

Trying Something Old?: Incorporating the Dodd–Frank Act into Modern Efforts to Eliminate Workplace Sexual Harassment

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ABSTRACT

The recent exposure of public figures such as Harvey Weinstein and Bill Cosby show that current measures taken to curb sexual harassment in the workplace have not proven to be enough. It is, then, important and worth exploring acts from different sectors that have proven effective and then applying the provisions from those acts to address this issue. This Note will explore the Dodd–Frank Act and pick out the provisions that have potentiality to be adopted and applied in addressing sexual harassment in the workplace.

“It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something.”

Franklin D. Roosevelt¹

INTRODUCTION

#MeToo, #TimesUp, and #BelieveWomen. Hashtags become exposure, which in turn, inspire regulations.² The rise of social media has exposed the issue of sexual harassment in the workplace.³ Within the last

* I dedicate this to my family and roommates. Thank you for being my source of encouragement.

1. Franklin D. Roosevelt, Commencement Address at Oglethorpe University 12 (May 22, 1932) (transcript available at the Franklin D. Roosevelt Presidential Library and Museum), http://www.fdrlibrary.marist.edu/_resources/images/msf/msf00486 [<https://perma.cc/5RDN-EJMD>].

2. Michael Collins & David Jackson, *19 Million Tweets Later: A Look at #MeToo a Year After the Hashtag Went Viral*, USA TODAY (Oct. 13, 2018), <https://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002/> [<https://perma.cc/3UJL-GAV4>]; Ashley Hesse, *Every Feminist Hashtag You Need to Know, From #METOO to #TimesUp*, LIVE YOUR DREAM (Feb. 5, 2018), <https://yourdream.liveyourdream.org/2018/02/feminist-hashtags-metoo-timesup/> [<https://perma.cc/5KNG-U7XR>].

3. Anna North et al., *Sexual Harassment Assault Allegations List*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> [<https://perma.cc/9S5D-B36L>].

few years, many high-profile victims have come forward to expose the prevalence of sexual harassment in the workplace.⁴ Hundreds of household names like Bill Cosby and Harvey Weinstein have also been held responsible for sexual misconduct over the last few years.⁵ In fact, 263 celebrities, politicians, CEOs, and other high-profile individuals have been accused of sexual misconduct since 2017.⁶

With the rise of exposure, agencies like the Equal Employment Opportunity Commission have taken active measures to address the issue of sexual harassment in the workplace.⁷ Such measures range from foundational initiatives such as Title VII of the Civil Rights Act to recent spotlights placed upon public figures facing criminal sexual misconduct charges, like Bill Cosby. Yet skepticism of the effectiveness of these actions still floods offices across the country for one simple reason—these measures are not enough.

Even with current sexual harassment laws, many employers “have done little to address sexual harassment.”⁸ For instance, 81% of women and 43% of men have experienced some form of sexual harassment,⁹ and 87% to 94% of individuals who are harassed do not file a complaint.¹⁰ Furthermore, sexual harassment laws have remained in a continual state of flux.¹¹ It is therefore time to try something new. Restricting our search for provisions to address sexual harassment solely to traditional provisions would be inefficient and, as America’s current state has shown,

4. Kevin LaCroix, *Guest Post: EPL Claims: Changing Norms and New Legislation in the #MeToo Era*, D&O DIARY (Aug. 23, 2018), <https://www.dandodiary.com/2018/08/articles/employment-practices-liability-2/guest-post-epl-claims-changing-norms-new-legislation-metoo-era/> [<https://perma.cc/JZK4-K7R4>].

5. See generally *From Harvey Weinstein to Bill Cosby’s Trials & Convictions: #TimesUp Sends Clear Message*, ECON. TIMES (Apr. 27, 2018), <https://economictimes.indiatimes.com/magazines/panache/from-harvey-weinstein-to-bill-cosbys-trials-convictions-timesup-sends-clear-message/hollywoods-walk-of-shame/slideshow/62307879.cms> [<https://perma.cc/X82L-NSY5>].

6. North et al., *supra* note 3.

7. See generally *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> [<https://perma.cc/GW48-4VZG>].

8. Brendan L. Smith, *What it Really Takes to Stop Sexual Harassment*, MONITOR ON PSYCHOLOGY, Feb. 2018, at 36, 36.

9. Rhitu Chatterjee, *A New Survey Finds 81% of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment> [<https://perma.cc/AG4F-VSDH>].

10. Katie Yahнке, *The 2019 Guide to Workplace Sexual Harassment [INFOGRAPHIC]*, I-SIGHT (Jan. 30, 2019), <https://i-sight.com/resources/guide-to-workplace-sexual-harassment-infographic/> [<https://perma.cc/25AN-V4DS>].

11. Merrick T. Rossein, *Work Environment - Sexual Harassment*, C780 ALI-ABA 81, 86 (1993).

ineffective.¹² Looking to the Dodd–Frank Act and adopting applicable and useful provisions from this Act to acts like Title VII could contribute to the active effort in working to eliminate the serious problem of sexual harassment in the workplace.

To effectively eliminate sexual harassment in the workplace, the U.S. needs to take a new approach. Specifically, employers and legislators should look to the Dodd–Frank Act, an act within business and corporate law that was created in response to the Great Financial Crisis that occurred in 2007 and 2008.¹³ Certain provisions in the Dodd–Frank Act assert positive policies, procedures, and ideas that can potentially be impactful in addressing sexual harassment. The Dodd–Frank analysis of an economic act within the context of sexual harassment can lead to obvious complications; however, the gaps, holes, and limitations in the current provisions like Title VII addressing sexual harassment are very similar to the same gaps the Dodd–Frank Act attempts to fill in the economic sector. Nevertheless, the Dodd–Frank Act closes these gaps by incorporating methods that establish frameworks and programs to supervise financial institutions and absorb losses during stressful conditions.¹⁴

This Note will focus on some of the measures in the Dodd–Frank Act and analyze how they can serve as potential strategies to be used in the context of mitigating the occurrence of sexual harassment in the employment setting. Part I of this paper will discuss the foundational regulations and measures like the Civil Rights Act of 1964 that have had the most widespread effect. Part II will discuss employers' use of Non-Disclosure Agreements to prevent employees from disclosing any sexual harassment made against them. Parts III and IV will provide a brief overview of the Dodd–Frank Act and some of its provisions. An understanding of the goals, purposes, and provisions of the Act will help lead to an analysis of the rationale behind certain provisions in the Act. Finally, Part V will recommend the provisions that should be adopted from the Dodd–Frank Act and applied to current acts like Title VII that address sexual harassment.

12. Julie Goldscheid, *Is Sexual Harassment a Civil Rights Violation? It Should Be*, ACLU (Jan. 26, 2018), <https://www.aclu.org/blog/womens-rights/sexual-harassment-civil-rights-violation-it-should-be> [https://perma.cc/6C6H-XREP].

13. *Dodd–Frank Act*, HISTORY.COM (Aug. 21, 2018), <https://www.history.com/topics/21st-century/dodd-frank-act> [hereinafter HISTORY] [https://perma.cc/Z6BZ-VR36].

14. *See Generally* FED. RES. BD., DODD–FRANK ACT STRESS TEST 2018: SUPERVISORY STRESS TEST METHODOLOGY AND RESULTS (2018).

