"INFLUENCING" THE LEGISLATURE: THE NEED FOR LEGISLATION TARGETING ONLINE SEXUAL HARASSMENT OF SOCIAL MEDIA INFLUENCERS

INTRODUCTION

More than 4.5 billion people use the internet, and 3.8 billion of these users live comfortably on social media.[1] Social media's quick, cost-effective flow of information and unlimited reach are ideal for individuals looking to, for example, reconnect with a childhood best friend with whom they have lost touch or instantaneously share opinions and viewpoints with others from around the globe. Companies large and small have revolutionized social media—and specifically its users—into an effective tool to market their brands. Though effective, these users, utilized by companies for profit, are often subject to rampant sexual harassment while conducting their work, with neither federal nor state antidiscrimination laws available to protect these users while they make their living.[2]

A social media influencer (Influencer) is a social media user who has "the power to affect the buying habits or quantifiable actions of others by uploading some form of original – often sponsored – content to social media platforms like Instagram, YouTube, [and] Snapchat," as well as others.[3] Social media influencer marketing (Influencer Marketing) is "the act of a marketer identifying and engaging influencers to share information with influencees in pursuit of a business goal."[4] The Influencer Marketing

1. Simon Kemp, *Digital 2020: 3.8 Billion People Use Social Media*, WE ARE SOCIAL (Jan. 30, 2020), https://wearesocial.com/blog/2020/01/digital-2020-3-8-billion-people-use-social-media [https://perma.cc/4DW4-UNHT]. "Social media is a broad term that encompasses many different types of communication tools, including collaborative projects, blogs, content communities, social networking sites, virtual game worlds, and virtual social worlds." Kristen N. Coletta, *Sexual Harassment on Social Media: Why Traditional Company Sexual Harassment Policies are not Enough and How to Fix It*, 48 SETON HALL L. REV. 449, 458 (2018). Social networking sites, defined as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system," are viewed as the main source of internet communication. *Id.* In this Note, "social media" refers to social networking sites, including Instagram, YouTube, Facebook, blogs, Twitter, and Snapchat. *See generally What is the Best Social Media Channel for Influencer Marketing*, MEDIAKIX, https://mediakix.com/blog/how-to-choose-social-media-channels-influencer-marketing/ [https://perma.cc/QC5Q-XJ54] (reporting the top five most strategically important social media channels for influencer marketing as Instagram, YouTube, Facebook, blogs, and Twitter, respectively).

2. *See infra* notes 16–19 and accompanying text.

3. Paris Martineau, *The WIRED Guide to Influencers*, WIRED (Dec. 6, 2019, 10:00 AM), https://www.wired.com/story/what-is-an-influencer/ [https://perma.cc/8SSE-6HR5].

4. WORD OF MOUTH MKTG. ASS'N (WOMMA), THE WOMMA GUIDE TO INFLUENCER MARKETING 7 (2017), http://getgeeked.tv/wp-content/uploads/uploads/2018/03/WOMMA-The-WOMMA-Guide-to-Influencer-Marketing-2017.compressed.pdf [https://perma.cc/3DDV-KPK9].

industry was projected to generate around $10 billion by 2020.[5] Successful Influencer Marketing depends on brands paying the right Influencers to market their products.[6] Influencers' presence on social media is ubiquitous and effective, with roughly 15.7% of Instagram profiles alone dominated by just one subset of Influencers called "micro-influencers,"[7] or Influencers who have between 10,000 and 100,000 social media followers,[8] and with 88% of consumers reported to have been "inspired to purchase based on what they saw from an influencer."[9] Unsurprisingly, the glamorous job of an Influencer is coveted and desired among millennials and Generation Z.[10]

Though difficult to tell from Influencers' frequent smiling photos or videos full of high-end products they were sent and paid by brands to promote, a quick glance at the comment section of an Influencer's social media account reveals that, by way of their job, Influencers are the target of severe, public, and often sexually charged online harassment from other social media users.[11] Most social media platforms allow users to delete

5. Simon Owens, *Is It Time to Regulate Social Media Influencers?*, N.Y. MAG.: INTELLIGENCER (Jan. 17, 2019), https://nymag.com/intelligencer/2019/01/is-it-time-to-regulate-social-media-influencers.html [https://perma.cc/AQL4-TDRW?type=image].

6. *See* Fabrizio Perrone, *How to Find the Right Influencers for Your Brand*, DRUM (Nov. 18, 2019), https://www.thedrum.com/opinion/2019/11/18/how-find-the-right-influencers-your-brand [https://perma.cc/8KU6-USEH].

7. Heather-Mae Pusztai, *Why Micro-Influencers May Be the Most Effective Influencer Marketing Strategy*, BUFFER (July 23, 2019), https://buffer.com/resources/micro-influencers/ [https://perma.cc/LLM5-TPPV].

8. Amanda Perelli, *The 7 Types of Social Media Influencers, from 'Nano' to 'Macro,' Explained by a Top Marketing Agency*, BUSINESS INSIDER (Jan. 27, 2020, 10:24 AM), https://www.businesinsider.com/types-of-influencers-on-social-media-micro-macro-nano-classification-2020-1 [https://perma.cc/QZ44-M5LA].

9. RAKUTEN MKTG., 2019 INFLUENCER MARKETING GLOBAL SURVEY CONSUMERS 11 (2019), https://go.rakutenmarketing.com/hubfs/docs/2019%20Influencer%20Marketing%20Report%20-%20Rakuten%20Marketing.pdf [https://perma.cc/7UY3-PTJZ].

10. *See* Taylor Locke, *86% of Young People Say They Want to Post Social Media Content for Money*, CNBC (Nov. 11, 2019, 4:34 PM), https://www.cnbc.com/2019/11/08/study-young-people-want-to-be-paid-influencers.html [https://perma.cc/6G72-3HD2] ("86% of Gen Z and millennials surveyed would post sponsored content for money, and 54% would become an influencer given the opportunity, according to the report by research firm Morning Consult, which surveyed 2,000 Americans ages 13 to 38 about influencer culture.").

11. "Monitoring the women's social media feeds, we found that many female influencers are subject to sexually aggressive comments, objectifying messages from followers, and a lack of privacy in their personal lives. Influencers in our study were subject to sexual solicitation and even physical threats." Jenna Drenten, Lauren Gurrieri & Meagan Tyler, *How Highly Sexualised Imagery Is Shaping 'Influence' on Instagram – and Harassment Is Rife*, CONVERSATION (May 7, 2019, 4:08 PM), https://theconversation.com/how-highly-sexualised-imagery-is-shaping-influence-on-instagram-and-harassment-is-rife-113030 [https://perma.cc/PRR3-Q446]. Online sexual harassment can take the form of a harasser "posting inappropriate sexual remarks or questions online," "post[ing] sexually defamatory comments or sensitive private information," "posting and sending sexually offensive photographs," or "creat[ing] a sexually defamatory profile of another on a social networking site or weblog." KrisAnn Norby-Jahner, Comment, *"Minor" Online Sexual Harassment and the CDA §230 Defense: New*

comments left on their posts; however, since Influencers' engagement with users—both negative and positive—and the attention their posts receive are factors that brands consider when deciding which Influencers to work with, "reading such harassment, and making the choice to not delete it, simply becomes 'part of the job.'"[12] The daily, yet unavoidable, exposure to this harassment can lead to detrimental physical and mental effects for the Influencer-victim.[13]

In contrast to traditional marketing departments, Influencers are typically classified by the sponsoring brands as independent contractors,[14] or "self-employed workers who are brought into an organization to provide specific skills."[15] This means that, unlike standard employees, Influencer-independent contractors lack vital workplace protections under both federal and (typically) state employment laws.[16] In particular, Influencers classified as independent contractors are not protected under Title VII of the Civil Rights Act (Title VII),[17] also known as "the central federal antidiscrimination law,"[18] nor the antidiscrimination laws of several states,

Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207, 217–19 (2009). For examples of online sexual harassment against influencers, see *infra* notes 66–70 and accompanying text.

12. Drenten et. al, *supra* note 11.

13. *See infra* notes 79–81 and accompanying text.

14. Keri S. Bruce, Mark S. Goldstein & Sarah T. Hansel, *Is Your Social Media Influencer or Blogger an Employee or an Independent Contractor? What Companies Need to Know Before They Engage Bloggers and Other Independent Contractors*, REEDSMITH: ADLAW BY REQUEST (Apr. 9, 2015), https://www.adlawbyrequest.com/2015/04/articles/social-media/is-your-social-media-influencer-or-blogger-an-employee-or-an-independent-contractor-what-companies-need-to-know-before-they-engage-bloggers-and-other-independent-contractors [https://perma.cc/P866-LQGH]; *see also* Complaint & Demand for Jury Trial at 3, Brueckner v. You Can Beam LLC, No. 1:20-cv-03323-JSR (S.D.N.Y. Apr. 28, 2020) (stating that the plaintiff, a social media influencer, signed an Independent Contractor Agreement prepared by the defendant, a sponsoring corporation, providing that in exchange for a monthly payment of $15,000, the plaintiff would engage in specific promotional activities including Instagram posts and YouTube videos and the defendant could use the plaintiff's likeness during this term); Exhibit A to Complaint for Declaratory Judgment, Fata v. Nature Catalyst, LLC, No. 1:20-cv-00024 (W.D. Mich. Jan. 10, 2020) (The Brand Ambassador Agreement between the plaintiff, a social media influencer, and the defendant, a sponsoring brand included the following provision: "F. Independent Contractor. Each party is an independent contractor in relation to the other party with respect to all matters arising under this Agreement and nothing herein shall be deemed to establish a partnership, joint venture, association or employment relationship between the Parties. Brand Ambassador shall have no express or implied rights or authority to assume or create any obligations on behalf of or in the name of Company or to bind Company to any contract, agreement, or undertaking with any third party.").

15. Karen R. Harned, Georgine M. Kryda & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93, 95 (2010) (quoting Daniel G. Gallagher & Magnus Sverke, *Contingent Employment Contracts: Are Existing Employment Theories Still Relevant?*, 26(2) ECON. & INDUS. DEMOCRACY 181, 187 (2005)).

16. *See* Charlotte S. Alexander, *Misclassification and Antidiscrimination: An Empirical Analysis*, 101 MINN. L. REV. 907, 908 (2017).

17. *See* 42 U.S.C. § 2000e *et seq*.

