

## The Teeny Tiny Fine Print That Can Allow Sexual Harassment Claims to Go Unheard

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[Gretchen Carlson](#) is both extraordinary—in her cultural visibility, in her multimillion-dollar career, in her personal accomplishments—and utterly ordinary. When [she filed a lawsuit](#) in July alleging sexual harassment during her tenure at Fox News, she became part of a disturbing statistic: [at least 25% of American women say they have experienced sexual harassment in the workplace](#), according to a 2016 report from the Equal Employment Opportunity Commission. She also faced an obstacle that blocks an untold lot of them: an arbitration clause in her employment contract.

There is no reliable data on how many Americans have ceded their rights to a court hearing through arbitration clauses; one academic study estimates, using projections based on narrow data sets, that as many as [a quarter of nonunionized American workers may be subject to the restrictions](#). Arbitration clauses are found not only in multimillion-dollar contracts like Carlson's but also in the most mundane hiring materials—form contracts, even employee handbooks—that have been given to employees at Anheuser-Busch or Applebee's or some editors at TIME.

Carlson cleverly navigated her own clause: she sued Roger Ailes, the co-founder, CEO and chairman of Fox, not the company itself. Her suit alleged that Ailes “unlawfully retaliated against Carlson and sabotaged her career because she refused his sexual advances and complained about severe and pervasive sexual harassment.” As soon as the case was public, Ailes' lawyers tried to compel it into arbitration, arguing that Carlson had broken the terms of her contract, which stipulated that any legal disputes be brought not in court but in arbitration proceedings. Ailes denied wrongdoing, and he and Carlson agreed on a confidential settlement. “As we've made clear, there's absolutely no room anywhere at our company for behavior that disrespects women or contributes to an uncomfortable work environment,” 21st Century Fox said in a statement. “Within hours of the first public complaint raising an issue at Fox News, we commenced an investigation, and less than two weeks after that investigation began, the Chairman and CEO of Fox News departed.”

This August, in response to Carlson’s case, Democratic U.S. Senators Richard Blumenthal, Al Franken and Dick Durbin wrote to four major arbitration businesses, requesting information on employment disputes and cases involving sexual harassment that have been heard in secret by arbitrators. Questions included how many sexual-harassment lawsuits have been referred to binding arbitration through their organizations, and how many cases involved confidentiality clauses similar to Carlson’s, regardless of the cause of action. Three of the four arbitration organizations responded. The American Arbitration Association, one of the largest businesses (and a not-for-profit), noted that its data was not comprehensive and added that only 4% of employment-plan cases in 2014 involved sexual-harassment issues. For Blumenthal, that information was not adequate.

“The responses give us no informative or comprehensive view of how prevalent the problem is,” he says. “It could be very substantial with illegal or dangerous activity going unreported or underreported.”

Last year, Franken reintroduced the [Arbitration Fairness Act](#), which would invalidate current arbitration clauses in employment, consumer, civil rights and antitrust claims. Under this measure, a claimant alleging sexual harassment who is subject to an arbitration mandate could not be forced to resolve the dispute that way. This year, Senator Patrick Leahy followed it up with the [Restoring Statutory Rights Act](#), which says no arbitration agreement can make you waive a statutory right.

“Clearly these clauses can be misused, and silence can be a means for abusers to conceal misconduct,” says Blumenthal, who refers to Carlson’s case as a teaching moment for the nation. “If Ms. Carlson had adhered strictly to the terms of her employment contract, her case would have remained a secret forever.”

**Arbitration clauses are** easy to miss—you probably have agreed to one at some point, whether at your job or at your bank. They can be just a few short words, but their impact is vast. These clauses push disputes between parties to a system in which an arbitrator (sometimes a retired judge) is hired to adjudicate the matter. Some contracts prohibit claimants from speaking about the claims, which in harassment cases could leave other victims in the dark. And you don’t necessarily have to sign on a dotted line to agree to one—Netflix subscribers agree to arbitration in the terms of use before picking a movie; workers at Macy’s and Raymour & Flanigan have sued over arbitration clauses that the companies said they agreed to by virtue of

accepting employment at the company. Even at-will employees can be compelled into arbitration through clauses in employee materials.

“You don’t necessarily have to have signed anything to be bound by it,” says Katherine Stone, a law professor at UCLA. “It might just be in the materials that were given to you when you took the job, the same materials that told you where your parking space is.”

Research by Stone and Cornell law professor Alexander Colvin shows that payouts in arbitration are much smaller than the damages plaintiffs might receive in court—so small that lawyers are reluctant to take the cases. Carlson’s reported \$20 million settlement is far more than most could hope to win—again, because of the confidentiality, statistics are hard to come by, but a 2007 Chicago-wide survey put [median sexual-harassment settlements at roughly \\$30,000](#); a national study from a researcher at Columbia University in 2006 found [employees who take their cases to trial win on average \\$217,000](#).

“Mandatory arbitration clauses in negotiating away the civil rights of an individual are just a bad idea,” says [Anita Hill](#), now an antidiscrimination professor at Brandeis University. “What we’re talking about here with harassment is a civil rights violation. Our policy is driven from the point of view of the people, the men, who are more powerful and engaging in abusive behavior. Women are skeptical coming forward because they don’t trust the procedures.”

In 1991, Hill told a Senate committee that Clarence Thomas—the man they were considering confirming to the Supreme Court, who had been her former boss, including at the EEOC—had asked her, “Who has put pubic hair on my Coke?” Thomas was of course confirmed, but [Hill’s testimony marked a watershed moment](#) for sexual-harassment awareness: the following year, reports of sexual harassment filed with the EEOC shot up from 3,349 to 5,607.