I. EXISTING PROVISIONS THAT ADDRESS SEXUAL HARASSMENT

There have been moments in our history when women's rights movements garnered significant attention.¹⁵ For example, between the 1960s and the 1980s, "women . . . challenged their exclusion from traditionally male jobs ranging from the professions to the blue collar trades . . ."¹⁶ When joining the workforce, women consolidated to protect themselves from unwanted sexual harassment.¹⁷ For example, during the late nineteenth century, societies like the Working Women's Society, an association whose major aim was to protect women from unwanted sexual advances,¹⁸ and the Women Christian Temperance Union, an organization that strived to shape public opinion and enact legal reforms,¹⁹ were formed to guard women.²⁰ However, these movements and societies did not compel immediate legislative provisions that addressed sexual harassment in the workplace.²¹ In 1941, President Franklin D. Roosevelt signed Executive Order 8802 in recognition of employers' discriminatory behavior toward union members, which prohibited discrimination based on race, color, and national origin.²² However, the Order did not mention or address sexual discrimination.²³

The Civil Rights Act of 1964 was the first significant provision that addressed an initial remedy against sexual harassment.²⁴ Specifically, Title VII of the Civil Rights Act prohibited discrimination in employment on the basis of "race, color, religion, sex, or national origin."²⁵

In order to assert discrimination on the basis of sex under Title VII, certain elements must be met. For example, "a sexually objectionable environment must be both objectively and subjectively offensive . . ."²⁶

15. Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1217 (1998).

16. *Id.* at 1195.

17. Maggie M. Lewis, *Sexual Harassment in the Workplace: Hurdles of a Modern "Rosie the Riveter"*, 15 DUQ. BUS. L.J. 199, 205 (2013).

18. Mary Bularzik, *Sexual Harassment at the Workplace: Historical Notes*, RADICAL AM., July–Aug. 1978, at 1, 11.

19. Jane E. Larson, "Even A Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1, 2–3 (1997).

20. Lewis, *supra* note 17.

21. *Id.* at 206.

22. *Id.*

23. *Id.*

24. Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997).

25. *Id.* (emphasis added).

26. Editorial, *Sexual Harassment by Supervisors is a Persistent Problem*, WASH. POST, https://www.washingtonpost.com/archive/politics/1998/06/27/sexual-harassment-by-supervisors-is-a-persistent-problem/7fa12116-6509-4c2c-a280-0ef07eb8e96a/?utm_term=.e176b30cc5bd [<https://perma.cc/5UUL-GHDG>].

This is based on whether a reasonable person would have perceived the environment to be hostile or abusive.²⁷ A court then determines whether an environment is hostile or abusive by looking at the totality of the circumstances, which includes (1) the frequency of discriminatory conduct; (2) its severity; (3) whether it unreasonably interferes with employee's work performance; and (4) whether it is physically threatening or humiliating.²⁸

To ensure that Title VII was properly implemented, Congress created the U.S. Equal Employment Opportunity Commission (EEOC).²⁹ The EEOC's goal was to "eliminate unlawful employment discrimination practices through their five-member, bipartisan commission."³⁰ On April 11, 1980, the EEOC published the "Interim Guidelines on Sexual Harassment," an amendment to its current guidelines on discrimination because of sex.³¹ The guidelines listed criteria to help clarify whether an action constitutes unlawful behavior.³² These criteria are

- 1) submission to the conduct is either an explicit or implicit term or condition of employment;
- 2) submission to or rejection of the conduct is used as the basis for employment decisions affecting the person who did the submitting or rejecting; or
- 3) the conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.³³

The crucial significance of the EEOC Guidelines was that they acknowledged sexual harassment in the workplace as unlawful.³⁴ In furtherance of this acknowledgement, that same year, Congress asked the U.S. Merit Systems Protection Board (MSPB) to study sexual harassment in the federal workplace.³⁵ Several studies and surveys were conducted by

27. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990).

28. Sara L. Johnson, *When is Work Environment Intimidating, Hostile, or Offensive, so as to Constitute Sexual Harassment in Violation of Title VII of Civil Rights Act of 1964*, 78 AM. L. REP. FED. 252, 252 (1986).

29. Lewis, *supra* note 17, at 208.

30. *Id.*

31. See 29 C.F.R. § 1604 (2019); Adoption of Interim Interpretive Guidelines, 45 Fed. Reg. 24,851, 25,024 (Apr. 11, 1980) (codified at 29 C.F.R. § 1604).

32. See 29 C.F.R. § 1604.11 (2019).

33. *Id.*

34. Lewis, *supra* note 17, at 209.

35. See generally U.S. MERIT. SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS AND CONTINUING CHALLENGES (1995) [hereinafter M.S.P.B.].

MSPB.³⁶ These surveys played an important role in assisting Congress in determining the nature and extent of sexual harassment in the federal workplace.³⁷ For example, one survey found that “in 1944, 44 percent of women and 19 percent of men responding to our survey reported that they had experienced some form of unwanted sexual attention during the preceding 2 years.”³⁸ In 1987, rates were similar: 42% and 14%, respectively.³⁹ Sexual harassment cost the federal government \$327 million during a two-year period from 1992 to 1994⁴⁰ due to sick leave, job turnover, and productivity losses.⁴¹ This survey was significant in several ways: first, the survey showed the gradual admittance and recognition that sexual harassment in the workplace was heavily prevalent;⁴² second, the survey brought sexual harassment to the national limelight;⁴³ and finally, it led to important suggestions and recommendations to address workplace sexual harassment.⁴⁴

Once the EEOC was created and there was admitted acknowledgement of the presence of unlawful sexual harassment, cases concerning sexual harassment arose and courts were obliged to apply provisions of Title VII.⁴⁵ These cases continued to build on the foundation set by the Civil Rights Act and defined the protections against sexual harassment.⁴⁶ One of the first cases where the court made its decision on sexual harassment was in *Meritor Savings Bank v. Vinson*.⁴⁷ Michelle Vinson, a female bank employee, alleged that she had been subjected to sexual harassment by her male supervisor.⁴⁸ Vinson initially refused to have sexual relations with her supervisor, but she later consented due to the constant pressure she faced.⁴⁹ Vinson was threatened with the fear of losing her job if she failed to comply with her supervisor’s sexual demands.⁵⁰ In this case, the Supreme Court made several determinations

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at vii.

40. *Id.* at viii.

41. *Id.*

42. *Id.*

43. *Id.* at vi.

44. *Id.* at 53.

45. *Id.*

46. DeNeen L. Brown, *She Said Her Boss Raped Her in a Bank Vault. Her Sexual Harassment Case Would Make Legal History.*, WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history/?utm_term=.db253061f2c5 [<https://perma.cc/Y8QA-VTW8>].

47. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 57 (1986).

48. *Id.*

49. *Id.* at 60.

50. *Id.*

under Title VII: a plaintiff may establish a violation by proving that discrimination based on sex had created a hostile or abusive work environment;⁵¹ “voluntary” sex-related conduct is not a defense to a sexual harassment suit;⁵² and employers are not always automatically liable for the sexual harassment of employees by their supervisors.⁵³

Seven years later, another sexual harassment case reached the Supreme Court.⁵⁴ In *Harris v. Forklift System*, the Supreme Court specified the circumstances that constitute an abusive and hostile environment and ruled out the argument that a diagnosed psychological injury had to occur to create such an environment.⁵⁵ Teresa Harris worked as a manager at Forklift Systems, Inc. (Forklift), and Charles Hardy was Forklift’s president during the time of Harris’s employment.⁵⁶ Throughout Harris’s time at Forklift, Hardy often insulted her and made her the target of “unwanted sexual innuendos.”⁵⁷ For example, Hardy threw objects on the ground in front of Harris and asked her to pick the objects up.⁵⁸ Furthermore, Hardy would, in front of others, suggest that Harris “go to the Holiday Inn to negotiate [Harris’s] raise.”⁵⁹ After Harris complained to Hardy about his conduct, Hardy promised he would stop.⁶⁰ Based on this assurance, Harris stayed on the job.⁶¹ However, Hardy persisted with his conduct.⁶² The Court ruled that an abusive environment was not limited to just economic or tangible discrimination.⁶³ When the workplace is permeated with “discriminatory intimidation, ridicule, and insult,” it is enough.⁶⁴ Most importantly, the Court noted that “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”⁶⁵ What is more, even if discrimination does not seriously affect an employee’s psychological well-being, it can create an abusive work environment.⁶⁶

51. *Id.* at 66. A hostile or offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule, or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/harassment.cfm> [https://perma.cc/FQF5-ZZGA].

