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With this first issue of Volume 33, the University of Minnesota Law School begins its ninth, and what will be its last, year as the editorial home of the ABA Journal of Labor & Employment Law. Nearly a year ago, we, the Journal’s Faculty Co-Editors, notified the ABA Section of Labor and Employment Law that we would, with our coming retirements, have to relinquish this much-treasured collaborative work with our students, the Section, and our attorney-authors. The Section’s Editorial Board (comprised of Section members from various areas of practice and regions of the country) decided that this time of necessary transition would be an opportune moment to assess Section members’ opinions about the Journal. Should the Section continue to publish the Journal? Did the Journal, in its current form, serve their professional needs?

Five hundred and sixty members of the Section responded to the Editorial Board’s survey in Spring 2017. A majority of respondents said that they read a significant portion of the Journal each year. Interestingly, the Journal appeared to satisfy the needs of readers engaged in different kinds of legal work and at diverse stages of their careers. Law students said that they read the Journal to prepare to practice labor and employment law. Recent law graduates found the Journal useful in transition from law school to practice. Law professors relied on the Journal for their scholarly research and class preparation, particularly allowing them to share with their students what practitioners considered “hot topics.” Several attorneys wrote that they looked to the Journal to alert them to new legal issues that might affect their clients. Another wrote, “The Journal publishes articles that make me think in new ways about how different labor/employment laws fit together, and about what labor and employment laws SHOULD look like. The articles challenge me to think outside my normal box.” Retired attorneys said that they read the Journal because they wanted to continue to be informed about developments in labor and employment law. Asked whether the Section should discontinue publication of the Journal, ninety percent of respondents wanted the Journal to continue. After assessing the survey results, the Journal’s Editorial Board concluded that the Journal should continue publication after our retirements, and it has now identified a new law school to serve as the Journal’s editorial home, commencing with Volume 34.

We hope that you will find, in the articles in this issue, a reflection of our commitment to provide our readers with relevant, useful, and reliable information about labor and employment law issues.

In Mind the Gap: Pay Audits, Pay Transparency, and the Public Disclosure of Pay Data, management attorneys Erin M. Connell and Kathryn G. Mantoan examine recent efforts by governments and private
companies to improve pay equity. The authors describe legislative and administrative efforts to close the pay gap by the federal government, states, and municipalities. They analyze the recent trend of companies publicly disclosing pay data, whether in response to shareholder proposals, public pressure, or a sense of social responsibility. The authors describe the detailed process of performing pay audits and offer guidance on conducting audits while maintaining attorney-client privilege and work-product protection and highlight considerations for employers contemplating remedial action.

Recent scandals over alleged illegal payments facilitated by university athletics programs to college athletes have renewed attention to college athletes’ peculiar status as neither “employees” of universities or “independent contractors.” In Big-Time College Athletes’ Status as Employees, Eastern Michigan University Associate Professor Richard T. Karcher argues that at least some college athletes are statutory employees. He discusses similarities between professional and college athletes in major sports programs, and analyzes National Labor Relations Board (NLRB) decisions on the rights of student assistants and college athletes to unionize, to conclude that students who participate in major college athletics programs in exchange for compensation in the form of scholarships are university employees. He further suggests that NLRB precedent supports finding college athletes to be “employees” under state workers’ compensation statutes and the Fair Labor Standards Act, as well.

In Employment Practices Liability Insurance: A Guide to Policy Provisions and Challenging Issues for Insureds and Plaintiffs, plaintiffs’ employment attorney Stephanie D. Gironda and management attorney Kimberly W. Geisler detail the rise and current prevalence of employment practices liability insurance (EPLI). The authors examine the typical provisions and structure of an EPLI policy and highlight issues important to understanding the basic contract. The authors bring their combined experience to show that employment lawyers on both sides of a dispute must understand the provisions of EPLI policies that will increasingly influence the course of litigation and settlement negotiations. Plaintiffs’ counsel must strategize to maximize insurance coverage. Defense counsel retained by EPLI insurers may face ethical conflicts when determining who the client is, who controls the defense, and who controls settlement.

New wearable technologies are rapidly changing the workplace for employers and employees. In Wearable Technology and Implications for the Americans with Disabilities Act, Genetic Information Nondiscrimination Act, and Health Privacy, management attorney Kevin J. Haskins takes a closer look at these new technologies and some potential legal pitfalls for employers who adopt them in the workplace. He explores some of the ways in which wearable technology might make a workplace safer by monitoring employees’ health. But he explains that, because wearable technology is so adept at collecting health information from users, it may reveal employees’ health conditions to employers in ways prohibited
by the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and other health privacy laws.

Wearable technology’s impacts are not limited to health and privacy, however, as management attorney Brian D. Hall demonstrates in *The Impact of Smart and Wearable Technology on Trade Secret Protection and E-Discovery*. He discusses the potential productivity and efficiency benefits of using smart and wearable technology to measure employee performance, but warns that new technologies may enable trade secret disclosure and make it difficult for employers to comply with document retention obligations during discovery in litigation. With case law lagging behind the development of new technologies, he recommends employers rely on traditional approaches to trade secret protection and evidence preservation.

