns sparked an SEC initiative to simplify disclosures, which resulted in a new "Disclosure Update and Simplification" regulatory rule, enacted in November 2018, to amend disclosure requirements that had "become redundant, duplicative, overlapping, outdated, or superseded."[366]

As applied to antidiscrimination law efforts, the Trump Administration's efforts to roll back the Obama-era pay-data collection efforts center around cost. As described previously, the sole justification given for suspending EEO-1 Component 2 data collection was cost.[367] In 2016, the EEOC estimated a total cost of approximately $53.5 million for 2017 and 2018 combined; the EEOC under the Trump Administration recalculated to $1.23 billion ($614 million in 2017 and $622 million in 2018).[368] This increase of twenty-three times the original estimated cost is not only hard to rationalize but was generated only after a federal district court found inadequate justification for staying the order.[369] Even using the Trump-era numbers arguendo, when divided by the number of filers, this is an extremely manageable cost for a company to incur to help play a role in redressing and preventing structural discrimination. The original estimates were based on 60,886 firms (employers and contractors)[370]—meaning a cost of $439 per firm per year. The revised estimates were based on

[363] *See* Estlund, *Just the Facts, supra* note 16, at 396-99 (considering costs of disclosure).

[364] *See supra* Part I.

[365] SU, *supra* note 68, at 2.

[366] Disclosure Update and Simplification, Securities Act Release No. 10,532, Exchange Act Release No. 83,875, Investment Company Act Release No. 33,203, 83 Fed. Reg. 50,148, 50,148 (Oct. 4, 2018).

[367] *See* Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO–1), 81 Fed. Reg. 45,479, 45,484 (July 14, 2016).

[368] *EEO-1 Collection Information*, *supra* note 230.

[369] *See* Nat'l Women's L. Ctr. v. Off. of Mgmt. & Budget, 358 F. Supp. 3d. 66, 90 (2019); Agency Information Collection Activities, 81 Fed. Reg. at 45,493.

[370] Agency Information Collection Activities, 81 Fed. Reg. at 45,494.

90,000 firms filing[371]—meaning a cost of $6,869 per firm per year. For an employer of 100 employees or more, even the revised number is a small amount of money, particularly if it leads to improvement in productivity or a reduction in litigation costs over the longer term.[372]

Given that any creation or expansion of equality disclosures would be limited to specific information on pay, promotion, and harassment, there is little concern of disclosure overload in this context. Instead, the real question is one of costs and general employer concern about regulatory overload. There is no doubt that imposing new disclosure requirements would add costs to business operations, but there is a great deal of uncertainty about both how much cost and whether the benefits would be worth it. In particular, as the example of the Component 2 pay-data collection shows, within seven months, nearly 90% of the at least 60,000 entities required to report[373] were able to comply.[374] Most importantly, costs are only a problem if they are not worth the benefits. If we are truly committed to rooting out discrimination and harassment, relative to other options, this is a low cost to the government, and it places some cost on employers to self-police. The law contemplates that employers must prevent and redress discrimination. If that is true, this is a cost that should be imposed.

[371] Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48,138, 48,141 (Sept. 12, 2019).

[372] This radical change in calculation was, according to the Trump-era EEOC, because the Obama-era EEOC calculated "at the individual employer level . . . and not at the individual form level," "relied . . . on the number of . . . 'EEO–1 filers' without considering the variation in burden attributable to the different number and types of EEO–1 reports that different employers file," and failed to account for the fact that "an employer with numerous locations [must] file a corresponding number of EEO-1 'establishment' reports." *Id.* at 48,140. The Obama EEOC explained this choice with the explanation "that the bulk of the tasks performed in completing the EEO–1 report will be completed at the firm level due to the centrality of automation"—a rational assumption the Trump EEOC ignored. *Id.* (quoting Agency Information Collection Activities: Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed Reg. at 45,493). Regardless, it is difficult to believe that the $1.2 billion difference can be accounted for by the Trump EEOC's explanation: that it "has developed a more accurate methodology that deconstructs the total number of reports submitted by report type and by filer type, and then estimates an average burden based on the number and types of reports submitted." *Id.* This recalculation then led the Trump EEOC to conclude that "the utility of the data to its enforcement programs" of "Component 2 is far outweighed by the burden imposed on employers that must comply with the reporting obligation." *Id.* at 48,141.

