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Exempting Mandatory Arbitration for Sexual Harassment Claims from the Federal Arbitration Act

by

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Introduction:

Since Tarana Burke in 2006 used the phrase “Me Too” in order to help women and girls survive sexual violence, sexual harassment has become a central topic within the workplace environment. Over 12,739 sex-based allegations, including sexual harassment, in the United States have been filed in 2019 (7). Although there are a variety of reasons why, both professional and personal, an employee would not file a complaint, non-disclosure agreements (NDAs), contracts signed at the beginning of employment and mandatory arbitration- have been a tool used to silence victim of sexual harassment.

In 2018, New York State enacted CPLR section 3005-b which invalidates NDAs, when used as part of settlement agreements in sexual harassment claims unless the employee agrees after a cooling off period, and CPLR section 7515 which invalidates employment contract provisions requiring claims of discrimination to be resolved through mandatory arbitration. By some accounts, sections 3005-B and 7515 were much needed and long overdue legislation meant to address the problem of using these employment contract provisions, to silence victims of sexual harassment. However, in the recent case of *Latif v. Morgan Stanley*, the federal district court in New York held that the Federal Arbitration Act (FAA), which facilitates resolving disputes through private arbitration rather than public trial, preempts section 7515; Latif potentially renders section 7515 mute. This means that victims of sexual harassment are bound by their original employment contract and must resolve their sexual harassment claims through arbitration, which effectively silences those victims.

Nondisclosure Agreements:

There is no clear person or date in which nondisclosure agreements came to be although, they did start coming into the light in the 1940s, used for maritime law. Originally, they were used for companies that built technology, take IBM for example, to make sure that their trade secrets and algorithms were protected. In the 1970s, the U.S. government used NDAs to protect what they called national security. Specifically, the CIA created the use of contracts of silence, which led to NDAs spreading to other government agencies and eventually into industries. Nondisclosure agreements began to enter contract law in the 1980s. It was a common paper to be signed in employment contracts of white-collar jobs. During this time, nondisclosure agreements began to become a problem for journalists, creating barriers to some of the biggest stories, mostly about corporate misconduct. While nondisclosure agreements are a necessity in business in order to keep companies' intellectual property, its end result has been to keep victims quiet and assaulters on the loose.

Arbitration and Mandatory Arbitration:

The main point of mandatory arbitration is letting cases be kept private instead of going to court. All the protections that are provided in court do not apply in mandatory arbitration. By protections I mean that there are no standards of proof and there is no trial by a jury of the defendants or plaintiffs peers. Mandatory arbitration is not public and is also a fair amount cheaper than a trial. It is a good thing that helps in certain cases but when it comes to sexual harassment in employment issues it is misused. Mandatory works for the employer and against the employees which New York State took care of with CPLR 7515.

The purpose of this paper is to propose amendments to (a) New York legislation to define the term sexual harassment and then (b) exempt sexual harassment claims from Federal Arbitration Act allowing for victims to have a public trial and the offender's acts subject to public scrutiny. The following provides a review of the literature to provide both historical and contemporary context to this issue. Based on this review proposals will be made to answer the two questions.

Federal Arbitration Act:

The Federal Arbitration Act (FAA) was first enacted February 12, 1925. It is an act of Congress to ensure the validity and enforcement of arbitration agreements in any transaction that involves commerce. The U.S. Supreme Court "has recognized the FAA as evidencing 'a national policy favoring arbitration'" (33). However, in light of various state law requirements, the application of the FAA and the use of arbitration agreements of different types, raises numerous legal questions and has been the subject of several court cases. Routinely, the Court has held the FAA above state requirements that "restrain the enforceability of mandatory arbitration agreements" (33). Recent federal regulatory action has been taken as concern over "a perceived lack of 'meaning choice' to decide whether to submit a claim to arbitration" (33). Included is legislation that would "amend the FAA to render pre-dispute arbitration agreements unenforceable" (33).

Misuse of mandatory arbitration has been linked with silencing harms from misconduct in the Catholic Church, discovery environmental hazards, and recently from sexual abuse allegations in the film industry. These agreements have become so ubiquitous that refusing to sign an agreement can mean the difference between being hired and not being hired. For some, where an industry uses this agreement, there is no real alternative for those needing a job.

