



## Labor and Employment Legal Update

Presented by: Carrie Claiborne, Julia Farrell, and A.J. Weissler

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## Fair Labor Standards Act (“FLSA”)

- *Allen v. City of Chicago*, 865 F.3d 936 (7th Cir. 2017).
  - Plaintiffs sought pay for off-duty work performed on mobile devices provided by the employer.
  - “Suffer or Permit” Rule: Employers must pay for work that it knew about or should have known about with reasonable diligence.

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## FLSA – Off-Duty Work

- Reasonable diligence can be shown through a self-reporting system for off-duty work.
  - But, employers cannot explicitly or implicitly discourage reporting of time.
- Knowledge that work is being performed away from work is not enough for liability unless the employer also should know it is not being reported.

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## FLSA – Off-Duty Work

- Reasonable diligence asks what the employer reasonably should have known, not what it could have known.
  - In this case, Employer was not required to take the unreasonable step of comparing time slips with emails, phone call records, and other evidence of potential off-duty work to ensure all time worked was accurately reported.

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## FLSA – Salary Threshold for Exemptions

- Still \$455 per week (\$23,660 per year).
- Obama Administration's proposed increase to \$913 per week (\$47,476 per year) was initially stayed in November 2016 and then finally ruled invalid in August 2017.

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## FLSA – Salary Threshold for Exemptions

- Trump Administration re-opened comments on the rule.
  - Promised its own revision to the exemption standards (likely in line with inflation).
- Trump Administration appealed the invalidation Obama Administration's new rule.
  - Seek to preserve the DOL's authority to make the rule (not to save the increased salary threshold).

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## National Labor Relations Act (“NLRA”)

- Newly appointed Board members & General Counsel.
- Day to day decisions likely more management-friendly.
- May overturn controversial Obama-era decisions:
  - Micro unions
  - Timeline for union elections
  - Joint employer standards

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## NLRA – Workplace Policies

- *T-Mobile USA Inc. v. NLRB*, 865 F.3d 265 (5th Cir. 2017)
  - NLRB struck down handbook provisions that:
    - Encouraged employees to “maintain a positive work environment” and
    - Prohibited “[a]rguing or fighting,” “failing to treat others with respect,” and “failing to demonstrate appropriate teamwork”
  - Discouraged concerted activity, including candid, potentially contentious discussions of unionizing.

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## NLRA – Workplace Policies

- Fifth Circuit disagreed. Upheld T-Mobile’s rules because no reasonable employee *would actually think* that these rules prevent protected activity.
- Court focused on policy language that tied the rules to normal work conduct on a normal workday.

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## NLRA - Class Action Waivers in Employment Arbitration Agreements

- NLRB’s *D.R. Horton* ruling is currently pending before the U.S. Supreme Court.
- Lower courts split over whether the NLRA prohibits class action waivers in employment arbitration agreements.

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## NLRA - Class Action Waivers in Employment Arbitration Agreements

- Dozens of amicus briefs were filed, including one on behalf of the United States that opposes the NLRB position.
- Argued on October 2, 2017; a decision will occur at some point between now and June 2018.

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## Occupational Safety and Health Act (“OSHA”)

- Electronic submission of Injury & Illness data.
  - Due date **currently** set for December 1.
- Applies to:
  - Employers with 250 or more employees.
  - High hazard industries.

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## Americans with Disabilities Act (“ADA”)

- *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017)
  - Long-term leave is **not** a reasonable accommodation
  - Employee requested additional 3 months’ leave, after FMLA expired, for back condition and back surgery;
  - “An extended leave of absence does not give a disabled individual the means to work; it excuses his not working.”
  - Splits from several other circuits and the EEOC guidance.

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## Missouri Human Rights Act (“MHRA”)

- MHRA Amendments signed into law on June 30, 2017; took effect on August 28, 2017.
- Changed causation standard from “contributing factor” to “motivating factor.”

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## MHRA Amendments

- Removed individual liability (paves way for greater federal diversity jurisdiction).
  
