TO DEDUCT OR NOT TO DEDUCT: THAT IS THE QUESTION: THE IMPACT OF § 162(Q) OF THE TAX CUTS AND JOBS ACT IN TEXAS IN THE WAKE OF THE #METOO MOVEMENT

Comment

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I. #METOO: AN INTRODUCTION

"It may not even be possible to accurately assess the total damage caused by sexual harassment, because so many of the cases are settled privately and sexual harassment is still under-reported . . . ."[1]

Sexual harassment in the workplace is an ever-present problem that has been in the spotlight for the last few years in the wake of the #MeToo movement.[2] Approximately 17,700,000 women have reported sexual assaults since 2009.[3] However, not every victim comes forward and reports their allegations due to fear of their perpetrator, fear of losing their jobs, or fear of how society will view them as a victim of sexual harassment or sexual assault.[4]

Before the rise of the notable #MeToo hashtag, a woman named Tarana Burke founded the Me Too Movement in 2006 to help survivors of sexual violence—particularly those of color or those from low-income communities—start the journey to recovery and healing.[5] Over ten years later, Burke's hopes to spread awareness and support for her movement became a reality on October 15, 2017, when actress Alyssa Milano tweeted: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."[6] Twenty-four hours after Milano posted her tweet, close to 40,000 individuals had replied.[7] Since that empowering and eye-opening day, countless celebrities and everyday citizens have gained the courage to speak out against their perpetrators to ensure that they are held accountable for their actions and do not engage in this harmful behavior again.[8] Two of the

1. Kari Paul & Maria LaMagna, *The Damaging, Incalculable Price of Sexual Harassment*, MKT. WATCH (Jan. 9, 2018, 9:48 AM), https://www.marketwatch.com/story/as-harvey-weinstein-takes-a-leave-of-absence-heres-how-much-sexual-harassment-costs-companies-and-victims-2017-10-07 (quoting Maya Raghu, an "expert on workplace sexual harassment at the National Women's Law Center in Washington, D.C.").

2. *See* ME TOO, https://metoomvmt.org/ (last visited Feb. 27, 2020).

3. *Id.*

4. Paul & LaMagna, *supra* note 1.

5. *See* ME TOO, *supra* note 2.

6. Alyssa Milano (@Alyssa_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), https://twitter.com/Alyssa_Milano/status/919659438700670976/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F10%2F16%2Ftechnology%2Fmetoo-twitter-facebook.html.

7. *See* Heidi Stevens, *#MeToo Campaign Proves Scope of Sexual Harassment, Flaw in Mayim Bialik's Op-Ed*, CHI. TRIB. (Oct. 16, 2017, 11:15 AM), http://www.chicagotribune.com/lifestyles/stevens/ct-life-stevens-monday-me-too-mayim-bialik-1016-story.html.

8. *See id.*

prominent stories featured in the media were those of United States Gymnastics star McKayla Maroney and former assistant to Harvey Weinstein, Zelda Perkins.[9] McKayla Maroney is a gold and silver Olympic medalist who was part of the 2012 USA Gymnastics "Fierce Five."[10] However, Maroney's success came with the price of enduring Dr. Larry Nassar's continued abuse since she was just thirteen years old.[11] Maroney spoke out about her abuse in October 2017 and "credited the #MeToo movement for giving her the courage to speak out about the abuse."[12] She was one of more than 260 athletes that openly accused Nassar of abuse.[13] The athletes' strength and courage to stand up and speak out about the abuse ultimately ended in Nassar's well-deserved prison sentence.[14]

Maroney not only dealt with Nassar's prolonged abuse but she also faced the pressure of USA Gymnastics attempting to keep her accusations quiet.[15] USA Gymnastics, with its power as a national governing body for gymnastics, offered Maroney a $1.25 million settlement in exchange for her silence regarding Nassar's abuse.[16] To ensure her silence and maintain its reputation, USA Gymnastics attached a nondisclosure agreement to Maroney's settlement.[17] Because the abuse left her emotionally exhausted and in need of money to pay for psychological treatment, Maroney signed the settlement agreement.[18]

Zelda Perkins, a former assistant to Harvey Weinstein, also entered the spotlight because she courageously stood up against Weinstein—her abuser.[19] Perkins worked for Weinstein more than twenty years ago when she moved out to New York from Manchester with her boyfriend.[20] She first crossed paths with Weinstein when a friend who was a producer at Miramax, where Weinstein was an executive, offered her a job at the studio.[21] Sadly,

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9. Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html.

10. Eric Levenson, *McKayla Maroney Questions if Gymnastics Was Worth It in First Speech Since Nassar Abuse Case*, CNN (Apr. 17, 2018, 4:26 PM), https://www.cnn.com/2018/04/17/us/mckayla-maroney-nassar-speech/index.html.

11. *Id.*

12. A.J. Perez, *McKayla Maroney Makes First Public Comments on Larry Nassar: 'I Should Never Have Met Him'*, USA TODAY (Apr. 17, 2018, 8:30 PM), https://www.usatoday.com/story/sports/olympics/2018/04/17/mckayla-maroney-makes-first-public-comments-larry-nassar-sexual-abuse/524197002/.

13. *Id.*

14. *See id.*

15. *See* Tom Schad, *Lawsuit Claims USA Gymnastics Paid to Quiet Olympic Gold Medalist McKayla Maroney*, USA TODAY (Dec. 20, 2017, 7:57 PM), https://www.usatoday.com/story/sports/olympics/2017/12/20/lawsuit-usa-gymnastics-paid-quiet-olympic-gold-medalist-mckayla-maroney/969843001/.

16. *Id.*

17. *Id.*

18. *See id.*

19. Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589.

20. *Id.*

21. *Id.*

this job offer led to a prolonged period of sexual harassment while she worked at Miramax.[22] Unfortunately, the harassment led to a similar outcome as Maroney's: Powerful individuals aiming to silence an emotionally exhausted and terrified employee.[23] Miramax's attorneys, some of Hollywood's most influential individuals, convinced Perkins to sign a settlement agreement of £25,000 in exchange for her silence about her allegations against Weinstein.[24] This nondisclosure clause forced Perkins to remain silent for nineteen years.[25]

Maroney and Perkins are just two of the countless individuals whose employers forced them to stay silent regarding sexual harassment and sexual abuse allegations through the use of nondisclosure agreements.[26] Both women—with unbelievable bravery and strength—broke their nondisclosure agreements regardless of the financial penalties they could face, and spoke out against their abusers to spread awareness for this nationwide problem and to hold their perpetrators accountable.[27]

On December 22, 2017, Congress passed § 162(q) of the Tax Cuts and Jobs Act in direct response to Maroney's and Perkins's stories and the stories of many others.[28] Congress created § 162(q) as just one way to put a stop to the use of nondisclosure agreements when addressing sexual harassment and sexual abuse allegations in the workplace.[29] Section 162(q) states: "No deduction shall be allowed under this chapter for—(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment."[30] Therefore, § 162(q) discourages businesses from using nondisclosures in sexual harassment and sexual abuse settlement agreements because if included, the businesses will not be able to deduct the settlement payments as "ordinary and necessary" expenses as they did before.[31]

Although this provision is the first step in ending the practice of using nondisclosures in sexual harassment settlements, there are a number of problems with it.[32] Notably, the provision contains significantly vague language, does not discuss what will happen to nondisclosure agreements

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *See* Schad, *supra* note 15; Garrahan, *supra* note 19.
27. *See* Schad, *supra* note 15; Garrahan, *supra* note 19.
28. *New Bill Includes Novel "Harvey Weinstein" Provision to Prevent Sexual Harassment*, REED SMITH (Jan. 16, 2018), https://www.reedsmith.com/en/perspectives/2018/01/new-tax-bill-includes-novel-harvey-weinstein-provision.
29. *See id.*
30. Tax Cuts & Jobs Act § 13307, 26 U.S.C. § 162(q) (2018).
31. *See id.*; *Deducting Business Expenses*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/deducting-business-expenses (last visited Feb. 4, 2020).
32. *See* § 162(q).

executed before § 162(q)'s enactment, and does not take into account the fact that some victims prefer to sign a nondisclosure to ensure the details of their daunting experience remain confidential.[33]

Even though § 162(q) is relatively new, both Washington and California have already passed laws barring sexual harassment settlements that contain nondisclosure agreements.[34] Ideally, with Washington and California as examples, all fifty states—especially Texas—will adopt similar provisions to end the practice of silencing sexual harassment victims.