[373] *Compare* Agency Information Collection Activities, 81 Fed. Reg. at 45,494 (estimating in 2016 that "60,886 private industry and contractor filers" would "submit both Components 1 and 2 starting with the 2017 reporting cycle"), *with* Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. at 48,141 ("Because the number of Component 1 filers increased to 87,021 by the close of data year 2018, the EEOC is estimating that the number of filers required to submit Component 1 will increase again to approximately 90,000 for data years 2019 through 2021.").

[374] *See* Lidgett, *supra* note 235.

2. Manipulability and Symbolic Compliance

Separate from the issues of cost to employers is the risk that compelling disclosures may not be effective because data produced by covered entities is susceptible to manipulation. From the securities disclosure context, this is another criticism: the concern that disclosure requirements will be made less effective by "be[ing] so carefully calculated or cabined that they mislead by omission" or include "half-truths."[375]

In the context of antidiscrimination law, "symbolic compliance" has long been a concern of scholars who study how the legal proscriptions get translated into action in the workplace and how employer actions are then perceived as legal compliance by courts.[376] For example, Frank Dobbin and Alexandra Kalev have conducted extensive research to document how to separate employer practices and policies on diversity management and harassment training that are effective from those that are merely window dressing.[377]

While no self-policing mechanism is foolproof, there is reason to believe that equality disclosure requirements that require specific types of data as proposed can be designed in a way that limits their manipulation. All data disclosed under this proposal would be verifiable as objective data—simply reporting what an employee earns based on a W-2 statement, what their official job title is, and the number of settlements. While the employer will be producing the data, the range of information collected and the opportunities for manipulation of that information will be limited. The EEOC can also provide definitional data to be used, as it has done with EEO-1 and Component 2 data.[378] Moreover, any data submitted to the EEOC and/or made public by the employer could be investigated or audited by the EEOC for compliance, creating an incentive for the employer to limit any manipulation it might contemplate. As proposed, pay, promotion, and settlement data is concrete and specific and would be submitted to the EEOC, leaving little room for interpretation—unlike an assessment of

[375] Sale, *supra* note 65, at 1052.

[376] *See generally, e.g.*, FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2009); LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016).

[377] *See generally, e.g.*, Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work?: The Challenge for Industry and Academia*, 10 ANTHROPOLOGY NOW, Sept. 2018, at 48 [hereinafter Dobbin & Kalev, *Why Doesn't Diversity Training Work?*]; Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, 116 PNAS 12,255 (2019); Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. EMP. & LAB. L. 481 (2018).

[378] *See EEO-1 Instruction Booklet*, *supra* note 205 (categorizing employment data concerning sex, race, and ethnicity using ten defined occupational categories).

whether something is "material" before it must be disclosed such as in the securities context[379] or creating a merely symbolic training.[380]

3. Rebound Effects

A final criticism of disclosure requirements is that the requirement to disclose certain information may result in unintended negative consequences that actually undermine intended outcomes. Here, the main concern would be related to harassment or discrimination settlement reporting; pay- and promotion-data reporting would not likely lead to any backlash, as only increasing pay or seniority of women or racial minorities could improve employer data. Hemel and Lund considered these "backfire" effects in their proposal to add sexual harassment reporting to SEC disclosures, raising "the risk that companies will respond by implementing measures designed to keep allegations from coming to their attention" or that, even though disclosures "are required to keep the victim's name confidential . . . , the prospect of public disclosure could chill employee reporting."[381] Unintended consequences could arguably be more damaging in the context of equality disclosures to the EEOC. Because employers are both the subjects of complaints and the reporters of information that can subject them to liability or investigation to the entity that would investigate—the EEOC, not the SEC—they may try to discourage discrimination or harassment complaints.