Mandatory arbitration also binds the abuser and abused to secrecy, where money can be involved in some cases, in order to keep the victim silent. Mandatory arbitration is being used on a daily basis to violate those with no power and bury the truth. Because of mandatory arbitrations frequent use, employers use them without a second thought about the public or community's best interest. This has led to mandatory arbitration to becoming a legal epidemic that ruins the idea of an accountable society.

Mandatory arbitration was originally meant to keep company information private and secure but, the use of mandatory arbitration has evolved into keeping sexual harassment cases quiet. Victims are being silenced while the offender is given a slap on the wrist. New York State's response to this issue was to enact CPLR section 7515 in 2018. The first draft was initialed by Governor Andrew Cuomo when it was put on the legislation floor August 23, 2018. A significant amount of changes was made by the New York State Department of Labor (NYSDOL). These changes included, anti-harassment policy, model training programs, and model complaint form (36). This policy has added that sexual harassment is harassment that is classified on the basis of "Self-identified or perceived sex" (36). For the safety and reputation of the victim and accused, investigations will be kept as confidential as possible and the investigation process will be varied based on the specific case (36). There will no longer be a thirty-day requirement to finish complaint investigations instead, an investigation will be "prompt and thorough, commenced immediately and completed as soon as possible" helping to preserve the evidence and give the victims closure (36).

Civil Practices Law & Rules Section 7515:

The creation of Civil Practice Law & Rules section 7515 is mostly due to the #MeToo Movement. It helped push this legislation forward and encouraged the New York federal government to act. As Jean R. Sternlight writes, "A law's interpretation can shift and change over time, and it is possible that the #MeToo movement will lead judges (and juries should a case proceed past summary judgement to trial) to think differently, and more empathetically, about how workplace harassment affects [employees] and to assess whether it is actionable accordingly" (30). The #MeToo Movement has opened people's eyes to how many people are being sexually harassed and how it is affecting those in the workforce.

The New York State legislation subpart B of chapter 57 of the Civil Practice Law & Rules section 7515 enacted on April 12, 2018 focuses on sexual harassment in the workplaces for public and private employers. For private owners, the legislation bans mandatory arbitration for sexual harassment claims, require employers to have sexual harassment policies written down, conduct annual sexual harassment presentations training for all employees, prohibit pre-disrupted arbitration clauses relating to sexual harassment complaints, and have liability for sexual harassment claims extend to certain non-employees. With legislation subpart B of chapter 57 passed so quickly, it raises concern that there may be some areas where the law is over inclusive or under inclusive. For example, for new employment contracts, a choice of law provision opting out of New York Law in an employment contract should circumvent section 7515 in its entirety; therefore, section 7515 is under inclusive because it fails to address opting out option. Although this legislation is a step in the right direction, federal arbitration is preventing it from doing any good. Under the arbitration, the CPLR 7515 does not work for mandatory arbitrations because the Federal Arbitration Act (FAA) gives offenders the right to

have a trial be public or private and has NDAs be effective in any form of a contract. In Latif v. Morgan Stanley & Co. the FAA "'requires courts to enforce covered arbitration agreements according to their terms'" meaning, that the FAA enforces the contract of the mandatory arbitration because of the terms in the contract that are listed prior (35). The plaintiff's (Latiff's) sexual harassment claims should be subject to mandatory arbitration while CPLR 7515 has sexual harassment claim agreements related to nulling and voiding the mandatory arbitrations (35). It would go against Federal Arbitration Agreement to apply CPLR 7515 and makes the parties arbitration agreement unenforceable (35).

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Sexual Harassment Definition:

In law, definitions are the key to making a case. They determine if a law was broken, how it has been broken, and which law was broken based off the definition. In the Federal Arbitration Act and CPLR 7515 there is no definition of sexual harassment, it bluntly states so. To form a definition, first a look at what is already out there needs to happen. The difficult part about creating a definition is making sure that we are not under or over inclusive. It has to be specific enough that the definition can be used in law but not make it broad enough for the assaulters to get away with the crime because it does not fit into the definition.

