WORKPLACE TRANSPARENCY BEYOND DISCLOSURE: WHAT'S BLOCKING THE VIEW?

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Recent developments have exacerbated informational asymmetry between employers and workers. Employers increasingly use "black box" automated-decision systems, such as machine learning processes where algorithms are used in recruitment and hiring. They have technological tools that enable intense monitoring of workers. Contemporary work relationships have changed, with trends toward remote and scattered worksites. Employees are more frequently bound by nondisclosure agreements, non-disparagement provisions, and mandatory arbitration agreements. These developments have made it more difficult for workers to communicate with each other and to act collectively.

The result is that workers are kept in the dark when it comes to much of an employer's decision-making. How might an employee know, for example, if she is being paid less than her male coworkers if she is being closely watched and is afraid of speaking? How might someone turned down for a job know whether the hiring process was discriminatory?

We need to look beyond disclosure mandates, take a closer look at channels of communication in today's workplaces, and consider the vantage point of workers. Developing effective transparency measures requires greater attention to the sightlines of workers who cannot get information they need to spot, articulate, and prove violations of workplace protections.

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I. INTRODUCTION

Discussions of workplace regulation require to some extent, explicitly or not, consideration of informational asymmetry and notions of "transparency." This has long been the case, but perhaps never more so than today.

Technology now allows employers to monitor workers in new and sophisticated ways. Employers increasingly use automated decision-making systems to hire and manage their workforces. Employees are often bound by nondisclosure, non-disparagement, and mandatory arbitration provisions, which can effectively silence and isolate them. Work relationships can take many forms, ranging from the traditional on-site, 9-to-5 job, to the sporadic, off-site schedules of gig work. Telework has become more common, making it possible never to meet one's coworkers.

It was already difficult for workers to see behind the curtain of many employment practices, but these developments make that decision-making machinery even less visible. How might an employee know, for example, if she is being paid less than her male coworkers if she is being closely watched and is afraid of speaking? How might someone who was denied a position know whether the hiring process was discriminatory when machine learning processes are used to screen job candidates?

Employees and job seekers have limited, sometimes no, access to information they need to recognize potential workplace violations and to prove them. To illustrate, meet Emma and Alex.

Emma has been with the same employer, a large marketing company, for twelve years. She is one of several non-unionized assistant managers in her region. She suspects that she is being paid less than male assistant managers. The company has a policy of confidentiality in its employee manual, and Emma is afraid of talking about compensation with coworkers. She contacts a lawyer,[1] who asks her some questions:

> Q. What makes you think the male assistant managers are getting paid more than you?
> A. I haven't received a raise in three years. I heard that at least two male assistant managers got raises last year. I've been there longer, and my sales numbers were better than theirs.
> Q. Do all the assistant managers have the same duties, responsibilities, and working conditions?
> A. I think so, but I'm not sure since we work in different locations most of the time and we're often on the road.
> Q. What do you know about the salaries of the female assistant managers?
> A. I don't know what they make.
> Q. Have you heard anyone suggest that your pay might be lower because you are a woman?
> A. No.
> Q. Is there some kind of policy or formula about how pay is determined?
> A. Nothing written. It seems like it is up to the regional managers to decide how much to pay.
> Q. Do you know if anyone else has complained about pay practices at this place?
> A. Not that I know of.

Alex is fifty years old and looking for a job as a software designer. He meets the stated job requirements of the positions for which he applies. He has checked with his references, and had his resume reviewed by a job coach. His age and graduation dates are not on his resume, but given his work experience, it is obvious that he is not a kid. He has checked his social media accounts to make sure there is nothing inappropriate on them, and he has strengthened his privacy settings. He has had no offers, and only one interview. He wonders if he is not getting hired because of his age. He has this discussion with a lawyer:

> Q. Do you know who was hired into the positions you did not get?

1. Emma and Alex can afford at least a consultation with a law firm. See discussion *infra* § IV.B about limited access to affordable counsel.

> A. No.
> Q. How did you learn of these positions?
> A. Online job boards, mostly ads that don't show the names of the employers.
> Q. Did any of the postings include language suggesting a preference for younger people?
> A. No.
> Q. Do you know if the employers are still looking to fill the positions?
> A. I'm not sure. There is one posting that looks like to the one I applied to, but it's worded a little differently. It doesn't identify the company, so it's hard to tell if it's the same job.
> Q. You did have one interview. Did anyone there say anything to suggest your age might have been a factor?
> A. No, but the interviewer looked like he was in his twenties, and I noticed walking through the office that almost everyone there seemed to be in their twenties or thirties.
> Q. Were you given any reason after the interview why you did not get the job?
> A. No. I just got a generic email that thanked me for applying.

Without more information, the lawyers in these scenarios do not have much to work with, and this might well be the end of the matters. Workers like Emma and Alex at this point often ask: *How am I supposed to know the answers to these questions? What good are these laws if we can't use them?*

William Felstiner, Richard L. Abel, and Austin Sarat offer a useful starting point for this discussion. They lay out three steps of a "transformation of a perceived injurious experience into a grievance": (1) Naming: Saying to oneself, "I've been injured." (2) Blaming: Attributing an injury to the fault of another. (3) Claiming: Voicing a grievance and asking for a remedy.[2] Factually ignorant, Emma and Alex stand at a threshold before such naming, blaming, and claiming are possible.

The focus of this Article is the lack of transparency at this threshold. What information is necessary as a prerequisite to naming, blaming, and claiming? How visible, accessible, and usable is it? It is not enough to look at disclosure mandates. We need to take a closer look at channels of communication in

2. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635–36 (1980).

today's workplaces and job markets and consider the vantage point of workers. What is their sightline? What is getting in the way?

My purpose is to flag some important obstructions to this view, with an emphasis on the non-union shop in the private sector, where information can be especially hard for workers to get. This requires an understanding of the particularities of contemporary employment relationships and practices, substantive law, and some procedural barriers.

II. LARGER DISCUSSIONS OF TRANSPARENCY

As Frederick Schauer has put it: "Transparency, it appears these days, is everywhere; or at least talk of it is everywhere."[3]

Transparency is hardly a new topic. Demands for transparency stretch back at least to the Progressive Era, with spurts in the mid-to late-20th century when reformers pushed for disclosures regarding product safety, environmental pollutants, and banking practices, for example.[4]

Archon Fung, Mary Graham, and David Weil, in their comprehensive treatment of transparency issues, distinguish "right-to-know" laws from "targeted transparency policies."[5] Right-to-know measures are "open government" laws, meant to hold officials accountable and to inform public discourse.[6] Landmark right-to-know laws include the Administrative Procedures Act,[7] which requires federal agencies to publish notices of proposed and final rulemaking and provide opportunities for public comment, and the Freedom of Information Act (FOIA), which permits the public to request access to records from federal agencies.[8] By contrast, targeted transparency policies require that public- and private-sector entities collect and disclose data as a means to inform public choices.[9] Examples include mandates that food companies disclose ingredients and nutritional information in their products; that public companies make certain financial disclosures; that banks report on their mortgage loans to address concerns of lending discrimination; and that schools report performance data as a condition of federal aid.[10]

3. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1340 (2011).

4. David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 135–39 (2018).

5. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 39 (2007).

6. *Id.* at 25–28.

7. 5 U.SC. § 551 *et seq.* (2018).

8. 5 U.S.C. § 552 (2018).

9. FUNG, GRAHAM & WEIL, *supra* note 5, at 28.

10. *Id.* at 5.

Cynthia Estlund has written extensively and pointedly on transparency in the workplace, noting the relatively limited scholarly attention given to this sphere until recently.[11] She has proposed disclosures of various types, including information about working conditions, job requirements, performance standards and expectations, pay practices, safety records, leave policies, workforce demographics, and waivers that might be required as a condition for employment.[12]

Estlund writes of information disclosure along three dimensions[13]:

(1) Disclosure "in aid of contract": Disclosure of information to workers that can "help make employment contracts and labor markets more efficient as to terms and conditions that are left to contract by better matching employee preferences and employers' proffered terms of employment."[14] Such would include information to help workers decide which jobs to seek, which to accept, whether to negotiate a better deal, and how to assess exit options.

(2) Disclosure "in aid of reputational rewards and sanctions": Disclosure of information to workers and the public to nudge employers beyond compliance to "best practices" and higher standards of social responsibility.[15]

(3) Disclosure "in aid of compliance": Disclosure of information to workers and their advocates to "promote employer compliance with existing substantive mandates by exposing evidence of noncompliance and facilitating enforcement."[16]

The information Emma and Alex need are situated along the dimension "in aid of compliance," that which would allow workers to recognize violations of law; decide whether and when to seek help; decide whether to take legal action; and figure out how to state a claim and prove a violation. Or in Felstiner's framework, information needed to name, blame, and claim.[17] What this means in practice will depend on the context.

11. Cynthia Estlund, *Extending the Case for Workplace Transparency to Information About Pay*, 4 U.C. IRVINE L. REV. 781, 781 (2014) [hereinafter Estlund, *Extending the Case for Workplace Transparency*]; Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 355 (2011) [hereinafter Estlund, *Just the Facts*] ("[T]he idea of mandatory disclosure has made barely a cameo appearance in the field of labor and employment law.").

12. Estlund, *Extending the Case for Workplace Transparency*, *supra* note 11; Estlund, *Just the Facts*, *supra* note 11, at 365–67.

13. Estlund, *Just the Facts*, *supra* note 11, at 357. I'm discussing these out of her order.

14. *Id.* at 369. Of course, as Estlund notes, "workers' ability to make use of information will vary enormously. Workers with scarce skills and talents can use information to choose among employers and bargain for higher wages, while workers who lack scarce skills have fewer choices and less use for additional information about jobs and employers." *Id.* at 372.

15. *Id.* at 369.

16. *Id.*

17. Felstiner, *supra* note 2.

III. INFORMATION VISIBLE TO WORKERS

Employment law, which governs the relationship between an employer and its individual employees, is a patchwork of federal, state, and local protections.[18] Hardly elegant or coherent, the field includes discrimination laws, leave laws, wage and hour laws, safety laws, and more.[19] Labor law governs the relationship between employers and collective bargaining units. There is some overlap of labor and employment law. For example, the National Labor Relations Act (NLRA), which protects the rights of employees to engage in collective bargaining and other forms of concerted action with respect to the terms and conditions of their employment, also applies in non-union settings in some scenarios.[20] Conversely, most individual-rights protections apply to unionized employees. In addition to the federal and state court systems, there are numerous federal, state, and local agencies that might investigate complaints brought by workers, each with its own claims, processes, and procedures.[21] So perhaps it is unavoidable that discussions around transparency in the workplace tend to be as disjointed as this web of substantive law and procedural apparatus.

A. Disclosure Mandates

There is no unified, comprehensive scheme that requires employers to provide information to workers. Instead, there is a hodgepodge of disclosure requirements that might allow workers to glimpse bits of information in limited situations.[22]

There are "FYI" or "heads up" disclosure requirements. The Worker Adjustment and Retraining Notification Act, for example, requires certain large employers to provide written advance notice of covered plant closings and mass layoffs to allow workers time to transition and seek alternative jobs or training.[23] Some state statutes require that employers notify employees about certain types of surveillance and data-collection practices.[24] (However, as

18. Craig Becker, *Thoughts on the Unification of U.S. Labor and Employment Law: Is the Whole Greater than the Sum of the Parts?*, 35 YALE L. & POL'Y REV. 161, 162 (2016).

19. *Id.* at 162–63, 165, 171, 186.

20. 29 U.S.C. §§ 157–158 (2018).

21. *See generally Labor Laws and Issues,* USA.GOV, https://www.usa.gov/labor-laws [https://perma.cc/YAN3-ZCU4].

22. This is not an exhaustive discussion of all disclosure mandates.

23. 29 U.S.C. § 2101 *et seq.,* (2018).

24. Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CAL. L. REV. 735, 757–62 (2017) [hereinafter Ajunwa, *Limitless Worker Surveillance*] (reviewing state statutes that address workplace monitoring); *State Laws Related to Digital Privacy*, NATIONAL

discussed below, there is not much a worker can do about most of these intrusions, except forfeit the job.)[25] And in response to reports of employees who were surprised with nonnegotiable noncompete agreements sprung on them after starting a job, several states now require that, to be enforceable, employers give at least some advance notice to consider post-employment restrictions.[26]

Some laws allow workers the option to correct or "rebut" inaccurate information that might affect their employability. The Fair Credit Reporting Act (FCRA), for instance, regulates the collection, maintenance, and use of consumers' credit information, and access to credit reports.[27] FCRA imposes disclosure requirements on employers that conduct background checks on workers that meet the definition of "consumer reports."[28] Before accessing a consumer report, an employer must, *inter alia*, provide appropriate notice to the worker and get written authorization for procuring such a report.[29] If an employer intends to make an adverse decision (such as rejecting a job applicant), it first must notify the worker, provide a copy of the consumer report relied upon and a notice of rights under FCRA, and provide an opportunity to review the report and notify the employer of inaccuracies.[30] After taking an

CONFERENCE OF STATE LEGISLATURES, 8–9, https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx [https://perma.cc/P6M4-CS33] (noting state statutes that require employers to give notice to employees prior to monitoring e-mail or internet access). Some states have recently enacted biometric privacy laws. *E.g.,* Illinois Biometric Information Privacy Act (BIPA) prohibits covered employers from obtaining biometric data, such as fingerprints and iris scans, without notifying employees and getting consent. 740 ILL. COMP. STAT. 14. BIPA requires that private entities "in possession of biometric identifiers or biometric information must develop a written policy, made available to the public . . ." 740 ILL. COMP. STAT.14/15(a).

25. *See* discussion *infra* at § IV.C.3.

26. Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1224–25 (2020) (discussing legislative developments).

27. 15 U.S.C. § 1681 (2018).

28. FED. TRADE COMM'N, USING CONSUMER REPORTS: WHAT EMPLOYERS NEED TO KNOW, https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know [https://perma.cc/KWH2-9WDC]. Others have written on the gaps in FCRA, practical realities regarding enforcement, impediments to taking private action, the lack of meaningful consent when workers must acquiesce to these employer requests as a condition of employment, and the questionable applicability to contemporary data-collection practices. *E.g.,* Mary Madden, Michele Gilman, Karen Levy & Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. UNIV. L. REV. 53, 84 (2017); Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 YALE J.L. & TECH. 148, 189–90 (2016); Pauline T. Kim & Erika Hanson, *People Analytics and the Regulation of Information under the Fair Credit Reporting Act*, 61 ST. LOUIS UNIV. L.J. 17, 26 (2016).

29. FED. TRADE COMM'N, *supra* note 28.

30. *Id.*

adverse action based on the contents of such a report, the employer must provide to the individual, *inter alia*, notice of the adverse action, name and contact information for the company that supplied the report, and notice of rights to dispute the accuracy or completeness of the report if timely requested.[31] FCRA is mostly about notice and corrections to the "ingredients" in reports, less about fundamental uses of the information.[32] If one is denied a job or suffers some other adverse action based on such a consumer report, the person's recourse is to try to correct the record.

Other disclosure mandates are more useful in identifying and proving certain types of violations. For example, some jurisdictions have enacted wage-notice laws that require employers to provide workers with a written notice at the start of employment with specific information about wages, timing of paychecks, identification and contact information of the employer, and other terms of employment.[33] Such disclosures can be important in cases of unpaid wages where there is a dispute about the agreed-upon compensation or uncertainty about the identity and whereabouts of the employer.

Under some state laws, an employee or former employee is entitled to see her own personnel records upon request. The definition of "personnel records" differs by statute, but it typically includes job applications, performance reviews, and other documents used to assess qualifications and make decisions regarding promotion, compensation, termination, and disciplinary action.[34] The laws vary as to how, when, and what must be provided to an employee. Some allow the employee to rebut information in those records. So, an employee who believes, for instance, that she has been suspended based on inaccurate information might write up her story to be placed in the file.[35] Access to one's own personnel records can be helpful in evaluating and proving some claims. In a case alleging discriminatory firing, for example, where an employer's defense is that it terminated the plaintiff for bad performance or

31. *Id.*

32. 15 U.S.C. § 1681 (2018).

33. *E.g.,* CAL. DEP'T OF INDUS. RELS., Wage Theft Protection Act of 2011 – Notice to Employees (Mar. 11, 2016), https://www.dir.ca.gov/dlse/FAQs-NoticeToEmployee.html [https://perma.cc/TJ5Z-982Y]. Some notification laws are more targeted. *See* Estlund, *Extending the Case for Workplace Transparency*, *supra* note 11, at 784 (citing federal and state laws requiring disclosure for seasonal and migrant agricultural workers, and other low-wage workers).

34. *See* Barbara Kate Repa, *State Laws on Access to Your Personnel File*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter5-2.html [https://perma.cc/XVH6-SUPP].

35. *E.g.,* MASS. GEN. LS. ANN. ch. 149, § 52C.

misconduct, the plaintiff might counter such a defense with documentation of good performance or the lack of corrective actions in the file.[36]

The Older Worker Benefits Protection Act sets minimum standards for an employee waiver of the right to sue for discrimination under the Age Discrimination in Employment Act, designed to ensure that the waiver is knowing and voluntary.[37] When the release is sought in connection with a reduction in force (RIF), the employer must provide employees who are over forty years old with information about who was selected for the RIF, who was not selected, their job titles, and ages.[38] That data about coworkers might be useful to someone over who has been laid off and suspects age discrimination.

The Occupational Safety and Health Act of 1970 (OSH Act), which requires covered employers to "provide a workplace free from serious recognized hazards and comply with standards, rules, and regulations" issued under that statute,[39] imposes various disclosure requirements on employers, including warnings of potential safety hazards; information about injuries, fatalities, illnesses, and exposures; and citations for violations.[40] Inspection information is available to the public via the OSHA website, and one can search establishments and locations to see at least some information regarding complaints and inspections.[41]

36. *See, e.g.,* Laxton v. Gap, Inc. 333 F.3d 572, 580 (5th Cir. 2003) (considering lack of contemporaneous written documentation of complaints about plaintiff in denying summary judgment on discrimination claim); Kalinoski v. Gutierrez, 435 F. Supp. 2d 55, 72 (D.D.C. 2006) (considering plaintiff's "stellar performance reviews" in concluding that she had "enough evidence to create a genuine issue of material fact about whether defendant's proffered rationale was the real reason defendant declined to select plaintiff for the position"). Requesting such records is a routine part of most case evaluations for plaintiffs' lawyers in jurisdictions that have such laws. *See* JOHN F. ADKINS, BRIAN J. MACDOUNOUGH, BARBARA A. ROBB, JENNIFER A. YELEN, MASS. EMP. L., ch. 1, § 29.5, at 29–23 (4th ed. 2015) ("Make sure to get a copy of the complainant's personnel file early in the evaluation process.").