Yet two things mitigate this concern. First, in the context of hostile work environment claims, since 1998, under Supreme Court decisions in *Faragher v. City of Boca Raton*[382] and *Burlington Industries, Inc. v. Ellerth*,[383] Title VII provides an affirmative defense from liability where a supervisor's harassment does not result in a tangible employment action, "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[384] This is a strong defense that has greatly increased

[379] *See* SU, *supra* note 68, at 1.

[380] *See* Dobbin & Kalev, *Why Doesn't Diversity Training Work?*, *supra* note 377, at 48-49 (describing how corporations may find training essential despite ineffectiveness because such trainings are "vital for fending off lawsuits").

[381] *See* Hemel & Lund, *supra* note 19, at 1666-67 (concluding, however, that doing so "could render them vulnerable to a . . . claim" against directors for breach of duty of loyalty). They also discuss the risk of the "Mike Pence" effect—that "male employers will respond in ways that redound to the detriment of female employees"—but properly conclude that "[t]he argument that we should refrain from penalizing executives for behaving illegally because they might respond by behaving illegally is . . . a weak one." *Id.* at 1674-75. I agree.

[382] 524 U.S. 775 (1998).

[383] 524 U.S. 742 (1998).

[384] *Id.* at 765.

employers' creation and encouragement of employee reporting, even though it has been subject to criticism for shielding employers from liability.[385]

Second, these risks arise only when the employee reports internally and never to the EEOC, which an employee must also do to pursue any claim or lawsuit under Title VII.[386] The employer cannot stop an employee from complaining to the EEOC, so the charge would be recorded regardless; there is no additional benefit in deterring an employee from pursuing a claim that is arbitrated or settled to hide its existence from the EEOC once the EEOC knows about the charge. If the employee felt deterred from complaining internally, they could still complain only to the EEOC and argue that their failure to report internally was not unreasonable given employer pressure, thus limiting the employer's *Faragher*/*Ellerth* defense. And employees need not report any claim of discrimination other than harassment internally.

As for the chilling effect of fear that confidential reporting would be made public, in reality, the far greater deterrent to any employee is fear of retaliation at work. If they can get past that fear, repeated assurances that the accuser's identifying data would be kept confidential may suffice. Nevertheless, the interaction of disclosure requirements with internal reporting systems poses a potential concern that the EEOC will need to track.[387]

B. *Privacy Concerns*

Because this Article is proposing that, to the extent possible, disclosure information should be reported publicly, critics may also raise concerns about infringing on the privacy of employers and possibly their employees.[388]

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[385] *See, e.g.*, Elizabeth C. Potter, Note, *When Women's Silence Is Reasonable: Reforming the Faragher/Ellerth Defense in the #MeToo Era*, 85 BROOK. L. REV. 603, 605 (2020) (criticizing how courts have interpreted the defense because it "allows employers to easily escape liability in cases where victims have been silent").

[386] *See supra* Section I.A (describing how Title VII requires administrative exhaustion).

[387] *See* Hemel & Lund, *supra* note 19, at 1675 ("This is not to dismiss the backfire concern out of hand; it is to say that the benefits of increased legal protection almost certainly outweigh the costs.").

