Preserving Pandemic Protections

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Preserving Pandemic Protections

Daiquiri J. Steele†

Though violations of workplace laws are typically viewed as private matters between employee and employer, such violations often transcend these private relationships and impact third parties and the broader society. As an important example, violations of workplace laws can impact public health, particularly during public health emergencies like the COVID-19 pandemic.

Empirical research has consistently shown that access to paid sick leave decreases transmission of infectious diseases. In the wake of the COVID-19 pandemic, Congress created a statutory entitlement to paid sick leave to help ease the economic burden on workers and prevent community spread of the novel coronavirus in the workplace and surrounding communities. However, workplace laws are only as strong as their protections against retaliation.

This Article critically assesses the retaliation provision Congress drafted as part of this legislation. That provision inadequately incorporates the holdings of previous cases in which the judiciary interpreted retaliation and whistleblowing provisions of other statutes. In so doing, Congress failed to provide the robust retaliation protections needed to support the underlying goal of the emergency entitlement. This Article proposes how the legislature can strengthen anti-retaliation statutory text to allow for the broadest interpretation possible in accordance with goals of the private enforcement scheme Congress created, particularly in times of national crisis.

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INTRODUCTION

Empirical research has consistently shown that paid sick leave decreases the transmission of infectious diseases. Access to paid sick leave allows employees who have contagious diseases to stay home from work without...
suffering major economic consequences. This limits the spread of disease to coworkers, who could then transmit the disease to their families and others in their community. The World Health Organization (WHO) has long advocated for paid sick leave, recognizing of the value of this right in times of crisis. In Spring 2020, the rapid transmission of the novel coronavirus, also known as the severe acute respiratory syndrome coronavirus 2 (COVID-19), prompted a global pandemic. Countries around the globe witnessed rapid, exponential growth in the number of COVID-19 infections within weeks. The COVID-19 global pandemic and corresponding economic shutdown have demonstrated the desperate need for paid sick leave in the United States. The following hypothetical illustrates why.

Assume Alex, an employee working as a resident assistant at a senior living center, has been diagnosed with COVID-19, but lacks access to paid sick leave. With bills to pay and children to care for, she cannot afford to take unpaid time off from work. These economic pressures may induce Alex to return to work even while still ill with a highly contagious disease, thereby increasing the risk the virus spreads to Alex’s coworkers, the center’s residents, and other individuals with whom her coworkers and residents come in contact. Without access to paid sick leave, Alex endangers not only her own health but also the health of the employer’s other personnel, the residents, and the public at large.

In addition to exacerbating the spread of disease in the workplace, a lack of access to paid sick leave can also fuel the transmission of contagious diseases in schools. Parents without paid sick leave are more likely to send their children to school or a childcare facility when their children have a contagious disease. This increases the rate of infection at the school or childcare facility which, in tum, contributes to community spread of the

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3. Id. at 4.


7. Heymann et al., supra note 1, at 3.

8. Id.

9. Id.
disease. Hence, paid sick leave not only protects America’s workforce, but also its children.

Employees without paid sick leave are frequently incentivized to go to work while ill to avoid job insecurity and economic ramifications. A 2008 study found that 16 percent of 1,493 workers surveyed reported they or a family member have been terminated, suspended, or otherwise penalized or that they would be terminated if they missed work due to illness.\(^\text{10}\) Furthermore, a 2015 study showed that 51 percent of food workers “always” or “frequently” go to work while sick.\(^\text{11}\) The majority of these respondents said they did so because they could not afford the loss in pay.\(^\text{12}\)

Incentivizing workers to come to work while sick not only risks spreading disease among coworkers, but also endangers the public at large. Take for example workers infected with norovirus, the leading cause of foodborne illness in the United States.\(^\text{13}\) The majority of norovirus infections have been traced back to infected food industry employees.\(^\text{14}\) According to a study by the Centers for Disease Control and Prevention (CDC), between 2001 and 2008, 53 percent of norovirus outbreaks originated with infected food service workers, who may have contributed to 82 percent of outbreaks.\(^\text{15}\) This occurred despite Occupational Safety and Health Administration (OSHA) guidance stating that ill employees should be sent home and not be allowed to return to work until forty-eight to seventy-two hours after symptoms have ceased.\(^\text{16}\) Recognizing the danger posed by sick employees, some restaurants have started offering paid sick leave to prevent their employees from infecting coworkers and customers.\(^\text{17}\)

The lack of paid sick leave can be catastrophic during a pandemic. For example, studies estimate that lack of paid sick leave during the H1N1


\(^\text{12}\) See id.


\(^\text{14}\) Id.

\(^\text{15}\) Id.


\(^\text{17}\) See, e.g., LeaAnne DeRigne, Patricia Stoddard-Dare & Linda Quinn, Workers without Paid Sick Leave Less Likely to Take Time Off for Illness or Injury Compared to Those with Paid Sick Leave, 35 Health Affairs 520, 525 (2016) (noting that Chipotle began offering paid sick leave to its employees after an outbreak of norovirus and E. coli to ensure sick employees stay home and do not infect customers).
influenza outbreak in 2009 resulted in 1,500 additional deaths.\textsuperscript{18} Between September and November of 2009, approximately 25.5 million employees were infected with H1N1.\textsuperscript{19} Of these, about 17.7 million took time off work, but the remaining 7.8 million went to work while infected with the contagious disease.\textsuperscript{20} As data suggest that each worker infected with the seasonal flu infects an additional 0.9 coworkers,\textsuperscript{21} it is estimated that those 7.8 million workers with H1N1 infected an additional 7 million workers,\textsuperscript{22} resulting in 1,500 deaths.\textsuperscript{23}

Data analysis from the H1N1 outbreak comparing public and private sector employees also suggests that paid sick leave provisions are effective at keeping sick employees from going to work. Public sector employees were, and continue to be, more likely to have access to paid sick leave than their private sector counterparts.\textsuperscript{24} The majority of the employees who went to work while infected with H1N1 worked in the private sector.\textsuperscript{25} Meanwhile, public sector employees, who have better access to paid sick leave coverage, were more likely to stay at home.\textsuperscript{26} However, public sector employees comprise only around 15 percent of the American workforce.\textsuperscript{27} Slightly under 75 percent of American workers are employed in the private sector, and slightly over 10 percent are self-employed.\textsuperscript{28}

Preventing employees from working while infected with the novel coronavirus is a key policy imperative to limit the spread of the disease. Indeed, the first case in the first major COVID-19 outbreak in the United States is attributed to an employee at a nursing home in Washington state who went to work sick.\textsuperscript{29} Just after COVID-19 was declared a pandemic,

\begin{itemize}
\item \textsuperscript{18} See id.
\item \textsuperscript{19} Drago & Miller, supra note 1.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.; see also VICKY LOVELL, INST. FOR WOMEN’S POLICY RESEARCH, NO TIME TO BE SICK: WHY EVERYONE SUFFERS WHEN WORKERS DON’T HAVE PAID SICK LEAVE 4 (2004), http://www.iwpr.org/pdf/B242.pdf [https://perma.cc/BAZ7-BYF7].
\item \textsuperscript{22} Drago & Miller, supra note 1, at 7.
\item \textsuperscript{23} See DeRigne et al., supra note 17, at 525.
\item \textsuperscript{25} See Drago & Miller, supra note 1, at 8.
\item \textsuperscript{26} Id. at 2.
\item \textsuperscript{27} Id. at 5.
\item \textsuperscript{28} See id.
\end{itemize}
experts in multiple industries began lobbying Congress for paid sick leave. A group of fifty-five organizations from business, labor, and health sectors sent a letter to members of Congress requesting that the federal government implement a paid sick leave law. Among these organizations were the American Lung Association, American Public Health Association, Infectious Diseases Society of America, and National Organization for Women.

In response to the pandemic, Congress passed the Families First Coronavirus Response Act (FFCRA) to provide paid sick leave and emergency assistance for individuals, families, and businesses impacted by the novel coronavirus. Among the legislation’s provisions were the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). Both the EFMLEA and the EPSLA provide employees with statutory entitlements to take temporary paid leave. While the mandatory provisions of the EFMLEA and the EPSLA expired on December 31, 2020, Congress passed the American Rescue Plan...
Act of 2021 (ARPA) in March 2021. The ARPA permits employers to voluntarily extend the EPSLA and EFMLEA provisions to their employees and receive tax credits in return.

The right to paid sick leave established by these laws or similar future legislation can only be as effective as their retaliation provisions. Protection against retaliation is critical in preventing the spread of infectious diseases. Just as there are market forces that incentivize employees to go to work while sick if no paid sick leave is available, there are also market forces that incentivize employers to discourage employees from taking sick leave. Hence, it is important that laws enacted to provide employees with sick leave are robustly enforced. Retaliation provisions help with this enforcement.

Turning back to Alex, assume she has invoked her right to paid sick leave because of COVID-19. Two days into the leave, her supervisor calls her and threatens to terminate her employment if she does not return to work immediately. The threat will likely induce her to return to work immediately, once again risking her own health and that of the public as a whole, nullifying the value of her statutory right to paid sick leave.

The EFMLEA and the EPSLA both contain retaliation provisions in an effort to ensure workers can realize their statutory rights. However, only the EPSLA contains a newly crafted retaliation provision, offering an opportunity to evaluate whether Congress has learned from the judicial interpretation of previous retaliation statutes and tailored new statutory language accordingly. This Article critically assesses the retaliation provision Congress drafted as part of the EPSLA through the lens of jurisprudence interpreting retaliation and whistleblowing provisions of other statutes. In light of this jurisprudence, this Article argues that the EPSLA’s retaliation provision is inadequate, particularly for a statute passed to ameliorate a public health emergency. The Article provides Congress a roadmap to strengthen anti-retaliation statutory text so that courts are more likely to interpret the language in a way that upholds Congress’s private enforcement scheme for workplace law.

Part I discusses the anti-retaliation provisions of workplace protection laws that existed before the COVID-19 pandemic. The discussion first examines the underlying assumption that Congress intends retaliation provisions to provide employees with the maximum protection against reprisal and analyzes how the courts have undermined this objective by narrowly interpreting statutes. Next, Part I explores workers’ rights to leave prior to the pandemic under the Family Medical Leave Act (FMLA) and the shortcomings of this legislation. Finally, Part I examines other workplace
statutes that could be invoked during the pandemic and assesses the laws' strengths and weaknesses in safeguarding workers’ rights. Part I not only demonstrates the holes in the existing workplace legal framework but also illuminates the dire need for stronger retaliation provisions to promote Congress’s goals of curbing retaliation.

Part II explores the developments and promises of the EPSLA and the EFMLEA. Part II identifies and assesses the anti-retaliation principles and protections within this legislation.

Part III critically assesses the language of the EPSLA’s retaliation provision. It divides components of the retaliation provision into three categories—first, areas in which the text provides the greatest possible protections based on judicial precedent; second, areas in which the language is sufficient to confer broad retaliation protections, but Congress could have further strengthened those protections; and finally, areas in which Congress failed to provide adequate protections. The Article illustrates that although congressional drafting of retaliation statutes has improved in some areas, additional reforms are needed to provide the robust retaliation protections needed to undergird existing laws.

I. THE FOUNDATION OF RETALIATION PROTECTIONS

The search for congressional intent is vital in the interpretation of any statutory provision, and anti-retaliation provisions are no exception. Hence, inherent in any argument seeking to critique the strength of retaliation protections is the premise that Congress indeed wanted to provide broad protections. This Part seeks to explain the foundation of retaliation provisions and provide support for the proposition that Congress intends to provide robust retaliation protections when it enacts such provisions. First, this Part provides a brief overview of the role of private enforcement of employment retaliation laws. It also discusses the preexisting employee leave offered at the federal level prior to the declaration of the COVID-19 public health emergency. Finally, this Part shows the relevance of other workplace statutes to the COVID-19 pandemic, illustrating the importance of the retaliation provisions in these laws.