18. Alexander, *supra* note 16, at 909.

often leaving them without a remedy against the pervasive sexual harassment they receive while doing their job.[19]

It is clear that "[t]echnology is transforming modern employment as new, disruptive ways of conducting business are redefining how the employer-employee relationship functions."[20] Yet, in the United States, laws guarding against sexual harassment have not evolved in tandem with these new work arrangements. Specifically, Influencer Marketing has created a new job for many Americans that falls outside of current antidiscrimination laws. Title VII was enacted, in part, because particular segments of the workforce were consistently the subject of workplace discrimination.[21] Influencers are consistently the subject of online sexual harassment while performing their jobs, yet they lack any similar protection merely because they are typically classified as independent contractors. However, even if some Influencer-brand relationships could properly be classified as an employee-employer relationship, an Influencer would likely not be able to recover under Title VII because of the virtual nature of the harassment, uncertainty surrounding whether social media platforms could be considered a "workplace," and the brand-employer's potential lack of control over the non-employee social media users that perpetrate harassment against Influencers.[22]

This Note proposes that legislative action specifically targeting Influencers and online sexual harassment must be taken to protect this segment of the modern workforce. New legislation, narrowly targeted at online sexual harassment against Influencers, should hold brands accountable for the harassment against the Influencers whose services they profit off of, regardless of whether the Influencer is an employee or an independent contractor.

Part I of this Note provides background on social media influencing as a job, discussing the Influencer-brand relationship, the benefits of Influencer Marketing for a brand, and the financial incentives of Influencer Marketing for Influencers. Part I then goes on to expose the inevitable downside to the glamorous job of influencing: online sexual harassment.[23] Next, Part II discusses the laws in place that attempt to address general incidents of online harassment and highlights their failure to provide victims with relief in many instances.[24] Because online sexual harassment of Influencers could

19. *See id.* at 908.

20. John A. Pearce II & Jonathan P. Silva, *The Future of Independent Contractors and Their Status as Non-Employees: Moving on from a Common Law Standard*, 14 HASTINGS BUS. L.J. 1, 1 (2018).

21. Nicola Kean, *The Unprotected Workforce: Why Title VII Must Apply to Workfare Participants*, 9 TEX. J. ON C.L. & C.R. 159, 167 (2004).

22. *See infra* Section III.B.

23. *See infra* Section I.B.

24. *See infra* Part II.

logically be classified as a form of workplace harassment, Part III follows by analyzing the current federal employment discrimination framework, detailing its inability to provide Influencer-victims of sexual harassment with relief. Expanding on this, Part III provides an overview of Title VII, with emphasis on Title VII hostile work environment claims, and identifies and discusses the problems that would likely block an Influencer from success if they were to bring a Title VII hostile work environment claim against the brand paying them to post on social media.[25] Finally, Part IV of this Note proposes that legislative action narrowly targeting online sexual harassment against Influencers is necessary to protect these modern workers.[26]

I. BACKGROUND

A. Social Media "Influencing" as a Job

As previously explained, an Influencer is a social media user who can "affect the buying habits or quantifiable actions of others" by posting content sponsored by brands in a range of different markets on social media platforms[27] such as Instagram, Facebook, YouTube, Twitter, and LinkedIn.[28] Unlike with a traditional celebrity endorsement, social media users perceive Influencers' relatable online presence and casual stream of content similarly to that of a close friend, rather than as an individual acting to persuade them to buy a product or engage in a service.[29] This "air of authenticity" creates the Influencer's power to influence.[30] Such power runs

25. *See infra* Part III.
26. *See infra* Part IV.
27. Martineau, *supra* note 3.
28. *Influencer Marketing: Social Media Influencer Market Stats and Research for 2021*, BUS. INSIDER: INSIDER INTELLIGENCE (Jan. 6, 2021, 9:19 AM), https://www.businessinsider.com/influencer-marketing-report [https://perma.cc/782D-D3U3]. "Every social platform attracts influencers to some degree, but Instagram is the gold standard for the group. Nearly four in five (79%) brands predominantly tap Instagram for influencer campaigns, compared with Facebook (46%), YouTube (36%), Twitter (24%), and LinkedIn (12%). Katherine Steiner-Dicks, *TikTokers to Teens: Instagram Influencers Banding Together for Better Pay as Influencer Industry Set to Grow to $15bn by 2022*, FREELANCE INFORMER (Sept. 17, 2020), https://www.freelanceinformer.com/creative-editorial-media/brand-influencers-to-unionise-in-the-uk-and-us-as-influencer-industry-set-to-grow-to-15bn-by-2022/ [https://perma.cc/L7KW-8G7H].
29. *See* Martineau, *supra* note 3; *see also* Kevin Payne, *How to Become an Influencer in Your Industry*, HUBSPOT (Nov. 12, 2019), https://blog.hubspot.com/marketing/how-to-become-an-influencer-in-10-steps [https://perma.cc/27NX-UHRS] ("In 2018, a study found that only 4% of people trusted celebrity endorsements. This is probably because they prefer to seek product and service recommendations from those who are, above all, knowledgeable and credible. And today, those qualities often come in the form of social media influencers.").
30. Martineau, *supra* note 3.

deep, as "[s]ix in ten YouTube subscribers would follow advice on what to buy from their favorite [Influencer] over their favorite TV or movie personality,"[31] and nearly 40% of Twitter users report having made a purchase based off of an Influencer's Tweet.[32]

Social media influencing as a profession would not exist without the many brands that capitalize on Influencers' authentic and relatable online personas and loyal follower base through Influencer Marketing. Influencer Marketing can take the form of payments or commission to Influencers, free goods or services, or any other benefit to Influencers that might affect how consumers view their endorsements in exchange for the Influencers promoting the supplying brand on their social media.[33] Influencer Marketing is growing greatly year by year, and the Influencer Marketing industry was estimated to be worth almost $10 billion in 2020.[34] This marketing approach is growing so quickly in part because it is viewed as effective by industry professionals. In a survey of 4,000 industry professionals, 78% reported that they would be dedicating their marketing budgets toward Influencer Marketing in 2020[35] and 91% of those same industry professionals reported that they believed Influencer Marketing to be an effective form of marketing.[36] Some brands even "eschew[] traditional ads altogether" to focus predominately on Influencer Marketing.[37] The appeal for Influencer Marketing may also come from its significant return on investment. Businesses can earn anywhere from $6.50 all the way up to

31. ARON LEVIN, INFLUENCER MARKETING FOR BRANDS: WHAT YOUTUBE AND INSTAGRAM CAN TEACH YOU ABOUT THE FUTURE OF DIGITAL ADVERTISING 12 (2020).

32. @katieaka, *New Research: The Value of Influencers on Twitter*, TWITTER (May 10, 2016), https://blog.twitter.com/en_us/a/2016/new-research-the-value-of-influencers-on-twitter.html [https://perma.cc/W8Z9-575V].

33. Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 89–90 (2020).

34. Werner Geyser, *The State of Influencer Marketing 2020: Benchmark Report*, INFLUENCER MKTG. HUB 7 (Feb. 14, 2021), https://influencermarketinghub.com/influencer-marketing-benchmark-report-2020/ [https://perma.cc/2DJE-JQJS]. In 2016, the Influencer Marketing industry was estimated to be worth $1.7 billion. *Id.* In 2020, the industry's worth had climbed to an estimated $9.7 billion, with roughly a 50% increase in worth each of the years in between. *Id.*

35. *Id.* at 20.

36. *Id.*

37. Roberts, *supra* note 33, at 90. For example, the vitamin-packed, hair growth gummies brand Sugar Bear Hair relies primarily on sponsored Instagram posts to market their product in lieu of traditional ads. *See How Sugar Bear Hair Gummies Took Over Instagram*, GURUPEEPS (July 10, 2019), https://www.gurupeeps.com/post/manage-your-blog-from-your-live-site [https://perma.cc/8D5J-3WTL]. The retailer Revolve is also well known for its Influencer Marketing skills and even takes many of its influencers on trips around the world, dubbed #Revolvearoundtheworld trips, that make for many "Instagrammable moments" for their influencers to post on their profiles. Dhani Mau, *'What are Influencers?' How Revolve Got Investors on Board with Its Marketing Strategy Ahead of IPO*, FASHIONISTA (June 7, 2019), https://fashionista.com/2019/06/revolve-clothing-ipo-marketing-strategy [https://perma.cc/SAT7-AL4W].

$20 or more for each dollar spent on Influencers.[38] Thus, budgets spent on Influencers are budgets well spent.

Brands often hire an Influencer to promote a specific product or service, to promote their brand in general, to participate in a specific campaign the brand is launching, or to form a long-term partnership.[39] The Influencer-brand relationship may be formed directly by a brand contacting an Influencer they desire to work with, or vice-versa, after which the brand offers the Influencer free products or compensation in exchange for the Influencer to "review, rave about, mention, or simply show the products" on their social media profiles.[40] To a lesser extent, the relationship may also be formed with the help of an agent who matches an Influencer with a brand based on the Influencer's targeted audience and reach and a brand's goals and aesthetics.[41] Once a brand and Influencer connect, the two negotiate an agreement, which may include, for example, the number of sponsored posts the Influencer will do for the brand, the type of content to be posted, the length of the relationship, the usage rights of the Influencer's posts, whether the brand will have exclusivity on the Influencer's social media feed and for how long, and the rate the Influencer will be paid.[42] Once the agreement is reached, a creative brief is sent to the Influencer.[43] The creative brief is the Influencer's guide to creating the brand's desired content and includes details such as "[d]ue dates for concepts, deliverables, and posting dates[,] [b]rand overview[,] [c]ampaign overview[,] [c]reative direction: examples of photos that they like/the vibe they want you to go for[,] [t]hought starters for captions[,] [c]ampaign hashtags[,] [and] FTC hashtags."[44] Some briefs may even lay out visual expectations for the Influencer's post, the location where the photo or video is to be taken, the lighting the photos should have, and how much and in what position the product must be shown in the posts.[45] After the Influencer films the requested video or takes the requested photo, the Influencer sends the content to the brand for approval.[46] The

38. *20 Surprising Influencer Marketing Statistics*, DIGIT. MKTG. INST. (Oct. 25, 2018), https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you [https://perma.cc/J84N-GK8V].

39. *See* Jera Foster-Fell, *Anatomy of a Sponsored Post*, JERA BEAN (Mar. 21, 2019), https://www.jerabean.com/blog/2019/3/19/anatomy-of-a-sponsored-post [https://perma.cc/GB3E-PQXU].