- Made a timely charge of discrimination an express prerequisite to bring a lawsuit.
  - Clarifies procedures for arguing untimeliness.

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## MHRA Amendments

- Implemented a strict cap on damages based on employer size:
  - 5 to 100 employees: back pay, interest, and \$50,000
  - 101 to 200 employees: back pay, interest, and \$100,000
  - 201 to 500 employees: back pay, interest, and \$200,000
  - 501 or more employees: back pay, interest, and \$500,000

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## MHRA Amendments

- Prohibits issuance of “right-to-sue” letters unless requested by charging party.
- Endorsed federal burden-shifting framework.
- Endorsed “business judgment rule” instruction.

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## Missouri – Whistleblower Protections

- *Yerra v. Mercy*, 2017 WL 4533770 (Mo. App. S.D. Oct. 11, 2017)
  - Reversed jury verdict in favor of physician whistleblower
  - Must report an *actually* illegal activity, not just an act *believed* to be illegal.

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## Missouri – Whistleblower Protections

- Whistleblower Protection Act (WPA) – new amendment to the MHRA, protects employees who:
  - Report unlawful act to authorities;
  - Report serious misconduct in violation of clear public mandate of public policy; or
  - Refuse to carry out unlawful directive
- “Motivating factor” standard

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## Missouri – “Right to Work” Law

- Signed into law on February 6, 2017 with an initial effective date of August 28, 2017.
- If effective, the law would prevent employees from being forced to pay union dues as a condition of employment.

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## Missouri – “Right to Work” Law

- Opponents obtained approximately 300,000 signatures to permit voters to accept or reject law during November 2018 statewide election.
- If 100,000 or more of the signatures are deemed valid, the law will be blocked until after the statewide vote.

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## Illinois Biometric Information Privacy Act (BIPA)

- BIPA was passed in 2008.
- Dictates consent, notice, and disclosure procedures for collecting, storing, or using biometric information.
  - Includes fingerprints, iris scans, and face prints.

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## Illinois BIPA

- More than 20 BIPA class actions have been filed recently in Illinois against employers.
  - Plaintiffs allege employers used fingerprint-operated timeclocks without BIPA-required notice.
  - Each violation results in attorneys' fees plus the greater of \$1,000 (\$5,000, if reckless) or actual damages.

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## Illinois – “Religious Garb Law”

- Amendment to Illinois Human Rights Act (IHRA)
- May not require employees to violate a sincerely held belief, unless:
  - Related to safety or food sanitation; or
  - Undue hardship

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## Illinois – Liability for Employee Torts

- *Anicich v. Home Depot USA, Inc.*, 852 F. 3d 643 (7th Cir. 2017).
  - Employer *could be* liable for supervisor who murdered employee.
    - Use of “supervisory authority.”
    - Negligent hiring, supervision, or retention.

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## Trend: Sexual Harassment Scandals

- National focus on (often powerful) men accused of sexual harassment across industries.
- Expect greater attention to and willingness of victim’s coming forward.
- Ensure policies and reporting structures are in place and supervisors are trained on how to respond to reports.

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## Trend: Fair Scheduling Laws

- Laws restrict employers' rights to make last-minute scheduling changes or require on-call scheduling.
  - San Francisco (since July 2015).
  - Emeryville, CA and Seattle (effective July 1, 2017).
  - New York City (effective November 26, 2017).
  - Oregon (passed June 2017; effective July 2018).

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## Trend: Fair Scheduling Laws

- Typically cover retail, hospitality, and food service.
- Scheduling notice (3 days (NYC) to 14 days (SF)).
- Some ban or require extra pay for on-call scheduling.
- Many require interactive scheduling process with employees (similar to ADA accommodations).
- Premium pay is required for violations.

