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Workplace Anonymity

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Workplace Anonymity

JAYNE S. RESSLER[†]

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INTRODUCTION

The Great Resignation has seen record numbers of Americans quitting their jobs. While individual reasons for doing so vary, one thing is consistent: working conditions for many are toxic. Hundreds of millions of Americans without the means to leave are constrained to work where they are harassed, demeaned, cheated out of properly earned wages, and risk illness or injury.

Agencies including the Department of Labor, the Equal Employment Opportunity Commission, and the Occupational Safety and Health Administration are tasked with addressing workplace misconduct. There is consistent failure on their part, however, to protect the workforce's interests. This, combined with the continued decline of labor unions, obliges employees to fend for themselves. Most employees are too afraid of the risk of reprisal to speak up and report abuses they have suffered, as legal prohibitions of retaliation offer little safety. Workplace misconduct continues, because employers are emboldened in the knowledge that vulnerable workers will be too fearful of potential repercussions to report wrongdoing.

An evolving scholarly literature advocates restricting management's access to certain information about employees, with a goal of averting employer malfeasance *ex ante*. This Article develops a complementary approach, one that uses information restrictions to report and document workplace misconduct *ex post*. Specifically, I propose the implementation of anonymous reporting mechanisms concerning workplace misconduct. Anonymous reporting of wrongdoing has precedents in the public and private sectors, but its utility has been overlooked. Decreasing the threat of reprisal via the structured and regulated implementation of anonymous reporting can lead to an increase in documentation of workplace misconduct—an essential first step toward needed workplace reform.

This Article proceeds in seven parts. Part I explores the

central role of work in American life, considering both the American worker's financial vulnerability and American culture's emphasis on work as identity. Part II examines three categories of common workplace misconduct: wage theft, invidious discrimination, and health and safety violations. I have added a fourth category I call "Perils of the Privileged," that highlights challenges facing high-income employees. Part III discusses underreported workplace wrongdoing resulting from fear of retaliation and reprisal. Part IV examines inadequate safeguards for reporting workplace misconduct, including deficiencies in prohibitions on retaliation and insufficient protections for whistleblowers. Part V reviews existing anonymity practices regarding litigation plaintiffs, as well as extrajudicial anonymous reporting of wrongdoing. Part VI develops an approach to reform. It demonstrates, in part through actual and hypothetical examples, how expanding anonymity can bring more employer misconduct to light. It also addresses employers' fairness and due process concerns. Finally, Part VII identifies circumstances in which anonymity is ineffective.

I. THE CENTRAL ROLE OF WORK IN AMERICAN LIFE

For most Americans, a job is necessary for basic survival. Unlike most industrialized nations—which offer government-provided subsidies to their citizens simply because they are citizens, and regardless of their employment status—much of America's social safety net is tethered to work. This includes, among other things, health insurance, disability insurance, retirement savings, family leave, workers' compensation, and unemployment insurance.¹ But only certain types of jobs "count"—non-

1. See Pamela Loprest & Demetra Nightingale, *The Nature of Work and the Social Safety Net*, URBAN INST. 1, 2 (July 2018) (citing ROBERT A. MOFFITT, *THE ECONOMICS OF MEANS-TESTED BENEFITS: VOLUME I AND II* (Chicago: University of Chicago Press, 2016)). See also Warren Fiske, *The U.S. is the only industrialized nation with no paid family leave plan*, POLITIFACT (Jan. 28, 2021),

traditional labor, such as child rearing, home-making, and family care-giving has long been undervalued and under-respected.² The mooring of essential benefits to certain types of employment, combined with the American government's primary means of obtaining taxes through income, and not broader wealth, reflects a deep societal view that individuals are regarded primarily as workers, not as citizens. A consequence of Americans' substantial dependence on having a traditional job is the catastrophe that awaits when that job is gone.³

Additionally, for many Americans, employment is more than a means to earn income—it is a vehicle by which we identify and judge ourselves and others.⁴ For the highly educated elite, work has “morphed into a kind of religion,

<https://www.politifact.com/factchecks/2021/jan/28/jennifer-boysko/us-only-industrialized-nation-no-paid-family-leave/> (discussing how the United States is also the only industrialized nation without a mandatory option for new parents to take parental leave); G.E. Miller, *The U.S. is the Most Overworked Developed Nation in the World*, 20 SOMETHING FIN., <https://20somethingfinance.com/american-hours-worked-productivity-vacation/> (last updated Jan. 30, 2022). Even over a decade ago, more than half of those under 65 (over 150 million people) were covered by employment-based health insurance. Kathryn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act*, 89 NEB. L. REV. 885, 887 (2011).

2. Silvia Federici, *The Lockdown Showed How the Economy Exploits Women. She Already Knew*, N.Y. TIMES (Feb. 17, 2021), <https://www.nytimes.com/2021/02/17/magazine/waged-housework.html>. See also Alina Dizik, *Women Are Getting Pushed Out of the Workforce—With Few Ways to Return*, NEXTADVISOR (Aug. 5, 2021), <https://time.com/nextadvisor/in-the-news/women-in-the-workplace/> (“In other countries there are safety nets. In the U.S. we have women.”); Sallie Krawcheck, *Women Are the Social Safety Net*, ELLEVEST (Nov. 17, 2020), <https://www.ellevest.com/magazine/disrupt-money/women-social-safety-net>.

3. See, e.g., Josh Bivens & Ben Zipperer, *Health insurance and the COVID-19 shock*, ECON. POL’Y INST. (Aug. 26, 2020), <https://www.epi.org/publication/health-insurance-and-the-covid-19-shock/> (“The COVID-19 shock has exposed just how incomplete and threadbare the U.S. safety net and social insurance system is.”).

4. Al Gini argues that Americans consider work “the necessary condition for life.” Al Gini, *My Job, My Self: How Work Defines Us*, IAI (May 3, 2018), <https://iai.tv/articles/my-job-my-self-how-work-defines-us-auid-1078>.

promising identity, transcendence, and community.”⁵ Many co-workers develop close personal bonds with their colleagues, which often extend to include the workers’ families. These relationships can go to the core of the employees’ sense of self.⁶ Thus, a job loss or change in job status can have profound emotional effects.

A. *The American Worker’s Financial Vulnerability*

Most Americans live on the precipice of a treacherous financial cliff. Even before the coronavirus pandemic disrupted much of the American workforce, over seventy-five percent of United States workers were living paycheck-to-paycheck, and were either in debt or had no monthly savings.⁷ More than half of those workers believed that they would never become solvent.⁸ One journalist noted, in an

5. Derek Thompson, *Workism Is Making America Miserable*, THE ATLANTIC (Feb. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/religion-workism-making-americans-miserable/583441/>. Even the climate crisis is celebrated for the opportunities it offers for job creation. As he had done on the campaign trail, when President Biden made his first address to a joint session of Congress he stated, “[f]or too long, we have failed to use the important word when it comes to meeting the climate crisis. Jobs. Jobs. For me, when I think about climate change, I think jobs.” *Biden’s Speech to Congress: Full Transcript*, N.Y. TIMES (April 29, 2021), <https://www.nytimes.com/2021/04/29/us/politics/joe-biden-speech-transcript.html>.

6. Marion Crain, *Arms-Length Intimacy: Employment As Relationship*, 35 WASH. UNIV. J. L. & POL’Y. 163, 199 (2011).

7. Zack Friedman, *78% of Workers Live Paycheck To Paycheck*, FORBES (Jan. 11, 2019 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2019/01/11/live-paycheck-to-paycheck-government-shutdown/?sh=584416f94f10>. See also Tom Anderson, *Retirement Crisis: 29 Percent of Older Americans Have No Savings*, GAO SAYS, NBC NEWS (June 3, 2015 4:07 PM), <https://www.nbcnews.com/better/money/retirement-crisis-29-percent-older-americans-have-no-savings-gao-n369241> at 1 (discussing how 29 percent of U.S. households headed by someone age 55 or older have no retirement savings or pension, meaning they’ll have to continue working or rely on Social Security to survive).

8. Friedman, *supra* note 7. See Kim Parker, Juliana Menasce Horowitz and Anna Brown, *About Half of Lower-Income Americans Report Household Job or Wage Loss Due to COVID-19. Only 23% Say They Have Emergency Funds That Would Last Them Three Months*, PEW RES. CENTER (April 21, 2020), <https://www.pewresearch.org/social-trends/2020/04/21/about-half-of-lower->

article entitled *Just Because I Own a Car Doesn't Mean I Have Enough Money to Buy Food*, “[t]he pandemic has exposed the fragile nature of success for millions of Americans: material markers of outward stability, if not prosperity, but next to nothing to fall back on when times get tough.”⁹

The mooring of essential benefits to employment has a powerful grip on the American worker. “Job lock” and “employment lock” are terms used to describe the inability of an employee to freely leave a job because doing so will result in the loss of these benefits.¹⁰ Although the Affordable Care Act has alleviated the shackles of job lock for some with respect to health care coverage, it is not a panacea for all.¹¹ Economic researchers have concluded that even if a job loss does not lead to a net loss of insurance coverage, workers are not well-served, as acquiring new health insurance “requires time for workers and their families to navigate the new set of benefits and often requires leaving a preferred doctor or

income-americans-report-household-job-or-wage-loss-due-to-covid-19/ (“[a]mong those without emergency funds, white adults, upper-income adults and those with a bachelor’s degree or more education are among the most likely to say they’d be able to cover their expenses by borrowing money, relying on savings or liquidating assets. For example, while 58% of upper-income adults who don’t have rainy day funds say they could cover their expenses for three months by tapping into other resources, only 34% of middle-income adults and 16% of lower-income adults without emergency funds say they could do the same.”).

9. Tim Arango, *Just Because I Have a Car Doesn't Mean I Have Enough Money to Buy Food*, N.Y. TIMES (Sep. 3, 2020) <https://www.nytimes.com/2020/09/03/us/food-pantries-hunger-us.html>.

10. See Moore, *supra* note 1, at 899 (discussing employees fears of giving up benefits and being left uninsured can lead people to stay in their current positions, a phenomenon known as “job lock”).

11. See James Bailey & Anna Chorniy, *Employer-Provided Health Insurance and Job Mobility: Did the Affordable Care Act Reduce Job Lock?*, 34 CONTEMP. ECON. POL’Y 173 (2015); see also Bivens & Zipperer, *supra* note 3 (“for every 100 workers who were covered by [employer-sponsored insurance] before losing their job, about 85 retained access to some form of health insurance in the week after they lost their job.”); Adam Sonfield, Jennifer J. Frost, Ruth Dawson, & Laura D. Lindberg, *COVID-19 Job Losses Threaten Insurance Coverage And Access To Reproductive Health Care for Millions*, HEALTH AFFS. (Aug. 3, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200728.779022/full/>.

set of providers.”¹² The literature is replete with references to the financial catastrophe that awaits many Americans with the arrival of one unexpected medical crisis.¹³ If this portends the future for Americans *with* health insurance, the prospect of risking a job loss and having *no* health insurance is unsustainable. One prominent economist noted that “[b]ecause the employer-based system ties health insurance to a particular job, it can induce employees to remain indentured in a detested job simply because it is the sole source of affordable health coverage.”¹⁴

Even worse than staying at a job that one detests, employees are compelled to stay at jobs that are physically unsafe, where they are harassed, demeaned, and treated as less-than, or cheated out of properly earned wages. Some employers control eating and bathroom time, require employees to take unscheduled drug tests, and regulate speech both on and off the worksite.¹⁵ Working conditions are so bad for some that they are forced to “defecate on themselves or wear adult diapers rather than lose their jobs.”¹⁶

Much of the current conversation regarding employment law focuses on efforts by employers to classify workers as

12. Bivens & Zipperer, *supra* note 3.

13. See, e.g., Moore, *supra* note 1. See also Alena Allen, *State Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglia*, 2011 BYU L. REV. 1327 (2011).

14. Uwe E. Reinhardt, *Employer-Based Health Insurance: A Balance Sheet*, 18 HEALTH AFFS. 124, 127 (1999).

15. ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (Princeton University Press, 2017); see also Miya Tokumitsu, *The United States of Work*, THE NEW REPUBLIC (April 18, 2017), <https://newrepublic.com/article/141663/united-states-work>.

16. See OxFam Report, *No Relief: Denial of Bathroom Breaks in the Poultry Industry*, OX FAM (2016), https://s3.amazonaws.com/oxfam-us/www/static/media/files/No_Relief_Embargo.pdf; see also Press Release, Schatz Introduces New Legislation To Protect Workers, Ensure Dignity In The Workplace, (Nov. 26, 2019) <https://www.schatz.senate.gov/news/press-releases/schatz-introduces-new-legislation-to-protect-workers-ensure-dignity-in-the-workplace>.

independent contractors or gig workers.¹⁷ The stakes are high, as only workers legally classified as “employees” are entitled to a myriad of employment benefits, including many of those listed above.¹⁸ Protections against retaliation are often tied to employment classification as well.¹⁹ Thus, workers have become even more vulnerable to the effects of job loss, because losing one’s “real” job entails the risk of leaving behind advantages that independent contractors and gig workers lack.

B. *Work as Identity*

Twentieth century economists got it wrong when they predicted that the hours that Americans spend at work would diminish over time.²⁰ Instead, work has evolved from a means of income generation to a means of identity creation.²¹ Work, for many Americans, provides meaning for their lives.²² Employees invest emotionally and psychologically in their workplaces.²³ One author noted that “[w]ork provides us with more than a paycheck. It gives us recognition, status, belonging, self-esteem, and reinforcement of our self-concept.”²⁴ The Great Resignation²⁵

17. See, e.g., Matthew Fritz-Mauer, *The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm*, 54 U. MICH. J.L. REFORM 735, 758 (2021).

18. *Id.*

19. See *infra* Part IV.

20. Derek Thompson, *supra* note 5 (“[i]n a 1957 article in The New York Times, the writer Erik Barnouw, predicted that, as work became easier our identity would be defined by our hobbies, or our family life.”).

21. *Id.*

22. See, e.g., OREN CASS, *THE ONCE AND FUTURE WORKER* (2018).

23. Crain, *supra* note 6.

24. Rebecca Zucker, *When You Lose Your Job—and It’s Your Whole Identity*, HARV. BUS. REV. (Feb. 17, 2021), <https://hbr.org/2021/02/when-you-lose-your-job-and-its-your-whole-identity>.

25. Professor Anthony Klotz coined the term “The Great Resignation” to describe the record number of employees who have left their jobs as a result of the Covid-19 pandemic. See, e.g., *Amazon.com, Inc.*, U.S. SEC. AND

for many is not about seeking a higher paycheck, but rather “feeling seen and valued.”²⁶ What is most important is “fulfillment, recognition, and humanity.”²⁷

The workplace also provides community and connection for many workers. Children of co-workers frequently attend the same schools, and families often gather at the same places of worship and shop in the same stores. This is particularly true in small towns where people are on a first-name basis. Conversely, the workplace can present a unique means by which employees, who would otherwise remain insular, meet and socialize with colleagues from diverse upbringings, ethnicities, and cultures.²⁸

Workers often construct their lives “around the assumption that their work in *that* place and often for *that* employer will continue . . . [T]he workplace serves as an important source of connection and belonging on par with that offered by family.”²⁹ Losing one’s job can have devastating emotional consequences. There can be a profound sense of shame and despair. In a Fourth Circuit employment discrimination case, the plaintiff described the powerful sense of kinship she had developed with her work colleagues:

Imagine being in a family for almost ten years and then they tell you they don’t want you anymore. I loved my job. I loved working

EXCH. COMM’N (2022), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2022/aysraphaelamazon040822-14a8.pdf>.

26. Jessica Stillman, *These Are the Top 5 Reasons People Are Quitting During the Great Resignation, According to Massive New Analysis (Hint: None of Them is Pay)*, INC. (Feb. 1, 2022), <https://www.inc.com/jessica-stillman/great-resignation-mit-revelio-research.html>.

27. David Dayen, *The Great Escape*, THE AM. PROSPECT (Nov. 29, 2021), <https://prospect.org/labor/great-escape-why-workers-quitting-pandemic-trauma/>.

28. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 73–74 (2005) (“[i]n today’s society, there is little opportunity, other than at work, for adults to hold sustained, in-person discussions and debates about social values with a relatively diverse group of fellow citizens.”).

29. Crain, *supra* note 6, at 164–73 (emphasis added).

for FedEx. I had made a determination that this is [where] I was going to retire . . . I saw FedEx employees more than I saw my family and I did everything that they wanted me to do.³⁰

A plaintiff in another discrimination case said of his job termination, “I think the hardest part is just not feeling like anybody sees value in me.”³¹ As one court noted, “[i]t does not require extensive discussion to demonstrate the devastating impact of the loss of a job, whether from a . . . psychological or emotional point of view.”³²

Loss of employment is not the only adverse job event³³ that can have profound consequences on an employee. Demotion, reassignment, and ostracism can also inflict substantial emotional and personal burdens.³⁴ A diminution in job status can foster feelings of failure, insecurity, exclusion, and shame.³⁵ These can impact an employee’s

30. *Calef v. FedEx Ground Packaging Sys., Inc.*, 343 F. Appx. 891, 895–96 (4th Cir. 2009) (alteration in original).

31. Aliya Hamid Rao, *When Losing Your Job Feels Like Losing Your Self*, HARV. BUS. REV. (April 21, 2020), <https://hbr.org/2020/04/when-losing-your-job-feels-like-losing-your-self>.

32. *Bray v. Workers’ Comp. Appeals Bd.*, 31 Cal. Rptr. 580, 586 (Cal. Ct. App. 1994); see *Griffin v. Wash Convention Ctr.*, CIV. A. No. 93-2297(JMF), 2000 WL 1174967, at *10 (D.D.C. July 21, 2000) (“plaintiff testified that the psychological devastation of losing her job left her with no motivation to look for work for a substantial period of time”). See generally Jedidiah J. Kroncke, *Reducing Job Security Does Not Lead to Growth*, 37 MINN. J. OF L. & INEQ. 97 (2019).

33. I use the term “adverse job event” to refer to an unfavorable shift in employment circumstances. The undesirability of this change is specific to the individual employee.

34. See Kroncke, *supra* note 32. Workplace violence most often follows conflicts and arguments where workers see themselves as victims of unfair treatment. See also Mitchell L. Doucette, Maria T. Bulzacchelli, Shannon Frattaroli & Cassandra K. Crifasi, *Workplace homicides committed by firearm: recent trends and narrative text analysis*, INJ. EPIDEMIOLOGY (2019), <https://injepijournal.biomedcentral.com/articles/10.1186/s40621-019-0184-0>; Corky Siemaszko, *FedEx killings mark return of mass workplace shootings paused by Pandemic*, NBC NEWS (April 16, 2021 7:55 PM), <https://www.nbcnews.com/news/us-news/fedex-killings-mark-return-mass-workplace-shootings-paused-pandemic-n1264355>.

35. Crain, *supra* note 6, at 199. See also Jane L. Dolkart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43

relationships with family and friends. Such wide-ranging consequences influence those who question whether to report workplace misconduct. Fear of the effect that such reporting can have on future employment opportunities can also weigh heavily in the decision process.³⁶

II. PERVASIVE EMPLOYER MISCONDUCT

American workers are subject to various kinds of mistreatment at the hands of their employers.³⁷ As one expert put it, “violations of bedrock employment laws are part and parcel of America’s capitalist economic landscape and cost people and society an extraordinary amount.”³⁸ This is particularly true of low-income workers—indeed, the United States has the highest percentage of low-wage jobs in the developed world.³⁹ Some pervasive forms of workplace misconduct include wage theft, unsafe working conditions, discrimination, harassment, and abuse.⁴⁰

EMORY L.J. 151, 187–88 (1994).

36. *See infra* Part III.D.

37. For purposes of this paper, I focus exclusively on workplace misconduct committed by employers with respect to employees. I acknowledge, however, that defining who is an “employer” and who is an “employee,” is a difficult task. Workplace misconduct that occurs between employees is beyond the scope of this Article, unless it is actively or tacitly encouraged by the organization. Additionally, I use the words “misconduct,” “wrongdoing,” and “malfeasance” interchangeably.

38. Fritz-Mauer, *supra* note 17, at 745.

39. Dayen, *supra* note 27.

40. For purposes of clarity, I discuss these forms of misconduct distinctly. It is not uncommon, however, for employers to engage in multiple forms of misconduct simultaneously. *See* Joyce Hanson, *NY Deli Owner Accused Of Sexual Harassment In Wage Suit*, LAW360 (Feb. 7, 2022 6:43 PM), <https://www.law360.com/articles/1462326/ny-deli-owner-accused-of-sexual-harassment-in-wage-suit>; *see also* Gavin Hart, *Former dental office manager alleges sexual harassment and wage theft*, WESTLAW TODAY (Feb. 22, 2021), [https://today.westlaw.com/Document/Ief87e57475f511ebbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://today.westlaw.com/Document/Ief87e57475f511ebbea4f0dc9fb69570/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true).

A. *Wage Theft*

Broadly defined, wage theft occurs “when an employer denies a worker the wages or benefits to which [the worker is] entitled.”⁴¹ Wage theft can take many forms, including employers failing to pay for overtime worked, requiring workers to work “off-the-clock,” deducting wages from workers’ paychecks for work-required expenditures, obliging workers to pay recruiting fees, stealing workers’ tips, paying employees with checks that bounce, misclassifying workers as independent contractors, withholding the final paycheck, and more.⁴² Often overlooked, wage theft is “one of the most common crimes in the United States.”⁴³ It is also exceedingly costly. Reports from the Economic Policy Institute estimate that employers steal between \$15 billion⁴⁴ to \$50 billion⁴⁵ annually from workers nationwide—almost equal to the

41. Fritz-Mauer, *supra* note 17, at 741; *see also* Jennifer J. Lee & Annie Smith, *Regulating Wage Theft*, 94 WASH. L. REV. 759, 765 (2019) (defining wage theft as “the illegal non-payment or underpayment of wages in violation of wage and hour law or contract law.”).

42. *See* Nicole Hallett, *The Problem of Wage Theft*, 37 YALE L. & POL’Y REV. 93, 98 (2018).

43. *Id.* at 97, 102 (“very little national political attention is paid to the problem of wage theft, even among progressive politicians. It is a crisis unfolding largely outside of public view.”).

44. David Cooper & Teresa Kroeger, *Employers steal billions from workers’ paychecks each year*, ECON. POL’Y INST. (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>.

45. Press Release, Wage Theft Costs American Workers as Much as \$50 Billion a Year (Sept. 11, 2014), <https://www.epi.org/press/wage-theft-costs-american-workers-50-billion/>; *see also* A *Practical Guide to Combatting Wage Theft: Lesson from the Field*, THE CENTER FOR POPULAR DEMOCRACY (Nov. 2017), https://populardemocracy.org/sites/default/files/WTHandbook-web_output%20%281%29.pdf; Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL’Y INST. (Sept. 11, 2014), <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

GDP of Alaska,⁴⁶ and more than twice the GDP of Iceland.⁴⁷ The industries with the highest incidence of wage theft are those that employ the majority of low-income workers, including agriculture, poultry processing, janitorial services, restaurant work, garment manufacturing, long-term care, home health care, and retail.⁴⁸ Those in higher-paid positions are not immune, however, from wage theft. In total, estimates indicate that wage violations cost affected workers approximately one-quarter of their earnings.⁴⁹

The large-scale presence of wage theft has impacted corporate competitiveness, as employers who comply with wage laws are often left unable to compete economically with those who cheat their employees.⁵⁰ Since profits acquired through exploitation are unobtainable by honest means, employers resort to wage theft as a means to survive.⁵¹ The vicious cycle continues by improperly increasing returns and enticing more employers to steal from their workforce.

The problem of wage theft is met with abysmally low enforcement rates.⁵² A Government Accountability Office

46. See *Real Gross Domestic Product (GDP) of the federal state of Alaska from 2000 to 2020*, STATISTA (April 14, 2021), <https://www.statista.com/statistics/187828/gdp-of-the-us-federal-state-of-alaska-since-1997/>.

47. See *Iceland GDP*, TRADING ECONOMICS, <https://tradingeconomics.com/iceland/gdp> (last visited July 2, 2022).

48. See Hallett, *supra* note 42, at 100 (“[t]he fact that the vast majority of low-wage workers regularly experience wage theft suggests a concerted decision by at least some employers in these industries to violate the law, not simply technical violations or clerical errors.”); see also Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft And The Degradation Of Low-Wage Workers*, 20 EMPL. RTS. & EMPLOY. POL’Y J. 71 (2016); Lee & Smith, *supra* note 41, at 820–21.

49. See Fritz-Mauer, *supra* note 17, at 745.

50. Lauren K. Dasse, *Wage Theft in New York: The Wage Theft Prevention Act As a Counter to an Endemic Problem*, 16 CUNY L. REV. 97, 103 (2012) (“[e]thical employers who abide by federal and state wage and hour laws are at a competitive disadvantage, as they have higher labor costs than their dishonest competitors who are increasing profits by violating the law.”).

51. *Id.*

52. Hallett, *supra* note 42.

(GAO) report found that “the Wage and Hour Division of DOL [Department of Labor] mishandled or failed to investigate nine out of ten complaints filed by undercover researchers.”⁵³ State agencies are even more understaffed than their federal counterparts, and prosecution of wage theft on the state level is rare.⁵⁴

B. *Health and Safety Violations*

The Bureau of Labor and Statistics estimates that approximately three million workers suffer serious illnesses or injuries on the job annually, of whom 4,500 die each year.⁵⁵ Employees and their families suffer economically and socially when employers permit and fail to treat injuries and illnesses at the workplace.⁵⁶ The Occupational Safety and Health Administration (“OSHA”) is responsible for ensuring safe working conditions in many industries, by setting workplace safety standards, conducting inspections, and investigating workers’ complaints.⁵⁷ Approximately half of

53. *Id.* at 106.

54. See Zach Sciller & Sarah DeCarlo, *Investigating Wage Theft: A Survey of the States*, POL’Y MATTERS OHIO (Nov. 2010), http://www.policymattersohio.org/wpcontent/uploads/2011/10/InvestigatingWage_Theft20101.pdf.

55. Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS U. L. REV. 891, 892 (2017) (quoting David Michaels, *Adding Inequality To Injury: The Costs Of Failing To Protect Workers On The Job*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., 3–4 (June 2015), <https://www.dol.gov/osha/report/20150304-inequality.pdf>).

56. See Safa Abdalla, et al., *Chapter 6 Occupation and Risk for Injuries*, NAT’L LIBR. FOR MED. (Oct. 27, 2017), <https://www.ncbi.nlm.nih.gov/books/NBK525209/> (“[p]oor workplace safety and health place a substantial economic burden on individuals, employers, and society. Estimates from the International Social Security Association (ISSA) suggest that costs associated with nonfatal workplace accidents alone equal approximately 4 percent of world gross domestic product (GDP) each year.”). See also Kathleen M. Fagan & Michael J. Hodgson, *Under-recording of work-related injuries and illnesses: An OSHA priority*, 60 J. OF SAFETY RES. 79 (2017).

57. *Workplace Safety and Health: Better Outreach Collaboration, and Information Needed to Help Protect Workers at Meat and Processing Plants, Report to Congressional Requesters*, U.S. GOV’T ACCT. OFF. (Nov. 2017),

the states defer to OSHA for enforcement of these standards, while the other half assumes responsibility for doing so under an OSHA-approved state plan.⁵⁸ The agencies tasked with reviewing and ensuring that safety protocols are followed, however, are overworked, short-staffed, and under resourced.⁵⁹ Noted one former OSHA chief of staff, “[i]t would take OSHA 150 years to investigate every workplace under their jurisdiction just once . . . [and] most companies don’t see OSHA in their whole lifetime.”⁶⁰

C. *Invidious Discrimination*

In addition to federal anti-discrimination laws, almost every state has enacted legislation prohibiting private employers from discriminating based on broad categories such as race, color, creed, religion, gender, national origin, disability, and age.⁶¹ While several organizations mandate diversity, equity, and inclusion trainings, post anti-discrimination signage around the office, and label themselves “cultures of inclusion,”⁶² many of these measures are performative, as racial and gender inequity, sexual harassment, and ageism persist in the American

<https://www.gao.gov/assets/gao-18-12.pdf>.

58. *Id.*

59. See Sciller & DeCarlo, *supra* note 54.

60. Dana Hull and Josh Eidelson, *Another safety probe hits Tesla after subcontractor breaks jaw*, THE MERCURY NEWS (April 20, 2018), <https://www.mercurynews.com/2018/04/20/another-safety-probe-hits-tesla-after-subcontractor-breaks-jaw/> (quoting Deborah Berkowitz).

61. For a list of federal and state anti-discrimination laws, see Iris Hentz & Rebecca Tyus, *Discrimination and Harassment in the Workplace*, NCSL (Aug. 12, 2021), <https://www.ncsl.org/research/labor-and-employment/employment-discrimination.aspx>.

62. See, e.g., Debra S. Katz & Aaron D. Blacksberg, *Racial Harassment and Retaliation: The Employee Perspective*, LAW 360 (April 11, 2017, 11:42 AM), <https://www.law360.com/articles/911165/racial-harassment-and-retaliation-the-employee-perspective>; see also Maryam Jameel & Joe Yerardi, *Workplace discrimination is illegal. But our data shows it's still a huge problem.*, VOX (Feb. 28, 2019, 8:29 AM), <https://www.vox.com/policy-and-politics/2019/2/28/18241973/workplace-discrimination-cpi-investigation-eeoc>.

workplace.⁶³ The Equal Employment Opportunity Commission (“EEOC”) currently plays the role of attending to the workforce pursuant to anti-discrimination laws. It is, however, understaffed, underfunded, and quick to close cases without even investigating them.⁶⁴

1. Race Discrimination

In 2020, the EEOC reported racial discrimination as the third leading harassment charge against federal employers.⁶⁵ The EEOC defines racial discrimination in the workplace as an employer treating a job applicant or employee “unfavorably because he/she [they] is of a certain race or because of personal characteristics associated with race (such as hair texture, skin color, or certain facial features).”⁶⁶

There is continued prevalence of racial discrimination plaguing American workplaces.⁶⁷ Not only are black workers twice as likely as their white counterparts to be unemployed,

63. To be certain, this is only a small sampling of the many types of discrimination employees routinely experience in the workplace. My inclusion of these specific categories is not meant to imply that others are less prevalent or important. Indeed, disability discrimination was the second leading claim of workplace discrimination in 2020. See *EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data> (last visited June 15, 2020) [hereinafter “EEOC 2020 Data”].

64. See Maryam Jameel, *More and more workplace discrimination cases are closed before they’re even investigated.*, CTR. PUB. 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/>.

65. See EEOC 2020 Data, *supra* note 63.

66. See *Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/racecolor-discrimination> (last visited Jan. 29, 2022).

67. See Jameel & Yerardi, *supra* note 64; see also Ashly Williams, *Modern-Day racism in the workplace: Symbolic diversity or real change?*, FROM SCIENCE TO PRACTICE: ORG. PSYCH. BULLETIN, 6 (Winter 2015), https://www.vanguard.edu/uploaded/Academics/Graduate/Organizational_Psychology/Modern-Day-racism-in-the-workplace-Symbolic-diversity-or-real-change.pdf.

despite identical educational backgrounds, black employed workers are also often disadvantaged when it comes to opportunities within their workplace.⁶⁸ Data shows that black workers are significantly more likely to be “underemployed,” meaning the tasks they are designated in their assigned employment roles are beneath their given skillset.⁶⁹ In addition to rampant outright racial macroaggressions, “[c]urrent research investigating discrimination within the workplace has revealed . . . that racial microaggressions are frequent, pervasive, and cause significant harm to both individuals and organizations.”⁷⁰

2. Gender Discrimination and Sexual Harassment

Gender discrimination continues with a notable presence in workplace culture. Well-known corporations such as Google, Microsoft, and Uber have made recent headline news for their participation in this inequity.⁷¹ Women are less likely than men to be awarded promotions or positions of authority within their workplace.⁷² Furthermore, even though the Equal Pay Act has been federal law for almost 60 years,⁷³ a 2020 study conducted by the Pew Research Center revealed that women working either full or part-time continued to earn, on average, sixteen percent less than

68. Jhacova Williams & Valerie Wilson, *Black workers endure persistent racial disparities in employment outcomes*, ECON. POL. INST. (Aug. 27, 2019), <https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment/>.