This Comment discusses how § 162(q) will affect the way Texas businesses handle sexual harassment claims in the workplace and provides recommendations for how Texas should expand on the goals of § 162(q) by passing a statute of its own. Part II analyzes the history of discrimination based on sex and sexual harassment in the workplace, the legislation that Congress and the Texas Legislature passed in response to the discrimination and harassment, and the case law interpreting the legislation that responded to these issues.[35] It also expands on why Congress created § 162(q) and discusses Congress's intent behind the passage of that subsection.[36] Part III recommends various approaches as to how the State of Texas can take § 162(q)'s provision and further expand on its goal by creating legislation of its own to end the practice of using nondisclosure agreements in sexual harassment settlements.[37] Finally, Part IV concludes by recognizing the substantial step that Congress took toward ending the practice of using nondisclosures in sexual harassment settlement agreements by passing § 162(q) and emphasizing the importance of Texas's participation in the attempt to eradicate this practice altogether.[38]

II. ON THE BASIS OF SEX: THE BACKGROUND OF SEXUAL HARASSMENT IN THE WORKPLACE

A. "Because of Sex": The Passage of Title VII of the Civil Rights Act of 1964

In 1964, Congress signed Title VII of the Civil Rights Act into law, which prohibits employment discrimination based on race, color, religion,

33. *See infra* Part III.A (discussing the problems with § 162(q)).

34. *Washington Bars Sexual Harassment Nondisclosure Agreements*, FISHER PHILLIPS (Mar. 22, 2018), https://www.fisherphillips.com/resources-alerts-washington-bars-sexual-harassment-nondisclosure-agreements.

35. *See infra* Part II (discussing the background of discrimination based on sex in the United States and Texas).

36. *See infra* Part II (discussing § 162(q)'s background and purpose).

37. *See infra* Part III (discussing how Texas can expand on § 162(q)'s provisions when creating its own legislation).

38. *See infra* Part IV (discussing the impact of § 162(q)).

sex, and national origin.[39] Although many individuals learn about this Act in a high school history class, most are unaware that discrimination based on sex was not initially included in the bill when it was considered by Congress.[40]

The Act's initial focus was to prevent racial discrimination that was overwhelmingly prevalent in the late 1950s and early 1960s.[41] However, during a debate in the House of Representatives on February 8, 1964, a myriad of Representatives pushed for an amendment to the bill that included discrimination based on sex.[42] The Representatives debated for over ten hours discussing whether adding this form of discrimination to the bill was appropriate.[43] One particular Representative, Mrs. Green of Oregon, powerfully stated: "Any woman who wants to have a career . . . who wants to work, I feel cannot possibly reach maturity without being very keenly and very painfully made aware of all the discrimination placed against her because of her sex."[44] Mrs. Green's candid accounts of the harsh realities of being a woman in the workplace, as well as many other men and women's statements supporting the amendment, ultimately resulted in the addition of "because of sex" to the bill.[45] Finally, on July 2, 1964, just five months after "because of sex" was added to Title VII, President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law.[46]

In 1990, the Equal Employment Opportunity Commission (EEOC) created guidelines for enforcing Title VII, and in the guidelines the EEOC explained that two forms of harassment were considered unlawful discrimination based on sex under Title VII.[47] The first form occurs when enduring the harmful or offensive conduct becomes a condition of the employment—known as "[q]uid pro quo harassment."[48] Essentially, rejection of this type of conduct could have the victim fired from their job.[49] The second form occurs when the unwelcomed conduct is so severe that it creates a workplace environment that a reasonable person would believe is hostile or abusive—known as "hostile work environment" harassment.[50]

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39. Civil Rights Act of 1964 tit. VII, § 703(a)–(c), 42 U.S.C. § 2000e-2 (2018).

40. 110 CONG. REC. 2548–2616 (1964).

41. *Civil Rights Act of 1964*, HISTORY (Feb. 10, 2010), https://www.history.com/topics/black-history/civil-rights-act.

42. 110 CONG. REC. 2548–2616 (1964).

43. *Id.*

44. *Id.* at 2581 (statement of Rep. Green).

45. *See* Civil Rights Act of 1964 tit. VII, § 703(a)–(c), 42 U.S.C. § 2000e-2 (2018); 110 CONG. REC. 2548, 2581 (1964).

46. *See* § 2000e-2; *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIB. CONGRESS, http://www.loc.gov/exhibits/civil-rights-act/civil-rights-act-of-1964.html (last visited Feb. 28, 2020).

47. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, N-915-050, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990).

48. *Id.*

49. *See id.*

50. *Id.*

These two forms of harassment are actionable under Title VII, and as a result, both the federal and state judicial systems resolve a countless number of these cases.[51]

B. The Supreme Court's Interpretation of the Because of Sex Clause in Title VII

The United States Supreme Court has interpreted Title VII in a variety of cases. In 1986, the Supreme Court granted certiorari in *Meritor Savings Bank, FSB v. Vinson*.[52] In this case, a female bank employee, Mechelle Vinson, brought a sexual harassment suit against her bank supervisor under Title VII.[53] Vinson worked at the bank branch for four years, and during that period, her supervisor demanded sexual favors both during and after business hours, fondled her while at the bank, and even suggested that they go to a motel to engage in sexual relations.[54] Vinson first refused these advances, but out of what she described as fear of losing her job, she hesitantly agreed to her supervisor's persistent advances.[55] After four years of enduring her supervisor's sexual advances, Vinson notified the bank branch that she was taking sick leave for an indefinite period of time.[56] Eventually, the bank dismissed her for her extended use of that sick leave.[57]

Vinson filed suit against her supervisor and the bank, claiming that she had been incessantly subjected to sexual harassment while working at Meritor Savings Bank in violation of Title VII.[58] After years of litigation and a grant of certiorari, the Supreme Court heard Vinson's case. The respondents—the bank and the bank supervisor—contended that in order for the discrimination against Vinson to fall under Title VII there must be a "tangible loss" of "an economic character," not just a loss of psychological character.[59] The Court ultimately rejected this argument stating that the EEOC issued guidelines specifying that sexual harassment is a form of discrimination based on sex, which is prohibited by Title VII.[60]

The Court explained that these guidelines describe the kinds of workplace actions that are considered sexual harassment, and consequently, actionable under Title VII.[61] These actions included "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of

51. *See id.*
52. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986).
53. *Id.*
54. *Id.* at 60.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 64 (quoting Brief for Petitioner at 30–31, 34, *Vinson*, 477 U.S. 57 (No. 84–1979)).
60. *Id.* at 65.
61. *Id.*

a sexual nature."[62] The Court found that the bank supervisor's conduct fell within the scope of the actions described as sexual harassment in Title VII and that his actions unreasonably interfered with Vinson's work environment and work performance; thus, creating a hostile work environment.[63]