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# Limiting Risk When Onboarding New Employees

Presented by: Randy Thompson, Kayt Kopen, Scott Meyers, and Kelli Stout

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## Topics Covered

- Pre-Employment Screening
- Immigration Issues
- Wage-Related Issues
- Employment Agreements and Restrictive Covenants
- Mergers and Acquisitions

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## Flood of FCRA Class Action Lawsuits



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## Pre-Employment Screening

- What is FCRA?
  - Primary federal law regulating employment background checks
  - Applies to all employment background checks conducted by a third party whether or not they include a credit report
  - FCRA focuses on the “how” not the “what”



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## Pre-Employment Screening

- Consumer Report
  - Any written, oral, or other communication of any information by a consumer reporting agency bearing on an individual's:
    - Credit worthiness/standing/capacity, character, general reputation, personal characteristics; or mode of living
  - Which is used or expected to be used for a permissible purpose

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## Pre-Employment Screening

- Three general requirements for employers
  - Before obtaining a consumer report
  - Before taking an adverse action
  - After taking an adverse action

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## Pre-Employment Screening

- Before obtaining a consumer report
  - Clear and conspicuous written disclosure
  - Written authorization
  - Compliance certification
  - “A Summary of Your Rights Under the Fair Credit Reporting Act”

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## Pre-Employment Screening

- Before taking an adverse action
  - A notice of the preliminary decision
  - A copy of the report
  - “A Summary of Your Rights Under the Fair Credit Reporting Act”

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## Pre-Employment Screening

- After taking an adverse action
  - Notice of adverse action based on consumer report
  - Contact information for agency that provided report
  - Statement regarding agency's role in decision
  - Statement of individual's right to obtain his or her file from the agency
  - Statement of individual's right to dispute the report's accuracy directly with the agency

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## Pre-Employment Screening

- FCRA Violations
  - Negligent violations
  - Willful violations

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## Pre-Employment Screening

- Other Issues
  - Individualized assessment of criminal history
  - Drug Testing
    - Relationship with FCRA
    - Well-defined policy

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## Immigration: Form I-9

- Why is this important?
  - Trump administration has announced plans to increase immigration-related worksite enforcement actions, targeting both employers and undocumented employees.
  - Following the I-9 rules can help prevent civil penalties and discrimination claims during the onboarding process.
  - Push for mandatory E-Verify.

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## Immigration: Form I-9 Completion

- Check to ensure you are using the right version of the form.
- Complete the form within the required timeframes.
- **Only** make copies of the document(s) required by the I-9 process.
- Set up a system for re-verification of employees whose work authorization will expire and make a note at the time of onboarding.

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## Immigration: IRCA Liability

- National origin discrimination
- Citizenship discrimination
- Document abuse
- Unfair immigration-related employment practices

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## Immigration: IRCA Liability

- Asking employee about his/her immigration status
- Requesting specific documentation or more documentation from an individual than required by the I-9 process
- Refusing to hire someone because of his/her national origin or citizenship status
- Requesting specific documents during the I-9 process or requesting more or different documents than required by law
- Refusing to accept documents during the I-9 process that are acceptable under the law (relate to individual and appear on the fact to be genuine)

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## Immigration: Form I-9 Common Issues

- Employee fails to present appropriate documentation.
- Employee makes an error on Form I-9.
- Employee presents a work card valid for only a few months.
- Employee asks about future sponsorship for work authorization.

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## Employment Status Issues

- At-will employment vs. employment agreement (i.e., guaranteed term)
- Whether to utilize a new-hire probationary period
  - Harassment and accommodation/leave requirements
  - Handbook
  - New-hire Packet

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## Wage-Related Issues

- Exempt vs. non-exempt (for overtime eligibility)
- Vacation and PTO
- Direct Deposit

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## Wage-Related Issues

- Various states require wage notifications and specific information
  - Required information must be provided in writing and prior to wage payments being made
  - Required information by various states includes rate of pay, withholdings, timing of payments, manner/place of payment
  - Missouri only requires that total monthly deductions from wages be set forth, and there is a 30-day notice period for permanent wage reductions

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## Restrictive Covenants

- Restrictive Covenants with Prior Employer
  - Non-competition provisions
  - Customer/Client non-solicitation provisions
  - Employee non-solicitation provisions