69. *Id.*

70. *Id.*

71. Khari Johnson & Manasa Gogineni, *Dozens of current and former dropbox employees allege gender discrimination*, VENTUREBEAT (Feb. 5, 2021, 8:12 AM), <https://venturebeat.com/2021/02/05/dozens-of-current-and-former-dropbox-employees-allege-gender-discrimination/>.

72. See, e.g., Cecilia L. Ridgeway, *How Gender Inequality Persists in the Modern World*, SCHOLARS STRATEGIC NETWORK (June 1, 2013), <https://scholars.org/contribution/how-gender-inequality-persists-modern-world>.

73. See Equal Pay Act of 1963, 29 U.S.C. § 206(d).

men.⁷⁴ Even when performing the same job as a man in the same workplace, one out of four women earns less money than her male counterpart.⁷⁵ Women of color suffer even higher burdens of gender discrimination, and have to work twice as hard as their male colleagues to achieve the same level of career advancement.⁷⁶

Additionally, an estimated 5 million people annually experience sexual harassment in the workplace.⁷⁷ The EEOC's own reports cite studies that estimate at least one in four women (and possibly as many as 85 percent of women) experiences sexual harassment at work.⁷⁸ Approximately 10 percent of men are subjected to workplace sexual harassment yearly.⁷⁹ Employees also suffer discrimination based on gender identity—they are often refused access to workplace restrooms consistent with their gender identity and are terminated once their employer discovers their transgender identity or intention to transition.⁸⁰ Indeed, while workplace sexual harassment might have decreased as a consequence of the #MeToo movement, studies show that

74. See Amanda Barroso & Anna Brown, *Gender pay gap in U.S. held steady in 2020*, PEW RES. CTR. (May 25, 2021), <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/>.

75. See *id.*

76. Johnson & Gogineni, *supra* note 71.

77. Carly McCann & Donald T. Tomaskovic-Devey, *About 5 million people experience sexual harassment at work every year. Nearly all of it goes unreported*, BUS. INSIDER (Dec. 17, 2018, 11:44 AM), <https://www.businessinsider.com/nearly-all-sexual-harassment-in-the-workplace-goes-unreported-2018-12?r=US&IR=T>.

78. Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 291 (2021) (citing CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8–9, 15–16 (2016)).

79. Tara Golshan, *Study finds 75 percent of workplace harassment victims experienced retaliation when they spoke up*, VOX (October 15, 2017, 9:00 AM), <https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts>.

80. *Your Rights Gender Identity Discrimination*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/gender-identity-discrimination> (last visited June 15, 2022).

gender harassment at work is on the rise.⁸¹

3. Age Discrimination

Data shows that over 60 percent of employees between the ages of 45 and 74 have been subjected to age discrimination.⁸² Age discrimination is somewhat of an afterthought compared to race and gender, yet it is nonetheless an insidious problem.⁸³ One expert stated “[a]ge discrimination is so pervasive that people don’t even recognize it’s illegal.”⁸⁴ Armed with the knowledge that it is particularly difficult to prove, employers routinely discriminate on the basis of age.⁸⁵ Age discrimination, like invidious discrimination, can affect not only current employees but prospective hires as well.⁸⁶ In one study,

81. See Jennifer Meckles, *Study finds workplace sexual harassment decreased, gender harassment increased after #MeToo movement*, 9NEWS (Jul. 18, 2019, 5:37 AM), <https://www.9news.com/article/news/study-finds-workplace-sexual-harassment-decreased-gender-harassment-increased-after-metoo/73-a88663e3-2e5d-4bfe-b87f-ff1a7b624c57>.

82. See Josh Bersin & Tomas Chamorro-Premuzic, *The Case for Hiring Older Workers*, HARV. BUS. REV. (Sept. 26, 2019), <https://hbr.org/2019/09/the-case-for-hiring-older-workers>.

83. See Joe Kita, *Workplace Age Discrimination Still Flourishes in America*, AARP (Dec. 30, 2019), <https://www.aarp.org/work/working-at-50-plus/info-2019/age-discrimination-in-america> (“[i]n 2019, Google agreed to pay \$11 million to settle the claims of more than 200 job applicants who said they were discriminated against because of their age”).

84. *Id.* (“Gary Gilbert, a former EEOC chief administrative judge . . . [stated] ‘[t]he commission is just not appreciating the degree of societal bias we have against older workers at this time.’”).

85. *Id.* (“A 2018 ProPublica investigation alleges that IBM deliberately engineered the dismissal of an estimated 20,000 employees over age 40 in a five-year period. In making these cuts, IBM has flouted or outflanked U.S. laws and regulations intended to protect later-career workers from age discrimination . . . IBM’s . . . supervisors and attorneys were exquisitely aware of how difficult it is to successfully prosecute age discrimination, and they took full advantage of that.” (internal quotations omitted)).

86. See Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; 29 U.S.C. § 623(a)(1) (“It shall be unlawful for an employer—to fail or refuse to hire . . . any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”).

researchers sent 40,000 resumes to over 10,000 job postings across 12 cities.⁸⁷ The age of the “candidate” was one of the few manipulated components of each resume.⁸⁸ Candidates within the older age bracket heard back from far fewer employers than their younger counterparts.⁸⁹

D. *Perils for the Privileged*

White-collar high-income earners are not immune from discrimination and harassment, unsafe working conditions, and exploitation. Industries such as investment banking and Big Law are known to pressure employees to work exceedingly long hours and tolerate demeaning, exploitative, and abusive behaviors.⁹⁰ Often these employees suffer from feelings of burnout, low self-worth, depression, and anxiety.⁹¹ Some investment bankers feel that they are constantly being monitored by their superiors, with one labeling the technological surveillance a “virtual leash.”⁹² A legal ethics scholar concluded that some law firm associates

87. *The Harsh Reality of Age Discrimination in the Hiring Process*, MCKINLEY MKTG. PARTNERS, <https://mckinleymarketingpartners.com/2019/05/the-harsh-reality-of-age-discrimination-in-the-hiring-process/> (last visited June 16, 2022).

88. *Id.*

89. *Id.*

90. A study revealed that 62 percent of high-earning workers surveyed worked more than 50 hours per week, 35 percent worked more than 60 hours per week, and 10 percent worked more than 80 hours per week. See Sylvia Ann Hewlett & Carolyn Buck Luce, *Extreme Jobs: The Dangerous Allure of the 70-Hour Workweek*, HARV. BUS. REV. (Dec. 2006), <https://hbr.org/2006/12/extreme-jobs-the-dangerous-allure-of-the-70-hour-workweek>.

91. See Grant, *How Does Technology Affect the Work Environment Today?* CHRON, <https://smallbusiness.chron.com/technology-affect-work-environment-today-27299.html> (last updated March 16, 2019) (“Holding a computer in your pocket that is constantly connected to your work email can make it feel impossible to ever truly be off the clock. Flashing, buzzing and “pinging” notifications consistently draw workers back to their jobs. This mentality doesn’t result in better work; in fact, it leads to burnout, lack of sleep and even mild depression.”).

92. Stephen Morris, James Fontanella-Khan & Robert Armstrong, *Burnout: can investment banks cure their addiction to overwork?*, FIN. TIMES (March 26, 2021), <https://www.ft.com/content/2f5d2587-d9a7-4cd5-ac84-e36d75b13a24>.

have “lost their souls.”⁹³ Former United States Supreme Court Chief Justice Rehnquist stated that certain billable hour requirements at law firms are akin to “treating the associate very much as a manufacturer would treat a purchaser of one hundred tons of scrap metal.”⁹⁴ These work environments foster irrational expectations that compromise employees’ work product, and negatively impact their physical and mental well-being.⁹⁵

Research by the International Bar Association uncovered rampant examples of workplace misconduct targeting high-income employees, such as “bullying that included implicit or explicit threats, misuse of power or position, constant unproductive criticism, malicious rumors, being blocked from promotion or training opportunities, unfounded comments about job security, and violence.”⁹⁶ A recent news story about life at Goldman Sachs likewise paints a grim picture.⁹⁷ A survey of anonymous first-year analysts⁹⁸ revealed that the analysts work, on average, 95 hours per week, sleep 5 hours per night, and are subjected to abusive behavior from their managers.⁹⁹

93. Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 240 (2000).

94. *Id.*

95. *See id.* at 240–41.

96. Wendi Lazar, *Bullying in the Legal Profession*, OTTEN & GOLDEN (Nov. 27, 2018), <https://www.outtengolden.com/blog/2018/11/bullying-legal-profession>.

97. *Current and former investment bankers react to claims of workplace abuse by junior analysts at Goldman Sachs.*, N.Y. TIMES, <https://www.nytimes.com/2021/03/22/business/goldman-sachs-junior-bankers.html> (last updated June 10, 2021).

98. *Id.*; *see also* Palash Ghosh, *Goldman Sachs First-Year Analysts Face 100-Hour Weeks, Abusive Behavior, Stress: Survey Says*, FORBES (March 18, 2021, 10:35 AM), <https://www.forbes.com/sites/palashghosh/2021/03/18/goldman-sachs-first-year-analysts-face-100-hour-weeks-abusive-behavior-stress-survey-says/?sh=58d94d647c28>.

99. *Id.*

III. UNDERREPORTED EMPLOYER MISCONDUCT DUE TO FEAR OF RETALIATION AND REPRISAL

Approximately 60 percent of workplace misconduct remains unreported.¹⁰⁰ The driving reason for this silence is fear of retaliation.¹⁰¹ Indeed, retaliation¹⁰² was the most frequently filed claim with the EEOC in 2020.¹⁰³ Workers often worry that if they report wrongdoing, they will suffer negative consequences at their current employment. These consequences can include not only adverse job events, but social reprisal from co-workers, shame about being “a snitch,”¹⁰⁴ and embarrassment about what they experienced.¹⁰⁵ This trepidation can also be prospective, whereby employees are concerned about potential repercussions to future employment opportunities—reputational harm—as a result of reporting existing workplace misconduct. If a worker does speak up and thereafter experiences retaliation, she likely will have “learned her lesson” and never complain again, either at the

100. Rob van der Meulen, *Gartner Says Just 41 Percent of Workplace Misconduct is Reported*, GARTNER (March 12, 2019), <https://www.gartner.com/en/newsroom/press-releases/2019-03-12-gartner-says-just-41-percent-of-workplace-misconduct-is-reported>.

101. See, e.g., Neta Meidav, *Why workers don't report misconduct in the workplace*, VAULT (Feb. 17, 2020), <https://vaultplatform.com/why-workers-dont-report-misconduct-in-the-workplace/>.

102. Throughout this Article I use the terms “retaliation,” “retribution,” and “reprisal” interchangeably to refer in a colloquial sense to negative actions taken against individuals as a result of reporting wrongdoing. “Retaliation,” however, has a distinct definition in the context of a legal claim. When I discuss negative actions consequential to reporting misconduct in the legal claim context, I use only the term “retaliation.” See *infra* Part IV.

103. See EEOC 2020 Data, *supra* note 63. According to the EEOC, “retaliation remained the most frequently cited claim in charges with the agency—accounting for a staggering 55.8 percent of all charges filed.”

104. See *infra* Part IV.A.

105. See, e.g., Jamie Darin Prenekert et. al., *Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action*, 91 N.C. L. REV. 889, 904 (2013) (discussing ways in which exposing the identity of a workplace misconduct complainant can have a chilling effect on reporting).

current job or a future one.

The intersectionality of workers' various vulnerabilities, such as race and gender,¹⁰⁶ and the fusion of multiple types of discrimination—harassment and wage theft,¹⁰⁷ for instance, further contribute to the underreporting of workplace misconduct. In addition to being the most vulnerable workers, women and minorities are subject to what Deborah Tuerkheimer calls a “credibility discount.”¹⁰⁸ This theory observes that society “doubts [vulnerable population’s] authority to assert facts—even facts about their own lives.”¹⁰⁹ In addition to not being believed, complaints from those without power are often trivialized and minimized. Notes Tuerkheimer, “[m]any . . . are silenced by the prospect [of being dismissed]. . . For an allegation to be deemed credible we must also believe that the conduct it describes is blameworthy, and that it’s worthy of our concern.”¹¹⁰

A. *Underreported Wage Theft*

Exposure of wage theft occurs mostly through complaints filed by individual workers.¹¹¹ Some employees do not know that their employer has cheated them out of earnings, and thus could not be expected to file a report.¹¹² Among employees who do have this knowledge, however, the

106. See Fritz-Mauer, *supra* note 17, at 741 (“While wage theft affects workers of all backgrounds and in every industry, low-wage workers—and especially women, people of color, immigrants, and those with little formal education—are more susceptible to abuse than others.”).

107. See Hanson, *supra* note 40.

108. DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 9 (2021).

109. *Id.*

110. *Id.* at 10.

111. Hallett, *supra* note 42, at 104–05.

112. See *id.*; see also *infra* Part II.A.

majority never file a complaint.¹¹³ Although retaliation for reporting wage theft is illegal,¹¹⁴ a study revealed that 43 percent of workers who complained about their wages being short-changed were retaliated against for speaking up.¹¹⁵ Penalties are not high enough, nor certain enough, to deter employer noncompliance with compensation laws.¹¹⁶

B. Underreported Health and Safety Violations

Employers routinely fail to report workplace injuries because their premiums increase when compensation claims are paid.¹¹⁷ Thus, it is common for employers to instruct their employees to go home after an injury instead of seeking

113. See, e.g., Marianne Levine, *Behind the minimum wage fight, a sweeping failure to enforce the law*, POLITICO (Feb. 18, 2018), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644> (“Given the widespread nature of wage theft and the dearth of resources to combat it, most cases go unreported.”); see also David A. Love, *The Theft Nobody Sees*, PHILA. CITIZEN (Jan. 16, 2017), <https://thephiladelphiacitizen.org/wage-theft-epidemic/> (“[B]ecause wage theft is so underreported, the practice is more widespread than you would ever imagine.”).

114. See 29 U.S.C. § 215(a)(3).

115. Annette Bernhardt, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, NAT’L EMP. L. PROJECT (Sept. 21, 2009), <https://www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/>.

116. Hallett, *supra* note 42, at 108 (“Employers know that if they fail to pay wages, the worst that may happen is that they will eventually have to pay the bare amount of wages owed. In effect this amounts to a free loan. If there are no consequences to violating the law beyond nominal penalties, employers . . . have [in]sufficient incentive to comply with the law.”); see also Alison Morantz, et al., *Economic Incentives in Workers’ Compensation: A Holistic, International Perspective*, 69 RUTGERS L. REV. 1015, 1048 (2017) (“The availability of civil remedies to injured workers also depends, indirectly, on the nature of the employment relationship. The United States is the only country examined with an ‘employment at-will’ regime, in which a worker who is fired in retaliation for filing a workers’ compensation claim may have no recourse but to bring a wrongful discharge claim under state law.”).

117. See, e.g., Nolo, *Why Would an Employer Dispute a Worker’s Comp Claim?*, DISABILITY SECRETS, <https://www.disabilitysecrets.com/workmans-comp-question-8.html> (last visited June 16, 2022).

medical care.¹¹⁸ It is then up to the employee to file a claim, risking retaliation in the process.¹¹⁹ One scholar estimates that between 55 and 79 percent of workers entitled to workers' compensation benefits due to a workplace illness or injury do not seek them.¹²⁰ Indeed, in one study over 80 percent of workers who informed their employers about an occupational injury or illness were met with attempts to deter or dissuade the employee from filing a workers' compensation claim.¹²¹ Employees stated that they did not report their ailments out of "a fear of retaliatory termination, suspension, or discipline."¹²² Michael Duff notes that retaliation for filing workers compensation claims "is as old as the workers compensation system itself."¹²³

118. *See id.*

119. Fatima Hussein, 'Culture of Fear' Grips UPS; Workers Say Injuries Underreported, BLOOMBERG L. (Dec. 4, 2019, 6:00 AM), <https://news.bloomberglaw.com/safety/culture-of-fear-grips-ups-workers-say-injuries-underreported>.