A. Retaliation’s Private Enforcement Scheme

Workplace statutes, regardless of what rights they provide or whether they are instituted in times of national crisis, provide important protections for the American workforce. However, these rights can only be effective in curing the harm they were promulgated to redress if workers are allowed to avail themselves of these rights without facing retaliation. By retaliating

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41. See infra Part I.A.
against workers who attempt to exercise these statutory rights, employers can simultaneously punish employees who report violations and deter others who may be considering reporting in the future. Simply put, retaliation is the mechanism by which an employer can dilute statutory rights granted by Congress. Unfortunately, retaliation occurs at alarming rates, eroding these fundamental protections.

Congress’s private enforcement scheme is critical in combatting retaliation. Private enforcement is the hallmark of the regulatory scheme in labor and employment law. Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the FMLA, among other workplace statutes, all allow for aggrieved parties to file individual lawsuits to challenge employer violations. Because labor standards can be costly and time consuming for employers, market forces push against employer compliance. Employee claims challenging noncompliance are thus vital to enforcement. Without employees who are willing to file complaints and participate in investigations, workplace violations are unlikely to be challenged or redressed. Although federal agencies are also tasked with the enforcement of certain workplace laws, their regulation is often deficient. Agencies may lack the resources and motive to exhaustively investigate claims, and often exercise their discretion to litigate sparingly, limiting the viability of this remedial system. While some scholars are critical of the inefficacy and excesses of private litigation, it remains the primary vehicle of enforcement.

42. See Annette Bernhardt, Ruth Milkman, Nik Theodore, Douglas D. Heckathorn, Mirabai Auer, James DeFilippis, Ana Luz Gonzalez, Victor Narro, Jason PerelShtein, Diana Polson & Michael Spiller, Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities 3 (2009), https://www.nelp.org/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf (reporting study findings that half of workers who were aware of workplace violations and did not complain had refused to do so because they were afraid of losing their jobs).


50. See J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1140-41 (2012). Courts have even furthered these inefficacies by erecting numerous barriers such as upholding contractual provisions limiting private litigation, implementing heightened pleading standards, and limiting class actions. See generally John Fabian Witt, Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System, 56 DEPAUL L. REV. 261 (2007) (noting the lack of market controls on the plaintiff’s bar); J. Maria Glover, Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements, 59 VAND. L. REV. (2006) (asserting that class action waivers can curtail the enforcement of substantive rights).
The effects of the dilution of workplace statutory rights are not limited to the confines of the relationship between employer and employee. Because retaliation provisions are a law enforcement mechanism, it clearly follows that when Congress includes retaliation provisions, it intends for them to provide broad retaliation protections. The Supreme Court endorsed this view in early retaliation cases. For instance, in *Mitchell v. Robert DeMario Jewelry, Inc.*, a retaliation case brought under the Fair Labor Standards Act (FLSA), the Court reasoned that Congress included retaliation provisions to enhance the underlying substantive provisions:

Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. . . . For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. By the proscription of retaliatory acts set forth in [the FLSA retaliation provision], and its enforcement in equity by the Secretary pursuant to [the FLSA], Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced.  

Recognizing the importance of retaliation prohibitions, the Supreme Court historically interpreted such provisions broadly. Before the Roberts Court took hold, the Court subscribed to the theory that retaliation protections enhance the enforcement of workplace laws. This canonical theory—termed the “anti-retaliation principle” by Professor Richard E. Moberly—guided the Court’s expansive retaliation jurisprudence. During this time, the Court included justices who subscribed to a textualist theory of statutory interpretation and others who subscribed to a purposivist theory. Despite these different analytic approaches, the Court routinely interpreted these statutes broadly. For example, the Court read an implied private right of action into retaliation statutes, held that former employees can bring suit despite the statute’s use of the term “employee,” allowed third-party

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52. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (“Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of [Title VII’s] primary objective depends.”).
56. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that the term “employee” in Title VII includes former employees because it is more consistent with the broader context and purpose of the statute).
retaliation claims, and even recognized implied retaliation prohibitions where the statute did not explicitly provide one.

In spite of an established canon of statutory interpretation calling for retaliation statutes to be read broadly, the Roberts Court abandoned the anti-retaliation principle. More recent rulings have instead narrowed statutory workplace retaliation provisions. The Court has held that certain negative employment actions do not constitute “adverse action,” certain employee actions to exercise their rights do not qualify as protected activity, and internal employee complaints do not rise to the level of protected activity. The Court has further required a higher causation standard in retaliation claims than that of the underlying statutory claim.

In large part, this mode of statutory analysis flows from the Roberts Court’s treatment of workplace protection statutes as private law rather than public law. Typically, statutes are viewed as public law while the common law is viewed as private law. Workplace statutes are an anomaly. Private law refers to horizontal interactions by private individuals, corporations, or governmental entities acting in their private capacities, whereas public law refers to vertical interaction between the government and non-governmental actors. Courts have traditionally treated workplace disputes as private clashes between employee and employer; however, such treatment ignores the public nature of these disputes and the public norms implicated by these laws. This includes public policy issues like equal protection, due process, industrial peace, the economy, and health and safety. The COVID-19 pandemic, for instance, provides a public health illustration.

57. See Thompson v. N. Am. Stainless LP, 562 U.S. 170, 172, 178 (2011) (determining that an employee had standing to sue for retaliation after he was fired when his fiancé, who worked at the same company filed a sex discrimination charge, even though he was not the individual who engaged in the protected activity).


59. See, e.g., Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (noting that “remedial legislation should be construed broadly to effectuate its purposes”).


61. See infra Part III.B.2.

62. See infra Part III.B.2.

63. See infra Part III.A.1.

64. See infra Part III.A.


67. See Steele supra note 66, at 1940.
Courts' treatment of workplace law as private, rather than public law, undermines the statutes themselves as well as the private enforcement mechanism created by Congress. Because workplace law is treated as private law, common law—particularly tort and contract law—forms the basis for interpreting these statutes. Common law doctrines like at-will employment, negligence, and freedom of contract are frequently invoked in interpreting workplace law statutes. However, public norms like civil rights, public health and safety, and protection of the public treasury are also implicated in workplace statutes and should be considered by the courts.

For example, courts frequently apply the common law doctrine of at-will employment when adjudicating federal statutory workplace law cases, including retaliation suits. However, courts interpreting these cases rarely invoke a notable common law exception to the at-will employment rule—wrongful termination against public policy. In essence, this tort is the common law equivalent of a federal statutory retaliation claim. Forty-three jurisdictions in the United States recognize public policy exceptions for wrongful termination. These exceptions are as much a part of the common law as the at-will employment doctrine itself. The tort recognizes that employer-employee disputes may cause societal harm and attempts to safeguard society's interest against such harm. The tort is the common law's acknowledgment that a portion of employment disputes concern public law. Nevertheless, this tort is rarely invoked in comparison to at-will employment, negligence, and freedom of contract, which courts rely on to interpret all workplace law statutes. Courts often invoke these common law doctrines to narrowly interpret employment and retaliation statutes. These interpretations typically benefit employers to the detriment of the employee and, notably, the public at large.

Whistleblowers and individuals reporting retaliation have different levels of protection depending on the statute in question because courts vary widely in their interpretation of different workplace laws.


71. *See* *RESTATEMENT OF EMP'T LAW § 5.01 cmt. a* (AM. LAW INST. 2015).

72. *See generally id.*

textual variation across retaliation provisions as the primary justification for divergent interpretations.\textsuperscript{74} These inconsistencies result in varying burdens for employee-plaintiffs. Protections against retaliation range anywhere from very low to extremely high.

It is difficult to imagine why Congress would have intended certain whistleblower and retaliation provisions to provide employees with less protection than others. It is only rational to assume that Congress intends all retaliation protections to be robust, regardless of the primary workplace right at issue. This is especially true for retaliation provisions undergirding statutes enacted to protect workers during a national emergency.

The importance of broad interpretation and effective enforcement of retaliation provisions in workplace statutes cannot be overstated. However, the Roberts Court is starting to dilute retaliation protections, abandoning the Court’s previous embrace of the anti-retaliation principle. Following the Roberts Court’s lead, lower courts have also largely failed to recognize their role in upholding public policy imperatives through the enforcement of workplace protections.\textsuperscript{75} In part, this shortcoming stems from treating such disputes as private matters between employee and employer rather than understanding the negative impact such disputes have on others and society at large. The COVID-19 pandemic provides an excellent illustration of the public effect that insipid enforcement of workplace retaliation provisions can have on the public as a whole.

\textbf{B. Leave Entitlements Prior to the COVID-19 Pandemic}

An inability to take sick leave can pressure employees to go to work while ill, and as a result, spread contagious diseases to other employees, customers, and clients of the employer’s business. Recognizing that lack of paid sick leave is thus a threat to public health, the WHO is a staunch advocate for paid sick leave.\textsuperscript{76} Despite decades of calls from global experts on health, the United States has long lagged behind other countries with respect to paid family leave.\textsuperscript{77} Of 185 countries and territories, the United States joins Suriname and Papua New Guinea as the only ones without some form of paid family leave.\textsuperscript{78} While the FMLA provides up to twelve weeks of unpaid leave during any twelve-month period for the birth, adoption, foster

\textsuperscript{74} See generally id.
\textsuperscript{75} See, e.g., Gourdeau v. City of Newton, 238 F. Supp. 3d 179, 187 (D. Mass. 2017) (holding that the Roberts Court’s logic in \textit{Nassar}, a Title VII case, signals a but-for causation requirement in the FMLA); Kubiak v. S.W. Cowboy, Inc., 164 F. Supp. 3d 1344, 1365 (M.D. Fla. 2016) (applying the but-for causation requirement from \textit{Nassar} to a retaliation claim under the FLSA).
\textsuperscript{76} See \textit{ScheiL-Adlung & Sandner, supra note 2, at 2.
\textsuperscript{77} Id. at 13.
care placement of a child, care for a spouse, child, or parent with a serious health condition, or inability to perform the functions of an employee’s job due to a serious health condition, there is no provision for paid leave.\textsuperscript{79} Balancing the needs of families with the demands of the workplace and ensuring the economic stability of families are among the FMLA’s stated purposes.\textsuperscript{80} The statutory entitlements provided for in the Act are crucial to employees who may be suffering from serious health conditions themselves, are new parents, or are caregivers.

The FMLA has been the subject of much debate both pre and post passage. The legislation, which ultimately became known as the FMLA in 1993, was originally introduced in 1985.\textsuperscript{81} The bill was then debated for eight years, voted on thirteen times, and vetoed twice by the president.\textsuperscript{82} In 1989, Congress passed the legislation for the first time after introduction of versions of the bill in the House\textsuperscript{83} and Senate.\textsuperscript{84} However, President George H.W. Bush vetoed the legislation.\textsuperscript{85} In January 1991, bills were again introduced in the House\textsuperscript{86} and the Senate.\textsuperscript{87} The measure passed, but President Bush again vetoed it.\textsuperscript{88} Although a sufficient number of senators—two-thirds—voted to override the presidential veto,\textsuperscript{89} there were not enough votes in the House.\textsuperscript{90} In January 1993, yet another version of the measure was introduced in the House, this time finally passing and becoming law.\textsuperscript{91}

\textsuperscript{80} Id. § 2601(b)(1).
\textsuperscript{82} Many changes were made following the original introduction the Parental and Disability Leave Act of 1985 (PDLA), the law that eventually became the FMLA. The next iteration of the legislation was the Parental and Medical Leave Act of 1986. In early 1987, the Parental and Temporary Medical Leave Act of 1987 and the Family and Medical Leave Act of 1987 were introduced in the Senate and House, respectively. While no action was taken on the Senate bill, hearings were held in the House, and the bill was reported favorably out of committee. However, no further action was taken. A new version of the bill, the Parental and Medical Leave Act of 1988, was introduced in the Senate in June 1988. The bill was filibustered in the Senate and was eventually withdrawn. See id.; Parental and Temporary Medical Leave Act of 1987, S. 249, 100th Cong. (1987); Family and Medical Act of 1987, H.R. 925, 100th Cong. (1987); H.R. REP. NO. 100-511, pt. 2 (1988); Parental and Medical Leave Act of 1988, S. 2488, 100th Cong. (1988).
\textsuperscript{88} Id.; S. DOC. NO. 102-26 (1992).
\textsuperscript{89} 138 CONG. REC. 27,513 (1992). Sixty-eight senators voted to override the veto and thirty-one voted not to. One senator did not vote. See id.
\textsuperscript{90} 138 CONG. REC. 29,140 (1992). Two hundred fifty-eight members of the House voted to override the veto, and 169 members voted not to. Five members did not vote. See id.
\textsuperscript{91} Family and Medical Leave Act of 1993, H.R. 1, 103d Cong. (1993). A version of the bill was also introduced in the Senate, but the Senate substituted its bill for the House version. See id.
Staunch opposition from the business community fueled much of the congressional debate over the eight years. Whittled down by the opposition, the version Congress ultimately passed provided fewer weeks of leave, increased exemptions for small business, and raised the requirements for employee eligibility.