52. *Vinson*, 477 U.S. at 58.

53. *See id.* at 57–73.

54. *Harris v. Forklift Sys.*, 510 U.S. 17, 19 (1993).

55. *Id.* at 21.

56. *Id.* at 19.

57. *Id.*

58. *Id.*

59. *Id.* at 19.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 21.

64. *Id.* at 21.

65. *Id.* at 22.

66. *Id.*

Furthermore, in 1998, the Supreme Court extended Title VII's reach to apply to a harasser's employers, as opposed to only applying to the harasser himself, under the agency argument.⁶⁷ In *Faragher v. City of Boca Raton*, petitioner Beth Ann Faragher, a lifeguard, brought an action against her immediate supervisors Terry and Silverman as well as the City.⁶⁸ Faragher alleged that Terry and Silverman created a sexually hostile environment by subjecting Faragher to "uninvited and offensive touching," making lewd remarks, and by speaking of women in offensive terms.⁶⁹ The Court held that the City of Boca Raton was vicariously liable for the supervisors' violation of Title VII⁷⁰ and clarified that traditional agency principles applied under Title VII.⁷¹ Therefore, a victim of sexual harassment did not have to limit her claim to just the harasser—it could extend to employees higher up in the company.⁷²

To summarize, below is a brief outline of what the major cases show about the provisions of Title VII:

- 1) Title VII has been violated if sexual harassment has created an abusive or hostile work environment;⁷³
- 2) Any sexual conduct is "voluntary" is not a defense to sexual harassment;⁷⁴
- 3) Presentation of diagnosed psychological injuries are not required to recover under Title VII;⁷⁵ and
- 4) Traditional agency principles can be applied under Title VII.⁷⁶

II. NON-DISCLOSURE AGREEMENTS

Confidentiality provisions, sometimes referred to as non-disclosure agreements (NDAs), are legal contracts used to prevent people from discussing confidential information and are widely used in the business

67. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998). In short, the agency argument entails that supervisors will be held liable if their employee was a direct employee or servant (as opposed to an independent contractor) and was acting in the scope of his or her employment at the time of the harassment. Restatement section 219 of Torts provides that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment." *Id.* at 776.

68. *Id.* at 780.

69. *Id.*

70. *Id.* at 808.

71. *Id.* at 791.

72. *Id.*

73. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

74. *See id.* at 68.

75. *See Harris v. Forklift Sys.*, 510 U.S. 17, 22 (1993).

76. *See Faragher*, 524 U.S. at 791.

sphere.⁷⁷ These types of settlement agreements are in no way illegal.⁷⁸ In fact, businesses need these in order to preserve their trade secrets from getting leaked.⁷⁹ In the context of our current discussion, however, employers have used NDAs to bar employees from bringing awareness to the issue or a lawsuit regarding the sexual harassment made against them.⁸⁰ Therefore, NDAs frequently prohibit employees from disclosing any details about the settlement.⁸¹

However, Title VII prohibits settlement agreements that forbid employees from filing charges with the EEOC or assisting the EEOC in its investigations.⁸² Unfortunately, it does not apply this prohibition to all employers.⁸³ To qualify as an “employer,” one must be a person who has fifteen employees or more (during each working day for at least twenty weeks in the current or preceding year).⁸⁴ Furthermore, though Title VII prohibits these types of settlement agreements with “employees,” sometimes nonemployees, such as independent contractors, temporary workers, and gig economy workers, are not considered as employees, and therefore Title VII does not apply.⁸⁵ What’s more, employers use the “take it or leave it” condition that leaves employees helpless and eventually forced to sign an NDA.⁸⁶ In other words, employers use the threat of unemployment to coerce employees into signing documents with these NDAs.⁸⁷ Additionally, employees may be uninformed about the existence of non-disclosure provisions in their agreements,⁸⁸ as NDAs can be several pages long and contain extensive technical information.⁸⁹ Furthermore,

77. Robert Mendick & Gordon Rayner, *Non-Disclosure Agreements: Everything You Need to Know About NDAs (and Their Misuse)*, TELEGRAPH (Oct. 25, 2018), <https://www.telegraph.co.uk/news/0/non-disclosure-agreements-everything-need-know-ndas-misuse/> [https://perma.cc/5RTS-K2D4].

78. Ann Fromholz & Jeanette Laba, #METOO Challenges Confidentiality and Nondisclosure Agreements, L.A. LAW., May 2018, at 12, 13.

79. *Id.*

80. *Id.* at 14.

81. *Id.* at 12.

82. *Id.*

83. Pamela Wolf, *Sexual Harassment: Grappling with a Persistent Workplace Quagmire*, WOLTERS KLUWER LEGAL REG. U.S. 1, 1–17 (Mar. 1, 2018), https://www.jacksonlewis.com/sites/default/files/docs/ELD_Sexual-harassment_02-20-2018_final_locked.pdf [https://perma.cc/T5GE-LPUL].

84. *Id.*

85. *Id.*

86. See Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. Rev. 869, 869–93 (2016).

87. *Id.*

88. Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 20, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change> [https://perma.cc/Z2XW-XD2L].

89. Lobel, *supra* note 86, at 875.

timing is very sensitive—employees are less likely to negotiate the terms of the contract after they have completed their job search and have begun working for the new employer.⁹⁰

Recently, Congress has taken legislative action to address the problems of NDAs and their effects on victims of sexual harassment.⁹¹ Congress has introduced a bipartisan bill, called the “ME TOO Congress Act” that would limit the use of NDAs.⁹² This bill would prohibit non-disclosure agreements as a condition of initiating a complaint while still permitting contents of mediations as part of a negotiation settlement to be included.⁹³ Furthermore, the EMPOWER Act was also introduced to Congress,⁹⁴ which would prohibit non-disclosure clauses as a condition of employment, promotion, compensation, benefits, or change in employment status.⁹⁵ Specifically, “[t]his bill would stop employers from imposing their one-sided terms on victims of workplace abuse[,]” thus eliminating the “take-it-or leave-it” condition.⁹⁶

Both the ME TOO Congress Act and the EMPOWER Act show the substantial movement made to address the hardships that NDAs impose upon victims of sexual harassment.⁹⁷ However, while these bills are a good initial step, they are not enough.⁹⁸ Manipulation by employers emphasizes the current lack of provisions present that require employers to be the ones who provide a safe environment for their employees.⁹⁹ Indeed, manipulation by employers and the lack of knowledge and understanding from employees highlight the necessity of implementing measures that require employers to be the ones to inform their employees of the existence

90. *Id.* at 877.

91. Ilyse W. Schuman & Betsy Cammarata, *Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements?*, LITTLER MENDELSON P.C. (Jan. 9, 2018), <https://www.littler.com/publication-press/publication/lawmakers-take-aim-will-metoo-curb-nondisclosure-or-arbitration> [<https://perma.cc/7F89-3V77>].

92. ME TOO Congress Act, H.R. 4396, 115th Cong. (2017).

93. *Id.* at § 104.

94. Eleanor Salsbury, *Women in Congress Are Taking on Sexual Harassment with the EMPOWER Act*, MS. (June 14, 2018), <https://msmagazine.com/2018/06/14/women-congress-taking-sexual-harassment-empower-act/> [<https://perma.cc/F387-HWRW>].