37. 29 U.S.C. § 626(f)(1) (2018).

38. 29 C.F.R § 1625.22 (f)(1) (2020).

39. 29 U.S.C 654 § 5(a).

40. U.S. OCCUPATIONAL SAFETY & HEALTH ADMIN., WORKER RIGHTS AND PROTECTIONS/EMPLOYER RESPONSIBILITIES, https://www.osha.gov/as/opa/worker/employer-responsibility.html [https://perma.cc/V36H-N3HT].

41. U.S. OCCUPATIONAL SAFETY & HEALTH ADMIN., ESTABLISHMENT SEARCH, https://www.osha.gov/pls/imis/establishment.html [https://perma.cc/5HB8-EDFN]. OSHA does not make public the outcomes of retaliation complaints. Deborah Berkowitz & Shayla Thompson, *OSHA Must Protect COVID Whistleblowers Who File Retaliation Complaints*, NAT'L EMP. L. PROJECT, 1 (Oct. 2020), https://s27147.pcdn.co/wp-content/uploads/OSHA-Must-Protect-COVID-Whistleblowers-Who-File-Retaliation-Complaints-v2.pdf [https://perma.cc/2LWA-RAQL]. Workers or their representatives may file a complaint with the Occupational Safety and Health Administration (OSHA, a part of the U.S. Department of Labor) if they believe the employer is not in compliance.

Some laws require disclosures to government agencies. For example, employers covered by Title VII of the Civil Rights Act of 1964, as amended (Title VII), with at least 100 employees, and certain federal contractors with fifty or more employees, must "report annually the number of individuals they employ by job category and by race, ethnicity, and sex."[42] The Equal Employment Opportunity Commission (EEOC) and Office of Federal Contract Compliance (OFCCP) use this "EEO-1" information for purposes of enforcement and to produce reports, with aggregated data, on workforce demographics.[43] Employers need not include data on age or disability in EEO-1 reports.[44]

Public access to EEO-1 reports depends on whether the data is collected by the EEOC pursuant to Title VII or by the OFCCP pursuant to Executive Order 11246.[45] EEOC is prohibited by statutory language from making public data it collects about specific employers unless a proceeding has been filed under Title VII.[46] Otherwise, EEOC makes this data available only in aggregate form.[47]

U.S. OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3021-06R, 11, 15 (2017), https://www.osha.gov/Publications/osha3021.pdf [https://perma.cc/4N89-X7T6]. OSHA includes protections from retaliation, albeit with a filing deadline of only 30 days. *Id.* OSHA does not provide for a private right of action, so if OSHA does not pursue the matter, the employee's options will depend on the facts, and the jurisdiction, as discussed in Emily A. Spieler, *Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act*, 32 ABA J. LAB. & EMP. L. 1, 7, 21–22 (2017).

42. EQUAL EMP. OPPORTUNITY COMM'N, 81 F.R. 5113, 5114, https://www.govinfo.gov/content/pkg/FR-2016-02-01/pdf/2016-01544.pdf [https://perma.cc/J4ZR-XFWH]. EEOC also collects data on union membership, government workforces and job patterns in elementary and secondary schools. *Id.*

43. *Id.*, U.S. OFFICE OF FED. CONT. COMPLIANCE PROGRAM, FED. CONT. COMPLIANCE MANUAL, Chapter 4, Evaluation of EEO-1 Reports, https://www.dol.gov/agencies/ofccp/manual/fccm/4b-pre-desk-audit-actions/4b12-evaluation-eeo-1-reports [https://perma.cc/ZTR8-U89T].

44. U.S. EQUAL EMP. OPPORTUNITY COMM'N, SPECIAL REPORT ON DIVERSITY IN HIGH TECH (2014), https://www.eeoc.gov/special-report/diversity-high-tech [https://perma.cc/4HQU-BK3F] ("EEO-1 reports . . . data based on race, color, sex and national origin, but do not report data on age or disability."). Covered employers were briefly required (for years 2017–2018) to prepare EEO-1 "Component 2" reports, to include employee aggregated pay data, broken down by gender, race, ethnicity, and job category. *See* discussion *infra* § V.

45. U.S. DEP'T OF LAB., FREEDOM OF INFO. ACT FREQUENTLY ASKED QUESTIONS, https://www.dol.gov/agencies/ofccp/faqs/foia#ftn.id2 [https://perma.cc/PK9F-NL7C] [hereinafter DEPT. OF LAB., FOIA FAQs]; U.S. DEP'T OF LAB., Exec. Order No. 11,246, as amended, https://www.dol.gov/agencies/ofccp/executive-order-11246/as-amended [https://perma.cc/NW2Y-5357].

46. 42 U.S.C. § 2000e-8(e); DEP'T OF LAB., FOIA FAQs, *supra* note 45.

47. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC QUESTIONS AND ANSWERS – FREEDOM OF INFORMATION REQUESTS, https://www.eeoc.gov/foia/questions-and-answers-freedom-

By contrast, EEO-1 data collected by OFCCP under Executive Order 11246 may be accessible through a request for records under FOIA.[48] (Other Department of Labor enforcement information is also available via FOIA, such as information about violations of the Fair Labor Standards Act (FLSA).[49]) However, under an exemption to FOIA, an agency may withhold "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[50] Employers that consider their EEO-1 data or other material as confidential may therefore use FOIA Exemption 4 to keep the data from public disclosure.[51]

In addition to EEO-1 data, OFCCP makes available on its website a dataset of closed compliance evaluations and complaint investigations and some Conciliation Agreements with offending employers.[52]

Some jurisdictions have recently passed laws requiring more transparency about sexual harassment and discrimination claims. The Illinois Human Rights Act, for example, now requires employers to disclose to the state Department

information-act-foia-requests [https://perma.cc/EJV9-GKGE]. In 2020, EEOC launched "EEOC Explore, a new interactive data query and mapping tool that . . . allows users to analyze aggregate data associated . . . [and] compare data trends across a number of categories, including location, sex, race and ethnicity, and industry sector . . . ." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC LAUNCHES NEW DATA TOOL TO TRACK EMPLOYMENT TRENDS (Dec. 02, 2020), https://www.eeoc.gov/newsroom/eeoc-launches-new-data-tool-track-employment-trends [https://perma.cc/S2FQ-42MQ]. Files available via this tool contain "aggregate employment characteristics without identifying any employer or employee." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC EXPLORE FREQUENTLY ASKED QUESTIONS, https://www.eeoc.gov/sites/default/files/2020-12/EEOC%20Explore%20FAQs.pdf [https://perma.cc/C933-F4R4].

48. DEP'T OF LAB, FOIA FAQs, *supra* note 45. Covered federal contractors have additional recordkeeping and disclosure requirements, including hiring data, compensation practices, personnel policies, subject to FOIA. U.S. OFF. OF FED. CONT. COMPLIANCE PROGRAM, FED. CONT. COMPLIANCE MANUAL, §§ 1A06, 8, 1C02, 22–23, 2E, 82 (2020), https://www.dol.gov/sites/dolgov/files/OFCCP/FCCM/508_FCCM_05012020.pdf [https://perma.cc/ET4X-6VUA].

49. U.S. DEP'T OF LAB., ENFORCEMENT, https://enforcedata.dol.gov/homePage.php [https://perma.cc/JV5F-ZVZ5].

50. 5 U.S.C. § 552 (b)(4).

51. *See* Jamillah Bowman Williams, *Diversity as Trade Secret*, 107 GEO. L.J. 1685, 1688 (2019) ("Since 2011, tech companies have routinely used [FOIA's Exemption 4] . . . to prevent exposure of diversity data collected by the government.").

52. U.S. OFF. OF FED. CONT. COMPLIANCE PROGRAM, FREEDOM OF INFORMATION ACT LIBRARY, https://www.dol.gov/agencies/ofccp/foia/library#Q3 [https://perma.cc/AR6A-UGTS].

of Human Rights annual data regarding adverse judgments or rulings involving sexual harassment and discrimination.[53]

Other disclosure mandates that are not designed specifically to protect workers might nevertheless produce useful information, such as court filings, mandated corporate disclosures, and other public records.[54]

B. Laws Prohibiting Employers from Blocking Information

Some laws prohibit employers from stifling information flow among workers. Executive Order 13665, for example, prohibits covered federal contractors from retaliating against "any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant."[55]

The NLRA has been interpreted to prohibit employers from imposing pay secrecy rules on covered employees (unionized or not), in that such rules interfere with the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[56] The NLRA,

53. The Department will publish such data annually, without identifying the parties. If the Department is investigating a charge of sexual harassment or discrimination, it may request information about private settlements for the previous five years. 775 ILL. COMP. STAT. 5/2-108 (2019). For a snapshot of recent legislative developments in other states, see Andrea Johnson, Ramya Sekaran, Sasha Gombar, *2020 Progress Update: MeToo Workplace Reforms in the States*, NAT'L WOMEN'S L. CTR. (Sept. 2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report.pdf [https://perma.cc/HQ7B-W5UV].

54. *E.g.,* The Securities and Exchange Act requires covered companies to disclose any material legal proceedings currently pending against it, as well as "any such proceedings known to be contemplated by governmental authorities." 17 C.F.R. § 229.103 (2020); *See* EUGENE K. HOLLANDER & DAVID W. NEEL, EMPLOYMENT EVIDENCE § 7:50 (2019) (recommending that plaintiff's counsel review employer's website and annual reports: "If the decisionmaker is a senior executive of Defendant, check to see if any statement can be construed to have a discriminatory animus, e.g., in an age case, where the CEO makes a statement in an annual report that he is entering into the next decade with 'a young management team.'").

55. Exec. Order No. 13,665, 79 FED. REG. 20,749 (Apr. 8, 2014), https://www.federalregister.gov/documents/2014/04/11/2014-08426/non-retaliation-for-disclosure-of-compensation-information [https://perma.cc/HV2H-Z3JA].

56. 29 U.S.C. § 157; Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLOM. L. REV. 547, 588 (2020) [hereinafter Lobel, *Knowledge Pays*] ("The National Labor Relations Board . . . has consistently held that prohibiting employees from discussing their salaries violates their right to engage in concerted activity for mutual aid."); *See* 1 N. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 4.04[4][a]–[b], 12 (2003, with 2021 supp.) (discussing scrutiny of pay secrecy rules under NLRA).

however, excludes wide swaths of employees (supervisors, for example), and imposes minimal penalties for violations.[57]

Some states have passed anti-pay secrecy statutes, under which employers may not prohibit employees from talking with their coworkers about their compensation.[58] A few are broader. California, for example, requires that an employer, "upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment,"[59] and Colorado requires that job postings include "the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant."[60]

C. Information Available Without Mandates

Employers might voluntarily disclose their anti-discrimination policies, workplace demographics, or statements supporting diversity.[61] Other information is gathered and distributed by labor unions or advocacy organizations.[62] Workers also learn of information in the press and can read (not necessarily reliable or accurate) stories on social media platforms and websites that review employers.[63]

57. Kate Andrias & Brishen Rogers, *Rebuilding Worker Voice in Today's Economy*, ROOSEVELT INSTITUTE, 4–6 (2018) (discussing gaps in coverage of NLRA); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 6, 26 (2016) (noting the "weak enforcement mechanisms, slight penalties, and lengthy delays" for NLRA complaints).

58. Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 321 (2021).

59. CAL. LAB. CODE § 432.3(c) (2019).

60. COLO. REV. STAT. § 8-5-201 (2020).

61. *See*, *e.g.,* Jena McGregor, *Urged to Back Up Pledges for Racial Justice, 34 Major Firms Commit to Disclose Government Workforce Data,* WASH. POST, Sept. 29, 2020, https://www.washingtonpost.com/business/2020/09/29/corporate-diversity-data-pledge/ [https://perma.cc/G7W4-7YJG] (reporting that more than thirty major companies have agreed to publicly share government diversity reports).

62. *See*, *e.g.,* Jeffrey M. Hirsch, Worker Collective Action in the Digital Age, 117 W. VA. L. REV. 921, 933 (2015) [hereinafter Hirsch, Worker Collective Action] (noting that AFL-CIO-supported Working America "appears to have one of the more-developed employer databases, with data on over 400,000 employers' labor and employment law violations, mass layoffs, and offshoring practices."). And see discussion *supra* at § III.D about the roles of intermediaries.

63. *See* Hirsch, Worker Collective Action, *supra* note 62, at 932–33 ("[W]ebsites such as Glassdoor.com provide information . . . that include salary, basic business facts, and rankings and reviews from employees . . . . [E]ven for these larger employers, many specific jobs have little or no information. . . . [F]or most smaller employers, the amount of information available is lacking in both quality and quantity."); Jason Sockin & Aaron Sojourner, *What's the Inside Scoop? Challenges in the Supply and Demand for Information about Job Attributes* 2–3 (2020), http://conference.iza.org/conference_files/DATA_2020/sojourner_a5669.pdf [https://perma.cc/227L-YDM7] (finding even former employees are concerned about career damage if they volunteer candid negative information about employers on websites).

IV. CONDITIONS THAT INHIBIT INFORMATION FLOW

Some of the disclosures noted above might yield information that would aid a worker in recognizing a violation of law and stating a claim. But this can be a scavenger hunt, one made more challenging by the particular nature of employment relationships, the web of substantive laws governing them, and some procedural hurdles.

As Schauer has observed: "At times, it seems that transparency is a prime example of the old adage that where you stand depends on where you sit."[64] I suggest that what you *see* depends on where you sit. Let's consider a worker's seat on the (figurative) shop floor—or outside the door trying to get in. This is typically a vulnerable position with an obstructed view.

A. Employment At-Will

The employment-at-will doctrine essentially says that absent a contract (e.g., a collective bargaining agreement or individual contract), an employer may fire (and by extension, take other adverse actions against) an employee for any reason or no reason without incurring legal liability.[65] Employment-at-will is the presumption in nearly every state.[66]

Courts in most jurisdictions have recognized, and legislatures have enacted, various (often cramped) exceptions to the rule.[67] Statutory exceptions include laws prohibiting adverse actions for union activities; for discrimination based on race, sex, disability, age, and other characteristics; and for retaliation for exercising one's rights under those laws.[68] Many jurisdictions have also enacted statutes protecting employees from retaliation for taking certain actions—for example, reporting unlawful conduct to authorities[69]—and most jurisdictions recognize at least some common law protections.[70] Workers must

64. Schauer, *supra* note 3, at 1342.

65. Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 450 (2020) ("Employment-at-will stands as the baseline rule nearly everywhere in the United States. Under that rule, an employer is free to 'terminate an employee for a good reason, a bad reason, or no reason at all.'"). Montana is the exceptional state. RESTATEMENT OF EMPLOYMENT LAW, § 2.01 cmt.a, reporters' notes (AM. L. INST. 2015). Public employees might have additional rights under statutory or constitutional provisions. With few exceptions, independent contractors are not covered by workplace protections.

66. Bagenstos, *supra* note 65, at 450.

67. *Id*. at 452.

68. Lisa J. Bernt, *Wrongful Discharge of Independent Contractors*, 19 YALE L. & POL'Y REV. 39, 43, 43 n.23 (2000).

69. *Id.* at 43.

70. *Id.*

plead and prove an exception to the employment-at-will rule to sustain an action against an employer.[71]

With relatively few workers protected these days by collective bargaining agreements (about six percent of the private-sector workforce),[72] most are employed at-will, and must tread carefully if they want to get and keep a job. They are often reluctant to ask questions or make waves for fear of sending the wrong signals to an employer.[73] And an employee who is thinking about raising concerns about unlawful practices, such as discrimination, will have to weigh the risks of retaliation, perhaps in the form of termination, reduced hours, pay cuts, increased workloads, miserable job conditions, calls to immigration, or negative references.[74] Even if such retaliation is actionable, that still might leave one with no paycheck and a speculative and expensive legal journey as they try to prove their termination (or other adverse action) was because of their complaints of discrimination or other "protected" conduct.[75] It also means they will have to explain to prospective employers why they lost their last job. Their exit options might be further limited if they are one of the nearly one-fifth of workers in the U.S. (including many in low-wage occupations) bound by noncompete agreements.[76]

71. *Id.* at 43–44.

72. News Release, U.S. Bureau of Lab. Stat., Union Members—2020 (Jan. 22, 2021), https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/YL3X-YKJ2]; NATIONAL CONFERENCE OF STATE LEGISLATURES, AT-WILL EMPLOYMENT – OVERVIEW I (2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/3JPW-GAAJ].

73. Estlund discusses signaling concerns in *Just the Facts*, *supra* note 11, at 387–88.

74. For discussion of survey data on frequency and forms of retaliation, and how such fears affect willingness to make complaints, see Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1938–39 (2020); Charlotte Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement*, 89 IND. L.J. 1069, 1104 (2014); ANNETTE BERNHARDT, RUTH MILKMAN, NIK THEODORE, DOUGLAS HECKATHORN, MIRABAI AUER, JAMES DEFILIPPIS, ANA LUZ GONZÁLEZ, VICTOR NARRO, JASON PERELSHTEYN, DIANA POLSON & MICHAEL SPILLER, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 24–25 (2009), https://escholarship.org/uc/item/1vn389nh [https://perma.cc/J9Q3-28WW].

75. U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.003, COMPLIANCE MANUAL: COMPENSATION DISCRIMINATION, § 10-II (2000), https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination [https://perma.cc/ZJ8B-N7H4] [hereinafter EEOC COMPLIANCE MANUAL, COMPENSATION] ("All of the anti-discrimination statutes prohibit retaliation for opposing violations of the statutes or participating in the statutory complaint process.").

76. U.S. Dept. of Treasury, Non-compete Contracts: Economic Effects and Policy Implications 3 (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_Effects_and_Policy_Implications_MAR2016.pdf [https://perma.cc/L654-7GWR].

