TITLE VII PROHIBITS EMPLOYMENT DISCRIMINATION . . . EXCEPT WHEN IT DOESN'T: ELIMINATING THE SMALL FIRM EXEMPTION

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I. INTRODUCTION

Discrimination, bigotry, prejudice, and bias may describe unfair employment practices used throughout time. However, today, not all

such practices are as blatant as they were in the mid-twentieth century and earlier. While undisguised discrimination is still seen in employment, veiled prejudices may slip by unnoticed. Additionally, implicit bias theory suggests that "people can act on the basis of prejudice and stereotypes without intending to do so,"[1] so discrimination may also occur without the perpetrator being aware.

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discriminatory practices in employment,[2] but it only covers certain employers, leaving many employees and applicants unprotected.[3] Title VII's definition of "employer" contains an express exception to its coverage—the small firm exemption.[4] Title VII's substantive limitations on employment practices only apply to employers with "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[5] This small firm exemption was critical in Congress' passing of Title VII.[6] Many comparator statutes in the United States and abroad, however, do not contain a small firm exemption, demonstrating that it is possible to enact and enforce laws which require compliance from all employers.[7] Accordingly, the small firm exemption should be eliminated from Title VII because it allows many employers in the United States to discriminate against protected classes of employees and applicants without consequence, leaving over seventeen million workers unprotected by Title VII.[8]

The small firm exemption's perceived economic benefits to small businesses are greatly outweighed by the tangible impacts of the lack

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[1] Michael Brownstein, *Implicit Bias*, STAN. ENCYC. PHIL. (July 31, 2019), https://plato.stanford.edu/entries/implicit-bias/.

[2] 42 U.S.C. §§ 2000e–2000e-10 (2021).

[3] § 2000e(b).

[4] *Id.*

[5] *Id.*

[6] Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1205 (2006).

[7] *See, e.g.*, 29 U.S.C. § 206 (2020); ME. STAT. tit. 5, §§ 4553(4), 4571 (2020); N.Y.C. ADMIN. CODE §§ 8-101–02, 107, 109, 111–132 (2021); Equality Act 2010, c. 15 (UK), https://www.legislation.gov.uk/ukpga/2010/15/contents.

[8] U.S. CENSUS BUREAU, *2017 SUSB Annual Data Tables by Establishment Industry*, https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html (under section "U.S. and States," choose "U.S. & states, NAIC, detailed employment sizes (U.S., 6-digit and states, NAIC sectors)").

of discrimination protections on the workforce.[9] If an applicant or employee is unprotected by Title VII and also unprotected by a state or local law, the individual will not have a remedy, even when the individual is a victim of blatant intentional discrimination. While most states have anti-discrimination laws,[10] many do little to meaningfully supplement federal protections. The United States' political and social climate is displaying continued unrest and demanding sweeping changes to rid itself of institutional racism and other forms of discrimination.[11] This conceivably demonstrates a demand to the federal government for, among other initiatives, more national workplace protections.[12] Eliminating Title VII's small firm exemption to provide universal coverage would bring the United States closer to achieving Title VII's original goals of eradicating employment discrimination.

All workers in the United States would be protected from discrimination without putting small businesses at risk if the small firm exemption was eliminated and alternative protections for small businesses were implemented. One such proposal is a cap on the amount of damages that may be recovered from a small business in a Title VII suit. This is the approach in the Maine Human Rights Act ("MHRA"), under which the caps on damages recoverable in suits

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[9] *See* Carlson, *supra* note 7, at 1247 ("The essence of the argument is that a firm with very few employees lacks the economies of scale enjoyed by a firm employing a larger workforce.").

[10] *See infra* Part III Section A.

[11] *See* Pierre-Antoine Louis, *Color of Change: Talking Systemic Racism One Strategy at a Time*, N.Y. TIMES (Sept. 5, 2020), https://www.nytimes.com/2020/09/05/us/Rashad-Robinson-color-of-change.html?searchResultPosition=8 ("We are in a moment of deep cultural reckoning, where some of the rules are changing about what is acceptable and what is possible."); Christine Hauser, *Merriam-Webster Revises 'Racism' Entry After Missouri Woman Asks for Changes*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/10/us/merriam-webster-racism-definition.html?searchResultPosition=19 (Merriam-Webster revised its definition of racism "after a recent college graduate in Missouri, inspired by the protests and debates about what it means to be racist, urged editors to make changes"); Jess Bravin, *Breaking with Tradition, Some Judges Speak Out on Racial Injustices*, W.S.J. (June 13, 2020), https://www.wsj.com/articles/breaking-with-tradition-some-judges-speak-out-on-racial-injustices-11592060400 ("These protests are a resounding, national chorus of voices whose lived experiences reinforce the notion that black people are ostracized, cast out, and dehumanized.").

[12] *See* Kathy Gurchiek, *President Biden Signs Directives to Promote Racial Equity, Champion Pandemic Measures*, SOC'Y FOR HUM. RES. MGMT. (Jan. 20, 2021), https://www.shrm.org/hr-today/news/hr-news/pages/biden-signs-directives-to-promote-racial-equity-champion-pandemic-measures-.aspx.

against employers with under fourteen employees are substantially lower than those available to complainants in suits brought against larger businesses.[13] Following a similar scheme of the MHRA damages caps, as well as the Civil Rights Act of 1991 ("CRA of 1991")[14] damages caps, Congress could, upon eliminating Title VII's small firm exemption, craft new caps for smaller businesses in one of two ways. First, Congress could establish one cap for all employers with less than fifteen employees. Alternatively, it could establish different caps for employers with one to four employees, five to nine employees, ten to nineteen employees, twenty to forty-nine employees, fifty to one hundred forty-nine employees, one hundred fifty to three hundred employees, three hundred to five hundred employees, and, finally, over five hundred employees. The latter approach would account for the large disparity in economic resources available to the diverse small businesses in the United States, similarly to how the CRA of 1991 is currently written.[15]

This Note argues that Title VII's small firm exemption should be eliminated, extending Title VII's coverage. Other federal, state, and foreign statutes have successfully implemented equal employment opportunity ("EEO") laws covering all employers. Discrimination is a moral and social issue that impacts the day-to-day lives of the American workforce. Thus, the only way to ensure remedies for all victims of discriminatory practices is to mandate such through an expansion of Title VII protections. Such expansion of protections would also incentivize employers to adopt anti-discrimination measures.

Part II of this Note discusses Title VII's provisions, its tenuous legislative history providing insight into the small firm exemption, and relevant case law which has contributed to our modern understanding of this area. I also discuss other relevant federal EEO legislation which do not contain small firm exemptions, such as federal government contractors' anti-discrimination obligations[16] and the Equal Pay Act ("EPA").[17] Additionally there is further discussion of the CRA of 1991's damages caps, which correlate with the number of employees an employer has.[18] In Part III, I examine how the small firm exemption

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[13] ME. STAT. tit. 5, § 4613(2)(B)(7) (2020).
[14] 42 U.S.C. § 1981a(b)(3) (2020).
[15] *Id.*
[16] Exec. Order No. 11246, 30 Fed. Reg. 12,319, 12,935 (Sept. 24, 1965).
[17] 29 U.S.C. § 206 (2020).
[18] § 1981a(b)(3).

has forced individuals to rely on state and local laws and elaborate on the protections that some of these laws offer. Also addressed is the impact of discrimination on the day-to-day lives and health of victims. In Part IV, I address the arguments in support of the small firm exemption. Part V focuses on the MHRA and the United Kingdom's Equality Act 2010 ("Equality Act"),[19] neither of which contain small firm exemptions. In Part VI, I propose my solution to the small firm exemption problem by suggesting its removal from Title VII and the implementation of additional damages caps to protect the interests of small businesses that would be covered by Title VII for the first time.[20]

II. TITLE VII: TEXT, HISTORY, AND LITIGATION

A. Title VII and Private Employers

Title VII was the first major congressional commitment to civil rights since the Civil Rights Act of 1875. It "took on the status of a foundational precedent, one which defined the terms in which discrimination would be prohibited and enforcement of equality would be pursued."[21] To enact Title VII, legislators needed to recognize the necessity for an equal employment opportunity law, as "job opportunity discrimination permeate[d] the national social fabric."[22] The legislative history produced by the House of Representatives states that "[j]ob discrimination [was] extant in almost every area of

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[19] Equality Act 2010, c. 15 (UK).

[20] Other federal equal employment opportunity ("EEO") statutes also have small firm exemptions that are similar to that of Title VII. *See* Age Discrimination in Employment Act, 29 U.S.C. § 623 (2020) (defines an employer as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"); Americans with Disabilities Act, 42 U.S.C. § 1220 (2020) (defines employer as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year"); Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff (2020) (uses the Title VII definition of employer). The specific issues with the small firm exemptions of each of these statutes are beyond the scope of this Note, but I will be using Title VII as a stand-in to demonstrate that these same issues also arise in the contexts of these other anti-discrimination laws.

[21] George Rutherglen, *Title VII as Precedent: Past and Prologue for Future Legislation*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 159, 162 (2014).

[22] H.R. 7152: CIVIL RIGHTS ACT OF 1964, TITLE VII, *reprinted in* LEGISLATIVE HISTORY AND SCOPE OF H.R. 7152: TITLE VII, BURKE MARSHALL PERSONAL PAPERS: ASSISTANT ATTORNEY GENERAL FILES, 1958–1965, at 1 (1963), https://www.jfklibrary.org/asset-viewer/archives/BMPP/029/BMPP-029-010 [hereinafter LEGISLATIVE HISTORY OF TITLE VII].

employment and in every area of the country," and that "permitting such discrimination to continue projects these evil effects still further into the future."[23]

Although Title VII was the first federal law of its kind actually enacted, it was not Congress's first attempt at creating equal employment opportunity legislation. Between 1942 and 1964, "literally hundreds of bills were filed seeking [federal employment protection] legislation . . . ; all died, usually in the House or Senate Committee to which the bill was referred, and at times, if a bill was reported and reached the Senate floor, it died as the result of a Senate filibuster."[24] In 1960, both Republicans and Democrats running for federal office, including then-Senator John F. Kennedy, "had pledged legislative action on civil rights in strong and sweeping terms."[25] President Kennedy was "faced with 'a rising tide of discontent that threaten[ed] the public safety.'"[26] He submitted to Congress a message on civil rights, stressing "creating more jobs through greater economic growth, raising the level of skills through more education and training[,] and eliminating racial discrimination in employment."[27]

Title VII's proposed predecessors "ran the gamut" in terms of enforcement ideas, "from those providing for a strong administrative agency, like the [National Labor Relations Board], with power to hold hearings and issue cease-and-desist orders enforceable in court, to those providing simply for conciliation and persuasion or merely further study and recommendations."[28] To ensure authority to enact Title VII, Congress framed the legislation as "necessary 'to remove obstructions to the free flow of commerce among the States and with foreign nations' and 'to insure the complete and full enjoyment by all persons of the rights, privileges, and immunities secured and protected by the Constitution.'"[29] By grounding its legality in the Commerce Clause and the Privileges and Immunities Clause,[30] Congress sought to avoid the Fourteenth Amendment so as not to "inflame regional

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[23] *Id.* at 1, 4.