The bank and the bank supervisor also argued that the bank supervisor's actions did not constitute sexual harassment because Vinson complied with some of the sexual advances.[64] The Court quickly rejected the argument stating that the fact that the victim complied with a request to engage in sexual relations and that she was not forced to participate in the sexual conduct are *not* defenses to a sexual harassment claim brought under Title VII.[65] The question is whether the sexual advances were unwelcome, not whether the response to the sexual advances was voluntary.[66]

Additionally, the Court created the standard used in current cases for determining whether conduct is actionable as hostile work environment sexual harassment.[67] The Court explained that for conduct to create a hostile work environment, the behavior must be considered both an objectively hostile environment—one a reasonable person would find hostile—and a subjectively hostile environment—one the victim finds hostile.[68]

As a result of those findings, the Court held that a claim of hostile-work-environment sexual harassment is, in fact, a form of sex discrimination actionable under Title VII.[69] This landmark case was a significant feat in the fight to hold perpetrators accountable for sexual harassment by establishing that a victim may make an actionable claim against the perpetrator under Title VII as a form of sex discrimination.[70]

In 1993, the United States Supreme Court decided another critical case involving an issue of sexual harassment in the workplace and took another substantial step in punishing those responsible for the harassment.[71] In *Harris v. Forklift Systems, Inc.*, Teresa Harris worked as a manager at Forklift Systems, Inc. and was regularly harassed by the company's president during her two-year period as an employee.[72] The president would berate her by saying comments such as: "'You're a woman, what do you know' and 'We need a man as the rental manager."[73] After two years of enduring the

62. *Id.* (alteration in original) (quoting 29 C.F.R. § 1604.11(a) (1985)).
63. *Id.* (citing § 1604.11(a)(3)).
64. *Id.* at 68.
65. *Id.*
66. *Id.*
67. *See id.* at 67.
68. *Id.*
69. *Id.* at 73.
70. *See id.* at 59–73.
71. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 19 (1993).
72. *Id.*
73. *Id.*

president's remarks, Harris sued Forklift asserting that the president's conduct created an abusive work environment according to Title VII.[74]

Once the case reached the Supreme Court, the Court had to decide whether conduct had to "seriously affect an employee's psychological well-being" to be considered actionable as an abusive work environment under Title VII.[75] In its analysis, the Court used the standard established in *Meritor* to decide whether the conduct created a hostile work environment.[76] The Court reasoned that as long as the victim perceived the environment—both objectively and subjectively—as an abusive work environment, Title VII would not require that the conduct create a psychological injury.[77] Therefore, the Court held that to be actionable under Title VII as an abusive or hostile work environment, the conduct need not seriously affect an employee's psychological well-being or lead the employee to suffer an injury.[78]

Finally, in 1998, the Supreme Court reviewed a Fifth Circuit case that would ultimately expand the definition of the "because of . . . sex" clause in Title VII.[79] In *Oncale v. Sundowner Offshore Services, Inc.*, a male employee named Oncale brought a Title VII action against a former employer and his male supervisors and co-workers.[80] Oncale claimed that while working at Sundowner Offshore Services, his co-workers forced him to engage in "sex-related . . . actions [while] in the presence of the rest of the crew," and they also threatened to rape him.[81] As a result, Oncale filed suit against Sundowner Offshore Services.[82]

"[T]he District Court held that Oncale, [as] a male, had no Title VII cause of action for harassment by male co-workers. The Fifth Circuit affirmed."[83] The Supreme Court granted certiorari and had to decide whether Title VII's prohibition against discrimination based on sex extended to situations in which the harassers and the victims were of the same sex.[84] The Court stated in the 1983 case of *Newport News Shipbuilding & Dry Dock Co. v. EEOC* that Title VII's prohibition of discrimination because of sex protects both men and women.[85] The Court also explained that in the context of racial discrimination in the workplace, another category of discrimination barred by Title VII, the Court already rejected the idea that an employer would not

74. *Id.*
75. *Id.* at 20.
76. *Id.* at 21–22 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).
77. *Id.* at 22.
78. *Id.* at 22–23.
79. *See* Civil Rights Act of 1964 tit. VII, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2018); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998).
80. *Oncale*, 523 U.S. at 75.
81. *Id.* at 77.
82. *Id.*
83. *Id.* at 75.
84. *Id.* at 76.
85. *Id.* at 78; *see* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

discriminate against other members of the same race.[86] By analogizing the previous two cases to the Oncale's case, the Court ultimately held that "discrimination consisting of same-sex sexual harassment [was in fact] actionable under Title VII."[87] This landmark decision illustrated that discrimination because of sex is not limited to just women, but can also be expanded to include men and possibly those who identify with another gender or prefer not to identify with any particular gender.[88]

C. A Harsh Reality: The History of Sexual Harassment in the Workplace in Texas

1. Texas Commission on Human Rights Act: The Legislature's Rendition of Title VII

The attempt to end sexual harassment in the workplace is also apparent in Texas history and case law. On June 26, 1983, the Texas Legislature passed the Texas Commission on Human Rights Act (TCHRA) prohibiting employment discrimination based on "race, color, disability, religion, sex, national origin, [and] age."[89] The TCHRA authorized the Texas Commission on Human Rights to enforce the TCHRA's provisions and handle complaints of discrimination made to the commission itself or passed down by the United States EEOC.[90] The TCHRA also established the following four steps to prove sexual harassment based on a hostile work environment, which is still the test used in Texas today: "(1) [a person] was subjected to unwelcome sexual harassment, (2) [a person] was harassed because of [their] sex, (3) the harassment was so severe or pervasive as to alter the conditions of the employment and create a hostile work environment, and (4) [there is] some basis for holding the employer liable."[91]

The TCHRA was also intended to carry out Title VII's policies in the State of Texas.[92] "In 2003, the commission was abolished as an independent agency;" however, the agency's duties remained in effect and "were transferred to the Texas Workforce Commission, Civil Rights Division . . . [in] 2004."[93] "The original commission was composed of six members

86. *Oncale*, 523 U.S. at 78; *see* Castaneda v. Partida, 430 U.S. 482 (1977).

87. *Oncale*, 523 U.S. at 82.

88. *See id.*

89. TEX. LAB. CODE ANN. § 21.051.

90. Richard Allen Burns, *Texas Commission on Human Rights*, TEX. ST. HIST. ASS'N (June 15, 2010), https://tshaonline.org/handbook/online/articles/mdtnb.

91. Alamo Heights Indep. Sch. Dist. v. Clark, 544 S.W.3d 755, 771 (Tex. 2018) (citing Nischan v. Stratosphere Quality, L.L.C., 865 F.3d 922, 928 (7th Cir. 2017)).

92. *See* LAB. § 21.051; *see also* Wal-Mart Stores, Inc. v. Davis, 979 S.W.2d 30, 34 (Tex. App.—Austin 1998, pet. denied) (discussing how Texas courts frequently rely on the guidance of federal court decisions when analyzing Title VII claims).