Yet it may actually be getting harder for employees to take sexual-harassment complaints to court. “Anecdotally speaking, the use of arbitration agreements from our perspective is increasing,” says Peggy Mastroianni, legal counsel at the EEOC. Many women rationalize that it’s not worth the risk to bring cases forward. “The biggest problem in many of these cases is fear of retaliation, fear of more harassment,” says Mastroianni. “If they leave their company, usually they want to continue working in the same

industry, but they fear they'll be seen as litigious or difficult." As Jean Sternlight, director of the Saltman Center for Conflict Resolution at the University of Nevada, Las Vegas, points out, privacy is one benefit of arbitration: an employee dealing with sexual harassment "might prefer to have it handled in a private way, and arbitration could give them that privacy."

Those who do want to file complaints face a series of legal hurdles. Eighty-three percent of those who file sexual-harassment claims with the EEOC are women, some of whom presumably want not only to be free of it and compensated but also to fundamentally change the place where they work. Employers can be liable for quid pro quo sexual harassment perpetrated by supervisors and for supervisors or co-workers who create a hostile work environment—but a [2013 Supreme Court decision](#) narrowed the definition of supervisor to someone who can hire, fire or significantly change the responsibilities of the person being harassed.

"When you take a job, you don't think you're going to end up suing your employer," says Stone. "Any employer that is big enough will be advised to put an arbitration clause into their employment materials, and employees will not be able to bring a class-action suit. It'd basically be malpractice not to advise that."

"The EEOC's stance has always been that mandatory arbitration of employment discrimination is bad: the secrecy, the lack of precedent," says the EEOC's Mastroianni. "We litigated this issue in a number of cases that we lost."

**The arbitration system** has expanded in scope over the past decade, for what many argue are good reasons. Corporations often maintain that circumventing court systems reduces litigation costs, allows more-limited discovery and yields a swifter result for both parties. "Most of the controversy in these employment cases often have to do with, does the employee have a choice?" says Chris Poole, CEO of the arbitration company JAMS. "We don't really have a dog in that fight. All we can do is try to do everything to level the playing field." That includes asking the employer to pay the bulk of the cost of arbitration and allowing the employee to help choose the arbitrator. "Our entire business depends on neutrality," he adds. "It's our religion." When asked about Ailes' role in the clause in Carlson's contract, Susan Estrich, a lawyer for Ailes, says he "does not get into the weeds of contracts."

Arbitration clauses, she adds, “have become increasingly standard not just in employment contracts but across the board. My gynecologist was the last of my doctors to require them in order to keep his insurance rates from skyrocketing. The reason doesn’t have to do with sexual harassment and secrecy; it’s because litigation is so expensive that no one can afford it, and it drives insurance costs through the roof.”

Employers have also seen arbitration as a way to cut down on class-action and employment disputes. State and federal rulings are mixed. The Supreme Court provided the means for businesses to prevent class-action suits. Critics say the attempt to stop arbitration’s use is a move in support of trial lawyers, who have been large Democratic supporters. “Arbitration denies personal-injury lawyers opportunities to score even more giant contingency fees,” American Tort Reform Association spokesman Darren McKinney says. “For years those lawyers have used sympathetic groups—including the elderly, service veterans and crime victims—to press lawmakers for statutory exceptions to the Federal Arbitration Act. Having largely failed with Congress, the lawsuit industry has more recently turned its lobbying focus to regulatory agencies and certain state legislatures, where its reliably generous campaign contributions seem to be more appreciated.”

But the trend of moving cases into confidential arbitration cases has troubled many. Carlson, Leahy and Blumenthal are part of a tide. The Obama Administration has tried to curb the arbitration boom without Congress. Last month, a Department of Health and Human Services agency barred nursing homes that receive federal funding from mandating that residents resolve disputes in arbitration. In May, the Consumer Financial Protection Bureau (CFPB) proposed a rule to prevent banks and credit-card companies from using arbitration clauses with consumers. In June, the Department of Education proposed to protect students from arbitration clauses buried in enrollment agreements.

On the presidential campaign trail, Hillary Clinton has attacked the use of arbitration clauses. She supported the CFPB’s proposed rule in May. In early October, Clinton promised to carry on the Obama Administration’s efforts and order agencies “to curb the overuse of harmful forced-arbitration clauses.” Donald Trump has been quiet on the issue. Employment contracts for Trump’s campaign have included binding arbitration clauses that can turn any disputes over to the American Arbitration Association instead of a

court system. A spokesperson for the Clinton campaign said that Clinton campaign contracts do not include arbitration clauses or references.

Even if Clinton wins in November, Democrats will likely not be able to hold a hearing on arbitration unless they win back the Senate, and even then, Republicans are likely to continue to control the House. Change outside of Congress is also difficult given federal case-law trends—the change for nursing homes came after Leahy held regular hearings on the use of arbitration clauses when he chaired the Senate Judiciary Committee.

But Blumenthal and his colleagues are not backing down. “Gretchen Carlson is woman of great courage and moral fiber and personal strength, and hopefully her example will help support legislation to protect others,” he says.

**The conversation around harassment**, sexual assault and sexism has gone from a whisper to a roar—on campuses where women have persuaded the White House to investigate Title IX mishandlings, in war zones where servicewomen appealed to Senators for a new process to adjudicate cases of rape and on social media, where campaigns like the one started by Kelly Oxford have spurred women to share their stories of assault and harassment.

But Carlson’s story, and the systemic problems it highlights, underscores the challenges women still face. “I have a hard time reconciling the current climate for women with the progress we’ve tried to make. But if people thought this was going to be resolved in 25 years of talking about sexual harassment, that’s not going to happen,” says Hill. “These things are deeply embedded in our brains and baked into the way we do things.”