In passing the bill, Congress recognized the role of sick leave in promoting gender equality in employment. The statute reflects this aim:

"Consistent with the Equal Protection Clause of the Fourteenth Amendment, [the FMLA] minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and [promoting] the goal of equal employment opportunity for women and men ...." 94

To ensure that workers could enforce their statutory rights, Congress provided in the FMLA both a private right of action and retaliation provisions. In establishing an express private right of action, the FMLA empowers private citizens to play a key role in Congress' regulatory scheme and leaves no room for deviation in the courts' interpretation.

Furthermore, the FMLA contains a combination of three types of retaliation provisions: an opposition clause, a participation clause, and an interference clause. First, the text prohibits interference with the exercise of rights provided under the Act. Second, the opposition clause makes it illegal to take adverse action against a person because that person has opposed a practice made unlawful by the FMLA. Finally, the FMLA's participation clause prohibits taking adverse action against an individual because that individual has initiated, provided information for, or testified in a FMLA proceeding or inquiry. As the FMLA contains all three types of provisions, particularly an interference clause, which garners the broadest protections from the courts, the statute offers expansive coverage and manifests Congress's intent to ensure that workers are able to enforce their statutory rights without fear of retaliation.

Although scholars have criticized the FMLA as insufficient, the legislation was a major step forward in providing private employees access to sick leave. Some scholars have bemoaned the fact that the FMLA has not been amended, and others have criticized the lack of efficacy the FMLA has

94. Id. § 2601(4)-(5).
95. See id. § 2617(a).
96. Id. § 2601.
97. Id. § 2615(a)(2).
98. Id. § 2615(b).
had in bringing about family leave protections, arguing that the statute does not go far enough.\textsuperscript{99} However, notwithstanding arguments that the FMLA should provide additional protections, no federal\textsuperscript{100} legislation offered paid family leave for private employees prior to the pandemic.\textsuperscript{101}

C. Other Workplace Statutes Implicated in the COVID-19 Pandemic

In addition to the right to unpaid leave under the FMLA, several other workplace statutes are implicated in the COVID-19 pandemic. While this Article purports to neither provide an exhaustive list of workplace statutes that are relevant to the COVID-19 pandemic nor a comprehensive list of the types of retaliation claims that may be prevalent under each statute, it does seek to offer examples of how the COVID-19 pandemic has and will trigger protections under workplace statutes that predate the pandemic. It highlights the importance of having a functional workplace law structure in place prior to emergencies and the necessity of ensuring effective enforcement of preexisting laws through broad retaliation proscriptions.

1. Occupational Safety and Health Act

While paid sick leave is important in curtailing the spread of COVID-19, not all workers have access to sick leave. Some workers, like healthcare personnel and emergency responders, are exempt from the paid leave provisions;\textsuperscript{102} other workers may operate in industries that are deemed critical infrastructure;\textsuperscript{103} and others may not be eligible for the leave. For these employees and their families, strong occupational and safety laws are pivotal to keeping them healthy.


\textsuperscript{100} While no federal legislation offered paid family leave prior to the passage of the FFCRA, some states and municipalities offered paid family leave. See, e.g., 4 DALLAS, TEX. CITY CODE § 20-4(a)-(b) (2019) (requiring employers to grant one hour of paid sick leave for every thirty hours worked by an employee in Dallas, regardless of the employer’s location); SEATTLE, WASH. ORD. 124960, § 1 (2015) (requiring employers to provide employees with paid leave to care for their personal health conditions or those of their family members).

\textsuperscript{101} However, in December 2019, the federal government passed legislation to provide up to twelve weeks of paid family leave for federal civilian employees. See National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, §§ 7601–7613, 133 Stat. 1231, 2304–09 (2019).


The Occupational Safety and Health Act ("OSH Act") was enacted to ensure safe working conditions; however, the law is ineffective at identifying and remediying these problems. The OSH Act prescribes mandatory safety and health standards by which employers must abide. Despite providing these integral worker protections, the OSH Act is arguably the weakest federal statute in part because it does not provide for a private right of action.

As discussed earlier, private enforcement is a hallmark of the regulatory scheme Congress created in labor and employment law. However, the OSH Act does not have a private right of action. Instead, enforcement of the OSH Act’s safety and health standards and its retaliation provision are done exclusively via public enforcement through the administrative agency OSHA. Moreover, the agency’s enforcement of the OSH Act is widely criticized as dysfunctional.

First, employees must file a complaint with OSHA, and, if the agency finds the complaint meritorious, it will attempt to settle with the employer. If settlement attempts are unsuccessful, the agency then refers the complaint to the U.S. Department of Labor (DOL) Office of the Solicitor for possible litigation. However, given the limited resources DOL has, very few cases are actually litigated. If an employee’s case is meritorious, but the Solicitor opts not to file suit, the employee is left without any remedy other than an informal internal appeal process.

Of course, effective enforcement of OSH’s safety standards is inextricably linked to the OSH Act’s prohibition on retaliation against employees for asserting their rights under the statute. Employee complaints

104. See generally Emily A. Spieler, Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act, 32 A.B.A. J. LAB. & EMP. L. 1 (2016).
106. Spieler, supra note 104, at 7.
110. Id.
111. Id.
are vital to the OSH Act's enforcement scheme because the government relies on information provided by employees to initiate and investigate occupational safety and hazard defects. The OSH Act's retaliation provision undergirds the statute's substantive rights by protecting employees who make such complaints. The OSH Act prohibits an employer from discriminating against an employee for filing a complaint; instituting, or causing to be instituted, a proceeding; testifying in a proceeding; or exercising any right afforded by the OSH Act for the employee or others. 112

Like its overall enforcement of substantive safety and health claims, OSHA's enforcement of retaliation claims is deficient. OSH Act retaliation claims are investigated by OSHA, and where violations are found, the agency attempts to settle them. 113 Those that are not settled are referred to the DOL Solicitor for possible litigation in federal court. 114 If the Solicitor decides not to pursue litigation, that decision is not reviewable, and the employee has no right to pursue a private action in court. 115 Because of this, plaintiffs alleging retaliation have attempted to bring claims of wrongful termination in violation of public policy 116 in state court. While some courts allow the OSH Act to serve as the underlying policy in these claims, others do not, averring that the OSH Act preempts the claims. 117 Hence, an employee who experiences retaliation for reporting occupational safety and health hazards, but whose case OSHA, with its limited resources, decides not to pursue, is left without a remedy.

2. Title VII of the Civil Rights Act of 1964

Civil rights laws and their enforcement are social determinants of health because they affect other determinants of health, including access to housing, education, transportation, and employment. 118 Discrimination on the basis of race, color, sex, or religion limits educational, employment, and housing opportunities, which, in turn, damages health. 119 Conversely, civil rights

113. Id. § 660(c)(2)–(3).
114. Id. § 663.
115. Id.
116. See supra Part I.A.
117. See, e.g., Rural Cmty. Workers Alliance v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228, 1241–42 (W.D. Mo. Apr 23, 2020) ("Due to its expertise and experience with workplace regulation, OSHA (in coordination with the USDA per the Executive Order) is better positioned to make this determination than the Court is. Indeed, this determination goes to the heart of OSHA's special competence: its mission includes 'enforcing' occupational safety and health standards.").
enforcement on the basis of race and national origin is correlated to health improvements. Title VII of the Civil Rights Act of 1964 (Title VII) makes it illegal for an employer to refuse to hire, terminate, or discriminate against an individual with respect to terms, privileges, or conditions of employment on the basis of race, color, national origin, sex, or religion. Title VII plays a crucial role in preventing and correcting discrimination and thus, promoting public health.

The COVID-19 pandemic brought with it a sharp increase in discrimination against Asian Americans. The President, other government leaders, and White House officials referred to the novel coronavirus as the "Wuhan virus," "Chinese virus," and "kung flu," contributing to the racialization of the virus. This culminated in a spate of hate crimes against Asian Americans.

In one incident, a man stabbed three members of an Asian American family, including two children ages two and six, as the family was shopping at a Sam's Club in Midland, Texas. The man later admitted to law enforcement that "he stabbed the family because he thought the family was...


120. Hahn et al., supra note 118, at 23.

121. Id.


124. See, e.g., White House Briefing Statement, Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (Mar. 18, 2020) (transcribing the President’s remarks which began, “Thank you very much. I would like to begin by announcing some important developments in our war against the Chinese virus.”).

125. Id. (transcribing a press briefing in which a reporter told the President that at least one White House official referred to the coronavirus as the “kung flu,” and the President remarked that he did not think anything was wrong with the term).


Chinese, and infecting people with the coronavirus.” This is just one example of the heinous treatment the Asian American community has faced during the pandemic. According to the Asian Pacific Policy and Planning Council, a coalition of community-based organizations that advocate for the Asian and Pacific Islander American community, there were 3,340 self-reported COVID-19 related incidents of discrimination against Asian Americans from March 19, 2020 to May 31, 2020.

Incidents of coronavirus-related discrimination against Asian Americans have occurred in various contexts, including in transit, commerce, and education. The workplace is certainly not exempt. According to a statement released by the Chair of the Equal Employment Opportunity Commission (EEOC), the agency has received reports of harassment and mistreatment of Asian Americans and other people of Asian descent in the wake of COVID-19. The statement further identified anti-

128. Id.


128. Id.


discrimination laws as playing a vital role in combating such discrimination.\textsuperscript{134}

Coronavirus-related discrimination against Asian Americans in the workplace may manifest in different forms including harassment, disparate treatment, policies or practices with a disparate impact, and associational discrimination. Ways in which the first two forms of discrimination may present are fairly evident. For example, disparate treatment discrimination may involve an employer refusing to hire or terminating Asian American workers because of their race.

The second two forms of discrimination against Asian Americans—policies having a disparate impact and associational discrimination—may arise in new ways specific to the pandemic. Disparate impact discrimination describes facially neutral policies or practices that burden employees differently based on their race or other protected characteristic.\textsuperscript{135} Take for example a policy of firing any employee who has traveled to China, regardless of race, for fear that the employee has contracted the virus. Such a policy would likely have a disparate impact on Asian Americans if it can also be shown that people of Asian descent are more likely to travel to China than their white or non-Asian counterparts.

Employers may also engage in associational discrimination, that is, treating an employee differently based on the employee’s association with a person of a certain race or other protected characteristic.\textsuperscript{136} For instance, imagine that an employer discovers that her non-Asian employee is married to an Asian American or has an Asian American child. As a result of this relationship, the employer starts treating that employee unfavorably. Such treatment would constitute associational discrimination. Indeed, in one reported incident, an employer instructed an Asian American employee to go home because someone said his spouse, also an Asian American, had COVID-19.\textsuperscript{137} The employer did not ask the employee if this was true before dismissing him.\textsuperscript{138} The employee’s spouse did not have COVID-19.\textsuperscript{139}

\textsuperscript{134} Id.