93. *Texas Workforce Commission: An Inventory of Commission on Human Rights Records at the Texas State Archives 1983–2009*, TEX. ST. LIBR. & ARCHIVES COMMISSION, https://legacy.lib.utexas.edu

appointed by the [G]overnor," and they held the position "for overlapping six-year terms."[94] "One member represented industry, one member represented labor, and four members represented the general public."[95] After the commission's duties were transferred to the Texas Workforce Commission, one additional member was appointed to represent the general public.[96]

Provisions of the Texas Labor Code were also created to address sexual harassment claims in the workplace.[97] For example, § 21.056 discusses how aiding and abetting a discriminatory practice in the workplace is considered an unlawful employment practice.[98] Additionally, § 21.055 makes it unlawful for an employer to "retaliate[]or discriminate[] against a person who . . . . (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing."[99] Finally, § 21.2585 discusses how there could be an award of compensatory and punitive damages for a victim of an unlawful employment practice such as sexual harassment.[100] These are but a few of the countless statutes that the Texas Legislature has added to the Labor Code in an attempt to put an end to sexual harassment in the workplace.[101]

2. Texas Courts' Perception of the Because of Sex Clause

Texas courts have also interpreted the TCHRA and the various employment discrimination statutes established by the legislature.[102] In 1998, the Third Court of Appeals in Austin, Texas heard a notable case in which Wendy Davis, an employee of Wal-Mart, endured lewd and disrespectful comments from her store manager during her seven-year term working at the Marble Falls store.[103] On multiple occasions, the store manager told Davis he wanted her to wear a short skirt and bend over so that he would have something to look at.[104] He would also inappropriately touch her by rubbing her arms, and on a more serious occasion, he even grabbed her by the upperpart of her thighs and straddled her.[105] After years of enduring this type

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/taro/tslac/30123/30123-P.html (last visited Feb. 24, 2020).

94. *Id.*
95. *Id.*
96. *See id.*
97. *See* LAB. § 21.
98. *Id.* § 21.056.
99. *Id.* § 21.055.
100. *Id.* § 21.2585.
101. *See Id.* § 21.
102. *See, e.g.*, Wal-Mart Stores, Inc. v. Davis, 979 S.W.2d 30, 34–35 (Tex. App.—Austin 1998, pet. denied) (discussing how workplace sexual harassment claims were established under controlling law).
103. *Id.* at 33–34.
104. *Id.* at 34.
105. *Id.*

of behavior, Davis filed a complaint with the regional personnel manager; after an investigation, the store manager was transferred to another store.[106] Despite the transfer, Davis still filed suit against Wal-Mart, and the district court found in favor of Davis on her sexual harassment claim.[107]

At the appellate level, the Third Court of Appeals analyzed whether Davis's hostile-work-environment sexual harassment claim was actionable against Wal-Mart for the store manager's actions directed toward Davis.[108] In its analysis, the court expanded on the four-step method established by the TCHRA to prove that Davis's claim was actionable.[109] The fourth prong, stating that there must be some basis for holding the employer liable, was at issue in the case.[110] For her claim to succeed, Davis had to prove "that Wal-Mart knew or should have known of the harassment and failed to take prompt remedial action . . . to [stop] the harassment."[111] The court found in favor of Davis on this prong because evidence showed the store manager's conduct was not limited to Davis, and his behaviors were regularly out in the open at the store.[112] Therefore, the court held that the upper-level Wal-Mart executives who were frequently in the Marble Falls store knew or should have known about the store manager's behaviors, and Wal-Mart failed to take the proper remedial measures to end the sexual harassment of Davis.[113]

Wal-Mart Stores, Inc. v. Davis was a significant step forward by the Texas courts towards ending the practice of sexual harassment in the workplace and holding perpetrators accountable; however, not every case had the same positive outcome.[114] In 2018, the Supreme Court of Texas analyzed a sexual harassment case under the TCHRA and Title VII in *Alamo Heights Independent School District v. Clark*.[115] Catherine Clark was a coach and physical education teacher in the girl's athletic department at Alamo Heights Junior School.[116] In her two years working at Alamo Heights, she claimed to have faced verbal harassment from another female employee.[117] This harassment included comments discussing the size of her breasts and stating that she would be thinking of Clark the next time she was engaged in sexual intercourse.[118] She even made some of these comments in the presence of the

106. *Id.*
107. *Id.* at 33.
108. *Id.*
109. *See id.* at 34–35 (citing TEX. LAB. CODE ANN. § 21.051).
110. *Id.* at 35.
111. *Id.*
112. *Id.* at 40.
113. *Id.* at 39–40.
114. *See, e.g.*, Alamo Heights Indep. Sch. Dist. v. Clark, 544 S.W.3d 755, 800 (Tex. 2018) (holding that the victim failed to prove that she was discriminated against because of her sex).
115. *Id.* at 770.
116. *Id.* at 764.
117. *Id.* at 765.
118. *Id.*

middle school children.[119] Clark subsequently filed a formal complaint to the school district, and although the school district's investigation resulted in finding no merit for Clark's complaints, the school district transferred the harasser in hopes to restore order at the school.[120] Unfortunately, as a result of the harassment, Clark's coaching and teaching performance suffered and the school ultimately terminated her.[121]

Clark sued the school district asserting sexual harassment and retaliation claims under TCHRA.[122] Once the case reached the Supreme Court of Texas, the Court had to analyze whether Clark's claim was actionable under TCHRA and Title VII.[123] The court also used the four-step method for analyzing a sexual harassment claim under the TCHRA and found that Clark's action failed because it did not meet the second prong: the victim was not harassed because of her sex.[124] The court found that there was no evidence establishing that the harasser's comments were motivated by sexual desires to support the because of sex prong.[125] As to the retaliation claim, the Court found that Clark's internal complaints regarding the harasser's conduct did not put the school district on notice that Clark was complaining about harassment based on gender—a prerequisite for the teacher's retaliation claim to fall under the TCHRA as a protected activity.[126] Therefore, the Court dismissed Clark's claims.[127]

Since the establishment of Title VII, the United States Supreme Court and various Texas courts have taken substantial steps to put an end to sexual harassment in the workplace and hold perpetrators accountable.[128] Although not every case has been successful, as illustrated by *Alamo Heights*, the judicial system has still made progress towards putting an end to this practice.[129]

D. No More Deductions: Section 162(q) of the Tax Cuts and Jobs Act

After decades of documented instances of sexual harassment in the workplace and in direct response to the rise of the #MeToo movement, Congress attempted to stop this overwhelmingly prevalent practice by passing § 162(q) of the Tax Cuts and Jobs Act on December 22, 2017.[130] The

119. *Id.*
120. *Id.* at 769.
121. *Id.*
122. *Id.*
123. *Id.* at 765.
124. *Id.* at 774; *see* TEX. LAB. CODE ANN. § 21.051.
125. *See Clark*, 544 S.W.3d at 774–76.
126. *Id.* at 786; *see* LAB. § 21.055.
127. *See Clark*, 544 S.W.3d at 800.
128. Civil Rights Act of 1964 tit. VII, § 703(a)–(c), 42 U.S.C. § 2000e-2 (2018).
129. *See Clark*, 544 S.W.3d at 755.
130. *See New Bill Includes Novel "Harvey Weinstein" Provision to Prevent Sexual Harassment*, *supra* note 28.