B. Limited Access to Legal Information and Assistance

Despite numerous "know your rights" poster requirements, studies have shown that workers are largely uninformed or misinformed about their rights, and how to enforce them.[77]

Legally ignorant workers are less likely to know what information is important, where to look for it, how to gather it, and what to do with it. They are less likely to know the differences between enforceable and unenforceable agreements or workplace restrictions. Yet talking with a lawyer could itself lead to retaliation if the employer learns of it, and only some jurisdictions recognize a cause of action when someone is fired for consulting counsel.[78]

It can also be difficult to find affordable legal help. Few workers, especially if they have just lost a job, can afford to pay "full price" for legal services, which might run hundreds of dollars per hour.[79] At the same time, law firms are often reluctant to accept employment cases on a contingency basis, where the client does not pay hourly fees but shares a percentage of any recovery with the firm.[80] Firms that do take contingency matters tend to be selective and will require an especially strong set of facts at the outset before they will assume the risk of not getting paid for their services.[81]

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77. Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1558 n.236 (2014) ("Workers' limited understanding of the employment at-will default has been both documented empirically and much discussed by workplace law scholars."); Alexander & Prasad, *supra* note 74, at 1110 (finding that "approximately 59% of low-wage, front-line workers did not know their minimum wage and overtime rights and 78% did not know how to file a government complaint . . . .").

78. Lisa J. Bernt, *Finding the Rights Jobs for the Reasonable Person in Employment Law*, 77 UMKC L. REV. 1, 28–29 n.141 (2008).

79. ALEXANDER J.S. COLVIN & MARK D. GOUGH, COMPARING MANDATORY ARBITRATION AND LITIGATION: ACCESS, PROCESS, AND OUTCOMES 12 (2014) ("[A]ttorneys in our sample reported charging an average rate of $398 per hour.").

80. Alexander J.S. Colvin, *Conflict and Employment Relations in the Individual Rights Era, in* MANAGING AND RESOLVING WORKPLACE CONFLICT 1, 21–22 (David B. Lipsky, Ariel C. Avgar & J. Ryan Lamare eds., 2016) ("Under a standard contingency fee arrangement . . . the cost of financing the case is shifted from the employee to the lawyer, who then also bears the financial risk of losing."); ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 125 (Univ. of Chic. Press 2017) ("There was wide variation as to how plaintiffs' lawyers in our sample negotiated payment. A few operated on a contingency-fee basis, expecting the bulk of payment only when and if a client prevailed. Others operated on a contingency-fee-plus, where the 'plus' was an up-front fee (designed to screen out clients who are not 'serious') and/or an hourly fee to be 'topped up' with funds from the award if the case prevailed. Many lawyers reported no longer being willing to work on contingency and said they billed entirely by hourly rate.").

81. Colvin & Gough, *supra* note 79, at 13 ("On average, the attorneys [surveyed] indicated that they would need a minimum of $58,000 in potential settlement value or damages to justify accepting

It can be especially difficult for low-wage workers to find affordable representation, as potential damages consist primarily of lost compensation.[82] So, higher-paid employees will make more attractive contingency-fee clients.[83] Alternatively, they are better able to afford hourly rates.[84] Even a consultation might be out of one's budget, as intakes can be time-consuming and many attorneys will charge for them.[85] In addition, research suggests that law firms are more reluctant to take on clients bound by arbitration agreements, which are more common today (as discussed below).[86] Given these calculations of risk and potential recovery, plaintiffs' law firms agree to represent a very small fraction of potential clients who approach them.[87] There are also scarce free legal services available for most types of employment matters.[88]

a case on a non-pro bono basis."); ROBERT E. MCKNIGHT, JR., REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 11.01 (5th ed. 2020) ("In the practice of employment discrimination law, case selection is critical; no lawyer can hope to stay in business for very long while spending substantial amounts of time and that yield no eventual compensation. But case selection isn't easy, which is evident from the number of appellate opinions that affirm summary judgments for defendants. The problem is we have to pick cases on the basis of EEOC investigative files and other incomplete information, then dig hard in discovery and hope for the best. Since there's nothing that can be done in case selection to remedy a lack of information that can only be obtained through discovery, we have to focus on the aspects of case selection that we can do something about."). Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 933–50 (2006), discusses interplay of statutory fee-shifting provisions and contingency-fee agreements.

82. BERREY, NELSON & NIELSEN, *supra* note 80, at 126 ("Since damages recovered in employment civil rights cases are often determined by calculating back pay, the potential plaintiff's salary was very important for determining whether to take a particular case [on a contingency fee basis].").

83. *Id.*

84. *Id.*

85. MCKNIGHT, *supra* note 81, § 11.01[B] (cautioning that a no-consultation-fee policy can swamp a law office's intake process); Amy Myrick, Robert L Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 LEGIS. & PUB. POL'Y 705, 743 (2012) (discussing the practice of many plaintiffs' counsel to charge a consultation fee).

86. Mark D. Gough, *Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice?* 22 ADVANCES IN INDUS. AND LAB. REL. 105, 119 (Emerald Grp. Publ'g Ltd., 2016); Alexander J. S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKLEY J. LAB. & EMP. L. 71, 85 (2014); *see also* discussion *infra* § IV.C.1.

87. Ellen Berrey, Steve G. Hoffman & Laura Beth Nielssen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination*, 46 LAW & SOC'Y REV. 1, 22 (2012) ("[P]laintiff attorneys report that, on average, they took only one of every ten clients who approached them, even though they believed that many of the cases they rejected involved discrimination.").

88. *See* BERREY, NELSON & NIELSEN, *supra* note 80, at 271 ("Less than 1% of our random sample of [discrimination] case filings entailed representation by a public interest law firm."); Alexander & Prasad, *supra* note 74, at 1111 n.149 ("Study after study has documented the gulf between

C. A Lone-Complainant-Driven System

The U.S. has a predominantly reactive, complainant-driven system of employment law enforcement, one that requires workers, themselves, to recognize, plead, and prove violations. Charlotte Alexander and Arthi Prasad aptly call this a "bottom-up" system.[89] While some agencies, such as EEOC and the U.S. Department of Labor, are empowered to initiate complaints without a particular complainant, the reality is that agency-initiated charges and investigations are rare.[90]

Not only is this a complainant-driven system, but it is largely a *lone*-complainant-driven system. Collective action (broadly defined) has been hampered by recent developments in employer practices and court decisions.[91] At the same time, individual employees face various impediments in bringing claims.[92]

civil legal needs and lawyer availability, particularly for *ex ante* legal advice."); Stephen Churchill, *Making Employment Civil Rights Real* 6 (Amicus Harv. C.R.-C.L. L. Rev., Working Paper No. 09-65, 2009), https://harvardcrcl.org/wp-content/uploads/sites/10/2010/02/Churchill-FINAL.pdf [https://perma.cc/5EYT-7LEN] (discussing dearth of legal-aid options for employment civil rights claims).

89. Alexander & Prasad, *supra* note 74, at 1070–71. David Weil describes the approach of many enforcement systems as reactive, i.e., "respond[ing] to complaints and then bring[ing] individual offending employers into compliance." David Weil, *Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change*, 60 J. INDUS. REL. 437, 441 (2018) [hereinafter Weil, *Strategic Enforcement*].

90. U.S. EQUAL EMP. OPPORTUNITY COMM'N, COMMISSIONER CHARGES AND DIRECTED INVESTIGATIONS, https://www.eeoc.gov/commissioner-charges-and-directed-investigations [https://perma.cc/3NVE-FMNR] ("From fiscal year 2015 through fiscal year 2019, the EEOC initiated an average of thirteen new Commissioner charges per year addressing allegations under Title VII, the [Americans with Disabilities Act] and/or [Genetic Information Nondiscrimination Act], and an average of 138 new directed investigations per year addressing allegations under the ADEA and/or the EPA. This represents a very small proportion – far less than 1% – of the Commission's annual charge volume. . . . From fiscal year 2015 through fiscal year 2019 the EEOC filed a total of nine lawsuits based on a Commissioner's charge or directed investigation, or an average of about two lawsuits per year."). Alexander & Prasad, *supra* note 74, at 1070 n.3 ("The U.S. Department of Labor may also initiate its own affirmative 'directed investigations,' but those are vastly outnumbered by complaint-driven investigations.").

91. *See* BERREY, NELSON & NIELSEN, *supra* note 80, at 263.

92. *Id.*, discussing the "individualization" of rights claims. Their large-scale study of cases filed 1988–2003 in federal court found that 93% of cases were brought by a sole plaintiff. Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?* 19 (Peterson Inst. for Int'l Econ., Working Paper No. 21-9, 2021), https://www.piie.com/publications/working-papers/do-us-firms-have-incentive-comply-flsa-and-nlra [https://perma.cc/P65C-YP4] (analyzing violations of wage-and-hour laws and the NLRA, concluding that workers might not bring claims because they are uninformed about their rights, violations can be difficult to detect, they lack time and resources to bring a claim, they fear retaliation, and/or they are bound by MAAs or other waivers).

i. Nondisclosure Agreements, Non-disparagement Provisions, and Other Secrecy Rules

Confidentiality and nondisclosure agreements (NDAs) in settlement and severance agreements have long been commonplace.[93] The upshot of such provisions is that an employee with a potential or actual legal claim cannot "compare notes" with a former employee who might have useful information or evidence.

NDAs now appear to be on the rise outside the context of settlement and severance agreements and are increasingly imposed on employees as a condition of getting and keeping a job.[94] Many employers are also using non-disparagement provisions, which require employees to keep quiet about anything that might cast the employer in a negative light.[95]

There are some regulatory limits on these practices. For example, an employer cannot prevent a worker from reporting unlawful conduct to government agencies or cooperating in investigations.[96] Several states have recently put limits on the use of NDAs in settlements of discrimination matters, some with particular attention paid to sexual harassment claims or settlements of claims that use public funds.[97] And overbroad secrecy requirements have been found in some cases to violate the NLRA, where they inhibit employee speech and interfere with the ability to work together to improve terms and

93. BERREY, NELSON & NIELSEN, *supra* note 80, at 19 ("When plaintiffs settle their claims, they typically sign a confidentiality agreement . . . ."). The EEOC, however, will not enter into settlements subject to NDAs. U.S. EQUAL EMP. OPPORTUNITY COMM'N, SETTLEMENT STANDARDS AND PROCEDURES, https://www.eeoc.gov/settlement-standards-and-procedures [https://perma.cc/7QFF-YJCW].

94. Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change [https://perma.cc/9CQA-RB75] [hereinafter Lobel, *NDAs are Out of Control*] (NDAs "are increasingly common in employment contracts . . . . These contracts have grown not only in number but also in breadth . . . [and] are now routinely included in standard employment contracts upon hiring.").

95. Lobel offers an example of a non-disparagement clause used by a major corporation:

> [Y]ou shall not at any time, directly or indirectly, disparage the Company, including making or publishing any statement, written, oral, electronic or digital, truthful or otherwise, which may adversely affect the business, public image, reputation or goodwill of the company, including its operations, employees, directors and its past, present or future products or services.

Id.

96. U.S. EQUAL EMP. OPPORTUNITY COMM'N, 915.002, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EEOC ENFORCED STATUTES (1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-non-waivable-employee-rights-under-eeoc-enforced-statutes [https://perma.cc/J5GF-8FWP].

97. *See* Johnson, Sekaran & Gombar, *supra* note 53; Rachel S. Spooner, *The Goldilocks Approach: Finding the 'Just Right' Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases*, 37 HOFSTRA LAB. & EMP. L.J. 331 (2020) (surveying recent legislation and proposals).

conditions of employment.[98] However, not all employees are protected by the NLRA, and the National Labor Relations Board (NLRB) has a tendency to sway back and forth (depending on who is in the White House) when reviewing employer practices.[99]

Even if unlawful or unenforceable, gag rules can still have a chilling effect. An at-will employee who is not quite sure about what they can say under the employer's rules might be more inclined to keep quiet, for fear of losing their job or being sued themselves.[100]

ii. Pre-dispute Mandatory Arbitration Provisions and Limits on Class Actions

In recent years, employers have increasingly required non-unionized workers, as a condition of employment, to agree before a dispute arises to have all employment-related disagreements decided in binding arbitration.[101] These pre-dispute mandatory arbitration agreements (MAAs) bar access to the courts for legal claims, including those alleging statutory violations.[102] Instead, a private neutral would resolve any future dispute between the parties.

98. 29 U.S.C. §§ 157, 158(1). *See* 1 THE DEVELOPING LABOR LAW CH. 6.III.D (John e. Higgins, Jr., Patrick E. Deady, Joseph J. Torres, Barry J. Kearney & Anna Wermuth eds., 7th ed. 2017 & Supp. 2020) (discussing NLRB scrutiny of confidentiality rules); LAREAU, *supra* note 56, § 4.04[4] (same).

99. *See* discussion *supra* Section III.B; Robert Sprague, *More and More Employers Are Spying on Workers Online. Federal Regulators Are Okay With It*, PROMARKET, July 30, 2020, https://promarket.org/2020/07/30/more-and-more-employers-are-spying-on-workers-online-federal-regulators-are-okay-with-it/ [https://perma.cc/EC3S-3K6F] ("The fluctuating state of labor law, exemplified by the NLRB influenced by whoever is in the White House, resembles a constantly swinging pendulum—not unlike Edgar Allan Poe's—with respect to employee workplace protections.").

100. *See* Lobel, *NDAs are Out of Control*, *supra* note 94 ("[E]mployers threaten litigation even under those circumstances in which NDAs would be void. New empirical studies show that employees are largely uninformed about these protections, and the routinely broad language of confidentiality clauses along with the threat of litigation chills even this protected speech.").

101. Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 4 (2019) [hereinafter Colvin, *Metastasization of Mandatory Arbitration*] (differentiating MAAs in nonunion settings from arbitration system used in disputes between unions and employers).

102. Some administrative options are open even to those who have signed an arbitration agreement. *See* EEOC v. Waffle House, 534 U.S. 279 (2002) (holding that an MAA does not bar EEOC from pursuing victim-specific judicial relief). And the California Supreme Court has held that the state's Private Attorneys General Act, which "authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state" is not preempted by FAA. Iskanian v. CLS Transp. Los Angeles, LLC, 59 Cal.4th 348, 360 (2014), *cert. denied*, 574 U.S. 1121 (2015). Other states are considering private attorneys general statutes. Juvan Bonni, Johnathan Ence, Lauren Smith & Jackson Tyler, *State Legislative Update*, 2020 J. DISP. RESOL. 221, 228–234 (2020).

The practice of using MAAs has grown so much in the past twenty years that, according to a study by Alexander Colvin, a bit more than half of private-sector, non-unionized employees in a broad range of industries and occupations are now bound by one.[103] A worker might be presented with an MAA in a job application, on the first day of work in a stack of paperwork, in a "click-through" document, or in a mass mailing. Generally, "so-called 'agreements' to arbitrate are unilaterally imposed by employers on employees who likely are not aware the terms exist, and, in any case, have little choice but to accept the provision if they want to get or keep their jobs."[104] Yet, MAAs are typically enforced.[105] Courts have even enforced MAAs where someone merely applied for a job but was not hired.[106]

Many have objected to MAAs, for various reasons, treated extensively elsewhere. In addition to the often-coercive way in which MAAs are forced on workers, critics of MAAs argue that the arbitration process favors employers and is subject to limited judicial review.[107] There are concerns about "repeat player" effects; that is, bias on the part of arbitrators in favor of parties (*i.e.,*

103. ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 5 (Econ. Pol'y Inst. 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/J4G9-5J2Y] [hereinafter Colvin, *Growing Use of Mandatory Arbitration*].

104. Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 171 (2019); *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2810 (2015) ("[O]bligations to arbitrate [can] arise not from negotiation but by signing (or clicking on) documents, some of which stipulate that the drafter of the provisions 'may change any terms' unilaterally."); Sternlight questions whether nonnegotiable MAAs should be referred to as "agreements": "[E]mployees do not typically 'agree' to these terms in any meaningful sense, as they often are not aware of the terms much less knowledgeable about their implications." *Id.* at 171 n.103. I, too, use the word "agreement" here with reservation. I have argued that such provisions should not be enforced where there is no meaningful consent. Lisa J. Bernt, *Tailoring a Consent Inquiry to Fit Individual Employment Contracts*, 63 SYRACUSE L. REV. 31 (2012).

105. Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1321 (2015) [hereinafter Sternlight, *Disarming Employees*] ("[I]t has become increasingly difficult for employees to defeat employment arbitration clauses. And it is expensive and time consuming for employees to try to mount such challenges.").

106. *E.g.,* Johnson v. Circuit City Stores, 148 F.3d 373, 378 (4th Cir. 1998) (enforcing MAA in job application in failure-to-hire discrimination case); Fernandes v. Dillard's, Inc., 997 F. Supp. 2d 607, 611 (S.D. Tex. 2014) (same).

107. Michael J. Zimmer, *Title VII's Last Harrah: Can Discrimination Be Plausibly Pled?* 2014 LOY. U. CHI. LEGAL F. 19, 71–72 ("[A]wards rendered by arbitrators cannot be overturned for mistakes of either law or fact since the grounds to vacate an award are limited to process issues. Further, arbitrators do not need to know the law and many do not.").

employers) that they are more likely to see repeatedly.[108] And there is data suggesting that employees tend to win less frequently and with lower damage awards in arbitration, as compared to litigation.[109]

The most important objections for purposes of this discussion are that arbitrations are private and that they limit collective activity. Typically, these arbitrations are closed-door proceedings, and the arbitrators' decisions are unpublished.[110] Even the existence of an MAA itself might be subject to an NDA.[111] Estlund and others have written about the disappearance of employment matters into a black hole, saying that disputes subject to MAAs might "simply evaporate before they are even filed."[112]

Furthermore, MAAs increasingly contain clauses whereby the employee is prohibited from bringing, or joining in, class or other multi-plaintiff actions either in court or in arbitration proceedings.[113]

108. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 686 (2018) [hereinafter Estlund, *Black Hole*] ("[As] one arbitrator said, 'Why would an arbitrator cater to a person they will never see again?'").

109. Colvin, *Metastasization of Mandatory Arbitration*, *supra* note 101, at 17–18 ("Attorneys who represent employees are less likely to take on clients who are subject to mandatory arbitration, given that arbitration claims are less likely to court, when damages are awarded, they are likely to be significantly lower than Court awarded damages. Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney."); Gough, *supra* note 86, at 107 ("[E]mployee win rates and award amount in arbitration are substantially lower than outcomes in litigation."). Others have challenged survey data and conclusions, pointing out that litigation-versus-arbitration results do not account for some variables, such as EEOC filings. *E.g.,* Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research,* 70 RUTGERS L. REV. 375 (2018).