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## Restrictive Covenants

- What should you do?
  - Verify in writing that none exist that would affect current employment
  - Verify in writing that employee will not be asked or required to utilize any confidential information of his/her prior employer
  - Tortious interference analysis

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## Entering into Restrictive Covenants

- Determine proper purpose
- Determine type and extent
  - A customer/client non-solicitation provision is less intrusive and generally more enforceable
- Don't forget to provide consideration

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## Mergers and Acquisitions

- Who retains liability for pre-merger conduct?
- Transitioning and ensuring payroll is maintained and is timely
- Potential layoffs/reductions
- Immigration issues
  - Ensuring foreign national employees are authorized post-merger
  - Consider if new 1-9s are needed

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## Preparing for the Unexpected During Investigations

Presented by: Bob Tomaso, Sonni Nolan & Anthony Grice

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### Uncooperative Witness

- Review company policies before the investigation.
- Ensure there is good language in the policy regarding employees' obligation to cooperate during an investigation.
- Determine what the company's unwritten policy is regarding obtaining cooperation.

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## Policy Pointers

- Do not require that the employee contact the company before contacting the government regarding complaints.
- Do not require confidentiality in the investigation without individualized assessment.
- Make It Part of Your Culture: Do train regarding your policy during annual training and orientation.

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## Uncooperative Victim, Complaining Party, or Harasser

- You come across an email between the employee and...
  - Their spouse about their lawsuit against the company.
  - Their attorney about their charge of discrimination against the company.
  - You see that they are emailing confidential information to their attorney regarding their whistleblower case against the company.

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## Who Can/Should Attend Interview

- The witness employee's attorney or the complaining employee's attorney
  - Exception?
- The union representative
- The complaining employee's spouse
- The complaining employee's psychiatrist
- The company's witness
- The vendor's attorney

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## Technology Issues

- Employee states: *"I want to record this."*
  - Be sure that your company already has a "no recording discussions without consent" policy.
  - Cannot be too broad because of the National Labor Relations Act ("NLRA").
- Employee states: *"I am recording this conversation."*

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## Technology Issues

- You come across an email between the employee and...
  - Their spouse about their lawsuit against the company.
  - Their attorney about their charge of discrimination against the company.
  - You see that they are emailing confidential information to their attorney regarding their whistleblower case against the company.

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## Proceed With Caution

- Looking at your employee's personal or company-provided smart phone, texts, social media.
- Asking for password or requiring an employee to show you their social media information.
- Running a criminal history check.
- Harassment on social media or outside the workplace.

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## Other Policies & Laws

- Workplace Monitoring Policies
  - Use of company property
  - Internet or email monitoring
  - Password policy
  - BYOD policy
  - Telephone monitoring

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## Other Policies & Laws

- Health Privacy Policies
  - Genetic Information Nondiscrimination Act (“GINA”)
  - Health Insurance Portability and Accountability Act (“HIPAA”)

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## Employees or Data Not in the U.S.

- When data or employees are not in the U.S., your company is likely subject to other non-U.S. laws.
  - Under the EU Data Protection Directive employers must consider necessity, purpose specification, transparency, legitimacy, proportionality, and security.

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## Employees on FMLA Leave

- *Throneberry v. McGehee Desha Cty.*, 403 F.3d 972 (8<sup>th</sup> Cir. 2005)
  - Employee on Family Medical Leave Act (“FMLA”) leave has no greater rights than employee who remains at work
  - No strict liability for FMLA interference
  - Investigation must be by the book
  - Burden is on the employer

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## Employees on ADA Leave

- Participation may be compelled if employer provides a reasonable accommodation
- Does not matter whether the employee is subject of the investigation or a witness

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## Law Enforcement Involvement

- Fraud, embezzlement, stalking/intimidation, theft
- Conduct connected to employee's work?
  - If so, begin or continue internal investigation
  - If not, consider what support, if any, to provide to employee

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## Maintaining Confidentiality

- Take Control
- Keep the Circle Small
- Preserve All Evidence
- Know Your Own Rules

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## Former Employees

- Little incentive to cooperate
- Be careful about “payment” agreements
- Does the attorney/client privilege still apply?