40. Roberts, *supra* note 33, at 94.

41. *Id.*

42. *See* Foster-Fell, *supra* note 39.

43. *Id.*

44. *Id.*

45. *See* Werner Geyser, *Creative Briefs: The Influencer Marketer Perspective*, INFLUENCER MKTG. HUB (Mar. 11, 2019), https://influencermarketinghub.com/creative-briefs-the-influencer-marketer-perspective/ [https://perma.cc/8YAL-JRZQ].

46. *See* Foster-Fell, *supra* note 39.

brand either approves the content and the Influencer posts it to social media, or the brand requests edits.[47] When all is said and done, the brand has their product marketed to potentially millions of social media users and the Influencer has their money.

Influencers can be categorized based on the number of followers they have on each social media platform. Their categorization, in part, determines how much money an Influencer can charge per post, which determines how much money they generate annually from social media influencing. [48] Looking at Instagram follower counts, for example, nano-influencers are Influencers who have between 2,500 to 10,000 followers, micro-influencers have between 10,000 and 100,000 followers, mid-tier influencers have between 100,000 and 500,000 followers, and macro-influencers have between 500,000 and 2.5 million followers.[49] Once an Influencer has surpassed the highest follower count for macro-influencer classification, that Influencer has attained celebrity-influencer status.[50] The celebrity-influencer differs from celebrity personalities and famous actors, musicians, athletes, and the like who are primarily known for their work beyond social media but still use their social media platforms to earn money and connect with fans.[51] The celebrity-influencer earned their status because of their social media presence alone.[52] Though nano-influencer status is the lowest Influencer rank, nano-influencers can generate between $30,000 and $60,000 annually,[53] and the potential profit only increases in accordance with the number of followers the Influencer has. Once an Influencer hits one million followers or more, for example, they may have the power to charge $100,000 or more for just one post depending on the platform and the industry.[54] Needless to say, Influencers charge, and brands are willing to pay, a significant amount for their marketing services, with most Influencers "earning enough from sponsored content to make a living or justify the time invested in a side hustle."[55]

Despite the financial success felt by both brands and Influencers from this effective marketing tactic, it is apparent that brands come out on top, as

47. *See id.*
48. *See* Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX (Nov. 28, 2018, 6:00 PM), https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube [https://perma.cc/5SBZ-CB7G?type=image].
49. Perelli, *supra* note 8.
50. *Id.*
51. *See id.*
52. *Id.*
53. Lieber, *supra* note 48.
54. *Id.*
55. Roberts, *supra* note 33, at 92.

Influencers who put themselves online for the world to see inevitably must endure online sexual harassment.

B. Online Harassment

Social media platforms provide a great space for rapid connection, exchange of information and content, and active participation in digital political activism and contentious debate.[56] Yet the constant encouragement for social media users, and the monetary incentive for Influencers particularly, to publicly share their personal "thoughts, feelings, likes, and dislikes to express their affiliation with certain content, figures, products, and brands" paves a dark path for online harassment.[57] Though "[o]nline harassment is one of the most indelible aspects of the Internet,"[58] it is also a pervasive problem, with nearly half of Americans reporting that they have experienced online harassment during their time spent online.[59] Further, "[h]arassment in social media tends to involve sexual elements in its application."[60] In particular, social media is a "notoriously hostile place[] for women who dare to share opinions."[61] Women face more than double the rate of online harassment reported by men of the same age range.[62] Given that 77% of the total number of Influencers are women,[63] it is easy to see how Influencers, individuals followed by thousands and thousands of other social media users, could quickly become victims of harsh online sexual harassment schemes.

Online sexual harassment can take many forms, including, but not limited to, a harasser "posting inappropriate sexual remarks or questions

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56. Kim Barker & Olga Jurasz, *Online Misogyny: A Challenge for Digital Feminism?*, 72 J. INT'L AFFS. 95, 95 (2019).

57. Tom van Laer, *The Means to Justify the End: Combating Cyber Harassment in Social Media*, 123 J. BUS. ETHICS 85, 85 (2014).

58. John T. Holden, Thomas A. Baker II & Marc Edelman, *The #E-Too Movement: Fighting Back Against Sexual Harassment in Electronic Sports*, 52 ARIZ. ST. L.J. 1, 21 (2020).

59. Maeve Duggan, *Men, Women Experience and View Online Harassment Differently*, PEW RSCH. CTR. (July 14, 2017), https://www.pewresearch.org/fact-tank/2017/07/14/men-women-experience-and-view-online-harassment-differently/ [https://perma.cc/8A55-LQXG] ("Overall, 41% of Americans have experienced online harassment, defined in the survey as offensive name-calling, purposeful embarrassment, physical threats, stalking, sexual harassment, or harassment over a sustained period of time.").

60. Virgin Suciyanti Maghfiroh & Faqihul Muqoddam, *Dynamics of Sexual Harassment on Social Media*, PROCEEDING: INT'L CONF. MENTAL HEALTH, NEUROSCIENCE, & CYBERPSYCHOLOGY, 153, 154 (2018).

61. Barker & Jurasz, *supra* note 56, at 95–96.

62. Duggan, *supra* note 59 ("Some 21% of women ages 18 to 29 have been sexually harassed online, a figure that is more than double that of men in the same age group (9%).").

63. Amy Gesenhues, *Women Make Up Majority of Influencer Community, Still Earn Less Than Male Influencers*, MKTG. LAND (June 6, 2019, 11:06 AM), https://martech.org/women-make-up-majority-of-influencer-community-earn-less-than-male-influencers/ [https://perma.cc/QF4G-PEUC].

online," "post[ing] sexually defamatory comments or sensitive private information," "posting and sending sexually offensive photographs," or "creat[ing] a sexually defamatory profile of another on a social networking site or weblog."[64] Online sexual harassment against internet-famous individuals is nothing new. For instance, in 2007 blogger Kathy Sierra, whose blog was centered on computer software, stopped posting on her blog altogether after seeing, among other things, "a photo of her muzzled by what appears to be a piece of lingerie with the title 'I dream of Kathy Sierra.'"[65]

Current attacks on Influencers come in all forms. German Influencer Charlotte Weise, whose online persona revolves around fashion, veganism, natural cosmetics, self-love, and positive thinking, was the target of a cruel online sexual harassment ploy when a social media user re-cut a video of her dancing and uploaded it to a porn website.[66] Charlotte recounts feeling "completely powerless," and the video remained online for days while she figured out a way to get the harassing content removed.[67] "Katie," a plus-size fashion Influencer who influences in addition to working a day job, reports times when social media users have maliciously called her day job in attempts to sabotage her career, and have threatened over social media to mutilate her body.[68] A look at the comments section of Influencers' social media posts will show just how easy it is to leave a sexually charged and disturbing comment, even on posts affiliated with brands. Take Influencer Jess Hunt's Instagram post from January 11, 2021, for example.[69] She posted a photo wearing a dress from a clothing brand named White Fox, noting in her caption that the photo was an advertisement for the brand, and received thousands of comments, including ones like "WOW amazing beautiful sexy looks body I like to kisses [sic] all your body legs butt back baby," "One day this beautifaul [sic] body 😍will enter the grave and

64. Norby-Jahner, *supra* note 11, at 217–19.

65. Theresa Cook, *Female Bloggers Face Threats: What Can Be Done?*, ABC NEWS (May 1, 2007, 10:10 PM), https://abcnews.go.com/TheLaw/story?id=3107139&page=1 [https://perma.cc/7NA4-B6T3].

66. *Global Influencers Speak Out About Online Abuse*, PLAN INT'L, https://plan-international.org/girls-get-equal/global-influencers-speak-out-online-abuse [https://perma.cc/6KTM-YBAM].

67. *Id.*

68. Taylor Lorenz, *Instagram Has a Massive Harassment Problem*, ATLANTIC (Oct. 15, 2018), https://www.theatlantic.com/technology/archive/2018/10/instagram-has-massive-harassment-problem/572890/ [https://perma.cc/B4QR-TAZA]. "Katie," an influencer with hundreds of thousands of followers, requested that *The Atlantic* refer to her by a pseudonym for fear of backlash from Instagram and her harassers. *See id.*

69. Jess Hunt (@jesshunt), INSTAGRAM (Jan. 11, 2021) https://www.instagram.com/p/CJ6otZfsUlD/.

worms will eat it 😔," and many, many other comments sexualizing her appearance.[70]

Online sexual harassment may produce all the effects that real-life, or face-to-face harassment does,[71] but the elements of "anonymity, amplification, and permanence" that lurk behind online sexual harassment may imprint even more harmful and long-lasting effects on its victims.[72] With online harassment, the harasser can hide behind the device and remain anonymous to their targets, making it almost impossible for a victim to seek legal remedies against the harasser or do anything to protect themselves on their own.[73] Additionally, the public nature of online sexual harassment makes it easier for these anonymous harassers to band together and target a single victim,[74] which may result in "more aggressive, deviant, antinormative, or socially unacceptable behaviors" directed at the victim until they feel as if everyone is against them.[75] Notably, when harassing pictures or texts are disseminated online, they are essentially glued to the internet[76] and become "global in reach."[77] This permanence can make a victim feel more violated than they would in a more private and less continuous situation.[78]

As with other forms of sexual harassment, online sexual harassment can physically and mentally effect its victim, with harm crystalizing as a loss of sleep, loss of appetite, trauma, shame, and stress, to name just a few examples.[79] Victims also face a high risk of depression and anxiety and may confront an increased propensity for harming oneself.[80] Some instances of online harassment have even pushed the victim to suicide.[81] In addition to

70. *Id.*

71. Sexual harassment in the workplace inflicts harm on its victims crystallizing in a loss of economic and employment opportunities, deterioration of physical and psychological well-being, and lasting trauma. Jennifer L. Vinciguerra, Note, *The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Disorder in Sexually Harassed Women*, 42 CLEV. ST. L. REV. 301, 305–06 (1994).

72. Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 682 (2012).

73. *Id.*

74. *Id.*

75. Norby-Jahner, *supra* note 11, at 221.

76. Franks, *supra* note 72, at 683.

77. Norby-Jahner, *supra* note 11, at 221.

78. *Id.*

79. Sarah Eberspacher, *'Delete Your Account' or Deal with It? How News Organizations Are Failing to Support Female Reports Against Online Harassment*, 21 GEO. J. GENDER & L. 143, 154 (2019).