[24] Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 431 (1966); *id.* at 431 n.2.

[25] *Id.* at 432.

[26] *Id.* (citing 109 CONG. REC. 3245 (1963)).

[27] *Id. See also* John F. Kennedy, President of the United States, Address to the Nation on Civil Rights (June 11, 1963).

[28] Vaas, *supra* note 24, at 433.

[29] LEGISLATIVE HISTORY OF TITLE VII, *supra* note 23.

[30] U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. IV, § 2.

opposition to the legislation" nor "raise constitutional objections under the *Civil Rights Cases*."[31]

Title VII's text provides a somewhat broad characterization of discriminatory conduct, but this is limited by the narrow definition of "employer," which is where the small firm exemption exists within the statute.[32] Under Section 703 of Title VII, it is unlawful for an employer:

> (1) 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; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[33]

Further, Section 701 defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."[34]

From Title VII's enactment in 1964 until 1973, however, the minimum employee threshold was twenty-five.[35] During the congressional debates, there were many discussions about employer coverage and the minimum employee threshold, but ultimately it was settled that twenty-five employees would be the minimum, until this was later amended.[36] The conversations preceding Title VII's enactment and the 1972 amendment reveal possible purposes for a small firm exemption, including "to relieve small firms of the otherwise disproportionate costs they might bear under the new law" and "to defuse at least some business opposition to Title VII and preserve enough support for its enactment."[37]

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[31] Rutherglen, *supra* note 22, at 163; Civil Rights Cases, 109 U.S. 3 (1883).

[32] 42 U.S.C. § 2000e(b) (2020).

[33] 42 U.S.C. § 2000e-2(a) (2020).

[34] § 2000e(b).

[35] § 2000e(b)(2) ("except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers").

[36] § 2000e(b).

[37] Carlson, *supra* note 7, at 1205.

During the deliberations, Senator Norris Cotton, in an effort to narrow the coverage of Title VII, proposed that Title VII should only cover establishments with one hundred or more employees.[38] Then-Senator Hubert Humphrey, who was against Senator Cotton's proposal and wished to set the threshold at twenty-five employees, noted that a "large number of small businesses in America . . . employ fewer than 25 persons,"[39] so many employees would be unprotected by Title VII. Senator Humphrey sought to convince those who agreed with Senator Cotton that twenty-five employees is not too low of a threshold to require accountability from such business owners. Senator Humphrey further explained that "there are 3 million employers in America registered under the social security system," and out of this number, "259,343, or only about 8 percent of the total employers, employ 25 or more persons."[40] Senator Humphrey stated that a twenty-five employee threshold resulted in "92 percent of the employers of America" not being covered.[41] On the contrary, to demonstrate the impact that a one hundred employee minimum would have, Humphrey pointed out that "[t]here are only 56,366 employers in the entire Nation who employ 100 or more employees. Thus, the Cotton amendment would cover less than 2 percent of the total employers in America."[42] Senator Cotton's proposal failed by a vote of thirty-four to sixty-three.[43] With about one-third of the Senate voting in support of a one hundred employee threshold for coverage, it is unlikely that a threshold much lower than twenty-five, or no threshold at all, would have passed in the Senate. Therefore, it is evident that the inclusion of the small firm exemption was a product of politics and political compromise, rather than a product of legal theory or informed policymaking.

Title VII was not the first employment law to contain a small firm exemption. The Supreme Court upheld early state occupational safety and workers' compensation laws that contained small firm

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[38] U.S. EQUAL EMP. OPPORTUNITY COMM'N & U.S. GOV'T PRINTING OFF., LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3107 (1964).

[39] *Id.* at 3108.

[40] *Id.*

[41] *Id.*

[42] *Id.* If the Cotton amendment was to be enacted in 2017, it would still cover less than two percent of employers. U.S. CENSUS BUREAU, *supra* note 9.

[43] U.S. EQUAL EMP. OPPORTUNITY COMM'N & U.S. GOV'T PRINTING OFF., *supra* note 38, at 3107.

exemptions.[44] Covered employers challenged these laws on the ground that the small firm exemptions unconstitutionally violated the Fourteenth Amendment's Equal Protection Clause.[45] In *Consolidated Coal Co. of St. Louis v. Illinois*, the Supreme Court upheld an Illinois law that provided for the health and safety of persons employed in "coal mines 'where more than five men are employed at any one time.'"[46] This occupational safety law assumed "that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines," where work is done on a "larger scale or at a greater depth from the surface," necessitating a "much larger force . . . for their successful operation."[47] Seven years later, the Court also upheld an Arkansas coal miner safety law with a ten-employee minimum in *McLean v. Arkansas*.[48] The Court cited *Consolidated Coal Co.*,[49] and held that "[t]here is no attempt at unjust or unreasonable discrimination."[50] Later, the Court also upheld state workers' compensation laws containing minimum employee thresholds on similar grounds, noting that they are "evidently permissible upon the ground that the conditions of the industry are different and the hazards fewer, simpler, and more easily avoided where so few are employed together."[51]

The small firm exemption necessarily raised the issue of how to count employees. A circuit split demonstrated confusion and disagreement,[52] so the Supreme Court set out a uniform method. In

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[44] Carlson, *supra* note 7, at 1197–98.

[45] *See infra* notes 46–51.

[46] Consol. Coal Co. of St. Louis v. Ill., 185 U.S. 203, 204, 207 (1902).

[47] *Id.* at 208.

[48] McLean v. Ark., 211 U.S. 539 (1909).

[49] *Id.* at 551–52.

[50] *Id.* at 552.

[51] Middleton v. Tex. Power & Light Co., 249 U.S. 152, 159 (1919). *See also* Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571 (1915).

[52] *Compare* E.E.O.C. v. Garden & Assoc., Ltd., 956 F.2d 842, 843 (8th Cir. 1992) (holding that "employees must either work or be on paid leave each day of the work week in order to be counted as an employee for that week under" the Age Discrimination in Employment Act ("ADEA")), *with* Dumas v. Mount Vernon, 612 F.2d 974, 979, n.7 (5th Cir. 1980) (holding that the court looks to "working days" in the calendar weeks reviewed to see whether fifteen or more individuals were on the payroll in the given weeks, "regardless of whether they were actually working full time or on any particular day"), *and* Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 634–635 (1st Cir. 1983) (noting that "there is nothing in the record to indicate a Congressional intent to require that employees report to work on each day that they are included" and interpreting the payroll method).

Walters v. Metropolitan Educational Enterprises, Inc., the Court held that the "payroll method represents the fair reading of the statutory language."[53] The payroll method "looks to whether the employer has an employment relationship with the employee on the day in question, as is most readily demonstrated by the individual's appearance on the employer's payroll."[54] When the issue is whether an employer has enough employees to reach the threshold, it "is an element of a plaintiff's claim for relief, not a jurisdictional issue,"[55] meaning that an employer may, but is unlikely to, waive the requirement.

B. The Equal Employment Opportunity Commission

Title VII created the Equal Employment Opportunity Commission ("EEOC") to enforce the federal EEO laws.[56] The EEOC is "a bipartisan Commission comprised of five presidentially appointed members, including the Chair, Vice Chair, and three Commissioners."[57] In addition to Title VII, the EEOC also enforces the EPA,[58] the Age Discrimination in Employment Act ("ADEA"),[59] the Americans with Disabilities Act ("ADA"),[60] Sections 501 and 505 of the Rehabilitation Act,[61] and the Genetic Information Nondiscrimination Act ("GINA").[62] The EEOC periodically publishes regulations, sub-regulatory guidance, decisions, opinion letters, memoranda of understanding, and informal discussion letters.[63] These publications, especially the enforcement guidance documents, are particularly helpful in assisting the general public with understanding how Title VII and the other EEO laws apply to them.[64]

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[53] Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 202 (1997).

[54] *Id.*

[55] Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006).

[56] 42 U.S.C. § 2000e-4 (2020).

[57] *The Commission and the General Counsel*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/commission (last visited Feb. 21, 2021).

[58] 29 U.S.C. § 206(d) (2020).

[59] 29 U.S.C. § 623 (2020).

[60] 42 U.S.C. § 12203 (2020).

[61] 29 U.S.C. §§ 791, 794 (2020).

[62] 42 U.S.C. § 2000ff (2020).

[63] *See Laws & Guidance*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws-guidance-0 (last visited Feb. 21, 2021).

[64] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2016-1, ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES (2016); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2016-2, EEOC ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION (2016).

For example, some EEOC Fact Sheet publications read as advertisements directed at businesses.[65] One such publication, entitled "Fact Sheet: Preventing Discrimination is Good Business," highlights "business reasons for complying with federal EEO law protections" and provides "basic information for employers on their responsibilities and how the EEOC can help with their compliance efforts."[66] The document explains to employers that "[c]omplying with the law may increase employee productivity, retention, and morale and limit legal expenses," and that employers "may even be entitled to tax benefits for hiring individuals with disabilities or making your business accessible to individuals with disabilities!"[67] This Fact Sheet has the dual purpose of informing employers of their responsibilities, while also encouraging them to comply with the laws for economic and other business-related reasons. Such encouragements would be attractive to any employer seeking to be more successful, not just those with fifteen or more employees.