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## Former Employees

- If no privilege, then plaintiff's lawyer may contact former managers
- Varies widely by state

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## Illinois Personnel File Requests

- 820 ILCS 40
- Employees/designees may access personnel records
- "... qualifications, promotion, transfer, additional compensation, discharge or other disciplinary actions."

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## Illinois Personnel File Requests

- Several notable exceptions (e.g., privacy of others, reference letters, test results)
- Employee has right to written rebuttal
- Delete disciplinary records older than 4 years if third-party request (future employer)

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## Closing The Loop On An Investigation

- “We did X, Y and/or Z.”
- “You indicated you did not want to see Dr. Kildare lose his job.”
- “In our discussion, you indicated you were satisfied with our handling of the situation.”

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## Lower Wages for Soccer Balls and Search Engines – What U.S. Soccer and Google Can Teach Us About Gender Pay Disparities

Presented by: Brad Hiles, Joe Glynias, and Brittany Falkowski

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### U.S. Soccer

- Women's U.S. Soccer team won the World Cup in July 2015

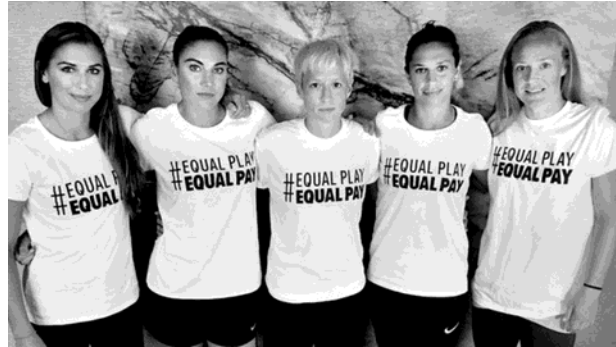


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## U.S. Soccer

- 5 members of Women's U.S. Soccer team filed an EEOC complaint in March 2016
- Brought a lot of media attention to equal pay issues



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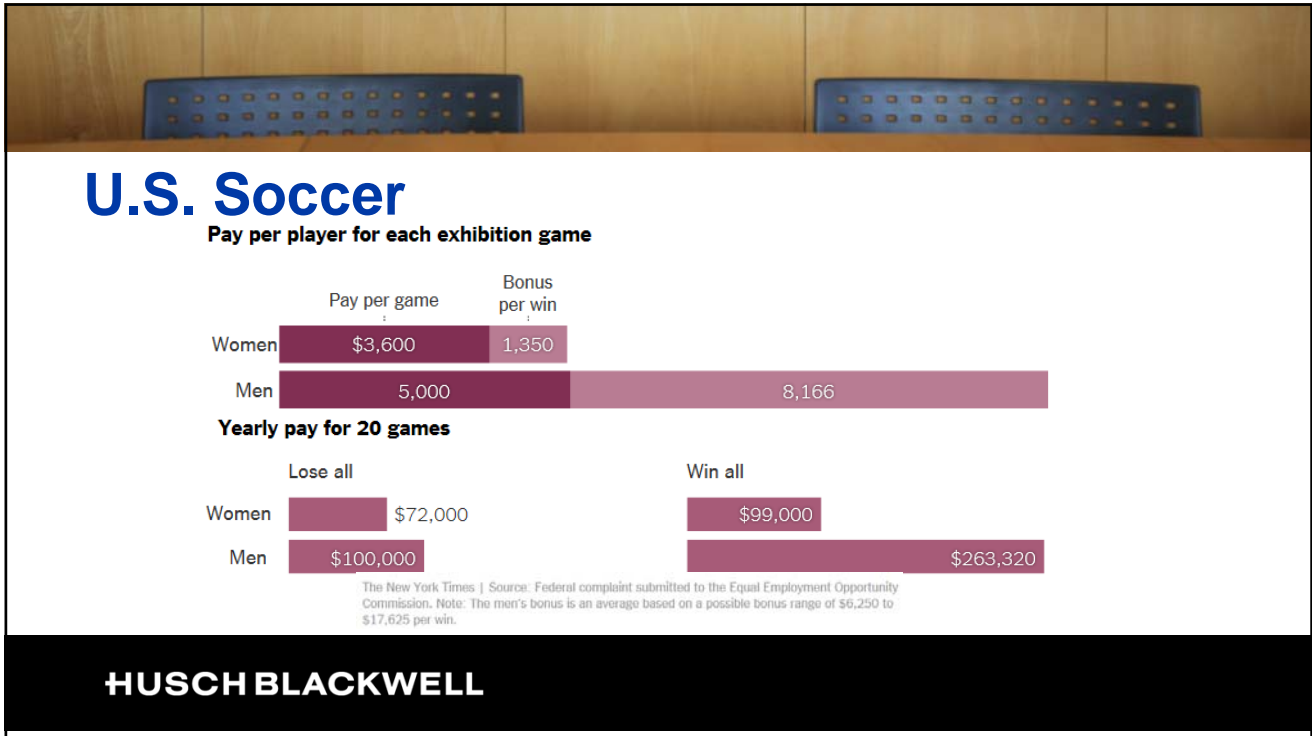
## U.S. Soccer