Tax Cuts and Jobs Act, as a whole, is an enormous amendment to the Internal Revenue Code aimed at reducing tax rates, and modifying policies and deductions for both individuals and businesses.[131] Section 162(q) is merely one provision out of a 182-page Act; however, its impact could make an unbelievable difference to countless individuals.[132]

As noted in the introduction of this Comment, § 162(q) states: "No deduction shall be allowed under this chapter for—(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such settlement or payment."[133] Therefore, the Act explicitly discourages the practice of using nondisclosures in settlement agreements related to sexual harassment claims in the workplace by preventing businesses from deducting these expenses as ordinary and necessary expenses—a common practice companies engaged in prior to the passage of § 162(q)—if they do decide to use a nondisclosure under these circumstances.[134]

To be deductible, a business expense must be both ordinary and necessary.[135] An ordinary expense is one that is common and acceptable in a trade or business, and a necessary expense is one that is helpful and appropriate for a trade or business.[136] Therefore, before the passage of § 162(q), businesses were able to deem the settlement agreements with nondisclosures attached as ordinary and necessary expenses that fell within the scope of everyday business practices, and as a result, these monetary settlements were tax deductible.[137] Essentially, harassment victims were forced to remain silent about their claims while businesses wrote off the monetary settlement given to the victim-employee as nothing more than a mere ordinary and necessary business expense.[138] For decades, companies were able to control settlement negotiations and keep them confidential without grabbing the media's attention, at essentially no cost; meanwhile, the victim-employees were restricted from speaking about any circumstances surrounding their horrifying experiences.[139]

Gretchen Carlson, a former Fox News reporter, has been very vocal about her position on sexual harassment in the workplace after her own experience at Fox News with Bill O'Reilly.[140] In a December 2017 article,

131. *See id.*
132. Tax Cuts & Jobs Act § 13307, 26 U.S.C. § 162(q) (2018).
133. *Id.*
134. *Id.*; *Deducting Business Expenses*, *supra* note 31.
135. *Deducting Business Expenses*, *supra* note 31.
136. *Id.*
137. *See id.*
138. *See id.*
139. *See* Gretchen Carlson, *Gretchen Carlson: Sexual Harassment Reckoning Has Been a Long Time Coming*, VARIETY (Dec. 5, 2017, 7:30 AM), https://variety.com/2017/tv/news/gretchen-carlson-sexual-harassment-guest-column-1202630527/.
140. *Id.*

she powerfully explained that the culture of concealment and denial is slowly coming to an end and that ending the practice of using nondisclosure agreements for discrimination and harassment claims is crucial.[141]

Just three weeks after Carlson discussed the importance of ending the use of nondisclosure agreements in sexual harassment settlements,[142] Congress finally took a stand against this egregious practice, and by passing § 162(q), Congress attempted to find a way to hold both the perpetrators and the companies accountable for their actions.[143] The House of Representatives Conference Report 115-466 explained that the § 162(q) provision would be added in the section of the Internal Revenue Code that discusses exceptions to deductions for ordinary and necessary expenses paid or incurred in a trade or business practice.[144] Therefore, a monetary settlement agreement for a sexual harassment claim with a nondisclosure agreement attached is now considered an exception to the general rule that a company's ordinary and necessary expenses are tax deductible.[145] A business that now uses a nondisclosure in those types of settlement agreements will face a substantial monetary loss because the generally large pay-offs, specifically in the case of high-profile individuals, will now be taxed.[146]

Since the passage of § 162(q), the provision has been coined the "Harvey Weinstein" provision.[147] The provision targets nondisclosure agreements in sexual harassment cases, as these agreements are ultimately used to silence harassment victims for the sake of a company's reputation and enable perpetrators to continue their behavior.[148] Although nondisclosure agreements are frequently used by companies in a variety of circumstances,[149] they cannot be used in sexual harassment settlements without a price.[150]

Section 162(q) has been in effect for over one year, yet only a handful of states have expanded on the provision and passed laws to further bar the use of nondisclosures in settlement agreements for sexual harassment

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141. *Id.*

142. *Id.*

143. *See New Bill Includes Novel "Harvey Weinstein" Provision to Prevent Sexual Harassment*, *supra* note 28.

144. H.R. REP. NO. 115-466, at 431 (2017) (Conf. Rep.).

145. *See id.*

146. *See id.* McKayla Maroney's settlement agreement with a nondisclosure from USA Gymnastics was $1.25 million, which would have had a substantial financial impact on the organization if it was unable to write off the settlement amount as tax deductible. Schad, *supra* note 15.

147. *New Bill Includes Novel "Harvey Weinstein" Provision to Prevent Sexual Harassment*, *supra* note 28.

148. *See id.*

149. *See* Tom James of Dall., Inc. v. Cobb, 109 S.W.3d 877, 888 (Tex. App.—Dallas 2003, no pet.) (determining the enforceability of a nondisclosure agreement for trade secrets).

150. Tax Cuts & Jobs Act § 13307, 26 U.S.C. § 162(q) (2018).

claims.[151] In 2018, the State of Washington passed two pieces of legislation prohibiting sexual harassment nondisclosure agreements in response to the #MeToo movement and the passage of § 162(q).[152] The first—Senate Bill 5996, which took effect June 7, 2018—states that a settlement agreement with a nondisclosure made in response to sexual harassment allegations will be considered void and unenforceable.[153] The second—Senate Bill 6471, which took effect January 1, 2019—describes how Washington will develop model policies and practices to keep workplaces safe from sexual harassment.[154]

Additionally, on January 3, 2018, the California Legislature introduced Senate Bill 820, which would expand on California's current law that bars nondisclosures in a settlement agreement for specific sexual offenses.[155] Senate Bill 820 would also limit the ability of a court or the litigants to include a nondisclosure in a settlement agreement for claims of sexual assault, sexual harassment, or discrimination based on sex.[156] On September 30, 2018, the California Legislature passed the bill.[157] So far, Washington and California are two of the few states that have taken § 162(q) and expanded on its provisions by establishing a state law.[158] Following these states' guidance, the Texas Legislature should enact similar legislation in the near future to continue the nationwide trend of eradicating this practice altogether.

III. A NEW BEGINNING: WHAT DOES § 162(Q) MEAN FOR TEXAS EMPLOYERS?

A. Apparent Problems with § 162(q)

Section 162(q) will undoubtedly have an impact on Texas employers because if they execute a monetary settlement agreement with a nondisclosure attached regarding a sexual harassment claim, they will not be

151. Michelle R. Smith, *Some States Place Limits on Secret Harassment Settlements*, AP NEWS (Aug. 27, 2018), https://apnews.com/448968e898554d128c3247e41f7d8d91/Some-states-place-limits-on-secret-harassment-settlements.

152. *Washington Bars Sexual Harassment Nondisclosure Agreements*, *supra* note 34.

153. *See id.*

154. *See id.*

155. Sandra R. Brown, *The New Section 162(q) of the 2017 Tax Cuts & Jobs Act: The Price of Confidentiality in Sexual Harassment Cases, #NoDeduction*, HOCHMAN SALKIN TOSCHER PEREZ P.C. (May 9, 2018), https://www.taxlitigator.com/the-new-section-162q-of-the-2017-tax-cuts-jobs-act-the-price-of-confidentiality-in-sexual-harassment-cases-nodeduction-by-sandra-r-brown/.

156. *See id.*

157. Anthony Zaller, *New Employment Bills Signed by Governor Brown*, CAL. EMP. L. REP. (Oct. 1, 2018), https://www.californiaemploymentlawreport.com/2018/10/new-employment-bill-signed-governor-brown/.