Enacted fifty years ago, the Age Discrimination in Employment Act (ADEA) significantly advanced older workers’ employment prospects and protections. In *The Age Discrimination in Employment Act at 50: When Will It Become a “Real” Civil Rights Statute?*, AARP in-house counsel Laurie A. McCann argues that the ADEA’s work is far from finished. She describes how hiring discrimination against older workers remains a problem, and how it has become more sophisticated in an increasingly online world. She explains that courts have limited the ADEA’s protections by requiring plaintiffs to meet a higher burden of proof in age discrimination suits than for other types of discrimination and by rejecting the disparate impact theory of liability for age discrimination. She contends, however, that age should not be singled out for less protection than other protected characteristics. She offers suggestions for improving upon the ADEA’s first fifty years, by working to combat harmful stereotypes, amending the ADEA, and advocating to limit or reverse precedent that narrowed ADEA protections.

Jacob C. Harksen, a third-year student at the University of Minnesota Law School and the Editor-in-Chief of the *Journal*, considers whether employers may lawfully reemploy returning military veterans in positions lower than the jobs they left and under what circumstances. In *Are Discretionary Demotions, Layoffs, and Terminations Valid Reemployment Positions for Returning Veterans?: Uncertain Applications of the Escalator Principle under the Uniformed Services Employment and Reemployment Rights Act*, he compares federal case law to argue that if the “escalator principle” under the Uniformed Services Employment and Reemployment Rights Act applies to discretionary promotions and to automatic terminations, it must also apply to discretionary demotions and terminations. To avoid unlawfully discriminating against veterans, however, employers are best advised not to demote or discharge veterans upon reemployment, except in rare circumstances.
Web Access to Journal Issues and Indexes

The website of the ABA Section of Labor and Employment Law includes cumulative indexes (author, title, and subject matter) of all issues of the *ABA Journal of Labor & Employment Law* and its predecessor title, *The Labor Lawyer*. The website also includes PDFs of all issues, commencing with Volume 12. Articles listed in the indexes are linked to the PDFs. Members of the Section may access the indexes and issues at:

Mind the Gap: Pay Audits, Pay Transparency, and the Public Disclosure of Pay Data

Erin M. Connell* & Kathryn G. Mantoan**

Introduction

Few employment law issues have commanded as much attention in recent years as equal pay.1 It is a hot topic not only among lawyers and legislators, but also among politicians, celebrities, and professional athletes. Although Congress has not strengthened the nation’s equal pay laws since the Lilly Ledbetter Fair Pay Act in 2009,2 states and municipalities have led the charge in adopting aggressive new equal pay laws, making it easier for employees to demonstrate pay disparities and harder for employers to justify them.3 At the same time, there has been a growing effort to increase pay transparency through state statutes and local ordinances, as well as federal enforcement agencies, including the Equal Employment Opportunity Commission.

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1. See Genevieve Douglas, #MeToo Movement Shines Spotlight on Pay Equity, BNA: DAILY LAB. REP. (Jan. 24, 2018), https://bnanews.bna.com/daily-labor-report/metoo-movement-shines-spotlight-on-pay-equity/. It is important, however, to distinguish between “pay equity”—equal pay for equal (or, depending upon the jurisdiction, “substantially similar”) work—and the oft-cited “pay gap.” For purposes of this article, the “pay gap” between men and women (frequently cited nationally as women in the United States making eighty cents for every dollar men make) is understood as a simple ratio of median earnings among male full-time workers compared to female full-time workers. See U.S. CENSUS BUREAU, HISTORICAL INCOME TABLE P-40: WOMEN’S EARNINGS AS A PERCENTAGE OF MEN’S EARNINGS BY RACE AND HISPANIC ORIGIN (2017), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html. Employers sometimes refer to their own company’s “pay gap,” typically meaning a comparison of the median earnings of men and women company-wide. These “pay gap” statistics do not compare similarly situated employees or control for other meaningful factors, such as company position or unpaid leaves. While this Article discusses both concepts, the primary focus is on “pay equity,” meaning a determination of whether comparable employees are paid equitably based on their work, irrespective of gender.


3. See infra Sections I.B, I.C.
(EEOC) and the Office of Federal Contract Compliance Programs (OFCCP).\textsuperscript{4} Additionally, some private companies are voluntarily adopting pay transparency policies exceeding legal mandates.\textsuperscript{5} Pressure to ensure pay equity and to release pay data publicly has also come from activist shareholder proposals, particularly targeting the technology, finance, and retail industries.\textsuperscript{6}

All of these developments have triggered a proliferation of pay audits by employers, both to assess risk and in response to threatened or actual litigation.\textsuperscript{7} But conducting meaningful pay audits is complicated. Not only do they depend on accurate models that comply with applicable law, but companies must implement them carefully to preserve attorney-client privilege and work product protections. Further, carrying out remedial steps, including potential pay adjustments and changes to policies or practices that may have contributed to pay disparities, can sometimes be more complex than the audits themselves.

