

2021

## A Labor of Love: Finding Justice for Victims of Workplace Sexual Harassment Excluded from Title VII

Abigail M. Whitmore

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/jgspl>



Part of the [Law and Gender Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Whitmore, Abigail M. (2021) "A Labor of Love: Finding Justice for Victims of Workplace Sexual Harassment Excluded from Title VII," *American University Journal of Gender, Social Policy & the Law*: Vol. 29 : Iss. 3 , Article 2.

Available at: <https://digitalcommons.wcl.american.edu/jgspl/vol29/iss3/2>

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University Journal of Gender, Social Policy & the Law* by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# A LABOR OF LOVE: FINDING JUSTICE FOR VICTIMS OF WORKPLACE SEXUAL HARASSMENT EXCLUDED FROM TITLE VII

ABIGAIL M. WHITMORE\*

I.Introduction .....	372
II.Background .....	376
A. Domestic Workers Have Historically Been Excluded From Employment Protections In the United States .....	378
B. States Have Adopted a Variety of Approaches to Addressing Discrimination Against Domestic Workers, Including Domestic Workers’ Bills of Rights .....	381
C. Other Avenues of Protection From Sexual Harassment Include Visa Regulation and Criminal Charges .....	385
III.Analysis .....	386
A. There Are Severely Limited Remedies And Protections in Federal Labor Law for Domestic Workers Experiencing Sexual Harassment in the Workplace Because Domestic Workers Are Not Covered By Title VII .....	387
B. State Legislative Adoption of a Domestic Workers’ Bill of Rights Provides Domestic Workers With Necessary But Incomplete Legal Protections in the Workplace Because Rights Are State-Specific .....	392
C. State-Level Criminal Law Is Not a Realistic Means of Protection From Sexual Harassment for Domestic Workers	

---

\* Abigail Whitmore is a Juris Doctorate candidate at American University Washington College of Law. She graduated from the University of Colorado in 2017 with a degree in International Affairs and French. Abi would like to thank her Note and Comment Editor, Bridget Winkler, for her support and thoughtful feedback on this piece. She would also like to thank her mom and sister for answering many panicked phone calls and providing endless love and encouragement throughout the writing process.

Because Most Workplace Harassment Is Not Criminal .397

IV. Policy Recommendation..... 399

    A. A Federal Domestic Workers’ Bill of Rights Would Create the Necessary Protections Against Sexual Harassment For Domestic Workers In the Workplace. .... 399

    B. Changes to Title VII May Be a More Realistic Solution to the Domestic Worker Loophole ..... 401

V. Conclusion ..... 402

I. INTRODUCTION

“Sexual harassment perpetuates the interlocked structure by which women have been kept sexually in thrall to men and at the bottom of the labor market. Two forces of American society converge: men’s control over women’s sexuality and capital’s control over employees’ work lives.”<sup>1</sup>

I first began working with children as a college student in a part-time daycare position and eventually moved into a full-time nanny position after graduating. Working as a nanny was the perfect option for me at the time, as I was seeking temporary work in between my undergraduate education and law school. The opportunity also seemed natural given my background working in childcare. For me, the nanny experience was incredibly positive despite the very informal nature of my position. The family I worked for was happy to provide me with requested time off and a salary within the range I requested. I was compensated for work-related expenses, and I always felt like my work environment was safe and professional. In many ways, working for a family seemed no different than my prior experience working in childcare for a large company. Of course, the positivity of this experience can largely be attributed to my status as a friend of the family, as well as my privileged identities as a white woman, United States citizen, and native English speaker.<sup>2</sup>

While my individual employment situation was free of conflict, I became involved with different play groups and nanny collectives through my work, exposing me to the darker side of the industry. While I was happy to go to work every day confident that my employer would be receptive to any

---

1. See Catharine A. MacKinnon, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 77-81 (1979) (reflecting on the prevalence of sexual harassment in the workplace and how it inevitably creates a hostile work environment).

2. See A. Elaine Lewis, *Who Is at Highest Risk of Sexual Harassment?*, ACLU (Jan. 18, 2018, 3:15 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment> (providing that people of color, non-citizens, and non-native English speakers are more susceptible to workplace abuse).

concerns, my fellow childcare workers dreaded their daily returns to work. This dread was not due to any behavioral issues with the children; rather, my peers feared unchecked sexual harassment in their work environments, ranging from minor lewd comments to sexual assault. Sometimes sexual harassment looked like a father repeatedly brushing the nanny's lower back or referring to her only as "honey" or "sweetie." Other times, it was an employer asking for nude massages or sexual favors.<sup>3</sup>

The experiences of my colleagues are by no means atypical.<sup>4</sup> Nannies fall within the broader labor category of domestic work, which for the purposes of this Comment is defined as services of a household nature performed by an individual in a private home.<sup>5</sup> This workforce has historically been isolated and informal.<sup>6</sup> It is work that transcends professional and personal lines, with some domestic workers having access to the most intimate aspects of their employers' lives.<sup>7</sup> The informal nature, as well as the deeply racial and gendered history behind domestic work, has resulted in nannies, housecleaners, and home health aides lacking necessary labor protections in the United States.<sup>8</sup> Domestic workers also face a unique risk because of their intimate access to the private lives of their employers, making protections from abuse and harassment very necessary.<sup>9</sup> Domestic workers are especially susceptible to sexual harassment in the workplace when compared

---

3. See Alexia Fernández Campbell, *Housekeepers and Nannies Have No Protection from Sexual Harassment Under Federal Law*, VOX (Apr. 26, 2018, 1:10 PM), <https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws> (noting the experiences of sexual harassment faced by Etelbina Hauser over twenty-four years).

4. See Lillian Agbeyegbe, et al., *Human Trafficking at Home: Labor Trafficking of Domestic Workers*, POLARIS 1, 4 (July 1, 2019), [https://polarisproject.org/wpcontent/uploads/2019/09/Human\\_Trafficking\\_at\\_Home\\_Labor\\_Trafficking\\_of\\_Domestic\\_Workers.pdf](https://polarisproject.org/wpcontent/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf) (finding that domestic workers are subjected in large numbers to various forms of employment abuse).

5. See Domestic Workers' Bill of Rights Act, H.R. 3760, 116th Cong. § 3 (2019) (defining domestic services as services of a household nature provided in interstate commerce).

6. See Agbeyegbe, *supra* note 4, at 8 (considering the role that domestic workers fulfill worldwide as an isolated workforce).

7. See generally *Who Are Domestic Workers*, INT'L LABOUR ORG., <https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm> (last visited Oct. 24, 2020) (stating that domestic workers provide vital support to working families).

8. See Campbell, *supra* note 3 (emphasizing that domestic works are not included under several federal labor laws).

9. See Agbeyegbe, *supra* note 4, at 6 (reiterating that domestic workers are isolated and largely disenfranchised, creating opportunity for unreported abuses).

with other forms of labor.<sup>10</sup>

The lack of protection from sexual harassment in this workforce is not a recent development.<sup>11</sup> Domestic work is inextricably tied to the United States' history of slavery, mistreatment of immigrants, and gender inequality.<sup>12</sup> Coinciding with this history, domestic workers have always mobilized for greater employment rights despite continuous exclusion from other groups' policy and labor movements.<sup>13</sup> Domestic workers have been fighting for increased rights for the past century, but the rest of the world has only recently started to pay attention because of emerging labor and social activist movements.<sup>14</sup>

Today's ongoing momentum from #MeToo has shed light on the seriousness of sexual harassment.<sup>15</sup> The #MeToo movement was created in 2006 to raise awareness around women who have been abused, and the #MeToo hashtag gained significant media attention in 2017.<sup>16</sup> The movement has seen repercussions for many powerful men with histories of committing sexual harassment in the workplace.<sup>17</sup> However, experiences of sexual harassment are not unique to celebrities, and #MeToo has brought

10. See H.R. 3760 (finding that domestic workers are vulnerable to harassment exacerbated by their unique working conditions).

11. See generally Adam J. Hiller & Leah E. Saxtein, *Falling Through the Cracks: The Plight of Domestic Workers and Their Continued Search for Legislative Protection*, 27 HOFSTRA LAB. & EMP. L. J. 233, 254-55 (2009) (asserting that domestic workers have experienced a history of exclusion from labor laws).

12. See Vanessa May, *Domestic Workers in U.S. History*, OXFORD RESEARCH ENCYCLOPEDIA: AM. HISTORY (May 2017), <https://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-431> (reviewing the role of domestic workers in Early American history).

13. See generally Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 855-56 (1999) (asserting that domestic workers have always fought for basic rights despite the lack of protections under federal legislation).

14. See Audrey Gibbs, *COVID-19 Leaves Black Domestic Workers Strained, Unseen and Vulnerable*, MS. MAGAZINE (July 12, 2020), <https://msmagazine.com/2020/07/12/covid-19-leaves-black-domestic-workers-strained-unseen-and-vulnerable> (resolving that the Covid-19 pandemic highlights domestic worker vulnerability).

15. See Gurvinder Gill & Imran Rahman-Jones, *Me Too Founder Tarana Burke: Movement is Not Over*, BBC NEWS (July 9, 2020), <https://www.bbc.com/news/newsbeat-53269751> (saying that #MeToo requires ongoing systemic changes to achieve true justice).