158. *See id.*; Brown, *supra* note 155.

able to deduct the so-called "hush money" from their expenses.[159] The Texas Legislature, however, has not yet enacted similar legislation to carry out the intent of the provision and will have to manage some of the inevitable problems that come with the application of § 162(q).[160] First, the provision's language is extremely broad in that it does not define the terms "sexual harassment," "sexual abuse," or "related to."[161] This creates a potential application issue in the case of a nondisclosure agreement that does not settle sexual harassment claims but includes sexual harassment as one of the waivers of claims in the agreement.[162] Does this mean that the IRS will preclude any settlement agreement with a nondisclosure that contains the term "sexual harassment" or "related to" sexual harassment from being deducted?[163] Or does this mean that the settlement agreement with a nondisclosure must be the settlement of a sexual harassment or abuse claim for the provision to apply?[164] Another potential issue with the vague language of the statute is related to the other expenses a company might endure in response to an employee's sexual harassment claim.[165] The statute clearly expresses that the preclusion of a deduction relates to the sexual harassment settlement money itself and the attorney's fees; but what about the fees that a company incurs by hiring a private investigator to look into the situation?[166] What about costs the company expends for psychological or outpatient help for the victim—are those tax deductible?[167]

The various problems with the vague language of § 162(q) bring about the horrifying reality that eventually, large corporations could get their elite financial and legal personnel to find loopholes in the statute and find ways to attach nondisclosures to these types of sexual harassment settlement agreements without falling within the scope of the statute.[168] This is a likely consequence of the vague statutory language.[169]

Second, the statute does not address what will happen to the nondisclosure agreements related to sexual harassment settlements that were in force before the passage of § 162(q).[170] This is a major problem that should

159. Paul S. Drizner & Michael D. Fleischer, *Sexual Harassment Legal Settlements: What Employers Need to Know About the New Tax Act*, SEYFARTH SHAW: EMP. L. LOOKOUT (Feb. 6, 2018), https://www.laborandemploymentlawcounsel.com/tag/section-162q/; *see Deducting Business Expenses*, *supra* note 31.

160. *See* Drizner & Fleischer, *supra* note 159.

161. SoRelle Brown & Michael Hepburn, *Section 162(q) Raises Questions About Deductibility of Employment Settlements*, JDSUPRA (Dec. 27, 2017), https://www.jdsupra.com/legalnews/section-162-q-raises-questions-about-85821/.

162. *Id.*

163. *Id.*

164. *Id.*

165. *See* Drizner & Fleischer, *supra* note 159.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See* Brown, *supra* note 155.

be addressed because although the provision attempts to prevent the silencing of individuals about their claims, it does nothing to aid women like Zelda Perkins who suffered in silence for nineteen years.[171] Surprisingly, this is one particular problem that could be solved by following the example of Harvey Weinstein.[172] In March 2018, Weinstein Company Holdings, LLC announced that it would be releasing from their nondisclosure agreements all the victims of and witnesses to the sexual misconduct of Mr. Weinstein.[173] This monumental decision benefitted countless individuals who were forced to remain silent about their claims and it will hopefully serve as an example to other companies—with people still trapped under these agreements—to follow in Weinstein Company Holdings's footsteps and free the victims from their nondisclosures.[174]

The last and most important issue regarding the implementation of § 162(q) is that the victim may value confidentiality more than the company.[175] Although it seems as if sexual harassment victims should be able to speak freely about their claims, many individuals may wish to remain silent because they are ashamed of these encounters and want them to be kept private.[176] Additionally, some victims may actually benefit from keeping these claims—and the ensuing publicity—private because the publication of these claims may make it more difficult for them to find another job.[177] There may even be cases where the company knows that the victim-employee desires confidentiality more than the company does, and the company could use this against the victim and reduce their monetary settlement by the cost of adding the nondisclosure agreement—yet another example of a company's power over one individual.[178] These problems are but a few that Texas must address when deciding how to implement the provisions of § 162(q).

B. WWTD: What Would Texas Do? Recommendations for the State of Texas in Implementing a Statute that Expands on § 162(q)'s Provisions

Texas should use states like Washington and California as examples, and it should pass legislation that goes beyond the precedent described in § 162(q)—causing a settlement agreement involving a sexual harassment claim that includes a nondisclosure to be considered automatically null and void unless the victim-employee chooses to include one.[179] Although

171. *See* Garrahan, *supra* note 19.
172. *See* Brown, *supra* note 155.
173. *See id.*
174. *See id.*
175. *See* Drizner & Fleischer, *supra* note 159.
176. *See* Paul & LaMagna, *supra* note 1.
177. Drizner & Fleischer, *supra* note 159.
178. *See id.*
179. *See Washington Bars Sexual Harassment Nondisclosure Agreements*, *supra* note 34; Brown, *supra* note 155.

§ 162(q) does punish a business for attaching a nondisclosure to these types of settlement agreements by slapping it on the wrist and not allowing it to write the monetary settlement off as an ordinary and necessary business expense, it ultimately does not stop it from taking the financial loss and adding the nondisclosure anyway.[180] Section 162(q) also has a number of problems—introduced in the subsection above—that need to be addressed in Texas's statute because these problems leave critical questions unanswered.[181] With states like Washington and California as examples, Texas can take § 162(q)'s provisions and expand on its goals to hold perpetrators accountable and allow the victim-employees to have the freedom to control the settlement negotiations following their claims.[182]

1. Include an Unconscionability Provision

By passing a statute similar to Washington's or California's, Texas could protect those being abused, mistreated, or wronged, and those who would ordinarily be forced to choose between two bad decisions: take the settlement money and keep quiet about their allegations, or refuse the settlement money which could have a substantial impact on their lives.[183] Such a statute gives a business no choice in the matter and completely prohibits the use of a nondisclosure unless the victim-employee decides it is in their best interest to include one.[184] Otherwise, the entire settlement agreement would be considered automatically unenforceable.[185] This strict approach is the solution that is desperately needed to solve this nationwide problem.

Typically in Texas, a contract—in this case a settlement agreement—is considered unenforceable if it is contrary to public policy or deemed to be unconscionable at the time it was formed.[186] In general, "unconscionability" describes a contract that is unfair because of the unequal bargaining power between the parties or its inherent one-sidedness.[187] The determination of whether a contract is contrary to public policy or unconscionable are questions of law, and therefore, a trial court has no discretion to determine this matter.[188]

The unequal bargaining power that is frequently considered to be unconscionable commonly occurs when one party has no choice but to accept

180. *See* H.R. REP. NO. 115-466, at 431 (2017) (Conf. Rep.).
181. *See supra* Part III.A (discussing § 162(q)'s vague language).
182. *See* Tax Cuts & Jobs Act § 13307, 26 U.S.C. § 162(q) (2018).
183. *See* Schad, *supra* note 15.
184. *See Washington Bars Sexual Harassment Nondisclosure Agreements*, *supra* note 34.
185. *See id.*
186. *See* TEX. BUS. & COM. CODE ANN. § 2.302.
187. Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc., 997 S.W.2d 803, 815 (Tex. App.—Dallas 1999, no pet.) (explaining the idea of unconscionability).
188. Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 562 (Tex. 2006).

an agreement: A take-it-or-leave-it type of offer.[189] These types of offers are frequently used in the workplace between an employer and employee due to the disparity in their bargaining power.[190] The National Labor Relations Act (NLRA) has been in place for over eighty years and it has attempted to overcome the unequal bargaining power between employers and employees.[191] However, the problem is still apparent from the large number of individuals forced to remain silent about their sexual harassment accusations through the nondisclosure agreements their companies compelled them to sign by threatening their jobs.[192] Ideally, with the passage of a statute that expands on § 162(q), Texas would make these types of agreements between a powerful company and a vulnerable employee unconscionable by definition and thus unenforceable at the moment of their creation.[193] However, if the employee decides that they do want a nondisclosure attached to the settlement agreement to keep their harrowing —and often humiliating—experience confidential, the unconscionability provision would be inapplicable.[194] The employee—as the less powerful party and victim in the matter—should have the power to decide if a nondisclosure is used.[195]

This unconscionability provision should also include language emphasizing that *all* sexual harassment settlement agreements—both past and future—with a nondisclosure included will be considered null and void in Texas if the employee wishes.[196] This language is imperative because it addresses one of the significant issues with § 162(q): the vague language that does not explain what will happen to the nondisclosure agreements executed before December 22, 2017.[197] The creation of such a provision will free the hundreds—and maybe even thousands—of victims in Texas still bound to silence by a nondisclosure agreement and allow them to speak out either about their experience or against their perpetrators.[198]

189. *See* Allright, Inc. v. Elledge, 515 S.W.2d 266, 267 (Tex. 1974).