Part I provides a brief overview of the current equal pay landscape, including both legislation and litigation. Part II discusses the recent trend of publicly disclosing pay data in response to shareholder proposals, public or competitive pressure, or a sense of corporate social responsibility. Part III summarizes recent pressures for pay transparency, including efforts of states and federal agencies. Part IV addresses the nuances of pay audits, including the sensitive issues of preserving attorney-client privilege and work product protection, as well as considerations that inform remedial steps such as pay adjustments or other policy changes.

I. The Current Equal Pay Landscape

The federal government, states, and municipalities have all sought to promote gender pay equity.

A. The Federal Landscape

At the federal level, equal pay was a key issue for the Obama administration. Although Congress did not pass the Paycheck Fairness Act during President Obama's two terms,\textsuperscript{8} his administration took several steps, primarily through administrative agencies, that helped shape the current federal equal pay landscape.

In 2010, President Obama created the National Equal Pay Enforcement Task Force to increase federal agency coordination and enforcement efforts on equal pay issues among the EEOC, the Depart-

\textsuperscript{4} See infra Section I.A.
\textsuperscript{5} See infra Sections II.B, III.B.
\textsuperscript{6} See infra Section II.C.
\textsuperscript{7} See infra Part IV.
\textsuperscript{8} The Act was introduced during three congressional sessions. See H.R. 12, 111th Cong. (2009); H.R. 1519, 112th Cong. (2011); S. 2199, 113th Cong. (2014).
ment of Labor (including the OFCCP), and the Department of Justice. In June 2013, the Task Force published a lengthy report reviewing the “Equal Pay” movement’s history, touting Task Force accomplishments, and highlighting increased interagency collaborative enforcement efforts.10

In 2012, and again in 2016, the EEOC released its Strategic Enforcement Plan (SEP), identifying the agency’s national priorities. Enforcing equal pay laws and targeting “compensation systems and practices that discriminate based on gender” were priorities for fiscal years 2013 through 2016.12 For fiscal years 2017 through 2021, the EEOC extended this priority to cover other types of pay discrimination, including discrimination based on race, ethnicity, age, disability, and “the intersection of protected bases.”

Not every Obama-era pay equity initiative has survived the change in administration, however. In September 2016, the EEOC announced approval of a revised EEO-1 form that would have required certain employers to report aggregate W-2 pay data, as well as hours worked, by gender, race, and ethnicity across twelve pay bands for ten EEO-1 job categories beginning in March 2018. The job categories, which remain unchanged from the prior EEO-1 form, include broad groupings such as “Professionals” and “Service Workers.” On August 29, 2017, however, the Office of Management and Budget (OMB) informed the EEOC that it was initiating a review and immediate stay of the pay data collection aspects of the revised EEO-1 form.16 Given the review and stay of pay data collection, employers

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must comply with the earlier approved EEO-1 by the previous filing date of March 31, 2018.17

As for the OFCCP, in 2013 the agency rescinded its 2006 Compensation Standards and Voluntary Guidelines on the basis that they were too narrow and limited the agency’s ability to investigate pay discrimination.18 Instead, the OFCCP released new guidance (Directive 307) that significantly expands its approaches to analyzing contractor compensation practices.19 Directive 307 explains that it is part of an “ongoing policy commitment to address pay discrimination by federal contractors” and states that the OFCCP will approach pay discrimination by federal contractors on a case-by-case basis using both statistical and non-statistical investigative and analytical tools.20 Additionally, as discussed in greater detail in Part III, effective January 11, 2016, OFCCP regulations prohibit federal contractors from discharging or otherwise discriminating against employees or job applicants for discussing, disclosing, or inquiring about compensation.21 No longer constrained by the 2006 compensation standards, and armed with a broad new directive and a stated policy commitment to addressing pay discrimination, the OFCCP pursued investigation of systemic pay issues in a dramatically increased proportion of its compliance reviews.22 The agency brought several lawsuits alleging pay discrimination in the final months of the Obama administration.23 What the OFCCP heralded as increased flexibility under Directive 307 has, in practice, left many contractors less certain of how the agency will interpret and enforce governing regulations and orders on compensation.24


20. Id § 4.


Finally, in 2016, President Obama had invited private companies to sign the “Equal Pay Pledge,” to make a commitment to conduct annual company-wide gender pay analyses across occupations. Companies were also asked to pledge to review hiring and promotion procedures to reduce unconscious bias and structural barriers, to embed equal pay efforts into broader company-wide equity initiatives, and to identify and promote other best practices to “close the national wage gap to ensure fundamental fairness for all workers.” Over 100 companies across sectors signed the pledge, and many made supportive public statements.