16. See *id.* (showing that Tarana Burke founded #MeToo in 2006 and the hashtag became viral through a tweet).

17. See *id.* (arguing that the conviction of Harvey Weinstein is an important triumph, but that women outside of Hollywood continue to face sexual violence).

public attention to the threat of sexual harassment faced by all workers and especially isolated workers.<sup>18</sup>

The gig economy has also spurred conversation around protections for informal labor, while a growing elderly population has demanded an increase in home health aides and other home care assistance.<sup>19</sup> Most recently, the devastating impact of the novel coronavirus has revealed how many gaps exist when it comes to protections for certain workforces.<sup>20</sup> Domestic workers fall squarely at the intersection of these major cultural and economic shifts.<sup>21</sup>

Though the momentum around sexual harassment protections, and labor protections in general, is growing, domestic workers lag behind other sectors in employment protections.<sup>22</sup> Particularly in regard to sex discrimination, in most states domestic workers have neither protections from sexual harassment nor remedies for workplace discrimination, despite being a heavily female-gendered workforce.<sup>23</sup> A vast majority of domestic workers continue to be excluded from Title VII of the Civil Rights Act, the leading federal legislation addressing workplace discrimination.<sup>24</sup> The loophole excluding certain workers from Title VII is often overlooked, but it is the reason that workplace discrimination of nannies, housecleaners, and home healthcare aides persists without any repercussions.<sup>25</sup>

This Comment will argue that, even as federal labor law has evolved to incorporate domestic workers, and some states have enacted specific protections for this workforce, domestic workers continually lack crucial

18. See Campbell, *supra* note 3 (asserting that sexual harassment advocacy should be framed around domestic and farmworkers).

19. See Hina B. Shah, *Understaffed and Overworked: Poor Working Conditions and Quality of Care in Residential Care Facilities for the Elderly*, GOLDEN GATE UNIV. COMMONS 1, 5 (May 2017), <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1789&context=pubs> (finding that the number of home health aides in the United States has increased as a result of an aging population).

20. See Gibbs, *supra* note 14 (stating that workers in care industries are less likely to have personal protective equipment provided at work).

21. See *id.* (reasoning that lack of workplace protections for domestic workers is made evident by the coronavirus pandemic).

22. See Smith, *supra* note 13, at 854 (detailing how domestic workers continue to lack many protections in labor law).

23. See *Who Are Domestic Workers*, *supra* note 7 (stating that domestic work is gendered as 80% of domestic workers are women).

24. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (asserting that employers with fifteen or more employees may not discriminate based on sex).

25. See Campbell, *supra* note 3 (voicing that the small-firm exception to Title VII has created hostile work environments for domestic workers).

protections against sexual harassment and abuse.<sup>26</sup> Part II will explore the history of domestic workers' exclusion from employment law and will review the law as it stands today.<sup>27</sup> Part III will analyze how, even with certain developments in protections for domestic workers, this population continues to lack necessary rights and remedies.<sup>28</sup> Part IV will consider policy changes to strengthen protections for domestic workers, including the proposed Federal Domestic Workers' Bill of Rights.<sup>29</sup> Part V will conclude that domestic workers continue to lack protection from sexual harassment in the workplace and passage of a Federal Domestic Workers' Bill of Rights is the best means for expanding protections and filling this gap.<sup>30</sup>

## II. BACKGROUND

The position of domestic workers in the United States today is inextricably tied to a long history of slavery, immigration, and the discriminatory gendering of labor.<sup>31</sup> Prior to the Civil War, enslaved Black women and men performed work in the homes of plantation owners, in addition to other types of labor that served the benefit of the plantation economy.<sup>32</sup> After Emancipation, these domestic positions transitioned into wage work for Black workers who had been formerly enslaved, meaning there was now a socioeconomic relationship between employer and employee.<sup>33</sup> In the North, the Industrial Revolution also saw the emergence of domestic work as wage labor, which was almost always performed by immigrant women.<sup>34</sup> As

---

26. See generally Hiller & Saxtein, *supra* note 11, at 233-34 (arguing that domestic workers are excluded from employment law generally, including discrimination protections).

27. See *infra* Part II (explaining the history of domestic workers' exclusion from federal and state employment law).

28. See *infra* Part III (arguing that domestic workers continue to fall through the gaps of employment protections from sexual harassment).

29. See *infra* Part IV (suggesting that passage of a Federal Domestic Workers' Bill of Rights provides the best opportunity to protect domestic workers from workplace harassment).

30. See *infra* Part V (concluding that domestic workers continue to lack protections from sexual harassment in both federal and state employment law).

31. See May, *supra* note 12 (reviewing the history of domestic workers going back to the pre-Civil War era in the South and the early nineteenth century in the North).

32. See *id.* (explaining that domestic work was incorporated into the plantation economy and was considered within the scope of responsibilities of enslaved women).

33. See *id.* (describing that, where previously certain roles like laundry services were reserved for slaves, these positions became paid labor).

34. See *id.* (noting Irish immigrants often performed services as maids and caregivers in Northern homes).

formal industry expanded, a more distinct line was drawn between private family life and work life.<sup>35</sup> Through this evolution, domestic work was socially classified as a “labor of love” because services in the home were considered to be performed for the benefit of the family rather than to advance industry.<sup>36</sup> This classification persisted despite many domestic workers taking strides to establish home lives separate from their work.<sup>37</sup> Especially after Emancipation, many formerly enslaved people intentionally distanced themselves from the plantations and worked to establish distinct communities.<sup>38</sup>

The history of sexual harassment in the workplace is directly tied to the historical roots of domestic workers in Early American history.<sup>39</sup> Sexual coercion and assault were entrenched in slavery with no legal ramifications.<sup>40</sup> Black women especially were labeled as sexually promiscuous.<sup>41</sup> After Emancipation, the stereotype persisted, and Black women continue to face elevated threats of sexual assault correlated to racist and sexist ideas.<sup>42</sup> Irish immigrant women in the North were also subject to xenophobic stereotypes. These stereotypes contributed to the threat of harassment and abuse in the homes where servants worked.<sup>43</sup> This deeply intertwined history of sexism,

---

35. *See id.* (stating where domestic work was previously done by community members, it developed into a legitimate industry during the Industrial Revolution).

36. *See id.* (noting the growing distinction between the public and private spheres resulted in work within the home being viewed as less legitimate than other types of labor).

37. *See id.* (explaining, especially after Emancipation, Black domestic workers established families distinct from their work in a way that was not possible during slavery).

38. *See id.* (stating post-Emancipation saw the growth of Black communities outside of plantations).

39. *See* Reva B. Siegel, DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 3-8 (Catharine A. MacKinnon & Reva B. Siegel eds., Forthcoming Yale Press 2003) (stating that sexual harassment has only recently become a legal claim under federal law).

40. *See id.* at 3 (contending that rape and slavery were intertwined during Early American history).

41. *See* Jennifer Hallam, *The Slave Experience: Men, Women, and Gender*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/gender/history2.html> (last visited Nov. 23, 2020) (stating that white society historically viewed Black women as lustful).

42. *See* Ujima, Black Women and Sexual Assault *BLACK WOMEN AND SEXUAL ASSAULT*, NAT’L CTR ON VIOLENCE AGAINST WOMEN IN THE BLACK CMTY. (Oct. 2018) (reporting 35% of Black women experience some form of contact sexual violence in their lifetime).

43. *See* May, *supra* note 12 (saying that domestic workers in Early American society faced harassment in the home because of notions that they were promiscuous).



racism, and xenophobia has resulted in the perpetuation of sexual harassment in the American workforce.<sup>44</sup> The history of domestic work has also served as a basis for excluding domestic workers from civil rights and employment protections under federal law.<sup>45</sup>

*A. Domestic Workers Have Historically Been Excluded From Employment Protections In the United States*

Over the past century, American industry expanded and labor movements pushed for greater regulation, resulting in federal legislation specifically protecting workers' rights.<sup>46</sup> However, dating back to the Fair Labor Standards Act of 1938 ("FLSA"), Congress has explicitly and repeatedly denied domestic workers employment protections.<sup>47</sup> When FLSA was passed, Congress refused to instill additional rights in a domestic worker population that was, much like today, made up of primarily Black women and non-Black women of color.<sup>48</sup> Particularly in the South, positions for nannies, cooks, and housecleaners in the early twentieth century were occupied by mostly Black employees, where one hundred years earlier the same positions were filled by enslaved people.<sup>49</sup> Jim Crow laws in the South restricted workers' earnings to very little payment, and Southern legislators feared that FLSA would interfere with this practice.<sup>50</sup> For this reason, Congressmen from the Jim Crow South refused to sign on to FLSA unless the Act excluded domestic workers.<sup>51</sup> The Act was passed with an exception for servants working in the home.<sup>52</sup>

---

44. See Siegel, *supra* note 39, at 3 (arguing that the history of slavery in the United States contributed to domestic workers being denied rights as a workforce).

45. See *id.* (restating how the frequency of rape during slavery established a foundation for the sexual harassment of women performing labor in the home).

46. See generally Hiller & Saxtein, *supra* note 11, at 264 (assessing the history of labor law developments and how labor law has systematically excluded domestic workers from labor protections under the law).

47. See 29 U.S.C. §§ 206, 215 (2018) (creating fair labor practices including a minimum wage and prohibited employment practices).

48. See *About the Domestic Workers Alliance*, NAT'L DOMESTIC WORKERS ALLIANCE, <https://www.domesticworkers.org/about-us> (saying that domestic workers are mostly immigrants and women of color) (last visited Apr. 15, 2021).

49. See May, *supra* note 12 (restating that, after Emancipation, jobs were created where slave labor had previously been used).

50. See *id.* (contending that southern congressmen refused to extend labor protections to black low-wage workers).

51. See *id.* (stating that the exclusion of domestic workers from FLSA in 1938 was due to objections by one senator).

52. See *id.* (detailing the process of passing FLSA which saw debate around the

FLSA was amended in 1974 to include language around domestic work.<sup>53</sup> FLSA now includes Sections 206 and 207, which apply specifically to domestic work and require fair wages.<sup>54</sup> The Act does not include a definition of domestic work.<sup>55</sup> The “Department of Labor’s Application of FLSA to Domestic Service” further expanded these protections.<sup>56</sup> The new Department of Labor regulation applies specifically to home health aides, bringing this group under the protections of FLSA and ensuring payment of fair wages.<sup>57</sup> There was uncertainty as to the incorporation of home healthcare workers under FLSA prior to this regulation because a definition of domestic work is not included in FLSA.<sup>58</sup>

Like FLSA, domestic work was left out of the Occupational Safety and Health Act of 1970 (“OSH Act”) and was also excluded from the National Labor Relations Act (“NLRA”) of 1935.<sup>59</sup> The OSH Act was created to assure safe and healthy working conditions, but the Department of Labor excluded domestic workers from the OSH Act because people who privately employ another within the home are not considered employers.<sup>60</sup> The NLRA establishes rights around organizing and bargaining for workers.<sup>61</sup> The NLRA also brought in other labor forces that have traditionally been marginalized.<sup>62</sup> This practice allowed for collective bargaining opportunities

---

inclusion of low-wage workers).