190. Julius G. Getman, *The NLRB: What Went Wrong and Should We Try to Fix It?*, 64 EMORY L.J. 1495 (2015).

191. National Labor Relations Act § 1, 29 U.S.C. § 151 (2018).

192. *See* Paul & LaMagna, *supra* note 1.

193. *See* 29 U.S.C. § 151; *Walton*, 206 S.W.3d at 562.

194. *See infra* Part III.B.6 (discussing the victim's choices in a sexual harassment settlement negotiation).

195. *See infra* Part III.B.6 (discussing the importance of allowing the victim to have control over their settlement negotiation).

196. *See* Brown, *supra* note 155.

197. *See id.*

198. *See id.*

2. Administer Mandatory Sexual Harassment Training to Every Business

In addition to Texas's provision regarding the unconscionability of a sexual harassment settlement with a nondisclosure attached, the statute should also include other provisions that ensure its goals of ending the use of nondisclosures in sexual harassment settlements and lowering the overwhelming number of sexual harassment claims in the workplace are achieved.[199]

First, Texas should require all businesses to engage in mandatory sexual harassment training, similar to California's requirement.[200] Although Texas requires all employees of state agencies to partake in mandatory sexual harassment training, the state should extend this practice to any new employees of a business to inform them of the type of environment that they will be working in—one that does not condone or tolerate sexual harassment.[201] The training should include information about ways to prevent sexual harassment, illustrate the remedies available to those who experience sexual harassment, and ensure that those who sexually harass any other employee will immediately be suspended or terminated.[202] Requiring this type of training in all Texas businesses will make a considerable impact by showing employees that sexual harassment will not be tolerated in their work environment.[203]

3. Enforce Strict Liability for Employers

Second, Texas's statute should include a provision stating that an employer will be held strictly liable for any sexual harassment regardless of whether the employer knew about the conduct.[204] This proposed provision differs from the precedent established in the Northern District of Texas, which held that an employer will be liable for sexual harassment only if an employee can show that their employer knew or should have known of the employee's sexual harassment.[205] This proposed provision will hold the employers accountable for any act of sexual harassment that occurs in the workplace.[206] It will also encourage business owners to put procedures in place to prevent these acts before they happen, so that they can avoid liability if an act occurs.[207] It would also encourage employers to have better

199. *See* Hoover Slovacek L.L.P. v. Walton, 206 S.W.3d 557, 562 (Tex. 2006).

200. *See* Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. F. 121, 131 (2018).

201. *See* TEX. LAB. CODE ANN. § 21.010; Mizrahi, *supra* note 200, at 131.

202. *See* Mizrahi, *supra* note 200, at 131.

203. *See id.*

204. *See id.* at 129.

205. Colbert v. Ga.-Pac. Corp., 995 F. Supp. 697, 702 (N.D. Tex. 1998).

206. *See* Mizrahi, *supra* note 200, at 129.

207. *See id.*

communication with their employees to ensure they tell the employer when they think a fellow employee may be sexually harassing another.[208] Finally, this provision should include a section that not only provides for liability against the employer but also individual liability against the perpetrator.[209] Such language would ensure that the perpetrator actually faced legal consequences for their actions, instead of just a slap on the wrist, and would also allow the victim to receive an adequate amount of damages by suing the employer as well.[210]

4. Establish a Separate Cause of Action for Failure to Prevent Sexual Harassment

Additionally, Texas's statute should include specific language explaining that failure to prevent sexual harassment is a separate and distinct cause of action from the sexual harassment claim itself.[211] Although a Texas appellate court held that an employer will be liable for sexual harassment if its actions are not reasonably calculated to stop the harassment, the proposed wording in this statute will take the court's holding a step further.[212] It would make the employers not only liable for the sexual harassment claim itself but also for failing to prevent the sexual harassment from occurring and continuing.[213] This language would hold employers to a higher standard in preventing sexual harassment at their workplaces and likely push them to nip this problem in the bud once it came to their attention to avoid liability for two potential causes of action.[214] Such a provision would provide an incentive for employers to respond quickly and efficiently to sexual harassment claims.[215] It would also incentivize employers to uncover important details about the incident such as what other employees knew about the harassment and what steps could be taken to prevent the situation from happening again.[216]

5. Eliminate Mandatory Arbitration Clauses in Relation to Sexual Harassment Claims

Furthermore, Texas's statute should include a provision that eliminates arbitration clauses in employment agreements for sexual harassment

208. *See id.*
209. *See id.*
210. *See id.*
211. *See id.*
212. *See* Wal-Mart Stores, Inc. v. Davis, 979 S.W.2d 30, 37 (Tex. App.—Austin 1998, pet. denied).
213. *See id.*; Mizrahi, *supra* note 200, at 129.
214. *See* Mizrahi, *supra* note 200, at 129.
215. *See id.*
216. *See id.*

claims.[217] A majority of employment contracts include mandatory arbitration clauses which prevents an employee from taking legal action against their employer for a grievance.[218] Instead, the employer and employee must resolve their issues through arbitration, a form of alternative dispute resolution.[219] Some employees do not even know that these clauses are included in their employment contracts because many times they are hidden within the fine print of a lengthy contract.[220] Although this seems like an effective way to resolve issues within the workplace, mandatory arbitration clauses are used—similar to nondisclosure agreements—to keep the problem behind closed doors and address these issues without public attention.[221] Employers include these clauses in their employment contracts because they enable the employer to have the power to control the situation when an employee files a grievance against the business.[222] For example, many mandatory arbitration clauses allow the company to select and hire the arbitrator; therefore, the arbitrator is essentially working for the company.[223] Arbitration can substantially lower the amount of damages an employee receives from their grievances rather than if the employee decided to file a lawsuit against his or her employer.[224] One study noted "that arbitration claimants receive only about 20 percent of the damages that they would have received in court."[225] Ultimately, mandatory arbitration is a way for employers to, yet again, maintain control over an employee's actions.[226]

In February 2018, the state attorneys general in all fifty states, the District of Columbia, and the United States territories wrote a letter to congressional leadership seeking the elimination of arbitration clauses in settlement agreements for sexual harassment claims.[227] They hoped that this type of legislative action would allow a sexual harassment victim the right to access the court system to pursue justice, instead of secretly resolving the problem through private arbitration.[228] The attorneys general objected to the culture of silence that not only protects the perpetrators but also prevents other employees from learning about the sexual harassment claims.[229] The

217. *See* Antone Melton-Meaux, *Sex Harassment Settlements: A New Scarlet Letter for Employers*, 75 BENCH & B. MINN. 18, 19 (2018).

218. *See* Jean Murray, *Mandatory Arbitration Clauses in Business Agreements*, BALANCE SMALL BUS., https://www.thebalancesmb.com/mandatory-arbitration-clauses-in-business-agreements-397425 (last updated May 30, 2019).