China

In the Beijing Platform for Action, paragraph 178, "recognizes sexual harassment as a form of violence against women and as a form of discrimination, and calls on multiple actors including government, employers, unions, and civil society to ensure that governments enact and enforce laws on sexual harassment and that employers develop anti-harassment policies and prevention strategies" (1). It should be noted that when the Beijing Declaration and Platform for Action was created (September 1995) it was considered "the most progressive blueprint ever for advancing women's rights" (32). Although this is a good start to a solid definition, it does not go it to the specifics of what type of violence it is. This law only addresses violence towards women. However, all people can experience sexual harassment such as transgenders and men. Additionally, sexual harassment is a form of discrimination but

what type? This is a very broad definition that was revolutionary for the time it was enacted in acted but should be updated to take into account the changes that have occurred over time.

European Union

European Union's Charter of Fundamental Rights "prohibits discrimination on the grounds of sex and enshrines the right to equal treatment between men and women in all areas, including employment, work and pay, vocational training, and access to goods and services" (1). Another good baseline definition but it is still too broad. The main addition is that it does include both genders unlike the Beijing definition from 1995.

United Nations

The United Nations has "recognized sexual harassment as a form of discrimination and violence against women" and define sexual harassment as "any unwelcome sexual advance, request for sexual [favor], verbal or physical conduct or gesture of a sexual nature, or any other [behavior] of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another, when such conduct interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. While typically involving a pattern of [behavior], it can take the form of a single incident. Sexual harassment may occur between persons of the opposite or same sex. Both males and females can be either the victims or the offenders." (34). This definition is very specific and narrows down what sexual harassment is. With that said, "any other behavior of a sexual nature" is very broad that it tells the reader/lawyer it is attempting avoid becoming underinclusive. It is good however, that both

genders are mentioned as the victim or assaulter but what about transgenders? How do they fit into this definition?

Egypt

In Egypt, prior to the summer 2014, sexual harassment "were not considered crimes as defined by the Egyptian Penal Code" and "there was no stated definition of sexual harassment. What existed instead was a vague statement of what constituted "'indecent public behavior'" (2). In the definition, it attributed "inappropriate behavior to a 'lewd word, deed, or gesture to another on a public road or populated place'" (2). This description is very vague and open to interpretation of what is considered a public road or a populated place, for example an office space could be considered private. Also, if there is not an "explicit definitions, civil society groups noted that women often did not know what constituted harassment" (2). In 2008, during the Mubarak regime, a task force was formed to prohibition of sexual violence and they proposed amendments to the Penal Code. In the draft, a definition of sexual harassment says "'the act of following or pursuit with direct or indirect sexual or lewd messages, or delivering such messages via telephone, the internet, or other modern means of communication, or sending messages containing sexual images, text, or figures'" (2). What is interesting about this definition is that it is the only one, so far, that mentions the use of technology in sexual harassment. Technology is an important factor in sexual harassment because there is such widespread access to it and people can be harassed on the internet. It should be noted that the term "'lewd behavior' in the Egyptian Penal Code" is also used to justify arrest in acts of homosexuality as well (2). Because of this

vague term, legal wording such as "'scandalous acts'" has allowed authorities to change articles on harassment so that homosexuality is encompassed (2). In conclusion, the Egyptian definition of sexual harassment is moving in the right direction but there are still loopholes assaulters can fall through.

United States: California

California is an interesting case where their definition of sexual harassment falls under two categories- "'Quid pro quo'" and "'hostile work environment'" harassment (16). It should be noted that both categories require sexual conduct to be unwelcomed and a worker can claim both quid pro quo and hostile work environment harassment. Quid pro quo sexual harassment is when a supervisor demands "sexual favors for a workplace benefit" (16). For a victim to prove their assault the following is required:

- "They worked for the defendant, applied for a job with the defendant, or provided services to the defendant
- A supervisor or one of the defendant's agents made unwanted sexual advances or other conduct,
- A favorable working condition was made contingent, by words or insinuation, on those sexual requests
- The worker was harmed by this conduct
- The supervisor's actions were a substantial factor in that harm" (16)

The workplace benefits can include, a promotion, a raise, extra working hours, getting assigned a project of choice, more favorable working schedule, hiring the job applicant, not

firing said employee (16). Quid pro quo can be implied or explicit, either way “there have to be repercussions for a refusal for it to be harassment” (16). For the worker that claims harassment a causal connection has to be established, a connection of the refusal and the repercussions has to be there. With this definition, there are tasks that the assaulted employee has to do in order for there to be enough proof. This may seem unfair to the victim but it protects those that are accused, making sure that they were not falsely accused. It should be noted that this legislation and definition were passed in 2018 making it a more recent idea of sexual harassment.