\textsuperscript{136} See, e.g., Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009) ("Title VII protects individuals who, though not members of a protected class, are 'victims of discriminatory animus toward protected third persons with whom the individuals associate.'") (internal citation omitted); Holcomb v. Iona Coll., 521 F.3d 130, 139 (2d Cir. 2008) (noting that where adverse action occurs "because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race"); Parr v. Woodmen of World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race.").


\textsuperscript{138} Id.

\textsuperscript{139} Id.
African American workers have experienced a different type of employment discrimination during COVID-19. One study found that employers are more likely to retaliate against Black employees who raise coronavirus-related safety issues than workers of other races. Such retaliation not only implicates the OSH Act’s anti-retaliation provisions, but may also trigger Title VII protections against disparate treatment on the basis of race. Moreover, the same study found that Black workers are twice as likely to avoid raising COVID-19 safety concerns for fear of retaliation. Enforcement of Title VII’s retaliation protections are thus essential to allowing Black workers, both those retaliated against and those who fear retaliation, to assert their rights to a safe workplace.

Title VII’s prohibition against racial discrimination in employment protects against all of the aforementioned types of discrimination. While racial discrimination exists inside and outside times of pandemic, Title VII serves as an example of how having an existing legal framework to combat the type of discriminatory behavior that may be exacerbated during a pandemic is crucial.

3. Age Discrimination in Employment Act

The COVID-19 pandemic may also implicate age discrimination in employment. Individuals sixty-five years old and older are at high risk for severe illness from COVID-19. While they may have good intentions, employers seeking to only bring back younger workers or prioritize younger workers may run afoul of the Age Discrimination in Employment Act (ADEA) and equivalent state or local laws prohibiting discrimination on the basis of age. The EEOC has issued guidance stating that employers may not exclude older individuals who may be at a higher risk of COVID-19 complications.

The supposed benevolence of a policy excluding older workers (i.e., to protect them) is of no consequence. Exclusion based on age would violate the ADEA regardless of the rationale for the exclusion. A Supreme Court case interpreting Title VII is instructive here. In UAW v. Johnson Controls, Inc., female plaintiffs sued a battery manufacturer for its policy prohibiting...
"women who are pregnant or who are capable of bearing children" from working in positions within the company that involved lead exposure.\textsuperscript{145} The company argued that exposure to lead carried certain risks, including risk of harm to a fetus.\textsuperscript{146} In ruling that the company’s policy constituted sex discrimination, the Court noted "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."\textsuperscript{147} Likewise, an employer that excludes older individuals from employment because of their age is discriminating under the ADEA, regardless of whether the company’s motive is to safeguard those employees from the elevated risks of virus exposure.

The CDC has recommended that employers accommodate older workers who fall in the high-risk category due to age.\textsuperscript{148} Suggested policies include adjusting job duties to allow for minimal contact with customers and employees and supporting and encouraging telework.\textsuperscript{149} While the ADEA does not provide a right to reasonable accommodation on the basis of age, employers are able to provide flexibility to employees sixty-five and older, even if doing so results in workers age forty to sixty-four being treated less favorably.\textsuperscript{150}

Despite the ADEA, employers may be using the pandemic to terminate older employees. Allegations in a complaint filed in California state court provide an example.\textsuperscript{151} A ninety-year-old former employee who was chief financial officer of a company filed a complaint alleging age discrimination among other claims.\textsuperscript{152} The plaintiff had previously been told that he was too old and too slow to remain in his job.\textsuperscript{153} In March 2020, the employee was told by his supervisor to take two weeks’ worth of leave due to his age and the company’s desire to protect him from COVID-19.\textsuperscript{154} However, the employer did not discuss possible alternatives, like telework.\textsuperscript{155} While the employee was on leave, the employer fired him via email.\textsuperscript{156}

\textsuperscript{146} Id. at 190.
\textsuperscript{147} Id. at 199.
\textsuperscript{149} Id.
\textsuperscript{150} See EEOC, supra note 144.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
The ADEA is another example of how existing legal protections would apply during the pandemic to protect workers, as well as provide guidance to employers on managing issues related to employee age during the pandemic.

4. Americans with Disabilities Act

One type of employment discrimination that will likely become rampant as a result of the pandemic is disability discrimination. This includes both differential treatment and failure to accommodate. A threshold issue for many claims will be whether COVID-19 qualifies as a disability under the Americans with Disabilities Act (ADA). 157

For example, a policy against recalling or rehiring employees who have disabilities that increase their vulnerability to COVID-19 would likely constitute discrimination on the basis of disability. Employers cannot defend such policies based on an employee’s susceptibility to exposure as the Supreme Court rejected a similar defense in UAW v. Johnson Controls. 158

In addition to the economic impact that disability discrimination would have on individual victims and the economy as a whole, it may also impact coronavirus testing and affect community spread. The federal government learned as much in previous pandemics, as illustrated by guidance from the HIV/AIDS pandemic. 159 In 1988, the Presidential Commission on the Human Immunodeficiency Virus Epidemic issued a report that discussed the impact of discrimination. 160 The report noted,

As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination will . . . undermine our efforts to contain the HIV epidemic, and will leave HIV-infected individuals isolated and alone. 161

Congress passed the ADA two years after the report was issued. 162 These same concepts are applicable to the COVID-19 pandemic. If individuals fear

157. See 42 U.S.C. § 12101 (2018). The analysis of whether COVID-19 qualifies as a disability is further complicated by post-COVID conditions such as “long COVID”—a range of symptoms that can last months after the initial infection with the virus. CTRS. FOR DISEASE CONTROL & PREVENTION, POST-COVID CONDITIONS (Apr. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html [https://perma.cc/MB7T-F5TS].

158. See UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (rejecting battery manufacturer’s defense that it was justified in not hiring women capable of having children because the job involved exposure to substances with a risk of causing birth defects).


160. Id.

161. Id.

discrimination in employment because of coronavirus infection, they will be less likely to get tested or make the infection known to their employer.

Because of the contagious nature of COVID-19, the ADA’s direct threat provision is applicable. The ADA allows the exclusion of an individual from the workplace if that individual is a direct threat. The ADA regulations define “direct threat” as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” The reasonable accommodation portion will be key.

Though an employer may conclude that an employee is a threat to the health and safety of the employee or others, the employer is prohibited from excluding the employee from the workplace if a reasonable accommodation can be provided. If an employer fails to accommodate employees through telework, alternative job assignments, or some other means, when doing so would not result in undue hardship, then the employer has violated the ADA. However, if an employer can establish undue hardship, the employer may exclude the employee. This will result in job loss or other wage loss for the individual. Employees not wanting to risk this may choose not to get tested for the coronavirus or not to request an accommodation at all.

Inherent in an employee’s consideration of whether to even make a request for accommodation is the possibility of retaliation, which would result in some sort of employment-related harm to the employee simply for asking. The notion that a request for reasonable accommodations constitutes a request for preferential treatment abounds, and many employers are hostile to the request. The ADA protects individuals with COVID-19 or coronavirus-related medical conditions, but it must be enforced to be effective, and the ADA’s retaliation provision supports its enforcement.

Different types of workplace statutes are important for effectively navigating the COVID-19 pandemic. As illustrated above, employee leave entitlements, occupational safety and health protections, and civil rights laws play significant roles. However, effective enforcement is key, regardless of whether the applicable workplace statute is one that was passed long ago or is newly created in response to the pandemic. The next section explores the new legislation created in the wake of COVID-19.

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163. *Id.* § 12111.
164. 29 C.F.R. §1630.2(r) (2020).
165. EEOC, *supra* note 144.
166. *Id.*
168. *Id.*
II. THE RETALIATION PROVISIONS OF THE NEW LEGISLATION

Congress' swift passage of the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) in the face of the COVID-19 pandemic reflects lawmakers' belief in the urgent need for paid sick leave. Still, the only way the EPSLA and the EFMLEA will be effective in preventing the spread of disease and providing for others who have to care for family members is if employees are allowed to avail themselves of their statutory rights. As many employees forego taking advantage of workplace rights because they are fearful of retaliation from their employer, strong retaliation laws are needed to effectuate the leave entitlements.

The EFMLEA expanded the Family and Medical Leave Act of 1993 (FMLA) to address the needs of families during the COVID-19 pandemic. Whereas the FMLA offers twelve weeks of unpaid leave for purposes of childcare, a relative's health condition, or one's own illness, the EFMLEA provides up to twelve weeks of paid leave for the exclusive purpose of caring for a child due to school closures or childcare unavailability for COVID-19 related reasons. While the FMLA was only applicable to employees who had been with their employer for twelve months and who worked a minimum of 1,250 hours, the EFMLEA only requires that employees have worked for their employer for thirty days. Under the EFMLEA, the initial two weeks are unpaid, and the remaining ten weeks are paid at two-thirds the employee's regular rate of pay.

Because the EFMLEA builds off the FMLA, the legislation also explicitly references a private right of action, upholding the private enforcement structure of the regulatory scheme. Similarly, the EFMLEA contains the FMLA's retaliation provisions, which offer wide coverage by including an interference clause, which courts interpret broadly, in addition to an opposition clause and a participation clause. Because the EFMLEA

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169. See Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 11–12 (2011) (asserting that the FLSA, which provides standards concerning wages, hours, and overtime, relies upon information and complaints from employees for enforcement; thus, "its antiretaliation provision makes this enforcement scheme effective by preventing 'fear of economic retaliation' from inducing workers 'quietly to accept substandard conditions'") (internal citation omitted).
173. FFCRA § 3102(b), 134 Stat. at 189.
174. Id. An employee may choose to use paid sick leave under the EPSLA, or accrued paid time off under their employer's benefits package, at the same time as their two weeks of unpaid EFMLEA leave.
175. Total pay under the EFMLEA is capped at $200 a day or $10,000 total. Id.
177. Id. § 2615(a)(1) ("It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]."); § 2615(a)(2) ("It shall be
is based on the FMLA, this legislation offers robust protections against retaliation.

The EPSLA, on the other hand, offers more expansive coverage for eligible employees, but only provides up to eighty hours of paid sick leave. Under the EPSLA, all employees on the employer’s payroll as of the date of passage are eligible. The rate of pay for these eighty hours of leave is dependent upon the reason for the leave. An employee is eligible for pay at the employee’s regular rate of pay if the employee is incapable of working because the employee is (1) quarantined pursuant to an order of the federal, state, or local government; (2) quarantined on account of the advice of a healthcare provider; or (3) experiencing symptoms of COVID-19 and seeking a medical diagnosis. The rate of pay for these eighty hours of leave is two-thirds of the employee’s regular pay rate if the leave is taken because the employee is (1) caring for an individual subject to quarantine; (2) caring for a child age eighteen or younger whose school or childcare provider is unavailable due to COVID-19 precautions; or (3) is experiencing “a substantially similar condition as specified by the U.S. Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.”

The EPSLA is largely modeled on the FLSA, a minimum labor standards statute that confers statutory rights on employees. In addition to mirroring some of the FLSA’s text, the EPSLA is also subject to the same enforcement scheme. Therefore, the leave provided for by the EPSLA is protected by the FLSA and employers are subject to penalties under the FLSA for failing to comply with this legislation.

unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]; § 2615(b) ("It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual (1) has filed any charge or has institute or caused to be instituted any proceeding, under or related to this subchapter; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under [the FMLA]; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA].").