219. *See id.*

220. *See id.*

221. *Arbitration*, NAT'L ASS'N OF CONSUMER ADVOCS., https://www.consumeradvocates.org/for-consumers/arbitration (last visited Feb. 4, 2020).

222. *See id.*

223. Murray, *supra* note 219.

224. *See id.*

225. *See id.* (emphasis omitted).

226. *See id.*

227. *See* Melton-Meaux, *supra* note 217.

228. Letter from Nat'l Ass'n of Attorneys General, to Cong. Leadership (Feb. 12, 2018).

229. *See id.*

letter also discussed the introduction of the Ending Forced Arbitration of Sexual Harassment Act of 2017 in the Senate, which would prohibit the enforcement of an arbitration clause for claims based on sex under Title VII.[230] Unfortunately, the Act still has not passed.[231] Texas's statute desperately needs a provision that eliminates mandatory arbitration clauses in settlement agreements for sexual harassment claims to allow the victim-employee to pursue any legal measures they wish—instead of being forced to engage in private arbitration—and further the idea of transparency and accountability in the workplace.[232]

6. Give the Victim the Freedom of Choice

Likewise, Texas's statute should include language similar to that passed by the New York Legislature in 2018.[233] New York's law strictly prohibits nondisclosure agreements involving sexual harassment settlements, similar to Washington's and California's laws.[234] However, the most notable aspect of New York's law is that the prohibition of nondisclosure agreements involving sexual harassment claims is at the discretion of the victim-employee.[235] If the employee makes a specific request for the settlement to be confidential, then a nondisclosure agreement may be included in the settlement proceedings.[236] The employee has a twenty-one-day review period to decide whether to rescind this settlement agreement with a nondisclosure attached.[237] Texas's statute should include a provision similar to New York's because it allows the victim-employee to have the upper-hand in the settlement proceeding and allows them to decide whether a nondisclosure agreement should be attached.[238] After being harassed in a place where they are supposed to feel safe—their workplace—it is only fair that the victim-employee decide how to resolve this unfortunate situation.[239] Therefore, it is crucial that Texas's statute includes a provision to enable the victim-employee to decide the result of their settlement negotiations—with a nondisclosure or without—and to give the victim-employee the freedom of choice rather than having their employer choose for them.[240]

Texas's statute should also include a provision to clarify the language within § 162(q) if a victim-employee does, in fact, decide to include a

230. *See id.*; S. 2203, 115th Cong. (2017).
231. *See* S. 2203.
232. *See* Melton-Meaux, *supra* note 217.
233. S.B. S7507-C, 2017–18 Leg., 202nd Sess. (N.Y. 2018).
234. *See id.*
235. *See id.*
236. *See id.*
237. *See id.*
238. *See id.*; Melton-Meaux, *supra* note 217, at 19.
239. *See* Melton-Meaux, *supra* note 217, at 19.
240. *See id.*

nondisclosure to their settlement agreement.[241] First, the statute needs to include definitions of the terms "sexual harassment" and "sexual abuse" to fill in the gaps in § 162(q)'s language.[242] The definitions should clarify that the provision applies only to settlement agreements of sexual harassment or sexual abuse claims by an employee against an employer.[243] Second, the statute needs to include language explaining that *any* expenses the company undertakes as a result of the claims are not tax deductible if a nondisclosure is used.[244] Therefore, expenses such as private investigator fees, psychologist fees for the employee, and any other fees, cannot be deducted if related to the particular sexual harassment claim.[245]

The addition of these provisions will not only resolve § 162(q)'s vague language issues but will also give victim-employees the freedom of choice to include a nondisclosure in their settlement agreement if they desire.[246]

7. Hold Every Employer Accountable Regardless of the Business's Size

Finally, Texas's statute should apply to *all* employers and not just those of a certain size or type of business.[247] Title VII only applies to employers with fifteen or more employees and does not protect partnerships, sole proprietorships, unpaid interns, or volunteers.[248] In 2018, there were 2.6 million small businesses and 4.7 million small business employees in Texas.[249] As a result, all of the individuals working in one of the 2.6 million small businesses in Texas that have less than fifteen employees are not protected by Title VII, and therefore, are not protected from discrimination based on sex.[250] Over the years, California amended its Fair Employment and Housing Act (FEHA), which protects individuals from various forms of discrimination including discrimination based on sex, to omit any minimum employee requirement for the protection against discrimination.[251] This amendment provided protection for more than 15% of California's workforce—who work for small employers—from discrimination based on sex by FEHA.[252] If Texas creates a similar statute with a broad scope eliminating the minimum employee requirement, it would have an enormous impact by protecting those 4.7 million small business employees, giving them

241. *See* Brown & Hepburn, *supra* note 161.
242. *See id.*
243. *See id.*
244. *See* Drizner & Fleischer, *supra* note 159.
245. *See id.*
246. *See* Brown & Hepburn, *supra* note 161.
247. *See* Civil Rights Act of 1964 tit. VII, § 703(a)–(c), 42 U.S.C. § 2000e-2 (2018).
248. *Id.*
249. *2018 Small Business Profile*, U.S. SMALL BUS. ADMIN. OFF. ADVOC., https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-TX.pdf (last visited Mar. 4, 2020).
250. *See* 42 U.S.C. § 2000e-2; *2018 Small Business Profile*, *supra* note 249.
251. *See* Mizrahi, *supra* note 200, at 127.
252. *See id.* at 128.

the protection that they deserve from sexual harassment and discrimination based on sex.[253]

With the addition of these various provisions in a proposed statute, the State of Texas could become an example for all fifty states by creating a movement towards accountability and transparency in the workplace. This effort could bring an end to sexual harassment in the workplace, hold perpetrators accountable, and stop victims from being silenced from speaking out about their experiences.[254]

IV. CONCLUSION

Section 162(q) of the Tax Cuts and Jobs Act was the first step Congress made towards ending the norm of silencing the victims of sexual harassment in the workplace through the use of nondisclosures in settlement agreements.[255] This step towards a culture of transparency and accountability could not have been accomplished without the bravery of the hundreds of women who spoke out against their perpetrators—many of whom broke their nondisclosure agreements—sparking the notable #MeToo movement.[256] In the words of Harvey Weinstein's former assistant Zelda Perkins:

> Unless somebody [breaks a nondisclosure agreement] there won't be a debate about how egregious these agreements are and the amount of duress that victims are put under. My entire world fell in because I thought the law was there to protect those who abided by it. I discovered that it had nothing to do with right and wrong and everything to do with money and power.[257]

Although § 162(q) was a substantial step towards ending this practice, Texas must pass its own legislation that takes § 162(q)'s goal of ending the use of nondisclosures in sexual harassment settlement agreements and expands on it by explicitly prohibiting these agreements if the victim chooses.[258] Even though there is still a long way to go in the eradication of this practice, thankfully, there is currently a powerful movement towards accountability, empowerment, and change.

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253. *See* 42 U.S.C. § 2000e-2; *2018 Small Business Profile*, *supra* note 249.

254. *See supra* notes 89–129, 233–51 and accompanying text (explaining how proposed statutory changes can effectively prevent future sexual crimes in the workplace, increase perpetrator accountability, and empower victims).

255. *See* Tax Cuts & Jobs Act § 13307, 26 U.S.C. § 162(q) (2018).

256. *See supra* Part I (discussing the stories of women who spoke out against their harassers).

257. *See* Garrahan, *supra* note 19.

258. *See supra* Part III (discussing the states that have created legislation that expands on the goals of § 162(q), and recommending that Texas do the same).