80. Dylan E. Penza, Note, *The Unstoppable Intrusion: The Unique Effect of Online Harassment and What the United States Can Ascertain from Other Countries' Attempts to Prevent It*, 51 CORNELL INT'L L.J. 297, 308 (2018).

81. *See* United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009) (defendant was charged with one count of conspiracy in violation of 18 U.S.C. § 371 and three counts of violating a felony portion of the Computer Fraud and Abuse Act after the defendant created a fake MySpace profile of a

physical and mental destruction, online harassment disrupts a victim's economic security.[82] Victims of persistent online harassment may incur costs from attempts to protect themselves, such as "legal fees, online protection services, and missed wages."[83] Victims may also suffer economically from the loss of business opportunities.[84] Brands may refrain from employing a victim of online harassment for fear that the perpetrators will attack the brand in turn.[85] Additionally, Influencer-victims that limit "public exposure online by making their accounts private and otherwise refraining from engaging in the social life of the internet" likely would directly incur a loss of business opportunities.[86] Audience engagement is a factor brands consider when deciding whether they want to work with a particular Influencer.[87] Less engagement online would directly result in fewer brand deals and less attention, which would negatively impact the Influencer's chance for success in their chosen career.

Online sexual harassment is distinguishable from traditional forms of harassment because it is "an unstoppable intrusion"[88] in which victims are deprived of any way to escape the harassing environment.[89] Some argue that the victim has the option to simply exit the social media applications or delete their social media accounts altogether to effectively end the harassment.[90] For Influencers who have created their career and earn their livelihoods on social media, however, this is not a practical or even rational

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sixteen-year-old male and used the profile to interact with a thirteen-year-old female, eventually telling the thirteen-year-old that "the world would be a better place without her in it," resulting in the thirteen-year-old died by suicide later that same afternoon); *see also* Neal Buccino, *Rutgers Honors Tyler Clementi Ten Years Later*, RUTGERS TODAY (Sept. 22, 2020), https://www.rutgers.edu/news/rutgers-honors-tyler-clementi-10-years-later [https://perma.cc/DTL6-547Y] (discussing the cyber-harassment of Tyler Clementi, whose college roommate ridiculed and mocked him on social media for his sexual orientation, ending with his death by suicide less than one month into the academic year).

82. *See* Emma Marshak, Note, *Online Harassment: A Legislative Solution*, 54 HARV. J. ON LEGIS., 503, 509–512 (2017).

83. Amanda Hess, *Why Women Aren't Welcome on the Internet*, PAC. STANDARD (June 14, 2017), https://psmag.com/social-justice/women-arent-welcome-internet-72170 [https://perma.cc/D3HB-N499].

84. Marshak, *supra* note 82, at 509.

85. *Id.*

86. *Id.* at 510.

87. *See* John Boitnott, *7 Factors Brands Need to Consider Before Hiring an Influencer*, ENTREPRENEUR (June 16, 2015), https://www.entrepreneur.com/article/247204 [https://perma.cc/HFR3-LV84]. Audience engagement is measured by how much an influencer interacts with their followers online. *Id.* "[R]egular engagement means followers are more likely to pay attention to recommendations," *id.*, and thus a brand is more inclined to work with an influencer who employs such regular engagement.

88. Penza, *supra* note 80, at 305.

89. Norby-Jahner, *supra* note 11, at 223.

90. Penza, *supra* note 80, at 306 ("A rational critique to this concept of online harassment as an 'unstoppable intrusion' is that, unlike verbal harassment in the physical world, the victim can simply turn off the computer and effectively end the harassment.").

remedy. Removing themselves from the harassing environment would be akin to quitting their job and starting over from scratch. Additionally, social media providers have no legal obligation to remove harassing or offensive content from their platforms,[91] meaning harassment may never truly end so long as the harassing post or text is available online for all to see.

Because "social media, and the internet broadly, is so vital to our everyday life,"[92] it is necessary to protect users from online sexual harassment. Further, Influencers need this protection because they cannot remove themselves from the harassing environment without losing their livelihood.[93] Influencers must often endure the constant harassment while performing their jobs. The legal scheme currently in place that aims to provide protection against online harassment fails to adequately ensure those who make their living on social media can do so free from "constant and inescapable" harassing interactions.[94]

II. LEGISLATION TARGETING ONLINE HARASSMENT

Under the current landscape, victims of online harassment have limited options for redress,[95] and Influencers are no exception. There are two main obstacles that block many instances of online harassment from redress. First, internet speech is protected under the First Amendment, and this protection "places limits on laws that attempt to govern online speech."[96] There are several categories of speech that are excluded from First Amendment protection,[97] such as defamation,[98] fighting words,[99] true

91. ALICE E. MARWICK & ROSS MILLER, FORDHAM L. SCH. CTR ON L. & POL'Y INFO., ONLINE HARASSMENT, DEFAMATION, AND HATEFUL SPEECH: A PRIMER OF THE LEGAL LANDSCAPE, 7–8 (2014), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1002&context=clip [https://perma.cc/4EHK-EK3R].

92. Penza, *supra* note 80, at 306.

93. *See supra* Section I.A. for a background on influencing as a job.

94. Drenten et. al, *supra* note 11 ("The intensity, volume and public nature of this harassment makes social media influencers particularly vulnerable. They do not have the support of a traditional workplace and employer in dealing with these constant and inescapable interactions.").

95. MARWICK & MILLER, *supra* note 91, at 7.

96. *Id.* at 8.

97. *Id.* at 7.

98. "Defamation is the communication of a false statement of fact that harms the reputation of a victim." *Id.* at 9.

99. Fighting words consist of content that "embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.* at 10 (emphasis added) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 393 (1992)). Various courts disagree as to what qualify as fighting words. *Id.*

threats,[100] and obscene speech,[101] but the bar to bringing a successful action under each of these categories of unprotected speech is high.[102]

Second, victims have limited options from whom they can seek recovery. Section 230 of the Communications Decency Act[103] provides immunity to any "interactive computer service," meaning any website message board, blog-hosting service, or social media site, from lawsuits in "defamation, negligence, gross negligence, unfair competition and false advertising" based on content posted by a third-party user of the service, so long as the service did not contribute substantively or in an editorial capacity.[104] As such, victims of online harassment often cannot hold the social media provider liable, unfortunately leaving them with just the option of holding the often anonymous or pseudonymous perpetrator liable.[105] An anonymous online harasser is difficult to trace, meaning the harasser can easily avoid liability simply by remaining unknown.[106] A victim may be able to get around the anonymity barrier by "unmasking" the anonymous perpetrator through a court order forcing the social media service to disclose the perpetrator's IP address and personal information associated with the account.[107] This is not an easy task, however. A victim is required to conquer a number of preliminary steps to show that unmasking is warranted.[108]

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100. "True threats" encompass those statements where the "speaker 'means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" *Id.* (quoting Virginia v. Black, 538 U.S. 343, 360 (2000)).

101.

> To determine whether content qualifies as obscene, and is therefore constitutionally unprotected, the Supreme Court created the *Miller* test. Under the *Miller* test, speech is obscene if it meets three conditions: (1) "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest, (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Several states have cyberharassment laws that criminalize certain obscene speech using this definition . . . . In practice, there is a high threshold for obscenity.

Id. at 9. (citations omitted).

102. Eberspacher, *supra* note 79, at 164. To constitute "fighting words" the online speech would have to "incit[e] imminent lawless action." MARWICK & MILLER, *supra* note 91, at 9–10 (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)). Most online speech, even if violent, will not be able to meet this requirement. *Id.* at 10. Similarly, "it can be quite difficult for internet speech to pass the 'true threat' test," because of its intent requirement. *Id*. at 10–11. The threshold for obscenity is high, as well. *Id.* at 9.A claim for defamation may offer some solace for victims, but only if the victim can show that the online harassment is a false statement, rather than pure opinion. *Id.* at 19.

103. 47 U.S.C. § 230.

104. MARWICK & MILLER, *supra* note 91, at 14. An interactive computer service may be held liable, however, under federal criminal law and certain state claims. *Id.*

105. *See supra* notes 71–73 and accompanying text.

106. Norby-Jahner, *supra* note 11, at 228.

107. MARWICK & MILLER, *supra* note 91, at 12.

108. Eberspacher, *supra* note 79, at 164–65. Courts have created various tests to determine if unmasking should be ordered, but most tests follow the same pattern: first, a plaintiff must take

Further, a court tasked with deciding whether to issue such an order to unmask is faced with the fact that there is a right to anonymous speech under the First Amendment and must weigh this consideration before issuing the court order.[109]

Despite these obstacles, select federal laws attempt to provide some relief for victims of online harassment.[110] Victims that attempt to take advantage of the laws in place find success in only a limited set of circumstances. The Interstate Communications Act (ICA),[111] for instance, states that a person who "transmits in interstate or foreign commerce any communication containing . . . any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."[112] The ICA has been applied to communications on social media platforms;[113] however, it only applies to *true* threats to injure.[114] This is a difficult standard to satisfy for threats made online, especially when made anonymously, as there is no way to know whether the perpetrator has the means to carry out the threat without knowing the perpetrator's identity and location.[115] This standard also excludes many forms of online sexual harassment that are not violent in nature and do not include a "threat to injure."[116] The Computer Fraud and Abuse Act (CFAA)[117] similarly

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reasonable steps to notify the defendant of the possibility of an unmasking court order, and second, the court considers whether the plaintiff has provided enough evidence to support all of the elements of the claim the plaintiff is seeking, "typically by comparing it to existing procedural standards, such as whether the case would be strong enough to survive a motion for summary judgment or a motion to dismiss." MARWICK & MILLER, *supra* note 91, at 13. If a plaintiff claims that an anonymous poster defamed them, for example, the court will consider whether the plaintiff has provided enough evidence to support each element of a defamation claim before ordering an unmasking. *Id.* at 13.

109. *Id.* at 12. The right to engage in anonymous speech would be "of little practical value if . . . there was no concomitant right to remain anonymous after the speech is concluded." *In re* Does 1-10, 242 S.W.3d 805, 820 (Tex. Ct. App. 2007) (citation omitted). The chilling effect on the First Amendment right of free speech that a threat to a speaker's ability to remain anonymous would have is what pushes many courts to require plaintiffs to make a threshold showing before considering unmasking an anonymous speaker. Nathaniel Plemons, Note, *Weeding Out Wolves: Protecting Speakers and Punishing Pirates in Unmasking Analyses*, 22 VAND. J. ENT. & TECH. L. 181, 195–96 (2019).