120. Charlotte S. Alexander, *Transmitting the Costs of Unsafe Work*, 54 AM. BUS. L. J. 463, 474 (2017); *see also* Emily A. Spieler & Gregory R. Wagner, *Counting Matters: Implications of Undercounting in the BLS Survey of Occupational Injuries and Illnesses*, 57 AM. J. INDUS. MED. 1077 (2014) (talking about the difficulty of calculating the actual number of injuries caused by the workplace); William J. Wiatrowski, *The BLS Survey of Occupational Injuries and Illnesses: A Primer*, 57 AM. J. INDUS. MED. 1085, 1089 (2014) (talking about the constraints of SOII and not having access to detailed data about occupation injuries and illnesses).

121. *See* Alexander, *supra* note 120, at 475.

122. *See id.* at 478; Lynne Shallcross, *Survey: Half of Food Workers Go To Work Sick Because They Have To*, NPR (Oct. 19, 2015, 12:28 PM) <https://www.npr.org/sections/thesalt/2015/10/19/449213511/survey-half-of-food-workers-go-to-work-sick-because-they-have-to> ("Research . . . conducted in Philadelphia . . . showed that a third of restaurant workers in that city have worked sick because they feared retaliation if they took a day off."). *See also* James A. Gross, *Undermining Worker Safety and Health Protection Through Statutory Interpretation*, 36 HOFSTRA LAB. & EMP. L.J. 225, 245–46 (2019) ("Empirical studies have confirmed . . . most workers experiencing workplace rights violations remain silent because they fear employer retaliation.").

123. Hussein, *supra* note 119.

C. Underreported Invidious Discrimination

There is a critical lack of resources at the EEOC, leaving employees who are discriminated against to often fend for themselves.¹²⁴ Even fully funded, EEOC protection is typically contingent upon an antecedent employee responsibility—informing the employer of the grievance before the EEOC will preserve the employee’s right to sue.¹²⁵ The threat of retaliation frequently converts this requirement into a barrier. Furthermore, marginalized workers often internalize the “credibility discount.”¹²⁶ They blame themselves, minimize the misconduct, and believe that “silence is the only option.”¹²⁷ As Stephanie Bornstein declared “there is simply no question that placing near-total responsibility for pursuing harassment and discrimination complaints on individual employees has a deeply chilling effect on anti-discrimination enforcement.”¹²⁸

1. Race Discrimination

Black workers are twice as likely as white workers to eschew raising workplace concerns for fear of retaliation.¹²⁹

124. Maryam Jameel & Joe Yerardi, *Despite legal protections, most workers who face discrimination are on their own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases> (“[T]he EEOC has a smaller budget today than it did in 1980, adjusted for inflation, and 42 percent less staff.”).

125. See Brake, *supra* note 28, at 78 (“Charges of discrimination rarely reach the EEOC or the courts without some higher-level person first learning of the complainant’s concerns. Without protection from retaliation at the early, less formal stages of complaining, challengers would be chilled from ever complaining or be forced into taking formal legal action when informal action might have been a more appropriate response, at least initially.”).

126. See TUEKHEIMER, *supra* note 108, at 89.

127. *Id.*

128. Bornstein, *supra* note 78, at 310.

129. *Black Workers See Higher Rates of Employer Retaliation for Raising COVID Safety Concerns*, NAT. EMP. L. PROJECT (June 10, 2020), <https://www.nelp.org/news-releases/black-workers-see-higher-rates-employer-retaliation-raising-covid-workplace-safety-concerns/>.

Indeed, “social psychologists have found that . . . racial minorities are perceived as troublemakers and hypersensitive when they confront discrimination”¹³⁰ The National Employment Law Project (“NELP”) conducted a recent nationwide survey about COVID-19’s impact on black workers.¹³¹ A senior policy analyst with NELP noted that “vocal workers are being punished, and other workers are staying quiet to avoid job repercussions.”¹³² Black employees were retaliated against at twice the rate of their white counterparts for voicing unease about the pandemic’s effect on employee health.¹³³ Almost 75 percent of black workers went to work even though they believed that they were risking their own health and that of family members, compared to less than 50 percent of white workers.¹³⁴ A co-author of the study surmised that “the disproportionate impact of COVID-19 on Black communities may be related to greater exposure of Black workers to repressive workplace environments.”¹³⁵

Workplace ostracization following claims of discrimination occurs at a disturbingly higher rate for people of color and ethnic minorities, even when their claims possess unquestionable merit.¹³⁶ Consequently, reports of discrimination more likely than not result in a sense of isolation and friction among fellow employees or superiors.¹³⁷ A systematically instilled perception exists that reporting workplace discrimination results in stigmatization with

130. Brake, *supra* note 28, at 32.

131. See *Black Workers See Higher Rates of Employer Retaliation for Raising COVID Safety Concerns*, *supra* note 129.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Brake, *supra* note 28, at 32.

137. See *id.*

serious social and professional costs.¹³⁸

2. Gender Discrimination and Sexual Harassment

The majority of women do not report gender discrimination and harassment because they fear the repercussions of doing so.¹³⁹ Of those women who do complain about harassment, 75 percent experience retaliation.¹⁴⁰ A 2018 survey by the Women's Bar Association in partnership with the Rikleen Institute for Strategic Leadership revealed that women who have reported workplace abuse have been called derogatory names, isolated socially in the workplace, demoted, denied promotions, or fired.¹⁴¹ Those who complain about unequal pay likewise are at risk of retaliation. For example, the Eighth Circuit agreed that a female employee was terminated after notifying her employer that she believed she was excluded from cash bonuses received by male employees because of her gender.¹⁴²

Shame also plays a role in a woman's decision not to speak up. A piece in *Psychology Today* notes:

One of the primary reasons women don't come forward to report sexual harassment . . . is shame. . . When we feel ashamed, we want

138. *See id.*

139. *See, e.g.,* Joyner v. Woodspring Hotels Prop. Mgmt. LLC, 785 Fed. Appx. 771, 775 (11th Cir. 2019) (noting that the plaintiff cited "fear of retribution" as reason for failing to make a complaint of sexual harassment). *See also* Samorn Salem, *Why Women Leave: Culture of Abuse, Silence, and Retaliation*, AM. BAR. ASS'N, <https://www.americanbar.org/careercenter/blog/why-women-leave-culture-of-abuse-silence-and-retaliation/> (last visited June 18, 2022); *see also* McCann & Tomaskovic-Devey, *supra* note 77.

140. Bornstein, *supra* note 78, at 291 (citing Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace>); *see also* Golshan, *supra* note 79.

141. Salem, *supra* note 139.

142. Donathan v. Oakley Grain, Inc., 861 F.3d 735, 737 (8th Cir. 2017). *See generally* Tamara Lytle, *Closing the Gender Pay Gap*, SHRM (June 4, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/summer2019/pages/closing-the-gender-pay-gap.aspx>.

to hide. . . Sexual harassment . . . can be a humiliating experience to recount privately, let alone publicly. . . Depending on how much a woman has already been shamed by previous abuse or by bullying, she may choose to try to forget the entire incident, to put her head in the sand and try to pretend it never happened.¹⁴³

Although men also experience sexual misconduct at work,¹⁴⁴ they are even less likely than women to report it.¹⁴⁵

3. Age Discrimination

There is “vast underreporting” of age discrimination, according to the EEOC.¹⁴⁶ Indeed, an AARP survey found that only 3 percent of older employees have ever made a formal complaint to a government agency of age discrimination in the workplace,¹⁴⁷ but the incidence of age discrimination, however, is close to 60 percent.¹⁴⁸ The acting chair of the EEOC said in 2018 “[e]veryone knows [age discrimination] happens every day to workers in all kinds of jobs, but few speak up. It’s an open secret.”¹⁴⁹ Many employees do not speak up about age discrimination because they fear retaliation.¹⁵⁰ The loss of employment later in life

143. Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.

144. Golshan, *supra* note 79.

145. See, e.g., Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261-65 (2011) (explaining that the taint of homophobia and fears of appearing weak contribute to this underreporting). See generally Kiran Mehta, *Male Rape Victims: Breaking the Silence*, 13 PUB. INT. L. REP. 93 (2008).

146. See Kita, *supra* note 83.

147. *Ageism in the Workplace Study*, HISCOX (2019), <https://www.hiscox.com/documents/2019-Hiscox-Ageism-Workplace-Study.pdf>.

148. *Id.*

149. Press Release, Equal Emp. Opportunity Comm’n, EEOC Acting Chair Lipnic Releases Report on The State Of Older Workers And Age Discrimination 50 Years After The ADEA (June 26, 2018), <https://www.eeoc.gov/newsroom/eeoc-acting-chair-lipnic-releases-report-state-older-workers-and-age-discrimination-50>.

150. See John Rosengren, *Learn the Language of Age Discrimination*, AARP (Dec. 30, 2019), <https://www.aarp.org/work/working-at-50-plus/info-2019/age->

can have exceptionally devastating financial consequences.¹⁵¹ While age discrimination does not account for all employment termination of those over the age of fifty, the issue of age discrimination is considerable, as it has negatively impacted a significant number of workers, their families, and the economy at large.¹⁵²

D. Underreported Perils for the Privileged

Unquestionably, employees most vulnerable to workplace misconduct and retaliation for reporting it are those at the low end of the pay scale. White-collar high-income workers are, however, particularly sensitive to reputational concerns outside of their current employment. These employees fear that there will be a negative impact on their careers if they complain about their current employer. They suffer in silence because they know that “a Google search can forever portray even a successful litigant as ‘the complainer,’”¹⁵³ and thus essentially unemployable tarnished goods.¹⁵⁴ In a case where the plaintiff sought to sue his employer under a pseudonym, the Southern District of New York remarked “[p]laintiff wants what most

discrimination-language.html.

151. Kristin McKenna, *The Next Big Retirement Threat—Keeping Your Job Past 50*, FORBES (Feb. 14, 2020, 7:20 AM), <https://www.forbes.com/sites/kristinmckenna/2020/02/14/the-next-big-retirement-threatkeeping-your-job-past-50/?sh=6c025d657d3d>.

152. Kita, *supra* note 83; *see also* *Ageism in the Workplace Study*, *supra* note 147.

153. Jayne S. Ressler, *Anonymous Plaintiffs and Sexual Misconduct*, 50 SETON HALL L. REV. 955, 971 (2020) (quoting Danielle Citron, cited in Jodi Kantor, *Lawsuits’ Lurid Details Draw an Online Crowd*, N.Y. TIMES (Feb. 22, 2015), http://www.nytimes.com/2015/02/23/us/lawsuits-lurid-details-draw-an-online-crowd.html?_r=1).

154. A social media firm estimates that ninety percent of employers conduct online searches for prospective hires, and, according to a Microsoft study, in about seventy percent of cases, internet search results have a negative impact on job applicants. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 8 (2014); *see also* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 352 (2014).

employment-discrimination plaintiffs would like: to sue their . . . employer without future employers knowing about it . . . [T]hat desire is understandable.”¹⁵⁵

IV. INADEQUATE SAFEGUARDS FOR REPORTING WORKPLACE MISCONDUCT

There are several regulations aimed at prohibiting employers from retaliating against those who report workplace misconduct. Title VII and the Age Discrimination in Employment Act, for example, contain nearly identical provisions proscribing mistreatment of an employee arising from opposition to the employer’s wrongful workplace practices.¹⁵⁶ In addition, there are laws designed specifically to protect whistleblowers. Whistleblowers characteristically do not speak out with respect to misconduct directed at them individually, but rather about large-scale illicit activity occurring at their workplace.¹⁵⁷

These anti-retaliation laws, however, have proven to be ineffective.¹⁵⁸ For example, Sandra Sperino has documented

155. *Doe v. Fedcap Rehab. Servs., Inc.*, No. 17-CV-8220 (JPO), 2018 WL 2021588, at *3 (S.D.N.Y. April 27, 2018).

156. See 42 U.S.C. § 2000e-3 (2000); see also 29 U.S.C. § 623(d) (2000) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.”).

157. *What is a Whistleblower?*, NAT’L WHISTLEBLOWER CENTER, <https://www.whistleblowers.org/what-is-a-whistleblower/> (last visited June 18, 2022); see also Charlie Savage, *How the Law Protects Intelligence Whistle-Blowers, and Leaves Them at Risk*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/politics/whistleblower-complaint.html> (“A whistle-blower is a person from within an organization who observes uncorrected issues occurring, such as “waste, fraud, abuse, crime or something that poses a threat to public safety and security,” and then reports this information to an outsider.”).

158. See, e.g., Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 673 (2021) (arguing for a reversal of the trend toward narrowing employer liability for harassment and retaliation); Shawn Marie Boyne,

how lower courts have applied precedent narrowly, excluding many undesirable job consequences, such as schedule or assignment changes, reprimands, or ostracism from the definition of a “materially adverse” action required to trigger anti-retaliation protections.¹⁵⁹ Anti-retaliation laws are tightly drawn and interpreted, and impose unrealistic demands upon employees. Furthermore, the fact that most employment in the United States is “at-will” makes it difficult to prove that the reason for an adverse job event was retaliatory.¹⁶⁰

A. *Inadequate Laws Prohibiting Retaliation*

Broadly defined, retaliation occurs when an employer takes negative action against an employee for reporting workplace misconduct.¹⁶¹ Employers retaliate against

Whistleblowing, 62 AM. J. COMP. L. 425, 453 (2014) (holding state level protections are “murky, piecemeal, disorganized and [inconsistent] from jurisdiction to jurisdiction.”). *See generally* Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37 (2013); Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 99–100 (2000); *Williams v. City of Burns*, 465 S.W.3d 96 (Tenn. 2015).

159. *See* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031 (2015). *See generally* *Stephens v. Erickson*, 569 F.3d 779, 790 (7th Cir. 2009) (holding that supervisors yelling at employee and physically isolating him from other employees did not constitute an adverse employment action); *Brown v. Advoc. S. Suburban Hosp.*, 700 F.3d 1101, 1107 (7th Cir. 2012) (calling an employee a “cry baby” and “trouble maker” was not an adverse employment action).

160. *See, e.g.*, Alison Morantz, et al., *Economic Incentives in Workers’ Compensation: A Holistic, International Perspective*, 69 RUTGERS L. REV. 1015, 1048 (2017) (“[t]he availability of civil remedies to injured workers also depends, indirectly, on the nature of the employment relationship. The United States is one of the few industrialized countries with an ‘employment at-will’ regime”, which incentivizes employers to retaliate with impunity against workers compensations claimants).

161. *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Aug. 26, 2016), <https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues> (defining retaliation as “materially adverse action” taken by an employer against an applicant or employee who, in some manner, has asserted protected EEO rights, which is considered “protected

employees in order to maintain social order, norms and hierarchies, and racial, socioeconomic, and gender privilege.¹⁶² Retaliation perpetuates discrimination and inequality,¹⁶³ and it occurs in all types of institutions and in response to various forms of speaking up.¹⁶⁴ Although retaliation can result in different consequences among individuals, it is a common problem that necessitates a broad response.

The United States relies primarily on a rights-claiming approach to employment regulation. This means that employees must seek redress for the harms done to them, rather than depend on others to protect and enforce their rights.¹⁶⁵ Yet in order to speak up, the employee must know that she is entitled to relief in the first place. Labor unions have historically served this important information-providing function, but they have been on the decline for over

activity”). However, employer retaliation can occur prior to any manifestation of protected activity. For example, retaliation can covertly exist via company policies, such as those that discourage the exercise of EEO rights in the first place. *Id.*; see also *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013) (explaining that Title VII makes it unlawful for an employer to subject an employee to retribution for actively opposing prohibited workplace discrimination).