95. *Id.*

96. Lauren Holter, *What is the EMPOWER Act? This Workplace Harassment Bill Could Make NDAs a Thing of the Past*, BUSTLE (July 17, 2018), <https://www.bustle.com/p/what-is-the-empower-act-this-workplace-harassment-bill-could-make-ndas-a-thing-of-the-past-9792924> [<https://perma.cc/3X2G-6UQS>].

97. Candace Baker, *Months After #MeToo, Congress is Getting Serious About Workplace Harassment*, STUDYBREAK (June 18, 2018), <https://studybreaks.com/thoughts/empower-act-congress-addressing-harassment/> [<https://perma.cc/526N-NFMV>].

98. *Id.*

99. See Eliza G.C. Collins & Timothy B. Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, HARV. BUS. REV. (Mar. 1981), <https://hbr.org/1981/03/sexual-harassmentsome-see-itsome-wont> [<https://perma.cc/38EB-3M38>].

of NDAs and how NDAs can impede an employee who faces sexual harassment from successfully bringing a claim.¹⁰⁰

III. A BRIEF HISTORY OF THE DODD–FRANK ACT

Before the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), the Sarbanes–Oxley Act served as the congressional mechanism for financial regulation.¹⁰¹ The Sarbanes–Oxley Act proposed to fix the auditing of U.S. public companies by protecting shareholders and the general public from fraudulent practices.¹⁰² In the early 2000s, many financial scandals involving fraudulent disclosure or accounting statements as well as explicit theft by corporate officials occurred.¹⁰³ The Sarbanes–Oxley Act was designed to fight these kinds of fraudulent practices by creating enlisting auditors to enforce new disclosure rules—rules that could strengthen the incentives for firms to increase spending on financial controls.¹⁰⁴ As a result, U.S. public companies are required to have a type of “control system” over their assets and accounting systems.¹⁰⁵ This system could provide companies the ability to be reasonably assured that transactions are authorized, recorded, and used to detect and prevent theft and deception.¹⁰⁶ Though doing so requires a higher cost to companies to implement this type of system, the Act promises long-term benefits; for example, it promises a lower risk of loss from fraud and theft for investors, greater transparency, and accountability.¹⁰⁷ The combat against fraud has also been supported by establishing a quasi-public institution, the Public Company Accounting Oversight Board (PCAOB), to supervise auditors.¹⁰⁸ More specifically, the PCAOB establishes auditing and practice standards for public firms to follow when preparing their audit reports for public companies and other issues.¹⁰⁹

100. *Id.*

101. See generally John C. Coates, IV, *The Goals and Promise of the Sarbanes–Oxley Act*, 21 J. ECON. PERSP. 91 (2007), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.21.1.91> [<https://perma.cc/UL2U-V4Z9>].

102. Juliana De Groot, *What is SOX Compliance? 2019 SOX Requirements & More*, DATA INSIDER (July 15, 2019), <https://digitalguardian.com/blog/what-sox-compliance> [<https://perma.cc/8SPW-7VB6>].

103. Coates, *supra* note 101, at 100.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 92.

108. The Sarbanes–Oxley Act created the Public Company Accounting Oversight Board (PCAOB) to oversee and regulate auditing and to enlist auditors to enforce existing laws against theft and fraud by corporate officers. *Standards*, PUB. CO. ACCT. OVERSIGHT BD., <https://pcaobus.org/Standards> [<https://perma.cc/PNX3-ZWFA>].

109. *Id.*

The “Great Recession” began in 2007, and peaked in 2008 when the fourth largest investment bank in the United States, Lehman Brothers, collapsed.¹¹⁰ In response to the 2008 financial crisis, President Obama signed, and Congress passed, the Dodd–Frank Act on July 21, 2010.¹¹¹ The overarching goal of the Act is to “promote the financial stability of the United States by improving accountability and transparency in the financial system,”¹¹² as well as to “protect the American taxpayer by ending bailouts, protect consumers from abusive financial service practices, and for other purposes.”¹¹³ When explaining the rationales for this Act, President Obama noted that “some firms that posed a . . . ‘systemic risk’ were not regulated as strongly as others; they behaved like . . . other entities that were under less scrutiny.”¹¹⁴ The intentions of this Act are to put in place safeguards to prevent the failure of these firms, create a set of orderly procedures, raise the standards to which these kinds of firms are held, and to have these firms meet stronger requirements so they are more resilient and less likely to fail.¹¹⁵

IV. THE DODD–FRANK ACT

Although the Sarbanes–Oxley Act has effective measures, it has several gaps that the Dodd–Frank Act endeavors to fill.¹¹⁶ Before Dodd–Frank’s existence, Section 806 of the Sarbanes–Oxley Act was the only source of federal whistleblower protection for private sector employees.¹¹⁷ However, it does not protect all private-sector employees,¹¹⁸ and it only protects certain private companies.¹¹⁹ In the Dodd–Frank Act, the whistleblower provision is extended to the employees of a private subsidiary of a publicly traded company if the “publicly traded company’s

110. HISTORY, *supra* note 13.

111. Arthur E. Wilmarth, Jr., *The Dodd–Frank Act: A Flawed and Inadequate Response to the Too-Big-To-Fail Problem*, 89 OR. L. REV. 951 (2011).

112. Dodd Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong., 124 Stat. 1376 (2010).

113. *Id.*

114. President Barack Obama, Remarks by the President on 21st Century Financial Regulatory Reform (June 17, 2009).

115. *Id.*

116. Larry Bumgardner, *Lessons from the New Dodd–Frank Financial Regulatory Reform Law*, 13 GRAZIADIO BUS. REV., no. 4, 2010, <https://gbr.pepperdine.edu/2010/10/lessons-from-the-new-financial-regulatory-reform-law-2/> [<https://perma.cc/9CVS-2DAE>].

117. Meghan Elizabeth King, *Blowing the Whistle on the Dodd–Frank Amendments: The Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes–Oxley*, 48 AM. CRIM. L. REV. 1457, 1457 (2011).

118. *Id.*

119. *Id.* at 1461.

consolidated financial statements include the subsidiary's financial information."¹²⁰

Additionally, section 922 of the Dodd–Frank Act vastly expands Sarbanes–Oxley's limited whistleblower award (also known as a bounty-award provision for whistleblowers).¹²¹ Before the Dodd–Frank Act, an action could be taken against an employer only if it resulted in monetary sanctions exceeding one million dollars.¹²² Furthermore, an award made to a whistleblower would be capped at 10% of the total amount of sanctions.¹²³ With the Dodd–Frank Act, the whistleblower award provision may provide a whistleblower award for a whistleblower who voluntarily provides the Securities and Exchange Commission (SEC) with information.¹²⁴ The SEC then, under the Dodd–Frank Act, is allowed to grant whistleblower awards.¹²⁵

Furthermore, the Dodd–Frank Act extends the statute of limitations and also hastens the process for when a whistleblower files a claim.¹²⁶ As opposed to Sarbanes–Oxley's statute of limitation of ninety days after the violation occurred, the Dodd–Frank Act extends the statute of limitations to 180 days after the employee becomes aware of the violation.¹²⁷ Furthermore, unlike Sarbanes–Oxley's long administrative process where the whistleblower has to first file a complaint with the United States Department of Labor, under the Dodd–Frank Act, the whistleblower can immediately file in federal district court.¹²⁸ Finally, the Dodd–Frank Act contains sections that create its own cause of action for retaliation.¹²⁹ The Act explicitly extends whistleblower protection to the employees of a private subsidiary of a publicly traded company and invalidates any pre-dispute agreements requiring arbitration for Sarbanes–Oxley's whistleblower claims.¹³⁰

120. *Id.* at 1465.