110. Resnik, *supra* note 104, at 2853–54 ("[N]o central registries account for the hundreds of ADR decision makers, the claims filed before them, their rules, fees, or outcomes. . . . [T]he hearings are generally closed, and the rules permit arbitrators to bar third parties from attending hearings."); Sternlight, *Disarming Employees, supra* note 105, at 1323 ("Arbitration providers do not need to open their files to researchers and most have not."). For a discussion of California's requirement that arbitration providers make public some information about the matters that they decide, see David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 463 (2016).

111. *See, e.g.,* Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 857 (2020) (citing example).

112. Estlund, *Black Hole*, *supra* note 108, at 682; Sternlight, *Disarming Employees*, *supra* note 105, at 1312 ("[A]vailable empirical evidence now shows . . . that employees who are covered by mandatory arbitration provisions almost never file arbitration claims.").

113. Colvin's study found that of employees subject to MAAs, about 41 percent were also subject to class action waivers. Colvin, *Metastasization of Mandatory Arbitration*, *supra* note 101, at 17. Sternlight notes that some MAAs preclude employees from joining claims even with one other employee. Sternlight, *Disarming Employees*, *supra* note 105, at 1351.

This proliferation of MAAs can be traced to some key Supreme Court decisions interpreting the Federal Arbitration Act (FAA). Enacted in 1925, the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[114] The FAA in its early years was of concern primarily in the context of commercial disputes, playing little role in the field of employment law.[115] Things changed with a series of Supreme Court decisions enforcing arbitration agreements in employment and consumer matters and holding that efforts at the state level to curb MAAs are preempted by the FAA.[116] The 1991 Supreme Court decision in *Gilmer v. Interstate/Johnson Lane* upheld the enforceability of MAAs in a case brought under the Age Discrimination in Employment Act.[117] In 2018, the Supreme Court held in *Epic Systems Corporation v. Lewis* that MAAs are enforceable in employment agreements, even when they prohibit class or collective actions.[118] Such waiver, the Court concluded, did not violate Section 7 of the NLRA, which gives employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[119]

During this period of pro-arbitration decisions, the Supreme Court also tightened standards under Federal Rule of Civil Procedure 23 (Rule 23), arguably making it more difficult for workers to certify class actions—often the only economical way for those with individually small damage awards to

114. 9 U.S.C. § 2.

115. Colvin, *Metastasization of Mandatory Arbitration*, *supra* note 101, at 5.

116. *Id.* at 5–7 (providing summary of case law); Colvin & Gough, *supra* note 79, at 107 (discussing the expanding reach of FAA, starting with commercial cases and moving into other spheres). In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011), the Court held that the FAA preempts state laws that "condition[] the enforceability of arbitration agreements on the availability of classwide arbitration procedures."

117. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–27 (1991). In 1992, the year after the Gilmer decision, only about two percent of employees were bound by MAAs. Colvin, *Growing Use of Mandatory Arbitration*, *supra* note 103, at 3. Other notable Supreme Court decisions include: *Circuit City v. Adams*, 532 U.S. 105, 109 (2001), holding that the FAA's exemption of "'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce'" is confined to transportation workers; *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233, 235–36 (2013), holding in a dispute between merchants and a credit card company that a waiver of class arbitration was enforceable under the FAA even when the plaintiff's cost of individually arbitrating the dispute exceeds the potential recovery; and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019), holding that under the FAA, "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."

118. Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

119. *Id.* at 1624.

bring claims.[120] Rule 23(a)(2) requires a party seeking class certification to show, *inter alia*, that there are "questions of law or fact common to the class."[121] In *Wal-Mart, Inc. v. Dukes*, decided by the Supreme Court in 2011, the lower court had approved the certification of a class of about 1.5 million current and former female employees of Wal-Mart alleging sex discrimination in pay and promotions.[122] Wal-Mart had a practice of giving its individual stores managers discretion in making decisions about pay and promotions.[123] The plaintiffs argued that in the exercise of such discretion, management made decisions that discriminated against women, all women working in the company's stores were affected by this bias, and that class certification was appropriate.[124] The Supreme Court disagreed, finding insufficient "glue" holding together the allegations of sex discrimination given the multitude of jobs categories (at different levels of the company's hierarchy, for variable lengths of time, in thousands of stores across fifty states):

> The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact common to the class."
>
> . . . .
>
> Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.
>
> . . . .
>
> The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters.
>
> . . . .
>
> Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims together.[125]

120. Areheart, *supra* note 74, at 1943–44 ("Class actions have long been understood as indispensable for antidiscrimination: class actions generate publicity and can better deter future discrimination; discriminatory people or policies often harm more than just one employee in the organization; and the damages are often low enough that aggregation is necessary to incentivize lawyers to bring such suits. Indeed, the advisory notes on Rule 23(b)(2) specifically mention civil rights lawsuits as ones where class action status may be particularly appropriate.").

121. FED. R. CIV. P. 23(a)(2).

122. Wal-Mart v. Dukes, 564 U.S. 338, 342 (2011).

123. *Id.* at 343.

124. *Id.* at 345.

125. *Id.* at 349, 352, 355, 357.

While opinions differ as to the impact of *Wal-Mart v. Dukes*, the decision presents—at least—an additional hurdle for some workers with claims that are not viable as individual actions.[126] That said, class actions were uncommon even before these recent Supreme Court decisions. One landmark study of federal cases filed between 1988 and 2003 found that class actions in discrimination matters amounted to only about 1% of cases sampled.[127] And some statutes, like the Equal Pay Act (EPA) and Age Discrimination in Employment Act (ADEA), do not allow for traditional class actions under Rule 23, in which named plaintiffs will spearhead the litigation and potential class members can opt out. Rather, EPA and ADEA cases require each individual plaintiff to affirmatively opt-in to a case after receiving a notice of the litigation.[128]

iii. Isolated Workers, Closely Monitored

Various workplace developments have effectively isolated many workers in ways that can inhibit collective action and information-sharing.

126. *Compare* Michael Selmi & Sylvia Tsakos, *Employment Discrimination Class Actions After Wal-Mart v. Dukes*, 48 AKRON L. REV. 803, 803 (2015) ("[I]t appears that courts are proceeding much as they did prior to [Wal-Mart v. Dukes]. Employment discrimination class actions have never been easy to certify, nor have they been plentiful, and that remains true today."), *with* Areheart, *supra* note 74, at 1944 ("[I]t has become substantially harder to bring (and win) class action cases. Courts have increasingly applied more stringent interpretations of the commonality requirement, as well as required more in the way of merits before certifying the class."), *and* JOSEPH A. SEINER, THE SUPREME COURT'S NEW WORKPLACE 63 (2017) ("[T]he overall view has been that the [Wal-Mart v. Dukes] decision presents substantial problems for plaintiffs—thus undermining civil rights. The academic scholarship has been quite harsh on the case.").

127. BERREY, NELSON & NIELSEN, *supra* note 80, at 270.

128. 29 U.S.C. § 216(b); Alexander & Prasad, *supra* note 74, at 1106 ("[T]he Fair Labor Standards Act, Equal Pay Act, and Age Discrimination in Employment Act have never allowed traditional class actions, in which a few named plaintiffs represent a largely anonymous class, but instead require each individual additional plaintiff to affirmatively opt into a case. As a result, workers are increasingly forced to bring cases alone or in small groups, with each worker's identity exposed, setting the stage for retaliation by unscrupulous employers."). For discussion of the differences in certification standards between class actions under Rule 23 and collective actions under ADEA, EPA, and FLSA, see Scott A. Moss & Nantiya Ruan, *No Longer a Second-Class Class Action? Finding Common Ground in the Debate Over Wage Collective Actions with Best Practices for Litigation and Adjudication*, 11 FED. CTS. L. REV. 1 (2019). EEOC may seek class wide relief under Title VII without being certified as the class representative under Fed. R. Civ. P. 23. General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 321 (1980).

Some employees don't even know who they work for, how many other employees answer to the same entity, or whether anyone else is in similar straits, all of which can make it more difficult for workers to complain.[129]

Weil writes of the modern disaggregated or "fissured" workplace, where employment arrangements often differ from the traditional relationship between one well-defined employer and its employees: "The basic terms of employment—hiring, evaluation, pay, supervision, training, coordination—are now the result of multiple organizations. Responsibility for conditions have become blurred. Like a rock with a fracture that deepens and spreads with time, the workplace over the past three decades has fissured."[130]

Employees might not have a fixed, centralized worksite or communal space—more are working from home. These trends toward remote or scattered work make it less likely an employee will communicate in person with coworkers.[131] Wherever they are working, employees are often subject to novel methods of monitoring that can chill communications with co-workers.

Employee monitoring is hardly new. A century ago, Henry Ford monitored his employees, at work and at home, dispatching his "sociological department" to gather information about the lifestyles and proclivities of employees, including their drinking, spending, household tidiness, and union activity.[132] But technological advances now allow employers to take surveillance methods to new levels. Employers can now use trackers, cameras, and wearable technology to monitor workers, even when off duty.[133] Employers can capture and analyze the content, length, and tone of conversations.[134] Often with the

129. Weil, *Strategic Enforcement*, *supra* note 89, at 444 ("[W]orkers from a staffing agency may be working side-by-side with employees of the host company – or may have had their status switched from an employee to one of independent contractor. This murkiness undermines the likelihood of complaints.").

130. DAVID WEIL, THE FISSURED WORKPLACE 7 (2014). Bales and Stone describe work relationships ranging from long-term employment to project-based work, often involving "multiple interlocking and cascading tiers of employers all at once," where "employee leasing firms, payroll contractors, human resources (HR) service providers, and numerous types of ancillary enterprises also perform employer functions." Richard A. Bales & Katherine V.W. Stone, *The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace*, 41 BERKELEY J. EMP. & LAB. L. 1, 3 (2020).

131. Tammy Katsabian, *The Rule of Technology – How Technology is Used to Disturb Basic Labor Law Protections*, 25 LEWIS & CLARK L. REV. 895, 918–920 (2021) (discussing trend toward telework, even before COVID-19 pandemic, and how online communication falls short as a substitute for in-person interactions).

132. Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law and Policy of People Analytics*, 88 U. COL. L. REV. 961, 966 (2017). Ajunwa, Crawford & Schultz provide a brief history of employer surveillance. *Limitless Worker Surveillance*, *supra* note 24, at 738.

133. Bodie, Cherry, McCormick & Tang, *supra* note 132, at 963.

134. *Id.*

assistance of third-party data miners and vendors, employers can also now collect, aggregate, and process personal and consumer data about workers, which can be used to predict who is most likely to job hop, get pregnant, take parental or medical leave, file a workers' compensation claim, call in sick, complain about working conditions, or join a union.[135]

Employer surveillance can be hard for workers to avoid, as there are few legal limits on such practices in the private sector.[136] As Matthew Bodie

135. Bradley A. Areheart & Jessica L. Roberts, "*GINA, Big Data, and the Future of Employee Privacy"*, 128 YALE L.J. 710, 713–14 (2019) ("'[B]ig data' offers the opportunity to aggregate and cross-reference information to gain access to some of our most intimate secrets, including our disease risks, our reproductive choices, and our personal relationships. . . . [Big] data analytics could reveal which employees are more likely to get sick, which employees are more likely to take parental leave, and which employees are more likely to be under stress at home."); *The Future of Work: Protecting Workers' Civil Rights in the Digital Age: Hearing Before the H. Comm. on Educ. and Lab.*, 116th Cong. 17 (2020) (statement of Jenny R. Yang, Senior Fellow of the Urban Institute), https://docs.house.gov/meetings/ED/ED07/20200205/110438/HHRG-116-ED07-Wstate-YangJDJ-20200205.pdf [https://perma.cc/L2QL-63W4] [hereinafter Yang Testimony] ("Increased surveillance creates a very real risk that employers will use technology to monitor who workers are communicating with in a manner that may suppress worker dissent and organizing efforts, which in addition to raising concerns under the [NLRA], could also interfere with the ability for workers to raise and organize around civil rights issues such as harassment. Access to this information could also lead to retaliatory measures against employees who exercise these rights."). Others have reported on and testified to such practices. *E.g.,* David Streitfeld, *How Amazon Crushes Unions*, N.Y. TIMES, Mar. 16, 2021, https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html [https://perma.cc/Q2UA-B89E]; Sam Adler-Bell & Michelle Miller, *The Datafication of Employment How Surveillance and Capitalism Are Shaping Workers' Futures without Their Knowledge*, CENTURY FOUNDATION 12, (Dec. 19, 2018) https://tcf.org/content/report/datafication-employment-surveillance-capitalism-shaping-workers-futures-without-knowledge/?session=1 [https://perma.cc/PS53-R33Y]; Kelly Trindel, Chief Analyst for the Office of Research, Information and Planning, Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law, Testimony at the Meeting of the EEOC (Oct. 13, 2016) [hereinafter Trindel Testimony]; See also discussion *infra* Section V.B about use of automated decision-making systems.

136. There are some state laws that speak to certain types of monitoring and data collection. *See* Ajunwa, *Limitless Worker Surveillance, supra* note 24. Some states have enacted statutes to prevent employers from requesting passwords to personal internet accounts to get or keep a job. *State Social Media Privacy Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx [https://perma.cc/3EXA-69RZ]. For discussions of limited privacy protections, *see*, *e.g.,* Bales & Stone, *supra* note 130, at 30–34; Bodie, Cherry, McCormick & Tang, *supra* note 132, at 985–1031; Ajunwa, Crawford & Schultz, *Limitless Worker Surveillance*, *supra* note 24, *passim*. Unlike the U.S., the European Union and numerous other countries have comprehensive data privacy laws. Michael Kearns and Aaron Roth discuss the European General Data Protection Regulation (GDPR) "a sweeping set of laws designed to limit algorithmic violations of privacy and to enforce still-vague social values such as 'accountability' and 'interpretability' on algorithmic behavior." MICHAEL KEARNS & AARON ROTH, THE ETHICAL ALGORITHM 15 (2020). And the European Union in April 2021 proposed new

observes: "Never have employers been able to know so much about their employees, and so easily."[137]

D. Important, but Limited, Role of Intermediaries

Intermediaries might help workers gather and understand relevant information, act as conduits for collective action, and, in some cases, provide legal advice and representation. Worker centers, for example, have played an increasingly important role in this regard. Worker centers are advocacy groups typically organized around a particular issue (e.g., safety), community (e.g., Latinx workers), or industry (e.g., farm workers).[138] Unlike unions, worker centers do not collectively bargain on behalf of members.[139] Their services range and might include political advocacy, informational resources, community support, or pressure on employers to improve working conditions or pay practices.[140]

A union, even when not acting as a bargaining agent, might provide a key informational role, for example in gathering and interpreting safety data and

regulations on the use of Artificial Intelligence. *Proposal for a Regulation on a European approach for Artificial Intelligence*, COM (2021) 206 final (Apr. 21, 2021), https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-european-approach-artificial-intelligence [https://perma.cc/D3DY-LRYK]. Some states have recently enacted statutes to regulate data collection and usage. *State Laws Related to Digital Privacy*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-related-to-internet-privacy.aspx [https://perma.cc/L9AC-JB5X] (outlining requirements of statutes enacted in California, Nevada, and Virginia). It is unclear at this point whether GDPR-type of data regulation can or will meaningfully address the concerns here. *See, e.g.,* Jeffrey M. Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889, 931, 935 (2020) [hereinafter Hirsch, *Future Work*] (discussing and noting the limitations of the GDPR, especially as it applies in the workplace).

137. Bodie, Cherry, McCormick & Tang, *supra* note 132, at 987.

138. Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y. L. REV., 417, 419 (2005).

139. *Id.* at 427.

140. Janice Fine, Victor Narro & Jacob Barnes, *Understanding Worker Center Trajectories*, *in* NO ONE SIZE FITS ALL: WORKER ORGANIZATION, POLICY, AND MOVEMENT IN A NEW ECONOMIC AGE 9, 9–11 (Janice Fine, Linda Burnham, Kati L. Griffith, Minsun Ji, Victor Narro & Steven C. Pitts, eds. 2018) (discussing the variety of worker centers and the services they provide); WEIL, *supra* note 130, at 255 ("Worker centers, community organizations, immigrant rights groups, and other advocacy groups play a variety of informational and educational roles for workers both inside and outside the workplace. Some also function as labor market intermediaries, particularly in day labor markets.") (discussing examples); David Weil, *Why Complain?*, 27 COMP. LAB. L. & POL'Y J. 59, 91 (2005) ("A large number of empirical studies demonstrate that workers are more likely to exercise rights where they have an agent that assists them in use of those rights.").

facilitating complaints.[141] Other intermediaries include hybrid worker/community groups or other advocacy organizations that play various roles, such as collecting data on employers' workplace practices or facilitating concerted action outside the traditional model of collective bargaining.[142] Nongovernmental organizations might gather and analyze information voluntarily supplied by employers.[143] Some intermediaries will offer legal counsel in bringing cases before courts or agencies.[144]

Intermediaries, however, have played a minimal role overall in representing groups of employees who bring legal claims, especially discrimination cases.[145]

141. Aditi Bagchi, *Who Should Talk? What Counts as Employee Voice and Who Stands to Gain?* 94 MARQ. L. REV. 882, 884 (2011) ("If a union is present and entitled to relevant data, it may act as a filter and only provide what is most useful to the employee, or perhaps even offer its assessment of the data."); FUNG, GRAHAM & WEIL, *supra* note 5, at 86–87, 100 (discussing the comprehension of safety information and the "key intermediary role" of unions); *see also* United Farm Workers of America v. Foster Poultry Farms (Super. Ct. No. 20-CV-03605), http://majlabor.com/wp-content/uploads/2021/01/TR-UFW-v.-Foster-Poultry-Farms.pdf [https://perma.cc/J4PH-B4DT] (obtaining preliminary injunction against poultry processor to take safety measures to prevent spread of COVID-19).

142. For discussion and examples, see STEVEN GREENHOUSE, BEATEN DOWN, WORKED UP 18–20 (2019), and Catherine L. Fisk, *Reimagining Collective Rights in the Workplace*, 4 U.C. IRVINE L. REV. 523, 524 (2014).

143. *See* Estlund, *Just the Facts*, *supra* note 11, at 367 ("Many . . . intermediaries [] exist—private organizations, for profit and not for profit, that evaluate and compare companies on the basis of their general worker friendliness, family friendliness, diversity along lines of gender, race and ethnicity, sexual orientation, or disability, or more broadly. But these intermediaries currently depend largely on employers' voluntary disclosure . . . .").

144. For example, AARP Foundation Litigation represented the plaintiff in *Kleber v. CareFusion Corp.*, 914 F.3d 480 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 306 (2019), an age discrimination case. And Justice at Work, an organization in Massachusetts, offers legal support to employees through worker centers, with a focus on litigating cases of unpaid wages. https://jatwork.org/ [https://perma.cc/F5S6-ZLAC].