Maine

Under the Maine Criminal code Chapter 11: Sexual Assaults there is no definition of sexual harassment but there is a sexual acts section. In the sexual act definition, it means, “

1.) Any act between 2 persons involving direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other;
2.) Any act between a person and an animal being used by another person which act involves direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other; or
3.) Any act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact” (17).

This definition is very specific and goes into explicit details compared to the above definitions. In this case, if a victim is able to talk about what occurred in such explicit detail and it meets the requirements above it would be difficult for the assaulters to find loopholes. At the same time though, if there is not enough evidence or another act that does not fit into the above category was committed then the assaulter could not be convicted. The definition has a good base but is too narrow to cover all of sexual harassment cases in the state of Maine.

In the United States, other states are starting the process of getting legislations on the floor that help prevent sexual harassment in the workplace. There are eleven states that are currently working towards legislations that prohibit the use of NDAs in situations that involve workplace sexual misconduct. These states include Florida, Connecticut, Hawaii, Iowa, Illinois, Kansas, Rhode Island, Virginia, West Virginia, and Texas. Some of these states already have definitions that need to be revised in order to meet the requirements of the legislation. Connecticut is using this definition; “Sexual harassment means unwelcome sexual advances, requests for sexual favors, or conduct of a sexual nature when: employees' and applicants' submission to this conduct is explicitly or implicitly made a term or condition of their employment; this conduct has the purpose or effect of substantially interfering with employees' work performance or creating an intimidating, hostile, or offensive work environment” (18). This is a very broad definition that will be updated in the new legislation. For Hawaii, they define sexual harassment as “submission to a request for sexual favors or a sexual advance a term or condition of employment; interferes substantially with an employee's work performance; or creates an intimidating, hostile, or offensive work environment” (18). Again, another broad definition that will be updated in the new legislation. For Iowa and Texas, there definition is based off of the fair employment practices law. For Illinois, their definition is more up to date,

“sexual harassment when it: makes submission to a request for sexual favors, sexual advances, or any conduct of a sexual nature a term or condition of employment; makes submission to or rejection of a request for sexual favors, sexual advances, or any conduct of a sexual nature a basis for employment decisions; interferes substantially with an employee's work performance; or creates an intimidating, hostile, or offensive work environment” (18). Even though this definition is more up to date, it is very broad and does not cover all areas. For example, what is considered a submission? What if it was a joke and it was taken the wrong way, that would be under discrimination not sexual harassment. Rhode Island, considers sexual harassment to be “unwelcome sexual advances or requests for sexual favors or any other verbal or physical conduct of a sexual nature when: an individual's submission to such advances, requests, or conduct is explicitly or implicitly made a term or condition of employment; an individual's submission to or rejection of such advances, requests, or conduct is used as the basis for employment decisions that affect them; or such advances, requests, or conduct have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment” (18). This definition is interesting for the fact that it does not identify by gender but rather as individuals, getting rid of the gender problem. West Virginia deems conduct as unlawful sexual harassment as “submission to a request for sexual favors or a sexual advance a term or condition of employment; unreasonably interferes with an employee's work performance; or creates an intimidating, hostile, or offensive work environment” (18). This is another example of a law which is too broad because of the difficulty defining “unreasonable interference”. Florida, Kansas, and Virginia have no data on sexual harassment definitions as of this time.

In summary, based off the above definitions, it is not simply the definition of sexual harassment that plays a part in the legislation but other definitions that build up sexual harassment.