- EEOC Complaint alleged pay disparity stemming from different ways in which men and women were paid:

Women	salaries (~ \$72k) + bonuses (based on appearances/wins)
Men	appearances, results, roster selections

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## U.S. Soccer

**Per diem for traveling**

	Domestic venues	International venues
Women	\$50.00	\$60.00
Men	\$62.50	\$75.00

The New York Times | Source: Federal complaint submitted to the Equal Employment Opportunity Commission

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## U.S. Soccer

- U.S. Soccer filed a position statement with the EEOC in May 2016, requesting dismissal:
  - Arguing no evidence of discriminatory motive
  - Explaining that men generate more revenue, attendance, and television ratings

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## U.S. Soccer

- In April 2017, the parties reached new terms after collective bargaining:
  - Substantial raises (30% increase in base + better bonuses)
  - 2 years' back pay for unequal per diems
- EEOC Complaint is technically still pending

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## Equal Pay Act

- Requires that men and women be given equal pay for equal work in the same establishment
  - “Pay” includes overtime, bonuses, stock options, reimbursement for expenses, and other benefits
- The jobs need not be identical, but must be **substantially equal**

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## Equal Pay Act

- A plaintiff must show that he/she receives less pay than an employee of the opposite sex who:
  - Works at the **same establishment**
  - Performs **substantially equal** work
  - Under similar **working conditions**

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## Equal Pay Act

- Whether work is **substantially equal** depends on
  - **Skill**,
  - **Effort**, and
  - **Responsibility**

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## Equal Pay Act

- **Affirmative Defenses**: Pay differentials permitted when based on:
  - a seniority system,
  - a merit pay system,
  - a system that measures quantity or quality of production, or
  - a factor other than sex.

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## Equal Pay Act

- **Remedies**:
  - Back pay for 2 years (3 years if violation is willful),
  - Order *increasing* pay
  - Attorneys' fees
  - Liquidated damages (up to amount of back pay for willful violations/not available if good faith belief Equal Pay Act was not violated)

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## Equal Pay Act

- **Administrative Exhaustion**: Not required
- **Statute of Limitations**: Two years, three years if the violation is willful

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## Title VII, ADEA, and ADA

- Statutes prohibit intentional pay discrimination based on protected categories:
  - Sex, race, color, national origin, religion, age, and disability
- Unlike Equal Pay Act, no “substantially equal” or “same establishment” requirements
- **NOTE**: Under the Lilly Ledbetter Fair Pay Act of 2009, the 180-day statute of limitations for Title VII pay discrimination claims resets with each new paycheck