53. *See id.* (explaining that FLSA was passed specifically with an exception for domestic workers).

54. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 206(f), 207(l) (2018) (requiring that persons employed in domestic work shall be paid the effective wage).

55. *See id.* (applying provisions of the Act to domestic workers but providing no expansion on the meaning of domestic service).

56. *See* U.S. DEP’T OF LAB., *Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service, Final Rule*, U.S. WAGE & HOUR DIV., (Sept. 2013), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfsFinalRule.pdf> (stating that the new rule brings home health aide workers into the framework of FLSA).

57. *See id.* (applying FLSA to home health aides for legal right to overtime pay).

58. *See* Adriana M. Paris, *Women Meet the State: Protection for Domestic Workers in the United States*, 24 FLA. J. INT’L L. 213, 219 (2012) (saying that FLSA was unclear as to the application to home health workers as well as many other domestic workers).

59. *See* National Labor Relations Act, 29 U.S.C. § 152 (2018) (restricting the right to organize and bargain from individuals employed in domestic service).

60. *See* 29 C.F.R. § 1975.6 (2021) (declaring that individuals performing ordinary domestic household tasks are not subject to the requirements of the OSH Act).

61. *See* 29 U.S.C. § 151 (2018) (expressing that workers must be free to unionize and collectively bargain to prevent strikes or worker unrest from disrupting the flow of commerce).

62. *See* § 151 (providing that businesses may not engage in labor practices that harm

and unionization, but left out domestic workers.<sup>63</sup>

The Civil Rights Act sits at the center of these federal employment law developments over the past century.<sup>64</sup> The Act covers a wide array of civil rights protections, and among these protections is the prohibition of discrimination in the workplace under Title VII.<sup>65</sup> Title VII prohibits an employer from discriminating against an employee based on membership of a protected class.<sup>66</sup> Precluded discriminatory practices under Title VII include discrimination on the basis of sex, which is interpreted by the courts to include sexual harassment.<sup>67</sup> It was not possible to bring a Title VII claim based on sexual harassment when the Civil Rights Act was first passed.<sup>68</sup> The Court's understanding of employment discrimination on the basis of sex was limited to policies like creating separate education facilities for men and women or mandatory maternity leave policies.<sup>69</sup> However, *Meritor Savings Bank v. Vinson* brought sexual harassment under the umbrella of sex discrimination, and it has continued to be treated as such by the judiciary.<sup>70</sup>

An exception in Title VII excludes application to small-firms, which are defined as employers engaged in industry with less than fifteen employees.<sup>71</sup> Employers typically have obligations to prevent sexual harassment under

---

the general welfare of workers).

63. See § 151 (creating avenues for unionizing and stating that employers may not curtail unionization efforts).

64. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (expanding constitutional protections to prevent discrimination and violations of civil rights).

65. See § 2000e-2 (prohibiting discrimination by an employer based on sex).

66. See § 2000e-2 (stating that employers may not discriminate against employees based on race, color, religion, sex, or national origin).

67. See *Barnes v. Costle*, 561 F.2d 983, 993-94 (D.C. Cir. 1977) (finding that sexual harassment is sex discrimination because it acts as an impediment to equal opportunity employment under Title VII).

68. See Siegel, *supra* note 39, at 8-9 (explaining how the push for sexual harassment to be defined as sex discrimination took place in the 1970s after the passage of the Civil Rights Act of 1964).

69. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640-43 (1974) (finding that a requirement of maternity leave for women was sex discrimination and was therefore unconstitutional); see also *United States v. Virginia*, 518 U.S. 515, 539-40 (1996) (holding that having two separate school facilities for men and women was discrimination based on sex).

70. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 71 (1986) (concluding that sexual harassment in the workplace and a failure to address harassment constitutes sex discrimination).

71. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (defining an employer as someone engaged in industry with fifteen or more employees for each working day).

Title VII, but a firm with less than fifteen employees is not considered an employer.<sup>72</sup> This means that, for workers who may be the sole employee of a family or individual, there are no protections allotted to them under Title VII.<sup>73</sup> Some domestic workers do fall within Title VII protections because they work for a third-party employer or because the employees perform domestic work for an organization with more than fifteen employees, such as a hotel.<sup>74</sup> However, many domestic workers are the sole employee of a family, and as such these workers are not covered by Title VII protections.<sup>75</sup>

*B. States Have Adopted a Variety of Approaches to Addressing  
Discrimination Against Domestic Workers, Including Domestic Workers’  
Bills of Rights*

While domestic workers continue to be excluded from much of federal employment law and lack protections from sexual harassment on a federal level, nine states have passed legislation aimed at securing rights for domestic workers (hereinafter “states with protections”).<sup>76</sup> Many states with protections have provisions explicitly prohibiting sexual harassment.<sup>77</sup> The provisions of four of these Bills of Rights are discussed in this Comment.<sup>78</sup>

New York was the first state to implement a Domestic Workers’ Bill of Rights in 2010.<sup>79</sup> The state had previously established reporting mechanisms

72. See § 2000e-2 (defining an employer as someone with fifteen or more employees).

73. See §2000e-2 (stating that an employer is someone with more than fifteen employees, which excludes families with less than fifteen employees).

74. See, e.g., CAL. CIV. CODE § 1812.5095 (West 2020) (providing requirements for employment agencies employing domestic workers); see also *Marshall v. Domestic Emp’t Serv., Inc.*, No. 77-0279-CV-W-3, 1978 WL 1703, at \*2 (W.D. Mo. Oct. 21, 1978) (finding that third-party employers may be responsible for unpaid wages to domestic workers).

75. See *Who Are Domestic Workers*, *supra* note 7 (suggesting that many domestic workers are the sole employee of their employer).

76. See *Campbell*, *supra* note 3 (explaining how domestic workers’ bills of rights have been passed in nine states).

77. See, e.g., 820 ILL. COMP. STAT. ANN. §§ 182/1 – 182/99 (LexisNexis 2017) (finding that it is in the interest of the people of Illinois to ensure the rights of domestic workers are protected); MASS. GEN. LAWS ch. 149, § 191 (2020) (outlining certain discriminatory practices against domestic workers that are unlawful); N.Y. EXEC. LAW § 296-b (Consol. 2020) (establishing that it is unlawful for employers to sexually harass domestic workers); OR. REV. STAT. § 653.547 (2020) (establishing that domestic workers have certain rights that should be protected).

78. See *infra* Section II.B (discussing the provisions of several state laws that are specific to domestic workers).

79. See S. 02311-E, § 1, 198th Reg. Sess. (N.Y. 2009) (establishing fair wages and

and remedies for workers experiencing sexual harassment.<sup>80</sup> New York law requires the Commissioner of Labor to report to the Governor, the Speaker of the Assembly, and the Temporary President of the Senate on how best to provide accessible educational and informational material on employment rights to employers and domestic workers.<sup>81</sup> Since passage of the 2010 law, several suits have been brought based on wage disputes by domestic workers that would not have been covered by Title VII or other state law.<sup>82</sup>

Like New York, the Massachusetts Domestic Workers' Bill of Rights includes a provision stating that employers may not discriminate in hiring, pay, or other terms of employment based on a worker's sex.<sup>83</sup> Where a worker has experienced discrimination, she may file a civil rights complaint alleging employer misconduct with the Civil Rights Division of the Attorney General's Office.<sup>84</sup> The filing of a complaint is followed by an investigation and subsequent decision by the Attorney General on how best to proceed with the case.<sup>85</sup>

The Illinois policy incorporates domestic workers into the Illinois Human Rights Act.<sup>86</sup> By including domestic workers in the Act, these workers gained access to a helpline to report sexual harassment and discrimination.<sup>87</sup>

---

employment protections for domestic workers).

80. See S. 2311-E, § 10 (requiring a report on the collective bargaining power of domestic workers).

81. See David A. Paterson & Colleen C. Gardner, *Feasibility of Domestic Worker Collective Bargaining*, N.Y. DEP'T OF LABOR 1, 3 (Nov. 2, 2010), <https://www.ilo.org/dyn/migpractice/docs/147/Feasibility.pdf>. (discussing the feasibility of domestic worker collective bargaining in response to a requirement of the Domestic Workers' Bill of Rights).

82. *E.g.*, *Stoica v. Phipps*, No. 153834/2017 2018 WL 1226045, at \*1, \*3 (N.Y. Sup. Ct. Mar. 8, 2018) (finding that there was a factual basis of a violation of the Domestic Workers' Bill of Rights).

83. See MASS. GEN. LAWS ch. 149, § 190 (2020) (stating that discrimination based on sex, including sexual harassment, is an illegal employment practice).

84. See *generally File a Workplace Complaint*, MASS.GOV, <https://www.mass.gov/how-to/file-a-workplace-complaint> (last visited Mar. 24, 2021) (providing means for an employee to file a workplace discrimination complaint with the Office).

85. See *File a Workplace Complaint*, *supra* note 84 (stating that, once an employee files a complaint, there will potentially be an investigation).