110. Several states have passed laws that address online harassment; however, what constitutes online harassment and violates each law is an extremely state-specific inquiry. *See* Holden et. al, *supra* note 58, at 30. A full review of such state laws and their efficacy is beyond the scope of this Note.

111. 18 U.S.C. § 875(c).

112. *Id.*

113. *See, e.g.*, Elonis v. United States, 575 U.S. 723 (2015).

114. A true threat, by nature, is "a threat that . . . would cause a reasonable person to reasonably fear that the threat will be carried out (even if the person making the threat does not actually intend to carry out the threat)." A. Meena Seralathan, Note, *Making the Time Fit the Crime: Clearly Defining Online Harassment Crimes and Providing Incentives for Investigating Online Threats in the Digital Age*, 42 BROOK. J. INT'L L. 425, 440–41 (2016). *See also supra* text accompanying note 100.

115. Seralathan, *supra* note 114.

116. *See* MARWICK & MILLER, *supra* note 91.

117. 18 U.S.C. § 1030(a)–(j).

"addresses a wide variety of computer crimes related to misuse of computers."[118] In actuality, however, courts have applied it only in narrow circumstances, calling into question its efficacy in online harassment situations.[119] For example, a California district court has ruled that the CFAA cannot be extended to cover an adult user's conduct of creating a fake profile of a sixteen-year-old boy on the social media platform MySpace, in violation of MySpace's Terms of Service, and using that fake profile to tell a thirteen-year-old MySpace user that "the world would be a better place without her in it,"[120] leading the thirteen-year-old to kill herself shortly after.[121]

Federal laws that directly address cyberstalking, or the use of technology to make another person fearful or concerned for his or her safety,[122] are equally limited in their application. The Federal Interstate Stalking Punishment and Prevention Act,[123] for instance, imposes a criminal punishment on a person who,

> with the intent to. . .harass. . ., uses. . . any interactive computer service or electronic communication service or electronic communication system of interstate commerce. . . to engage in a course of conduct that—
>
> (A) places that person in reasonable fear of the death of or serious bodily injury to a person, a pet, a service animal, an emotional support animal, or a horse described in clause (i), (ii), (iii), or (iv) of paragraph (1)(A); or
>
> (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A) . . . .[124]

118. Holden et. al, *supra* note 58, at 29.

119. *Id.*

120. United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

121. *Id.* at 465–67 (concluding that while an intentional breach of MySpace's Terms of Service could potentially constitute accessing the MySpace computer/server without authorization and/or in excess of authorization under the CFAA, basing a CFAA violation upon the conscious violation of a website's terms of service runs afoul of the void-for-vagueness doctrine because of the absence of minimal guidelines to govern law enforcement and the actual notice deficiencies).

122. Kara Powell, *Cyberstalking: Holding Perpetrators Accountable and Providing Relief for Victims*, 25 RICH. J.L. & TECH., no. 3, 2019, at 1, 2. Cyberstalking encompasses some forms of online sexual harassment, including publishing derogatory posts on social media and sending unwanted and inappropriate photographs or videos. *Id.*

123. 18 U.S.C § 2261A(2) (2018).

124. *Id.*

Though it looks promising, Section 2261A(2) contains no explicit or implied private right of action.[125] A defendant-harasser can only be liable if he or she is "criminally convicted in a case brought by the government."[126] Further, the statute requires "intent," which means that the defendant must have *actually intended* to harass the victim.[127] This requirement is challenging to satisfy in cyberstalking cases, where there is no personal relationship between the victim and the perpetrator and "where the perpetrator hides behind a cybermedium."[128] Another federal cyberstalking law, the Communications Act (CA),[129] specifically makes it a crime to *anonymously* direct harassing communication through a telephone call or telecommunications device at a person with the intent to harass.[130] Just like Section 2261(A), the CA requires specific intent,[131] which presents the same set of challenges for a victim. Also, the CA narrowly applies only to anonymous harassment that involves "direct communication with a victim."[132] Thus, the CA fails to address many forms of online harassment, such as instances where harassing photos, comments, or private information are posted to a webpage or social media profile without any direct communication with the victim, or situations where harassers create fake social media profiles of another user for the purpose of harassment.

As this Part highlights, laws targeting online harassment provide victims relief in only a limited set of circumstances. Many instances of online harassment often go unreported out of fear from the victim that their claim will not be taken seriously.[133] This fear seems warranted, as law enforcement officers either lack the ability to properly handle an online harassment case or, when officers do receive reports of online harassment,

125. Powell, *supra* note 122, at 10. "A private right of action is the right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement." Estate of McFarlin v. State, 881 N.W.2d 51, 56 (Iowa 2016) (quoting Shumate v. Drake Univ., 846 N.W.2d 503, 507 (Iowa 2014)).

126. Powell, *supra* note 122, at 10.

127. *Id.* at 11. "[E]ven if the victim experiences severe emotional distress that causes her to withdraw from school, work, and society, the claim will fail if it cannot be proven that the perpetrator actually intended to cause distress." Cassie Cox, Comment, *Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws*, 54 JURIMETRICS J. 277, 287 (2014).

128. Cox, *supra* note 127, at 287.

129. 47 U.S.C. § 223. One court has found this statute unconstitutional as applied in a situation where a United States citizen anonymously sent eight vitriolic messages to a United States senator through the senator's official website contact form. *See* United States v. Weiss, 475 F. Supp. 3d 1015, 1038 (N.D. Cal. 2020).

130. 47 U.S.C. § 223(1)(C).

131. Seralathan, *supra* note 114, at 444.

132. *Id.*

133. Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 402 (2009).

are unwilling to investigate the situation until the harassment has traveled offline, advising victims to ignore the harassment until then.[134] Even if a lawsuit is filed, victims are met with steep challenges and, in many cases, no one to hold liable.[135] Influencers, no strangers to online harassment,[136] would likely fare no better than the average social media user under these laws, though they are unique from the typical user in the sense that their job relies entirely on social media and they are being paid to open themselves up to this harassment.[137] Despite this, federal antidiscrimination laws appear no more effective at combatting online harassment against Influencers than these online harassment laws.

III. ONLINE SEXUAL HARASSMENT OF INFLUENCERS VIEWED AS WORKPLACE SEXUAL HARASSMENT

A. Distinguishing Between Employees and Independent Contractors Under Title VII

While the independent contractor title historically was reserved for "entrepreneurial individuals with specialized skills that demand[] higher pay on the open market," independent contracting has recently begun to invade industries that used to be dominated by employees.[138] Coincidentally, "[m]isclassification of employees as independent contractors has been a persistent problem in recent years."[139] This is significant because individuals classified as independent contractors are denied many of the basic protections American employees enjoy.[140] Most major federal labor and employment statutes apply exclusively to employees,[141] and state employment laws are also, in many cases, interpreted to apply only to employees.[142] For example, because of this distinction, independent contractors cannot bring claims

> for overtime compensation under the Fair Labor Standards Act (FLSA) and comparable

134. *Id.* at 402–03.
135. *See supra* notes 71–73 and accompanying text.
136. *See supra* notes 66–70 and accompanying text.
137. *See supra* Part I.
138. Pearce II & Silva, *supra* note 20, at 12–13. Some of these industries include "home health care, janitorial services, and food service." *Id.* at 13.
139. *Id.*
140. *See* Alexander, *supra* note 16, at 907–08.
141. *Id.* at 908.
142. Debbie Whittle Durban, *Independent Contractor or Employee?: Getting It Wrong Can Be Costly*, 21 S.C. LAW. 31, 32 (2010).

> state wage and hours law; claims for discrimination, harassment and retaliation under
>
> Title VII, the Age Discrimination in Employment Act (ADEA), the Americans With
>
> Disabilities Act (ADA) and others; claims under the National Labor Relations Act,
>
> ERISA[,] and the Family and Medical Leave Act; and claims for wrongful termination
>
> under state laws.[143]

Properly determining whether a worker is an independent contractor or an employee is an incredibly fact-intensive and subjective process[144] that "requires identifying applicable federal and state laws, then applying a number of federal tests that vary between circuits and another set of state law tests that vary among states."[145] This can be a confusing and ambiguous process[146] because it is not always clear which test should be used, each test requires a complex multifactor analysis that produces different results even in substantially similar factual situations, and some courts consider factors of the tests to be "inapplicable and outdated."[147] This legal ambiguity surrounding proper worker classification further encourages employers to classify their workers as independent contractors rather than employees in uncertain situations.[148]

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143. *Id.*

144. *Id.* at 33.

145. Adam H. Miller, *Issues in Vermont Law: Curbing Worker Misclassification in Vermont: Proposed State Action to Improve a National Problem*, 39 VT. L. REV. 207, 225 (2014). There are three tests commonly used to determine whether a worker is an independent contractor or an employee: the common law agency or right-to-control test, the economic realities test, and a hybrid test. Pearce II & Silva, *supra* note 20, at 9. Courts applying to right-to-control test place the most emphasis on "hiring party's right to control the manner and means by which the product is accomplished." Robert Sprague, *Using the ABC Test to Classify Workers: End of the Platform-Based Business Model or Status Quo Ante?*, 11 WM. & MARY BUS. L. REV. 733, 741 (2020). Under the economic realities test, the focus is heavily on whether a worker, "as a matter of economic reality," is economically dependent upon the putative employer or is more properly said to be "in business for themselves." *Id.* at 743. The hybrid test combines the elements of both the right-to-control test and the economic realities test, though the employer's right to the worker is the most important factor. *Id.* at 744.

146. Pearce II & Silva, *supra* note 20, at 15; *see also* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 121 (1994) ("Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

147. Pearce II & Silva, *supra* note 20, at 15.

148. *Id.* at 14–15.