145. Discussing limitations of alt-labor groups are Nicole Hallett, *From the Picket Line to the Courtroom: A Labor Organizing Privilege to Protect Workers*, 39 N.Y.U. REV. L. & SOC. CHANGE 475, 478–83 (2015) (noting limited resources of worker centers and issues of privilege and confidentiality around communications between workers and non-lawyer advocates); WEIL, *supra* note 130, at 255 ("[B]oth legal restrictions and the practical fact that worker centers and related organizations operate outside the walls of the workplace complicate their role in this regard.") (discussing examples). Compare this to housing and lending discrimination, where like in employment discrimination, it can be difficult to "name" the injury: "'It might be hard for somebody to articulate and recognize [housing discrimination] immediately,' said Kate Scott, executive director of the Equal Rights Center in Washington. But it usually starts with 'a bad feeling about what's going on.'" Dima Williams, *Challenging Discrimination When Purchasing a Home*, WASH. POST (Mar. 18, 2021), https://www.washingtonpost.com/business/2021/03/18/report-housing-discrimination-renter-buyer [https://perma.cc/DR3W-TY2H]. The non-profit National Fair Housing Alliance (a consortium of hundreds of organizations throughout the U.S.) reports that in 2019, private non-profit fair housing

Data collected by Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen bear this out, as they conclude that "collective legal mobilization is rare in the system of workplace discrimination litigation."[146] Instead, the overwhelming majority of cases are brought by individual plaintiffs, without the support of other workers or a public interest firm or organization.[147]

V. PARTICULARLY OPAQUE SCENARIOS: PAY AND HIRING

The visibility of information is especially limited in cases of unlawful pay practices and discrimination in hiring. Following is a discussion of two such scenarios: (1) Pay equity and pay discrimination on the basis of sex, and (2) age discrimination in hiring.

A. Pay Equity and Pay Discrimination on the Basis of Sex

Research shows a persistent pay gap between men and women.[148] Yet few employees have enough information even to suspect a violation of pay equity or pay discrimination laws.[149]

organizations processed the overwhelming majority of housing discrimination complaints. Fair Housing Organizations "continue to address approximately three times as many complaints as the government agencies combined." NATIONAL FAIR HOUSING ALLIANCE, FAIR HOUSING IN JEOPARDY, 2020 FAIR HOUSING TRENDS REPORT 32, https://nationalfairhousing.org/wp-content/uploads/2020/09/NFHA-2020-Fair-Housing-Trends-Report.pdf [https://perma.cc/6PDW-78R8]. And see FUNG, GRAHAM & WEIL, *supra* note 5, at 62, for discussion of intermediaries in the area of mortgage lending.

146. BERREY, NELSON & NIELSEN, *supra* note 80, at 69.

147. *Id.*

148. Lobel, *Knowledge Pays*, *supra* note 56, at 555–56 ("Even after accounting for skill, experience, occupation, industry, job description, and factors such as evaluation and performance, which have a degree of subjectivity, a significant portion of the [male-female pay] gap persists."); Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1049–51 (2012) ("[N]ot all of the documented wage gaps can be explained by factors that are likely to be related to business necessity, such as degrees, skills, hours worked, or even internal performance evaluations.") (footnote omitted) (citing studies). My focus here is on pay gaps by sex, as they might implicate the Equal Pay Act, as well as Title VII.

149. Claims filed with the EEOC 1966–2014 show that equal-pay complaints make up about 3% of total cases filed. BERRY, NELSON & NIELSEN, *supra* note 80, at 43. Lobel, *Knowledge Pays*, *supra* note 56, at 565 ("[P]ay equity claims are often only brought by women when something else such as an adverse action, failure to promote, or harassment occurs."). Of the total charges filed with the EEOC in fiscal year 2019, 1.5 percent included claims for violation of the Equal Pay Act. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data (Jan. 24, 2020), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data [https://perma.cc/4N8U-FBLN]. From 2011 to 2020, the EEOC brought only forty-seven matters that included an EPA claim. U.S. EQUAL EMP. OPPORTUNITY COMM'N, ALL STATUTES (CHARGES FILED WITH EEOC) FY 1997 – FY 2020, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 [https://perma.cc/9UTQ-JRBE].

Recall Emma, who wonders if she is getting paid less because she is a woman. *It seems like the men at my job get paid more. How can I get more information about coworkers pay and duties? Should I talk with my coworkers? If I do, will we get in trouble?*

An attorney will evaluate her situation within the frameworks of: (1) the Equal Pay Act (EPA), which essentially requires employers to pay male and female employees at the same establishment equal wages for equal work;[150] and (2) Title VII, which prohibits, *inter alia*, compensation discrimination based on sex.[151] The coverage of the EPA and Title VII overlap, but there are some important differences.[152]

There is no requirement under the EPA for a plaintiff to prove intentional discrimination.[153] Instead, a *prima facie* EPA violation is established by showing that: "(1) the complainant receives a lower wage than paid to an employee of the opposite sex in the same establishment; and (2) the employees perform substantially equal work (in terms of skill, effort, and responsibility) under similar working conditions."[154]

150. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10–II (distilling text of the EPA, codified at 29 U.S.C. § 206(d)(1)).

151. Title VII prohibits employment discrimination based on race, color, religion, sex (including pregnancy), and national origin. 42 U.S.C. §§ 2000e. In *Bostock v. Clayton County*, 140 S. Ct. 1731, 1742 (2020), the Court held that Title VII encompasses bias based on sex stereotypes and gender identity.

152. A claim of unequal compensation based on sex can be brought under the EPA, Title VII, or both. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10–II. Emma might also have protections under state and local laws. *See Discrimination and Workplace Harassment*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/discrimination.aspx [https://perma.cc/44HX-89BV].

153. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 640 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. Note, however, that "willfulness" is important to the filing deadline and recovery: "The time limit for filing an EPA charge [is] . . . within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years. . . . In addition, the EPA limits the recovery of back pay to two years (or three years if the violation was willful) before the filing of suit or the end of successful conciliation." EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-IV.A (footnote omitted).

154. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-IV.B.

> Skill is measured by factors such as the experience, ability, education, and training required to perform a job. . . . Effort is the amount of physical or mental exertion needed to perform a job. . . . Responsibility is the degree of accountability required in performing a job. Factors to be considered in determining the level of responsibility in a job include: the extent to which the employee works without supervision; the extent to which the employee exercises supervisory functions; and the impact of the employee's exercise of his or her job functions on the employer's business. . . . Working conditions consist of two factors: surroundings; and hazards.

Id. § 10-IV.E.2 (emphasis omitted).

"Comparators" are essential in EPA cases. A plaintiff must be able to point to at least one person of the opposite sex in the same establishment who is, or was, getting paid more: "A complainant cannot compare herself or himself to a hypothetical male or female; rather, the complainant must show that a specific employee of the opposite sex earned higher compensation for a substantially equal job."[155] It might be a current or former employee.[156]

The evaluation of "equal" or "similar" work is highly fact-specific and can be difficult to establish.[157] An EPA plaintiff needs specific and detailed information about the actual duties (not just job titles) of such comparator(s).[158] Only if the plaintiff can establish the *prima facie* showing will the burden shift to the defendant employer to "prove that the compensation difference is based on a seniority, merit, or incentive system, or any other factor other than sex."[159]

Unlike the EPA, a disparate treatment case under Title VII requires that a plaintiff prove that her employer has discriminated against her because of her sex.[160] This does not necessarily require comparators; a plaintiff might prevail without one.[161] This can be done with direct evidence of discrimination, as in

155. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-IV.E.1. Laura Palk and Shelly Grunsted discuss difficulties for LGBTQIA employees: "The EPA requires that plaintiffs prove their cases through reference to an opposite sex comparator, but then defers to the employer's subjective definition of who is 'the opposite sex.' This makes LGBTQIA plaintiffs' cases essentially unwinnable." Laura Palk & Shelly Grunsted, *Born Free: Toward an Expansive Definition of Sex*, 25 MICH. J. GENDER & L. 1, 3–4 (2018).

156. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-IV.E.1.

157. Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815, 831 (2012–2013) ("[T]he prima facie standard under the EPA . . . requires an intricate factual examination of the compared jobs . . . ."). *See* Galligan v. Detroit Free Press, 436 F. Supp. 3d 980, 998–99 (E.D. Mich. 2020) (finding plaintiffs had not satisfied *prima facie* burden under EPA because they "did not identify . . . a complete list of the specific job duties of any male [comparator]," concluding that a partial list of duties was insufficient).

158. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-IV.E.2 ("In comparing two jobs for purposes of the EPA, consideration should be given to the *actual* duties that the employees are required to perform. Job *content*, not job titles or classifications, determines the equality of jobs.").

159. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-IV.B.

160. 42 U.S.C. § 2000e-2(a)(1). For review and discussion of causation standards under the various discrimination statutes, see, for example, Hillel J. Bavli, *Cause and Effect in Antidiscrimination Law*, 106 IOWA L. REV. 483 (2021); Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, VA. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801699 [https://perma.cc/MQX7-WESA]. Some types of discrimination cases might also be brought under a disparate impact theory, where the plaintiff challenges a facially neutral employment practice that has a disparate impact on a protected group. *See infra* note 171.

161. A claim of compensation discrimination can be brought under Title VII "even if no person outside the protected class holds a 'substantially equal,' higher paying job." EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-II.

those rare instances where a manager tells an employee "I'm paying you less because you are a woman."[162] Far more likely, Emma would need to rely on indirect evidence, sometimes described as a "convincing mosaic" of circumstantial evidence, "bits and pieces" of evidence to support an inference of discriminatory intent and to demonstrate that the employer's stated justification for its actions is pretextual.[163]

A recent Second Circuit case provides an illustration. The plaintiff in *Lenzi v. Systemax*, *Inc.*, a sex discrimination case under Title VII, produced evidence that her employer paid her at below market for her position, that it paid nearly all male peers at her workplace above market rate for their respective positions, and that the defendant's chief financial officer had made graphic and disparaging remarks about women.[164] In reversing the district court's grant of summary judgment to the employer, the Second Circuit explained the difference between the EPA and Title VII:

> Title VII makes actionable *any* form of sex-based compensation discrimination. . . . To be sure, one way an employer might discriminate against an employee because of her sex is to pay her less than her male peers who perform equal work. In such circumstances, an employee may seek redress under the EPA or, if the circumstances admit "an inference of discrimination" [under] Title VII. However, it by no means follows that this is the only way in which an employer might achieve its discriminatory purpose. For example, an employer might "hire[ ] a woman for a unique position in the company," but then pay her less than it would "had she been male." If a Title VII plaintiff were first required to establish an EPA violation, she would be without redress under those circumstances, even if her employer flatly "admitted that her salary would have been higher had she been male." "Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a

162. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-III.A n.16 ("If there is an explicit policy or other direct evidence of compensation discrimination, cause should be found. Such evidence might include, for example, discriminatory statements by officials of the respondent, combined with evidence of pay disparities, or documentation that the respondent's pay practices are applied differently to those inside and outside the protected class.").

163. Lewis v. City of Union City, 934 F.3d 1169, 1185 (11th Cir. 2019). Not all courts use this articulation. The Seventh Circuit, for example, has discarded the "convincing mosaic" terminology and the idea of direct and indirect proof as distinct piles of evidence. Ortiz v. Werner Enterprises, Inc., 834 F.3d 760 (7th Cir. 2016).

164. Lenzi v. Systemax, Inc., 944 F.3d 97 (2d Cir. 2019).

pretext for discrimination."[165]

But while the court in *Lenzi* concluded that the plaintiff need not produce the same comparator evidence under Title VII as is required under the EPA, that case did rest in large part on a showing of how men were paid at her workplace, and how they were paid *vis-a-vis* market rates.[166] The plaintiff then would still need information about her male coworkers and their compensation rates.[167] And the reality in most Title VII pay discrimination cases is that a plaintiff will need information about other employees' pay and duties.[168]

What information might Emma be able to gather to support a claim under either the EPA or Title VII? Unless she stumbles upon some useful information about coworkers' pay (perhaps an anonymous note),[169] she will need to find information about other employees' duties and pay. That will probably not be easy to do. Despite some prohibitions against pay secrecy rules, they are still common, and even without such restrictions, employees can be reluctant to share.[170] Counsel can search legal databases for litigation, reports of similar discrimination, or other publicly available records that might provide some

165. *Id.* at 110 (internal citations omitted).

166. "Taken together, the fact that Systemax paid [plaintiff] below the market rate for her position while paying her male peers above market rate, along with Reinhold's pervasive disparagement of women, are enough to carry [her] past the prima facie stage." *Id.* at 112.

167. *Id.* at 111.

168. EEOC COMPLIANCE MANUAL, COMPENSATION, *supra* note 75, § 10-III.A ("Because direct evidence of discrimination is rare, investigators typically must evaluate whether comparative evidence supports a finding of compensation discrimination.") (footnote omitted). *See* Laing v. Fed. Express Corp., 703 F.3d 713, 719 (4th Cir. 2013) (**"**[Courts consider] comparator evidence to be a particularly probative means for discerning whether a given adverse action was the product of a discriminatory motive."); LEX K. LARSON & KIM H. HAGEN, EMPLOYMENT DISCRIMINATION 8–76, (2d ed. 2020) ("Probably the most commonly employed method of demonstrating that an employer's explanation is pretextual is to show that similarly situated persons of a different race or sex [or other protected class] received more favorable treatment.").

169. LILLY LEDBETTER, GRACE AND GRIT: MY FIGHT FOR EQUAL PAY AND FAIRNESS AT GOODYEAR AND BEYOND 5 (2012) (recounting how she discovered pay disparities when someone slipped her an anonymous note with a list of names and salaries). *See also* Charlotte S. Alexander, *Transparency and Transmission: Theorizing Information's Role in Regulatory and Market Responses to Workplace Problems*, 48 CONN. L. REV. 177, 179–80 (2015) (writing of a woman who learned of pay disparity because her husband worked for the same employer); Sternlight, *Disarming Employees*, *supra* note 105, at 1348 n.234 (describing a plaintiff who said "she had no reason to believe her salary was unfair until she accidentally stumbled on documents showing the salaries of her male counterparts.").

170. JAKE ROSENFIELD, YOU'RE PAID WHAT YOU'RE WORTH AND OTHER MYTHS OF THE MODERN ECONOMY 57–64 (2021) ("Pay secrecy policies—workplace rules, formal or informal, that ban or discourage workers from discussing their pay with one another—are the norm in private-sector workplaces . . . .") (citing survey data).

useful leads.[171] Such a search, however, will not yield information about other employees who have arbitrated or settled claims with NDAs. And if at the end of a consultation there is not enough information available to support a claim or at least warrant further review, counsel will likely decline the matter.

Emma might go to the EEOC (or a state or local fair employment practices agency), which she generally must do to exhaust administrative remedies under Title VII (not the EPA).[172] She can do this *pro se*, as is common.[173] To lodge a complaint with the EEOC, Emma must be timely and specific with her allegations.[174] If the EEOC accepts her complaint and sends it into investigation (doubtful without at least some information about other employees), then the EEOC might get more information from the employer.[175]

171. *See, e.g.*, Shattuck v. Kinetic Concepts, Inc., 49 F.3d 1106, 1109–10 (5th Cir. 1995) (recognizing that evidence of discrimination against other members of the plaintiff's protected class may be highly probative, depending on the circumstances); Phillip v. ANR Freight Sys., Inc., 945 F.2d 1054, 1056 (8th Cir. 1991) (reversing district court decision excluding evidence of other discrimination lawsuits filed against defendant).

172. The EEOC maintains "work sharing agreements" with state and local Fair Employment Practices Agencies to coordinate investigation of charges dual-filed under federal, state, local laws. U.S. EQUAL EMP. OPPORTUNITY COMM'N, FISCAL YEAR 2020 ANNUAL PERFORMANCE REPORT, https://www.eeoc.gov/fiscal-year-2020-annual-performance-report [https://perma.cc/23UL-VEH6]. U.S. EQUAL EMP. OPPORTUNITY COMM'N, TIME LIMITS FOR FILING A CHARGE, https://www.eeoc.gov/time-limits-filing-charge [https://perma.cc/56AX-79RA] ("Under the Equal Pay Act, you don't need to file a charge of discrimination with EEOC. Instead, you are allowed to go directly to court and file a lawsuit.").

173. At the EEOC, "it appears *pro se* filings may be the rule, not the exception." Fed. Express Corp. v. Holowecki, 552 U.S. 389, 402 (2008).

174. 29 C.F.R § 1601.12 (2020) ("Each charge should contain . . . [a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices . . . ."). The EEOC asks questions about other workers in its intake questionnaire:

> Describe who was in the same or similar situation as you and how they were treated. For example, who else applied for the same job you did, who else had the same attendance record, or who else had the same performance? Provide the race, sex, age, national origin, religion, or disability of these individuals, if known, and if it relates to your claim of discrimination. For example, if your complaint alleges race discrimination, provide the race of each person; if it alleges sex discrimination, provide the sex of each person; and so on. . . . Of the persons in the same or similar situation as you, who was treated *worse* than you?

U.S. EQUAL EMP. OPPORTUNITY COMM'N, INTAKE QUESTIONNAIRE, https://www.hoopa-nsn.gov/wp-content/uploads/2019/05/EEOC-COMPLAINT-FORM-FOR-OTHER-AGENCIES-THAT-ARE-NOT-A-TRIBAL-GOVERNMENT.pdf [https://perma.cc/PU63-E6ST].

175. Maryam Jameel, *More and More Workplace Discrimination Cases are Closed Before They're Even Investigated*, PUBLIC INTEGRITY (June 14, 2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/more-and-more-workplace-discrimination-cases-being-closed-before-theyre-even-investigated/ [https://perma.cc/D7XF-H7JF] (describing EEOC's process of weeding out "low priority" complaints without an investigation: "Since 2008, the EEOC has more than doubled the share of

If at the end of the investigation process, the EEOC finds "reasonable cause" that there has been a statutory violation, it will attempt to settle the matter through a conciliation process.[176] If the matter does not settle, the EEOC will either bring suit in the case itself (rarely), or issue a "right-to-sue letter" informing the complainant of the right to bring a claim in federal court within ninety days.[177] The EEOC takes very few cases into court on behalf of complainants, even if there has been a finding of reasonable cause—which itself is a tiny percentage of EEOC filings (three percent in fiscal year 2019).[178]

If the EEOC declines to take the matter into court, Emma will need to find affordable counsel to represent her or, more dauntingly, file a court complaint *pro se*.[179] If she files in federal court, she can expect to face a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim,

complaints . . . that it places on its lowest-priority track, effectively guaranteeing no probes, mediation or other substantive efforts on behalf of those workers. About 30 percent of cases were shunted to that category [in 2018], according to internal data obtained by the Center for Public Integrity through a public-records request.").