While the issue of whether an employer meets the minimum employee threshold is not a jurisdictional question for federal courts, it is a jurisdictional question for the purposes of filing a complaint with the EEOC. "Title VII does not give the EEOC jurisdiction to enforce the Act against employers of fewer than 15 employees."[68] After an investigation, the EEOC may determine that it lacks jurisdiction on the ground of the small firm exemption.[69]

C. EEO and Federal Government Contractors

Federal government contractors and subcontractors cannot discriminate against any prescribed protected class.[70] Under Executive Order 11246, as amended, all contracting agencies must include in every government contract a statement that:

> [t]he contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated

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[65] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-0000-31, FACT SHEET: PREVENTING DISCRIMINATION IS GOOD BUSINESS (2016).

[66] *Id.*

[67] *Id.*

[68] E.E.O.C. v. Com. Off. Prods., Co., 486 U.S. 107, 119 n.5 (1988).

[69] *See id.*

[70] Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

> during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.[71]

This language prohibits government contractors and subcontractors from discriminating against applicants and employees and mandates affirmative action to ensure equal opportunities.[72] The Office of Federal Contract Compliance Programs, within the Department of Labor ("DOL"), oversees contractor and subcontractor compliance by "ensuring nondiscrimination and supporting voluntary compliance . . . , promot[ing] diversity through [EEO], and enforc[ing] the law, with a particular emphasis on systemic and high-impact cases."[73]

There is a long history of workplace discrimination initiatives for government contractors that led to these obligations.[74] In 1943, President Franklin D. Roosevelt proscribed all government contractors from discriminating on the basis of race, color, creed, and national origin.[75] In 1951, President Harry S. Truman created the Committee on Government Contract Compliance to oversee federal contractor compliance with President Roosevelt's earlier order.[76] This initiative was later expanded in 1953 by President Dwight D. Eisenhower when he created the President's Committee on Government Contracts to give responsibility to the heads of contracting agencies to ensure compliance.[77] Eight years later, President Kennedy created the EEOC's predecessor, the President's Committee on Equal Employment Opportunity, and gave contracting agencies authority to institute proceedings against contractors who violated the anti-discrimination orders.[78] Then, in 1965, President Lyndon B. Johnson signed Executive Order 11246.[79] Subsequently,

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[71] Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 23, 2014).

[72] *See Small Federal Contractor Technical Assistance Guide*, OFF. FED. CONT. COMPLIANCE PROGRAMS (Dec. 2020), https://www.dol.gov/sites/dolgov/files/OFCCP/CAGuides/files/SmallContractorsGuide-508_1222020.pdf.

[73] *OFCCP By the Numbers*, OFF. FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/about/data/accomplishments (last visited Feb. 21, 2021).

[74] *See History of Executive Order 11246*, OFF. FED. CONT. COMPLIANCE PROGRAMS, https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history (last visited Feb. 21, 2021).

[75] Exec. Order No. 9,346, 3 C.F.R. 1,280 (1938–1943).

[76] Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (Dec. 3, 1951).

[77] Exec. Order No. 10,479, 18 Fed. Reg. 4,899 (Aug. 18, 1953).

[78] Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 6, 1961).

[79] Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

executive orders in the twenty-first century provided for religious exemptions,[80] provisions relating to the promotion of equal pay,[81] and sexual orientation and gender identity as protected classes.[82]

D. The EPA and Small Firms

The EPA, as part of the Fair Labor Standards Act minimum wage provisions,[83] covers virtually all employers, and therefore all employees.[84] Enacted prior to Title VII, the EPA was passed in an effort to prohibit wage discrimination based on sex. It provides that employers may not discriminate:

> on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.[85]

The EPA is predicated on this "equal pay for equal work" concept,[86] because unequal pay for equal work is discriminatory.[87] Therefore, Congress has passed anti-discrimination legislation applicable to all employers without disastrous consequences.

Despite an extensive history of women fighting for equal pay,[88] pay disparities between the sexes still exist; yet still, extending Title VII to cover all employers would more than likely narrow pay gaps. Because the EPA addresses only "equal pay for equal work," below I

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[80] Exec. Order No. 13,279, 3 C.F.R. 13,279 (Dec. 16, 2002).

[81] Exec. Order No. 13,665, 79 Fed. Reg. 20,749 (Apr. 8, 2014).

[82] Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

[83] 29 U.S.C. § 206 (2020).

[84] *See Coverage of Business/Private Employers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/coverage-businessprivate-employers (last visited Feb. 21, 2021).

[85] 29 U.S.C. § 206(d) (2020).

[86] Kimberly J. Houghton, *The Equal Pay Act of 1963: Where Did We Go Wrong?*, 15 LAB. LAW. 155, 156 (1999).

[87] For a discussion of the alternative "equal pay for work of equal value," or "comparable worth," concept as applied to a 2020 New Zealand law aimed at "eliminating pay discrimination against women in female-dominated occupations," see Anna Louie Sussman, '*Women's Work' Can No Longer Be Taken for Granted*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/opinion/sunday/women-pay-gender-gap.html.

[88] *See* Charlotte Alter, *Here's the History of the Battle for Equal Pay for American Women*, TIME (Aug. 14, 2015), https://time.com/3774661/equal-pay-history/.

focus only on the controlled gender pay gap, "which controls for job title, years of experience, education, industry, location[,] and other compensable factors," rather than the uncontrolled gender pay gap (or the opportunity pay gap), which is the ratio of the median earnings of women to men without controlling for compensable factors.[89]

In 2021, the controlled gender pay gap shows that women earn ninety-eight cents to a man's dollar.[90] This pay gap has not shrunk since 2016.[91] Because this statistic accounts for all compensable factors, the controlled gender pay gap is the result of "no attributable reason other than gender,"[92] or, in one word, discrimination. Looking closer, the controlled gender pay gap widens in certain circumstances. Disparities may widen for workers with intersectional identities, such as for Black women, who earn ninety-seven cents for a white man's dollar today.[93] The gap also widens as women progress in their careers. Women at the executive level make ninety-four cents to every dollar a man makes in the same position.[94] Further, while some industries have closed the controlled gender wage gap,[95] others have extreme inequities. For example, the farming, fishing, and forestry industries have the largest controlled gender pay gap as of 2021, where women make only ninety-two cents for every dollar a man makes.[96]

While many factors are at play in the workforce and may "influence pay rate disparities between men and women," this does not "mean that discrimination does not exist within the workplace, or that discrimination is not a contributing factor when certain compensation decisions are made."[97] Exploration of these factors "reveals the importance of trying to figure out which factors contribute the most to the gender pay gap, and, more importantly, why those factors exist."[98] Still, it is evident that discrimination has a significant

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[89] *The State of the Gender Pay Gap in 2021*, PAYSCALE, https://www.payscale.com/data/gender-pay-gap [https://perma.cc/2CJV-9C74].

[90] *Id.* Compare this statistic to the uncontrolled gender pay gap, which is that women earn eighty-two cents to a man's dollar, as of 2021. *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* Compare this to the fact that Black men have a controlled pay gap of ninety-nine cents compared to a white man's dollar. *Id.*

[94] *Id.*

[95] For example, the legal, architecture, and engineering professions do not have a controlled gender pay gap. *Id.*

[96] *Id.*

[97] Julie A. Morgan, *How to Close the Gender Pay Gap: Transparency in Data Regarding Compensation is the Key*, 35 CONN. J. INT'L L. 409, 411 (2020).

[98] *Id.*

role, and since the statistics of the gender pay gap cannot at all be attributed to a small firm exemption—because the EPA does not have one—discrimination and noncompliance with the EPA can be viewed as broad, yet significant, issues preventing closure of the gender pay gap.[99] Eliminating the small firm exemption from Title VII would assist in closing the gender pay gap because small employers would be concerned with compliance and avoiding liability under both Title VII and the EPA, making them more likely to develop a comprehensive anti-discrimination scheme and better educate themselves about their obligations. Victims of sex-based wage discrimination would also have an additional federal cause of action against small employers, creating a greater chance of success in litigation.

In addition, the COVID-19 pandemic has had a disproportionate impact on the professional lives of women, particularly mothers.[100] Vice President Kamala Harris has said that this constitutes a national emergency.[101] By February of 2021, just about a year into the pandemic, about 2.5 million women left the workforce (as compared to 1.8 million men).[102] This impact was seen immediately.[103] Among

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[99] For a discussion of the use of state and local laws to supplement the effectiveness of the EPA, see Jeffrey A. Mello, *Why the Equal Pay Act and Laws Which Prohibit Salary Inquiries of Job Applicants Can Not Adequately Address Gender-Based Pay Inequity*, 9 SAGE OPEN 1 (2019). *See also* Paycheck Fairness Act, H.R. 7, 117th Cong. (2021) (proposed amendments to the EPA "to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex").

[100] Amanda Taub, *Pandemic Will 'Take Our Women 10 Years Back' in the Workplace*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/world/covid-women-childcare-equality.html?searchResultPosition=10.

[101] Kamala Harris, *The Exodus of Women from the Workforce is a National Emergency*, WASH. POST (Feb. 12, 2021), https://www.washingtonpost.com/opinions/kamala-harris-women-workforce-pandemic/2021/02/12/b8cd1cb6-6d6f-11eb-9f80-3d7646ce1bc0_story.html.

[102] *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., https://www.bls.gov/web/empsit/cpseea03.htm [https://perma.cc/8WVH-X95E]. *See also* Megan Cassella, *The Pandemic Drove Women Out of the Workforce. Will They Come Back?*, POLITICO (July 22, 2021), https://www.politico.com/news/2021/07/22/coronavirus-pandemic-women-workforce-500329.

[103] *Gender Differences in the Economic and Social Impact of the COVID-19 Pandemic*, WIA REPORT (July 8, 2020), https://www.wiareport.com/2020/07/gender-differences-in-the-economic-and-social-impact-of-the-covid-19-pandemic/ ("[F]emale employment dropped 13 percentage points between March and early April – from 59 percent to 46 percent –

women "married or living together with a partner and school-age children in the household," forty-four percent "reported being the only one in the household providing care" after schools closed.[104] Meanwhile, only fourteen percent of men reported being the sole care provider.[105] Therefore, gender pay disparities will widen in the coming years as mothers attempt to recover from an absence in the workforce, heightening the need for additional protections.