There is no universally applied test for determining whether an individual is an employee or an independent contractor when ambiguities arise in a Title VII claim.[149] Congress enacted Title VII after recognizing that particular groups were consistently the subject of workplace discrimination,[150] and, by enacting Title VII, intended to give all persons, especially those with little bargaining power,[151] the right to a workplace free from discrimination.[152] However, "[t]he discrimination targeted by Title VII relates to the field of employment, and therefore courts have consistently held that Title VII contemplates some employment relationship."[153] To validly state a claim under Title VII, the individual looking for the protection must be an employee of the business they seek to hold accountable.[154] As stated previously, independent contractors are left unprotected, so the employee or independent contractor classification is important.[155]

Courts most often use one of five different tests to determine whether a worker is an employee or an independent contractor when the question arises in a Title VII claim: "(1) the benefits analysis test, (2) the common law agency test, (3) the primary purpose test, (4) the economic realities test, and (5) the hybrid test."[156] Courts apply the benefits analysis test in one of two ways: (1) as a threshold test to gain access to consideration under another test,[157] asking "whether, and to what extent, the worker receives remuneration, whether direct or indirect,"[158] or (2) as a stand-alone test, asking whether the benefit the worker received from the putative employer is sufficient to determine the worker is an employee.[159] Typically, courts

149. Elizabeth Heffernan, Note, *"It Will Be Good for You," They Said: Ensuring Internships Actually Benefit the Intern and Why It Matters for FLSA and Title VII Claims*, 102 IOWA L. REV. 1757, 1768 (2017).

150. Nicola Kean, *The Unprotected Workforce: Why Title VII Must Apply to Workfare Participants*, 9 TEX. J. ON C.L. & C.R. 159, 167 (2004).

151. *Id.* at 166.

152. H.R. REP. NO. 88-914, at 26 (1963).

153. Vakharia v. Swedish Covenant Hosp., 765 F. Supp. 461, 463 (N.D. Ill. 1991) (citations omitted) (internal quotations omitted).

154. Taylor J. Freeman Peshehonoff, *Title VII's Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail America's Workforce*, 72 OKLA. L. REV. 479, 494 (2020).

155. Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 180 (2006) ("[D]espite expansive application in many other respects, Title VII . . . [has] been interpreted to guarantee only to traditional employees, and not to independent contractors, the right to be free from workplace discrimination.").

156. Freeman Peshehonoff, *supra* note 154, at 494.

157. *Id.* at 495. The Second, Fourth, and Eighth Circuits use the benefits analysis test as a threshold test before considering one of the other tests. Heffernan, *supra* note 149, at 1771.

158. Lauren Fredrickson, Comment, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 256 (2013).

159. *Id.* at 256. The Sixth and Ninth Circuits utilize the benefits analysis test as a stand-alone test. Heffernan, *supra* note 149, at 1770.

follow the first approach, applying the benefits analysis test as a threshold before considering another test.[160] To pass the threshold, the putative employee must receive a benefit, like monetary compensation or traditional benefits,[161] that "plausibly approximate[s] an employment relationship."[162] Where no benefit is received from the purported employer, no plausible employment relationship exists.[163]

Assuming the threshold is passed, courts move on to apply one of the other tests. Courts that apply the common law agency test determine whether an individual is an employee based on the employer's right to control the worker.[164] Courts using the primary purpose test analyze the entire relationship of the worker and the putative employer, searching for the primary purpose of the relationship,[165] and may consider "the incentives and benefits on both sides of the table"[166] to determine if an employment relationship exists. The economic realities test is less technical than both the primary purpose test and the common law agency test, and courts that use this test consider "the worker's economic dependence on her job, the work she performs, and the power balance between employer and worker."[167] Lastly, the hybrid test encompasses both the economic realities test and the common law agency test.[168] Courts typically prefer the common law agency test, the economic reality test, or the hybrid test.[169]

Determining whether an Influencer should properly be considered an employee under each one of these tests would be a very fact-intensive inquiry, unique to each Influencer-brand relationship.[170] It is also an inquiry that courts have not yet dealt with. Given the general nature of an Influencer-brand relationship, however, it is not hard to imagine a situation where an Influencer would properly be classified as an employee, rather than an independent contractor, under one or more of these tests. For

160. Fredrickson, *supra* note 158, at 255–56.

161. Freeman Peshehonoff, *supra* note 154, at 495–96.

162. Graves v. Women's Professional Rodeo Ass'n, 907 F.2d 71, 74 (8th Cir. 1990) ("Courts have turned to analyses such as the 'economic realities' test and 'right to control' test under Title VII only in situations that plausibly approximate an employment relationship.").

163. O'Connor v. Davis, 126 F.3d 112, 115–16 (2nd Cir. 1997) (holding that an unpaid student intern was not an employee within the meaning of Title VII because she was not a "hired party," as she did not receive compensation for her work, and thus failed to meet the perquisite for analysis of her employment relationship under the common-law agency principles).

164. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 80 (1984).

165. Heffernan, *supra* note 149, at 1772.

166. Fredrickson, *supra* note 158, at 259.

167. Heffernan, *supra* note 149, at 1773.

168. Freeman Peshehonoff, *supra* note 154, at 502.

169. Fredrickson, *supra* note 158, at 255.

170. *See id.*

instance, most Influencers receive monetary compensation or other comparable benefits from brands to promote products on the Influencer's personal social media profiles.[171] This direct compensation establishes that an Influencer-brand relationship plausibly approximates an employment relationship under the benefits analysis test[172] and would allow courts to move to another test to assess the relationship. If a court is to analyze the relationship under the common-law agency test, for example, the central inquiry is whether the putative employer controls the manner and means of the worker's performance.[173] In a general brand-Influencer relationship, the brand dictates, at a minimum, the date the Influencer must upload their sponsored post to social media and the creative direction of the post, meaning the theme or ambiance the brand wants the Influencer to recreate in their post.[174] Brands sometimes even require a specific location, lighting, or positioning of the product the Influencer must capture in their post[175] and may script the phrasing and substance of the caption the Influencer must use for their post.[176] Given these aspects of the relationship, a court applying the right-to-control test may find that the brand's control over the Influencer is enough to establish an employment relationship. Theoretically, then, the Influencer could bring a claim under Title VII.

B. Barriers to Recovery for Influencer-Victims of Online Sexual Harassment Under Title VII

It would seem like a victory for an Influencer, specifically one who is a victim of online sexual harassment, to earn employee classification and be covered under Title VII. An Influencer-employee would likely face steep barriers to recovery, however, if they tried to bring a claim for sexual harassment against their employer, a.k.a. the brand that sponsors them. To highlight these barriers, this Section proceeds as follows: Subsection 1 discusses the Title VII hostile work environment harassment claim, which is the category of actionable behavior under which online sexual harassment against Influencer-employees would fall, and raises concern that the negligence standard for employer liability for non-employee harassment

171. Roberts, *supra* note 33, at 89–90.
172. *See* Graves v. Women's Professional Rodeo Ass'n, 907 F.2d 71, 73–74 (8th Cir. 1990).
173. Sprague, *supra* note 145, at 741.
174. *See* Foster-Fell, *supra* note 39.
175. Eric Dahan, *Creative Briefs: The Influencer Marketer Perspective*, INFLUENCER MARKETING HUB (Mar. 11, 2019), https://influencermarketinghub.com/creative-briefs-the-influencer-marketer-perspective/ [https://perma.cc/5Q45-ACS8].
176. *See* Foster-Fell, *supra* note 39.

may present a barrier for Influencer-employees.[177] Next, Subsection 2 details how social media harassment has been treated in the context of a hostile work environment claim.[178] This Subsection looks at cases where the social media harassment occurred in conjunction with instances of in-person workplace harassment where the harassment was perpetrated solely in an online forum.[179] Lastly, Subsection 3 concludes by discussing barriers to recovery that Influencer-employees are likely to face given the treatment of social media harassment previously seen in Title VII hostile work environment claims.[180]

1. Title VII Hostile Work Environment Claims

Title VII makes it an "unlawful employment practice 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."[181] Sexual harassment in the workplace began to be viewed as illegal sex discrimination in the 1970s,[182] but it was not until the 1980s that sexual harassment was recognized as an actionable form of sex discrimination under Title VII,[183] both by the Equal Employment Opportunity Commission (EEOC), established by Title VII "to enforce the statutory provisions against discrimination,"[184] and the Supreme Court.

One theory of actionable behavior under Title VII is hostile work environment harassment,[185] which occurs when an employee is subject to "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or

177. *See infra* Section III.B.1.
178. *See infra* Section III.B.2.
179. *See infra* Section III.B.2.
180. *See infra* Section III.B.3.
181. 42 U.S.C. §2000e-2(a).
182. Franks, *supra* note 72, at 663.
183. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (finding sexual harassment to be actionable where the conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'").
184. *Id.*
185. Franks, *supra* note 72, at 663. There are two forms of sexual harassment: quid pro quo harassment and hostile work environment harassment. *Id.* These two categories are not present in Title VII. Burlington Indus. v. Ellerth, 524 U.S. 742, 752 (1998). Rather, the terms first appeared in academia, and gained traction after their use by the Court of Appeals in 1982 and by the Supreme Court in the 1986 decision in *Meritor Sav. Bank v. Vinson*. *Id.*

offensive working environment."[186] Hostile work environment harassment must be sufficiently "severe or pervasive to alter the conditions of [the victim's] employment" in order to be actionable.[187] This "severe or pervasive" requirement is both an objective and subjective standard, meaning to meet the requirement, "the plaintiff must show not only that he or she personally perceived the work environment to be hostile or abusive, but also that a reasonable person in the plaintiff's position would perceive the environment to be hostile."[188] Courts look to the totality of circumstances, including, but not limited to, "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"[189] to determine whether the alleged harassment creates a hostile work environment. Conduct such as "simple teasing, offhand comments, and isolated incidents (unless extremely serious)" do not create a hostile work environment.[190]

Employer liability for hostile work environment harassment differs depending on who perpetrates the harassing conduct. An employer is vicariously liable when the harassment is perpetrated by a supervisor who has authority over the victim.[191] This means that the employer does not have to be at fault in order to be liable.[192] On the other hand, an employer is liable only under a negligence standard for harassment perpetrated by a non-supervisor coworker[193] or by a non-employee.[194] Under the negligence

186. 29 C.F.R. 1604.11(a)(3) (1999).

187. *Meritor Sav. Bank*, 477 U.S. at 67.

188. Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 253 (2012).

189. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

190. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (citation omitted) (internal quotations omitted).

191. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. at 807.

192. RESTATEMENT (THIRD) OF AGENCY §7.03, cmt. b (AM. L. INST. 2006).

193. Fleming v. Boeing Co., 120 F.3d 242, 246 (11th Cir. 1997) (quoting Faragher v. City of Boca Raton, 111 F.3d 1530, 1535 (11th Cir. 1997)).