The Trump administration’s approach to equal pay is still developing. Although the Equal Pay Pledge has been removed from the White House website, it appears unlikely that momentum for aggressively tackling equal pay will be fully reversed or halted. For example, the majority of EEOC Commissioners who approved the 2017–2021 SEP, which underscored the agency’s continued focus on discriminatory compensation practices, remain in place until at least mid-2018, although other Commissioners have resigned or have not been re-nominated, and President Trump will be able to create a Republican majority on the EEOC with two additional appointments and confirmations. Additionally, although the final OFCCP Director of the Obama administration left shortly after President Trump’s election, many OFCCP regional staff who joined the agency under President Obama retain their positions. And, as discussed in Section I.B, Congress may pass equal pay legislation to provide a consistent national standard.

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26. Id.
30. On May 11, 2017, Congresswoman Eleanor Holmes Norton introduced House Resolution 2418, the Pay Equity for All Act of 2017, which would prohibit employers from screening employees based on previous wages and from requesting or requiring, as a condition for an interview or offer, the disclosure of previous wages. See Pay Equity for All Act of 2017, H.R. 2418, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/2418/text. No further action has been taken, however, since the bill was initially referred to the House Committee on Education and the Workforce.
B. States on Equal Pay

In the absence of enhanced federal legislation, states from coast to coast have enacted aggressive new equal pay laws. This section describes some of the most important recent legislation in this ever-evolving area and discusses differences between these laws.31

1. California

Effective January 1, 2016, California enacted the California Fair Pay Act (FPA), amending its existing equal pay law.32 The FPA changes the earlier comparator standard that compared the pay of employees performing “equal work” to one comparing employees who perform “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.”33 The California Department of Industrial Relations has defined the terms of the new standard:

“Substantially similar work” refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.34

No court or administrative agency, however, has yet applied this guidance.

The FPA modifies California’s equal pay law in several other ways. It eliminates the requirement that comparator employees work at the same geographic “establishment.”35 Effective January 1, 2017, race and ethnicity became legally protected bases, introducing new protection not previously included in other states’ equal pay legislation.36 Additionally, California now explicitly prohibits employers from punishing workers for disclosing or discussing wages, provides

32. S.B. 358, Legis. Serv. Ch. 546 (Cal. 2015).
33. CAL. LAB. CODE § 1197.5(a) (West 2017).
35. Id.
anti-retaliation protection for employees who assist co-workers in bringing claims under the Act, and mandates that “[p]rior salary shall not, by itself, justify any disparity in compensation.”

The FPA also raises an employer’s burden to justify pay disparities. As under prior California law, the FPA affords employers four affirmative defenses to justify pay disparities: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex. The new law offers a non-exhaustive list of factors that could fall under the “bona fide factor other than sex” defense (such as “education, training, or experience”).

The FPA also mandates that an employer seeking to rely on this particular defense must demonstrate that the “factor other than sex” is: (1) not itself “based on or derived from a sex-based differential in compensation”; (2) job-related to the position in question; and (3) consistent with business necessity. These amendments create uncertainty for California employers regarding what factors courts will deem legitimate bases of pay differentials.

The FPA creates two additional hurdles for employers, regardless of what factors they cite to explain apparent pay disparities. Employers must establish that “[e]ach factor relied upon is applied reasonably” and that “[t]he one or more factors relied upon account for the entire wage differential.” While no courts have yet interpreted these new provisions, the latter requirement—that an employer explain the entire wage differential—should be interpreted in light of the fact that large-scale statistical models almost always show some variation in pay. At a minimum, differences that are not statistically significant should not be cited as support for even an inference of discrimination, because such results are consistent with random variation.

In addition to the requirements of the new FPA, employers in California also must contend with the statewide ban on salary history inquiries, effective January 1, 2018. A new section of the California Labor Code prohibits employers from “seeking salary history information” from any applicant, either directly or indirectly. Moreover, it prohibits employers from relying on salary history information in

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37. CAL. LAB. CODE § 1197.5(a)(3). Interestingly, Governor Jerry Brown previously vetoed legislation in 2015 prohibiting salary history inquiries because it “broadly prohibit[ed] employers from obtaining relevant information with little evidence that this would assure more equitable wages.” See Damrell et al., supra note 36.


40. CAL. LAB. CODE § 1197.5(a)(1)(D) (2017). The burden then shifts back to employees to demonstrate that alternative business practices exist that would serve the same purpose without causing wage disparity. Id.

41. Id. § 1197.5(a)(2)–(3).


43. Id.
determining what salary to offer, unless the applicant “voluntarily and without prompting” discloses that information.\textsuperscript{44} Even then, consistent with the FPA, the prior salary information cannot itself justify any resulting pay disparities.\textsuperscript{45} Finally, the new law mandates that employers furnish “the pay scale for a position” to any applicant “upon reasonable request.”\textsuperscript{46} The California Pay Equity Task Force has drafted guidance documents for employers regarding starting salary setting practices in light of these new laws, but these have not yet been formally adopted or relied upon by any court.\textsuperscript{47}