[388] A separate issue that may arise around collection of the data by employers is the concern of employee privacy in having to identify gender or race. Given that the EEOC already collects EEO-1 data, existing procedures should govern. The United Kingdom considered and issued best practices for how to handle nonbinary gender classification. *See* ADVISORY, CONCILIATION & ARB. SERV., MANAGING GENDER PAY REPORTING 9 (2019), https://archive.acas.org.uk/media/4764/Managing-gender-pay-reporting/pdf/Managing_gender_pay_reporting_07.02.19.pdf [https://perma.cc/448E-D8V2] ("It is important for employers to be sensitive to how an employee chooses to self-identify in terms of their gender. The regulations do not define the terms 'male' and 'female' and the requirement to report gender pay should not result in employees being singled out and questioned about their gender. . . . [M]ost employers should be able to base reports on the gender identification the employee has provided for HR . . . . [E]mployers should establish a method which enables all

Requiring employers to provide anonymized demographic and salary information on employees to the EEOC falls well short of raising any Fourth Amendment concerns around search and seizure.[389] But, as described previously, under Title VII and the EEOC's current EEO-1-data-collection program, the government is required to keep collected data confidential.[390]

Given existing practices, employers are likely to resist greater collection and exposure of data on equality measures, fearing negative repercussions of unflattering data. One option that could alleviate employers' privacy concerns is to expand EEO-1 data collection to provide the additional Component 2 pay data, data on leadership, and data on harassment settlements only to the EEOC in the same confidential manner as currently exists. Even this may be met with resistance by some employers. Jamillah Bowman Williams has documented the recent trend of technology companies seeking exemptions to FOIA requests for existing EEO-1 data by claiming that workforce diversity matters are protected trade secrets.[391] Yet no court has held that raw data on workforce demographics should be subject to such protections (as opposed to companies' "strategies" or "initiatives" around improving diversity).[392] Thus, expanding EEO-1 data collection under existing confidentiality practices should pose no new privacy problem for employers.

A more useful disclosure regime, however, would include some publication—whether aggregated or identified only by industry, or, even more effective, employer identified like the European model.[393] Should more employer-

employees to confirm or update their gender. . . . In cases where the employee does not self-identify as either gender, an employer may omit the individual from the calculations.").

[389] There is neither a reasonable expectation of privacy in this information by the employee nor an unreasonable search or intrusion by the government requesting it from the employer. *See* United States v. Miller, 425 U.S. 435, 443 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.").

[390] *See* 42 U.S.C § 2000e-8(e); *EEO-1 Instruction Booklet*, *supra* note 205. Following the EEOC and Title VII model, state laws or proposals to collect pay data in New York and California and the collection of sexual-harassment-settlement data in Maryland and Illinois all also require and ensure confidentiality of reported data to the state fair employment practices agency only. *See* 775 ILL. COMP. STAT. 5/2-108 (2020); MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2020); S.B. 171, 2019-2020 Leg., Reg. Sess. (Cal. 2019); S.B. S4065, 2019-2020 Leg., Reg. Sess. (N.Y. 2019).

[391] *See* Williams, *supra* note 17, at 1693-96.

[392] *See id.* at 1707 (explaining how trade secret caselaw "suggests that diversity strategies and data may deserve differing treatment"); *see also* Estlund, *Just the Facts, supra* note 16, at 391-94 (considering employers' arguments that disclosures contain "proprietary information"); Estlund, *Extending the Case*, *supra* note 16, at 792-93 (same with regard to pay-data disclosures).

[393] As discussed, this would require a change to Title VII. *See supra* notes 252-59 and accompanying text.

identifying information be made public, on some level, the response to concerned employers should be "too bad." When compared to data collection in Europe, or even in the United States as required by the SEC, the mandate to the EEOC to protect the privacy of employers seems both unnecessary and misguided. Congress passed Title VII, employers are mandated to comply, and improvement in workplace equality is still stalled. If employers are hesitant to share their information publicly, that is the point—that is the power of improving compliance through disclosure. Ironically, the European disclosure laws rely on the power of publicity, despite the fact that the EU has much stronger data privacy protections than the United States.[394] Title VII enforcement has long been hampered by a strong jurisprudential deference to employers.[395] It is worth questioning why the EEOC continues to keep compliance data confidential when discrimination persists six decades after Title VII was enacted.