121. *Id.* at 1463.

122. *Id.*

123. *Id.*

124. *Office of the Whistleblower: Retaliation*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/whistleblower/retaliation> [<https://perma.cc/78XJ-ED5X>].

125. *See SEC Announces Largest Whistleblower Awards Ever Granted under the Dodd–Frank Act's Bounty Provision*, SULLIVAN & CROMWELL LLP (Mar. 20, 2018), <https://www.sullcrom.com/blogs-sec-announces-largest-whistleblower-awards-ever-granted-under-the-dodd-frank-acts-bounty-provision> [<https://perma.cc/TZU7-A3GM>].

126. Joseph P. Sirbak, II, *The Dodd–Frank Act's New Whistleblower and Bounty Provisions*, BUCHANAN INGERSOLL & ROONEY PC (July 13, 2011), <https://www.bipc.com/the-dodd-frank-acts-new-whistleblower-and-bounty-provisions> [<https://perma.cc/DR3W-YKX7>].

127. *Id.*

128. *See* King, *supra* note 117, at 1460.

129. *Id.* at 1465.

130. *Id.*

In addition to filling certain gaps that the Sarbanes–Oxley Act had with its whistleblowing provision, the Dodd–Frank Act also presents provisions that address other issues. The Dodd–Frank Act requires all U.S. “banking holding companies” with more than \$50 billion in assets to conduct their own stress test and report the results to the Federal Reserve and Office of the Comptroller of the Currency (OCC) twice a year.¹³¹ In 2014, midsized firms (i.e., those with \$10–50 billion in assets) were also required to conduct a stress test.¹³² The purpose of a stress test is to help companies “gauge investment risk and the adequacy of assets, as well as to help evaluate internal processes and controls.”¹³³

Another issue the Dodd–Frank Act responds to is the “Too Big to Fail doctrine” (TBTF).¹³⁴ TBTF identifies firms that are essentially too big to fail,¹³⁵ which are firms whose “size, complexity, interconnectedness, and critical functions are such that, should the firm go unexpectedly into liquidation, the rest of the financial system and the economy would face severe adverse consequences.”¹³⁶ TBTF was highlighted by the financial crisis in 2007, when one of the biggest financial firms, Lehman Brothers Inc., was allowed to go under after it went insolvent.¹³⁷ Lehman Brothers Inc.’s failure was so interconnected with other financial firms that regulators determined “only massive bailouts would keep dozens more around the world from failing.”¹³⁸ The Dodd–Frank Act strengthens the ability of regulators to extend safety and prevention of failure to more than half of the financial sector.¹³⁹ Through the Dodd–Frank Act, regulators can mitigate any risks caused by the failure of TBTF institutions.¹⁴⁰

131. Sylvan Lane, *All US Banks Clear Latest Dodd–Frank Stress Tests*, THE HILL (June 21, 2018, 5:00 PM), <https://thehill.com/policy/finance/393552-all-us-banks-clear-latest-dodd-frank-stress-tests> [<https://perma.cc/CSD5-HALF>].

132. Joseph Reising, *The Reaction of Medium-Sized Banks to Stress Test Implementation*, 23 J. FIN. & ACCT., June 2018, at 1, 6, <https://www.aabri.com/manuscripts/172654.pdf>. Throughout this paper, these banking holding companies and midsized firms will be labeled as “covered institutions.” A stress test is a test “used to test the resilience of institutions . . . against possible future financial situations.” Will Kenton, *Stress Testing*, INVESTOPEDIA (Aug. 12, 2019), <https://www.investopedia.com/terms/s/stresstesting.asp> [<https://perma.cc/R2FV-XQDH>].

133. Kenton, *supra* note 132.

134. Troy S. Brown, *Legal Political Moral Hazard: Does the Dodd–Frank Act End Too Big to Fail?*, 3 ALA. CIV. RTS. & CIV. LIBERTIES. L. REV. 1 (2012).

135. Ben S. Bernanke, Chairman, Fed. Res., Testimony Before the Financial Crisis Inquiry Commission: Causes of the Recent Financial and Economic Crisis (Sept. 2, 2010), <https://www.federalreserve.gov/newsevents/testimony/bernanke20100902a.htm> [<https://perma.cc/5JDR-BZHU>].

136. *Id.*

137. Yalman Onaran, *Too Big to Fail*, BLOOMBERG (last updated Dec. 8, 2017), <https://www.bloomberg.com/quicktake/big-fail> (last visited Sept. 24, 2019).

138. *Id.*

139. MARC LABONTE, CONG. RESEARCH SERV., R42150, SYSTEMICALLY IMPORTANT OR “TOO BIG TO FAIL” FINANCIAL INSTITUTIONS 1 (2018).

140. *Id.*

Although aimed to protect firms from failing, the protection of TBTF firms poses several issues. First, economically, there is an expectation that by rescuing TBTF firms, the financial system will become less stable due to a moral hazard that weakens market discipline.¹⁴¹ In other words, “if the creditors and counterparties of a TBTF firm believe that the government will protect them from losses, they have less incentive to monitor the firm’s riskiness because they are shielded from the negative consequences of those risks.”¹⁴²

After the 2008 financial crisis, President Obama worked with Congress to create a plan to end TBTF firms,¹⁴³ which included attempts to prevent moral hazards.¹⁴⁴ For instance, his plan endeavored to subject banks to a number of regulations, such as regulating derivatives and establishing financial regulators—along with the possibility of breaking up banks if any of them were deemed to be TBTF.¹⁴⁵ As an example, Title II of the Dodd–Frank Act established a new special resolution regime called the “Orderly Liquidation Authority” (OLA).¹⁴⁶ OLA is applied as an alternative to the normally applicable Bankruptcy Code.¹⁴⁷ It was established to address systemically important financial institutions¹⁴⁸ and “serve[s] as the receiver for ‘failing financial companies that pose a significant risk to the financial stability of the United States.’”¹⁴⁹

Even though the OLA received criticism and doubt about its effectiveness in ending the moral hazards of TBTF,¹⁵⁰ there are certain measures from the Dodd–Frank Act that are effective and innovative means that can be adopted to address the issue of sexual harassment: most notably, certain whistleblower provisions and the stress test provided in the Dodd–Frank Act.

141. *Id.* at 5.

142. *Id.* at Summary.

143. See generally Eric Revell, *On This Date: Obama Signed the Dodd–Frank Act into Law*, COUNTABLE (July 21, 2017), <https://www.countable.us/articles/786-date-obama-signed-dodd-frank-act-law> [<https://perma.cc/UKP8-ZM52>].

144. See Mark Koba, *Dodd–Frank Act: CNBC Explains*, CNBC (last updated Apr. 30, 2013), <https://www.cnbc.com/id/47075854> [<https://perma.cc/2RBQ-3U2P>].

145. *Id.* “Derivatives are financial instruments that allow two parties to enter into a contract based upon the price of something, without either having to actually own that something.” Steven J. Markovich, *The Dodd–Frank Act*, COUNCIL ON FOREIGN REL. (last updated Dec. 10, 2013), <https://www.cfr.org/backgroundunder/dodd-frank-act> [<https://perma.cc/7TUN-YTLX>].

146. JAY B. SYKES, CONG. RESEARCH SERV., R45162, REGULATORY REFORM 10 YEARS AFTER THE FINANCIAL CRISIS: SYSTEMIC RISK REGULATION OF NON-BANK FINANCIAL INSTITUTIONS, 1 (2018).

147. See *id.*

148. *Id.*

149. *Id.* at 30.

150. See generally Steven L. Schwarcz, *Too Big to Fool: Moral Hazard, Bailouts, and Corporate Responsibility*, 102 MINN. L. REV. 761 (2017).