E. The CRA of 1991: Damage Caps

The CRA of 1991 expanded the relief available under Title VII.[106] Among other changes, the CRA of 1991 allows successful plaintiffs to recover compensatory and punitive damages in cases of intentional discrimination (disparate treatment).[107] Punitive damages are available when the complainant "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[108] The sum of compensatory damages awarded for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," and punitive damages, cannot exceed:

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

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while male employment dropped 10 percentage points – from 64 percent to 54 percent.").

[104] *Id.*

[105] *Id.*

[106] For a discussion of the cases and theory which led to the passage of the Civil Rights Act of 1991, see Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 283–91 (2011).

[107] 42 U.S.C. § 1981a(a)(1) (2020).

[108] *Id.*

> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.[109]

This provision was intended to expand "the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[110]

The CRA of 1991 was the product of many multi-faceted debates, including debates regarding the damage caps. Republicans wanted lower caps, while Democrats did not want any caps.[111] For example, Representative John Doolittle, a Republican from California, referred to the bill's inclusion of damages as a "tremendous injustice and burden to any employer,"[112] and as erecting a new barrier to ending discrimination.[113] Meanwhile, Representative Pat Schroeder, a Democrat from Colorado, argued that the caps essentially told victims of discrimination that "the people who own the company are much more moneyed and more powered than you are, so you get rolled."[114] Upon signing the CRA of 1991, President Bush referred to these damages caps as a "compromise."[115]

III. IMPLICATIONS OF DISCRIMINATION AND THE SMALL FIRM EXEMPTION ON THE AMERICAN WORKFORCE

A. Reliance on State and Local Laws

"One of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[116] In the context of workplace discrimination, however,

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[109] 42 U.S.C. § 1981a(b)(3) (1991).

[110] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2020)).

[111] Nicole L. Gueron, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1204 (1995) ("In the words of Representative Bill Goodling (R-Pa.), ranking Republican of the House Education and Labor Committee: '[The Democrats] started more to the left. We started more to the right.'").

[112] 137 CONG. REC. 30,644 (1991).

[113] 137 CONG. REC. 30,692 (1991).

[114] 137 CONG. REC. 30,644 (1991).

[115] Statement of President George Bush upon Signing S. 1745 (Nov. 21, 1991), *in* 1991 U.S.C.C.A.N. 768 (Nov. 25, 1991).

[116] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

state law has become a necessary protector of vulnerable employees, rather than a "happy incident" of experimentation.

By not prohibiting discrimination by all private employers, Title VII allows some discrimination to take place legally. By exempting employers with fewer than fifteen employees, "the effect of the exemption is to permit small firms to discriminate, unless they are subject to state or local anti-discrimination laws."[117] Many states and localities have EEO laws with more protections than Title VII, while some have laws that are only equally as protective as or less protective than Title VII, with regard to small firm exemptions and protected classes.

Seventeen states and the District of Columbia require that an employer have only one employee to be covered under their EEO laws.[118] While these eighteen jurisdictions may generally be seen as more protective of employees than Title VII is, some have other shortcomings. For example, the South Dakota Human Relations Act ("SDHRA") does not prohibit discrimination based on age, but does protect employees from discrimination based on race, color, creed, religion, sex, ancestry, disability, and national origin.[119] The SDHRA defines an employer as "any person within the State of South Dakota who hires or employs any employee, and any person wherever situated who hires or employs any employee whose services are to be partially or wholly performed in the State of South Dakota."[120] Therefore, all employees in South Dakota are protected against discrimination based on the enumerated protected classes. Assuming a more protective local law is not available, however, victims of age discrimination must rely on the ADEA, which only affords protection if the employer has twenty or more employees.[121] Thus, even in the eighteen "more protective" jurisdictions, laws like the SDHRA leave individuals of

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[117] Carlson, *supra* note 7, at 1264.

[118] *See* ALASKA STAT. § 18.80.300(5) (2020); COLO. REV. STAT. § 24-34-401(3) (2021); D.C. CODE § 2-1401.02(10) (2021); HAW. REV. STAT. § 378-1 (2020); 775 ILL. COMP. STAT. 5/2-101(B)(1) (2020); IOWA CODE § 216.2(7) (2020); ME. STAT. tit. 5, § 4553(4) (2020); MICH. COMP. LAWS § 37.2201(a) (2020); MINN. STAT. § 363A.03(16) (2020); MONT. CODE ANN. § 49-2-101(11) (2019); N.J. STAT. ANN. § 10:5-5(e) (West 2020); N.Y. EXEC. LAW § 292(5) (McKinney 2020); N.D. CENT. CODE § 14-02.4.02(8) (2019); OKLA. STAT. tit. 25, § 1301(1)(a) (2021); OR. REV. STAT. § 659A.001(4) (2020); S.D. CODIFIED LAWS § 20-13-1(7) (2020); VT. STAT. ANN. tit. 21, § 495d(1) (2021); WIS. STAT. § 111.32(6) (2020).

[119] S.D. CODIFIED LAWS § 20-13-10 (2020).

[120] S.D. CODIFIED LAWS § 20-13-1(7).

[121] 29 U.S.C. § 623 (2021).

certain protected classes unprotected from discrimination.[122] The practical reality of these laws leads to the conclusion that state legislatures deemed protection of individuals with certain identities important enough to expand protections from the federal standard, while leaving other characteristics unmentioned in the state EEO laws.

Another noteworthy EEO law without a small firm exemption is the New York Human Rights Law ("NYHRL").[123] In 2020, the NYHRL's definition of employer was amended to include all employers in the state.[124] Previously, the minimum employee threshold was four, except in cases of sexual harassment, for which all employers were covered.[125] Prior to 2016, however, the NYHRL only covered employers with four or more employees, regardless of the claim.[126] This history of amendments demonstrates the recognition that further protections were necessary. The New York Committee Report regarding the amendment that entirely eliminated the small firm exemption stated that, "[i]t is time for New York State law to abandon the protection of those who would discriminate and sexually harass in the workplace and recognize and serve victims of discrimination."[127] As a further variation, Maine's EEO law will be discussed in detail in Part V.

Nineteen states have EEO laws that have lower minimum employee thresholds than Title VII does.[128] For example, the

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[122] *See* Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the US Not Protected by State Non-Discrimination Statutes*, UCLA SCH. L. WILLIAMS INST. (Apr. 2020), https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/; Bryant Furlow, *Gaps in US Laws Leave Some Vulnerable to Workplace Discrimination*, 20 LANCET ONCOLOGY 908 (2019).

[123] N.Y. EXEC. LAW §§ 290–301.

[124] *Id.* § 292(5).

[125] *Id.* § 292(5) (amended 2020) ("'[E]mployer' does not include any employer with fewer than four persons in his or her employ except . . . that in the case of an action for discrimination based on sex . . . with respect to sexual harassment only, the term 'employer' shall include all employers within the state.").

[126] *Id.* § 292(5) (amended 2016).

[127] 2019 N.Y. A.B. 8421, N.Y. Leg. Sess. 242 (June 18, 2019), https://www.westlaw.com/Document/IE4DA53E191C111E99BF298AF7807B8A3/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0.

[128] *See* ARK. CODE ANN. § 16-123-102(5) (2021) (nine employee threshold); CAL. GOV'T CODE § 12926(d) (five employee threshold) (West 2021); CONN. GEN. STAT. § 46a-51(10) (2020) (three employee threshold); DEL. CODE ANN. tit. 19, § 710(7) (2020) (four employee threshold); IDAHO CODE § 67-5902(6) (2020) (five employee threshold); IND. CODE § 22-9-1-3(h) (2020) (six employee threshold); KAN. STAT. ANN. § 44-1002(b) (2021) (four employee threshold); KY. REV. STAT. ANN. § 344.030(2) (2021) (eight employee threshold); MASS. GEN. LAWS ch. 151B, § 1(5)

California Fair Employment and Housing Act ("FEHA") has a general minimum employee threshold of five for an entity to qualify as an employer and be liable in cases involving most protected classes.[129] For sexual harassment cases, however, the FEHA has no threshold.[130] The FEHA provides that when harassment because of sex is at issue, an employer "means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract."[131] Thus, under the FEHA, an employer with three employees would be liable for the sexual harassment of an employee, but not, for example, harassment because of ethnicity. This leaves 4.95% of California's employees, based 2017 data, unprotected from employment discrimination other than sexual harassment.[132]

Fourteen states do not provide more expansive protections than federal law provides. Three of these states (Alabama, Georgia, and Mississippi) do not have general EEO laws at all,[133] so individuals in these states must rely on federal law to assert their rights. Ten of the fourteen states have EEO laws that provide for the same fifteen-employee threshold that Title VII prescribes, with some exceptions for

(2020) (six employee threshold); MO. REV. STAT. § 213.010(8) (2020) (six employee threshold); N.H. REV. STAT. ANN. § 354-A:2(VII) (2020) (six employee threshold); N.M. STAT. ANN. § 28-1-2(B) (2020) (four employee threshold); OHIO REV. CODE ANN. § 4112.01(A)(2) (West 2020) (four employee threshold); 43 PA. CONS. STAT. § 954(b) (2021) (four employee threshold); 28 R.I. GEN. LAWS § 28-5-6(8)(i) (2020) (four employee threshold); TENN. CODE. ANN. § 4-21-102(5) (2020) (eight employee threshold); WASH. REV. CODE § 49/60/040(11) (2020) (eight employee threshold); W. VA. CODE § 5-11-3(d) (2020); WYO. STAT. ANN. § 27-9-102(b) (2020) (two employee threshold).

[129] CAL. GOV'T CODE § 12926(d).

[130] CAL. GOV'T CODE § 12940(j)(4) (West 2021).

[131] *Id.* §12940(j)(4)(A).

[132] U.S. CENSUS BUREAU, *supra* note 9.