2. New York

Also in January 2016, New York amended its equal pay law in the Achieve Pay Equity Act.\textsuperscript{48} Unlike California, New York’s statute still compares the pay of employees who perform “equal” work, although the 2016 amendments broaden the definition of “establishment” to include workplaces located in the “same geographical region, no larger than a county.”\textsuperscript{49} Like California, however, New York’s statute imposes new requirements for employers to justify pay disparities, including requiring employers who rely on the “bona fide factor other than sex” defense to prove that the stated factor: (1) is not based on or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity.\textsuperscript{50}

3. Maryland

Effective October 1, 2016, Maryland similarly broadened its existing equal pay laws. Although Maryland law has long compared the pay of employees who perform work of a “comparable character,” courts in Maryland have historically looked to federal Equal Pay Act (EPA) case law to interpret the state standard.\textsuperscript{51} The comparator standard now includes gender identity as well as sex and broadens the definition of “establishment” to include all related workplaces in the same county.\textsuperscript{52} Maryland also expanded the list of enumerated defenses available to

\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{49} N.Y. LAB. LAW § 194(1), (3) (McKinney 2016).
\textsuperscript{50} Id. § 1(d).
\textsuperscript{52} MD. CODE ANN., LAB. & EMPL. § 3-304(b) (LexisNexis 2017).
employers to justify pay disparities to include specifically “a bona fide factor other than sex or gender identity, including education, training, or experience.” Like California, Maryland requires employers to show that bona fide factors: (1) are not derived from a sex-based differential in compensation; (2) are job related and consistent with business necessity; and (3) account for “the entire differential.”

Maryland now explicitly prohibits “providing less favorable employment opportunities” to women than men, defined to include “assigning or directing the employee into a less favorable career track . . . or position,” or “limiting or depriving an employee of employment opportunities that would otherwise be available to the employee but for the employee’s sex or gender identity.” Employers with offices in Maryland should consider how this additional prohibition might affect their assessment of any observed pay disparities. In particular, explanations of pay disparities relying on differences in the jobs performed by men and women should be evaluated in light of the prohibition on “providing less favorable employment opportunities” to women.

4. Massachusetts

A new Massachusetts equal pay law becomes effective July 1, 2018. The new law’s standard compares the pay of “opposite sex” employees who perform “comparable work,” but explains that the term means “work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions . . . .” The law adds several affirmative defenses, expressly authorizing disparities that are the product of: (1) “a bona fide system that rewards seniority with the employer”; (2) “a bona fide merit system”; (3) “a bona fide system which measures earnings by quantity or quality of production or sales”; (4) geographic location; (5) “education, training or experience to the extent such factors are reasonably related to the particular job in question and consistent with business necessity”; and (6) travel that is a “regular and necessary” condition of the job. The law does not contain the “catch-all” defense of a “bona fide factor other than sex,” however, distinguishing it from California and Maryland.

The new Massachusetts law also contains a “safe harbor” that affords employers a defense against an allegation of wage discrimination if “within the previous 3 years and prior to the commencement of the action, [the employer] has both completed a self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress

53. Id. § 3-304(c)(7).
54. Id.
55. Id. § 3-304(a).
56. MASS. GEN. LAWS ch. 149, § 105A (2017).
57. Id. § 105A(a).
58. Id. § 105A(b).
59. See generally id.
has been made towards eliminating wage differentials based on gender for comparable work . . . in accordance with that evaluation . . . .” 60

Massachusetts also was the first state to pass a law prohibiting employers from requesting, inquiring about, or relying upon prior compensation before making a job offer or during negotiations over starting salary, though its prohibition will become effective later than a similar law in California.61 Under the Massachusetts version, employers may confirm prior compensation either after an offer of employment and compensation is negotiated, or in instances prior to an employment offer if the candidate voluntarily discloses prior compensation.62

5. Oregon

On June 1, 2017, Oregon Governor Kate Brown signed into law the Oregon Equal Pay Act of 2017, the majority of which will take effect January 1, 2019.63 The law enumerates several affirmative defenses; employers can justify differences in compensation using bona fide factors related to the position, including: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; (4) workplace location; (5) travel; (6) education; (7) training; (8) experience; or (9) a combination of these factors.64 Like Massachusetts, the Oregon law does not explicitly allow employers to point to any other bona fide factor other than sex to explain wage differentials.65 And similar to California, Oregon law permits the enumerated defenses only “if all of the difference in compensation levels is based on a bona fide factor that is related to the position in question.”66

Oregon law, like Massachusetts, includes a “safe harbor” that allows employers to limit potential backpay awards if they can demonstrate that they: (1) completed a good-faith equal pay analysis in reasonable detail and scope within three years before the date the employee filed the action; (2) eliminated the plaintiff’s wage differential; and (3) took reasonable and substantial steps to end pay differentials for the plaintiff’s protected class.67 If the employer proves this defense, the court may award a prevailing plaintiff back pay only for the

60. Id. § 105A(d).
61. Id. § 105A(c)(2).
62. Id.
66. Id. § 2(2).
67. Id. § 12(1).
two years immediately preceding filing the lawsuit and costs and reasonable attorneys’ fees. In such cases, neither compensatory nor punitive damages can be awarded.