V. INCORPORATING PROVISIONS FROM THE DODD–FRANK ACT TO
ELIMINATE SEXUAL HARASSMENT IN THE WORKPLACE

Workplace sexual harassment measures should incorporate specific provisions of the Dodd–Frank Act to eliminate workplace sexual harassment. In this context I will make two recommendations. The first recommendation is to increase the coverage and scope of Title VII by looking to the Dodd–Frank Act’s coverage. This recommendation is split into two separate efforts: (1) adopt the specific language and measures of Section 21F of the Dodd–Frank Act which provides whistleblower protections, and (2) adopt the specific language of the Dodd–Frank Act’s anti-retaliation provision. The second recommendation is to place higher accountability on employers by requiring them to adopt a stress test.

A. Whistleblower Reporting and Anti-Retaliation Protections

1. Whistleblower Reporting

The Dodd–Frank Act was amended by adding Section 21F: “Securities Whistleblower Incentives and Protection.”¹⁵¹ Section 21F starts by defining a whistleblower:

an individual is a whistleblower if (i) he possesses a reasonable belief that the information he is providing relates to a possible securities laws violation . . . that has occurred, is ongoing, or is about to occur.¹⁵² The “reasonable belief” standard requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, *and* that this belief is one that a similarly situated employee might reasonably possess.¹⁵³

The purpose of this section is “to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.”¹⁵⁴ Under Section 21F, whistleblowers may voluntarily provide the Commission with original information about violations of securities laws.¹⁵⁵ In other words, employers are not allowed to impede their employees from communicating directly with the SEC about possible securities law violations.¹⁵⁶ The requirement under the Dodd–Frank Act as to what type of information needs to be communicated

151. See Dodd–Frank Wall Street Reform and Consumer Protection Act, 1 U.S.C. § 5301 (2010).

152. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-64545, 14 (May 25, 2011) [hereinafter Section 21F Implementation].

153. *Id.* at 14–15.

154. KBR, Inc., 111 S.E.C. Docket 917, at *1 (2015), 2015 WL 1456619.

155. *Id.*

156. *Id.* at *2.

is low.¹⁵⁷ The information does not need to relate to a “material” violation of the securities laws; instead, the informant can communicate *any* information the informant possesses about possible securities violations.¹⁵⁸ This is a congressional attempt to create a strong incentive for whistleblowers to come forward early with information rather than wait to be approached by investigators.¹⁵⁹

A provision like Section 21F can be used as a response to the impediments that NDAs cause in preventing workplace sexual harassment. While we know that employers use NDAs to bar employees from disclosing information they obtain during employment, under Section 21F of the Dodd–Frank Act, explicit provisions prohibit employers from impeding individuals in their direct communications with the SEC about possible securities laws violations—these provisions explicitly extend to enforcing or threatening to enforce a confidentiality agreement to impede such communications.¹⁶⁰

In *In re KBR*, an administrative proceeding was made by the SEC against KBR in April 2015.¹⁶¹ KBR, a global engineering company, was charged for requiring its employees to adhere to a confidentiality statement¹⁶² that violated Section 21F of the Dodd–Frank Act because it threatened discipline (including termination) if employees discussed internal matters of the company with the SEC.¹⁶³

The first effort that should be adopted for the sexual harassment context is to adopt the measure and language from Section 21F and create an exception to NDAs. Similar to allowing employees to report information relating to securities laws violations, there should be an exception to confidentiality agreements that allow employees to report acts of sexual harassment against them to enforcing agencies like the EEOC, even with the presence of confidentiality agreements. A potential argument against adopting a provision like Section 21F is that this effort might be taken as too extreme and might cause a slippery slope. For example, if sexual harassment is an exception to NDAs, then one could argue that it would be easier to create exceptions for other situations. However, despite its potential to be extreme, this effort will explicitly

157. See generally Section 21F Implementation, *supra* note 152.

158. Adam Augustine Carter et al., *Notes On: Can I Be a Whistleblower If I Already Signed a Nondisclosure Agreement?*, LABOR L.J., Winter 2013, at 211–13.

159. *Id.*

160. *Id.* at 212.

161. KBR, Inc., 111 S.E.C. Docket 917, at *3 (2015), 2015 WL 1456619.

162. *Id.* at 2.

163. Richard A. Rosen & David S. Huntington, *Whistleblowers, NDAs, and the SEC’s KBR Enforcement Action*, INSIGHTS, Aug. 2015, at 1, 18, <https://www.perkinscoie.com/images/content/1/4/v2/146441/INSIGHTS-2015-08-31-Whistleblowers.pdf> [<https://perma.cc/3JRY-7GHW>].

combat employers who have utilized NDAs to protect themselves against acts of sexual harassment taken by their employees. Moreover, it considers the purpose of NDAs—to “prevent the disclosure of trade secrets”¹⁶⁴—while still providing a way for employees who have been sexually harassed to receive remediation and protection.¹⁶⁵ By limiting the exception to disclosing matters regarding sexual harassment, it maintains the core benefit of NDAs in protecting trade secrets and prevents NDAs from being useless. It seems justifiable for sexual harassment to be an exception that employees are able to disclose because this is not a type of trade secret but rather an unacceptable violation of human rights and integrity.¹⁶⁶

2. Anti-Retaliation Protection

The first measure logically transitions to the second, which provides further protections for employees who report sexual harassment. I will term the second measure the “Anti-Retaliation Protection.” The Anti-Retaliation Protection would provide a different protection for employees who report sexual harassment to agencies like the EEOC. With the existence of the first measure, the effects of the second measure are made more effective. If an employee were to report her sexual harassment regardless of the existence of an NDA, the second measure would then impose a limitation upon the employer’s ability to retaliate against that employee.¹⁶⁷ Section 922 of the Dodd–Frank Act contains anti-retaliation protections for whistleblowers who report possible securities law violations.¹⁶⁸ Under this Section,

no employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

164. Carter et al., *supra* note 158, at 212.

165. *Cf. id.* (stating that while the initial focus of these agreements has been extended, the focus is still singular in preventing the disclosure of trade secrets).

166. See Stacy Perman, *#MeToo Law Restricts Use of Nondisclosure Agreements in Sexual Misconduct Cases*, L.A. TIMES (Dec. 31, 2018), <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html> [<https://perma.cc/ADK4-A9LX>].

167. Jill L. Rosenberg & Renée B. Phillips, *Whistleblower Claims Under the Dodd–Frank Wall Street Reform and Consumer Protection Act: The New Landscape*, LABOR & EMP’T 9 (2017), https://www.nysba.org/Sections/Labor_and_Employment/Labor_PDFs/LaborMeetingsAssets/Whistleblower_Claims_Under_Dodd_Frank.html [<http://perma.cc/6KZU-7MJL>].

168. *Id.*

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under [specified federal laws], and any other law, rule, or regulation subject to the jurisdiction of the Commission.¹⁶⁹

In fact, remedies may be available to the employee which include reinstatement with seniority status consistent with what the employee would have had but for the discrimination, double back-pay with interest, and compensation for litigation costs and reasonable attorney fees.¹⁷⁰ This Anti-Retaliation Provision applies regardless of whether the individual is eligible for an award under the bounty program.¹⁷¹

This provision also addresses and protects the employees that Title VII does not cover. Under Title VII, independent contractors, farm workers, domestic workers, and workers with employers that have fewer than fifteen employees are not protected by federal law;¹⁷² however, the Anti-Retaliation Provision of the Dodd–Frank Act does not have a requirement that limits which employees are covered.¹⁷³

Furthermore, the statute of limitations for filing sexual harassment claims should also be extended. In contrast to Title VII, this provision contains a longer statute of limitations that should be adopted. Under Title VII, an employee has 180 days to file a charge (although this may be extended by state laws) and federal employees have forty-five days to contact an Equal Employment Opportunity Counselor.¹⁷⁴ In contrast, whistleblowers under Dodd–Frank have six years from the date of the violation to file suit against their employers, or three years after the date when facts material to the right of action are known or reasonably should have been known by the employee.¹⁷⁵ In the recent public exposure of various figures like Harvey Weinstein and Bill Cosby who committed sexual harassment against their employees, the importance of extending

169. 15 U.S.C. § 78u-6 (2010).