178. See FFCRA §§ 5101–5111, 134 Stat. at 195 (covering certain public employers and private employers with less than five hundred employees but exempting small businesses with less than fifty employees from the requirement to provide leave due to school closings or unavailable childcare if the leave requirements would endanger the viability of the business).
179. Id. § 5101.
180. Id.
181. Total pay is capped at $511 per day or $5,110 total. Id. § 5110(5)(A)(ii)(I).
182. Id. § 5110(5)(B)(i).
183. Total pay is capped at $200 per day, or $2,000 total. Id. § 5110(5)(A)(ii)(II).
184. Id. § 5110(5)(B)(ii).
186. FFCRA § 5105(a), 134 Stat. at 197.
187. Id.
Unlike the EFMLEA, which simply uses the FMLA’s preexisting retaliation provision from 1993, the EPSLA includes an entirely new retaliation provision. Because the EPSLA was drafted in 2020, it provides an opportunity to assess the statutory text to determine if Congress has learned the lessons the Court has espoused in case decisions that interpret employment retaliation provisions. The EPSLA retaliation provision reads as follows:

It shall be unlawful for any employer to discharge, discipline, or in any other manner discriminate against any employee who—

(1) takes leave in accordance with this Act; and
(2) has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding. 188

Violation of the EPSLA retaliation provisions by an employer will subject the employer to the penalties as delineated in sections 16 and 17 of the FSLA. 189 These penalties include damages to the employee in the amount of double the unpaid wages and reasonable attorney’s fees and costs; employment, reinstatement, or promotion of the employee; fines; and imprisonment. 190

Despite the existence of retaliation provisions in both the EFMLEA and the EPSLA, retaliatory actions against employees for taking sick leave persist. Shortly after Congress passed paid sick leave provisions in the face of the COVID-19 pandemic, employees filed lawsuits alleging retaliation for exercising their right to take paid sick leave. 191 If true, such allegations impact not only the individual employees, but also their coworkers and customers.

Retaliation can cause employees to not utilize federally-protected leave, even if the employees need it because they are infected with COVID-19. Moreover, witnessing an employer retaliate against an employee can deter other employees from exercising their statutory rights as well. Vigorous enforcement of anti-retaliation laws is thus necessary. However, the statutory

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188. Id. at § 5104.
190. Id.
191. See, e.g., Complaint at 8–9, Benedetto v. Action Rentals of FLL, LLC, No. 20-cv-22029-XXXX (S.D. Fla. May 14, 2020) 2020 WL 2508546 (alleging that a construction equipment rental company retaliated against an immune-compromised employee by firing him when he attempted to take leave because he had a fever of 103.4 and his physician advised him to quarantine); Complaint at 4, Conner v. Prof’l Med. Billing, Inc., No. 20-cv-00183 (N.D. Ind. May 1, 2020) (alleging that the employee-plaintiff was retaliated against by her employer, a medical billing company, for attempting to take leave when her daughter’s school closed as a result of COVID-19); Complaint at 3–4, Crider v. Lute Supply, Co., No. 20-cv-00081 (E.D. Ky. May 7, 2020) (alleging that a former manager at plumbing and hardware wholesale supply company was harassed while on jury duty and on EFMLEA leave caring for his children due to the COVID-19 pandemic and was subsequently terminated).
language Congress uses in crafting the retaliation provisions is subject to interpretation by courts, thus affecting the vigor of enforcement.

III. THE EMERGENCY PAID SICK LEAVE ACT AS A CASE STUDY

This Part addresses whether and how Congress has used previous court decisions interpreting statutory provisions in drafting the EPSLA to ensure broad protection from retaliation. It addresses (A) areas in which Congress internalized lessons from previous court decisions; (B) areas in which there was modest improvement, but more should be done; and (C) areas in which Congress failed to provide expansive protections. In each area of deficiency, a proposed enhancement is provided.

A. Lessons Learned from Previous Court Opinions

In drafting the EPSLA, Congress had the benefit of previous opinions in which the Court explained its interpretation of certain language in retaliation provisions of existing workplace statutes. Ever since 1973, courts have employed the framework from \textit{McDonnell Douglas Corp. v. Green} when analyzing retaliation claims.\textsuperscript{192} \textit{McDonnell} holds that in order to establish a prima facie case of retaliation, a plaintiff must prove that (1) there was protected activity of which the employer was aware; (2) the plaintiff suffered an adverse action; and (3) there is a causal link between the protected activity and the adverse action.\textsuperscript{193} Each one of these elements of a prima facie case has at some point been the subject of disagreement among scholars and jurists. However, judicial opinions issued after the drafting of most workplace law statutes, primarily from the Roberts Court, have narrowly interpreted these statutes. This Part details the portions of the EPSLA that Congress successfully crafted to offer broad protection given prior court rulings. A description of the precedent, as well as the applicable normative arguments, is provided for each term or clause.

\textsuperscript{192} See \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 802-03 (1973) (announcing that the different treatment framework in Title VII claims requires the plaintiff to carry the initial burden of proving a prima facie case of discrimination, then the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the adverse action, then the burden shifts back to the plaintiff to show the articulated reason is pretextual).

\textsuperscript{193} \textit{Id}. For examples of courts' application of this framework, see Theriault v. Genesis HealthCare LLC, 890 F.3d 342, 350 (1st Cir. 2018); Patane v. Clark, 508 F.3d 106, 115 (2d Cir. 2007); Anderson v. Boeing Co., 694 F. App'x 84, 86 (3d Cir. 2017); Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 249 (4th Cir. 2014); Williams v. B R F H H Shreveport, L.L.C., 801 F. App'x 921, 924 (5th Cir. 2020); Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 523 (6th Cir. 2008); McDaniel v. Progress Rail Locomotive, Inc., 940 F.3d 360, 370–71 (7th Cir. 2019); McCullough v. Univ. of Ark. for Med. Sci., 559 F.3d 855, 860–64 (8th Cir. 2009); Dawson v. Entek Int'l, 630 F.3d 928, 936 (9th Cir. 2011); Zann Kwan v. Andalex Grp. LLC, 737 F.3d 834, 843–44 (10th Cir. 2013); Johnson v. Miami-Dade Cty., 948 F.3d 1318, 1325 (11th Cir. 2020); Durant v. Dist. of Columbia Gov't, 875 F.3d 685, 696–97 (D.C. Cir. 2017); Haddon v. Exec. Residence at White House, 313 F.3d 1352, 1359 (Fed. Cir. 2002).
1. "Filed Any Complaint"

The EPSLA provision states that "an employer may not ... discharge, discipline, or in any other manner discriminate ... against an employee who has filed any complaint."194 Congress's use of "any" demonstrates its intent to provide broad protection, including for verbal complaints.

The Supreme Court addressed the permissibility of verbal complaints serving as protected activity in Kasten v. Saint-Gobain Performance Plastics Corp., a case involving a FLSA retaliation claim.195 The FLSA retaliation provision, like the EPSLA, contains the term "filed any complaint."196 The Court held that "the statutory term ‘filed any complaint’ includes oral as well as written complaints within its scope."197 In doing so, the Court focused on the text of the statute,198 the statute's purpose,199 and the interpretation of the DOL,200 the agency in charge of enforcing the FLSA. Specifically, the Court noted that the FLSA's retaliation prohibition makes the enforcement scheme effective by ensuring that employees do not accept substandard working conditions out of fear of retaliation.201 The Court also gave Skidmore deference202 to the DOL's interpretation that the phrase "filed any complaint" covers both oral and written complaints.203

Because Kasten strongly suggests that the term "filed any complaint" in the retaliation provision of any statute—not just the FLSA—encompasses oral complaints, Congress was wise to include this language in the EPSLA. The remaining considerations the Kasten Court used to decide the issue—the purpose of the statute and the applicable agency's interpretation—are also germane to the EPSLA. Like the FLSA, the EPLSA is a minimum labor standards statute that confers statutory rights on employees, and it is subject to the same enforcement scheme as the FLSA.204 Moreover, the Secretary of Labor has been charged with implementation of the EPSLA.205 Because

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196. 29 U.S.C. § 215(a)(3) (2018). ("[I]t shall be unlawful ... to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.").
198. See id. at 7–8.
199. See id. at 11–12.
200. See id. at 14–16.
201. Id. at 12.
203. See Kasten, 563 U.S. at 14–16 (appearing to apply Skidmore deference and citing to Skidmore). But see id. at 23 n.5 (Scalia, J., dissenting) (noting that the Court "never explicitly states the level of deference applied").
205. Id.
employers who fail to provide paid sick leave as required by the EPSLA are considered to have failed to pay minimum wages in violation of the FLSA, and because employers who violate the EPSLA’s retaliation provisions are subject to the penalties set forth in the FLSA, the DOL will likely interpret the statutes congruently. Inclusion of the term “filed any complaint” in the EPSLA retaliation provision was useful in ensuring the provision would offer broad protections.

2. The Absence of “Because”

One notable omission from the EPSLA retaliation provision is the term “because.” Although the term is one of the most common words in the English language, the Supreme Court has held that the term “because” in workplace statutes signals congressional intent to require the employee-plaintiff to prove but-for causation. While there are several causation factors from which courts can choose, and many retaliation and whistleblowing claims use lower standards like contributing factor or motivating factor, but-for causation is at the higher end of the spectrum, with only a sole cause standard above it. The exclusion of the term by Congress indicates its desire not to have the heightened but-for causation standard applied in EPSLA retaliation cases.

The foundation for the Supreme Court’s ruling on the term “because” in workplace law statutes came in 2009 when the Court decided Gross v. FBL Financial Services, Inc. There, an employee filed an age discrimination lawsuit against his employer because the employer changed his job title and reassigned his duties to a younger employee, effectively demoting the plaintiff. The Roberts Court held that the term “because” in the ADEA meant ADEA discrimination claims require but-for causation. In so holding, the Court examined the language of the ADEA which, in relevant part, makes it “unlawful for an employer . . . to fail or refuse to hire or to discharge 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.” The Court announced that “the ordinary meaning of the ADEA’s requirement that an employer took adverse action ‘because of’ age is that age was the ‘reason’ that the employer

206. 29 C.F.R. § 826 (2020).
209. Id. at 170–71.
210. Id. at 177–78.
211. Id. at 176 (quoting 29 U.S.C. § 623(a)(1)) (emphasis added).
decided to act.”212 As a result, but-for causation is the standard in ADEA discrimination claims.213

A few years later, in 2013, the Roberts Court greatly extended this rule in University of Texas Southwest Medical Center v. Nassar.214 In Nassar, a physician of Middle Eastern descent brought two claims against his former employer—one of harassment based on race and religion and a separate retaliation claim.215 In a five-to-four decision, the Court that while a motivating factor causation standard is used in Title VII discrimination cases pursuant to the Civil Rights Act of 1991,216 but-for causation was required for Title VII retaliation claims.217 Citing Gross and its definition of the word “because,” the Court held that in Title VII retaliation cases plaintiffs must establish their protected activity was a but-for cause of the employer's adverse action.218

The decision was met with dismay by many scholars219 and jurists,220 as the decision is incongruent with the Court’s anti-retaliation principle. Both the Gross and Nassar decisions purportedly rely on the plain meaning rule, a canon of statutory interpretation in which interpreters follow the plain meaning of text unless the plain meaning suggests a typographical error or doing so would lead to an absurd result.221 The premise that the word “because” mandates a but-for causation standard is doubtful and fails to take into account the purpose of the legislation.222 Nevertheless, this is the Roberts
Court’s position, and, alarmingly, lower courts are applying Gross and Nassar to other statutes as well.\footnote{See, e.g., Kubiak v. S.W. Cowboy, Inc., 164 F. Supp. 3d 1344, 1365 (M.D. Fla. 2016) (applying the but-for causation requirement from Nassar to a FLSA retaliation claim); West v. City of Holly Springs, No. 16CV79-RP, 2019 WL 2267294, at *2 (N.D. Miss. May 28, 2019) (applying Nassar to a FLSA retaliation case); Jackson v. Haynes & Haynes, P.C., No. 16-CV-01297, 2017 WL 3173302, at *5 (N.D. Ala. July 26, 2017) (citing Nassar when holding that the plaintiff’s FLSA retaliation claim fails because she cannot show the employer’s retaliation was the but-for cause of her discharge); Sharp v. Profitit, 674 F. App’x 440, 451 (6th Cir. 2016) (applying Nassar to the FMLA); Gourdeau v. City of Newton, 238 F. Supp. 3d 179, 187–88 (D. Mass. 2017) (holding that Nassar’s logic signals a but-for causation requirement in the FMLA); Acosta v. Brain, 910 F.3d 502, 513–14 (9th Cir. 2018) (assuming, but not deciding, that the but-for causation standard from Gross and Nassar is applicable to an ERISA retaliation claim). But see Perez v. Lloyd Indus., Inc., F. Supp. 3d 308, 321 (E.D. Pa. 2019) (affording deference to the DOL’s interpretation of the retaliation causation standard under OSHA as either the substantial reason or but-for causation standard despite the Gross and Nassar decisions).}

The Supreme Court recently attempted to clarify the application of but-for causation to Title VII in Bostock v. Clayton County,\footnote{140 S. Ct. 1731, 1737 (2020) (holding that Title VII’s prohibition against sex discrimination included discrimination on the basis of sexual orientation and transgender status).} noting that that but-for cause does not mean sole cause.\footnote{Id. at 1744 (“[T]he plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action.”).} Nevertheless, a but-for causation standard is still a heightened causation standard and may serve as a barrier to recovery for plaintiffs who prove that protected activity was a factor in the adverse action taken by their employers. The exclusion of the term “because” in the EPSLA broadened the scope of retaliation protections under the Act.