86. See *Illinois Domestic Workers Claim Victory in 5-Year Campaign*, ILL. DOMESTIC WORKERS COAL., <http://www.respectallwork.org/#:~:text=Illinois%20Domestic%20Workers%20Claim%20Victory%20in%205%20Year%20Campaign&text> (last visited Mar. 24, 2021) (reporting on the Illinois Domestic Workers' Bill of Rights, which amends Illinois policies).

87. See IDHS, *Domestic Violence Victim Services*, <https://www.dhs.state.il.us/page.aspx?item=30275> (establishing a helpline aimed at

The helpline aims to help persons find necessary resources who contact the Department and assist in filing sexual harassment and discrimination complaints with the Department.<sup>88</sup>

Finally, the Oregon Domestic Workers' Bill of Rights states that an employer may not engage in sexual harassment.<sup>89</sup> The law prohibits conduct of a sexual nature toward domestic workers by employers.<sup>90</sup> Employers may not make submission to sexual conduct a condition of employment, may not use submission to or rejection of sexual conduct as the basis for employment decisions affecting the domestic worker, and sexual harassment may not interfere with the domestic worker's work performance.<sup>91</sup> If an employer violates this provision, a worker may file a complaint with the Commissioner of the Bureau of Labor and Industries.<sup>92</sup>

California and Nevada are also among the states that have implemented a Domestic Workers' Bill of Rights.<sup>93</sup> However, these respective state statutes are primarily focused on wages and overtime pay and do not include provisions to address sexual harassment of domestic workers.<sup>94</sup> California has separate laws dedicated to issues of sexual harassment in the workplace that do not cover employers with fewer than five employees.<sup>95</sup> Nevada also has legislation on sexual harassment; however, domestic workers are not specifically mentioned in these statutes.<sup>96</sup>

---

providing domestic workers with a means for reporting sexual harassment).

88. See *Illinois Sexual Harassment and Discrimination Helpline*, ILL.GOV, <https://www2.illinois.gov/sites/sexualharassment/Pages/Reporting.aspx> (last visited Mar. 24, 2021) (providing a helpline for employees seeking information about sexual harassment law).

89. See OR. REV. STAT. §§ 653.547 – 653.553 (2020) (noting several circumstances that constitute employer sex discrimination).

90. See §§ 653.547 – 653.553 (prohibiting sexual misconduct by employers of domestic workers and providing remedies to workers).

91. See §§ 653.547 – 653.553 (establishing the definition of sexual harassment where employment behavior may be prohibited).

92. See OR. REV. STAT. § 653.551 (2020) (creating remedies for domestic workers who experience sexual harassment in the workplace).

93. See CAL. LAB. CODE §§ 1450-54 (Deering 2020) (providing certain rights to domestic workers for minimum wage and overtime pay); see also NEV. REV. STAT. §§ 613.610 – 613.620 (LexisNexis 2020) (creating regulation of minimum wage for domestic workers).

94. See CAL. LAB. CODE §§ 1450-54 (establishing a Domestic Workers' Bill of Rights but excluding provisions relating to discrimination).

95. See CAL. GOV. CODE § 12940 (Deering 2020) (making it unlawful for an employer to discriminate based on sex).

96. See NEV. REV. STAT. §§ 613.330 (LexisNexis 2020) (defining employers for the

Of the forty-one states that do not have a Domestic Workers' Bill of Rights, most have legislation that applies or expands the provisions of the Civil Rights Act.<sup>97</sup> Some of these essentially copy over the language of Title VII without layering on additional requirements.<sup>98</sup> A handful of states and the District of Columbia have not enacted a Domestic Workers' Bill of Rights but have expanded protections from sexual harassment to employers with as few as one employee.<sup>99</sup>

Several states do not have any legislation specific to sexual harassment in the workplace, and especially not pertaining to the specific needs of domestic workers.<sup>100</sup> One pertinent example of this phenomena is Texas.<sup>101</sup> There is nothing in the Texas code that prohibits sexual harassment in the workplace except for laws unique to unpaid interns.<sup>102</sup> Where interns are concerned, sexual harassment by a supervisor is prohibited.<sup>103</sup> However, Texas does not extend the application of Title VII to small-firms.<sup>104</sup> The same can be said for many other states.<sup>105</sup> Twelve states have not taken specific action to apply Title VII to firms with less than fifteen employees.<sup>106</sup> Another nineteen states have adjusted the small-firm rule, but not to a point where workplace discrimination regulation applies to employers with only one

---

purposes of sex discrimination as having fifteen or more employees and prohibiting sex discrimination).

97. See Rachel Farkas et al., *State Regulation of Sexual Harassment*, 20 GEO. J. GENDER & L. 421, 435 (2019) (arguing that many states go further than Title VII by providing discrimination protections for LGBT workers and workers in positions with less than fifteen employees).

98. See *id.* (noting that many states have not made additional changes when implementing policies under Title VII).

99. See *id.* at 437 (restating that ten states have statutes that hold employers with one or more employee liable for sex discrimination).

100. See *id.* at 437 (stating that several states have a version of Title VII language in state code, but many states have not changed the small-firm rule).

101. See TEX. LAB. CODE ANN. § 21.002 (West 2020) (defining an employer as someone with fifteen or more employees).

102. See LAB. § 21.1065 (making sexual harassment of an unpaid intern unlawful and providing civil remedies).

103. See LAB. § 21.1065 (prohibiting unwanted acts of a sexual nature committed by an employer of an unpaid intern).

104. See LAB. § 21.002 (stating that an employer under Texas labor law is considered someone with fifteen or more employees).

105. See LAB. § 21.002 (defining an employer in accordance with the definition provided in Title VII).

106. See Farkas, *supra* note 97, at 436-37 (finding that states have followed different courses for implementing Title VII).

employee.<sup>107</sup>

*C. Other Avenues of Protection From Sexual Harassment Include Visa Regulation and Criminal Charges*

Where domestic workers are not protected from sexual harassment under traditional labor law, there are certain federal and state protections against sexual assault and other abuses that may occur on the job.<sup>108</sup> These options are bolstered by the Violence Against Women Act (“VAWA”).<sup>109</sup> The Act establishes certain grant programs to maintain the confidentiality and safety of victims of sexual violence.<sup>110</sup> The grant programs also aim to incentivize states to create resources for victims, including intervention services.<sup>111</sup> VAWA was originally passed with a provision establishing a federal civil cause of action for victims of gender-based violence. However, the Civil Rights of Women provision was overturned by *United States v. Morrison*.<sup>112</sup> Certain forms of sexual harassment, such as sexual assault and stalking, are crimes.<sup>113</sup> However, sexual harassment as a broad category is not a crime and does not have a criminal remedy.<sup>114</sup>

Many domestic workers are employed with a worker’s visa.<sup>115</sup> Some domestic workers are employed through the Federal Au Pair Program.<sup>116</sup> Au Pairs that enter the country under a J-1 visa have the option of reporting any

---

107. *See id.* (noting that only seventeen states have expanded sex discrimination laws to cover employers with one or more employee).

108. *E.g.*, Violence Against Women Act, 34 U.S.C. § 12501 (2018) (creating statutorily mandated responses to domestic violence, sexual assault, and other forms of gender-based violence).

109. *See* 34 U.S.C. §§ 12291-12512 (2018) (establishing grant programs and regulation of victims’ services for victims of gender-based violence).

110. *See* 34 U.S.C. § 12441 (2018) (stating that grants shall be awarded to ensure confidentiality of victims’ identities).

111. *See* § 12511 (creating grant funds to be used in victims’ services such as intervention and related assistance).

112. *See generally* *United States v. Morrison*, 529 U.S. 598, 1740 (2000) (holding that the Commerce Clause did not give Congress the authority to enact a federal civil remedy under VAWA).

113. *See* Violence Against Women Act, 34 U.S.C. § 12291 (2018) (defining and encouraging prosecution for sexual assault and stalking as criminal conduct).

114. *See* Campbell, *supra* note 3 (explaining that sexual harassment is not a criminal offense and domestic workers may not press criminal charges).

115. *See* Violence Against Women Act, 34 U.S.C. § 12361 (2018) (creating federal civil liability for perpetrators of gender-based violence).

116. *See* Aqbeyegbe, *supra* note 4, at 2 (arguing that visas tied to employment status result in violations of labor laws and are contributing factors to human trafficking).



abuse by their host family to the Department of State, and the Department has a hotline available to Au Pairs to report abuse.<sup>117</sup> Workers who enter the country on a visa tied to their employment with a specific family are provided brochures explaining their rights and options for reporting.<sup>118</sup>

### III. ANALYSIS

The history of domestic work has resulted in the disenfranchisement of a labor force that is made up primarily of Black and non-Black women of color, particularly immigrant women.<sup>119</sup> Historical context reveals that domestic workers have been deliberately excluded from developments in labor laws, while other labor forces have increasingly benefited from labor movements.<sup>120</sup> The position of domestic workers in relation to labor law is no accident.<sup>121</sup> This relationship has been tainted by racist and sexist ideologies reflected in the legislative system.<sup>122</sup> Today, a significant number of domestic workers fall within the blind spot of federal employment law.<sup>123</sup> American society has largely rejected the institutions of slavery that predate domestic workers, but the remnants remain and perpetuate inegalitarian laws.<sup>124</sup> Thirty-six percent of domestic workers in the United States report having experienced some form of workplace sexual harassment.<sup>125</sup> This number aligns closely with the national average of thirty-five percent, proving that there is no basis in denying domestic workers protections from

---

117. *E.g.*, *Au Pair Program*, BRIDGEUSA' (2020) <https://j1visa.state.gov/programs/au-pair> (last visited Apr. 15, 2021) (providing that exchange visitors have an option to lodge a complaint and providing a hotline through the Department of State).

118. *See* Aqbeyegbe, *supra* note 4, at 5 (noting that visas tied to employment status require a distribution of literature even where labor laws may not apply to the worker).

119. *See* Campbell, *supra* note 3 (explaining that the domestic worker population is largely women of color and immigrants).