170. These remedies are available under Section 748 of the Dodd–Frank Act. See Rosenberg & Phillips, *supra* note 167, at 23.

171. Jennifer B. Poppe & Joe K. O’Connell, *Whistleblower Protection Under the Dodd–Frank Wall Street Reform and Consumer Protection Act*, 45 NO. 4 SEC. REG. L.J. (2017).

172. NAT’L P’SHIP FOR WOMEN & FAMILIES, KNOW YOUR RIGHTS: EXPERIENCING SEXUAL HARASSMENT AT WORK 1, 1 (2019), <http://www.nationalpartnership.org/our-work/resources/workplace/sexual-harassment/know-your-rights-sexual-harassment-in-the-workplace.pdf> [https://perma.cc/ESV2-7V2H].

173. See 15 U.S.C. §78u-6 (2010).

174. *Facts About Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/retaliation.cfm> [https://perma.cc/NFC8-DZ9W].

175. Jennifer M. Pacella, *Inside or Out? The Dodd–Frank Whistleblower Program’s Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 729 (2014).

the statute of limitations is visible.¹⁷⁶ Reports of sexual harassment that occurred in the 1980–90s just came to light in 2017.¹⁷⁷ For instance, seven different women were all sexually harassed by Bill Cosby.¹⁷⁸ In each case, by the time each decided to come forward, many years after they were harassed, their ability to press for criminal charges was precluded by the statute of limitations.¹⁷⁹ It is important to note that in these women’s situations, even the Dodd–Frank Act’s six year statute of limitations would have been short. Therefore, I would recommend extending the statute of limitations past six years.

There are numerous reasons why those who have been sexually harassed many years ago decide to now come forward: exclusion from opportunities relating to employment, hostility, intimidation—the list could infinitely continue.¹⁸⁰ One former employee who was sexually harassed by Weinstein stated that she was frightened of retaliation and was “worried that he could ruin my life.”¹⁸¹ Additionally, many of those who were sexually harassed by Weinstein mentioned that they were confronted and intimidated by those who crossed him.¹⁸² Several actresses “suspected that, after they rejected Weinstein’s advances or complained about them to company representatives, Weinstein had them removed from projects or dissuaded people from hiring them.”¹⁸³ Due to these various reasons, victims of sexual harassment need longer timeframes to consider their options.¹⁸⁴ They need time to understand what measures they can take and what options are available that would not compromise their employment. Furthermore, many victims might need therapy or some type of

176. LaCroix, *supra* note 4.

177. E.g., Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/775D-MAKG>].

178. Sydney Ember & Graham Bowley, *After Bill Cosby, States Shift on Statutes of Limitations in Sexual Assault Cases*, N.Y. TIMES (Nov. 6, 2016), <https://www.nytimes.com/2016/11/07/arts/television/after-bill-cosby-states-shift-sexual-assault-statutes-of-limitations.html> [<https://perma.cc/P3ML-6H7Y>].

179. *Id.*

180. See Renea I. Saade, *When Does a Workplace Qualify as Being Hostile?*, SEATTLE BUS., <https://www.seattlebusinessmag.com/business-corners/workplace/when-does-workplace-qualify-being-hostile> [<https://perma.cc/H29R-Z3LU>].

181. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [<https://perma.cc/A2F7-J5LP>].

182. *Id.*

183. *Id.*

184. See generally Ruth Padawer, *Should Statutes of Limitations for Rape be Abolished?*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/magazine/should-statutes-of-limitations-for-rape-be-abolished.html> [<https://perma.cc/TM6T-SQXW>].

treatment.¹⁸⁵ Some may even want to resign from where they are currently employed, and it takes time to find different employment.¹⁸⁶ By adopting the Dodd–Frank’s extended statute of limitations, victims might be able to prepare and seek the best options available for themselves.¹⁸⁷

B. Incorporating a Stress Test

1. Attributes of a Stress Test

The second recommendation is to require employers to conduct their own stress test as required by the Dodd–Frank Act.¹⁸⁸ “Stress testing is a key tool to ensure that financial companies have enough capital to weather a severe economic downturn without posing a risk to their communities, other financial institutions, or to the general economy.”¹⁸⁹

For a stress test, the Federal Reserve and OCC release economic and financial market scenarios.¹⁹⁰ A scenario is a hypothetical situation that includes stressed economic and financial conditions, and a covered institution is then required to assess how it would respond using its current policies and procedures.¹⁹¹ Each scenario would include “baseline,” “adverse,” and “severely adverse” scenarios.¹⁹² The adverse and severely adverse test scenarios attempt to categorize the strength and resilience of financial institutions in hypothetical adverse economic climates.¹⁹³ The definitions, rules, scope of application, scenarios, reporting, and disclosure are outlined and regulated by the Federal Reserve and OCC.¹⁹⁴ Each

185. Maura A. Greene, *The Sexual Harassment Laws Need to Change*, MASS. LAW. WKLY. (Nov. 7, 2017), <https://masslawyersweekly.com/reprints/the-sexual-harassment-laws-need-to-change/> [<https://perma.cc/CZQ8-KHJ4>].

186. *Id.*

187. *See generally* Ember & Bowley, *supra* note 178.

188. *See generally* Press Release, Fed. Res. Bd., Federal Reserve Board Publishes Two Final Rules, with Stress Testing Requirements for Certain Bank Holding Companies, State Member Banks, and Savings and Loan Holding Companies (Oct. 9, 2012), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20121009a.htm> [<https://perma.cc/XXF3-J5GN>].

189. *Id.*

190. *Dodd–Frank Act Stress Test (Company-Run)*, OFF. COMPTROLLER CURRENCY, <https://www.occ.treas.gov/tools-forms/forms/bank-operations/stress-test-reporting.html> [<https://perma.cc/AH5P-VR5B>].

191. *See generally* 2015 *Dodd–Frank Annual Stress Test Results*, CIT GROUP (June 26, 2015), <http://ir.cit.com/Cache/1500073352.PDF?O=PDF&T=&Y=&D=&FID=1500073352&iid=102820> [<https://perma.cc/LF3G-6NW3>]. Covered institutions are large and complex institutions as well as large and noncomplex firms. *Dodd–Frank Act Stress Test 2018: Supervisory Stress Test Methodology and Results-June 2018*, FED. RES. BD., <https://www.federalreserve.gov/publications/2018-june-dodd-frank-act-stress-test-background-on-dodd-frank-act-stress-testing.htm> [<https://perma.cc/YK9S-5R33>].

192. *Dodd–Frank Act Stress Test (Company-Run)*, *supra* note 190.