162. Brake, *supra* note 28, at 64 (“[w]hen retaliation intervenes to punish such opposition, it preserves privilege by punishing challenges to race and gender hierarchy.”). Therefore, “the interaction between discrimination and retaliation produces a reciprocal relationship: a decrease in toleration for workplace discrimination increases the likelihood of retaliation occurring.” *Id.* at 41–42. Unnoticed retaliation ultimately preserves, and even heightens, invidious discrimination in the workplace.

163. *Id.* at 41–42, 64 (“[t]he relationship between discrimination and retaliation is reciprocal: just as the tolerance for discrimination increases the likelihood of retaliation, retaliation also encourages further discrimination. . . . When retaliation intervenes . . . it preserves privilege by punishing challenges to race and gender hierarchy.”).

164. *Id.* at 20 (“[b]ecause retaliation can occur in any institution and in response to any type of discrimination challenge, the problem of retaliation cuts across discrimination law broadly and is not limited to any one legal context.”).

165. Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as A Rights-Claiming System*, 86 N.C. L. REV. 859 (2008) (“[t]he model of rights-claiming behavior . . . contrasts starkly with extensive social science research on how people perceive and respond to discrimination in the real world.”).

half a century.¹⁶⁶ Without unions, a worker who is fired in retaliation for filing a workplace misconduct claim may have no recourse but to bring a lawsuit.¹⁶⁷ The employee faces the arduous task of gathering proper documentation and finding a lawyer willing to take the case.¹⁶⁸ Hourly fees are typically too expensive for most, and for many lawyers the dollar amounts involved are too small to justify working on a contingency basis.

Furthermore, employees who speak up about misconduct will always fear reprisals, despite even the most robust anti-retaliation protections.¹⁶⁹ From a young age, Americans have been taught that speaking up when bad things happen will result in negative consequences. As David Skeel noted, “the reality of human interaction is that we often suspect that when we report, we’ll be punished. It starts at the playground as a kid and it doesn’t go away.”¹⁷⁰ We are afraid to be labeled a tattletale, snitch, rat, or squealer. In the employment context, employers are the authority figures and retaliation is the punishment.

Retaliation as a result of reporting workplace misconduct can have profound financial or social consequences, and often both. These include termination, salary reduction, demotion, hostility, intimidation, threats (including threats of deportation), harassment, social

166. See Jedidiah Kroncke, *The False Hope of Union Democracy*, 39 U. PA. J. INT’L L. 615 (2018); see also Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CALIF. L. REV. 1767 (2001).

167. See David H. Autor, et al., *The Costs of Wrongful-Discharge Laws*, 88 REV. ECON. & STAT. 211 (2006).

168. *Ageism in the Workplace Study*, *supra* note 147 (“[e]mployees often fail to report discrimination as result of a lack of knowledge about the process of filing a report.”).

169. See Prenkert, et. al., *supra* note 105, at 928 (noting that social science literature illustrates that the fear of reprisal, no matter how likely, disincentivizes reports of wrongdoing).

170. *The Whistleblower’s Dilemma: Do the Risks Outweigh the Benefits?*, KNOWLEDGE AT WHARTON (Nov. 5, 2019), <https://knowledge.wharton.upenn.edu/article/whistleblowers-in-business/>.

isolation, and adverse changes to schedules or assignments.¹⁷¹ It is risky enough for a vulnerable employee to report workplace misconduct. To require that the employee speak up again and report retaliation, after suffering reprisal for having reported misconduct, is untenable. As one scholar noted, the threat of being subjected to retribution results in most employees “choos[ing] to avoid the negative consequences of retaliation in the first place.”¹⁷² For most of the workforce, retaliation, or the threat thereof, makes the rights-claiming system unavailable.¹⁷³

An indirect consequence of retaliation is reflected in co-workers’ behavior. Co-workers are stakeholders when a colleague comes forward to report workplace misconduct. They see the repercussions and use that information to guide their own decisions not to report.¹⁷⁴ Employer retaliation against one outspoken employee can snowball into a company-wide fear among all employees. Co-workers might feel pressure to support the employer—often out of their own survival instincts or because of the social structure of the workplace.¹⁷⁵ Unsupportive, or even hostile co-workers can

171. See generally Brake, *supra* note 28.

172. Bornstein, *supra* note 78, at 311 (2021) (quoting Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 54–55 (2018)).

173. Lee & Smith, *supra* note 41, at 762–63 (2019) (“[L]aw and society scholarship . . . repeatedly documents how . . . rights-claiming may be ‘easier to bear for those who have many forms and volumes of capital’ but become ‘a heavier, often disabling burden that reinscribes disadvantage for those with less.’”) (citing Susan Silbey, *After Legal Consciousness*, 1 ANN. REV. L. SOC. SCI. 323, 353 (2005)).

174. See e.g., Fritz-Mauer, *supra* note 17, at 774 (2021) (describing an interview with a department store worker whose hours were cut after she complained about being shortchanged wages; her co-workers did not speak up after witnessing the retaliation).

175. Gordon Lafer and Lola Loustaunau, *Fear at Work*, ECON. POL’Y INST. (July 23, 2020), <https://www.epi.org/publication/fear-at-work-how-employers-scare-workers-out-of-unionizing/>.

dissuade their colleagues from reporting misconduct.¹⁷⁶ Correspondingly, those in positions of power within the company might desire to report malfeasance that they have witnessed. They too, however, could be at risk of retribution for attempting to interfere with the status quo. Thus, the specter of reprisal can silence even those in a position to affect change.

B. *Inadequate Protections for Whistleblowers*

Policymakers endorse the role that whistleblowers play in detecting and reporting workplace abuses.¹⁷⁷ Thus, there are numerous federal and state laws, as well as over 50 whistleblower laws in the private sector, aimed at protecting these employees from retaliation.¹⁷⁸ The Federal Whistleblower Protection Act, for example, prohibits any employer from taking or threatening negative personnel action against an employee for disclosing illegal conduct occurring within the workplace.¹⁷⁹ Additional federal laws, such as Sarbanes-Oxley and the Safe Drinking Water Act, include anti-retaliation whistleblower provisions.¹⁸⁰ In terms of state-level regulations, state legislatures for all fifty states and the District of Columbia have enacted statutes containing anti-retaliation provisions to protect

176. *Id.*

177. *See The Whistleblower's Dilemma: Do the Risks Outweigh the Benefits*, *supra* note 170 (questioning whether whistleblowing will “emerge bruised or burnished in the wake of recent whistleblower allegations that President Trump held back foreign aid to Ukraine”).

178. *Id.*

179. 5 U.S.C. § 2302(b)(8) (2021) (“(b) Any [government] employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) any violation of any law, rule, or regulation.”).

180. *See* 18 U.S.C. § 1514A(a); 42 U.S.C. § 300j-9(i)(1) (2010).

whistleblowers.¹⁸¹ Both federal and state laws, however, are inadequate and inconsistent. Furthermore, many of these statutes do not apply to independent contractors,¹⁸² and most of them are interpreted narrowly.¹⁸³

A recent holding by the Eighth Circuit provides an example of a narrow interpretation of a federal whistleblower law. In a case of first impression, that Court was tasked with determining whether a former employee at a General Motors manufacturing plant could bring a retaliation claim under the federal Moving Ahead for Progress in the 21st Century Act (“MAP-21”).¹⁸⁴ The relevant portion of MAP-21 read:

No motor vehicle manufacturer . . . may discharge an employee or otherwise discriminate against an employee . . . because the employee . . . provided, caused to be provided, or is about to provide . . . information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter.¹⁸⁵

The employee was fired for reporting falsified repair reports in the automobile manufacturing process, while the

181. See CAL. GOV'T CODE §§ 12650-12655 (West 2012); DEL. CODE ANN. tit. 6, §§ 1201-1209 (West 2012); D.C. CODE §§ 2-381.01-.09 (2012); FLA. STAT. §§ 68.081-.092 (2012); HAW. REV. STAT. §§ 46-171 to -177, -179 (2012) (false claims made to counties); HAW. REV. STAT. §§ 661-21 to -27, -29 (false claims made to state); 740 ILL. COMP. STAT. ANN. 175/1-/8 (LexisNexis 2012); IND. CODE § 5-11-5.5-1 to -18 (2012); IOWA CODE ANN. §§ 685.1-.7 (West 2012); MASS. GEN. LAWS ANN. ch. 12, §§ 5a-5o (West 2012); MINN. STAT. §§ 15C.01-.16 (2012); MONT. CODE ANN. §§§ 17-8-401 to -407, -409 to -413 (2012); NEV. REV. STAT. §§ 357.010-.250 (2011); N.H. REV. STAT. ANN. §§ 167:61-b to -e (2012); N.J. STAT. ANN. §§ 2A:32C-1 to -18 (West 2012); N.M. STAT. ANN. § 27-14-12 (2012); N.Y. STATE FIN. LAW §§ 187-194 (McKinney 2012); N.C. GEN. STAT. §§ 1-605 to -618 (2012); OKLA. STAT. TIT. 63, §§ 5053.1-.7 (2012); R.I. GEN. LAWS §§ 9-1.1-1 to -8 (2012); VA. CODE ANN. §§ 8.01-216.1.

182. See *The Whistleblower's Dilemma: Do the Risks Outweigh the Benefits*, *supra* note 170.

183. See, e.g., *Reddington v. Staten Island Univ. Hosp.*, 893 N.E.2d 120 (N.Y. 2008); *Tartaglia v. UBS PaineWebber Inc.*, 961 A.2d 1167 (N.J. 2008).

184. *Barcomb v. Gen. Motors, LLC*, 978 F.3d 545, 548–49 (8th Cir. 2020).

185. 49 U.S.C.A. § 30171 (West).

vehicles were still on the assembly line.¹⁸⁶ The court stated that the case turned on whether MAP-21 covered reports about safety violations regarding completed vehicles only, or if it applied to unfinished cars as well.¹⁸⁷ The majority chose to read the statute narrowly and held that it pertained only to reports of safety violations regarding completed vehicles, not to those in the production process.¹⁸⁸ Therefore, the employer did not act illegally in firing the whistleblower specifically for reporting falsified repair reports.¹⁸⁹

In another federal case, the Northern District of Mississippi held that an employer could properly fire a waste-management employee who reported safety violations to OSHA, because the allegations of wrongdoing did not constitute “criminal illegalities.”¹⁹⁰ In a case where an employee was fired in retaliation for reporting his employer’s failure to follow COVID-19 safety protocols, the Middle District of Pennsylvania stated that “Pennsylvania courts have repeatedly rejected claims that a private employer violated public policy by firing an employee for whistleblowing, when the employee was under no legal duty to report the acts at issue.”¹⁹¹ In contrast, the District Court of New Hampshire held that the public policy reflected in New Hampshire’s Whistleblower’s Protection Act¹⁹² protects whistleblowers from retaliation if they in good faith report perceived prohibited illegal activities, even if it is ultimately determined that the employer did nothing unlawful.¹⁹³

186. Gen. Motors, LLC, 978 F.3d at 547.

187. *Id.*

188. *Id.* at 549–50.

189. *Id.*

190. See *Howell v. Operations Mgmt. Inter'l, Inc.*, 161 F. Supp. 2d 713, 719 (N.D. Miss. 2001).

191. *Warner v. United Nat. Foods, Inc.*, 513 F. Supp. 3d 477, 485–86 (M.D. Pa. 2021) (internal citations omitted).

192. N.H. REV. STAT. ANN. § 275-E:2.

193. *Hidalgo-Semlek v. Hansa Med., Inc.*, 498 F. Supp. 3d 236, 257 (D.N.H. 2020).

State courts have also interpreted state laws narrowly.¹⁹⁴ For example, New York Labor Law Section 740, known as “New York’s Whistleblower statute,” provides, in part:

An employer shall not take any retaliatory personnel action against an employee because such employee does any of the following:

(a) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety.¹⁹⁵

In *Peace v. KRNH, Inc.*, a former employee, Roscoe Peace, sued his former employer for retaliation under the New York whistleblower statute.¹⁹⁶ Peace had been employed as a respiratory therapist in KRNH, Inc.’s health care facility.¹⁹⁷ He learned that another therapist documented performing respiratory patient procedures that in fact were never done.¹⁹⁸ Peace submitted a written report of this wrongdoing to his supervisor, who himself was then consequently cited by his superiors for various job deficiencies.¹⁹⁹ The supervisor fired Peace within months of making his report.²⁰⁰ Peace sued KRNH, Inc. for violation of New York Labor Law Section 740, specifically claiming that he disclosed a workplace violation that created a substantial danger to the public, and could not be fired as a result.²⁰¹ The

194. See e.g. *Dear v. Cares Ctr. Inc.*, 328 So. 3d 733, 741 (Miss. Ct. App. 2021) (holding that the whistleblower exception to Mississippi’s employment-at-will doctrine applies only if the conduct at issue “warrant[s] the imposition of criminal penalties, as opposed to mere civil penalties”).

195. N.Y. LAB. LAW § 740 (McKinney 2022).

196. *Peace v. KRNH, Inc.*, 785 N.Y.S.2d 547 (N.Y. App. Div. 2004).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Appellate Division affirmed the lower court's grant of summary judgment for the defendant.²⁰² The court emphasized that since the patient who was the subject of Peace's report suffered "no serious adverse consequences from the alleged lack of care," the remedies implicated by the statute were unavailable.²⁰³ In other words, the whistleblower law did not protect Peace from retaliation for reporting workplace misconduct that could have caused substantial harm, because in this particular case it had not.

In Virginia, April Dray, a quality control inspector working for a poultry plant, informed management about unsanitary practices on the production line.²⁰⁴ When management ignored Dray's reports, she informed the plant's on-site governmental inspectors about the health violations.²⁰⁵ These inspectors "confirmed the unsanitary conditions" and required management to remedy them.²⁰⁶ Sometime later Dray's employer suspected that she informed government inspectors of additional sanitary violations, and fired Dray.²⁰⁷ Dray sued her employer, alleging that she was impermissibly fired in violation of Virginia public policy against retaliatory firing.²⁰⁸ The court held that Virginia's "strong employment-at-will doctrine" trumped any "generalized common-law whistleblower retaliatory discharge claim."²⁰⁹ In other words, because Virginia did not have a specific law protecting whistleblowers' disclosure of unsanitary production processes, it was within the employer's right to fire Dray for reporting these conditions.

202. *Id.*

203. *Id.*

204. *Dray v. New Mkt. Poultry Prods., Inc.*, 518 S.E.2d 312 (Va. 1999).

205. *Id.* at 312–13.

206. *Id.* at 313.

207. *Id.*

208. *Id.*

209. *Id.*

V. THE EXISTING ANONYMITY SOLUTION

Anonymity has been instrumentally important in United States history. “Between 1789 and 1809, six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published anonymous political writings or used pen names.”²¹⁰ The Federalist Papers and their rebuttal were authored under a pseudonym.²¹¹ As the Supreme Court recognized in 1995, “[a]nonymity is a shield from the tyranny of the majority. . . . It thus exemplifies the purpose behind the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation . . . at the hand of an intolerant society.”²¹² Anonymity has consistently been a useful mechanism to “speak truth to power.” In litigation, courts have permitted plaintiffs to sue anonymously to protect various interests.²¹³ Outside of the judicial sphere, many public and private sector entities offer and utilize anonymous reporting mechanisms to obtain information about a variety of misconduct. Anonymity has a paradoxical effect: its secrecy generates information.

A. *Anonymity for Litigation Plaintiffs*

The Federal Rules of Civil Procedure require that “[t]he title of the complaint must name all the parties.”²¹⁴ Most

210. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET, 139–40 (2007).

211. See McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 343 n.6 (1995); *Federalist Papers: Primary Documents in American History*, RESEARCH GUIDES, <https://www.loc.gov/rr/program/bib/ourdocs/federalist.html> (last visited Jan. 29, 2022).