176. 28 C.F.R 42.609 (2003).

177. U.S. EQUAL EMP. OPPORTUNITY COMM'N, WHAT YOU CAN EXPECT AFTER YOU FILE A CHARGE, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge [https://perma.cc/V8NH-GNCJ]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, FILING A LAWSUIT, eeoc.gov/filing-lawsuit [https://perma.cc/W9NK-69CK].

178. The EEOC's "reasonable cause" rate was three percent in Fiscal Year 2019. The EEOC found "no reasonable cause" in 69.5% of complaints. Remaining complaints might be settled, withdrawn, administratively closed, or otherwise resolved. U.S. EQUAL EMP. OPPORTUNITY COMM'N, ALL STATUTES (CHARGES FILED WITH EEOC) FY 1997 – FY 2020, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 [https://perma.cc/XU7D-CJF7]. Bornstein, *supra* note 58, at 291 ("[O]f the roughly 75,000 to 100,000 charges of discrimination and harassment it received in each of the past twenty years, the EEOC itself litigated only between 114 and 465 cases each year—or fewer than 0.5%."); SEINER, *supra* note 126, at 7 ("The EEOC will typically bring between 200 and 400 lawsuits a year . . . [representing] an extremely small fraction of the charges that are filed in a given year, which fluctuate between 75,000 and 100,000 total charges.").

179. A fraction of complainants who receive a right-to-sue letter will file a suit in court. BERRY, NELSON & NIELSEN, *supra* note 80, at 41–42 ("The ratio of lawsuits to charges (sometimes referred to as the conversion rate) fluctuates between 15% and 30% for most years . . . ."). A significant number of those who do file in federal court (about one in five) will do so unrepresented by counsel. *Id.* at 58 (pro se rate for discrimination cases filed in federal court from 1988–2003 was 23%); Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 L. SOC. INQUIRY 567, 578 (2020) (documenting "20 percent of employment civil rights cases involving at least one pro se party."); Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 UNIV. CHI. L. REV. 1819, 1840 (2018) (using administrative records of civil cases filed in federal district courts 1998–2017, finding that 19% of employment discrimination cases in federal court were brought by pro se plaintiffs).

opposition to which is arguably now more difficult in the wake of recent Supreme Court decisions.[180]

The pleading requirement in federal court used to require only "a short and plain statement of the claim showing that the pleader is entitled to relief,"[181] and courts would dismiss a complaint under 12(b)(6) only if it was "beyond doubt" the plaintiff could prove "no set of facts" that would establish liability.[182]

In a pair of cases decided in 2007 and 2009, the U.S. Supreme court altered the standard for a motion to dismiss under Rule 12(b)(6). First, in *Bell Atlantic Corp. v. Twombly*, the Court introduced a new "plausibility" standard, one that calls for pleading enough facts "to raise a reasonable expectation that discovery will reveal evidence" of the claim, and "nudge[] their claims across the line from conceivable to plausible . . . ."[183] The court fleshed out this plausibility standard two years later in *Ashcroft v. Iqbal*: "[Fed. R. Civ. P. 8] does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[184]

A more rigorous pleading standard can be especially difficult for discrimination plaintiffs, where the plaintiff bears the burden of proving discrimination, and information that might help the plaintiff meet that burden

180. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(B)(6) Motions*, 46 UNIV. RICH. L. REV. 603, 653–54 (2012).

181. Fed. R. Civ. P. 8(a)(2) (2010).

182. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

183. *Twombly*, 550 U.S. at 556, 570.

184. *Iqbal*, 556 U.S. at 678–79.

is in the hands of the employer.[185] The plaintiff cannot access that information unless they can defeat a motion to dismiss and get into discovery.[186]

185. *See* Areheart, *supra* note 74, at 1947 ("[F]actual development is particularly difficult in employment discrimination cases where the touchstone is often intent—something that is nearly impossible to establish without access, often through discovery, to the employer's personnel and policies. Heightened pleading standards thus result in a catch-22: the plaintiff's claim cannot survive to the discovery phase without having sufficient facts, but the plaintiff cannot *obtain* sufficient facts without discovery.") (footnotes omitted); Suzette M. Malveaux, *Clearing Procedural Hurdles in the Quest for Justice*, 37 OHIO N. UNIV. L. REV. 621, 627 (2011) [hereinafter Malveaux, *Clearing Procedural Hurdles*] ("[P]laintiffs' complaints die on the vine not because they lack merit, but because plaintiffs do not have the same access to information that the defendant does. By raising the pleading bar to plausibility, the Supreme Court has created an untenable situation for plaintiffs challenging discrimination where there is informational inequality."). There is some debate regarding the impact of the plausibility standard on dismissal rates in discrimination cases. *Compare* Roger Michalski & Abby K. Wood, Twombly *and* Iqbal *at the State Level*, 14 J. EMPIRICAL LEGAL STUD. 424 (2017) (finding no evidence on state level that raising pleading standards affected plaintiff behavior; observing no decrease in filings; finding no increase in motions to dismiss and no increase in the grant rate on motions to dismiss), *and* JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* (2011) ("[T]here was a general increase from 2006 to 2010 in the rate of filing of motions to dismiss for failure to state a claim . . . [but t]here was . . . no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases."), *with* Morgan L.W. Hazelton, *Judicial Impact and Factual Allegations: How the Supreme Court Changed Civil Procedure through the Plausibility Standard*, 9 J.L. & CTS. 159, 182 (2021) (finding "some evidence that a lack of information keeps civil rights claimants from being able to adapt to the new pleading standard in comparison with torts cases."); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015) ("Contrary to the conclusions reached by the FJC in its 2011 study, . . . data show[s] that dismissals of employment discrimination and civil rights cases have risen significantly in the wake of *Iqbal*."), *and* Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 UNIV. ILL. L. REV. 1011, 1029 (analyzing decisions, finding higher rate of dismissals in Title VII cases after *Twombly*).

186. While it is not necessary to plead a *prima facie* case of discrimination to survive a motion to dismiss under Rule 12(b)(6), *Twombly*, 550 U.S. at 556, Emma's counsel would be prudent to nail down the facts necessary for the *prima facie* case as early as feasible—before taking on the risk of a contingency fee arrangement and filing a complaint. Counsel must also satisfy Fed. R. Civ. P. 11, which requires, *inter alia*, that:

> By presenting to the court a pleading . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

Parties will also share information under Fed. R. Civ. P. 26(a)(1)(A), which requires pre-discovery disclosures including names of individuals likely to have discovery information; documents to support claims or defenses; computation of damages; and applicable insurance agreements.

If Emma can defeat a motion to dismiss, then she will get additional information in the (often protracted, expensive) discovery process, probably followed by a motion for summary judgment.[187]

Many have discussed the high hurdle for discrimination plaintiffs looking to defeat a motion for summary judgment in federal court, with the result that very few such cases go to trial.[188] I concentrate here on access to information necessary to identify a grievance and state a claim that will survive a motion to dismiss and at least get into the discovery process. But would-be plaintiffs and counsel need to consider what is likely on the other side of the motion-to-dismiss gate. Such obstacles add to the speculative nature of these cases, which is a disincentive for workers to look to the legal process, and for counsel to take on these matters in the first place.

B. Age Discrimination in Hiring

Research suggests that discrimination in hiring is pervasive.[189] Yet relatively few failure-to-hire cases are filed. One large-scale study of discrimination cases filed in federal courts found that only nine percent of such

187. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). SEINER, *supra* note 126, at 47 ("The summary judgment motion was not typically used as often in the early days of Title VII. It has now become routine . . . .") (footnote omitted).

188. *See, e.g.*, Areheart, *supra* note 74, at 1948 (discussing Supreme Court decisions on summary judgment standards); SEINER, *supra* note 126, at 47–48 ("[E]ven before *Twombly* and *Iqbal*, few cases were making it to trial. They were proceeding past the complaint and discovery phase of the litigation, but were being rejected at summary judgment. . . . In one of the better[-]known studies on this question, which was conducted by Kevin Clermont and Stewart Schwab, the authors were able to conclude that only 3.7 percent of employment cases go to trial.") (footnotes omitted).

189. *See, e.g.*, Aaron Rieke, Urmila Janardan, Mingwei Hsu & Natasha Duarte, *Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers*, UPTURN, at 5–6 (2021) [hereinafter Rieke, *Essential Work*], https://www.upturn.org/static/reports/2021/essential-work/files/upturn-essential-work.pdf [https://perma.cc/9Y9R-KQ5T] ("[D]ecades of research shows that employers tend to discriminate against women, people of color, and people with disabilities, and a recent meta-analysis suggests that little has improved over the past 25 years.") (footnotes omitted) (citing studies); David Neumark, *Strengthen Age Discrimination Protections to Help Confront the Challenge of Population Aging,* BROOKINGS, at 5 (2020), https://www.brookings.edu/research/strengthen-age-discrimination-protections-to-help-confront-the-challenge-of-population-aging/ [https://perma.cc/RB8U-NVPU] ("[T]he most rigorous evidence we have establishing age discrimination concerns discrimination in hiring."); Victoria A. Lipnic, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, at 21 (June 2018), https://www.eeoc.gov/reports/state-age-discrimination-and-older-workers-us-50-years-after-age-discrimination-employment [https://perma.cc/6WP9-YSKP] ("[S]tudies find substantial evidence of age discrimination in hiring, as most hiring discrimination occurs when an interview is offered or not.").

cases alleged discriminatory hiring.[190] The EEOC's statistics on filings with the agency show similarly low percentages of failure-to-hire cases. In fiscal year 2019, for example, failure-to-hire cases made up about ten percent of charges filed with the EEOC.[191] And as a percentage of complaints received by the OFCCP (against employers who are federal contractors) from 2017 to 2020, hiring claims ranged from four to nine percent.[192]

These numbers should not surprise, as hiring decisions are made behind a curtain, often without an interview or any communications beyond submitting a resume in some fashion. Few job seekers have enough information even to suspect a violation of law.

Recall Alex, the fifty-year-old who can't find a job as a software designer: *I keep applying for jobs I know I am qualified to do, but I can't land one. Employers seems to be looking for younger people.*

An attorney will evaluate his situation within the framework of the ADEA, which prohibits discrimination against people who are forty and older.[193]

The plaintiff in a failure-to-hire case brought under the ADEA must show that they were not hired because of their age.[194] That "because of" language in

190. BERRY, NELSON & NIELSEN, *supra* note 80, at 56 (finding that only 9% of such cases alleged discriminatory hiring, versus 19% of claims that allege discriminatory failure to promote).

191. Data available on EEOC website: U.S. EQUAL EMP. OPPORTUNITY COMM'N, BASES BY ISSUE (CHARGES FILED WITH EEOC) FY 2010 – FY 2020, https://www.eeoc.gov/statistics/bases-issue-charges-filed-eeoc-fy-2010-fy-2020 [https://perma.cc/ZN38-HVD9]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, ALL STATUTES (CHARGES FILED WITH EEOC) FY 1997 – FY 2020, https://www.eeoc.gov/statistics/all-statutes-charges-filed-eeoc-fy-1997-fy-2020 [https://perma.cc/E6PE-PELJ]. 7,077 complaints that included hiring claims out of 72,675 total complaints filed with the EEOC in 2019. Promotion, recall, and reinstatement are categorized separately by EEOC. *Id.*

192. U.S. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, OFCCP BY THE NUMBER, FISCAL YEAR DATA TABLES, COMPLAINTS RECEIVED, BY EMPLOYMENT PRACTICE, https://www.dol.gov/agencies/ofccp/about/data/accomplishments [https://perma.cc/MK4H-JDVP] (figures are rounded). Promotion, assignment, and recall claims are categorized separately by the OFCCP.

193. 29 U.S.C. § 623 (2018). My attention here is on age discrimination, as there are some particular difficulties for plaintiffs looking to the ADEA for relief. *See supra* note 171. He might also be protected by state statutes, local statutes, or both. *See* Iris Hentze & Rebecca Tyus, *Protections in the Workplace: Equal Pay and Age Discrimination*, NAT'L CONF. OF STATES LEGISLATURES, (Aug.10, 2021), https://www.ncsl.org/research/labor-and-employment/equal-pay.aspx [https://perma.cc/77V8-2LWH].

194. 29 U.S.C. § 623(a)(1) (2018). Some discrimination statutes allow for a claim brought under a disparate impact theory, under which plaintiffs challenge a facially neutral employment practice (such as a standardized test) that has a disparate impact on a protected group. A disparate impact theory is not available in all discrimination cases. Ajunwa discusses differences across federal employment statutes, noting that Title VII and the ADA have disparate impact clauses in the statutes;

the statute has been interpreted to mean that "a plaintiff must prove . . . that age was the 'but-for' cause of the challenged employer['s adverse] decision."[195]

Alex might prove discrimination through direct evidence. The quintessential (exceedingly rare) example of direct evidence would be a management memorandum saying, "Don't hire Alex, he's too old."[196] More commonly, a plaintiff tries to prove age discrimination with indirect evidence.

Alex might establish a *prima facie* case of age discrimination for failure to hire by demonstrating that: (1) he is over forty years old; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) despite such qualifications, he was rejected; and (4) following such rejection, the position remained open and the employer continued to seek applicants with the plaintiff's qualifications, hired someone substantially younger, or he was rejected under circumstances giving rise to an inference of unlawful discrimination.[197]

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that GINA explicitly excludes actions based on a disparate impact theory; and that ADEA does not have a disparate impact clause in the statute, but has been interpreted to include one. Ifeoma Ajunwa, *Genetic Data and Civil Rights*, 51 HARV. C.R.-C.L. L. REV. 75, 93–96 (2016). "To state a *prima facie* case for disparate impact under the ADEA, a plaintiff must (1) identify a specific, facially neutral policy, and (2) proffer statistical evidence that the policy caused a significant age-based disparity." Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 69 (3d Cir. 2017). The burden of persuasion then shifts to the defendant to show that the challenged policy or practice was based on a reasonable factor other than age. Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008). But courts have held that job *applicants* may not bring disparate impact claims under ADEA. Kleber v. CareFusion Corp., 914 F.3d 480, 481 (7th Cir. 2019), *cert. denied*, 140 S. Ct. 306 (2019); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 961 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2292 (2017). Even when a disparate impact theory is available, such cases are a small percentage of discrimination cases. In a study of cases filed in federal courts from 1988 to 2003, only about four percent of cases were brought a disparate impact theory. BERREY, NELSON & NIELSEN, *supra* note 80, at 58.

195. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009). The Supreme Court in *Babb v. Wilkie*, 140 S. Ct. 1168, 1171 (2020), has articulated a different causation standard under the federal-sector provision of the ADEA, holding that personnel actions must "be untainted by any consideration of age." However, relief will be limited unless plaintiff can meet the "but-for" test. *Babb*, 140 S. Ct. at 1176.

196. *E.g.*, Soto-Feliciano v. Villa Cofresi Hotels, Inc., 779 F.3d 19, 25–26 (1st Cir. 2015) (finding direct evidence in comments by head of human resources that plaintiff was "too old" for the job).

197. A *prima facie* disparate treatment case might be articulated in various ways, depending on the case. *See, e.g.*, Oliver v. Joint Logistics Managers, Inc., 893 F.3d 408, 413 (7th Cir. 2018) ("To make out a *prima facie* case of discrimination in the failure-to-hire context, a plaintiff must establish that: (1) he was a member of a protected class; (2) he was qualified for and applied to an open position; (3) he was rejected; and (4) the employer filled the position by hiring someone outside the protected class, or left the position open."); Bryant v. Aiken Reg'l Med. Ctrs., Inc., 333 F.3d 536, 544–45 (4th Cir. 2003) (using framework in failure-to-hire case where plaintiff must show that (1) he is a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the position;

If the defendant articulates a nondiscriminatory reason for its decision, the plaintiff must demonstrate that the articulated reason is pretextual.[198] Evidence a court might consider here includes: plaintiff's superior qualifications, compared to the substantially younger person who actually was hired;[199] discriminatory treatment against other older workers;[200] statistics showing age disparities in the employer's workforce;[201] discriminatory comments;[202] wording of job postings that might suggest a preference for younger employees;[203] an employer's changing rationales, inconsistent application of policies, or shifting job criteria;[204] or other evidence that might give rise to an inference of discrimination.[205]

and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination.).

198. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981). Some evidence might do "double duty" in the sense that "evidence adduced in the process of presenting a prima facie case may serve the purpose of showing pretext." LARSON, *supra* note 168, at 135–57.

199. JOEL WM. FRIEDMAN, EMPLOYMENT DISCRIMINATION 7 (4th ed. 2021) ("[A] way in which plaintiffs seek to establish the pretextual nature of the defendant's explanation is by offering evidence that they are more qualified than the candidate that received the employment opportunity that was denied to the plaintiff.").

200. *See* Koster v. Trans World Airlines, Inc., 181 F.3d 24, 33–34 (1st Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999) (finding no abuse of discretion where trial court admitted testimony concerning treatment of other older workers); LARSON, *supra* note 169, at 135–63 ("[E]vidence of discrimination against other employees by supervisors not involved in the action against the plaintiff may, in certain circumstances, be relevant to show the employer's discriminatory animus.").

201. *See* MACK A. PLAYER & SANDRA F. SPERINO, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 109 (9th ed. 2021) ("Statistical data showing an unbalanced work force or rejection of a disproportionate percentage of [those in plaintiff's protected class] may suggest a general discriminatory animus."); LARSON, *supra* note 168, at 136–62 ("Plaintiffs have attempted to show pretext by offering statistical evidence, sometimes successfully, and sometimes not.") (footnotes omitted) (citing cases).

202. Autry v. Fort Bend Indep. Sch. Dist., 704 F.3d 344, 349 (5th Cir. 2013) ("[C]omments may be circumstantial evidence of discrimination if they reflect discriminatory animus and are uttered by a person who wields influence over the challenged employment action."); LARSON, *supra* note 168, at 135–64 (citing cases).