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- OFCCP Audit

- In September 2015, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) initiated an investigation into Google’s headquarters
- Google complied with requests for information until the agency asked for salary histories for 25,000 employees dating back to when they first joined Google

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- After Google refused, the OFCCP filed a lawsuit, seeking additional compensation data to complete its audit
- The OFCCP testified that it needed such data because its statistical analysis has “**found systemic compensation disparities against women pretty much across the entire workforce**”
- Google responded that it has conducted its own analyses and found no gender pay gap

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## Google

- On July 14, 2017, a court ordered Google to provide some, but not all, of the information requested
- The audit is ongoing

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## Google

- Class Action Lawsuit
  - 3 former female employees filed a class action lawsuit in California on September 14, 2017
    - The OFCCP investigation prompted the class action lawyers to ask female employees of Google to come forward if they had experienced pay discrimination
    - 90 current and former employees responded

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15           3.       Throughout the Class Period and throughout California, Google has discriminated  
16 and continues to discriminate against its female employees by paying female employees less than  
17 male employees with similar skills, experience, and duties; by assigning and keeping women in  
18 job ladders and levels with lower compensation ceilings and advancement opportunities than  
19 those to which men with similar skills, experience, and duties are assigned and kept; and by  
20 promoting fewer women and promoting women more slowly than it has promoted similarly-  
21 qualified men. The net result of this systemic discrimination is that Google pays women less  
22 than men for comparable work.

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5           20.       Google performs internal pay equity analyses on an annual basis. Google is also  
6 required to maintain records of the wage rates, job classifications, and other terms and conditions  
7 of employment of all of its employees throughout California. Google therefore knew or should  
8 have known that it paid female employees less than it paid their male counterparts for  
9 performing substantially equal or similar work, yet Google took no steps at any time during the  
10 Class Period to pay women equally to men as required by the Labor Code, §1197.5 *et seq.*

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“Job levels and promotions are determined through rigorous hiring and promotion committees, and must pass multiple levels of review, including checks to make sure there is no gender bias in these decisions. We have extensive systems in place to ensure that we pay fairly.”

- Gina Scigliano, Google Spokesperson

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A blurred photograph of an office hallway with several people walking, used as a background for the 'Traps' section.

## Traps

- Having job titles that don't reflect actual duties
- Treating different segments of the business differently even though in the same establishment
- Demoting/promoting employees without modifying pay (or substantially modifying pay)

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## Recommendations

- Conduct an audit and perform a statistical analysis
- Review results of the audit with individuals who can explain whether any pay gaps are based on factors other than sex
- Spend time on compensation decisions
- Document, document, document

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## Appendix

1

## Basic Checklist

- Nature of investigation: your purpose with emphasis on FACT finding.
- Company legally obligated to investigate.
- General outline of the process.
- Employee required to cooperate and be truthful.
- Confidentiality cannot be guaranteed.
- No retaliation will be condoned against any participant.

2



## Basic Checklist

- Request discretion of interviewee in maintaining confidentiality and instruct them not to interfere with the pending investigation by talking to other witnesses about the investigation.
  - (Complete gag order cannot be imposed; Navarro case by NLRB = narrowest possible gag order).
- Allow employee to ask questions or share concerns about the process. You may not be able to answer some, so state that you cannot disclose information that will affect the objectivity or outcome of the process.
- Weingarten rights must be observed and should be confirmed. Union representation should be allowed and the union informed of the existence of the investigation.

3

## Workplace Surveillance Policy Acknowledgement

An Example Form Acknowledgment:

This form acknowledges that you understand and agree to Acme's policies on workplace monitoring and surveillance. As noted in the orientation materials you received, Acme engages in surveillance activities in the workplace and this form provides your consent that you understand that Acme engages in such surveillance and monitoring practices. There should be no expectation of privacy in the workplace except in private areas such as restrooms, showers and dressing areas.

Date: \_\_\_\_\_ Name (Print): \_\_\_\_\_

Signature: \_\_\_\_\_

4