In drafting the EPSLA retaliation provision, Congress heeded some lessons learned from the judiciary’s interpretation of past statutes. By including the language “has filed any complaint” and by excluding the term “because,” Congress positioned the retaliation prohibition to be broadly construed by courts.

\section*{B. Room for Improvement}

While there are areas in which Congress successfully incorporated past interpretations of workplace statutes into the new EPSLA, there are other areas in which Congress enhanced protections but could have and should have gone further to bolster retaliation enforcement. These areas concern (1) creation of a private right of action; (2) adverse actions by employers; and (3) anticipatory retaliation.

\subsection*{1. Private Right of Action}

Even when legislation is meticulously drafted, it will have no effect if not enforced. One vital component of enforcement in workplace law is a
private right of action, and Congress should explicitly include language providing for this right. While a private right of action can be implied, whether it is implied is a matter of statutory interpretation.\textsuperscript{226} Despite the vitality of private rights of action and the importance of the EPSLA in the context of the COVID-19 pandemic, judicial findings of a private right of action are not guaranteed. For instance, some courts have ruled that the CARES Act, which does not include an explicit private right of action, does not contain an implied right of action.\textsuperscript{227}

While public agencies play a crucial role in enforcement of employment discrimination laws and laws that set minimum labor standards,\textsuperscript{228} budget constraints often hinder adequate enforcement\textsuperscript{229} and force agencies to forego enforcement on meritorious cases.\textsuperscript{230} Private rights of action can circumvent budgetary constraints by enlisting private resources for enforcement.\textsuperscript{231} Moreover, to further buttress the enforcement scheme,\textsuperscript{232} Congress has provided in some statutes that if violations by the employer are found, the employer-defendant must pay the employee-plaintiff’s attorney’s fees.\textsuperscript{233} Private litigation works in tandem with public agency enforcement to ensure the most effective regulatory scheme possible.\textsuperscript{234} The contribution of federal administrative agencies to the enforcement of workplace laws cannot be overstated. Nevertheless, there are hazards to giving federal agencies a monopoly over enforcement of workplace law.\textsuperscript{235}

Because the strongest enforcement is neither exclusively public nor private,\textsuperscript{236} Congress should have ensured the EPSLA provides for a private right of action in addition to enforcement by the DOL. Whereas the EFMLEA explicitly references a private right of action, the EPSLA does not.\textsuperscript{237}

\begin{itemize}
\item \textsuperscript{226} See, e.g., Planned Parenthood S. Atl. v. Baker, 941 F.3d 687, 694–95 (4th Cir. 2019).
\item \textsuperscript{228} See generally Angela D. Morrison, Duke-ing out Pattern or Practice after Wal-Mart: The EEOC as Fist, 63 AM. U. L. REV. 87 (2013) (examining the pivotal role the EEOC plays in Title VII enforcement).
\item \textsuperscript{229} Stewart & Sunstein, supra note 49, at 1214.
\item \textsuperscript{230} See Spieler, supra note 104, at 8–9.
\item \textsuperscript{231} Stewart & Sunstein, supra note 49, at 1212.
\item \textsuperscript{232} The default rule in the United States is that the prevailing litigant is not entitled to collect attorney’s fees from the non-prevailing party. However, there are exceptions, and some of these exceptions were enacted by Congress to encourage private litigation to implement public policy. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 260–62 (1975) (explaining the “American Rule” and listing the public policy rationales for some exceptions).
\item \textsuperscript{233} See, e.g., 29 U.S.C. § 216(b) (2020) (stating that in addition to any judgment awarded to the plaintiff or plaintiffs in a FLSA case, courts should allow reasonable attorney’s fees to be paid by the defendant).
\item \textsuperscript{234} See Stewart & Sunstein, supra note 49, at 1202.
\item \textsuperscript{235} Id. at 1201–02.
\item \textsuperscript{236} See id. at 1202; see also Stephanie Bornstein, Public-Private Co-Enforcement Litigation, 104 MINN. L. REV. 811, 822–30 (2019) (discussing the benefits of hybrid public-private enforcement).
\end{itemize}
Congress appears to signal its desire that the EPSLA provide a private right of action by connecting the EPSLA to the FLSA, which contains a private right of action. And while the Supreme Court has held that certain statutes contain an implied private right of action for retaliation, an overt statement would guarantee such interpretation.

The EPSLA provides that any employer who willfully violates the retaliation provision of the statute shall “be considered to be in violation of section 15(a)(3) of the [FLSA] . . . and be subject to the penalties described in sections 16 and 17 of [the FLSA] with respect to such violation.” The penalty provision in section 16 states, in relevant part, that an action to recover damages or equitable relief “may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”

Transitively, if a violation of the EPSLA retaliation provision is a violation of the FLSA retaliation provision, and the FLSA provides a private right of action to recover, then the EPSLA should provide a private right of action to recover. This private right of action will be crucial to enforcement, and Congress was prudent to include it along with the FLSA remedies. However, Congress could have gone further by making this right explicit. Because the most effective enforcement comes when private rights of action are expressly conveyed to supplement enforcement by public agencies, Congress should have expanded retaliation protections by explicitly providing for a private right of action.

2. "Any Other Manner Discriminate"

The EPSLA retaliation provision makes it unlawful for an employer “to discharge, discipline, or in any other manner discriminate” against employees who have engaged in certain conduct. The term “any other manner discriminate” is broad enough to encompass a variety of adverse actions. Courts have often been called upon to determine what types of adverse actions fulfill the requirement for retaliation statutes. The adverse action concept centers around how negative a consequence must be for the court to hold an employer liable for it.

239. FFCRA § 5105(b), 134 Stat. at 197.
241. FFCRA § 5104, 134 Stat. at 196.
242. Sandra F. Sperino, Retaliation and the Reasonable Person, 67 FLA. L. REV. 2031, 2037 (2015) ("Courts use the term ‘adverse action’ or similar language to separate actions that would potentially lead to liability from those that would not.”).
243. Id.
The Supreme Court articulated the standard for adverse action in *Burlington Northern & Santa Fe Railway v. White.*244 There, a female employee filed a sex discrimination charge with the EEOC.245 After the charge was transmitted to her employer, she was suspended without pay for alleged insubordination.246 An internal investigation found that the employee had not been insubordinate, and consequently, she was given full backpay for the thirty-seven-day suspension.247 Despite receiving backpay, the employee filed a retaliation charge with the EEOC.248 The case was subsequently filed in federal court and made its way to the Supreme Court.249 The issues before the Court were (1) whether the retaliation provision of Title VII250 requires the adverse action to pertain to the terms and conditions of employment and (2) how harmful must an adverse action be in order to be actionable.251

The Court held that employer conduct occurring outside of the employment context was actionable under Title VII’s retaliation provision based on an analysis of the text of Title VII, with a particular focus on comparison of the statute’s substantive discrimination provision to its retaliation provision.252 Title VII’s discrimination provision, in relevant part, states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .253

The text of the Title VII retaliation provision differs. It reads, in relevant part, “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by [Title VII].”254

In ruling that adverse action for Title VII retaliation claims is not limited to the context of employment, the Court noted that the language concerning “compensation, terms, conditions, or privileges of employment” limits the scope of actionable adverse actions for Title VII discrimination claims.255

245. *Id.* at 58.
246. *Id.*
247. *Id.* at 58–59.
248. *Id.* at 59.
249. *Id.*
252. *Id.* at 61–64, 67.
254. *Id.* at § 2000e–3(a) (emphasis added).
However, because this restrictive language is not in the retaliation provision, Title VII retaliation claims can be based on adverse actions by an employer that are not employment related.\footnote{256}

With respect to the level of harm that must be present for liability for retaliation, the Court announced that the employee-plaintiff bears the burden of showing that “a reasonable employee would have found the challenged action materially adverse.”\footnote{257} The Court defined “materially adverse” actions as conduct which “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”\footnote{258}

The Court’s holding in \textit{Burlington Northern} is facially broad and appears to comport with the anti-retaliation principle. Though \textit{Burlington Northern} was a Title VII retaliation case, its holding has been applied to retaliation claims under other statutes, including 42 U.S.C. § 1981, the FLSA, the ADEA, the ADA, and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).\footnote{259} Notwithstanding the broad language in \textit{Burlington Northern}, lower courts have narrowed the holding in their application by finding that a myriad of employer actions did not constitute prohibited adverse actions. Such actions include negative performance evaluations, changes in work schedules,\footnote{260} threatening to discipline an employee, threatening to fire an employee, removing an employee from the office, and filing lawsuits.\footnote{261} Despite applying the \textit{Burlington Northern} “materially adverse” standard, courts have concluded that certain employer conduct does not qualify as an adverse action.\footnote{262}

Interestingly, much of the conduct the courts refuse to consider as actionable adverse action has been empirically proven to be conduct that would dissuade a reasonable person from making a charge of discrimination.\footnote{263} While Congress inserted some language in the EPSLA

\begin{itemize}
\item \textit{Id.} at 62–64.
\item \textit{Id.} at 68.
\item \textit{Id.} (quoting Rochon v. Gonzalez, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).
\item \textit{See, e.g.,} Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 635 (10th Cir. 2012) (using the \textit{Burlington Northern} standard in an ADEA claim); Hicks v. Baines, 593 F.3d 159, 169–70 (2nd Cir. 2010) (applying \textit{Burlington Northern} when assessing whether employer conduct constituted adverse action in a retaliation claim under 42 U.S.C. § 1981); Mogenhan v. Napolitano, 613 F.3d 1162, 1165–66 (D.C. Cir. 2010) (adopting the \textit{Burlington Northern} standard for an ADA claim); Crews v. City of Mt. Vernon, 567 F.3d 860, 869 (7th Cir. 2009) (using the \textit{Burlington Northern} standard in a retaliation claim under USERRA); Darveau v. Detecon, Inc., 515 F.3d 334, 343 (4th Cir. 2008) (applying \textit{Burlington Northern} to a FLSA retaliation claim).
\item \textit{See, e.g.,} Lushute v. La., Dep’t of Soc. Servs., 479 F. App’x 553, 555 (5th Cir. 2012) (deciding that a change in an employee’s work schedule did not constitute an adverse action). \textit{But see} Hicks v. Baines, 593 F.3d at 169–70 (holding that a supervisor’s adjustment of employees’ shift times was sufficient to demonstrate adverse employment action under 42 U.S.C. § 1981).
\item \textit{See} Sperino, \textit{supra} note 242, at 2036.
\item \textit{Id.}
\item \textit{Id.} at 2043 (reporting the findings of a study in which over 50 percent of participants stated that they would or might be dissuaded from filing a discrimination complaint if the employer threatened them
retaliation provision that may be helpful in expanding what constitutes an adverse action, it did not go far enough given some lower courts’ restrictive definition of the Burlington Northern Court’s materially adverse standard.