194. The EEOC prescribes employer liability for non-employee sexual harassment "where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. 1604.11(e) (1999). "The Supreme Court has not yet extended Title VII to allow an actionable claim based upon non-employee discrimination." Liz Taylor, Note, *When the Customer is Wrong: Systemic Discrimination in the App-Based Service Industry*, 81 U. PITT. L. REV. 241, 249 (2019). Numerous courts, however, have followed the EEOC's regulations, crystalizing two types of situations in which employer liability for non-employee sexual harassment generally arises: (1) situations where an the employer's requirement that the employee dress or act in sexual ways while at work subjects the employee to sexual harassment by a third party and (2) situations where an employee is sexually harassed by a non-employee third party, independent of a requirement by their employer to act or present themselves in sexual ways. Einat Albin, *Customer Domination at Work: A New Paradigm for the Sexual Harassment of Employees by Customers*, 24 MICH. J. GENDER & L. 167, 176–80 (2017).

standard, an employer is liable only if it "knew or should have known about the conduct and failed to stop it."[195] Online sexual harassment against Influencer-employees would be classified as non-employee harassment, so Influencer-employees would be tasked with proving the more difficult negligence standard in order for employing brands to be liable. Absent an employing brand's actual knowledge of the online harassment, it may be difficult for Influencer-employees to argue that the employing brand should have known of the harassment just because social media is an environment where harassment is likely to occur or because Influencers are in the public eye and constantly interacting with social media users.

2. Sexual Harassment on Social Media

An interesting aspect of online sexual harassment against Influencers is that it takes place completely online, outside the walls of a traditional workplace. "Generally, the circuit courts consider harassment that occurs outside the four walls of the workplace when the harassment is severe or pervasive enough to have consequences at work."[196] Further, courts have included harassment that occurs on social media, in conjunction with harassment in the workplace, in the totality of circumstances in hostile work environment claims,[197] indicating that social media can be considered an extension of the workplace in two situations: (1) when the employer derives a substantial workplace benefit from the social media platform[198] or (2) when the social media harassment can be considered sufficiently related to the workplace.[199]

Social media platforms have been considered an extension of the workplace, and harassment on social media has been included, along with traditional workplace harassment, in the totality of circumstances review to

195. *Burlington Indus.*, 524 U.S. at 759.

196. Coletta, *supra* note 1, at 456. First, Second, Seventh, and Eighth Circuit Courts of Appeals have each considered harassment that occurs outside the workplace in the totality of circumstances to determine the severity and pervasiveness of the hostility in the workplace. *Id.*

197. *See, e.g.*, Blakey v. Cont'l Airlines, 751 A.2d 538, 551 (N.J. 2000) (finding that an online platform may be considered an integrated part of the workplace if the employer derives a substantial workplace benefit from the platform); Amira-Jabbar v. Travel Services, Inc., 726 F. Supp. 2d 77, 85–86 (D.P.R. 2010) (considering harassment that occurred on Facebook to be sufficiently related to the work environment so as to include it in the totality of circumstances determination, along with harassment that took place within the workplace).

198. *Blakey*, 751 A.2d at 551.

199. *Amira-Jabbar*, 726 F. Supp. 2d at 85–86. This case, however, does not provide insight as to why or by what standards the court considered the social media harassment sufficiently work-related. *See also* Gelms, *supra* note 188, at 271 ("The *Amira-Jabbar* court found the social media harassment sufficiently work-related to be included under the totality of the circumstances. The court did not explain, however, why these comments were sufficiently work-related.").

determine whether the harassment can be considered severe or pervasive. At least one court, however, has struggled to consider harassment to be severe and pervasive enough to establish a hostile environment when the harassment was perpetrated *exclusively* online.[200] Rather than finding the social media harassment to be inherently pervasive, as the plaintiff argued, such harassment was found to be nothing more than "only offhand comments and isolated incidents that are insufficiently extreme to amount to an objective change in the terms and conditions of employment,"[201] even though the court recognized that sporadic instances of in-person harassment have before been enough to constitute severe or pervasive conduct.[202] The in-person harassment in the previous cases appeared more objectively serious to the court.[203]

3. Influencer-Employees are Unlikely to Recover Under Title VII

A court has not yet addressed a hostile environment harassment claim under Title VII brought by an Influencer-employee against a hiring brand. From review of the current landscape, however, it appears unlikely that an Influencer-employee would be able to recover under Title VII for such a claim. To be successful, the Influencer-employee would need to prove each of the following:

(1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.[204]

The first three elements would likely be easy to satisfy for Influencer-employee subjected to online sexual harassment. However, the fourth, fifth, and sixth elements would likely present steep challenges.

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200. *See* Chinery v. Am. Airlines, 778 F. App'x 142, 145–46 (3d Cir. 2019) (finding multiple insulting photographs and derogatory phrases posted by coworkers to several Facebook groups and directed at the plaintiff, unaccompanied by any offline harassment, to be neither inherently pervasive, despite their public and permanent nature, nor extreme enough to state a claim for hostile work environment harassment).

201. *Chinery*, 778 F. App'x at 146 (internal quotations omitted).

202. *Id.*

203. *Id.*

204. O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001).

As to the fourth and fifth elements, a court may reject any argument that online harassment is inherently pervasive.[205] Instead, they may compare the incidents of online harassment to those found in claims of in-person harassment, which, at least to one court, present more objectively serious conduct.[206] This would dispel any finding that sexual harassment that occurs solely online is sufficiently severe or pervasive enough to equate to actionable conduct.

As to the sixth element, the basis for a brand's liability would depend on whether social media can be considered part of the workplace[207] and, thus, the brand knew or should have known about the online sexual harassment.[208] It is not clear whether an influencer's social media profiles or posts would be considered by a court to be part of the brand's workplace.[209] Further, when determining employer liability for non-employee harassment, an additional consideration is the extent of the employer's control over the non-employees.[210] This factor cuts strongly against a finding of brand liability for Influencer harassment. Brands have no control at all over the non-employee social media users perpetrating the harassment. This factor, if considered, would likely work to further dispel any basis for employer liability.

Title VII was created to address situations of face-to-face, employee-on-employee harassment,[211] yet it has expanded to reach situations where an employee is harassed by a non-employee and may include online social media harassment as a factor that contributes to a hostile work environment claim. Despite such expansion, it seems unlikely that a court would extend Title VII's protection further to cover a situation of sexual harassment conducted completely on social media by a non-employee against an Influencer working on behalf of a brand. The law was not crafted with a

205. *See supra* notes 200–203 and accompanying text.

206. *See supra* notes 200–203 and accompanying text.

207. Coletta, *supra* note 1, at 461 ("Employer liability for social media sexual harassment is more difficult because it is unclear when the use of social media is connected to the workplace such that the employer should be liable.").

208. *See supra* notes 193–195 and accompanying text.

209. Considering the approach used in *Blakey v. Continental Airlines*, *supra* notes 197–198 and accompanying text, a brand certainly does derive a benefit from an influencers' profile and posts, but it cannot be said for certain whether the benefit is substantial enough to consider the Influencer's social media as an integrated part of the workplace. The standard used in *Amira-Jabbar v. Travel Services, Inc.* is broader, as the social media harassment only must be considered work-related to be included in the totality of circumstances. *See supra* notes 197–199 and accompanying text. The court, however, does not expand any further on the meaning of this standard, so it is hard to say whether courts would use this broader standard to assess an influencer's situation. *Id.*

210. 29 C.F.R. 1604.11(e) (1999).

211. Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1211 (2017).

situation like this in mind, yet this is the reality for Influencers-employees. Though their employee status would theoretically give them protection under Title VII, practically speaking, they would be unprotected from pervasive and enduring sexual harassment.

IV. PROPOSAL: THE URGENT NEED FOR LEGISLATIVE ACTION PROTECTING INFLUENCERS FROM SEXUAL HARASSMENT

Hundreds of companies large and small engage in Influencer Marketing[212] and Influencers dominate social media platforms. The job is enticing and sought after by many social media users, specifically young users,[213] yet the current legal framework does not adequately protect Influencers from the constant online sexual harassment they inevitably must endure while doing their jobs. A main way that employee rights advocates have been fighting for antidiscrimination protection for gig workers, and others who work outside of the traditional office spaces, is with an eye toward exposing worker misclassification.[214] The unique form of online sexual harassment that Influencers are subjected to, however, cannot be neatly solved by reclassifying Influencers as employees.[215] Legislative action specifically targeting social media influencers and online sexual harassment is necessary to protect this segment of the modern workforce. New legislation should hold hiring brands accountable for the harassment against the Influencers from whose services they profit. Brands should have two main obligations when it comes to addressing online sexual harassment against Influencers: (1) ending the current, ongoing harassment and (2)

212. "More than two-thirds of North American retailers use some form of influencer marketing." Christina Newberry, *Influencer Marketing Guide: How to Work with Social Media Influencers*, HOOTSUITE (May 2, 2019), https://blog.hootsuite.com/influencer-marketing/ [https://perma.cc/A5AD-6HSC].

213. Locke, *supra* note 10 ("86% of Gen Z and millennials surveyed would post sponsored content for money, and 54% would become an influencer given the opportunity, according to the report by research firm Morning Consult, which surveyed 2,000 Americans ages 13 to 38 about influencer culture.").

214. *See generally* Maya Pinto, Rebecca Smith & Irene Tung, *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It*, NAT'L EMP. L. PROJECT (Mar. 25, 2019), https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/ [https://perma.cc/RH3L-T2LM]; Jenny R. Yang, Molly Weston Williamson, Shelly Steward, K. Steven Brown, Hilary Greenberg & Jessica Shakesprere, *Reimagining Workplace Protections: A Policy Agenda to Meet Independent Contractors' and Temporary Workers' Needs*, URBAN INST. (Dec. 8, 2020), https://www.urban.org/research/publication/reimagining-workplace-protections-policy-agenda-meet-independent-contractors-and-temporary-workers-needs/view/full_report [https://perma.cc/WC2K-RXTU].

215. *See supra* Part III.

preventing future harassment incidents.[216] Legislation should address both of these obligations and brands themselves should strive to implement policies and practices to address these obligations as well.

