Op-Ed Contributor

I Wrote the Uber Memo. This Is How to End Sexual Harassment.

Image

CreditIllustration by Joan Wong; photograph by Werner Schnell/Getty Images

By Susan Fowler

Ms. Fowler is an engineer best known for her blog post about her experiences working at Uber.

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If the news over the past year has taught us anything, it's that discrimination, sexual harassment and retaliation are pervasive in nearly every industry.

From the systemic culture of sexual harassment and discrimination at Uber to the ubiquitous stories of women taken advantage of at Fox News to the tales of harassment in industries ranging from professional football to restaurants, we've seen one company after another publicly outed and shamed for illegal treatment of employees. The question is no longer whether egregious mistreatment actually occurs, nor whether it is limited to a few bad companies and industries, but what we can do to ensure that it never happens again.

Amid all the questions about where #MeToo goes next, there's at least one answer that everyone should support, one backed by bipartisan legislation currently sitting in Congress, simply

awaiting a vote: We need to end the practice of forced arbitration, a legal loophole companies use to cover up their illegal treatment of employees.

Discrimination, harassment and retaliation are illegal under federal and state laws. But they are not criminal offenses, so the process of obtaining justice must go through civil court. If, for example, you found yourself experiencing racial discrimination at your workplace and your workplace did nothing to fix the problem, you could publicly sue your employer in a court of law and — presumably — justice would be carried out.

Not all people want their lawsuit to play out in court. Sometimes victims of harassment and discrimination want privacy; sometimes corporations want to keep the ugly details of workplace disputes out of the public eye. For these cases, there is another avenue for obtaining justice: private arbitration. When the parties to a lawsuit decide to go to arbitration rather than a court of law, they meet with an arbitrator (usually a retired judge, and someone they both have decided to use), present their cases and then accept the judgment handed down. That is, ideally, how arbitration works.

Unfortunately, the reality of how arbitration is used to settle workplace disputes is far from that ideal. In the tech industry, where I work, and where issues of harassment and discrimination remain rampant, nearly every company requires as a condition of employment that its employees sign away their constitutional right to sue it in a court of law and instead agree to take any claims against the company to private arbitration. They are also typically legally bound to keep silent about the illegal treatment they experienced *and* the entire arbitration process — a process that will be handled by an arbitrator who is chosen by the company and has financial incentive to keep the company happy. (Forced arbitration of this sort goes beyond issues of sexual harassment: A recent investigation by ProPublica, for example, showed that I.B.M. employees who experienced age discrimination were bound by forced arbitration and would never be able to sue the company in court.)

Forced arbitration has become a standard practice for a variety of reasons. The dominant view is that it helps manage long-term legal risk, ensuring that companies won't become embroiled in costly, drawn-out lawsuits. The examples of Uber and I.B.M. show that the opposite is true: Forced arbitration leads to long-term operating risk. Forcing legal disputes about discrimination, harassment and retaliation to go through secret arbitration proceedings hides the behavior and allows it to become culturally entrenched.

Before us lie three possible options for putting an end to this practice. The first is to leave it to individual companies and allow them to choose not to force their employees to sign away their constitutional rights. Microsoft has taken the lead on this and has stopped using arbitration agreements in cases of sexual harassment. As hopeful as this option might sound, leaving it up to individual companies is not likely to change the industry: The good companies will elect to ban arbitration agreements, while the bad companies will continue to use them and continue to mistreat their employees.

The second is to leave it to the Supreme Court, which will soon hand down a decision in the case of Epic Systems Corp. v. Lewis, a suit filed not over harassment but over unpaid overtime, but that nonetheless has the potential to reshape the way companies can use arbitration agreements, particularly when they are used to ban class-action lawsuits. But it's not clear how the court will rule — some analysis has suggested it is likely to rule in favor of employers — nor is it clear how this decision could shape forced arbitration for individuals.

This leaves us a third and final option: legislation. Promising progress is being made at the state level. Several measures were recently passed in the state of Washington, including one that will prohibit companies from using forced arbitration agreements to keep victims from reporting sexual assault and sexual harassment to authorities; in California, Assemblywoman Lorena Gonzalez Fletcher plans to propose a measure that would prohibit employers from making forced arbitration a condition of employment.

We could be making progress at the federal level, too. Last year, Representative Cheri Bustos of Illinois and Senator Kirsten Gillibrand of New York introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017, which would ban the use of forced arbitration in cases of sexual harassment and discrimination. The bill has bipartisan support. Senators and members of the House are now waiting to vote on it. Even if this bill is passed, it will be only the beginning: We must demand that our federal and state legislatures pass laws that ban forced arbitration in all cases of discrimination and harassment.

There are real questions about where #MeToo goes next — how it maintains momentum, how it can go beyond individuals losing their jobs and companies issuing public statements to create real, lasting change in our workplaces. Not all of them have easy answers. But there is at least one clear, tangible step that everyone who supports ending discrimination, harassment and retaliation in the workplace can take: Support the elimination of forced arbitration.

Susan Fowler is a writer and former engineer at Uber.

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