The use of the phrase “any other manner discriminate” in the EPSLA, coupled with the absence of language about the terms and conditions of employment, firmly nestled adverse actions by employers that are not employment related into the scope of the EPSLA. It covers a wide range of actions and leaves room for employer conduct that may be adverse, but is not considered discharge or discipline. Nonetheless, Congress could have improved the scope of what is considered adverse action by including additional types of conduct.

While it may be prudent for Congress to avoid delineating the specific activities that constitute adverse action, the list can be expanded. Attempting to list all of the possible adverse actions may harm rather than advance the regulatory scheme for workplace law, largely because of the expressio unius canon of statutory construction. This canon is based on the maxim “expression unius est exclusio alterius,” which means “expression of one thing indicates exclusion of the other.” Pursuant to the canon, if items are included in a list, then those items not included were omitted purposefully. One fundamental problem with the canon is that it presumes legislators will take every possible scenario into account, which Congress can rarely, if ever, do. Consequently, Congress likely avoided creating a comprehensive list of employer conduct that could serve as adverse actions for the EPSLA, or any other statute, for fear that the expressio unius canon would exclude conduct not contemplated at the time the legislation was drafted. However, the canon is not applied in instances where the legislature signals the list is not exhaustive, which Congress does with the language “any other manner discriminate” in the EPSLA.

Specifically, Congress should have considered adding threatened termination and negative performance appraisals to the EPSLA to unequivocally signal that such actions fall within the scope of prohibited adverse actions contemplated. Not only would threatened termination dissuade a person from filing, but the threat may also induce a filer to withdraw a complaint or recant allegations. This becomes even more

with termination, suspended them for seven days with pay, transferred them to an office in another location, changed their job responsibilities with the same pay, were ostracized by coworkers, or had a negative performance appraisal placed in their personnel file).

264. See ESKRIDGE ET AL., supra note 54, at 668.

265. Id.

266. Id. at 669.

267. See, e.g., Sarbanes-Oxley Act § 806(a), 18 U.S.C. § 1514A(a) (2018) (providing precedent for enumerating specific actions in a workplace statute by making it unlawful to “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee” under its whistleblower provision).
pronounced in instances involving the exercise of a statutory right like taking paid sick leave. If an employer threatens termination after an employee has invoked the right to paid sick leave but the employee is located in a jurisdiction that does not recognize threatened termination as an adverse action, the employee would be left without an action for retaliation. This is particularly concerning because Congress did not include an interference clause in the EPSLA.\textsuperscript{268}

Negative performance evaluations should also be denoted as an adverse action under the statute. Discharge, which is explicitly listed in the statute, is a consequence of negative performance appraisals. Failure to include negative appraisals as an actionable adverse action would allow an employer to circumvent the cause of action all together. Under the \textit{McDonnell Douglas} burden-shifting framework, employers have the opportunity to present a legitimate, non-retaliatory reason for the dismissal and thus, can use the negative performance appraisal as the "legitimate" reason for the termination.\textsuperscript{269} The employee will have a difficult time proving pretext in response.\textsuperscript{270} Hence, to have any chance of recovery, the employee would be left with the daunting task of attempting to prove that the negative performance appraisal did not actually motivate the termination.

Inclusion of the "any other manner discriminate" language in the EPSLA helps broaden the scope of what courts could consider adverse action in EPSLA retaliation claims. While Congress should not attempt to provide an exhaustive list of adverse actions, the enumeration of specific types of conduct in addition to discharge and discipline would help ensure proper coverage of retaliatory conduct under the law.

3. \textit{Anticipatory Retaliation}

One tactic employers use to prevent employees from exercising their rights is taking adverse action in anticipation of an employee attempting to report workplace violations in the future.\textsuperscript{271} This phenomenon has been referred to as "anticipatory retaliation"\textsuperscript{272} or "preemptive retaliation."\textsuperscript{273}

\begin{itemize}
  \item \textsuperscript{268} \textit{See infra} Part III.C.2.
  \item \textsuperscript{269} \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 802 (1973).
  \item \textsuperscript{270} Additionally, the at-will employment doctrine would hinder an argument that the negative evaluation was insufficient to warrant the termination. The basic principle of the at-will employment doctrine is that an employee can be terminated for a good reason, a bad reason, or no reason at all. \textit{Engquist v. Or. Dep’t of Agr.}, 553 U.S. 591, 606 (2008).
  \item \textsuperscript{271} \textit{See Long}, supra note 73, at 561–63 (discussing anticipatory retaliation).
  \item \textsuperscript{272} Charlotte S. Alexander, \textit{Anticipatory Retaliation, Threats, and the Silencing of the Brown Collar Workforce}, 50 AM. BUS. L.J. 779, 780 (2013); Long, supra note 73, at 561.
  \item \textsuperscript{273} EEOC, EEOC-CVG-2016-1, \textit{ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES} (2016), https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#III_ADA [https://perma.cc/A3X2-UCGT] (noting that the doctrine of anticipatory retaliation is also called preemptive retaliation).
\end{itemize}
Depending on how the statute is drafted, some statutes provide explicit protection from anticipatory retaliation while others do not.

Most statutes that provide for anticipatory retaliation protections, including the EPSLA, only do so if the individual is about to testify in a proceeding. The EPSLA makes it unlawful for employers to discharge, discipline, or discriminate against an employee who “has testified or is about to testify in” a proceeding under or related to the statute. Some courts adopt a narrow interpretation of this language, requiring that the proceeding already be pending for the employee to be covered. Furthermore, these statutes that provide anticipatory retaliation protections apply only to anticipatory testimony, not anticipatory filings. For example, a portion of the FMLA retaliation provision provides:

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding under or related to [the FMLA];
(2) has given, or is about to give, any information in connection with any inquiry or proceeding related to any right provided under [the FMLA]; or
(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA].

The FMLA protects an individual who has given “or is about to give” information in connection with a FMLA proceeding and it protects an individual who has testified “or is about to testify.” However, the “or is about to” language is not included in the clause concerning filing or instituting proceedings. Hence, a textualist reading of the statute would find that anticipatory retaliation is covered only for individuals about to provide information or testimony, and not for those who are about to file a complaint or charge.

In contrast, the Immigration Reform and Control Act of 1986 (IRCA) retaliation provision provides an example of clear language that would protect anticipatory filings. IRCA’s retaliation provision makes it unlawful

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277. See, e.g., Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000) (“Even though [plaintiff’s] allegations describe morally unacceptable retaliatory conduct, we would not be faithful to the language of the testimony clause of the FLSA’s anti-retaliation provision if we were to expand its applicability to intra-company complaints or to potential testimony in a future-but-not-yet-filed court proceeding.”).
278. See Long, supra note 73, at 562.
280. Id.
to retaliate against a person “because the individual intends to file or has filed a charge or a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing....” 282 A textualist reading of the statute would yield protections for individuals who intend to file but have not filed by the time the adverse action occurred. However, unlike the FMLA, the IRCA would not protect anticipatory testimony. 283 To offer the strongest protections possible, a statute should protect anticipatory complaint filings, provision of information, and provision of testimony.

While the best way to ensure anticipatory retaliation is protected is to include clear, unambiguous language in the statute to that effect, there have been instances in which courts have interpreted statutes as implying these protections. 284 However, there are other courts that have refused to allow causes of action for anticipatory retaliation absent express language in the statute. 285

The EPSLA’s anticipatory retaliation language could have been improved upon by including language similar to that in the IRCA that protects employees who are about to file in addition to an employee who “has filed any complaint.” Another enhancement to the EPSLA’s anticipatory retaliation provisions would be to include language protecting individuals who provide or are about to provide information, as in the FMLA retaliation provision.

4. Non-Preemption of Common Law Remedies

Because federal workplace statutes often have gaps in coverage, one effective gap-filling measure is to ensure the federal statutes do not preempt related state court claims. While the language of the EPSLA suggests that Congress did not intend to preempt state wrongful discharge claims, explicit language should have been added.

282. Id.
283. See id.
284. See, e.g., Beckel v. Wal-Mart Assoc., Inc., 301 F.3d 621, 624 (7th Cir. 2002) (“[i]f there were admissible evidence that Wal-Mart had threatened the plaintiff with firing her if she sued... [s]uch a threat would be a form of anticipatory retaliation, actionable as retaliation under Title VII.”); Sauers v. Salt Lake Cty., 1 F.3d 1122, 1128 (10th Cir. 1993) (“Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact; consequently, we hold that this form of preemptive retaliation falls within the scope of Title VII.”); Holt v. Houston Methodist Sugar Land Hosp., No. 19-CV-564, 2020 WL 989911, at *7 (S.D. Tex. Feb. 10, 2020) (“It is difficult to image [sic] any judicial construction that would more readily turn the ADA’s anti-retaliation provision into a dead letter than for this Court to rule preemptive or anticipatory retaliation unactionable.”); see also Davis v. Crescent Elec. Supply, Co., 200 F. Supp. 3d 875, 887–88 (D.S.D. 2016) (finding that anticipatory retaliation claims are viable under Title VII).
285. See, e.g., Hill v. Mr. Money Fin. Co., 309 F. App’x 950, 962 (2009) (“[i]t is difficult to see why the argument for extending the clear and unambiguous statutory language to cover preemptive retaliation does not fail... Statutory language is clear that retaliation must follow the provision of information to a specified federal authority.”).
As discussed earlier, one claim that is analogous to retaliation is wrongful discharge in violation of public policy, which is a tort that exists in most states. Most states allow federal statutes to serve as the underlying public policy for the claim; however, some states mandate that the federal statute actually impact the state's citizens.

A canon of statutory construction known as the presumption against preemption instructs that federal law should not be read as preempting state law "unless that was the clear and manifest purpose of Congress." Courts will likely have a difficult time finding that Congress had a clear and manifest purpose to upend state wrongful discharge claims.

The EPSLA provides, "Nothing in this Act shall be construed to in any way diminish the rights or benefits that an employee is entitled to under any other Federal, State, or local law; collective bargaining agreement; or existing employer policy ...." If the ability to bring a common law wrongful discharge claim is considered a right or benefit, then this language can be interpreted as allowing common law wrongful discharge claims. However, another plausible interpretation is that the text is aimed at preventing the diminishment of other types of employee leave provided under other laws, collective bargaining agreements, and employer policies as a result of the EPSLA. In other words, there is a reasonable interpretation that the language protects other types of leave, not other types of claims.

The latter interpretation has been applied to the FMLA. For example, in Johnson v. Honda of America Manufacturing, Inc., a federal district court considered whether the FMLA could serve as the public policy underlying a wrongful discharge claim under Ohio law. The court analyzed a provision of the FMLA, which provides, "Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act." The plaintiff argued that this language permitted him to bring a wrongful discharge in violation of public policy claim under the FMLA. The court disagreed, holding that the FMLA language concerned rights, while the ability to bring a wrongful discharge claim concerned remedies. The court concluded that the


287. Muhl, supra note 70, at 4.


293. Id. at 859.

294. Id.
language in the FMLA did not preserve a state wrongful discharge claim.\textsuperscript{295} The EPSLA language, which is similar to the FMLA language, could be interpreted in the same manner.

To broaden the scope of protection, Congress should revise the EPSLA to ensure it protects rights, benefits, and remedies. While the states ultimately decide what public policies are encompassed in their state tort actions, broad language can convey that Congress did not intend to preempt remedies.

The EPSLA retaliation provision contains language that, despite enhancing protection for workers, could have and should have gone farther. In addition to listing specific activities that constitute adverse action, Congress should have added explicit language indicating the existence of a private right of action, protection from anticipatory retaliation, and the non-preemption of common law remedies to ensure broad protection.