203. The wording of job postings and advertisements can suggest unlawful discrimination. 29 C.F.R. § 1625.4 (2007).

204. *See, e.g.*, Joll v. Valparaiso Cmty. Sch., 953 F.3d 923, 932–33 (7th Cir. 2020) (considering "fluctuating accounts" and "shifting criteria" in selection process). PLAYER & SPERINO, *supra* note 201, at 109–10 ("Pretext can be established by showing that the [defendant's] articulated reason has not been consistently applied in the past. . . . Articulation of a reason different from that given at the time of the [employment decision at issue] is also strong evidence that the articulated reason was an afterthought, a pretext to cover illegal motivation.").

205. Evidence that might support a finding of pretext, depending on the circumstances, might also include the employer's failure to follow its own guidelines, notation of age information, rejection of an applicant on sight. LARSON, *supra* note 168, at 135–69, 135–72 to –73 (citing cases). Other

Alex will need enough such evidence ("bits and pieces"[206]) if his claim for age discrimination will get any traction. How can he do that? He does not know who was hired, their ages, or their qualifications. There is no language in the job postings or application forms to suggest age discrimination (for example, a preference for recent graduates).[207]

He did notice when he went for his job interview that just about everyone there was in their twenties or thirties, but he does not have any specific information about them. Counsel might be better able to search legal databases for other litigation (not arbitration), reports of discrimination, or other publicly available data that might provide some useful information or leads. Maybe Alex hears through his networks that some employers are not hiring older workers, or he reads about discrimination claims against high-tech employers or surveys suggesting more age bias in the industry.[208]

He has also read about employers increasingly using data automated-decision systems (ADS),[209] such as machine learning processes where algorithms are used in recruitment and hiring.

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factors to suggest pretext might include an employer's failure to interview the rejected job candidate, *Kline v. Tenn. Valley Auth.,* 128 F.3d 337, 351 (6th Cir. 1997), and subjective hiring criteria, which might be used to mask or camouflage a discriminatory motive, *Hamilton v. Geithner,* 666 F.3d 1344, 1356 (D.C. Cir. 2012). *See also* Marnocha v. St. Vincent Hosp. & Health Care Ctr., Inc., 986 F.3d 711, 721 (7th Cir. 2021) (noting that "weaknesses, implausibilities, inconsistencies, or contradictions" in the employer's asserted reasons can be evidence of pretext).

206. See discussion supra § V.A.

207. U.S. EQUAL EMP. OPPORTUNITY COMM'N, SYSTEMIC ENFORCEMENT AT THE EEOC, https://www.eeoc.gov/systemic-enforcement-eeoc [https://perma.cc/6GC5-TLPR] (citing examples of practices that may involve systemic discrimination, including job ads using words such as "young," "energetic," "recent graduate.").

208. *See*, *e.g.*, C.W. Headley, *The industries least likely to hire workers over age 45 and the reasons why*, THE LADDERS (Aug. 27, 2020) https://www.theladders.com/career-advice/the-industries-least-likely-to-hire-workers-over-age-45-and-the-reasons-why [https://perma.cc/5E63-WA4Q] (discussing age-based stereotypes and identifying industries, including software and IT, most reluctant to hire older workers).

209. *Hearing on the Future of Work: Protecting Workers' Civil Rights in the Digital Age:*, (Feb. 5, 2020) (testimony of Ifeoma Ajunwa), https://docs.house.gov/meetings/ED/ED07/20200205/110438/HHRG-116-ED07-Wstate-AjunwaJDPhDI-20200205.pdf [https://perma.cc/VV32-XLAH] [hereinafter Ajunwa Testimony] ("According to a survey by Paychex in 2019, 72% of US Human Resource (HR) leaders reported that recruiting technology enabled them to reach high-quality candidates and 45% of them plan to increase financial investment in these technologies. Another survey conducted by Korn Ferry found that over 69% of recruiters surveyed asserted that automated hiring platforms enabled them to find more qualified candidates.") (footnotes omitted). Some of these methods are getting more media attention lately. *E.g.*, Julie Weed, *Résumé-Writing Tips to Help You Get Past the A.I.* Gatekeepers, N.Y. TIMES (Mar. 19, 2021), https://www.nytimes.com/2021/03/19/business/resume-filter-articial-intelligence.html [https://perma.cc/B4VM-64E7] ("[H]uman resources departments are increasingly

ADS starts with data. Employers, often with the help of a vendor, can now collect and analyze large quantities of personal and consumer information from a variety of sources to create profiles or dossiers of job applicants.[210] The data can be collected from the "digital footprints" we leave behind when we use social media, smart phones, fitness apps, navigation tools, when we use credit cards and store loyalty cards, and just about any time we use the internet. Such massive data can be scooped up and combined with public records (e.g., marriage and divorce records, property transfers, litigation) that are now more likely to be digitized and readily available.[211] Employers can now "mix and match" or customize the buffet of offerings by data vendors, which can then be used to sort, rank, and score job candidates.[212]

turning to artificial intelligence systems to pluck out the candidates deemed to be good fits."). A good working definition of "automated decision systems" is the following modification of the definition in the proposed Algorithmic Accountability Act of 2019): An automated decision system (ADS) is a "computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that makes a decision or facilitates human decision making . . . " that affects employees or job seekers. Algorithmic Accountability Act of 2019, H.R. 2231, 116th Congress §2 (2019). Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 871 (2020). Predictive analytical tools in the employment context are also known as workforce analytics, people analytics, or talent analytics. *People Analytics*, CORNERSTONE (Aug. 30, 2021), https://www.cornerstoneondemand.com/glossary/people-analytics/ [https://perma.cc/E4V8-VSN7].

210. Trindel Testimony, *supra* note 135.

211. *Id.*

212. As the EEOC heard at a 2016 meeting about the sources and uses of "big data" in the workplace, businesses can now combine their own in-house data with "public records, social media activity logs, sensors, geographic systems, internet browsing history, consumer data-tracking systems, mobile devices, and communications metadata systems. . . . [E]verything is data. Everything that we do and say can be coded, quantified and utilized for analytic purposes." *Id. See also* Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, UPTURN (Dec. 2018), https://www.upturn.org/reports/2018/hiring-algorithms/ [https://perma.cc/HP8D-3K3S] ("[E]mployers can use multiple recruitment tools, often from third party vendors, to manage their hiring activities. Many of these tools can integrate with each other, making it easy for employers to mix and match product behind the scenes.") (footnote omitted); Michal Kosinski, Assistant Professor Organizational Behavior Stanford Graduate School of Business, Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law, Testimony at the Meeting of the EEOC (Oct. 13, 2016) https://www.eeoc.gov/meetings/meeting-october-13-2016-big-data-workplace-examining-implications-equal-employment/kosinski [https://perma.cc/DG7L-KAX6]; Trindell Testimony, *supra* note 135 (testifying as to type and quantity of data available for use by employers); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 151 (2016) ("Scores of companies, from giants like Acxiom Corporation to a host of fly-by-night operations, buy information from retailers, advertisers, smartphone app makers, and companies that run sweepstakes or operate social networks in order to assemble a cornucopia of facts on every consumer in the country. They might note, for example, whether a consumer has diabetes, lives in a house with a smoker, drives an SUV, or owns a pair of collies (who may live on in the dossier long after their earthly departure). These companies also scrape all kinds of publicly available government data, including voting and arrest records and

A 2016 White House report notes various ways that such methods might discriminate. For example:

> [M]achine-learning algorithms can help determine what kinds of employees are likely to be successful by reviewing the past performance of existing employees or by analyzing the preferences of hiring managers as shown by their past decisions. But if those sources themselves contain historical biases, the scores may well replicate those same biases.[213]

While some argue that ADS is less biased than humans, others counter that ADS can discriminate in ways that are less visible, less traceable, with a veneer of mathematical legitimacy.[214] As two commentators put it: "In the Wild West of datafied employment, transparency is . . . rare. Most workers have scarcely an inkling that their data is being mined and exploited" by employers.[215] So,

housing sales. All of this goes into a consumer profile, which they sell."). Citron and Pasquale refer to the "'big data's' promiscuous mashup of various data sources to deny opportunities." Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 32–33 (2014). ADS can be used to recruit active job seekers and seek out passive job candidates, in which case Alex might never even see a job posting. The scenario where one does not see a job posting and so does not apply presents additional challenges for proving discrimination, as discussed in Pauline T. Kim & Sharion Scott, *Discrimination in Online Employment Recruiting*, 63 ST. LOUIS L.J. 93 (2018).

213. EXEC. OFF. OF THE PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS 13–15 (May 2016) (footnote omitted), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf [https://perma.cc/2XRP-6MH6]. KEARNS & ROTH, *supra* note 136, at 92, also discusses the "pernicious feedback loop that can amplify discrimination over time."

214. *See* Anjanette H. Raymond, Emma Arrington Stone Young & Scott J. Shackelford, *Building a Better HAL 9000: Algorithms, the Market, and the Need to Prevent the Engraining of Bias*, 15 NW. J. TECH. & INTEL. PROP. 215, 232 (2018) ("Invoking words like 'data' and 'algorithm' can provide a veneer of objectivity and social science that prevents the critical discussion and iterative improvement necessary to actually use them wisely."); Bogen & Rieke, *supra* note 212, at 47 ("Legal scholars have aptly noted that 'although algorithms offer the potential for avoiding or minimizing bias, the real question is how the biases they may introduce compare with the human biases they avoid.' Our research did not convince us that sufficient safeguards yet exist to ensure this balance will tip in favor of equity.") (footnote omitted). Others have discussed in far more technical detail the various ways that ADS might result in discrimination, and the difficulties of proving such discrimination. *E.g.*, Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671 (2020); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857 (2017); Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671 (2016).

215. Adler-Bell & Miller, *supra* note 135, at 3. In a study of technologies used to hire low-wage workers, researchers:

> [W]ere not able to see how each employer ultimately analyzed the data it gathered from job seekers. . . . [N]either applicants nor researchers have any way of knowing how employers are making decisions behind the scenes. . . . Employers rarely inform applicants about the purpose of selection procedures, their performance on pre-employment tests, or reasons why their application was rejected.

while it has always been difficult to prove discrimination in hiring, we now have the additional complexity and opacity of ADS, often characterized as a "black box."[216] And proving discrimination in this scenario will likely require expert testimony and a sophisticated litigation team, which can be prohibitively expensive for an unemployed lone-plaintiff.[217] Unsurprisingly, there has been little litigation challenging such selection tools.[218]

At this point, Alex is in the dark about why he did not get hired. And unless an attorney believes further investigation might yield some evidence, the firm will likely not take on the matter. Like Emma, Alex might go to the EEOC, and will likely run into similar obstacles.[219]

Rieke, Janardan, Hsu & Duarte, *Essential Work*, *supra* note 189, at 28, 43. There has been movement on the state level to regulate some of these practices. E.g., Illinois' Artificial Intelligence Video Interview Act requires, *inter alia*, that employers notify job candidates when artificial intelligence is used in video interviewing, provide an explanation of how the AI system works, and obtain the applicant's consent before the video interview. 820 ILL. COMP. STAT. 42 (2019).

216. *See, e.g.*, MANISH RAGHAVAN & SOLON BAROCAS, *Challenges for Mitigating Bias in Algorithmic Hiring*, BROOKINGS INST. (Dec 6, 2019) https://www.brookings.edu/research/challenges-for-mitigating-bias-in-algorithmic-hiring/ [https://perma.cc/F7ZW-ZY9M] ("[T]these algorithms (and the datasets used to build them) are typically proprietary and contain private, sensitive employee data. . . . [T]he industry rarely discloses details about its methods or the mechanisms by which it aims to achieve an unbiased assessment."); David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 706 (2017) ("Almost all legal scholarship references machine learning as a 'black box,' and many authors state something like, 'Even the programmers of an algorithm do not know how it makes its predictions.'") (footnotes omitted); FRANK PASQUALE, THE BLACK BOX SOCIETY 21, 35 (2015) (describing the fair, foul and creepy uses of data and ADS, which can be used "secretly to rank, rate, and evaluate persons, often to their detriment and often unfairly.").

217. *See* Bogen & Rieke, *supra* note 212, at 12 ("[M]any job[-]seekers may not realize they have been judged by a predictive technology, and even if they do, may not have sufficient access to the tool to describe its impact (or the resources to retain expert witnesses to do so) . . . ."); Citron & Pasquale, *supra* note 212, at 33 ("Opening up the black box scoring systems to individuals or neutral experts representing them is key to permitting them to challenge 'arbitrariness by algorithm.'").

218. *The Future of Work: Protecting Workers' Civil Rights in the Digital Age*, 18 (Feb. 5, 2020) (testimony of Peter Romer-Friedman), https://docs.house.gov/meetings/ED/ED07/20200205/110438/HHRG-116-ED07-Wstate-Romer-FriedmanJDP-20200205.pdf [https://perma.cc/PZZ4-P7ZT] [hereinafter Romer-Friedman testimony] (**"**Despite the large number of employers that have already engaged in digital discrimination, there have been very few lawsuits or legal actions filed—because most workers do not know what technologies employers have used to advertise, recruit, hire, fire, promote, or set compensation.").

219. Unlike a Title VII complainant, an ADEA complainant need not obtain a right-to-sue letter from the EEOC before filing in court. U.S. Equal Emp. Opportunity Comm'n, FILING A LAWSUIT, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/WL6S-ZNAE].

VI. RECENT TRANSPARENCY PROPOSALS

Noteworthy workplace transparency proposals (broadly defined), with varied aims and approaches, have mushroomed in recent years.

Some propose that data that is already reported to government agencies be more widely available. Berrey, Nelson, and Nielson note, for example, that making EEO-1 data public "would allow potential plaintiffs and their attorneys an opportunity to assess the likelihood that illegal discrimination is playing a role in the reward structures of employers."[220] Estlund points out that employers already gather and disclose some such data to government agencies.[221] She suggests "piggybacking on existing reporting requirements," making public more of what government already collects or what employers already gather.[222]

There are calls for government to collect more data about workplace demographics as well as earnings.[223]

In addition to EEO-1 and other reports (discussed above), covered employers were briefly required (for years 2017–2018) to prepare EEO-1 "Component 2" reports, to include employee aggregated pay data, broken down by gender, race, ethnicity, and job category.[224] Collection of pay data for those years was deemed complete (after a court battle), and the EEOC stated that does not intend to collect such pay data in the future.[225] Rather, the EEOC announced in July 2020 that it was funding a study to review the quality and utility of such data.[226] Some have called for the EEOC to reinstate the

220. BERREY, NELSON & NIELSEN, *supra* note 80, at 271.

221. Estlund, *Just the Facts, supra* note 11, at 396.

222. *Id.* at 396–97. Estlund writes that pay information, for example, reported only to government agencies "would not help employees themselves to detect pay discrimination." Estlund, *Extending the Case for Workplace Transparency*, *supra* note 11, at 786.

223. Berrey, Nelson, and Nielsen, also propose that the EEOC make more information available to employees about their employer's demographic composition and pay data, including earnings by race/ethnicity and gender, information beyond what is currently collected as part of EEO-1 reports. BERREY, NELSON & NIELSEN, *supra* note 80, at 272.

224. U.S. Equal Emp. Opportunity Comm'n, WHAT YOU SHOULD KNOW ABOUT EEOC'S PROPOSAL TO COLLECT PAY DATA, 2–3, https://www.eeoc.gov/wysk/what-you-should-know-about-eeocs-proposal-collect-pay-data [https://perma.cc/3R9C-BWK2].

225. Agency Information Collection, 85 Fed. Reg. 16340, 16341 (proposed Mar. 23, 2020).

226. U.S. Equal Emp. Opportunity Comm'n, *EEOC Announces Analysis of EEO-1 Component 2 Pay Data Collection* (July 16, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-analysis-eeo-1-component-2-pay-data-collection [https://perma.cc/PE9F-FAE5]. Bornstein details Component 2 reporting, and the litigation challenging the mandate. Bornstein, *supra* note 58, at 323–27.

Component 2 data collection.[227] In the meantime, some states have imposed pay data collection. California, for example, has enacted a statute that requires covered employers to collect and report the type of pay data required by the EEOC's now-mothballed Component 2 form.[228] Illinois passed legislation in 2021 that will require covered employers to provide EEO-1 data to the state, which will then make the reports available to the public.[229]

Some scholars have promoted other measures to require or encourage employers to disclose their pay data.[230] Gowri Ramachandran, for example, proposes a pay transparency defense to, or safe harbor from, claims of pay discrimination, if the employer can establish that it made salaries internally transparent, in an "easily accessible" form, and the plaintiff-employee "failed to voice objections to any suspected or alleged discrimination in a timely fashion."[231] Marianne DelPo Kulow proposes a mandatory wage disclosure requirement based on current public-employment disclosure rules.[232] Under her proposal, employers would be required to post annual pay data for each employee, with information about gender, age, and length of service.[233] The postings would be available to all employees and to government agencies. [234] Orly Lobel proposes that we "incentivize employers to self-assess, monitor, and actively take steps to close the pay gap."[235] Bradley Areheart suggests legislating economic incentives, such as tax inducements for employers that make pay data publicly available.[236]

Some are looking to experiences in other countries that require pay disclosures of various types. Iceland, for example, requires that employers with

227. *E.g.*, Jocelyn Frye, *Why Pay Data Matter in the Fight for Equal* Pay, CTR. FOR AM. PROGRESS (Mar. 2, 2020), https://www.americanprogress.org/issues/women/reports/2020/03/02/480920/pay-data-matter-fight-equal-pay/ [https://perma.cc/Q2HS-MFRS].

228. Government Code Section 12999 enacted in SB 973. California Pay Data Reporting, CAL. DEPT. OF FAIR EMP. AND HOUS., https://www.dfeh.ca.gov/paydatareporting/ [https://perma.cc/NF45-ZXU6]. Bornstein, *supra* note 58, at 321–22 (discussing the California law, and a measure being considered in New York).

229. Act of Mar. 23, 2021, Pub. Act 101-0656, 2021 Ill. Laws.

230. Alexander, *supra* note 169, at 181 n.15 (citing to numerous scholars who have "championed pay transparency rules, which would force employers to publicize their wage and salary schedules and prohibit bans on workers' discussions of pay").

231. Ramachandran, *supra* note 148, at 1073–74, 1077.

232. Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEG. 385, 428 (2013).