212. Ohio Elections Comm’n, 514 U.S. at 357.

213. See generally Jayne S. Ressler, *Anonymous Plaintiffs and Sexual Misconduct*, 50 SETON HALL L. REV. 955, 964 (2020); Jayne S. Ressler, *#WorstPlaintiffEver: Popular Public Shaming and Pseudonymous Plaintiffs*, 84 TENN. L. REV. 779, 788 (2017); Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 197 (2004).

214. See FED. R. CIV. P. 10 “[t]he title of the complaint must name all the

state procedure statutes follow the federal rules.²¹⁵ Thus, there is no general authority in these codes permitting plaintiff anonymity. The states that do provide specifically for plaintiff anonymity present a variety of reasons for doing so.²¹⁶ Nonetheless, both federal and state courts have permitted plaintiffs to litigate anonymously in various contexts.²¹⁷ Indeed, the United States Supreme Court has implicitly endorsed the practice of pseudonymous plaintiffs in several cases, most famously in *Roe v. Wade*, and most recently in 2013.²¹⁸

There are five core factors most federal courts analyze in

parties.” See also FED. R. CIV. P. 17(a)(1) (“An action must be prosecuted in the name of the real party in interest.”).

215. For a compilation of state statutes’ filing requirements regarding parties’ names, see *Filing Pseudonymously By State*, WITHOUTMYCONSENT.ORG, <http://www.withoutmyconsent.org/50state/filing-pseudonymously/state> (last visited Jan. 29, 2022).

216. See e.g., Alaska Rules of Court—Rules of Administration 40(b), which provide that “[t]he presiding judge . . . may direct the clerk of the court to substitute the pseudonym ‘Jane Doe’ or ‘John Doe’ or initials for a party’s true name on the public index if the presiding judge finds that the issues in the case involve matters of a sensitive and highly personal nature, that publication of the name could expose a person to harassment, injury, ridicule, or personal embarrassment, and that protection of the party’s name outweighs the public’s interest in disclosure and any prejudice to the opposing party.” Alaska R. of Admin 40(b); In Illinois, a provision in the Code of Civil Procedure states that “[u]pon application and for good cause shown the parties may appear under fictitious names.” 735 ILL. COMP. STAT. ANN. 5/2-401(e) (West 2012). See also Conn. Practice Book § 11-20A(h)(1); VA. CODE ANN. § 8.01-15.1.

217. See *Filing Pseudonymously: Overview*, WITHOUTMYCONSENT.ORG, <https://withoutmyconsent.org/50state/filing-pseudonymously/overview/> (last visited Jan. 29, 2022).

218. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013); see also *Doe v. Reed*, 561 U.S. 186, 201–02 (2010). See also *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam) (pseudonymous police officer’s challenge to termination of employment); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) (pseudonymous students’ challenge to public high school’s “football prayer policy”); *Honig v. Doe*, 484 U.S. 305 (1988) (pseudonymous student’s challenge to district’s policy of excluding disabled children from classroom for dangerous or disruptive conduct); *Plyler v. Doe*, 457 U.S. 202 (1982) (pseudonymous children’s challenge to exclusion of illegal aliens from public schools); *Roe v. Wade*, 410 U.S. 113, 120, 124 (1973) (pseudonymous woman’s challenge to criminal abortion statute).

order to determine whether to permit a plaintiff to proceed using a pseudonym: (1) whether the plaintiff would risk suffering injury if publicly identified; (2) whether the plaintiff is challenging governmental activity; (3) whether the plaintiff would be compelled to admit her intention to engage in illegal conduct, thereby risking criminal prosecution; (4) whether the plaintiff would be required to disclose information of the utmost intimacy; and (5) whether the party defending against a suit brought under a pseudonym would be prejudiced.²¹⁹

Various federal courts add additional factors to these basic five.²²⁰ State courts follow an assortment of factors when permitting plaintiffs to litigate anonymously.²²¹ Courts, however, struggle with what these factors mean, and often apply them inconsistently.²²² Sometimes they do not apply them at all.²²³

219. See, e.g., *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008); *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); see also *Filing Pseudonymously: Federal, WITHOUT MY CONSENT*, <http://withoutmyconsent.org/50state/filing-pseudonymously/federal> (last visited Jan. 29, 2022).

220. Tom Isler, *White Paper: Anonymous Civil Litigants*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2015/white-paper-anonymous-civil-1> (last visited Jan. 29, 2022) (“[s]ome federal circuit courts have attempted to identify more specific factors to assess the strength of the litigant’s need for anonymity and the likelihood and severity of harm that would result from disclosure”).

221. See *Filing Pseudonymously: Federal*, *supra* note 219.

222. See e.g., *Doe v. Pa. Dep’t of Corrs.*, No. 4:19-CV-1584, 2019 WL 5683437, at *2 n.10 (M.D. Pa. Nov. 1, 2019) (noting the difficulty in applying these factors).

223. In 2018 the Second Circuit instructed that “a district court is not required to list each of the factors or use any particular formulation *as long as it is clear that the court balanced the interests at stake in reaching its conclusion*” *Sealed Plaintiff*, 537 F.3d at 190–91 n.4. Notwithstanding the Second Circuit’s mandate, district courts in the Eastern and Southern Districts of New York, as well as the District of Connecticut, subsequently permitted plaintiffs to proceed pseudonymously without addressing the issue. See *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179 (D. Conn. 2016); *Doe v. New York*, 97 F. Supp. 3d 5 (E.D.N.Y. 2015); *Doe v. Delta Airlines, Inc.*, 129 F. Supp. 3d 23 (S.D.N.Y. 2015); *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324 (S.D.N.Y. 2010).

There are several cases in the context of workplace misconduct in which courts have permitted plaintiffs to proceed anonymously.²²⁴ These are the atypical situations where the employee was intrepid enough to litigate in the first place. The United States Court for the District of Columbia permitted student employees to proceed anonymously when they alleged that they were subjected to a hostile work environment, discriminated against based on their gender, and retaliated against for complaining about sexual harassment.²²⁵ Likewise, the Northern District of California permitted seven female associates to bring a gender, pregnancy, and maternity discrimination against their employer.²²⁶ The United States District Court for the District of New Jersey allowed the plaintiff to proceed anonymously in his suit against his employer for multiple instances of discrimination.²²⁷ The United States District Court for the Eastern District of Pennsylvania similarly permitted a plaintiff to anonymously sue her employer for discrimination, harassment, and retaliation.²²⁸ In a 2006 case before the Tax Court, the court permitted the petitioner to sue the Commissioner under the name “Anonymous.”²²⁹

Not all requests to proceed anonymously when suing for

224. See *Doe v. Dejoy*, No. 5:19-cv-05885, 2020 WL 4382010, at *5 (E.D. Pa. July 31, 2020) (granting plaintiff's motion for leave to proceed under the pseudonym “Doe” on a conditional basis); *Doe v. Triangle Doughnuts*, 472 F. Supp. 3d 115, 124 (E.D.Pa. 2020); *Doe v. Google, Inc.*, 268 Cal. Rptr. 3d 783 (Cal. Ct. App. 2020) (permitting plaintiffs to sue employer as “John Doe” without discussion); *Doe v. Dep't of Corrs. and Rehab.*, 255 Cal. Rptr. 3d 910 (Cal. Ct. App. 2019); *Doe v. Grand Co.*, No. 18-cv-13123, 2020 WL 806031, at *1 (E.D. Mich. Feb. 18, 2020) (permitting plaintiff to sue her employer as “Jane K. K. Doe”).

225. *Doe 1 v. George Washington Univ.*, 369 F. Supp. 3d 49 (D.D.C. 2019).

226. *Doe 1 v. Morrison & Foerster LLP*, No. 18-cv-025420-JSC, 2019 WL 11806485, at *1 (N.D. Cal. May 1, 2019).

227. *Doe v. Sizewise Rentals, LLC*, No. 09-3409 (JLL), 2010 WL 4861138, at *2 n.1 (D.N.J. Nov. 22, 2010), *aff'd*, 530 F. App'x 171 (3d Cir. 2013).

228. *Doe v. TRX Ins. Servs., CIV. A. No. 20-4095*, 2021 WL 1566050, at *1 (E.D. Pa. April 21, 2021).

229. *Anonymous v. Comm'r*, 127 T.C. 89, 94 (2006).

workplace misconduct, however, are successful.²³⁰ For example, a federal judge in New York declined a gay and Muslim Morgan Stanley employee permission to bring a harassment suit anonymously against the brokerage firm.²³¹ Similarly, a federal judge in the District of Columbia denied a plaintiff's request to proceed anonymously in her gender discrimination case against her employer, Jones Day.²³² Focusing on the default presumption in the Federal Rules that the complaint must include the parties' names, in denying the plaintiffs the ability to proceed pseudonymously, a Judge in the Northern District of Illinois said "the worst-case scenario for the Plaintiffs is losing their jobs. That is no small thing, but transparency is no small thing either."²³³

B. *Extrajudicial Anonymous Reporting of Misconduct*

Both the Sarbanes-Oxley and Dodd-Frank Acts specifically afford anonymity to whistleblowers who report violations of securities and other laws.²³⁴ Sarbanes-Oxley provides: "(3) *Complaints*. Each audit committee must establish procedures for: (ii) The confidential, anonymous submission by employees of the listed issuer of concerns

230. See, e.g., *Doe v. Merritt Hospitality, LLC*, 353 F. Supp. 3d 472, 476 (E.D. La. 2018) (denying plaintiff's motion to proceed under a pseudonym when suing his former employer for employment discrimination and sexual harassment).

231. Patrick Dorrian, *Gay Muslim Morgan Stanley Worker Claiming Bias Must Reveal Name*, Bloomberg L. (May 2, 2019, 1:39 PM), <https://news.bloomberglaw.com/business-and-practice/gay-muslim-morgan-stanley-worker-claiming-bias-must-reveal-name?context=article-related>.

232. *Tolton v. Day*, No. CV 19-945, 2020 WL 2542129, at *1 (D.D.C. May 19, 2020).

233. *In re Boeing 737 MAX Pilots Litig.*, No. 1:19-cv-5008, 2020 WL 247404, at *3 (N.D. Ill. Jan. 16, 2020).

234. See, e.g., Dr. Tanya M. Marcum, J.D., Jacob Young, D.B.A., *Blowing the Whistle in the Digital Age: Are You Really Anonymous? The Perils and Pitfalls of Anonymity in Whistleblowing Law*, 17 DEPAUL BUS. & COM. L.J. 1, 4 (2019); See also Adam Hartung, *Regulations Work: Benefits of SOX and Dodd-Frank*, FORBES (Aug. 16, 2015, 5:41 PM), <https://www.forbes.com/sites/adamhartung/2015/08/16/regulations-work-benefits-of-sox-and-dodd-frank/?sh=285422671157>.

regarding questionable accounting or auditing matters.”²³⁵

The Dodd-Frank Act includes the following: “(b) You may submit information to the Commission anonymously. If you do so, however, you must also do the following: . . . (2) You . . . must follow the procedures set forth in § 240.21F–9 of this chapter for submitting original information anonymously.”²³⁶

Indeed, in 2017, the SEC awarded an anonymous whistleblower \$2.4 million for reporting a company that was misusing SEC regulations to avoid paying investors.²³⁷ The Department of Justice has an ATF anonymous reporting mobile app, and an anonymous tip form with which to report human trafficking.²³⁸ The 2018 STOP School Violence Act authorizes funding for “[a]nonymous reporting systems to be implemented for use by students, teachers, or others to contact law enforcement about potential threats.”²³⁹ In early 2020, Congress passed the Families First Coronavirus Response Act in an effort to provide employees and their family members sick leave for COVID-19 related reasons.²⁴⁰ With the provision of Federal COVID Relief plans came the onset of scams. In April, 2020, the Government Accountability Office announced that “[a]llegations [of fraud

235. Listing Standards Related to Audit Committees, Exchange Act Rule 17 CFR § 240.10A-3.

236. 17 C.F.R. § 240.21F-7.

237. See *Katz, Marshall & Banks Client Awarded \$2.4 Million by SEC Whistleblower Office for Role in Stopping Manipulation of Mutual Fund Share Prices*, KATZ, MARSHALL & BANKS, LLP (July 26, 2017), <https://www.kmblegal.com/news/katz-marshall-banks-client-awarded-24-million-sec-whistleblower-office-role-stopping>.

238. *Report a Crime*, U.S. DEP’T OF JUST., <https://www.justice.gov/actioncenter/report-crime> (last visited Jan. 29, 2022).

239. STOP School Violence Act of 2018, H.R. 4909, 115th Cong. (2018), <https://www.govtrack.us/congress/bills/115/hr4909>.

240. Families First Coronavirus Response Act, Pub. L. No. 116-127, H.R. 6201 (2020); see U.S. Department of Labor, *Families First Coronavirus Response Act: Employee Paid Leave Rights*, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> (last visited June 13, 2022).

relating to COVID-19 assistance] may be provided anonymously.”²⁴¹

State governments likewise provide anonymous tip lines to report a variety of misdeeds. Pennsylvania offers healthcare workers the means to anonymously report situations in which patients suffer unanticipated injuries while under clinical care.²⁴² California provides for the submission of anonymous complaints regarding climate pollutants,²⁴³ and in New York City, the Police Department’s (NYPD) anonymous crime-stoppers hotline offers a monetary reward for the arrest and conviction of violent felons.²⁴⁴ In late 2019, the NYPD released a mobile app to provide easy and quick access to the anonymous hotline.²⁴⁵

Institutions of higher education also provide outlets for students anonymously to report improper incidents or crimes on campus. For example, Vassar College offers an anonymous reporting form which is sent directly, and privately, to its Director of the Support, Advocacy, and Violence Prevention Office. These anonymous reports serve to collect information regarding “incidents of sexual assault, relationship abuse, stalking, and sexual harassment at Vassar College.”²⁴⁶ The University of Colorado Boulder offers

241. Press Release, U.S. Gov’t Accountability Off., GAO’s FraudNet Hotline Ready to Help Combat Fraud Under Covid-19 Assistance (April 10, 2020), <https://www.gao.gov/press-release/gaos-fraudnet-hotline-ready-help-combat-fraud-under-covid-19-assistance>.

242. Patient Safety Authority, *Anonymous Reporting*, <http://patientsafety.pa.gov/Pages/anonymous.aspx> (last visited Jan. 29, 2022).

243. CAL. CODE REGS. tit. 14, § 18995.3 (2022).

244. New York Police Department, *Crimes Stoppers*, NYC.GOV, <https://www1.nyc.gov/site/nypd/services/see-say-something/crimestoppers.page> (last visited Jan. 29, 2022) (“[c]alls to Crime Stoppers have helped solve more than 5,300 violent crimes, including over 1,400 murders and attempted murders.”).

245. Anthony M. DeStefano, *NYPD Rolls Out Smartphone App for Reporting Crime*, GOVTECH (Sept. 13, 2019), <https://www.govtech.com/public-safety/nypd-rolls-out-smart-phone-app-for-reporting-crime.html>.

246. *Anonymous Reporting*, VASSAR COLL.,

anonymous reporting to students by web, phone, and text message.²⁴⁷ Similarly, the State University of New York Maritime College offers a “Silent Witness” program, which allows for “the anonymous reporting of bias incidents, sexual assault, drugs, assault, theft, and other incidents and crimes that occur on campus.”²⁴⁸ Other higher education institutions provide similar anonymous reporting mechanisms as well.²⁴⁹

High schools are likewise joining the anonymous reporting bandwagon. Following the horrific school shooting at Columbine, the state of Colorado launched a telephone tip line to invite reports of potential safety concerns among students.²⁵⁰ The line received very few tips until it created a reporting mechanism in which callers and users could remain anonymous.²⁵¹ Following the devastating school shootings at Sandy Hook Elementary and Marjorie Stoneman Douglas, several high schools joined the Say Something anonymous reporting system.²⁵² Say Something

<https://offices.vassar.edu/savp/reporting/form/> (last visited Jan. 29, 2022).

247. *Anonymous Reporting*, UNIV. OF COLO. BOULDER POLICE DEPT., <https://www.colorado.edu/police/records-reports/anonymous-reporting> (last visited Jan. 29, 2022).