C. Failure to Master

This Part examines areas in which congressional failure to incorporate past interpretations have weakened the EPSLA's retaliation provision.

1. Incorporating Equal Protection for Additional Insulation

The EPSLA covers both private and public sector employees. As discussed above, a private right of action is pivotal to effective enforcement of workplace law.\textsuperscript{296} Hence, all covered employers, including state government employers, need to be subject to private lawsuits. However, Congress failed to draft the EPSLA in a way that would ensure this. Two Supreme Court cases decided within four years of each other illustrate the problem.

In 2003, the Supreme Court decided \textit{Nevada Department of Human Resources v. Hibbs}, a case in which a Nevada state employee was fired after taking time off to care for his spouse, who was recovering from a car accident and neck surgery.\textsuperscript{297} He sued alleging that his employer, the State of Nevada, violated the FMLA.\textsuperscript{298} The Supreme Court granted certiorari on the case to settle a split among the federal courts of appeals regarding whether plaintiffs could sue a state in federal court for money damages under the FMLA.\textsuperscript{299} In rendering its decision, the Court emphasized that while the U.S. Constitution does not provide for federal jurisdiction over suits against non-consenting states, Congress has the power to abrogate this immunity if it makes its intention to abrogate obvious in the language of the statute and if it acts

\textsuperscript{295} Id.
\textsuperscript{296} See supra Part III.B.
\textsuperscript{297} 538 U.S. 721, 725 (2003).
\textsuperscript{298} Id.
\textsuperscript{299} Id.
pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment. Because the language of the FMLA allows employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," and the FMLA included state agencies in its definition of an employer, it was clear to the Court that Congress intended to abrogate Eleventh Amendment immunity. The Court then analyzed whether Congress had the constitutional authority to do so.

The Court held that the FMLA was a valid use of Congress’s power to abrogate state immunity under section 5 of the Fourteenth Amendment. In so holding, the Court relied on language concerning gender inequity with respect to family leave responsibilities. In support of this assertion, the Court pointed to language in the FMLA that states, "[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men." The Court concluded that in passing the FMLA, Congress sought to promote equal employment opportunity for women and men by making gender-neutral leave available. The Court further explained:

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

The language in the FMLA concerning gender equity led the Court to rule that Congress validly abrogated Eleventh Amendment immunity. Absent such language, the Court would have reached a different decision.

Compare the Court’s decision concerning abrogation of state immunity in the FMLA with its decisions concerning abrogation of statutes passed

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300. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").
301. Hibbs, 538 U.S. at 726.
302. Id. at 724–25 (quoting 29 U.S.C. § 2617(a)(2)).
303. Id. at 726.
304. Id. at 726–28, 730.
305. Id. at 736.
306. Id. at 728 n.2 (quoting 29 U.S.C. § 2601(a)(5)).
307. Id.
308. Id. at 737.
pursuant to congressional power under Article I of the U.S. Constitution. In 1996, the Supreme Court ruled in *Seminole Tribe of Florida v. Florida* that Congress lacked power under Article I of the U.S. Constitution to abrogate the sovereign immunity of states. 310 The Court's reasoning in *Seminole Tribe* influenced the Supreme Court's decision in *Alden v. Maine*, a case involving sovereignty and the FLSA that was pending at the time. 311

In *Alden*, a group of probation officers employed by the State of Maine filed suit alleging violations of the overtime provisions of the FLSA in the U.S. District Court for the District of Maine. 312 While the suit was pending, the Supreme Court issued the *Seminole Tribe* decision. 313 Consequently, the district court dismissed the claim. 314 Upon dismissal, the plaintiffs filed the claim in Maine state court. 315 The trial court dismissed it based on sovereign immunity and the Maine Supreme Judicial Court affirmed. 316 The Supreme Court granted certiorari and held that congressional power under Article I does not include the power to subject non-consenting states to private suits for damages in state courts. 317 Hence, legislation promulgated under Congress' power pursuant to Article I cannot abrogate state sovereign immunity to allow suit in federal or state court. 318 However, legislation passed pursuant to section 5 of the Fourteenth Amendment can. 319

For the courts to hold that the EPSLA is a valid abrogation of state sovereign immunity, the EPSLA should have included language concerning equal protection similar to that in the FMLA. The same gender disparities noted by the Court in *Hibbs* (i.e., that the burden of caretaking falls disproportionately on women) were present when the EPSLA was passed. 320 Since the EPSLA is a leave statute like the EFMLEA and the two were passed together, it would be rational for Congress to make the two leave statutes congruent. However, unlike the EFMLEA, the absence of gender equity language in the EPSLA may lead courts to determine that any abrogation of state immunity is unconstitutional.

The practical consequences of such a decision would be textual, yet irrational. For instance, the EPSLA allows employees to take paid leave if they are incapable of working because they need to care for a child whose

312. Id. at 711.
313. Id. at 712.
314. Id.
315. Id.
316. Id.
317. Id.
318. Id.
319. Id. at 756.
school is closed or unavailable for COVID-19-related reasons.\[321\] The EFMLEA permits employees to take unpaid leave for the same reason.\[322\] The effect of this textual divergence would mean that if two state employees working for the same agency both take leave to care for a child whose school is closed due to the pandemic, and both employees are retaliated against, the one who took unpaid leave under the EFMLEA could sue the state agency in federal court, while the one who took leave under the EPSLA could not. To strengthen the EPSLA leave retaliation protections and make them congruent with retaliation protections for leave under the EFMLEA, Congress should have included language addressing the equal protection purposes behind the law.

2. Lack of an Interference Clause

Retaliation provisions in workplace statutes are comprised of one or a combination of the following: an opposition clause, a participation clause, and an interference clause. Opposition clauses protect individuals who oppose actions made unlawful by the statute.\[323\] Participation clauses provide protections for individuals who have participated in a proceeding under the statute.\[324\] Filing a complaint, causing a complaint to be filed, or testifying in a proceeding are classic examples of participation.\[325\] Some participation clauses also encompass individuals who are about to testify in a proceeding, but have yet to do so.\[326\] Interference clauses make it unlawful for employers to interfere with the exercise of rights provided by the legislation.\[327\] Of the three types of clauses, interference clauses appear to garner the broadest interpretations by courts.\[328\]

The FMLA illustrates the impact of an interference clause in broadly prohibiting retaliation. The provision states, “It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA].”\[329\] Retaliation claims usually require intent, but claims brought under the FMLA interference clause do not.\[330\] The ability to hold employers liable for adverse actions

\[323\] See Steele, supra note 66, at 1919–22 (discussing the types of clauses used in retaliation provisions).
\[324\] Id.
\[325\] Id. at 1920.
\[326\] See supra Part II.B on anticipatory retaliation.
\[327\] See Steele, supra note 66, at 1920.
\[328\] See id. at 1919–22.
\[330\] Stallings v. Hussmann Corp., 447 F.3d 1041, 1051 (8th Cir. 2006) (“[T]he interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA, while the retaliation claim requires proof of retaliatory intent.”); Russell v. N. Broward Hosp., 346 F.3d 1335, 1340
based on the leave entitlement without the employee having to prove intent strengthens the retaliation prohibition.

Even in cases where statutes have an interference clause but the court still requires intent, protections are broader than in statutes without an interference clause. The ADA’s interference clause provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA].\(^{331}\)

The EEOC has explained that while the ADA prohibits both retaliation and interference, ADA interference is broader than retaliation.\(^{332}\) The agency also notes that threats do not have to actually be carried out for ADA interference to have occurred.\(^{333}\) This lowers the employee’s burden with respect to proving an adverse action and increases protections for anticipatory retaliation.

Inclusion of interference clauses in addition to opposition and participation clauses ensures the most robust protections possible for employees. While the EPSLA contains both an opposition and a participation clause, it lacks an interference clause. Including language stating, “It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided under this Act” would have greatly enhanced protections by ensuring that it not only protected individuals who had taken the EPSLA leave, but also those who attempted to take the leave but were retaliated against before they could do so.\(^{334}\) It would have also broadened the category of what constitutes an adverse action.

3. Ambiguity with Respect to Mandatory Arbitration

One area in which Congress did not offer substantive protections is mandatory arbitration. Employers often use employment agreements that were signed by employees at the outset of the employee-employer relationship to mandate that employees arbitrate employment disputes. These requirements typically benefit employers and harm employees and the


\(^{333}\) Id.

\(^{334}\) See Brown v. City of Tucson, 336 F.3d 1181, 1192 (9th Cir. 2003); EEOC, supra note 334.
public, as mandatory arbitration keeps meritorious claims from being pursued. Furthermore, many arbitration agreements also contain class action waivers that prohibit employees from participating in class actions.

To provide stronger protections, Congress should have stated that pre-dispute forced arbitration requirements are invalid as applied to EPSLA retaliation. The ADEA provides an example of statutory protection against compelled arbitration that could have been adopted in the EPSLA. The ADEA has a provision that (1) prohibits a person from waiving rights through an agreement unless the waiver specifically refers to rights or claims arising under the statute and (2) does not permit an individual to waive rights or claims that may arise after the date the waiver is executed. Moreover, the ADEA prevents waiver of the ability to file charge with EEOC. This is important because compelling arbitration itself can be retaliatory.

The EPSLA should have included a similar explicit statement that mandatory arbitration provisions, particularly those executed before the rights at issue even existed, do not prevent employees from bringing retaliation claims. Such language would have ensured that arbitration agreements signed before a right to paid sick leave existed are not subsequently interpreted as mandating arbitration for disputes concerning sick leave.

339. Id. § 626(f)(4).
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<td>Courts may find that individuals waived their rights to bring retaliation claims under the EPSLA despite the EPSLA (and the rights it conferred) not having existed at the time the waiver was signed</td>
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While there are some areas in which Congress excelled at incorporating the interpretative lessons the Court has espoused in employment retaliation case decisions, there are others where improvement is necessary to provide broad protection against retaliation. The rapid nature of the passage of the EPSLA may have contributed to the statute’s shortcomings, as Congress may have been focused on the “low hanging fruit.” Nevertheless, the EPSLA shows that while gains have been made, further legislative reforms are needed to ensure broad retaliation protection. Unfortunately, it is highly unlikely that COVID-19 will be the last national emergency. Swift passage of legislation that includes weak retaliation provisions will likely lead to the reoccurrence of some of the same regulatory failures seen with the EPSLA.

CONCLUSION

Employment laws setting minimum labor standards or prohibiting discrimination against certain protected groups not only implicate the private interests of the employer and employee, but also the interests of society as a whole. Whether reinforcing public norms like equal protection or protecting public health by stopping the spread of infectious diseases, these laws do not operate solely in the private sphere. This is particularly true for legislation passed in response to a national emergency, as was the case with the EPSLA. Retaliation provisions in workplace statutes play a crucial role in protecting the rights of workers.

Courts have long recognized that Congress wants robust retaliation protections to undergird the enforcement scheme it created for workplace statutes, and substantial retaliation jurisprudence reflects this. However, ancillary factors such as the invocation of private law in statutory interpretation and textual discrepancies between statutes are leading to interpretations of retaliation laws that dilute their efficacy. Even at a moment in the nation’s history where Congress clearly understands the far-reaching ramifications of non-enforcement—and despite having the benefit of prior case decisions in which the courts narrowly interpreted retaliation protections—Congress still failed to craft retaliation provisions in the EPSLA that would provide expansive retaliation protections. A decision by Congress not to provide the maximum possible retaliation protection is inconsistent with the motivation of the EPSLA. Even more disturbing than the current failures is the likelihood that future emergency legislation will possess the same shortcomings.

Having uniform, broad anti-retaliatory language for Congressional use in existing and future statutes will make expansive retaliation protections the default and create a legislative mechanism whereby to lessen protections, Congress would have to affirmatively change the default language, unequivocally signaling to the courts its intent to reduce protections.