Oregon law further prohibits employers from “[s]creen[ing]” applicants based on prior compensation or “seek[ing]” salary history of an applicant or employee. Neither term is defined, though the new law does expressly authorize employers to request written authorization from applicants to confirm prior compensation after an offer defining compensation has been extended. This provision took effect on October 6, 2017. The Oregon Bureau of Labor and Industries will begin enforcing this provision and may issue civil fines beginning January 1, 2019. Beginning January 1, 2024, employees will have a private right of action against potential employers under this provision.

6. Delaware

Delaware’s new equal pay legislation took effect on December 14, 2017. The law prohibits employers from screening applicants based on prior salary, and from requiring that a candidate’s prior salary meet a minimum or maximum amount. Similarly, employers may not ask applicants about compensation history or elicit information from current or former employers. However, the law explicitly does not prohibit employers and applicants from “negotiating compensation expectations” if employers do not request or require applicants’ compensation histories. Furthermore, employers are free to ask about compensation history after extending, and after applicants accept, offers, including proposed terms of compensation. Employers are not liable for conduct of any non-employee agents (e.g., recruiting firms) that employers instruct to comply with the law, even if such agents later violate it.

7. Nevada

Nevada’s novel approach to pay equity relies on the “carrot” of potential state government contracts rather than the “stick” of potential fines or litigation. Effective January 1, 2018, Nevada will certify vendors who “pay their employees equal pay for equal work without regard

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68. Id. § 12(2).
69. Id.
70. Id. §§ 2(1)(c)–(d).
71. Id. § 2(1)(d).
72. Oregon Equal Pay Law, supra note 63.
73. Id.
74. Id.
76. Id. § 709B(b)(2).
77. Id. § 709B(d).
78. Id. § 709B(e).
79. Id. § 709B(c).
to gender.”80 Nevada gives certified vendors preference in competition for state contracts and permits them to note their certification in advertising, marketing, or other promotional materials.81 Nevada also permits companies to “self-certify” in accordance with state regulation, but contractors face debarment penalties if they make fraudulent misrepresentations.82

C. Municipal Equal Pay Laws

Although historically employment legislation has been enacted at the state and federal levels, increasingly municipalities are also initiating new equal pay requirements for local employers. The following subsections discuss a few of the most prominent such municipal enactments to date.

1. Philadelphia

Philadelphia was the first city to enact legislation prohibiting employers from asking prospective employees about wage history.83 The January 2017 ordinance declares that “[s]alary offers should be based upon the job responsibilities of the position sought and not based upon the prior wages earned by the applicant.”84 As a result, the bill not only prohibits employers from asking about prior salary, but also bans using prior salary information to set a newly hired employee’s salary if it is discovered later in the hiring process.85 The Philadelphia Chamber of Commerce challenged the law, arguing that it violates employers’ free speech rights and obstructs interstate commerce with little or no evidence that it will improve pay equity.86 The ordinance was stayed pending resolution of the Chamber’s motion for a preliminary injunction, on which oral argument was held on February 1, 2018.87 The Chamber’s lawsuit may become moot, as legislation was introduced in the Pennsylvania state legislature that would preempt local equal-pay laws; as of February 2018, that legislation has not yet been taken up for a vote, however.88

80. Assembly Bill No. 106, 79th Sess. (Nev. 2017). The law includes a sunset provision phasing the system out in 2021. Id.
81. See id. §§ 25, 28(6).
82. Id. § 24(2).
84. Id.
85. Id.
2. New York City

New York City was the next municipality to enact equal pay legislation. Initially, Mayor Bill De Blasio signed an executive order preventing city agencies from asking about applicants’ prior salaries during the hiring process. In 2017, an ordinance extended the prohibition on requesting salary history information to all public and private employers conducting business in New York City. However, the provision still allows employers to discuss salary expectations with job applicants. In addition, if applicants voluntarily disclose salary histories to employers, employers may consider that salary information in determining pay, benefits, and other compensation, and may verify salary histories. The law expressly states that it does not apply to applicants for internal transfer or promotion with current employers.

Employees can file complaints with the New York City Commission on Human Rights (NYCCHR) for violations of the equal pay legislation, and the NYCCHR can issue fines of up to $250,000 for willful and malicious violations. Further, the NYCCHR may award compensatory damages to victims, including emotional distress damages.

3. San Francisco

The San Francisco Board of Supervisors voted unanimously in June 2017 to ban employers from asking applicants about prior salary history, and former Mayor Ed Lee subsequently signed the “Parity in Pay Ordinance” into law. It applies to all employers in the city, as well as city contractors and subcontractors. Current Mayor (then City Supervisor)


92. Id.

93. Id.


95. Id.


97. Id.
Mark Farrell, who introduced the legislation, commented: “Especially in the era of Donald Trump, we need to be increasingly vigilant about a number of issues, in particular women’s rights, that are under a serious threat of being degraded at the national level.” The law provides that employers may not “consider or rely on” applicants’ salary histories in determining salaries to offer applicants, unless they volunteer the information or salary information is available online, as for city employees, for example. However, employers can still ask applicants about their “expectations with respect to salary.”