120. *See* Hiller & Saxtein, *supra* note 11, at 485 (contending that domestic workers are largely unincorporated into federal employment law).

121. *See generally id.* (arguing that domestic workers have intentionally been excluded from employment law because of sexist and racist ideologies).

122. *See generally* May, *supra* note 12 (stating that early American ideologies contributed to the exclusion of domestic workers from emerging employment rights).

123. *E.g.*, National Labor Relations Act, 29 U.S.C. § 151 (2018) (restricting the right to organize and bargain from individuals employed in domestic service).

124. *See generally* May, *supra* note 12 (arguing that remnants of slavery in *de jure* and *de facto* law perpetuate inequalities faced by domestic workers).

125. *See generally* Hiller & Saxtein, *supra* note 11 (reiterating that federal labor laws today encompass some labor rights for domestic workers, but these rights are not expansive).

this form of discrimination because of a lack of prevalence.<sup>126</sup>

Statistics also fail to reflect the disparity in reporting mechanisms between these populations, as workers that fall under Title VII can report to the Equal Employment Opportunity Commission (“EEOC”).<sup>127</sup> This Commission is a resource that is not available to most domestic workers.<sup>128</sup> Lack of access to this resource creates an expansive margin of error where domestic workers may be experiencing sexual harassment, but do not have means to report sex discrimination.<sup>129</sup> Sexual harassment could be more prevalent than data reflects, but without access to the EEOC or a human resources department, it is difficult to say how many instances of sexual harassment go unreported.<sup>130</sup>

*A. There Are Severely Limited Remedies And Protections in Federal Labor Law for Domestic Workers Experiencing Sexual Harassment in the Workplace Because Domestic Workers Are Not Covered By Title VII*

As a result of changes to federal labor laws in the last fifty years, there are labor protections available to domestic workers today that did not exist in the early part of the twentieth century.<sup>131</sup> Because domestic workers are now protected under FLSA, these workers have a right to overtime pay and minimum wage.<sup>132</sup> This advancement, which occurred in 1974, was an acknowledgement of the legitimacy of domestic work because, by federal law, employers can face repercussions for unpaid wages.<sup>133</sup> Before this change, there was no regulation regarding domestic work, and employers could refuse to pay fair wages to their cooks, cleaners, and nannies.<sup>134</sup> In

---

126. See Campbell, *supra* note 3 (stating that sexual harassment is a persistent problem in the workspaces of domestic workers).

127. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (presenting options for workers who have experienced sexual harassment to seek remedies).

128. See §2000e-2 (noting that the EEOC is available to workers under Title VII, which is not applicable to most domestic workers).

129. See Campbell, *supra* note 3 (stating that domestic workers are particularly susceptible to sexual harassment).

130. See *id.* (arguing that intersectional disadvantages may stand in the way of women seeking help for sexual harassment).

131. See Hiller & Saxtein, *supra* note 11, at 487 (explaining where labor law stands today in relation to domestic workers).

132. See Fair Labor Standards Act of 1938, 29 U.S.C. § 213 (2018) (providing rights for certain domestic workers for overtime and requiring certain breaks for hours worked but including no provisions as to discrimination in the workplace).

133. See § 213 (establishing remedies for employees that have been denied fair wages from their employees such as filing a claim).

134. See Hiller & Saxtein, *supra* note 11, at 246 (asserting domestic workers have

many ways, the practice of depriving workers of fair wages, similar to the practice of sexual harassment, is tied to institutional remnants of slavery.<sup>135</sup> Incorporation in FLSA is a stepping stone toward legitimatizing the industry by creating more expansive employment rights, steering away from the tradition of domestic work as a “labor of love” or as slave labor.<sup>136</sup> Still, FLSA does not provide concrete guidelines on how the law should incorporate domestic workers, and courts have not provided a clear definition.<sup>137</sup> The absent definition is problematic because there is no foundation for establishing a definition of domestic work in other federal labor laws.<sup>138</sup> Without this information, there is a risk of inconsistency as to how domestic workers are legally defined.<sup>139</sup>

As a wage law, FLSA is not designed to protect the civil rights of employees or to prevent sex discrimination.<sup>140</sup> Employment protections for domestic workers are still incomplete because FLSA is the only federal employment law that applies to domestic workers, and domestic workers are still specifically excluded from other areas of employment law.<sup>141</sup> The NRLA also excludes domestic workers, resulting in a lack of rights to mobilize and unionize for better working conditions.<sup>142</sup> Even though domestic workers are entitled to minimum wage, they cannot collectively bargain for better wages or working conditions under federal law.<sup>143</sup> In many ways, this serves to cancel out the positive impact of incorporating domestic

---

been excluded from federal employment law, leaving them without recourse for unpaid wages).

135. *See* 29 U.S.C. § 202 (2018) (“Congress further finds that the employment of persons in domestic service in households affects commerce”).

136. *See* May, *supra* note 12 (explaining how the law categorized domestic work as illegitimate work because of its ties to the private home and slavery).

137. *See* 29 U.S.C. §§ 206-207 (2018) (requiring employers to pay fair wages to domestic workers but failing to expand on who the law includes in the definition of domestic worker).

138. *See* §§ 206-207 (incorporating domestic workers into FLSA but failing to define domestic work).

139. *See* §§ 206-207 (providing that domestic workers are entitled to fair wages but not establishing the meaning of domestic work).

140. *E.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (prohibiting discrimination in the workplace for employers with more than fifteen employees).

141. *See generally* Hiller & Saxtein, *supra* note 11 (contending that domestic workers have been excluded from federal employment law and continue to lack certain rights).

142. *See* National Labor Relations Act, 29 U.S.C. § 151 (2018) (excluding domestic workers from the right to collective bargaining).

143. *See* § 151 (creating standards for unionization and bargaining around wages but excluding domestic workers from those standards).

workers into FLSA because workers have limited options when it comes to collectively increasing wages.<sup>144</sup> It also creates more obstacles in pursuing greater legislative protections for domestic workers.<sup>145</sup>

The OSH Act, which creates requirements for employers to ensure safe working conditions, also excludes domestic workers.<sup>146</sup> This exclusion is problematic in its own right, but especially in the context of the coronavirus pandemic, and the growing number of private health aides working in family homes.<sup>147</sup> Without OSH Act protections, employers of domestic workers are not legally required to provide their employees with access to personal protective equipment.<sup>148</sup> OSH Act's exclusion of domestic workers shows that, while wages for domestic workers have been protected by federal law, providing domestic workers with a happy and healthy work-life is still not a priority.<sup>149</sup> This sets a precedent because where the minimum safety needs of an employee are not protected, more expansive rights are not likely to be created.<sup>150</sup> The additional inability of domestic workers to unionize prevents this already isolated population from advocating on their behalf and pushing for more stringent protections, both from sexual harassment and other workplace safety concerns.<sup>151</sup>

The Civil Rights Act of 1964 falls at the very center of the federal employment law gap that domestic workers occupy.<sup>152</sup> Title VII provides a variety of remedies in most scenarios where an employee has experienced

144. *See* § 151 (establishing a right of workers to bargain for wages beyond state mandated minimum wage but excluding domestic workers).

145. *See* § 151 (establishing avenues for workers to pursue rights and wage increases under labor law).

146. *See* The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2018) (creating occupational health and safety regulations for the private sector, but explicitly exempting domestic workers from these protections).

147. *See* Campbell, *supra* note 3 (detailing that the number of home health aides has increased because of an aging population and explaining the home health aide population is increasingly at risk of sexual harassment).

148. *See* 29 U.S.C. § 651 (2018) (creating several safety and health standards that employers must follow but excluding domestic workers from these protections).

149. *See* 29 U.S.C. § 151 (2018) (creating standards for collective bargaining and negotiation by employees but specifically excluding domestic workers from these standards).

150. *See generally* Hiller & Saxtein, *supra* note 11 (arguing that domestic workers lack even minimal employment protections).

151. *See id.* (excluding domestic workers from the right to collective bargaining).

152. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (expanding constitutional rights in the workplace by providing discrimination protections to employees).

sexual harassment or sex discrimination.<sup>153</sup> An employee can file a complaint with the company or employer and expect an internal solution, or they can go to the EEOC to pursue remedies.<sup>154</sup> For much of the workforce, these protections are firmly in place and provide a multi-level system for checking employer compliance.<sup>155</sup> A benefit of the EEOC system is that it creates an external body available to employees who may face a hostile work environment.<sup>156</sup> Reporting sexual harassment to a human resources department may be a realistic option for some employees, but for others reporting internally may simply result in retaliation from the employer or colleagues.<sup>157</sup> The EEOC acts as a backstop, ensuring that employers are still held accountable for sexual harassment claims.<sup>158</sup> Because of the nature of domestic work and the Title VII exception for small-firms, domestic workers typically do not have access to these remedies and are left with few options.<sup>159</sup>

Precedent and subsequent amendments to the Civil Rights Act brought sexual harassment under the umbrella of sex discrimination.<sup>160</sup> However, the nature of Title VII makes bringing any civil actions or additional repercussions against a small-firm employer that perpetuates or permits sexual harassment on the job nearly impossible.<sup>161</sup> Even as the Act was amended to provide more protections against gender discrimination, and specifically sexual harassment in the workplace, there has never been a

---

153. *See* § 2000e-2 (establishing the enforcement provisions in circumstances of violations of Title VII).

154. *See* § 2000e-2 (providing possible courses of action for an employee seeking remedies for sexual harassment).

155. *See* § 2000e-2 (explaining that workers have several legal options available when faced with sexual harassment at work).

156. *See* § 2000e-2 (providing resources for workers whose employers have responded inappropriately to sexual harassment complaints).

157. *See* § 2000e-2 (stating that a worker may file a complaint where she feels that an employer has dismissed her in retaliation for lodging a sexual harassment complaint).

158. *See* § 2000e-2 (establishing that the EEOC investigates claims and provides advice on how best to proceed with action against employers who have acted unlawfully).