Proposals:

I. Define Sexual Harassment

In order for a definition of sexual harassment to be relevant, it must be reexamined and revised every few years. As cultural norms change so does the acceptability or non-acceptability of workforce behavior. It should be determined, first, how the definition still applies and does not apply in order to adapt it properly. As you will see below, I did not start from nothing. I used other definitions to help me form the best possible one. Once what applies and does not apply has been identified it should be determined how to fill the holes or remove what is not needed in order to avoid becoming under or over inclusive.

The first step in creating this definition is making sure that all genders are included and protected by this statement. Next is clarifying what acts are included in sexual harassment, the hardest part of creating this definition. The final step is making sure the accused rights are protected. This may sound counterintuitive but we do not want someone being charged with a crime they did not commit. With the above structure and broad range of definitions of sexual

harassment as a basis: the following is a proposed definition of sexual harassment that should be used in legislation moving forward:

Sexual harassment is any act between two or more people, of any gender, involving unwanted direct physical contact between the genitals, mouth, or anus of the other or direct physical contact of the party's genitals. Unwanted direct or indirect lewd or sexual messages through technology and other means of communication also falls under this offense.

1.) Any act that is committed for the purpose of arousing or gratifying sexual desire or for the purpose of inflicting bodily injury or unwanted physical contact, including any instrument or device manipulated by another person involved.
2.) Having direct or indirect lewd or sexual messages delivered by telephones, social media, the internet, or other means of communication. These messages include any that contain sexual images, figures, or texts
3.) Evidence of working for the defendant, applied for a job through the defendant, bribery of workplace benefits for sexual favors, or provided a service for the defendant has to be presented in order for proof of assault
    a. Workplace benefits include the following; a raise, extra working hours, more favorable working schedule, a promotion, hiring the job applicant, getting assigned a project of choice, or not firing said employee.

With this definition, sexual harassment covers all forms of gender and acts between multiple types of people. It clearly states that the acts are unwanted and covers a wide range of what the acts are. Both physically and through technology. Evidence of an unwanted sexual act taking place is in this definition, letting the defendant have a chance to state their claim. Again, this is

not meant to protect the assaulter but make sure that the right person is caught and that there was either the act or threat of sexual harassment.

II. Exempt Sexual Harassment Claims from Federal Arbitration Act:

In law, many arguments are formed by using other cases and examples. By using previous incidents, a case can be made by comparing the incidents to demonstrate similar situations in order for similar results. This is what is known as case law, the law as established by the outcome of former cases. By using former cases as evidence, we can see how the process and law has worked in favor of a situation similar to what is going on for us. Therefore, in this section there will be examples of other exemptions from the Federal Arbitration Act (FAA) and how and why they were made exempt.

January 15, 2019, the U.S. Supreme court issued its decision in *New Prime Inc. v. Oliveira,* impacting the "arbitrability of independent contractor misclassification cases in the transportation industry" (31). It was decided by the court that instead of an arbitrator, a court should resolve a dispute over the applicability of the FAA does not apply to "'contract of employment of seamen, railroad employees, or any other class of workers engage in foreign or interstate commerce'" (31). This exception is referred to as the "'transportation workers' exception to the FAA" (31). It should be noted, this only applies to interstate transportation workers. In the *New Prime Inc. v. Oliveira* there were two issues the Court was presented with that arose from an independent contractor agreement that contained an arbitration clause "1) who should decide if a claim falls within the transportation workers exception to the FAA, a court or an arbitrator, and 2) does the transportation workers carve-out from the FAA (which refers to

"contracts of employment") apply when, on the face of the independent contractor agreement, the plaintiff is not an employee?" (30). The court decided "1) that a court – rather than an arbitrator – should resolve a dispute over the applicability of the FAA's Section 1 exemption for "contracts of employment" of transportation workers, and 2) Dominic Oliveira's independent contractor agreement with New Prime, an interstate trucking company, falls within the Section 1 exemption from the FAA" (31). It should be noted that the "the Court declined to look beyond the FAA at other potential avenues to compel arbitration in this case" making it so "interstate transportation workers' claims may still be subject to arbitration under state arbitration acts and, in the absence of state statutory law, common law. Further, the determination of whether a class action waiver in an arbitration agreement would be enforceable will likely be analyzed on a state-by-state basis" (31).