248. *Silent Witness / Anonymous Reporting*, MAR. COLL. STATE UNIV. OF N.Y., <https://www.sunymaritime.edu/titleix/silent-witness> (last visited Jan. 29, 2022).

249. See *Anonymous Reporting Form*, FULTON-MONTGOMERY COMTY. COLL., <https://www.fmcc.edu/about/campus-safety/anonymous-reporting-form/> (last visited Jan. 29, 2022); *Anonymous and Confidential Reporting*, UNIV. OF WIS. MILWAUKEE, <https://uwm.edu/titleix/make-a-report/anonymous-and-confidential-reporting/> (last visited Jan. 29, 2022); *Policy on Reporting of Alleged Misconduct*, CUNY, <https://www.cuny.edu/about/administration/offices/legal-affairs/policies-resources/reporting-of-alleged-misconduct/> (last visited Jan. 29, 2022) (“Reports may be submitted anonymously.”).

250. Evie Blad, *More Schools Are Using Anonymous Tip Lines to Thwart Violence. Do They Work?*, EDUCATIONWEEK.COM (Aug. 10, 2018), <https://www.edweek.org/leadership/more-schools-are-using-anonymous-tip-lines-to-thwart-violence-do-they-work/2018/08>.

251. *Id.*

252. *Say Something Tips*, SANDY HOOK PROMISE, <https://www.sandyhookpromise.org/say-something-tips/> (last visited Jan. 29, 2022).

is a national violence prevention organization that provides an anonymous reporting system to “allow[] youth and adults to submit secure and anonymous safety concerns to help identify and intervene with at-risk individuals.”²⁵³

Private companies offer anonymous crime reporting to the public, and then share collected information with local law enforcement. One such business, called WeTip, claims to have aided law enforcement in solving over 17,000 crimes, including the seizure of over \$340 million worth of illegal drugs and narcotics.²⁵⁴ In the employment context, some employers have outsourced the handling of workplace misconduct complaints to third parties. This has been met with success for reports of sexual harassment, discrimination, and bias. One company that has employed third party reporting is AllVoices. AllVoices was created by a former technology executive at 20th Century Fox, as “[a] tool aimed at making it easier for people to [anonymously] report harassment and bias in the workplace.”²⁵⁵ Furthermore, several of the over 50 varying whistleblower protection laws in the private sector include anonymous reporting provisions.²⁵⁶ Outside of the United States, France has permitted anonymous whistleblower reporting on a limited basis,²⁵⁷ and both Germany and Spain have recently embraced anonymous whistleblower reporting as well.²⁵⁸

253. *Id.*

254. *About WeTip*, WETIP 2.0, <https://www.wetip.com/about-wetip/> (last visited Jan 29, 2022).

255. *Sexual harassment: This site would let employees bypass HR, go straight to CEO*, USA TODAY (Nov. 15, 2017, 4:23 PM), <https://www.usatoday.com/story/tech/talkingtech/2017/11/14/fox-exec-leaves-build-tech-tool-companies-report-harassment/864143001/>.

256. See *The Whistleblower's Dilemma: Do the Risks Outweigh the Benefits*, *supra* note 170; see, e.g., Tax Court Rule 345, entitled “Privacy Protections for Filings in Whistleblower Actions,” which provides that a petitioner in a whistleblower action may move the court to proceed anonymously.

257. See *How does the CNIL conduct its investigations?*, CNIL (Dec. 22, 2020), <https://www.cnil.fr/en/how-does-cnil-conduct-its-investigations>.

258. Jessica Wilburn, *Germany & Spain Respond to GDPR with Guidance &*

These are significant developments, as historically countries in the European Union have been wary of anonymous whistleblowing,²⁵⁹ and, in general, pro-employer.²⁶⁰

Taking anonymity one step further, and using it not as a tool to report misconduct but rather as a means to solicit feedback and ideas from employees, the Department of Homeland Security uses Waggl, an anonymous survey tool.²⁶¹ Waggl asks short, survey-like questions that encourage anonymous respondents to answer authentically in order to gauge employees' perception of their work culture.²⁶² Employees can view and vote on their colleagues' anonymous responses without the fear of criticism, being singled out, or retaliated against.²⁶³ Other prominent employers likewise use the anonymity provided by Waggl to solicit employee feedback, including Denver International Airport, North Texas Health Care System, and Freddie Mac.²⁶⁴

VI. EXPANDING ANONYMITY TO EXPOSE EMPLOYER MISCONDUCT

Given the various hazards confronting the American

Legislation on Anonymous Whistleblower Reporting, NAVEX (Jan. 24, 2019), <https://www.navexglobal.com/blog/article/germany-spain-respond-to-gdpr-with-guidance-on-anonymous-whistleblower-reporting/>.

259. K Royal, *Whistleblowing in the European Union*, ACC DOCKET (Dec. 21, 2020), <https://docket.acc.com/whistleblowing-european-union> ("Historically, the European Union has not supported traditional anonymous whistleblowing hotlines.").

260. *Id.*

261. *Waggl Privacy Policy and Notice*, U.S. DEPT OF HOMELAND SEC. (Feb. 14, 2020), <https://www.dhs.gov/waggl> (The Department of Homeland Security's website states that Waggl "enable[s] employees to crowd source ideas, vote on topics, and prioritize potential solutions to be forwarded to senior leadership.").

262. *How do we measure engagement*, WAGGL, <https://www.waggl.com/how-it-works/> (last visited June 13, 2022).

263. *Id.*

264. *Employee Voice in the words of our customers*, WAGGL, <https://www.waggl.com/customer-stories/> (last visited Jan. 29, 2022).

worker, a robust system of anonymous reporting of workplace wrongdoing should be developed and implemented. Under proper circumstances, and with adequate protections for employers in place, anonymous reporting could become a fundamental means to increase documentation of workplace misconduct.²⁶⁵ Scholars have explained that “[a]ccording to research, the single best way to combat fraud is to provide a way for employees to report anonymously.”²⁶⁶ A 2020 study concluded that allowing employees to report workplace misconduct anonymously creates greater opportunities for employers to identify unwanted behavior and address such wrongdoing than “via traditional reporting and monitoring.”²⁶⁷ Additionally, “significantly more” information is received when the reporter is permitted to remain anonymous.²⁶⁸ This is particularly meaningful given the financial and staffing constraints facing regulatory agencies. With more information at their disposal, these agencies can better know

265. My proposal is an approach to, rather than a specific mechanism for, reform. Those details are left for a future paper.

266. Marcum & Young, *supra* note 236, at 13 (2019) (citing *2016 ACFE Report to the Nations on Occupational Fraud and Abuse: 2016 Global Fraud Study*, ASS'N OF CERTIFIED FRAUD EXAM'RS (Feb. 21, 2017), <http://www.acfe.com/rtn2016/about/executive-summary.aspx> (reporting a study of 2,410 cases of occupational fraud that occurred in 114 countries exceeding \$6.3 billion dollars)).

267. Stephen R. Stubben & Kyle T. Welch, *Evidence on the Use and Efficacy of Internal Whistleblowing Systems*, 58 J. ACCT. RSCH. 473, 474 (Feb. 17, 2020).

268. *Id.* at 496; see also Kim Elsesser, *Can Apps Help Eradicate Sexual Harassment?*, FORBES (March 5, 2020, 2:45 PM), <https://www.forbes.com/sites/kimelsesser/2020/03/05/can-apps-help-eradicate-sexual-harassment/?sh=52f20f765522>; Kobi Kastiel, *Elements of an Effective Whistleblower Hotline*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 25, 2014), <https://corpgov.law.harvard.edu/2014/10/25/elements-of-an-effective-whistleblower-hotline/> (stating that “[I]n 2013, 60% of internal fraud tips were reported anonymously” and anonymous hotlines foster an environment where “employees are more likely to report or seek guidance regarding potential or actual wrongdoing without fear of retaliation.”); Ann B. Dunham, *Are Ethics Hotlines Effective?*, SOC'Y HUM. RES. MGMT. (Feb. 26, 2020), <https://www.shrm.org/hr-today/news/hr-magazine/spring2020/pages/are-ethics-hotlines-effective.aspx>.

where to target their limited resources.

NELP itself advocates for anonymous complaints, or in the alternative, for third parties, such as work centers, to file complaints.²⁶⁹ A NELP model policy states:

A worker may file an anonymous claim for unpaid wages with the agency. To file an anonymous claim, the worker should write 'ANONYMOUS' in the name section of the claim form, and leave the address blank. When the agency is investigating anonymous claims, it shall review records regarding all employees at the workplace. It will not provide any information to the anonymous claimant unless a resolution is reached with the employer that includes payment of the wages due.²⁷⁰

NELP contends that “[b]ecause worker complaints are essential to effective enforcement, protecting workers’ identity can contribute towards increased employer compliance.”²⁷¹ When others learn that their colleagues are speaking up about workplace misconduct without suffering retaliation, they will be incentivized to do so themselves.²⁷² Although the particulars of each case of misconduct will vary, to the extent that employers engage in a pattern and practice of malfeasance, individual allegations can lead to company-wide changes. When the anonymous report comes from a third party such as a fellow worker, it can be even more powerful, because it signals to the employer that the misconduct is seen by others and will not be tolerated. The more comfortable members of the workforce feel about coming forward with workplace misconduct allegations, the more pressured employers will be to reform their corporate culture. If the employer receives multiple reports of

269. *Winning Wage Justice: An Advocate’s Guide to State and City Policies to Fight Wage Theft*, NAT’L EMP. L. PROJECT, 57 (Jan. 2011), <https://s27147.pcdn.co/wp-content/uploads/2015/03/WinningWageJustice2011.pdf>.

270. *Id.*

271. *Id.*

272. *Cf.* Emma Goldberg, *You Quit. I Quit. We All Quit. And It’s Not a Coincidence.*, N.Y. TIMES (Jan. 21, 2022, 10:02 AM), <https://www.nytimes.com/2022/01/21/business/quitting-contagious.html>.

misconduct, strength in numbers can offset the risk of specific complainants being targeted.

Anonymity can also expand the time between reporting and retaliation—an important currency with respect to the workplace. Under the cloak of anonymity, an employee can speak up and not expect immediate repercussions, while the employer is forced to digest the substance of the report instead of immediately lashing out and retaliating against the messenger.

Furthermore, employees might fear alerting their employers about workplace issues that are not necessarily illegal misconduct but undesirable. Perhaps employers would be amenable to implementing change but are unaware of the situation. In this instance, offering an anonymous reporting mechanism can provide the employer with information necessary to transform the workplace. Additionally, reporting anonymously can also allay fears that employees have about reputational harm with respect to future employment. Indeed, speaking up about current workplace misconduct might obviate the desire for another job.

A. *Anonymity Unveils Wage Theft*

Recognizing the need for a means to encourage workers to speak up about wage theft without fear of reprisal, the Department of Labor maintains an “informer’s privilege,” which permits the use of anonymous employer statements in Fair Labor Standards Act cases.²⁷³ Likewise, the Western District of Oklahoma emphasized the importance of affording anonymity to encourage employees to come forward to report wage theft.²⁷⁴

Some states currently permit workers to file anonymous wage theft complaints with state labor agencies. For

273. See, e.g., *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

274. See *Scalia v. Ghosn*, 451 F. Supp. 3d 1215, 1221 (W.D. Okla. 2020).

example, the California Department of Industrial Relations provides: “[t]he California Department of Industrial Relations (the “DIR”) ‘encourages you to help protect the integrity of our programs by reporting allegations of fraud to DIR and to other agencies with which DIR works. You may remain anonymous.’”²⁷⁵

The New Jersey Department of Labor and Workforce Development provides:

You may file an anonymous complaint by mail if you so choose, . . . [and no one] will receive any information about the complaint unless a resolution is reached with your employer and wages due are sent as part of the resolution. [No one] . . . will be able to check on the status of an anonymous complaint.²⁷⁶

Consider Caleb, a hypothetical restaurant employee. Caleb was hired to work a standard forty-hour work week as a waiter, but his employer often requires him to work in the short-staffed catering department as well. Caleb works thirty hours per week waiting tables, and another twenty hours per week doing catering work. These fifty hours of work entitle him to ten hours of overtime pay. But the employer classifies these two tasks as independent jobs, and consequently pays Caleb regular wages for each position. If the employer is short-changing Caleb, it probably is doing the same to others. If Caleb speaks up directly (assuming, although unlikely, that he recognizes that it is illegal for his employer to avoid paying overtime), he risks the repercussions of retaliation. Thus, Caleb puts his livelihood in jeopardy. Conversely, if he or someone else reports the employer’s misconduct anonymously, the calculus changes. The employer might assume that Caleb himself spoke up, but the employer cannot be certain. Perhaps a coworker learned

275. *Report Fraud*, CA.GOV (May 2017), https://www.dir.ca.gov/fraud_prevention/DIR_Report-Fraud.htm.

276. *File a Wage Complaint*, OFFICIAL SITE OF THE STATE OF N.J., <https://www.nj.gov/labor/wageandhour/claims-appeals-investigations/file/> (last visited June 15, 2022).

about the wage violation and chose to come forward. Or perhaps it was someone in Caleb's personal life, such as an accountant or lawyer or another third party. Regardless, the report creates a record that the employer was put on notice that the conduct is illegal and must be corrected. It is now up to the employer to remedy the situation or face the threat of governmental investigation. The masking of the complainant's identity converts the threat of retaliation against Caleb into the employer's fear of sanctions and other consequences.

B. Anonymity Reveals Health and Safety Violations

The GAO itself has recommended that "OSHA consider conducting off-site interviews or find other ways to receive complaints anonymously to encourage workers to speak up about their conditions and injuries."²⁷⁷ New Jersey Administrative Code 8:6-9.3 provides an example of a state-enacted policy providing for employees anonymously to report health and safety workplace concerns. Citing to the deleterious effects of tobacco, New Jersey requires indoor spaces to be smoke-free.²⁷⁸ A section of the New Jersey Administrative Code provides, "[a] person may submit an anonymous request for . . . an investigation of an indoor . . . workplace."²⁷⁹ Massachusetts permits anonymous complaints of "health and safety conditions" in public sector workplaces.²⁸⁰ New York permits reports of "lack of safety

277. Huiqi Xu, Maureen Strode, & Andrew Withers, *Poultry Processing Plant Injuries Often Underreported*, CLAIMS J. (July 16, 2018), <https://www.claimsjournal.com/news/national/2018/07/16/285734.htm>.

278. *Regulations and Enforcement*, STATE OF N.J. DEP'T OF HEALTH, <https://www.nj.gov/health/fhs/tobacco/regulations/> (last visited June 15, 2022).

279. N.J. ADMIN. CODE § 8:6-9.3 (2022).

280. *See Filing a Complaint about Safety and Health Conditions in Public Sector Workplaces in Massachusetts*, THE COMMONWEALTH OF MASS. EXEC. OFFICE OF LAB. AND WORKFORCE DEV. DEP'T OF LAB. STANDARD, <https://www.mass.gov/doc/complaint-form-for-public-sector-workplaces/download> (last visited June 15, 2022) ("If you request to be anonymous, then the inspector assigned to the case will not be given your name.

equipment” at the workplace via an anonymous claim.²⁸¹

Consider the UPS worker at a plant in New Hampshire who fell from a loading dock in December 2018 and broke his pelvis, hip, wrist, and elbow.²⁸² Rather than call trained emergency medical personnel, company managers endangered the man’s life by placing and rolling him on a cart before driving him to the hospital.²⁸³ An OSHA inspector visited the site where the accident occurred and found numerous safety violations.²⁸⁴ An investigation into UPS found that the company created a “culture of fear,” where employers were reluctant to call for medical attention and employees were routinely retaliated against for doing so.²⁸⁵ After Bloomberg Law published a story revealing UPS’s documented violations for blocking workplace exits,²⁸⁶ more than a dozen workers provided anonymous tips that UPS was concealing accidents and inducing workers’ silence through threats.²⁸⁷ The employees desired to speak up about the safety violations at work long before Bloomberg printed the report, but feared the risks of doing so.²⁸⁸ Anonymous reporting would provide these employees an outlet for their first-hand accounts, and alert UPS that its workforce will not keep quiet about workplace misconduct. The protection

This means that during the site walkthrough the inspector will not know that you are the complainant. We do not provide copies of your complaint form to the employer.”).