[133] Alabama has a law which requires equal pay among the sexes and races. ALA. CODE § 25-1-30 (2020). Alabama also has an age discrimination statute, the Alabama Age Discrimination in Employment Act ("AADEA"), but it does not meaningfully differ from the federal ADEA, as it has the same twenty employee threshold. ALA. CODE § 25-1-20 (2020). Georgia has a statute that requires equal pay among the sexes for employers with ten or more employees. GA. CODE ANN. §§ 34-5-2(4), 34-5-3 (2020). Georgia also has an age discrimination statute which applies to all employers, GA. CODE ANN. § 34-1-2 (2020), and a disability discrimination statute which has a fifteen employee threshold. GA. CODE ANN. § 34-6A-2(2) (2020). Mississippi protects only public employees against discrimination based on the same protected classes included in Title VII, as well as based on age and handicap. MISS. CODE ANN. § 25-9-149 (2021).

certain claims.[134] These state laws do not expand the basic protections beyond those provided by federal law, unless they contain additional provisions or exceptions for expanded rights. An example of this is seen in the relevant Arizona law. The Arizona Civil Rights Act ("ACRA") provides that an employer is:

> a person who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, . . . except that to the extent that any person is alleged to have committed any act of sexual harassment, employer means, for purposes of administrative and civil actions regarding those allegations of sexual harassment, a person who has one or more employees in the current or preceding calendar year.[135]

The ACRA therefore provides the same protections as the federal equivalent, except in cases of sexual harassment, for which it provides protections to more employees.

Louisiana's EEO statute also does not provide for additional protections beyond federal law, but it is an outlier because the law has a small firm exemption with a higher threshold than that of Title VII.[136] The Louisiana Employment Discrimination Law ("LEDL"), which prohibits intentional discrimination based on race, color, religion, sex, national origin, age, disability, genetic information, and sickle cell trait,[137] only applies to employers who employ "twenty or more employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[138] This means that many victims of discrimination cannot bring claims under either federal or Louisiana state law, narrowing courtroom access. Even more surprisingly, the LEDL further narrows protections for discrimination based on pregnancy, childbirth, and related medical conditions by only requiring compliance from employers with more than twenty-five employees.[139] By protecting

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[134] ARIZ. REV. STAT. ANN. § 41-1461(6)(a) (2021); FLA. STAT. § 760.02(7) (2020); MD. CODE ANN., STATE GOV'T § 20-601(d) (West 2021) (fifteen employee threshold, except for harassment claims); NEB. REV. STAT. § 48-1102(2) (2020); NEV. REV. STAT. § 613.310(2) (2020); N.C. GEN. STAT. § 143-422.2(a) (2020); S.C. CODE ANN. § 1-13-30(e) (2020); TEX. LAB. CODE ANN. § 21.002(8) (West 2019); UTAH CODE ANN. § 34A-5-102(1)(i) (West 2020); VA. CODE ANN. § 2.2-3905(A) (2021) (fifteen employee threshold, except for unlawful discharge claims).

[135] ARIZ. REV. STAT. ANN. § 41-1461(6)(a).

[136] LA. STAT. ANN. § 23:302(2) (2021).

[137] LA. STAT. ANN. §§ 23:311–312, 323, 332, 352, 368 (2021).

[138] LA. STAT. ANN. § 23:302(2).

[139] LA. STAT. ANN. § 23:341 (2021).

even fewer individuals than federal law, the LEDL does little to combat employment discrimination in Louisiana. In 2017, Louisiana had nearly 296,528 employees working at establishments with fewer than twenty employees, which was about 17.56% of the total employment in the state.[140] These employees (and applicants to these establishments) were entirely unprotected by the LEDL and mostly unprotected by federal law, leaving a large gap in discrimination protections.

As further examples, local laws also vary in their protections. The New York City Human Rights Law, for one, requires compliance only if the employer has four or more employees, except in an action for discrimination based on a claim of gender-based harassment, where there is no minimum employee threshold.[141] In Tampa, Florida, the local ordinance defines a covered employer as any person with at least five full-time employees working more than thirty hours per week, or with at least sixteen employees irrespective of the numbers of hours worked per week.[142] In Bloomington, Indiana, an employer must have six or more employees to be covered under the local ordinance,[143] which is the same minimum employee threshold as the Indiana Civil Rights Law.[144] Meanwhile, in Michigan City, Indiana, just a four-hour drive from Bloomington, only employers with ten or more employees are covered under the local ordinance.[145]

In sum, many states and localities have enacted EEO laws more progressive and protective than Title VII and other federal statutes, but many have chosen not to do so. Millions of applicants and employees may be forced to suffer express discrimination and are left without a remedy. By excluding small employers, and therefore their employees, from coverage, legislatures ignore the reality of the existence of discrimination in workplaces of all sizes.

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[140] U.S. CENSUS BUREAU, *supra* note 9.

[141] New York City Human Rights Law, N.Y.C. ADMIN. CODE § 8-102 (2021).

[142] TAMPA, FLA., CODE OF ORDINANCES § 12-17 (2021), https://library.municode.com/fl/tampa/codes/code_of_ordinances?nodeId=COOR_CH12HURI.

[143] BLOOMINGTON, IND., CODE OF ORDINANCES § 2.21.030 (2021), https://library.municode.com/in/bloomington/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.21DELA_2.21.030DE.

[144] IND. CODE § 22-9-1-3(h) (2020).

[145] MICHIGAN CITY, IND., CODE OF ORDINANCES § 66-31 (2020), https://library.municode.com/in/michigan_city/codes/code_of_ordinances?nodeId=MICHIGAN_INDIANA_CODE_CH66HURE_ARTIIHURI.

B. The Hidden Impacts of Discrimination

Workplace environments have a large impact on employees' health and ways of life. The workplace "is an arena suffused by power relations, and just how these power relations play out has important consequences for . . . material livelihoods[,] . . . justice[,] and personal dignity."[146] Americans spend a significant amount of time at work, and the events that happen there often permeate into workers' thoughts outside of the workplace too.[147]

Employees' mental and physical health is at risk due to the persistence of workplace discrimination. It is widely recognized that mental health is heavily impacted by instances of discrimination, particularly harassment and bullying. Evidence shows that those who suffer from workplace discrimination suffer psychological distress, anxiety, depression, negative emotions, emotional trauma, and post-traumatic stress disorder ("PTSD").[148] "As a marginalized person," a workplace discrimination victim could develop PTSD "through day-to-day interactions and microaggressions—all of which can lead to fear, anxiety, self-doubt and general job insecurity."[149] "[A]lthough the experience of workplace injustice is often not life-threatening, the experience threatens the inner world of the target by shattering basic cognitive schema about fairness and justice and negatively influences one's social and personal identity leading to PTSD."[150] Those who experience discrimination on the basis of multiple protected classes are at an even greater risk for mental illnesses,[151] because their

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[146] Vincent J. Roscigno, *Discrimination, Sexual Harassment, and the Impact of Workplace Power*, 5 SOCIUS 1, 4 (2019).

[147] Gina Belli, *Here's How Many Years You'll Spend at Work in Your Lifetime*, PAYSCALE (Oct. 1, 2018), https://www.payscale.com/career-news/2018/10/heres-how-many-years-youll-spend-work-in-your-lifetime.

[148] Cassandra A. Okechukwu, Kerry Souza, Kelly D. Davis & A. Butch de Castro, *Discrimination, Harassment, Abuse, and Bullying in the Workplace: Contribution of Workplace Injustice to Occupational Health Disparities*, 57 AM. J. INDUS. MED. 573, 578 (2014).

[149] *Another Day on the Job: Racism and Workplace PTSD*, STAR (Sept. 14, 2020), https://www.thestar.com/podcasts/thismatters/2020/09/14/another-day-on-the-job-racism-and-workplace-ptsd.html.

[150] Okechukwu, Souza, Davis & de Castro, *supra* note 148, at 577.

[151] Sylvanna M. Vargas, Stanley J. Huey & Jeanne Miranda, *A Critical Review of Current Evidence on Multiple Types of Discrimination and Mental Health*, 90 AM. J. ORTHOPSYCHIATRY 374, 374 (2020). *See also* Lelia Gowland, *How Your Racial and Gender Identities Can Overlap and Affect Your Career*, FORBES (June 27, 2018), https://www.forbes.com/sites/leliagowland/2018/06/27/how-your-overlapping-identities-can-affect-your-career/?sh=f20425c45a38.

intersectional identities are unique. This is particularly important because individuals often file charges at the EEOC alleging multiple types of discrimination.[152] "These physiological responses that result from stressful experiences over time can [also] increase an individual's susceptibility to physical illness."[153]

Perceived discrimination has been linked to physical conditions, "such as hypertension, self-reported poor health, and breast cancer, as well as potential risk factors for disease, such as obesity [and] high blood pressure."[154] Also, "[e]xperiencing workplace injustice may lead to unhealthy behaviors that likely operate as maladaptive coping mechanisms."[155] Studies have shown that workplace discrimination may lead to victims becoming engaged with smoking and heavy alcohol use.[156] Additionally, "occupational health literature supports the observation that racial/ethnic minorities and immigrants are often over-represented in jobs with poorer working conditions," and some workers in the same occupational position "are directly exposed to more occupational hazards through assignment of the most hazardous duties to socially and economically disadvantaged populations, thus increasing their risk for work-related injury or illness."[157] These impacts on physical health and health behaviors, as well as increased occupational hazards, put victims of discrimination at risk for increased illnesses and injuries, meaning that workplace discrimination impacts victims well beyond the emotional consequences.

IV. DISPELLING THE ARGUMENTS FOR THE SMALL FIRM EXEMPTION

According to Professor Richard Carlson, the principal objections to eliminating the small firm exemption, as revealed by the debates leading to Title VII's enactment and 1972 amendment, are:

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[152] *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 [https://perma.cc/933U-E5WV] [hereinafter *EEOC Charge Statistics 1997–2020*].

[153] Yue Ethel Xu & William J. Chopik, *Identifying Moderators in the Link Between Workplace Discrimination and Health/Well-Being*, 11 FRONTIERS PSYCH. 1, 2 (2020).

[154] Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCH. BULL. 531, 531 (2009).

[155] Okechukwu, Souza, Davis & de Castro, *supra* note 148, at 579.

[156] *Id.*

[157] *Id.* at 576.

> (1) to relieve small firms of the otherwise disproportionate costs they might bear under the new law; (2) to preserve a right of 'personal' relationships beyond government intervention; (3) to permit racial or ethnic self-help by small firms and family-owned businesses; (4) to avoid over-extension of the [EEOC's] limited resources; and (5) to defuse at least some business opposition to Title VII and preserve enough support for its enactment.[158]

While these rationalizations for a small firm exemption represent valid concerns for small business owners, the pressing need to strengthen anti-discrimination protections outweigh them.