On the employee side, the EEOC could and should continue to ensure that individual identifying information about employees is protected.[396] If employer data were published, it would be in the aggregate, with no employee names attached. Moreover, all covered entities would have at least 100 employees, so it is unlikely that the data would be granular enough to impact the privacy of any individual employee. If employee privacy still remained a concern, the EEOC could publish analyses of pay- and promotion-gap data only, as in the U.K. model, rather than publishing raw data by salary bands. While employee privacy concerns should not be taken lightly, an equality-disclosure-reporting regime as envisioned in this Article would not risk exposure of any individual employee information.

C. *First Amendment Concerns*

Lastly, because an equality-disclosure requirement would compel private businesses to produce information to a governmental agency, critics may argue that it constitutes compelled speech in violation of the First Amendment. Lower courts have considered related issues, but whether compelling public disclosures could violate the free speech rights of employer entities has yet to be directly

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[394] *See* Editorial Board, Opinion, *Where Is America's Privacy Law?*, N.Y. TIMES, June 9, 2019, at SR10 (describing the European Union's 2018 General Data Protection Regulation, which "establishes several privacy rights that do not exist in the United States"); EUR. PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POL'YS, A COMPARISON BETWEEN US AND EU DATA PROTECTION LEGISLATION FOR LAW ENFORCEMENT 67 (2015), https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536459/IPOL_STU(2015)536459_EN.pdf [https://perma.cc/46YF-X7ZT].

[395] *See, e.g.*, Edelman et al., *supra* note 166, at 888 (documenting judicial deference to "formal organizational policies prohibiting discrimination or guaranteeing fair treatment" as evidence of nondiscrimination).

[396] *See* Estlund, *Extending the Case*, *supra* note 16, at 797-98 (considering employee privacy concerns raised by pay-data disclosures).

addressed by the Supreme Court.[397] A complete analysis of this topic, on which there is a robust and significant body of scholarship,[398] is well beyond the scope of this Article. Yet the few commentators to consider the issue in the context of antidiscrimination law provide some guidance.[399]

Broadly speaking, only certain types of speech are protected against government interference by the First Amendment. Regulation of unprotected speech must be reasonable to serve a governmental interest under rational basis review; regulation of protected speech, however, must be narrowly tailored to serve a substantial government interest under strict scrutiny.[400] Helen Norton suggests that information-forcing mechanisms like pay transparency rules intended to support enforcement of antidiscrimination law should fall outside the First Amendment as unprotected "commercial speech."[401] Where the Court has extended First Amendment protection to some commercial speech, it has done so to protect consumers; because "the Court has applied only deferential review to laws requiring commercial speakers to make accurate disclosures to their listeners," she suggests, "antidiscrimination laws . . . that require truthful disclosures by commercial actors will generally survive this review."[402] Even if such disclosures were considered protected speech, Norton argues, they should survive strict scrutiny: truthful disclosures on employment rights and conditions "provide considerable value to workers as listeners while imposing little, if any, expressive costs" on employers.[403] Moreover, enforcing antidiscrimination law

[397] Aronson, *supra* note 19, at 1212.

[398] *See generally, e.g.*, Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487 (2016); Aronson, *supra* note 19; Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277 (2014); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Helen Norton, *Discrimination, the Speech that Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209 (2020) [hereinafter Norton, *Discrimination*]; Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016) [hereinafter Norton, *Truth and Lies in the Workplace*]; Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653 (1993).

[399] *See generally, e.g.*, Aronson, *supra* note 19; Norton, *Discrimination*, *supra* note 398.

[400] *Compare* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980), *with* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 650 (1985); *see also* Post, *supra* note 402, at 881-900 (comparing the two cases).

[401] Norton, *Discrimination*, *supra* note 398, at 234-38, 245-46, 248-51.