233. *Id.*

234. *Id.*

235. Lobel, *Knowledge Pays*, *supra* note 56, at 600–01.

236. Areheart, *supra* note 74, at 1983.

at least twenty-five employees to do a pay audit and certify that their compensation structures comply with government standards.[237] And the European Commission in March 2021 put forward a proposal that requires covered employers, *inter alia*: to give job applicants the right to information about their expected pay level, either in a job posting or prior the interview, without the applicant having to request it; make "easily accessible to its workers a description of the criteria used to determine pay levels and career progression for workers"; give workers the right to information upon request on "their individual pay level and the average pay levels, broken down by sex, for categories of workers doing the same work as them or work of equal value to theirs"; and report data on gender pay gaps to workers and their representatives, and make it publicly available.[238] It would also ban pay secrecy rules.[239]

The Paycheck Fairness Act was reintroduced to Congress in January 2021.[240] It would require more collection by the EEOC and OFCCP of compensation and other employment data according to the sex, race, and national origin, with aggregated data made publicly available.[241] It would permit class actions under the EPA, limit defenses to the EPA, provide greater remedies, and increase penalties for violations.[242] In addition, it would prohibit pay secrecy agreements and waivers, prohibit the use of prior salary in making hiring decisions, and enhance nonretaliation prohibitions to include retaliation for discussing pay.[243] It does not address the issue of MAAs or the use of NDAs in settlements of claims under the EPA.[244]

As discussed above, some states have recently passed anti-pay secrecy statutes, under which employers may not prohibit employees from talking with their coworkers about their compensation. Other states are considering similar measures of various types.[245]

237. Bornstein, *supra* note 58, at 316–17 (discussing Iceland's mandate); Lobel, *Knowledge Pays*, *supra* note 56, at 603–04 (discussing Iceland and other countries).

238. Proposal for a Directive of the European Parliament and of the Council (Mar. 4, 2021) 2021/0050, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0093 [https://perma.cc/DB56-8RSW].

239. *Id.*

240. Paycheck Fairness Act, H.R. 7, 117th Cong. (2021). Text of current version, history, and earlier versions available at https://www.govtrack.us/congress/bills/117/hr7 [https://perma.cc/7GDG-BK4Z].

241. *Id.* § 7.

242. *Id.* § 2.

243. *Id.*

244. *Id.*

245. *See* discussion *supra* § III.B. Tatiana Follett & Iris Hentze, *The Gender Pay Gap*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 12, 2021), https://www.ncsl.org/research/labor-and-

Some suggest requiring audits to detect discrimination in the use of ADS, with audits done by, disclosed to, or available to government agencies.[246] Others have voiced concerns with a reliance on auditing, a nascent field with a lack of standards or oversight.[247] Auditors, themselves, have reported being kept in the dark, relating situations where they were not given access to the necessary software code.[248] Many have noted the technical complexities of such auditing, how to "explain" what is inside the black box, the difficulties of developing standards and guidelines, and the reluctance of companies to open their algorithmic machinery to scrutiny.[249]

There have been several bills offered on the federal, state, and municipal levels to address the potential discriminatory effects of ADS, not necessarily

employment/the-gender-pay-gap.aspx [https://perma.cc/C2BT-GP34] (reviewing research on gender pay gap and state efforts to address it).

246. *See, e.g.*, Ifeoma Ajunwa, *An Auditing Imperative for Automated Hiring*, 34 HARV. J.L. & TECH., 621, 663–64, 667 (2021) (proposing mandatory auditing of hiring practices that use algorithms); Pauline T. Kim, *Auditing Algorithms for Discrimination*, 166 UNIV. PA. L. REV. 189, 202 (2017) ("Auditing is an essential strategy for detecting unintended bias and prompting the reexamination and revision of algorithms to reduce discriminatory effects."); Danielle Keats Citron, *Big Data Should Be Regulated by 'Technological Due Process',* N.Y. TIMES (July 29, 2016), https://www.nytimes.com/roomfordebate/2014/08/06/is-big-data-spreading-inequality/big-data-should-be-regulated-by-technological-due-process [https://perma.cc/GHC4-WGCK] ("The best way to ensure the fairness of scoring systems is through routine auditing by an expert agency.").

247. *See* Alfred Ng, *Can Auditing Eliminate Bias from Algorithms?,* THE MARKUP (Feb. 23, 2021), https://themarkup.org/ask-the-markup/2021/02/23/can-auditing-eliminate-bias-from-algorithms [https://perma.cc/5L5L-SGLP] (describing algorithmic auditing as "a pretty undefined field," where "there are no industry standards or regulations that hold the auditors or the companies that use them to account.").

248. *Id.* ("[B]ecause audit reports are also almost always bound by non-disclosure agreements, the companies can't compare each other's work. . . . Auditors have been in scenarios where they don't have access to the software's code and so risk violating computer access laws . . . ."). *See also* Ryan Calo, *Artificial Intelligence Policy: A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 430 (2017) ("Many AI systems in use or development today are proprietary, and owners of AI systems have inadequate incentives to open them up to scrutiny.").

249. *E.g.*, Christo Wilson, Avijit Ghosh, Shan Jiang, Alan Mislove, Lewis Baker, Janelle Szary, Kelly Trindel & Frida Polli, *Building and Auditing Fair Algorithms: A Case Study in Candidate Screening*, FACCT (Mar. 2021), https://cbw.sh/static/pdf/wilson-facct21.pdf [https://perma.cc/HPN8-HDPJ] ("Academics, activists, and regulators are increasingly urging companies to develop and deploy sociotechnical systems that are fair and unbiased. Achieving this goal, however, is complex . . . . To date, there are few examples of companies that have transparently undertaken [necessary] steps."); Ng, *supra* note 247 ("[A]ccording to multiple auditors, companies don't want the scrutiny or potential legal issues that [] scrutiny may raise . . . ."); Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 FORDHAM L. REV. 1085, 1089 (2018) ("Scholarly and policy debates about regulating a world controlled by algorithms have been mired in difficult questions about how to observe, access, audit, or understand those algorithms.").

limited to the workplace.[250] Some have been drafted with a focus on requiring companies that use ADS to evaluate their own systems.[251] The proposed federal Algorithmic Accountability Act of 2019 would have required specified commercial entities to conduct assessments of high-risk systems that involve personal information or make automated decisions.[252] The companies required to make such assessments would decide whether to publicize them.[253] The proposed federal Algorithmic Fairness Act of 2020 would have required covered entities to create an audit trail (to be made available to the Fair Trade Commission upon request), to notify consumers when they had been the subject of an algorithmic determination, and to give them an opportunity to correct data used in the determination.[254]

Proposed state legislation in Washington would establish guidelines for government procurement and the use of automated decision systems. The bill would also add a provision to the state's anti-discrimination statute, making it "an unfair practice for any automated decision system to discriminate" on the basis of a factor enumerated in the discrimination statute.[255]

Some have proposed that employers notify workers and disclose to government agencies the types of ADS they use to make employment decisions.[256]

The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national civil rights organizations, has issued a set of principles to

250. *See Legislation Related to Artificial Intelligence*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/telecommunications-and-information-technology/2020-legislation-related-to-artificial-intelligence.aspx [https://perma.cc/N3NG-H6XH] (tracking developments).

251. *Id.* at 2.

252. Algorithmic Accountability Act of 2019, H.R. 2231, 116th Cong. (2019). Text and Legislative History can be found at https://www.congress.gov/116/bills/hr2231/BILLS-116hr2231ih.pdf [https://perma.cc/M5G2-RMWC].

253. *Id.* § 3.

254. Algorithmic Fairness Act of 2020, S. 5052, 116th Cong. § 5 (2020). Text and Legislative History can be found at https://www.congress.gov/bill/116th-congress/senate-bill/5052/text [https://perma.cc/CNA3-RPTG].

255. S. 5116, 67th Leg., 2021 Session (Wash. 2021); *see* Lydia X. Z. Brown, *2021 State Legislative Sessions Off to a Slow Start on AI Oversight, Offer 3 Models for Auditing*, CTR. FOR DEMOCRACY & TECH. (Mar. 15, 2021) for a discussion of state legislative efforts to address accountability and transparency in government use of ADS.

256. *See, e.g.*, Romer-Friedman Testimony, *supra* note 218 (proposing that employers and digital platforms be required to publicly disclose information about job advertisements, demographics and geographical reach of people targeted; and that employers disclose uses, workings, effects of ADS to jobseekers, employees, and government regulators); Hirsch, *Future Work*, *supra* note 136, at 943–44 ("[P]rocedural protections would better ensure fair and accurate analyses, such as requiring employers to notify workers of the use of AI and providing workers the opportunity [to] correct any erroneous data.").

guide the use of hiring assessment technologies. Its recommendations include "meaningful" notification to job applicants about the use of hiring technologies and "reasonable and timely feedback" to applicants about their performance on a hiring assessment; regular audit of assessment tools and public disclosure of the methods and results of such audits; regulatory oversight that includes the authority to request information from organizations about the development and use of hiring assessments.[257]

A recent New York City proposal would require companies using automated employment-decision tools to disclose use of the technology.[258] Vendors of such software would be required to conduct a "bias audit" of their products each year and make the results available to job candidates and employees.[259] The bill would also require any person who uses automated employment assessment tools for hiring and other employment purposes to disclose to candidates, within thirty days, when such tools were used to assess their candidacy for employment, and the job qualifications or characteristics for which the tool was used to screen.[260]

Some commentators have supported empowering the EEOC to take a greater role in addressing the uses of ADS in the workplace.[261] Former EEOC Chair Jenny Yang, for example, has written that the "EEOC could be empowered to establish standards for [ADS] auditors."[262]

As discussed above, there has been something of a movement to limit NDAs.[263] Several states have now enacted restrictions on NDAs, although such measures vary widely. Some are under consideration.[264] Some have proposed

257. CIVIL RIGHTS PRINCIPLES FOR HIRING ASSESSMENT TECHNOLOGIES, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (July 2020), https://civilrights.org/resource/civil-rights-principles-for-hiring-assessment-technologies/ [https://perma.cc/EKZ2-8FKR].

258. New York, N.Y., City Council Int. 1894–2020 (2020), https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9&Options=Advanced&Search [https://perma.cc/4ZTJ-DMDQ].

259. *Id.*

260. *Id.*

261. *E.g.*, Rieke, Janardan, Hsu & Duarte, *supra* note 189, at 41–42 (urging the EEOC "to increase its use of Commissioner charges and directed investigations" and "encourag[ing] the EEOC to creatively and aggressively use its statutory research authority to help develop a more detailed picture of how large employers are using hiring technologies today. Longer term, Congress may need to grant the EEOC new powers to ensure that it can provide effective oversight.") (footnote omitted).

262. Yang Testimony, *supra* note 135.

263. *See* discussion *supra* § III.B.

264. Bornstein, *supra* note 58, at 342 ("A number of legal scholars have also proposed, and federal legislators have introduced, bills that would limit or bar nondisclosure agreements or confidential settlements that include sexual harassment claims or discrimination claims on the basis of any protected class.") (footnote omitted); Johnson, Sekaran, and Gombar, *supra* note 54 (tracking

alternatives to legislation, such as greater agency oversight and approval of settlements, and treating NDAs in cases of sexual misconduct as void against public policy.[265]

The Forced Arbitration Injustice Repeal Act, introduced in the House in February 2021, would invalidate all MAAs as to consumer, employment, antitrust, and civil rights disputes.[266] Protecting the Right to Organize Act of 2021, would bar class action waivers in arbitration agreements.[267] There have also been numerous attempts at the state level to curb the use of MAAs in the workplace, which have largely faltered on preemption grounds.[268]

Jane Flanagan and Terri Gerstein suggest a multi-prong approach to addressing problems with MAAs and other coercive contracts. They would require that arbitrators make regular disclosures about arbitrations they handle and that workplace arbitration complaints and results be provided to state attorneys general, "to create a record of cases and also to allow the state to step in and address patterns and practices of violations that may be obscured by arbitration's lack of transparency."[269] They would also require that employers give advance notice to workers—before they accept the position—any contractual terms that come with the job, and direct government agencies to collect data and issue reports on employment contracts to monitor "practices that may be curtailing workers' rights and mobility, and serve as the basis for future legislative proposals. At the very least, labor enforcement agencies should routinely ask for and collect copies of employment contracts when they are conducting wage and hour, discrimination, or other investigations of workplace violations."[270]

developments on state level); Ifeoma Ozoma, *An NDA Was Designed to Keep Me Quiet*, N.Y. TIMES (Apr. 13, 2021) https://www.nytimes.com/2021/04/13/opinion/nda-work-discrimination.html [https://perma.cc/5CGZ-C2F6] (supporting California bill to allow discrimination victims to speak, regardless of NDA or non-disparagement agreements).

265. *See* Bornstein, *supra* note 58, at 343–45 (outlining some of these proposals).

266. Forced Arbitration Injustice Repeal Act, H.R. 963, 117th Cong. (2021).

267. The PRO Act, is a broader reform measure that would also amend the NLRA to allow workers to bring a private right of action, require that employers post notice of rights under NLRA, expand the definition of "supervisor," and broaden the definition of joint employment). Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

268. *See* Johnson, Sekaran & Gombar, *supra* note 53; Juvan Bonni, Jonathan Ence, Lauren Smith & Jackson Tyler, *State Legislative Update*, 2020 J. DISP. RESOL. 221, 227–34 (tracking developments regarding state efforts, and the challenges to same).

269. Jane Flanagan & Terri Gerstein, *"Sign on the Dotted Line": How Coercive Employment Contracts Are Bringing Back the Lochner Era and What We Can Do About It*, 54 U.S.F. L. REV. 441, 469 (2020) (enumerating state efforts to curb MAAs).

270. *Id.* at 470–71.

On another front, Suzette Malveaux proposes "plausibility discovery," that is, "limited, targeted discovery made available to the parties at the pleading stage in response to a defendant's Rule 12(b)(6) motion to dismiss on the grounds that a plaintiffs claims are implausible."[271] Malveaux suggests that such early discovery would be appropriate "where there is informational asymmetry between the parties."[272]

VII. LOOKING AT TRANSPARENCY PROPOSALS FROM THE WORKER'S SEAT

Rather than offer a critique of each of these numerous, varied proposals, I suggest that as a starting point, we pay greater attention to the sightlines of those workers who cannot get information they need to spot, articulate, and prove violations of workplace protections.

Development and assessment of transparency proposals should consider (at least) the following questions: Is the (or a) goal to aid workers in recognizing and stating a violation of a substantive mandate (such as the discrimination laws or the EPA)?[273] If so:

- What does the worker need to know to recognize a potential claim under the particular substantive mandate? To assess the viability of a claim? To state a claim?
- How can a worker access that information? Is it timely? Is it comprehensible? Is the information readily available to employees and applicants? To the public? Or must the worker make a request for it from the employer? If the latter, how will signaling and retaliation concerns be addressed?
- If the information is not comprehensible by most workers, is there a space and opportunity for an intermediary (e.g., a worker center) to collect, distribute, and interpret relevant data?
- How visible and useful is the measure for those without affordable access to legal assistance?
- Will aggrieved workers be able to act collectively?
- Will confidentiality requirements, secrecy constraints, or employee monitoring limit or negate the benefits of the

271. Malveaux, supra note 185, at 630.

272. *Id.*; Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 108 (2010) (discussing how early discovery might work; authority for same; possible objections).

273. I am not suggesting this is the *only* worthwhile goal. Transparency measures might serve other purposes, for example along Estlund's other dimensions, "in aid of contract" or "in aid of reputational rewards and sanctions." Estlund, *Just the Facts*, *supra* note 11, at 369.

transparency proposal?

- Are there procedural impediments that need to be addressed?
- What additional measures might be necessary to address the concerns raised here?

To illustrate, assume passage of the Paycheck Fairness Act (PFA).[274] The PFA would require that employers provide compensation data (by sex, race, and national origin) to the EEOC (and if a covered federal contractor, the OFCCP), and aggregated data would be publicly available.[275] That might help workers understand pay practices by industry, but Emma would not be able to see specific data about her own employer. The PFA would prohibit employers from requiring pay secrecy as a condition of employment.[276] But how free will workers be to discuss pay if every move and breath they take is being monitored? The PFA would limit defenses to the EPA and provide greater remedies for violations.[277] But if Emma and coworkers are bound by NDAs, how will Emma learn whether others at her job have complained of similar violations? If they are bound by MAAs, how will Emma learn about other claims that might have gone to arbitration? How likely will she be to find counsel willing to take the matter to arbitration? The PFA removes barriers to class actions under the EPA,[278] but what if the MAA at Emma's workplace prohibits class or collective actions? So, while PFA might be a significant improvement to pay equity protections, it alone will not remove some important impediments to accessing information necessary to recognize and bring a claim.

Consider Alex's situation and the proposed New York City law on the sale of automated decision tools.[279] That law would require ADS vendors to audit their tools for bias.[280] It would also require that employers using ADS to hire (and for other employment purposes) to disclose to candidates within thirty days when such tools were used to assess their job candidacy.[281] Suppose Alex, who suspects age discrimination, finds out within the thirty days that a prospective employer uses an automated decision tool. Then what? Can he see the data? Does he know what to do with the information? How would he know

274. Paycheck Fairness Act, H.R. 7, 117th Cong. (2021). Text of current version, history, and earlier versions available at https://www.govtrack.us/congress/bills/117/hr7 [https://perma.cc/2HHQ-SP4Y].

275. *Id.* § 7.

276. *Id.* § 2.

277. *Id.*

278. *Id.*

279. New York, N.Y., City Council Int. 1894–2020 (2020).

280. *Id.*

281. *Id.*

if there was unlawful discrimination in the process? And how can he prove it? Must he do this as a lone-plaintiff, for example, if he is bound by an MAA with a class-action waiver? Can he afford to do so? Will he be able to learn of others who have breached the black box? Or have they been decided in private arbitration or resolved by way of a settlement that includes an NDA?

VIII. CONCLUSION

There has long been informational asymmetry between employers and workers. Now consider the many new ways to intensively monitor workers, the growing use of NDAs and other gag rules, MAAs, and the shrouded uses of technologies to hire and make other employment decisions. At the same time, contemporary work relationships and employment practices have left workers more isolated and less able to act collectively. The result is that workers are more in the dark than ever when it comes to much of an employer's decision-making.

Discussions of workplace transparency need to acknowledge and address these realities of today's workplace. My point here is not to endorse any particular disclosure scheme. Rather, I suggest that any proposals consider the view from the worker's perch. Transparency proposals need to consider not only disclosure mandates, but obstacles to a worker's sightline, and chokepoints to information flow.

Effective measures will need to be multi-pronged to address the problems outlined here, with some combination of disclosures, removal of barriers, and consideration of the person or entities doing the viewing. Otherwise, we will continue to put the burden of enforcement on workers, leaving them without the means to do so.