A. Stronger EEO Legislation Does Not Harm Small Businesses Overall

If Title VII covered all employers, small business growth would not be harmed.[159] A 2015 Bell Policy Center study of state anti-discrimination statutes and small businesses found that there were no statistically significant differences "in the creation of small businesses in those states with remedies and those without remedies," nor were there any differences "in the creation of small businesses among states based on the strength of their remedies for victims of workplace discrimination."[160] The study found that, in fact, "states with stronger anti-discrimination laws had better small business numbers than those with less-stringent laws."[161] Therefore, more protective EEO laws do not harm the overall growth of small businesses.

Those who support the exemption point to small firms' "preventative costs of complying with antidiscrimination law and implementing it in the workplace, and to the costs of defending litigation for violations of antidiscrimination law."[162] While these costs are real, the small firm exemption was a political compromise, meaning that there are no facts to support the assertion that all businesses with less than fifteen employees are unable to shoulder any

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[158] *See* Carlson, *supra* note 7, at 1205.

[159] *Anti-Discrimination Remedies Do Not Harm Small Business Growth*, BELL POL'Y CTR. 1 (Aug. 4, 2015), https://www.bellpolicy.org/wp-content/uploads/2017/10/Anti-Discrimination-Remedies-Do-Not-Harm-Small-Business-Growth-August-4-2015.pdf.

[160] *Id.*

[161] *Id.*

[162] Anna B. Roberson, Note, *The Migrant Farmworkers' Case for Eliminating Small-Firm Exemptions in Antidiscrimination Law*, 98 TEX. L. REV. 185, 194 (2019).

increased costs, and that they are more so unable to shoulder costs than businesses with, for example, twenty-five to thirty employees.

Compliance costs may include, for instance, a substantive and informed review of existing policies, making reasonable accommodations where required, and informing employees about the law. Compliance may also include "paying attorneys to counsel on" relevant aspects, such as, "documenting an employee's performance to support a legitimate, non-discriminatory reason for an employment decision or performing disparate impact analysis with respect to compensation or layoff decisions."[163] While these costs may be significant in some circumstances, they have not, as found in the above-mentioned study by the Bell Policy Center, harmed the growth of small businesses.[164] Many small businesses may even find that such costs are not a burden when the business brings in considerable revenue.

Litigation costs may also be significant when they arise, but, again, not all small businesses will be unable to pay these costs, and even so, a majority of charges filed with the EEOC under Title VII do not make it to litigation.[165] In 2019, the EEOC resolved 57,285 charges.[166] 70.4% were found to have no reasonable cause,[167] meaning that the EEOC determined, based upon evidence obtained in an investigation, that discrimination did not occur.[168] Additionally, 14.5% of the charges had merit resolutions (an outcome favorable to the charging party or with meritorious allegations),[169] which included settlements during investigations, withdrawals with benefits (charging

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[163] Pam Jenoff, *As Equal as Others? Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85, 99 (2012).

[164] *See* BELL POL'Y CTR., *supra* note 160.

[165] *Title VII of the Civil Rights Act of 1964 Charges (Charges Filed with EEOC) (Includes Concurrent Charges with ADEA, ADA, EPA, and GINA) FY 1997–FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges (last visited Feb. 21, 2021) [hereinafter *Title VII Charges*].

[166] *Id.*

[167] *Id.*

[168] *Definitions of Terms*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/definitions-terms#:~:text=No%20Reasonable%20Cause,to%20bring%20private%20court%20action (last updated May 2020) [hereinafter *EEOC Definitions of Terms*]. While the charging party still may exercise the right to bring private court action against the employer, the party may choose not to do so because the EEOC did not find discrimination. *Id.*

[169] *Title VII Charges, supra* note 165; *EEOC Definitions of Terms*, *supra* note 167.

party and employer come to a separate agreement), and successful and unsuccessful conciliations with the EEOC as a party.[170] Therefore, the prospect of litigation is minimal compared to how many charges are actually received by the EEOC,[171] even though other costs are associated with preventing the litigation itself. These outcomes do not mean that the employers incurred no pre-litigation costs in their efforts to keep the possible cases out of courtrooms, but the amount expended is likely to be less than if a case was actually filed. If a case does reach a courtroom and the employer is successful in demonstrating that it did not violate Title VII, a prevailing defendant may recover reasonable attorneys' fees, at the court's discretion, "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[172]

In addition, discrimination is costly to businesses even when the discrimination is legal. There are costs associated with replacing workers who leave their jobs due to unfairness and discrimination.[173] Also, if the employer is basing recruitment and hiring decisions on discriminatory motives, the business is "left with a substandard workforce that diminishes their ability to generate healthy profits."[174] Further, if the surrounding community is privy to a certain employer's discriminatory tendencies, marketing to consumers will be particularly difficult and it may lose a share of the market when customers value diversity, as many do.[175] Overall, it is in the best financial interests of employers not to discriminate, whether it is legal or not.

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[170] *EEOC Definitions of Terms*, *supra* note 168.

[171] *Title VII Charges*, *supra* note 165. In 2019, the EEOC resolved 15.1% of charges by administrative closure. *Id.* Administrative closure includes, among other procedural issues, lack of jurisdiction due to insufficient number of employees, so if the small firm exemption were to be removed from Title VII, the percentage of administrative closures may reduce. *EEOC Definitions of Terms* , *supra* note 168.

[172] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). *See also* 42 U.S.C. § 2000e-5(k) (2020).

[173] Crosby Burns, *The Costly Business of Discrimination*, CTR. FOR AM. PROGRESS (Mar. 22, 2012, 9:00 AM), https://www.americanprogress.org/issues/lgbtq-rights/reports/2012/03/22/11234/the-costly-business-of-discrimination/ ("This introduces numerous turnover-related costs since employers must then find, hire, and retrain employees to replace those who have left due to workplace discrimination. This takes significant amounts of time, money, and resources that could have instead been spent on primary business operations.").

[174] *Id.*

[175] *Id.*

B. Personal Relations and Self-Help are Already Lost

There are already numerous laws which regulate small businesses and destroy the ideas of "personal relationships beyond intervention" and self-help. For example, the Fair Labor Standards Act regulates minimum wage, overtime requirements, maximum hours worked, and child labor, and imposes recordkeeping requirements.[176] Further, the Family and Medical Leave Act requires unpaid, job-protected leave in certain circumstances.[177] If federal law commands a minimum wage that even small businesses must adhere to, then federal law should be able to command small businesses not to discriminate.

As Professor Carlson noted, "there is no particular workplace population at which relations cease to be 'personal' and become 'impersonal.' Relations in very large workplaces can be very intimate between some pairs or groups of individuals, and relations between an individual owner/manager and his sole employee can be distant and cold."[178] It may be even easier for a personal relationship to form in a larger workplace because a subordinate employee may seek close mentorship from a supervisor in a sizeable and intimidating workplace. Because the number of employees is not indicative of the degree of personal relationship between the employer and each employee, the argument cannot support the continued existence of the small firm exemption.

While self-help for minority-owned small businesses allows those employers to hire others like themselves, this benefit is only topically plausible. Some opportunities may be opened for minorities through this approach, but more opportunities are closed as a result. It is palatable to assume that, for example, a Black woman-owned small business will hire other Black women, but it is morally wrong and socially harmful when a white man-owned small business seeks to hire other white men.

C. The EEOC's Resources are Already Overextended

It is undisputed that the EEOC is overburdened and that its resources are overextended. For the 2020 fiscal year, the EEOC's enacted budget was $389,500,000.[179] The EEOC received a total of

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[176] 29 U.S.C. §§ 206–07, 211–12 (2021).

[177] 29 U.S.C. §§ 2601, 2611–20 (2021).

[178] Carlson, *supra* note 7, at 1262.

[179] *EEOC Budget and Staffing History from 1980 to Present*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc-budget-and-staffing-history-

67,448 charges that year.[180] At the end of 2020, the EEOC's backlog was 41,951 charges.[181] While this is the EEOC's smallest backlog in fourteen years,[182] it is still substantial. It is also important to note that the EEOC received over five thousand fewer charges in 2020 than it did in 2019,[183] allowing the backlog to shrink. It is unclear whether the number of charges filed will increase again after the COVID-19 pandemic.

Eliminating the small firm exemption would undoubtedly further burden the EEOC by increasing its workload. However, the EEOC's budget should be increased to remedy this issue. Insufficient funding cannot be a reason to ignore discrimination. Budgeting is a distinct issue which always follows societal changes. "Historically, the EEOC has been a small agency with a huge mission."[184] The EEOC's budget should reflect that important mission.

D. Political Compromise is Congress' Job

Because the small firm exemption was a product of political compromise, rather than informed policymaking, Congress should be able to compromise again and come to an agreement which would result in the elimination of the small firm exemption. There will always be opposition to social and economic legislation from constituents and lawmakers, but politics require appropriate compromise at all stages of the process. Nearly six decades after Title VII's enactment, it is possible for legislators to agree that it should be amended to expand coverage.

1980-present#:~:text=EEOC's%20final%20funding%20is%20%24344.2,the%20Commission's%20target%20FTE%20Ceiling (last visited June 8, 2021).

[180] *EEOC Charge Statistics 1997–2020*, *supra* note 153.

[181] *Fiscal Year 2020 Annual Performance Report*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 19, 2021), https://www.eeoc.gov/fiscal-year-2020-annual-performance-report.

[182] *Id.*

[183] *EEOC Charge Statistics 1997–2020*, *supra* note 153.

[184] *Fiscal Year 2021 Congressional Budget Justification*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Feb. 2020), https://www.eeoc.gov/fiscal-year-2021-congressional-budget-justification#h_81061924869158111351 1086.

V. DOMESTIC AND GLOBAL PERSPECTIVES

A. Maine: The Maine Human Rights Act

The Maine Human Rights Act ("MHRA") provides that all individuals have the right "to secure employment without discrimination because of race, color, sex, sexual orientation, physical or mental disability, religion, age, ancestry[,] or national origin."[185] The MHRA defines an "employer" as "any person in this State employing any number of employees, whatever the place of employment of the employees, and any person outside this State employing any number of employees whose usual place of employment is in this State."[186] Therefore, the MHRA does not have a small firm exemption, so it covers all employers, unlike Title VII.