[402] *Id.* at 249-51; *see also* Post, *supra* note 402, at 901-907 (discussing caselaw supporting the proposition that "government may require the disclosure only of purely factual and 'uncontroversial' information" and "that close constitutional scrutiny will apply to government efforts to compel entities to disseminate ideas or opinions [rather than facts], even within the medium of commercial speech").

[403] Norton, *Discrimination*, *supra* note 398, at 250.

and eliminating protected class discrimination has long been held to be a compelling government interest.[404]

In the context of sexual harassment complaints, Elizabeth Aronson acknowledges that compelled disclosures may not fit well within current understandings of "commercial speech" but argues that they still do not necessarily implicate any heightened level of scrutiny.[405] Regardless of whether compelled disclosures qualify as commercial or noncommercial speech, Aronson suggests, they provide more information to the public and thus further First Amendment interests.[406] That said, Aronson notes that courts could "consider . . . explicitly adopting a regulatory exception for such disclosures" to best serve First Amendment values and create clarity in the law.[407]

Perhaps the strongest response to concerns about equality disclosures infringing on employer speech is that the EEOC has been successfully collecting EEO-1 data without challenge or great disruption to employer speech interests since just after Title VII's enactment. Of course, this does prevent such a challenge in the future, particularly if the EEOC requires additional data on pay, promotion, or harassment settlements. Yet under existing doctrine, any rule merely expanding factual information collected from employers could likely be drafted without implicating the First Amendment.[408]

CONCLUSION

Since Congress passed the Civil Rights Act of 1964, the U.S. government has relied on workers to recognize, raise, and pursue claims of discrimination and harassment, despite the serious risk of retaliation for doing so. In passing Title VII, Congress created the EEOC to help investigate and litigate such claims, but the bulk of its limited resources are spent processing charges and giving employees permission to hire private lawyers to litigate claims themselves. Due to resource constraints, the EEOC pursues only a small fraction of litigation each year relative to the number of private employee suits. The law prohibits retaliation for complaining of discrimination, but that does not stop employers from retaliating; the only redress an employee has for retaliation is to add a retaliation claim to the discrimination claim they are already pursuing.

Relying so heavily on private employee suits leads to underreporting of discrimination and harassment and to underenforcement even if complaints are reported. While this has long been a problem with the enforcement mechanism of Title VII, the most recent decade of Supreme Court precedent on mandatory arbitration and class action certification stands to worsen the situation by forcing

[404] David E. Bernstein, *Antidiscrimination Laws and the First Amendment,* 66 MO. L. REV. 83, 84-86 (2001).

[405] Aronson, *supra* note 19, at 1233.

[406] *Id.*

[407] *Id.*

[408] *See* Norton, *Discrimination*, *supra* note 398, at 250.

employees out of the courts and into private arbitration, where they may be barred from pursuing any claim on a class-wide basis. This means that, not only is it difficult to hold employers accountable for discriminatory treatment, but when employees are willing to take the risk to raise and pursue them, their claims are isolated and hidden away in secret proceedings. This perfect storm of underreporting, underenforcement, and the invisibility of enforcement means that an employer who violates the law may carry on as they always have with impunity, while systemic recurring problems of harassment and discrimination remain unaddressed.

This need not and should not be the case. Even without radically increasing the resources and capacity of the EEOC for public enforcement, the EEOC can place additional regulatory requirements on employers to produce information that can document the scope of the problem, assist existing enforcement efforts, and motivate employers to reduce inequality by self-policing. Looking to examples of disclosure requirements in securities law and to models for equality measures in other countries' and some U.S. state law provides a path forward.

As proposed, a disclosure regime in which employers are compelled to publicly produce basic information on pay, promotion, and harassment settlements by race and gender is a reasonable and necessary way to fulfill the promise of Title VII. Employers can and should be required to track and redress inequality and harassment fostered in their own institutions—without an employee having to risk personal peril by bringing a lawsuit to make them do so.