193. *Id.*

194. *Id.*

company or firm would then have to assess the strength and resilience of their company or firm in light of the scenario.¹⁹⁵ The results may be published on the institution's web site or in any other forum that is reasonably accessible to the public.¹⁹⁶ Upon receiving the results of the stress test, the Federal Reserve and OCC will use the results to supervise the companies and assist in assessing the company's risk profile and capital adequacy.¹⁹⁷

This test is intended to provide various actors like the company management, the board of directors, the public, and supervisors with forward-looking information.¹⁹⁸ This information then helps them gauge the potential effect of stressful conditions on the ability of these organizations and companies to absorb losses, while continuing to make loans and meet creditor obligations.¹⁹⁹ By requiring the covered institutions to evaluate how they are able to respond to these stressful conditions, these institutions will be able to determine what is "necessary to absorb losses as a result of adverse economic conditions."²⁰⁰

As mentioned above, the purpose of the test is twofold: (1) to prepare companies for stressful conditions and (2) to create awareness as to what measures companies will take in response to these stressful conditions.²⁰¹ This purpose outlines the different types of requirements for covered institutions. One requirement is of preparedness—companies need to have set protocols to use in response to events that might affect the economic status of their company.²⁰² Another requirement is the exposure of companies' practices, codes, and available measures to the public.²⁰³ Furthermore, covered institutions are required to be responsible and take action to ensure that their company is protected against stressful situations.²⁰⁴ Companies must take responsibility for their own preparedness by conducting their own stress tests and reporting those

195. *Id.*

196. *See generally Standards, supra* note 108.

197. *Dodd–Frank Act Stress Test (Company-Run), supra* note 190.

198. *Principles for Development & Distribution of Stress Test Scenarios*, FED. DEPOSIT INS. CO., <https://www.fdic.gov/regulations/laws/rules/5000-5360.html> [<https://perma.cc/87X8-HFWY>].

199. *Dodd–Frank Act Stress Test (Company-Run), supra* note 190.

200. 12 U.S.C. § 5365(i)(1)(A) (2010).

201. *See Stress Testing Policy Statement*, 84 Fed. Reg. 6,664, 6,664 (Feb. 28, 2019) (to be codified at 12 C.F.R. pt. 252).

202. *See generally* Pavel Kapino et al., *Stress Testing Banks: Whence and Whither?* 2–21 (Fed. Deposit Ins. Co. & Ctr. Fin. Res., Working Paper No. 7, 2015), <https://www.fdic.gov/bank/analytical/cfr/2015/wp2015/2015-07.pdf> [<https://perma.cc/9FT8-4EVR>].

203. *Id.* at 3.

204. *Id.* at 15.

results to the federal reserve and OCC.²⁰⁵ The structure of the stress test requires covered institutions to annually analyze its revenues, losses, reserves, and capital ratios based on three different scenarios.²⁰⁶ By analyzing and conducting responses to various scenarios, a company will be able to assess its vulnerability and risk exposures.²⁰⁷ If a covered institution fails the stress test, one possible penalty would be to have that institution resubmit its plan again (usually by the end of the year).²⁰⁸

2. Applying Stress Tests to Address Workplace Sexual Harassment

A stress test can be effectively adopted and applied by employers to address sexual harassment in the workplace. This stress test will merge and adopt the structure and requirements, purpose, involvement, and structure of the Dodd–Frank Act’s test.

The structure of the stress test in responding to sexual harassment should require employers to adopt measures that will provide protection from sexual harassment occurring in their company; employers should be required annually to analyze the current responses and measures they have for addressing sexual harassment in their company based on different scenarios. A federal agency like the EEOC should release various sexual harassment scenarios to employers. Employers should then be required to evaluate and assess what their protocol is in addressing these harassment issues. The scenarios should vary and cover the different forms of sexual harassment.

For example, one type of scenario could address quid pro quo harassment. Quid pro quo harassment is evidence that a supervisor took a “tangible employment action” against an employee for refusing to submit to the supervisor’s sexual demands.²⁰⁹ For instance, under a quid pro quo harassment claim, one could allege that an employer demanded sexual favors from an employee in return for a job benefit.²¹⁰ Another scenario could be about a “hostile work environment.”²¹¹ A hostile work

205. *Comprehensive Capital Analysis and Review (CCAR) and Dodd Frank Annual Stress Testing (DFAST)*, EXPERIAN, <http://www.experian.com/regulatory-compliance/consulting-services/ccar-dfast.html> [https://perma.cc/XZE8-BNYJ].

206. Shaheen Dil & Greggy Samonte, *Stress Testing Under Dodd–Frank: Benefits, Challenges, and Requirements*, WESTLAW J. BANK & LENDER LIAB., Oct. 2013, at 1, 1.

207. *Id.* at 2.

208. Drita Dokic, *Challenging Nonbank Sifi Designations: GE, METLIFE, and the Need for Reform*, 11 BROOKLYN J. CORP. FIN. & COM. L. 565, 565–88 (2017).

209. CHRISTINE J. BACK & WILSON C. FREEMAN, CONG. RESEARCH SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES, 1–41 (2018).

210. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 742 (1998).

211. Eric Bachman, *What is “Quid Pro Quo” Sexual Harassment?*, NAT’L L. REV. (May 23, 2017), <https://www.natlawreview.com/article/what-quid-pro-quo-sexual-harassment> [https://perma.cc/8JZH-QNSF].

environment exists when conduct does not result in a tangible employment action—but is nevertheless, so “severe or pervasive” that it creates an abusive working environment.²¹² Furthermore, employers should be required to submit their results to a federal agency similar to the Federal Reserve—for example, the EEOC.

This type of stress test, releasing different types of scenarios of sexual harassment and requiring employers to respond, would fulfill the same purpose as the Dodd–Frank’s stress test. First, employers will be required to evaluate what policies and procedures exist to address the different scenarios.²¹³ Next, if employers do not have any existing procedures to effectively respond to these scenarios, they should be required to develop procedures. Furthermore, by requiring employers to annually submit their results to a federal agency, employers will be incentivized to ensure they have policies that respond to the given scenarios. Once the federal agency has received an employer’s results, it should be allowed to publish those results for public view. By publishing the results, it would help ensure that the public is made aware of an employer’s policies and procedures. Unlike the Dodd–Frank Act’s penalty for an institution that fails the stress test, a company who fails the stress test based on sexual harassment scenarios should have more stringent penalties. If the same types of penalties like merely requiring employers to resubmit their plans are used, it would hardly place any accountability upon employers. A company then should not only have to resubmit its plan but should also be required to prove it has made progress in addressing the different scenarios.

CONCLUSION

Sexual harassment in the workplace has been and still is prevalent.²¹⁴ Though the severity of sexual harassment in the workplace has been acknowledged and active measures have been made to address sexual harassment,²¹⁵ it is not enough. Title VII does not protect all types of employees and its statute of limitations is too short.²¹⁶ Furthermore, Title VII contains no provision that places pressure on employers to evaluate and assess whether they have procedures and policies in place that could protect their employees who have been sexually harassed.²¹⁷

212. *Id.*

213. *Cf.* Dil & Samonte, *supra* note 206, at 1 (noting that these types of scenarios provide insight into an institution’s financial and operational circumstances under stressed scenarios).

214. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 1* (1979).

215. *See generally* Bird, *supra* note 24, at 209.

216. *See Facts About Retaliation*, *supra* note 174.

217. *See generally Facts About Retaliation*, *supra* note 174.

The current regulations addressing sexual harassment can be strengthened by the adoption of two provisions from the Dodd–Frank Act. Specifically, by expanding Title VII’s current whistleblower provisions to resemble the Dodd–Frank Act’s whistleblower provisions, employees will be allowed to disclose any sexual harassment made against them as well as trump the NDA preventing them from speaking up. This requires making the disclosure of sexual harassment information an exception to NDAs, disallowing employers to retaliate against employees who make that disclosure and allowing the exception to apply to all types of employees. Furthermore, Title VII should require employers to conduct a stress test, and by doing this, employers will have to assess what current policies and procedures they have that address sexual harassment in their companies. It would also incentivize employers to be more open and explicit with federal agencies and the public when disclosing their results.