Although the MHRA does not have a small firm exemption, it caps the amount of civil penal damages that a complainant may collect from a small business. If an employer has fourteen or fewer employees, civil penal damages cannot exceed "$20,000 in the case of the first order under this Act against the respondent," $50,000 in the case of a second order, or $100,000 in the case of a third or subsequent order.[187]

The MHRA also places caps on the total amount of compensatory and punitive damages that may be awarded to a complainant in cases of intentional discrimination where the employer has more than fourteen employees.[188] The current version of the MHRA states that the sum of compensatory damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, other nonpecuniary losses," and the amount of punitive damages awarded in cases of intentional discrimination may not exceed, for each complainant: $50,000 where the employer has between fifteen and one hundred employees, $100,000 where the employer has between 101 and 200 employees, $300,000 where the employer has between 201 and 500 employees, and $500,000 where the employer has more than 500 employees "in each of 20 or more calendar weeks in the current or preceding calendar year."[189]

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[185] ME. STAT. tit. 5, § 4571 (2020).
[186] *Id.* § 4553(4).
[187] *Id.* § 4613(2)(B)(7).
[188] *Id.* § 4613(2)(B)(8)(e).
[189] *Id.*

The compensatory/punitive damages caps were added to the MHRA in 1997 and were prompted by the enactment of the CRA of 1991,[190] which specified similar damages level caps for cases of intentional discrimination.[191] State Representative Richard Thompson, in support of the amendment, stated that it "is wholly appropriate that [Maine] be consistent with the federal statute."[192] When the caps were first added to the MHRA in 1997, those for larger employers were the same caps provided for in the CRA of 1991 ($50,000, $100,000, $200,000 and $300,000 for employers with 15 to 100 employees, 101 to 200 employees, 201 to 500 employees, and more than 500 employees, respectively).[193] Before 1997, the civil penal damages caps, which now only apply to businesses with fourteen or fewer employees, applied to all employers.[194] Therefore, successful plaintiffs cannot recover compensatory or punitive damages from employers with fourteen or fewer employees.

B. The United Kingdom: The Equality Act

After over forty years of fragmented anti-discrimination legislation, the Parliament of the United Kingdom passed the Equality Act in 2010 to consolidate and strengthen protections.[195] The Equality Act protects applicants and employees against discrimination on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.[196] Direct and indirect discrimination are defined generally,[197] and specific employer obligations are set out in the work-related provisions.[198]

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[190] H.R. 118, 1st Special Sess., at H-1006 (Me. 1997), http://lldc.mainelegislature.org/Open/LegRec/118/House/LegRec_1997-05-21_HP_pH0986-1020.pdf ("It amends [the MHRA] to be consistent with the federal statute.").

[191] 42 U.S.C. § 1981a(b) (2020).

[192] H.R. 118, 1st Special Sess., at H-1006 (Me. 1997), http://lldc.mainelegislature.org/Open/LegRec/118/House/LegRec_1997-05-21_HP_pH0986-1020.pdf.

[193] ME. STAT. tit. 5, § 4613(2)(B)(8)(e) (2006) (current version at ME. STAT. tit. 5, § 4613(2)(B)(8)(e) (2020)); § 1981a(b). The MHRA caps were amended to the present values in 2007. ME. STAT. tit. 5, § 4613(2)(B)(8)(e).

[194] ME. STAT. tit. 5, § 4613(2)(B)(7) (1996) (amended 1997).

[195] Equality Act 2010, c. 15 (UK), Revision Notes, https://www.legislation.gov.uk/ukpga/2010/15/notes.

[196] Equality Act 2010, c. 15.

[197] *Id.* §§ 13, 19.

[198] *Id.* §§ 39–40.

The Equality Act does not contain a minimum employee threshold, rendering it applicable to all employers. Compensatory damages, as well as other remedies, are available to complainants.[199] The only exemption in the Equality Act for small businesses is in relation to equal pay audits.[200] "An equal pay audit is an audit designed to identify action to be taken to avoid equal pay breaches occurring or continuing."[201] The Equality Act provides that regulations may require "an employment tribunal to order the respondent to carry out an equal pay audit in any case where the tribunal finds that there has been an equal pay breach."[202] Businesses with fewer than ten employees and new businesses are exempt and cannot be ordered to carry out an equal pay audit.[203] While the scope of this exemption is insignificant in relation to the small firm exemption in Title VII, it demonstrates that Parliament had small businesses in mind when passing this law; yet, it did not provide a substantive exemption for small businesses.

A significant portion of the United Kingdom's workers would be unprotected if the Equality Act exempted small businesses from its substantive provisions.[204] For example, if the Equality Act only applied to employers with at least ten employees, making coverage slightly broader than Title VII, only sixty-six percent of the United Kingdom's workforce would be protected.[205] In 2019, ninety-six percent of businesses in the United Kingdom were "micro-businesses," meaning they employed fewer than ten persons.[206] Micro-businesses employed thirty-three percent of the total workforce in the United Kingdom.[207] If Parliament added a small firm exemption, these micro-business employees would be excluded from coverage. By comparison, seventy-nine percent of employers in the United States employed fewer than ten employees in 2017, and almost ten percent of the United States' workforce is employed by these businesses.[208] Although a smaller percentage of the United States' workforce is

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[199] *Id.* § 119.

[200] *Id.* § 139A.

[201] *Id.* § 139A(3).

[202] *Id.* § 139A(1). *See* Equality Act 2010 (Equal Pay Audits) Regulations 2014, SI 2014/2559 (UK), https://www.legislation.gov.uk/uksi/2014/2559/contents/made.

[203] Equality Act 2010, c. 15, § 139A(10) (UK).

[204] Matthew Ward, *Business Statistics*, HOUSE OF COMMONS LIBR. (Jan. 22, 2021), https://commonslibrary.parliament.uk/research-briefings/sn06152/.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] U.S. CENSUS BUREAU, *supra* note 9.

employed by micro-businesses than the United Kingdom's workforce is, a larger percentage of employees are left unprotected by Title VII because employers with less than fifteen employees are not required to comply.[209]

Unlike the CRA of 1991 and the MHRA, caps on damages are not written into the Equality Act. The employment tribunals, however, which have jurisdiction to decide employment cases brought under the Equality Act,[210] award emotional damages according to the Vento bands, as established by *Vento v. Chief Constable of West Yorkshire Police*.[211] The Vento bands, further elaborated on below, are tiered guidelines for the employment tribunals to follow in determining how much compensation to award for "injury to feelings."[212] They are based on the egregiousness of the violation,[213] and they are persuasive, not binding.[214] The judge retains discretion in deciding which band applies in each case to ensure "that a claimant is properly and appropriately compensated, that there is no unfairness to the respondent[,] and that justice is done in the individual case."[215] The Vento bands were established to avoid overcompensation.[216]

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[209] 42 U.S.C. § 2000e(b) (2020).

[210] Equality Act 2010, c. 15, § 120 (UK).

[211] [2002] EWCA (Civ) 1871 (Eng.).

[212] *Id.* ¶ 65.

[213] *Id.*

[214] *Employment Tribunals Presidential Guidance*, CT. & TRIB. JUDICIARY (Sept. 5, 2017), https://www.judiciary.uk/wp-content/uploads/2015/03/vento-bands-presidential-guidance-20170905.pdf ("Tribunals must have regard to any such guidance, but they shall not be bound by it.").

[215] *Employment Tribunals Presidential Response to Judicial Consultation*, CT. & TRIB. JUDICIARY (Sept. 4, 2017), https://www.judiciary.uk/wp-content/uploads/2017/07/vento-consultation-response-20170904.pdf.

[216] Vento v. Chief Constable of West Yorkshire Police [2002] EWCA (Civ) 1871 [64].

The Vento bands have been adjusted for inflation several times,[217] the most recent as of this writing being in April of 2021.[218] The 2021 addendum established the lowest band, which is for less serious cases "such as where the act of discrimination is an isolated or one off occurrence,"[219] as between £900 and £9,100,[220] which is about $1,273 to $12,873 as of the June of 2021 conversion rate.[221] The middle band, used for serious cases that do not meet the intensity of those in the top band,[222] is set at £9,100 to £27,400.[223] This is about $12,873 to $38,758 as of June of 2021.[224] The top band is for the "most serious cases, such as where there has been a lengthy campaign of discriminatory harassment."[225] This range is set at £27,400 to £45,600,[226] which is about $38,758 to $64,499 as of June of 2021.[227] "[T]he most exceptional cases [are] capable of exceeding" this upper limit.[228] The judge decides whether or not to award these damages and, if so, how much to award, based on "the particular circumstances of the discrimination and on the way in which the complaint of

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[217] *See First Addendum to Presidential Guidance Originally Issued on 5 September 2017*, CT. & TRIB. JUDICIARY (Mar. 23, 2018), https://www.judiciary.uk/wp-content/uploads/2013/08/vento-bands-presidential-guidance-first-addendum-230318.pdf; *Second Addendum to Presidential Guidance Originally Issued on 5 September 2017*, CT. & TRIB. JUDICIARY (Mar. 25, 2019), https://www.judiciary.uk/wp-content/uploads/2015/03/Presidential-Guidance-Vento-Bands-Second-Addendum-25-March-2019.pdf; *Third Addendum to Presidential Guidance Originally Issued on 5 September 2017*, CT. & TRIB. JUDICIARY (Mar. 27, 2020), https://www.judiciary.uk/wp-content/uploads/2013/08/Presidential-Guidance-Vento-Bands-Third-Addendum-27-March-2020-1.pdf.

[218] *Fourth Addendum to Presidential Guidance Originally Issued on 5 September 2017*, CT. & TRIB. JUDICIARY (Mar. 26, 2021), https://www.judiciary.uk/wp-content/uploads/2013/08/Vento-bands-presidential-guidance-April-2021-addendum-1.pdf.

[219] Vento v. Chief Constable of West Yorkshire Police [2002] EWCA (Civ) 1871 [65(iii)].

[220] CT. AND TRIB. JUDICIARY, *supra* note 216, at 1.