159. *See* § 2000e-2 (providing that anyone with less than fifteen employees is exempt from the regulations of Title VII).

160. *E.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual harassment constitutes sex discrimination under Title VII of the Civil Rights Act).

161. *See id.* (noting that the provisions of the Act only apply to employers, which are defined as those employing more than fifteen people, so there is no avenue of action for small-firm employees).

movement to remove the small-firm exception.<sup>162</sup> Essentially, this legislative loophole bars most domestic workers from any federal employment protections against sex discrimination.<sup>163</sup>

The only way domestic workers can fall within Title VII is if their employer is a large corporation or an individual with more than fifteen employees.<sup>164</sup> For example, rather than working for a family directly, working for an organization that provides nanny, healthcare, or maid services would bring a domestic worker within the Title VII framework.<sup>165</sup> However, this is far from a reasonable solution for all domestic workers.<sup>166</sup> Like much of the existing employment discrimination law, this option only applies to a small portion of the population.<sup>167</sup> Many domestic workers are entrepreneurs, running childcare and cleaning services through their own business.<sup>168</sup> The reality of domestic work means that most domestic workers are employed by small-firms, and because of this, Title VII rarely applies.<sup>169</sup>

Title VII does cover employees that work in traditional domestic service roles for large employers and corporate entities.<sup>170</sup> This fact has allowed for women working in housekeeping roles, for example, to bring suit against major hotels where sexual harassment is an issue from coworkers and hotel guests.<sup>171</sup> As long as the services performed do not fall under the small-firm exception, there are still options for filing complaints and holding employers

162. *See id.* (maintaining the small-firm exception to employment discrimination protections).

163. *See Campbell, supra* note 3 (explaining how the small-firm exception in Title VII excludes domestic workers from protections and options for seeking redress).

164. *See id.* (stating that domestic workers employed by hotels are covered under Title VII).

165. *See id.* (defining an employee, for purposes of Title VII protection, as anyone having more than fifteen employees for every workday).

166. *See id.* (arguing that many domestic workers are individually and independently employed).

167. *See generally* Hiller & Saxtein, *supra* note 11 (asserting that most home health aide workers fall within employment law loopholes that exclude them from many protections).

168. *See Campbell, supra* note 3 (explaining the various roles filled by domestic workers and the ways in which domestic workers engage with the economy).

169. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (defining an employer as someone having more than fifteen employees, and therefore excluding domestic workers from inclusion in the Act).

170. *See* § 2000e-2 (establishing civil rights protections for employees of employers with more than fifteen regular employees).

171. *See Campbell, supra* note 3 (finding that employment with a third party may be one of the only means for domestic workers to fall under Title VII).

responsible for a discriminatory environment, even if the work performed by an employee is traditionally considered domestic work.<sup>172</sup> However, the employees that benefit from this option are not actually domestic workers.<sup>173</sup> Even if a maid performs the same duties as a housecleaner, or a daycare attendant performs the same tasks as a nanny, domestic workers are defined by performing services specific to the home.<sup>174</sup> Where a hotel maid has options under Title VII, a domestic worker does not.<sup>175</sup> The majority of domestic workers continue to work in homes and may be serving as the only, or one of a small number of, employees of a family.<sup>176</sup> Title VII does not cover the majority of domestic workers for this reason.<sup>177</sup>

*B. State Legislative Adoption of a Domestic Workers' Bill of Rights Provides Domestic Workers With Necessary But Incomplete Legal Protections in the Workplace Because Rights Are State-Specific*

State legislation providing protections and remedies for sexual harassment is a powerful tool for a workforce that otherwise has no means for ensuring their safety in the workplace.<sup>178</sup> The New York Domestic Workers' Bill of Rights is the oldest of the state legislation specific to domestic workers' rights.<sup>179</sup> Because New York law calls for the distribution of information to domestic workers, isolated employees have the mechanisms for filing a complaint of sexual harassment to the Division of Human Rights.<sup>180</sup> This

---

172. See 42 U.S.C. § 2000e-2 (2018) (providing resources for filing a complaint where an employer with more than fifteen employees has violated Title VII).

173. See Campbell, *supra* note 3 (explaining how domestic workers are often working in informal environments as the sole, or one of the sole, employees of a family).

174. See Domestic Workers' Bill of Rights Act, H.R. 3760, 116th Cong. § 3 (2019) (defining domestic work as providing household services as opposed to corporate services).

175. See Campbell, *supra* note 3 (stating that domestic workers provide services in the home, usually for single-families).

176. See *id.* (noting that many domestic workers are the single employee of the home in which employees work).

177. See *id.* (arguing that domestic workers face unique challenges and do not have remedies available for workplace sexual harassment).

178. E.g., Stoica v. Phipps, No. 153834/2017, 2018 WL 1226045, at \*1 (N.Y. Sup. Ct. Mar. 8, 2018) (finding that where an employer has violated the Domestic Workers' Bill of Rights by refusing to provide one day of rest per seven days on, the employee has the basis for a claim).

179. See N.Y. EXEC. LAW § 296-b (Consol. 2020) (establishing protections specific to domestic workers that went into effect in 2010).

180. See EXEC. § 296-b (providing for the distribution of information to workers because of the isolated nature of their work).

tactic ensures not only that the necessary laws are in place to protect domestic workers, but also that this typically isolated population has access to the tools for holding their employers accountable.<sup>181</sup> This component of the law is especially important because domestic workers are uniquely situated.<sup>182</sup> These workers do not have the same access to peers or information about their rights as employees, as many other types of workers have.<sup>183</sup> Many domestic workers do not know their rights as they stand now, so distribution of information is crucial in ensuring the success of this legislation.<sup>184</sup>

The distribution of information required by the New York law may be compared to the actual reporting mechanisms established in several other states, such as Massachusetts.<sup>185</sup> In Massachusetts's case, the complaint system is available through the website for the Civil Rights Division of the Attorney General's Office.<sup>186</sup> The data provided by the Office indicates that the complaint system is being used by domestic workers to file complaints under the Domestic Workers' Bill of Rights.<sup>187</sup> However, the data does not indicate any filed complaints based on sex discrimination or sexual harassment.<sup>188</sup> Of the 30,650 complaints filed since January of 2015, 122 of those reflected a violation of domestic workers' rights.<sup>189</sup> All of the noted complaints within this class were for unpaid wages.<sup>190</sup> This fact could be due to the simplicity of the data recording itself, or potentially because

---

181. See EXEC. § 296-b (maintaining that information shall be distributed to domestic workers due to the isolated nature of their work to ensure access to protections by the law).

182. See Campbell, *supra* note 3 (stating that domestic workers are typically employed by single-families and thus they often work in isolated situations).

183. See *id.* (explaining that many workers can report sexual harassment to the EEOC to receive information about their rights).

184. See *id.* (arguing that domestic workers often do not know their rights as employees or how to report abuse).

185. See MASS. GEN. LAWS ch. 149, § 190 (2020) (establishing a reporting mechanism for discrimination claims brought before the Attorney General).

186. See § 190 (providing a means for filing claims of sexual harassment and incorporating domestic workers' claims into this system).

187. See § 190 (creating mechanisms for domestic workers to file complaints based on sexual harassment claims).

188. See § 190 (including domestic workers in the state-wide reporting system for employment discrimination claims).

189. See § 190 (stating that complaints by domestic workers may be filed with the Attorney General based on the Massachusetts labor laws).

190. See § 190 (establishing that domestic workers must be paid fair wages and creating an enforcement mechanism for employers who do not pay fair wages).



domestic workers truly are not filing for sexual harassment.<sup>191</sup> These numbers still directly contradict national statistics, which report that thirty-six percent of domestic workers experience sexual harassment on the job.<sup>192</sup> It remains that Massachusetts has the systems available for domestic workers to bring claims of sexual harassment.<sup>193</sup>

While states with protections have their individual nuances, the domestic workers' bills of rights are mostly consistent between the nine states.<sup>194</sup> Several states with protections include provisions prohibiting sexual harassment and retaliation by an employer.<sup>195</sup> Like Oregon's policy, some of the policies outline specific behaviors by an employer that are considered sexual harassment.<sup>196</sup> This direct legislative language, in addition to the investigative organs and reporting mechanisms created by these policies, have filled the gaps intentionally created by Title VII.<sup>197</sup> The state laws also go beyond Title VII in many ways because they apply to the unique circumstances of domestic workers, taking into account especially the isolated nature of their work and the lack of institutional protections.<sup>198</sup>

The employment protections available to workers in both California and Nevada are notably lacking when it comes to sex discrimination.<sup>199</sup> While

---

191. See Campbell, *supra* note 3 (stating that domestic workers often face obstacles and fear reporting sexual harassment).

192. See Linda Burnham & Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work*, NAT'L DOMESTIC WORKERS ALLIANCE (2012), [https://idwfd.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment\\_1](https://idwfd.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1) (stating that 36% of live-in domestic workers have reported assault while only 19% of all workers have reported assault).

193. See MASS. GEN. LAWS ch. 149, § 191 (2020) (establishing that an employer may not discriminate against a domestic worker based on the worker's sex).

194. See *infra* Part II B (noting how the existing Domestic Workers' Bill of Rights has similar provisions that establish rights like overtime pay for workers).

195. E.g., MASS. GEN. LAWS ch. 149, § 191 (2020) (expanding sexual harassment protections to certain classes of workers in Massachusetts).

196. See OR. REV. STAT. §§ 653.547–653.553 (2020) (providing three behaviors by an employer that the law classifies as sexual harassment against a domestic worker).

197. E.g., §§ 653.547–653.553 (incorporating language on sexual harassment into Oregon law not previously included in Title VII).

198. E.g., N.Y. EXEC. LAW § 296-b (Consol. 2020) (considering the needs of domestic workers as an isolated population with obstacles to accessing information about their rights).