From this case, we can see that exceptions can be made for specific contracts but there are cracks that they can fall through. The court only looked at the FAA making it so the state statutory law, and common law are used and arbitration still applies. This is a key piece to getting sexual harassment exempt because if it does get exempt from the FAA then it becomes a state-by-state decision. This would allow CPLR 7515 to be applicable in cases such as Latif v. Morgan Stanley but other states would have to have a similar legislation to New York's. Overall, it is a move in the right direction but it is a long process based off the above example of exempt from FAA.

Why Sexual Harassment Should be Exempt from Mandatory Arbitration:

With a definition formed, and knowing that it will have to be updated to keep up with the times, an exemption can be made for the Federal Arbitration Act (FAA). First, it should be explained why sexual harassment should be exempt from the FAA. The FAA gives the defendants and plaintiffs the freedom of choosing whether or not the case is public knowledge. This choice should not be available for the assaulters because they are not going to want their acts to be public knowledge, hence the fact for the NDAs used in business contracts for employees. The judicial system is getting privatized in a way so it favors the accused. Normally, someone who is accused of a crime should have the ability to make it private for their benefit and reputation. In the case of sexual harassment, it is important for the victims to get justice and not be covered up. With privatizing sexual harassment cases involved in NDAs it is hiding the fact that it ever happened and lets the accused get away with their reputation intact.

In the case of *Latif v. Morgan Stanley & Co. LLC* the Judge, Judge Cote, clearly stated the collision of CPLR 7515 with the FAA which mandates the substantial deference to private arbitration. To give some background; Mahmoud Latif (Latif) signed an employment agreement that included, by reference, Morgan Stanley's mandatory arbitration program. In the mandatory arbitration program, it provided that any "'covered claim' that rose between Latif and Morgan Stanley would be resolved by final and binding arbitration, and that 'covered claims' included, among other causes of action, discrimination and harassment claims" (13). Latif still took action against Morgan Stanley in federal court for charges of sexual harassment under federal, state, and municipal law, charges that were proven true. In response the defendants of Morgan Stanley "moved to compel arbitration of the entire case, inclusive of the sexual harassment claims" which Latif opposed on the basis of CPLR 7515 (13). According to Latif, CPLR 7515 "expressed New York State's 'general intent to protect victims of sexual harassment,' and

required the Court to retain jurisdiction over the sexual harassment claims" (13). Judge Cote granted Morgan Stanley's motion to compel arbitration, inclusive of sexual harassment claims and held that CPLR 7515 "could not serve as the basis to invalidate the Arbitration Agreement" (13). The Courts rationale is that CPLR 7515 seeks to nullify agreements to arbitrate sexual harassment claims except when inconsistent with federal law which the statue is indeed. Latif's court action is pending on the outcome of the arbitration proceedings on Judge Cote's ruling.

Based off this case, we can see that CPLR 7515 should have applied and let Latif break his NDA in order to bring his case in front of a court. Instead, nothing has taken place as Latif has broken his contract and CPLR 7515 is ineffective under the FAA. CPLR 7515 was meant to protect those who had been wronged and make sure those accused were in the wrong instead, it has become a legislation that cannot be used as it goes against the FAA. If a clear definition for sexual harassment was created and made exempt from the FAA, then this legislation could be used in the case of *Latif v. Morgan Stanley & Co. LLC*.

Conclusion:

Sexual harassment has been silenced by non-disclosure agreements for too long. The purpose of NDAs was originally meant to keep company information private and secure but, the use of NDAs has evolved into keeping sexual harassment cases quiet. CPLR 7515 enactment was meant to help the victims come forward and have justice served. Instead, it was found that under FAA, CPLR 7515 is ineffective and cannot be used in court as it goes against the federal

government. This has led to the conclusion that sexual harassment should be exempt from the FAA as it should not be a privatized crime unless the victim deems it so. Based off different countries and states in the United states, a definition for this generation has been formed in order for an exemption of the FAA to be granted. This definition would give victims and the accused a chance to voice their claim and determine if the act committed falls under sexual harassment. Sexual harassment is a problem that non-disclosure agreements can no longer cover up and with a definition it has become a real problem that cannot be ignored by the legislation or FAA.

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