[221] *Convert British Pounds to US Dollars*, XE CURRENCY CONVERTER, https://www.xe.com/currencyconverter/convert/?Amount=9%2C000&From=GBP&To=USD (last visited Oct. 5, 2021).

[222] Vento v. Chief Constable of West Yorkshire Police [2002] EWCA (Civ) 1871 [65(ii)].

[223] CT. & TRIB. JUDICIARY, *supra* note 216, at 1.

[224] XE CURRENCY CONVERTER, *supra* note 222.

[225] Vento v. Chief Constable of West Yorkshire Police [2002] EWCA (Civ) 1871 [65(i)].

[226] CT. & TRIB. JUDICIARY, *supra* note 216, at 1.

[227] XE CURRENCY CONVERTER, *supra* note 222.

[228] CT. & TRIB. JUDICIARY, *supra* note 216, at 1.

discrimination has been handled."[229] While there is no evidence to suggest that the Vento bands were established with small businesses in mind, most businesses will financially benefit from protections against overcompensation in Equality Act cases.

Although there is no small firm exemption to the Equality Act, discrimination is still present in workplaces in the United Kingdom, even while all victims are able to seek relief. For example, a 2016–2017 survey demonstrated that "racism in the workplace still plays a major role" and places "experiences in a context that takes account of the historical roots of racism and the contemporary political events that influence people's attitudes and behaviours."[230] Of the more than five thousand participants in the Trade Union Congress Racism at Work Survey, over seventy percent of Asian and Black workers reported that they had experienced racial harassment at work in the previous five years, and sixty percent said that they had been subjected to unfair treatment by their employer due to their race.[231] Employees belonging to ethnic minorities have regularly reported that they have been "subjected to excessive surveillance and scrutiny by colleagues, supervisors[,] and managers," and were denied promotions and development opportunities.[232] The Equality Act covers all employers in the United Kingdom, and while discrimination still undeniably exists in the United Kingdom, remedies are available to all victims of discrimination under the Equality Act, therefore ensuring the opportunity to confront all discrimination, no matter the employer's size.

VI. PROPOSAL TO ELIMINATE THE SMALL FIRM EXEMPTION WHILE IMPLEMENTING ALTERNATIVE PROTECTIONS FOR SMALL BUSINESSES

The definition of "employer" in Title VII should be amended so as to eliminate the small firm exemption, which would result in coverage of all employers, and therefore all employees and applicants. Rather than an "employer" being defined as a person with fifteen or

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[229] Vento v. Chief Constable of West Yorkshire Police [2002] EWCA (Civ) 1871 [67].

[230] Stephen D. Ashe, Magda Borkowska & James Nazroo, *Racism Ruins Lives*, U. MANCHESTER CTR. ON DYNAMICS ETHNICITY 3 (Apr. 15, 2019), http://hummedia.manchester.ac.uk/institutes/code/research/projects/racism-at-work/tuc-full-report.pdf.

[231] *Id.* at 7–8.

[232] *Id.* at 8.

more employees,[233] Title VII should provide that an employer is a person with one or more employees. There is an extensive history of exempting small businesses from labor and employment laws,[234] and there was particularized discussion of the definition of "employer" prior to Title VII's enactment,[235] so the small firm exemption was not an overlooked detail of the legislation. However, the small firm exemption allows employers with less than fifteen employees and those not covered by a state or local law that is more protective than federal law, to expressly discriminate.

One argument against eliminating the small firm exemption is that requiring small businesses to comply with Title VII will result in financial harm. However, no correlation has been found between increased anti-discrimination protections and small business growth.[236] In reality, discriminatory practices harm businesses because employees will need to be replaced more often, the narrowed labor pool will be less talented, and customers will likely be lost.[237] Nevertheless, even if additional compliance costs must be accounted for by small businesses, it is a necessary consequence of ensuring protections for workers and bringing the country one step closer to eradicating discriminatory practices in the workplace.

Discrimination without any remedy is an unacceptable consequence of the small firm exemption. Seventeen states and the District of Columbia have EEO statutes that cover all employers, no matter the size.[238] This is thirty-four percent of states (plus the District of Columbia), which demonstrates that it is possible to implement such a statute without detrimental economic harm. Additionally, nineteen states have statutes with additional protections beyond federal law by virtue of a lower minimum employee threshold.[239] Thus, a substantial majority of states have recognized a need for more protections for employees and applicants. Likewise, other parts of the world, such as the United Kingdom, have recognized the importance of eliminating employment discrimination by enacting relevant legislation applicable to all employers.[240] Congress itself has also

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[233] 42 U.S.C. § 2000e(b) (2020).
[234] *See supra* notes 47–52.
[235] *See supra* notes 40–43.
[236] *See* BELL POL'Y CTR., *supra* note 160.
[237] *See* Burns, *supra* note 174.
[238] *See supra* note 117.
[239] *See supra* note 124.
[240] *See supra* notes 195–97.

recognized the importance of anti-discrimination legislation applicable to all employers in regard to federal contractors and in the EPA by requiring compliance by all employers.[241]

It is undisputable that the effects of discrimination go beyond hurt feelings and even financial inequalities. Mental and physical health are heavily impacted by experiences of workplace discrimination. This includes psychological distress, anxiety, depression, negative emotions, emotional trauma, and PTSD,[242] as well as physical ailments, maladaptive coping mechanisms, and occupation injuries.[243] These disastrous societal impacts bring this issue beyond the workplace.

It is necessary that the federal government demonstrate that it will not tolerate employment discrimination anywhere, no matter how small a business is. There is no path to eradicating or fully remedying discrimination if an employer with fifteen employees is liable for discriminatory practices, but an employer with fourteen employees is not. The greatest landmark civil rights laws have been passed under presidents who have made such issues a "substantive legislative domestic priority," beyond just rhetoric.[244] It is evident that President Joseph R. Biden has a goal of expanding and protecting civil rights. On his first day in office, President Biden signed two executive orders that support anti-discrimination policies, including revoking former President Trump's order limiting diversity and inclusion training for employees of federal agencies and contractors, implementing federal agency reviews and reports on equity, and forbidding discrimination on the basis of sexual orientation or gender identity against federal employees.[245]

To alleviate some of the financial concerns for small businesses, Congress should implement mechanisms to ensure that eliminating the small firm exemption does not have a negative economic impact. Caps on damages should be appended to the amendment to appease those who oppose such a change and ensure that the financial interests of small business owners are protected, should they violate the law. The

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[241] *See supra* notes 71–72, 83.

[242] *See* Okechukwu, Souza, Davis & de Castro, *supra* note 149.

[243] *See id.*; Pascoe, *supra* note 155.

[244] Cleve R. Wootson Jr. & Tracy Jan, *Biden Signs Orders on Racial Equity, and Civil Rights Groups Press for More*, WASH. POST (Jan. 26, 2021), https://www.washingtonpost.com/politics/biden-to-sign-executive-actions-on-equity/2021/01/26/3ffbcff6-5f8e-11eb-9430-e7c77b5b0297_story.html.

[245] Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 13988, Fed. Reg. 7023 (Jan. 20, 2021).

MHRA and the Equality Act (with the Vento bands) demonstrate that coverage of all employees with damages caps is widely feasible and workable, whether the caps are in relation to how many employees the employer has or how egregious the offense is. The CRA of 1991 already has a scheme of damages caps within Title VII,[246] so these could easily be expanded and improved to account for newly covered small businesses.

I propose that the amendment should provide one cap for employers with fewer than fifteen employees. This would be fitting because the CRA of 1991 provides for caps in large increments (one hundred to three hundred employee increments).[247] This is also how the MHRA implemented caps for small employers.[248] As part of this proposal, the existing damages caps in the CRA of 1991 should also be adjusted because they have never been adjusted for inflation. I propose that for employers with fewer than fifteen employees, the damages cap should be $50,000, which is presently the CRA of 1991's lowest cap. If an employer with fifteen employees is currently expected to pay up to $50,000 in compensatory and punitive damages, an employer with fewer employees should be held to that standard. The inflation rate in the United States between 1991 and 2021 is about. 94.78%.[249] Therefore, the present CRA of 1991 damages cap for employers with fifteen to one hundred employees should be at least $95,000. The cap for employers with one hundred and one to two hundred employees should be at least $190,000. The cap for employers with two hundred and one to five hundred employees should be at least $385,000. Finally, the cap for employers with more than five hundred employees should be at least $580,000.

Alternatively, the caps may be set at different levels for employers with less than five employees, five to nine employees, and ten to nineteen employees (amending the lowest cap in the CRA of 1991 to accommodate this scheme). Caps with these threshold increments would align with the way that the United States Census Bureau collects data on employers.[250] This would also account for the differing economic resources available to small businesses based on their sizes. I propose that the damages cap for employers with less than

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[246] 42 U.S.C. §1981a(b)(3) (2020).

[247] *Id.*

[248] ME. STAT. tit. 5, § 4613(2)(B)(7) (2020).

[249] *Inflation Calculator*, INFLATION TOOL, https://www.inflationtool.com/ (last visited Nov. 14, 2021).

[250] U.S. CENSUS BUREAU, *supra* note 9.

five employees should be $20,000. The cap for employers with five to nine employees should be $40,000. The cap for employers with ten to nineteen employees should be $50,000, and the caps for employers with more employees should be as I set out above in my initial proposal. Either method would provide security to small businesses while requiring Title VII compliance and providing remedies to victims of discrimination.

CONCLUSION

Title VII has not lived up to its promise to end employment discrimination in the United States, and while eliminating the small firm exemption will not remedy this entirely, it will certainly bring the United States one step closer to this goal by providing protections and remedies for more workers. As President Kennedy spoke to the country amid social unrest and extreme racial tensions, he said that the "heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated."[251] Title VII limited equal opportunities to those who work for employers with fifteen or more employees, but the elimination of the small firm exemption, supported by caps on damages, would push President Kennedy's message a little closer to becoming a reality. Accordingly, many states and other jurisdictions have been able to successfully implement and enforce EEO laws for businesses of all sizes, so the federal government should do the same to protect American workers because "equality is something everybody . . . should care about and something all of us have a stake in."[252]

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[251] Kennedy, *supra* note 28.

[252] Liz Truss, U.K. Minister for Women & Equals., Speech, Fight for Fairness, at the Centre for Policy Studies (Dec. 17, 2020).