D. Compliance Issues for Multi-Jurisdictional Employers

While these recent enactments address pay equity issues, differences between them present compliance challenges for national employers, particularly those desiring uniform national compensation practices. For example, the federal EPA and the laws of California and New York allow employers to articulate any “bona fide factor other than sex” to justify pay disparities. Massachusetts and Oregon, by contrast, provide an exclusive list of those factors—six in Massachusetts, eight in Oregon—that can justify pay disparities, but lack language that would allow employers to rely on other legitimate factors that influence pay at that company or in the relevant industry. National employers may be found in violation of one jurisdiction’s law for relying on a factor permitted by another jurisdiction’s broad “bona fide factor other than sex” language.

Additionally, differences in appropriate pay comparators under various state laws may prove challenging for interstate employers. California eliminates the requirement that purported pay comparators work in the same establishment. New York comparators encompass employees in the same “geographical region.” Maryland includes employees in the same county. Employers conducting company-wide pay audits may have trouble determining how to group employees for analysis because standards vary by jurisdiction.

100. S.F., CAL. ENACTMENT NO. 142-17, § 1 (2017).
102. N.Y. LAB. LAW § 194(3) (McKinney 2016).
103. MD. CODE ANN., LAB. & EMPL. § 3-304(b)(2) (LexisNexis 2017).
These potential problems are unlikely to slow enactment of state and municipal pay equity laws. Indeed, in the past two years alone, legislators in other states—including Washington, Pennsylvania, and Utah—have introduced equal pay bills more expansive than federal law. Further proliferation of competing, and potentially contradictory, standards will present additional employer challenges.

E. Litigation Trends

Along with legislators, private litigants have heightened the focus on equal pay through a proliferation of compensation discrimination lawsuits. Increasingly, lawsuits make claims not only under Title VII or the EPA, but also under state law analogs, particularly in California and New York. Putative class action suits were filed in New York against the New York Times and Bank of America, alleging compensation discrimination against women in reporting and managing director positions, respectively. Suits have been filed in California against Qualcomm, Oracle, Google, and Uber and the law firms

Sedgwick (now defunct), Steptoe & Johnson, Winston & Strawn, and Ogletree Deakins.

Now that the amended New York and California laws have been on the books for some time, additional individual and class action suits will surely follow. In addition, government agencies continue to pursue employers they perceive as engaging in compensation discrimination. For example, State Street Corporation, the investment firm responsible for commissioning the “Fearless Girl” statue placed in New York’s financial district in 2017, recently entered into a conciliation agreement with the OFCCP to resolve a notice of violation alleging that it discriminated against 305 top female employees by paying them less than men in the same positions; as part of this agreement, it will pay out $5 million.

Companies can expect not only more equal pay litigation, but also more detailed demands for programmatic injunctive relief in systemic cases. In Pan v. Qualcomm, Inc., for example, the parties agreed to programmatic relief worth an estimated $4 million that included, among other things, appointing a compliance officer responsible for monitoring the settlement agreement. The settlement further required the employer to retain two industrial/organizational psychology consultants to assess policies and practices and implement changes and to conduct annual statistical analyses of compensation. Similarly, the settlement in Coates v. Farmers Insurance Group required


120. Id. at *3.


the employer to conduct annual statistical analyses of compensation and eliminate any unjustified adverse impacts revealed.\textsuperscript{123}

Employers must reconcile state and local litigation trends with existing and emerging federal law. The Ninth Circuit, in \textit{Rizo v. Yovino},\textsuperscript{124} examined affirmative defenses under the federal EPA, particularly whether reliance on prior salary was a legitimate justification.\textsuperscript{125} The employer, a school district, argued it could peg starting salaries for new employees to prior salary, even if that reliance led a female teacher to be paid less than a male colleague.\textsuperscript{126} The district argued prior salary was a “factor other than sex” necessary to incentivize candidates (male or female) to accept employment with the district without suffering a pay cut.\textsuperscript{127} The plaintiff and the EEOC, as amicus curiae, argued that “prior salary alone cannot be a factor other than sex because when an employer sets pay by considering only its employees’ prior salaries, it perpetuates existing pay disparities and thus undermines the purpose of the [EPA].”\textsuperscript{128} The Ninth Circuit, however, held that employers may “base a pay differential on prior salary so long as it showed that its use of prior salary effectuated some business policy and that the employer used the factor reasonably in light of its stated purpose and its other practices.”\textsuperscript{129} The full Ninth Circuit agreed to rehear the case en banc and vacated the panel opinion,\textsuperscript{130} leaving unclear whether the Ninth Circuit will continue permitting reliance on prior salary under federal law. Also left uncertain is how employers in California, Oregon, or other states that prohibit such reliance (at least when prior salary is the sole factor explaining the pay disparity) will reconcile the Ninth Circuit’s ultimate opinion with local pay equity laws and standards.