199. See CAL. LAB. CODE §§ 1450, 1454 (Deering 2020) (providing certain rights to domestic workers for minimum wage and overtime pay but not including sexual harassment regulation); see also NEV. REV. STAT. §§ 613.610–613.620 (LexisNexis 2020) (creating regulation of minimum wage for domestic workers but excluding sex discrimination provisions).

both California and Nevada have domestic workers' bills of rights that largely mimic the language of other states with protections, there are not provisions around sexual harassment.<sup>200</sup> The result is that the employment law in these states remains incomplete because domestic workers continue to face a threat of sex discrimination in the workplace.<sup>201</sup>

It has been only ten years since the first Domestic Workers' Bill of Rights was passed in New York.<sup>202</sup> Most of these policies are new, and it will take time to build awareness among domestic workers regarding their rights and to establish trust among these workers that they will be able to come forward with allegations without facing retaliation.<sup>203</sup> This relates to the fact that a large portion of domestic workers are immigrant women.<sup>204</sup> Many of those that are immigrants are not documented or are in the United States on a visa that is directly tied to their employment with a specific family.<sup>205</sup> This fact makes reporting a daunting task because speaking up might create a risk of deportation.<sup>206</sup>

There is no doubt that states with protections are creating nets to catch domestic workers who would otherwise fall through the cracks.<sup>207</sup> The legislation is clearly built to complement Title VII, as well as other federal labor laws because the language picks up where Title VII left off.<sup>208</sup> It remains to be seen how effective these laws really are and whether they are expansive enough to meet the unique needs of the domestic worker population.<sup>209</sup> States with protections also only extend those protections as

---

200. *E.g.*, LAB. § 1454 (outlining prohibited employment practices pertaining to domestic workers, including wage theft).

201. *E.g.*, LAB. § 1454 (establishing rights for domestic workers but excluding discrimination regulation).

202. *See* EXEC. § 296-b (creating rights specific to domestic workers that went into effect in 2010).

203. *See* Campbell, *supra* note 3 (noting domestic workers' fear to report sexual harassment in the workplace because of potential retaliation and firing by the employer).

204. *See* *About the National Domestic Workers Alliance*, NAT'L DOMESTIC WORKERS ALLIANCE, <https://www.domesticworkers.org/about-us> (last visited Apr. 3, 2021) (explaining that a majority of domestic workers are immigrant women).

205. *See* Aqbeyegbe, *supra* note 4 (arguing that tying domestic work to visa status results in abuses by employers).

206. *See id.* (resolving that immigrant visas tied to employment status create a fear of deportation where the employment is terminated for any reason).

207. *E.g.*, COLO. REV. STAT. ANN. §§ 24-34-401, 24-34-402 (West 2016) (expanding the reach of sexual harassment law to include employers with one or more employee).

208. *See* §§ 24-34-401, 24-34-402 (including workers under the protections of sex discrimination law who would not otherwise be protected under Title VII).

209. *See generally* Maura Healey, *Protecting Massachusetts Workers*, OFF. ATT'Y

far as the state borders, and domestic workers outside of these jurisdictions are not protected.<sup>210</sup>

States that have removed the small-firm rule of Title VII in state employment law are imperfect solutions for domestic workers.<sup>211</sup> These laws do away with the major obstacle present in federal law: holding employers accountable for sex discrimination.<sup>212</sup> At the very least, these policies are acting as a gap filler for the federal law and creating legal rights that did not exist before.<sup>213</sup> However, from a policy standpoint, these laws lack the pointed nature of legislation aimed specifically at domestic workers.<sup>214</sup> Where the population is isolated and lacking in collective bargaining power, states that have created investigatory organs and tools for distributing information to domestic workers are addressing this additional need.<sup>215</sup> Without legislation specific to the rights of domestic workers, there are still opportunities for this workforce to fall through the cracks.<sup>216</sup>

The vast discrepancies in protections of domestic workers as compared to other labor forces is most evident in states like Texas where there are no additional protections for employees that fall outside of the small-firm rule.<sup>217</sup> Because twelve states have not made changes to the small-firm rule, and another nineteen still do not apply sexual harassment laws to employers with only one employee, domestic workers are not protected from sexual harassment in most of the United States.<sup>218</sup> Where a home healthcare worker

---

GEN. 1, 8 (Sept. 2, 2019) <https://www.mass.gov/doc/ags-labor-day-report-2019/download> (providing data on claims brought under the Domestic Workers' Bill of Rights but excluding data on sexual harassment claims).

210. *E.g.*, MASS. GEN. LAWS ch. 149, § 190 (2020) (creating legal rights for only those domestic workers located within Massachusetts).

211. *E.g.*, § 24-34-401 (providing that Colorado sexual harassment laws apply to employers with more than one employee).

212. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (prohibiting discrimination based on sex for employers with more than fifteen employees).

213. *See* Hiller & Saxtein, *supra* note 11, at 234 (arguing that state law has adapted to compensate for some of the gaps in Title VII).

214. *See* Domestic Workers' Bill of Rights Act, H.R. 3760, 116th Cong. § 125 (2019) (contending that legislation specific to domestic workers is necessary to address the specific needs of the domestic worker population).

215. *E.g.*, N.Y. LAB. LAW § 691 (Consol. 2020) (requiring a report on the collective bargaining power of domestic workers).

216. *See* H.R. 3760 §§ 2, 301 (finding that domestic workers lack important employment rights and that the ideal remedy is a Domestic Workers' Bill of Rights).

217. *See* TEX. LAB. CODE ANN. § 21.002 (West 2020) (defining an employer as someone engaged in commerce with fifteen or more employees).

218. *See generally* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (providing

in Oregon has the option of filing a complaint and taking action against an employer for sexual harassment, that same worker would have no options in Texas.<sup>219</sup> These circumstances demonstrate how much inconsistency domestic workers face in their available remedies and protections from workplace harassment.<sup>220</sup>

*C. State-Level Criminal Law Is Not a Realistic Means of Protection From Sexual Harassment for Domestic Workers Because Most Workplace Harassment Is Not Criminal*

Any worker who experiences sexual assault on the job has a remedy available to her through criminal law.<sup>221</sup> This remedy is an option whether the employee works for a large corporation or an individual.<sup>222</sup> This option is an important one for domestic workers, as criminal laws ensure justice in cases of assault.<sup>223</sup> However, much like the gap created by the small-firm rule of Title VII, criminal law only goes as far as specific acts of violence on the job.<sup>224</sup> A person may bring criminal charges for sexual assault or assault in general, but criminal law does not cover instances where, for example, an employer makes lewd comments about a worker's body that would otherwise be a violation of Title VII.<sup>225</sup> While a small subset of the domestic worker population that experiences sexual assault on the job has options under criminal law, there is still a massive chasm.<sup>226</sup> Workers whose experiences

---

that federal law does not protect employees of small-firms from sexual harassment); Farkas, *supra* note 98, at 336-377.

219. *E.g.*, OR. REV. STAT. § 653.547 (2020); LAB. § 21.002 (limiting discrimination regulations to employers with fifteen or more employees).

220. *Compare* LAB. § 21.002 (maintaining that claims for sexual harassment are not available to employees of small-firms), *with* MASS. GEN. LAWS ch. 149, § 190 (2020) (creating specific employment rights for domestic workers).

221. *See* Campbell, *supra* note 3 (explaining that sexual harassment is not illegal and there are no criminal charges available to victims of sexual harassment).

222. *See id.* (saying that there are civil options available to workers who experience sexual harassment in large companies).

223. *See generally* Violence Against Women Act, 34 U.S.C. § 12361 (2018) (creating organs for the regulation of violent crimes against women).

224. *See* §§ 12361, 12372 (resolving to create federal responses to gender-based violence specifically, including domestic violence and sexual assault, and creating a federal civil cause of action for gender-based violence claims).

225. *See* Campbell, *supra* note 3 (recalling the experiences of domestic workers that were sexually harassed with little recourse).

226. *See id.* (finding that sexual harassment is not a crime and is thus not a basis for filing criminal charges anywhere in the United States).

fall just shy of a criminal cause of action are left without any option.<sup>227</sup>

VAWA bolsters options for victims of gender-based violence, but it is in no way a supplement to Title VII.<sup>228</sup> The Act improves support systems for victims of assault, but this is of little help to a domestic worker that has not technically been assaulted.<sup>229</sup> VAWA also ensures the confidentiality of victim identification information, which can be exceptionally useful for domestic workers that have been assaulted by an employer and fear for their safety.<sup>230</sup> The grants established by VAWA, though, are not geared toward scenarios of workplace harassment, nor are the reporting systems that the Act created.<sup>231</sup> Domestic workers that are not assaulted but do experience harassment may continue to work in close proximity with their employers, with few available options to hold their employers accountable.<sup>232</sup> VAWA is not a protection for this class of workers because it is focused on gender-based crimes.<sup>233</sup>

The same problem applies in cases of worker visas and the Federal Au Pair Program.<sup>234</sup> While a subclass of domestic workers are covered because they have a worker's visa, this situation does not encompass the entire domestic worker population.<sup>235</sup> Further, these programs are far from revolutionary in addressing the prevention of sexual harassment.<sup>236</sup> The

227. *See id.* (describing the circumstances that some domestic workers face where sexual harassment may be an issue even if the conduct is not criminal).

228. *See* Violence Against Women Act, 34 U.S.C. § 12341 (2018) (establishing grant programs to encourage states in prosecuting gender-based violence).

229. *See* § 12511 (creating incentives for the maintenance of intervention programs for victims of sexual assault).

230. *See* § 12441 (asserting that states must take measures to ensure that perpetrators do not have access to identity information pertaining to victims of gender-based violence).

231. *See* §§ 12291-12512 (creating federal regulation for gender-based violence but not extending those regulations to sexual harassment).

232. *See* Campbell, *supra* note 3 (arguing that domestic workers are often forced to work in close proximity with employers engaging in sexual misconduct in the workplace).