A. Brands Must Have an Obligation to End Current Harassment Against Influencers

While cyberspace may be intangible,[217] it is a real workplace for Influencers. Just as workers in the tangible workplace have the right to work without being sexually harassed, Influencers should enjoy the same right online.[218] New legislation, largely informed by the Title VII hostile work environment framework and EEOC guidance, yet narrowly targeted at online sexual harassment against Influencers, should hold hiring brands liable for online sexual harassment against their Influencers. The following subsections discuss some features that Congress and/or States should consider when enacting new legislation.

1. New Legislation Must Protect Influencers, Regardless of Their Employment Classification

Federal antidiscrimination law only protects employees, leaving many workers, including Influencers, who lack this classification without legal redress for the sexual harassment they may suffer from in the workplace.[219] New legislation that targets online sexual harassment against Influencers must recognize that Influencers are not typically classified as employees, yet must still give them protection against the sexual harassment they currently must endure.

2. New Legislation Must Be Narrow and Specific

Victims of online harassment are limited in who they may hold liable for the harassing conduct, and often their only option is to hold an anonymous

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216. Under Title VII, an employer is obligated to take prompt action to end harassment and to take action "reasonably likely to prevent the conduct of recurring." Berry v. Delta Airlines, 260 F.3d 803, 813 (7th Cir. 2001). This Note proposes that brands should have the same obligation when it comes to online sexual harassment of influencers.

217. Norby-Jahner, *supra* note 11, at 243 ("The online environment might be intangible, but in the twenty-first century, cyberspace is a real place where teenagers meet, communicate, work, and learn.").

218. *Id.* ("Like tangible environments where people have a right to work, learn, and socialize without being sexually harassed, online environments should afford people the same right.").

219. Freeman Peshehonoff, *supra* note 154, at 494.

or pseudonymous perpetrator liable, which is a challenging task.[220] Legislation holding brands liable for online sexual harassment of their Influencers would give Influencer-victims another option for relief. Brand liability under new legislation must be customized to fit this modern workplace and modern form of harassment, which is often public, perpetrated by an anonymous user, easily amplified by other users, and permanently pasted online.[221] New legislation must also narrowly specify when brands may be liable for non-employee online sexual harassment of their Influencers. To do this, new legislation prescribing brand liability for online sexual harassment against Influencers should differ from employer liability for sexual harassment within the traditional workplace in three ways.

i. Brand Liability for Non-Employee Harassment

Under current EEOC regulations, an employer is liable for non-employee harassment in the traditional workplace "where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[222] Influencers are most commonly harassed by non-employees, yet applying this standard to online sexual harassment against Influencers would arguably open the brand up to liability for *all* incidents of online sexual harassment. This is because online sexual harassment today is so pervasive[223] on social media that one could argue that a brand should have known that their Influencers would receive online sexual harassment just by posting their picture on their social media. Thus, new legislation should narrowly limit brand liability for online sexual harassment to situations where the brand has knowledge of the harassment, either from viewing the harassment itself or from a complaint to the brand raised by the Influencer and said brand fails to take immediate and appropriate corrective action.[224]

ii. Brand Liability for Harassment on Social Media

Courts have included evidence of harassment that took place on social media in the totality of circumstances for hostile work environment claims

220. *See supra* notes 103–109 and accompanying text. For further discussion on the difficulties of determining, or "unmasking," the identity of online harassers, see generally MARWICK & MILLER, *supra* note 91, at 12–13.

221. Franks, *supra* note 72, at 682–83.

222. 29 C.F.R. 1604.11(e) (1999).

223. *See supra* Part III.

224. *See infra* Section IV.B.

in two situations: (1) when the employer derives a substantial benefit from the social media platform where the harassment took place[225] and (2) when the social media harassment could be considered sufficiently related to the workplace.[226] If the first situation, the "substantial benefit" standard,[227] were to be applied to incidents of online sexual harassment against Influencers, brands may be found liable for harassment that is perpetrated against an Influencer but has no relationship to the brand. For example, a brand certainly derives a substantial benefit from an Influencer's Instagram profile as a whole,[228] so under this standard, a brand could be liable for *any* harassing comments or direct messages sent to the Influencer in response to any of their posts, not just the comments posted in response to a post sponsored by and affiliated with the brand. Thus, new legislation should track the second situation: only those incidents of online sexual harassment that take place on or in response to posts by the Influencer that can be characterized as work-related should be considered when determining a brand's liability. Courts, however, will have to determine the parameters for when online sexual harassment is considered to be in response to a work-related post by the Influencer.[229]

iii. When is Online Sexual Harassment Considered Severe or Pervasive?

Hostile work environment harassment must be sufficiently "severe or pervasive" to alter the terms and conditions of employment in order to be actionable.[230] "Simple teasing, offhand comments, and isolated incidents (unless extremely serious)" are not enough to establish a hostile work environment claim.[231] The standard for what establishes a hostile work environment in a situation of online sexual harassment should similarly be limited to only instances of harassment that are "severe or pervasive."[232] The interpretation of these terms, however, must change when applied to

225. Blakey v. Cont'l Airlines, 751 A.2d 538, 551 (N.J. 2000).
226. Amira-Jabbar v. Travel Servs., Inc., 726 F. Supp. 2d 77, 85–86 (D.P.R. 2010).
227. Blakey, 751 A.2d at 55.
228. *See supra* notes 34–39 and accompanying text.
229. Some situations, such as when a social media user leaves a harassing public comment on an Influencer's post that depicts him or her promoting the brand's product and for which the Influencer was paid by the brand to post, may be easy to consider as related to work, but ambiguities are sure to arise. One ambiguous situation may be, for example, when an Influencer posts a picture to Instagram that is sponsored by a brand and minutes later, they receive a harassing private message that is not explicitly linked to the sponsored Instagram post. Could the private message have been sent in response to the Influencer's most recent, sponsored Instagram post, and thus be considered work-related?
230. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).
231. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (internal quotations omitted).
232. *Meritor Sav. Bank*, 477 U.S. at 67.

online sexual harassment given its unique features, such as its permanence, its often public nature, and the ease with which it can reach a wide audience and be amplified by other users.[233] For example, an Influencer receiving a large stream of sexually harassing comments in response to just one social media post may seem like the equivalent to an isolated incident of an employee receiving harassing comments in the workplace for just one day. With online sexual harassment, however, not only can an Influencer-victim view the harassing comments for eternity, or until someone deletes them, but because Influencers' engagement and interaction with their followers is part of their job,[234] they must continuously return to the comments section of their post and view the harassment over and over again. This cannot be said to be an isolated incident, thus it should be considered severe or pervasive under a standard specific to online sexual harassment. On the contrary, one single sexually charged comment in response to an Influencer's post appears more like an isolated incident[235] and should not satisfy such a standard. Legislation and subsequent judicial interpretation must be mindful of the unique features of online sexual harassment when determining what creates a hostile work environment online.

B. Brands Must Work to Prevent Future Incidents of Online Sexual Harassment Against Influencers

"Prevention is the best tool for the elimination of sexual harassment."[236] The EEOC places the onus on the employer to "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."[237] Brands should have a similar duty to prevent online sexual harassment against their Influencers. Brands may argue that they have less control over non-employee internet users than an employer does over their employees that engage in harassing conduct[238] or that they do not have duty

233. Franks, *supra* note 72, at 682–83.

234. *See supra* note 12 and accompanying text.

235. *See, e.g.*, Viruet v. Citizen Advice Bureau, No. 01 Civ. 4595, 2002 U.S. Dist. LEXIS 15045, at *53–*67 (S.D.N.Y. Aug. 27, 2002) (finding that an employee alleged nothing more than that he was subjected to isolated remarks that were insufficient to state a valid hostile work environment sex/sexual orientation claim against his employer, Citizen Advice Bureau (CAB), when he alleged that CAB had allowed clients to call him "faggot" and "inconsiderate.").

236. 29 C.F.R. § 1604.11(f) (1999).

237. *Id.*

238. The EEOC considers the extent of the employer's control over the non-employee's conduct as a factor for determining employer liability. *Id.* § 1604.11(e) (1999).

to prevent online harassment as whole. Brands that engage in Influencer Marketing, however, have immense power in shaping the content that is posted on social media platforms.[239] If they are going to profit off of their role in the flow of social media content, it seems logical that they have this obligation.

A potential prevention measure for brands could be to ensure they have a clear policy addressing online sexual harassment against their Influencers and to make sure that the Influencers are aware of the policy and the ways to report incidents of online sexual harassment to the hiring brand.[240] Additionally, brands could designate some of their employees to monitor the social media posts of the Influencers that they work with. If the Influencer is being harassed, the brand should catch this through their monitoring and take appropriate action, such as contacting the Influencer, investigating and addressing the harassment, or even instructing the Influencer to take the post down, depending on the circumstances.

CONCLUSION

Social media plays a large role in modern life, and many brands have capitalized on this phenomenon.[241] Brands have created a marketing approach that depends entirely on hiring Influencers to promote their products or services by posting themselves online for thousands and thousands of other users to observe, interact with, and comment on.[242] Though many companies that use Influencer Marketing find it to be effective, Influencers suffer greatly from the almost inevitable downside to social media: online sexual harassment.[243] Laws targeting online harassment exist, but only provide relief to victims in a limited set of circumstances, thus leaving many instances of online sexual harassment beyond reach.[244] Additionally, though many Influencers earn enough to live a comfortable life on influencing alone, influencing was not the type of work nor social media the type of workplace that is envisioned by antidiscrimination

239. On Instagram alone there were projected to be 6.12 million brand-sponsored influencer posts in 2020. A. Guttman, *Number of Brand Sponsored Influencer Posts on Instagram from 2016 to 2020*, STATISTA (June 30, 2020), https://www.statista.com/statistics/693775/instagram-sponsored-influencer-content/ [https://perma.cc/66YD-WRMF]. *See also supra* notes 39–47 and accompanying text.

240. *See Sexual Harassment Prevention Strategies for Employers*, NAT'L WOMEN'S L. CTR. 1 (Jan. 2018), https://nwlc.org/wp-content/uploads/2018/01/NWLC-Prevention-Strategies-fact-sheet-1.18.pdf [https://perma.cc/3ZY2-U6RV].

241. *See supra* note 35 and accompanying text.

242. *See* Foster-Fell, *supra* note 39.

243. *See supra* Part III.

244. *See supra* Part II.

laws,[245] leaving Influencers without protection. Technology has transformed the workplace, and it is time that legislatures craft new laws to protect modern workers in the modern workplace.

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245. *See supra* Section III.B.

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