281. See *Report Suspected Workplace Violations*, N.Y. STATE, <https://www.ny.gov/content/report-suspected-workplace-violations> (last visited June 15, 2022).

282. Hussein, *supra* note 119.

283. *Id.*

284. *Id.*

285. *Id.*

286. Fatima Hussein & Jasmine Ye Han, *No Way Out? Blocked Exits at UPS Warehouses Put Workers at Risk*, BLOOMBERG LAW (March 18, 2019, 5:55 AM), <https://news.bloomberglaw.com/safety/no-way-out-blocked-exits-at-ups-warehouses-put-workers-at-risk>.

287. Hussein, *supra* note 119.

288. *Id.*

supplied by anonymity would substantially increase the number of reports and, as a result, increase the pressure on UPS to correct the dangerous conditions. Such strength in numbers indicates to UPS management that it is vulnerable to escalated workforce complaints, including the threat of litigation.

C. Anonymity Unmasks Invidious Discrimination

In 2017, the New York City Commission on Human Rights, in conjunction with the Sexuality and Gender Law Clinic at Columbia Law School, held public hearings regarding means to combat sexual harassment in the workplace.²⁸⁹ Stakeholders offered that providing channels through which employees could anonymously report workplace sexual harassment would allow for early intervention and deter retaliation.²⁹⁰ Also in 2017, Moira Donegan created a spreadsheet originally named “Shitty Media Men List.”²⁹¹ The file was a crowdsourced document consisting of anonymous allegations of sexual harassment and assault by men in the publishing field. It was intended to inform women of the misconduct prevalent in the industry, and anonymity was utilized to protect users from retaliation.²⁹² That same year an anonymous Instagram account called “Diet Madison Avenue” was created to expose sexual misconduct in the advertising industry.²⁹³

289. *Combating Sexual Harassment in the Workplace: Trends and Recommendations Based on 2017 Public Hearing Testimony*, N.Y.C. COMM’N ON HUM. RTS., https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass_Report.pdf.

290. *Id.* at 13.

291. Moira Donegan, *I Started the Media Men List*, N.Y. MAG.: THE CUT (Jan. 10, 2018), <https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html>.

292. *See id.*

293. John McDermott, *This Anonymous Instagram Account is Outing Sexual Harassers in Advertising*, MEL MAG. (Feb. 13, 2018), <https://medium.com/mel-magazine/this-anonymous-instagram-account-is-outing-sexual-harassers-in-advertising-609d36d4b6e0>.

As Deborah Brake suggested, providing a medium of reporting that ensures protection for employees challenging discrimination can reform the cultural norms that perpetuate systematic discrimination in America's work culture.²⁹⁴ Although the EEOC forbids anonymous filings except in cases where a third party files a claim on behalf of another,²⁹⁵ the EEOC does not use employees' real names in the captions of its appellate opinions.²⁹⁶ Instead, the agency uses a randomly computer-generated first name and last initial to anonymously identify the complainant, purely as a means to make its opinions citable.²⁹⁷

Consider an employee, Simone, to whom a supervisor tells a race-based joke. This incident occurred in front of other colleagues and humiliated her.²⁹⁸ Simone knows that telling inappropriate jokes is against company policy, so she reports the incident to Human Resources. After an investigation, the supervisor apologizes for making the joke, explaining that he meant no harm by it and agreeing that it was in bad taste. The supervisor, however, now feels

294. Brake, *supra* note 28, at 104.

295. *Confidentiality*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/confidentiality> (last visited June 15, 2022) ("[w]hen you file a charge, you must give us your name. Your name must appear on the charge, and it must be signed by you. . . . If you wish to remain anonymous, we will accept a charge that is filed on behalf of someone else who has been the victim of discrimination").

296. Press Release, Equal Emp. Opportunity Comm'n, Commission Federal Sector Appellate Decisions to Use Randomly Generated Names (Oct. 5, 2015), <https://www.eeoc.gov/newsroom/commission-federal-sector-appellate-decisions-use-randomly-generated-names> ("[b]eginning on Oct. 1, 2015, all federal sector appellate decisions issued for publication will use a randomly generated name as a substitute for the name of the complainant.").

297. *Id.* See also *EEOC Decides Anonymity Policy Went a Little Too Far*, FEDWEEK (Oct. 14, 2015), <https://www.fedweek.com/federal-managers-daily-report/eeoc-decides-anonymity-policy-went-a-little-too-far/>.

298. This example is inspired by the work of Jeffrey R. Boles, Leora Eisenstadt, & Jennifer M. Pacella, *Whistleblowing in the Compliance Era*, 55 GA. L. REV. 147, 169–70 (2020). Their hypothetical involved a sexist comment. I have based my example on a race-based joke. The specific form of the employer's malfeasance can be, however, quite broad.

awkward and uncomfortable around Simone. He is also resentful that she reported him. When an opportunity for a promotion arises, the supervisor gives it to Simone's colleague, even though Simone was presumptively favored for the position.

The supervisor knows that he can promote the other employee—even if solely because he does not want to work with Simone—since it is unlikely that Simone would be able to bring a successful retaliation claim. Simone stands in a legal void because even if the workplace itself has a “zero-tolerance” policy for jokes and the like, a court would not consider Simone's belief that one inappropriate joke constitutes a hostile work environment to be reasonable²⁹⁹—a necessary precursor for a successful retaliation claim.³⁰⁰ In other words, “for retaliatory conduct to be unlawful, the complaining party must have an objectively reasonable belief that the practices he or she opposed (which, in turn, gave rise to the retaliation) were unlawful.”³⁰¹ Therefore, the supervisor is free to decline to promote Simone, demote her, or even terminate her—specifically because Simone reported the misconduct.³⁰²

299. *Id.* (citing Leora Eisenstadt & Deanna Geddes, *Suppressed Anger, Retaliation Doctrine, and Workplace Culture*, 20 U. PA. J. BUS. L. 147, 150–51 (2018) (discussing a similar hypothetical)).

300. *See, e.g.*, *Session v. Montgomery Cnty. Sch. Bd.*, 462 F. App'x 323, 326 (4th Cir. 2012) (holding unreasonable plaintiff's belief that two comments about being “light-skinned” created a hostile environment); *Van Portfliet v. H & R Block Mortg. Corp.*, No. 8:05-CV-1474-T-TGW, 2007 WL 2773995, at *1 (M.D. Fla. Sept. 21, 2007), *aff'd*, 290 F. App'x 301 (11th Cir. 2008) (holding that the plaintiff's report of supervisor's single comment to coworker implying that she should have married the boss instead of her actual husband could not have led to legally cognizable retaliation because the plaintiff did not have an objectively reasonable belief that comment created a hostile work environment); *But see Summa v. Hofstra Univ.*, 708 F.3d 115, 126 (2d Cir. 2013) (holding that for a successful retaliation claim, an employee “need not establish that the conduct she opposed was actually a violation of [the law], but only that she possessed a good faith, reasonable belief that the underlying employment practice was unlawful”) (internal citations omitted).

301. Boles, Eisenstadt, & Pacella, *supra* note 298, at 168–69.

302. *See id.* at 169–71. Likewise, companies such as Facebook and Apple have

Thus, there is a gap between the company's own broad internal compliance policies, and the law's narrow reach. Although the supervisor violated a *company* anti-discrimination policy and Simone suffered an adverse effect as a result, she might not have a *legally* cognizable retaliation claim because her belief that the joke constitutes a hostile work environment is unreasonable. If, however, Simone or another colleague could report the joke anonymously, it would be difficult for the supervisor to retaliate. He would not know who made the report, since he told the joke in front of several employees. Employees will feel more empowered to come forward, while the employer will be thwarted from seeking retribution. This in turn will inspire the employer to eliminate the inappropriate behavior in the first place.

D. Anonymity Provides Socially Valuable Protection for the Privileged

As previously discussed, a particular concern that privileged employees have when considering whether to report workplace misconduct is the impact that doing so will have on their careers.³⁰³ Connections made through, and references from, current employers are frequently essential for career advancement. Employees recognize that complaining about conduct at the office is often professional suicide.

In theory, anti-discrimination laws should protect employees against retaliation for “engaging in protected activity” not only at their current employment, but at their

internal codes of conduct that require personnel to report a violation of company policies or face disciplinary action, including termination. However, while these internal policies broadly apply to consultants, contractors, and the like, whistleblower protections under compliance statutes such as Sarbanes-Oxley and Dodd-Frank only apply to traditional employees. Thus, a contractor who reports a violation of company policy at Facebook or Apple and suffers an adverse job event as a result has no legal protection against such retaliation. *Id.* at 178–80.

303. See *supra* Part III.D.

previous employment as well. However, not all courts agree.³⁰⁴ Furthermore, the language of anti-discrimination statutes refers to “employees” who have engaged in protected activities, not “prospective employees.” In other words, it is uncertain that even if a prospective employee could prove that she was not hired by a potential employer solely because she reported employer misconduct at a previous workplace (an allegation that is almost impossible to substantiate) anti-discrimination laws would apply.

Consider a staffer or lawyer who worked in the Executive Chamber of former New York Governor Andrew Cuomo. That office culture was described as “toxic” and “full of bullying type behavior.”³⁰⁵ Employees there said they feared retaliation and a negative impact on their professional futures if they reported abuse. One employee, for example, was warned by her colleagues “not [to] make waves,” because “the Governor could destroy [her] career and [she] would never find a job in the state again.”³⁰⁶ Indeed, when one former employee went public with allegations of harassment at the hands of the Governor, his office set about to ruin her professional reputation—thereby sending a warning signal to others who might dare to speak up.³⁰⁷ The environment was one in which secrecy was imperative.³⁰⁸

Now reconsider the same situation if these employees

304. See, e.g., *Sessom v. Home Depot U.S.A., Inc.*, CIV. A. No. 2:05CV84-P-B, 2006 WL 3210484, at *11 (N.D. Miss. Nov. 6, 2006) (“[a]fter a thorough search of . . . caselaw, the court has been unable to find binding authority . . . standing for the proposition that a subsequent employer can be held liable under Title VII for retaliating against its current employee for protected activity by the employee at a former, unrelated employer. Only the Second and the Third Circuits appear to have touched on the idea.”).

305. Anne L. Clark, et al., *Report of Investigation into Allegations of Sexual Harassment by Governor Andrew M. Cuomo*, STATE OF N.Y. OFFICER OF THE ATT’Y GENERAL, 117 (Aug. 1, 2021), https://ag.ny.gov/sites/default/files/2021.08.03_nyag_-_investigative_report.pdf.

306. *Id.* at 126.

307. *Id.* at 157.

308. *Id.* at 125.

were able to report the workplace conditions anonymously. At the outset, there would be strength in numbers—knowing that colleagues were coming forward would galvanize others to speak up. Moreover, it would be difficult for the Governor's office to retaliate against unknown complainants. Anonymous reports would serve as records for future investigation into workplace malfeasance. The sought-after secrecy would be turned on its head; giving the workforce the means to anonymously expose workplace conditions would reveal furtive misconduct.

It should be noted that the notion of strength in numbers also applies to future employment opportunities. Word of misconduct allegations in one workplace is likely to spread to others in the industry. If there is a critical mass of reports from anonymous sources, any one individual's report will be concealed in a sea of complaints from others. An employee will feel less concerned that reporting a wrong at a current job will pollute her future employment prospects, because she will be even less identifiable as the one who spoke out.

E. Fairness to Employers

Although it is desirable to utilize anonymity as a tool to empower employees, it is important to ensure that doing so does not come at the expense of fairness to employers. Indeed, any mechanism installed to foster anonymous complaints needs safeguards. Left unchecked, the availability of anonymous reporting tips the power dynamic too far in favor of the workforce.

There are several issues that warrant consideration. First, a means to document the complaint's identity yet maintain confidentiality should be developed. Records are needed to determine if the complainant is a troublemaker with a propensity to bring unsubstantiated claims. In Colorado, for example, lawmakers passed a bill that requires its anonymous reporting system to annually track and

convey how often it is used for abusive purposes.³⁰⁹

Furthermore, due process demands that no adverse action be taken against the accused before an investigation, which must be as thorough as the complaint warrants. Likewise, an employer should be cautious about using “the appearance of impropriety” as a basis for action against management. Employees ought to be made aware that false accusations could subject them to defamation liability,³¹⁰ as well as adverse job events. Additionally, depending on the circumstances, certain categories of complaints should trigger an automatic external investigation by a governmental agency.

VII. ANONYMITY’S LIMITATIONS

While anonymous reporting can be a powerful tool to document workplace misconduct, its utility is not without limitations. For employees who are unaware that they have been harmed or that they have a right to redress, availability of anonymous reporting is of no practical use. Moreover, in some situations, it might be difficult or impossible to understand, let alone investigate and resolve, a dispute without the identity of the harmed employee. For example, if an employee has been short-changed wages, it will be necessary to review that employee’s individual pay history. Even if someone else reports this misconduct, the identity of the aggrieved employee is essential for the resolution of the issue. Relatedly, it could be impracticable to conduct a complete investigation of alleged wrongdoing without questioning potential witnesses, which would likely require

309. Blad, *supra* note 250.

310. Cf. Nicole Ligon, *Protecting Women’s Voices: Preventing Retaliatory Defamation Claims in the #MeToo Context*, 94 ST. JOHN’S L. REV. 961, 969 (2020) (“[t]o better ensure more accurate reporting and highlighting of women’s experiences with sexual harassment . . . , it is critical for more states to adopt strong protections for defendants in defamation cases. Until this happens, women will continue to face the difficult choice of whether to risk exposure to a defamation lawsuit aimed . . . at silencing their truths”).

knowing, and then revealing, the identity of the complainant.³¹¹

There is also a risk that the provision of anonymous mechanisms is performative only. For example, in a 2018 case in the Southern District of New York, the defendant employer provided its employees with an anonymous hotline through which they could report workplace misconduct.³¹² However, the company nonetheless retaliated against women who attempted to use the hotline to anonymously report sexual harassment.³¹³

Additionally, endorsing anonymous reporting might open a groundswell of allegations. Those with true merit could get lost in a wave of frivolous grievances. These deceitful reports themselves might be rooted in discrimination or other improper animosity. Employers might be discouraged by the volume of complaints to pay attention, and their anonymity could influence employers to assume that the reports are untrue. In this respect, anonymity could make “the credibility discount”³¹⁴ worse.

CONCLUSION

The cheated restaurant employee, injured UPS worker, harassed subordinate, and abused government staffers each has suffered from distinct forms of workplace misconduct. Their commonality, however, is greater than the sum of their parts. As a group they comprise the significant number of mistreated American employees who could benefit from a means to report workplace misconduct anonymously. Indeed, had individuals previously in similar positions reported prior

311. See, e.g., *Finnerty v. William H. Sadlier, Inc.*, 176 F. App'x 158, 163 (2d Cir. 2006) (“it is hard to imagine how a company could keep a complaint confidential and also conduct a fair and thorough investigation.”).

312. *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16 Civ. 6728 (CM), 2018 WL 6167889 (S.D.N.Y. Nov. 26, 2018).

313. *Id.* at *6.

314. See Turkheimer, *supra* note 108.

misconduct, perhaps the above-discussed employees themselves would not have been mistreated.

Broad categories of workplace misconduct surveyed in this Article, including wage theft, health and safety violations, and invidious discrimination, are all much more prevalent than what workers report. Employees keep silent about what they experience or observe because they know that the costs of speaking up likely outweigh the benefits of doing so. Statutory and regulatory prohibitions notwithstanding, employers routinely retaliate against those who challenge employment conditions. Even when employers do not retaliate, workers reasonably fear that they will. Under proper circumstances, and with adequate protections for employers in place, anonymous reporting could become a fundamental means to increase documentation of workplace misconduct—an essential first step toward needed workplace reform.