233. *See* §§ 12291-12512 (establishing a federal focus on the prevention of gender-based violence and creating mechanisms for addressing violence against women).

234. *See* Agbeyegbe, *supra* note 4, at 40-42 (examining an overview of the connection between temporary work visas and domestic work and determining that the practice is problematic).

235. *See id.* (providing that domestic workers come from a variety of demographics and include several different types of labor).

236. *E.g.*, *Beltran v. Aupaircare, Inc.*, 907 F.3d 1240 (10th Cir. 2018) (holding that the Federal Au Pair program must provide wages consistent with FLSA).

Federal Au Pair program has only recently been ordered to comply with state minimum wage laws, rather than the au pair wages set by the Department of State.<sup>237</sup> The program has a reporting mechanism for abusive employment situations, but it remains that the Federal Au Pair program has not established a basis of protections for its participants.<sup>238</sup>

Relying on criminal law and visa programs to report and seek remedies for sexual harassment is unsustainable because options for workers are heavily fact specific, leaving a large number of workers without protections.<sup>239</sup> Criminal law and visa protections are potential options available to a class of workers that is otherwise excluded from employment law; however, these solutions do not address the direct circumstances of sexual harassment in an otherwise legal employment situation.<sup>240</sup> None of these options provide for the domestic worker population as a whole.<sup>241</sup> While certain subsets of domestic workers may have options available to them, the fact remains that the entirety of domestic workers are not protected from sex discrimination and sexual harassment on the job.<sup>242</sup>

#### IV. POLICY RECOMMENDATION

##### *A. A Federal Domestic Workers' Bill of Rights Would Create the Necessary Protections Against Sexual Harassment For Domestic Workers In the Workplace.*

In 2019, Vice President (then Senator) Kamala Harris and Representative Pramila Jayapal introduced the Domestic Workers' Bill of Rights Act to Congress.<sup>243</sup> As of October 2020, the Act had been referred to the Committee on Health, Education, Labor, and Pensions.<sup>244</sup> The proposed Act

---

237. *See id.* (finding that the Federal Au Pair program does not fall outside of state and federal labor laws pertaining to minimum wage).

238. *See id.* (arguing that the Federal Au Pair program was engaging in unfair wage practices by not paying in accordance with state minimum wage laws).

239. *See Campbell, supra* note 3 (emphasizing that criminal penalties are not a sustainable solution for sexual harassment claims of domestic workers).

240. *See id.* (contending that there is a lack of options for domestic workers experiencing sexual harassment).

241. *See Hiller & Saxtein, supra* note 11, at 249, 252 (asserting that state law has adapted in some situations to compensate for some of the gaps in Title VII).

242. *See Civil Rights Act of 1964*, 42 U.S.C. § 2000e-2 (2018) (excluding small-firms from the requirements of Title VII protections, thus excluding a large mass of workers from protections).

243. *See Domestic Workers' Bill of Rights Act*, H.R. 3760, 116th Cong. (2019); *Domestic Workers' Bill of Rights Act*, S. 2112, 116th Cong. (2019).

244. *See Domestic Workers' Bill of Rights Act*, S. 2112, 116th Cong. (2019)

would bring domestic workers within the scope of many of the areas of federal employment law where domestic work is currently being excluded.<sup>245</sup> The Act proposes an amendment to Title VII that would strike the word “fifteen” under the definition of employer and insert the word “one.”<sup>246</sup> This seemingly minor change would result in new legal protections for a population of two million domestic workers across the United States.<sup>247</sup>

The proposed bill takes civil rights protections one step further by offering the establishment of a Domestic Worker Wage and Standards Board, which would investigate standards in the domestic service industry.<sup>248</sup> The Board would help to eliminate many of the major obstacles presented by the regulation of domestic workers, such as isolation, because the Board would be investigating and addressing needs specific to this workforce.<sup>249</sup> Investigating the needs of domestic workers specifically is something that has not previously been prioritized in federal law.<sup>250</sup>

The proposed Domestic Workers’ Bill of Rights Act is an ideal means of closing the significant loophole that is currently barring domestic workers from many workplace protections.<sup>251</sup> The proposed bill would also be a powerful policy choice because it incorporates domestic workers in other areas of law, such as the OSH Act, ensuring that this workforce has access to all necessary employment protections.<sup>252</sup>

---

(detailing the status of the proposed bill).

245. *See generally* H.R. 3760 (proposing amendments to several federal Acts to incorporate domestic workers).

246. *See* H.R. 3760 § 131 (proposing an amendment to Title VII of the Civil Rights Act of 1964, which would remove the “small-firm” exception of the law).

247. *See Who Are Domestic Workers, supra* note 7 (explaining that domestic workers account for about two million workers in the United States).

248. *See* Domestic Workers’ Bill of Rights Act, H.R. 3760, 116th Cong. § 201 (2019) (providing for the creation of a board dedicated to investigating the working conditions of domestic workers).

249. *See id.* (finding a need for an investigatory organ on domestic workers’ rights because of the unique characteristics of the workforce).

250. *See generally* Hiller & Saxtein, *supra* note 11, at 264-65 (arguing that domestic workers have historically been excluded from federal employment law).

251. *See* Campbell, *supra* note 3 (arguing that amending the small-firm exception of the Civil Rights Act of 1964 would create protections for domestic workers where protections have previously been lacking).

252. *See* H.R. 3760 § 123 (proposing occupational health and safety requirements for domestic workers, such as mandatory training).

*B. Changes to Title VII May Be a More Realistic Solution to the Domestic Worker Loophole*

A Federal Domestic Workers' Bill of Rights is the best option for bringing domestic workers under Title VII protections, but it is not the most realistic.<sup>253</sup> As of 2020, the bill has not moved beyond committee, and Westlaw gives the bill a three percent chance of being passed as written.<sup>254</sup> A more viable option for ensuring that domestic workers are protected from sexual harassment under the law would be an amendment to the language of the Civil Rights Act to remove the small-firm exception.<sup>255</sup> This option could be accomplished simply by changing the definition of "employer" to mimic what has already been done in several states, like Colorado, and what is suggested in the federal proposed Domestic Workers' Bill of Rights.<sup>256</sup>

Changing the language of Title VII would be feasible, and the seemingly minor change would have astounding impacts on domestic workers.<sup>257</sup> This workforce would gain access to the EEOC reporting mechanisms.<sup>258</sup> Even where domestic workers may not have access to a human resources department through their employer, they would be able to file complaints about their employers and get advice on how best to proceed.<sup>259</sup> Title VII also prohibits retaliation for reporting sexual harassment.<sup>260</sup> If brought under the language of Title VII, employers would not be permitted to fire or retaliate in any other way against an employee who reports sexual misconduct.<sup>261</sup> This avenue would be a massive benefit to domestic workers,

---

253. See Domestic Workers' Bill of Rights Act, S. 2112, 116th Cong. (2019) (showing that the bill has been in committee since 2019).

254. See *id.* (stating that the Domestic Workers' Bill of Rights Act has thus far only been referred to the Committee on Health, Education, Labor, and Pensions).

255. See Domestic Workers' Bill of Rights Act, H.R. 3760, 116th Cong. § 2 (2019) (finding that the small-firm exception of the Civil Rights Act has resulted in a disproportionately negative impact on domestic workers).

256. See *id.* (arguing for an amendment to the language of the Civil Rights Act to make Title VII applicable to small-firms).

257. See Campbell, *supra* note 3 (stating that millions of workers are susceptible to sexual harassment without any available remedy because of the exclusive language of Title VII).

258. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018) (providing a reporting resource for employees' discrimination claims under the authority of Title VII).

259. See § 2000e-2 (explaining that an EEOC complaint will result in an investigation and subsequent action depending on findings).

260. See § 2000e-e (providing that employers may not retaliate against an employee who files a discrimination claim).

261. See § 2000e-2 (stating that employers, as defined under the Act, are prohibited from taking retaliatory action against employees).



especially those that fear employers will use their immigration status against them, or for workers who fear reporting because of the consequences of being fired, especially during the Covid-19 pandemic.<sup>262</sup>

## V. CONCLUSION

Though I am no longer a domestic worker, my connections to this labor force remain strong. Friends and family members of mine are childcare workers, health aides, and housecleaners in the still informal field of domestic work. For many of my loved ones, domestic work is the main source of income and will remain their career for the foreseeable future. Yet, despite this commitment and the hours put toward learning and improving the trade of domestic work, the law still refuses to provide this work force with even the most basic protections.<sup>263</sup> Across the United States, domestic workers continue to be largely excluded from laws that aim to provide recourse for acts of sexual harassment.<sup>264</sup> The result is the flourishing of harassment in a sector where the workforce is most susceptible to this behavior.<sup>265</sup> This dire situation is only exacerbated by the Covid-19 pandemic, as workers fight to maintain work and feed their families at all costs.<sup>266</sup> If federal and state law continues to allow domestic workers to slip through the gaps, these workers will continue to experience alarming and unjust rates of sexual harassment in the workplace.<sup>267</sup>

---

262. See Gibbs, *supra* note 14 (arguing that domestic workers fear for their safety during the Covid-19 pandemic but must continue to work to support their families).

263. See generally Hiller & Saxtein, *supra* note 11, at 260-61 (emphasizing that domestic workers have systematically been excluded from federal employment law).

264. See Campbell, *supra* note 3 (stating that domestic workers are excluded from Title VII, because they often fall in the small-firm exception, and are therefore not protected from sexual harassment).

265. See *id.* (arguing that domestic workers are particularly susceptible to sexual harassment because there are no systems in place to hold harassers accountable).

266. See Gibbs, *supra* note 14 (stating that workers in care industries are less likely to have personal protective equipment provided at work).

267. See Campbell, *supra* note 3 (claiming that domestic workers face specific challenges related to sexual harassment because of the isolated nature of their work).