\textbf{II. Pay Disclosure}

Another driving force relating to pay equity is public pressure for employers to disclose pay data publicly. In recent years, several employers have voluntarily made public disclosures regarding their pay gap, or lack thereof, and also have disclosed steps taken to effectuate pay equity systematically and proactively. Other employers have made similar disclosures in response to activist shareholder proposals that, if adopted, would have required companies to disclose publicly

\begin{itemize}
\item \textsuperscript{123} See Notice of Motion and Unopposed Motion for Preliminary Approval of Class/Collective Action Settlement; Memorandum of Points and Authorities at 13, Coates v. Farmers Ins. Grp., No. 15-CV-01913-LHK (N.D. Cal. Apr. 13, 2016).
\item \textsuperscript{124} 854 F.3d 1161 (9th Cir. 2017).
\item \textsuperscript{125} \textit{Id.} at 1164.
\item \textsuperscript{126} \textit{Id.} at 1165.
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Id.} at 1166.
\item \textsuperscript{129} \textit{Id.} (citing Kouba v. Allstate Ins. Co., 691 F.2d 873, 876–78 (9th Cir. 1982)).
\item \textsuperscript{130} Rizo v. Yovino, No. 16-15372, 2017 WL 3720748 (9th Cir. Aug. 29, 2017).
\end{itemize}
the percentage pay gap between male and female employees and planned steps to address it. And, as large international employers are aware, new United Kingdom regulations require publication of statistics and other information regarding workforce gender pay gaps.131

A. Public Disclosure of Pay Data

Proponents of public pay data disclosure claim it helps ensure pay equity by forcing employers to assess and address the issue. Such disclosures also may allow employers to avoid shareholder proposals and demonstrate social responsibility, limiting exposure to public scrutiny. Publicly disclosing pay data can be risky, however. Not only must employers ensure public disclosures are accurate, but they also must be mindful of the possibility of waiving attorney-client privilege or work product protections for the underlying analyses. The waiver issue can be particularly sensitive for employers litigating claims of compensation discrimination.

B. Voluntary Disclosure of Pay Data

Several companies have chosen voluntarily to disclose information regarding compensation of male and female employees, as well as steps taken or proposed to address disparities. In September 2015, GoDaddy became the first major technology company to disclose pay gap statistics voluntarily. Following an audit, the company revealed that women on average earned 0.28 percent more than men, although women in management were paid 3.58 percent less.132 In March 2016, Salesforce announced that, after completing a “comprehensive analysis of the salaries of more than 17,000 global employees,” it had adjusted salaries for approximately six percent of its workforce—men and women alike—to achieve complete pay equity.133 Expedia announced in June 2016 that, on average, women and men in equivalent roles were paid the same.134

C. Disclosures in Response to Activist Shareholder Proposals

Although some companies have voluntarily disclosed select pay data, others have done so in response to shareholder proposals from activist funds such as Arjuna Capital, Trillium Asset Management, and Pax World Investments. In 2015 and 2016, Arjuna filed shareholder proposals against tech giants, including Microsoft, Intel, Amazon, Google, and Facebook, that, if passed, would have required disclosing publicly percentage pay gaps between male and female employees and remediation plans. In response, several companies, including Apple, Intel, and Amazon, released gender pay information, including statistics and remediation plans. These releases largely satisfied the activist funds. Shareholders of other companies, such as Google and Adobe, defeated the proposals and declined to disclose pay data.

In late 2016, the same three activist funds issued a second wave of shareholder proposals, this time targeting prominent U.S. financial institutions for the 2017 proxy season. Consistent with earlier efforts in the technology industry, these demanded disclosure of sex-based compensation data, as well as additional diversity statistics on employee race and gender. Targets included Goldman Sachs, Citigroup, Bank of America, Bank of New York Mellon, Wells Fargo, American Express, MasterCard, and JPMorgan Chase. Pax withdrew several proposals directed at companies that agreed to terms of disclosure, but MasterCard allowed the proposal to go to a vote. Only 7.8% of shareholder votes favored the proposal, but Pax has said “it’s enough to permit the resolution to be refiled next year.” In recent months, however, financial services companies have shown increased willingness to disclose publicly information regarding gender and pay gaps, with Citigroup leading the way in January 2018.

136. Id.
138. Id.
139. Id.
Additional industries, including retail and telecommunications, are now in the sights of activist investors. Arjuna Capital has filed proposals, similar to those it filed against technology companies, against Starbucks, Nike, The Gap, Costco, and Walmart.\textsuperscript{142} Zevin Asset Management, LLC filed a similar proposal against T.J. Maxx, Marshalls, and HomeGoods.\textsuperscript{143} Telecommunications firms, including Qualcomm, Verizon, and AT&T, have also been targeted.\textsuperscript{144} In addition to seeking gender pay gap information, however, this latest round of proposals also sought pay gap information on race and ethnicity.\textsuperscript{145}

III. Pay Transparency

In addition to pressure for public disclosure of pay data, employers also are dealing with new laws and corporate policies promoting employee pay transparency. This includes both federal and state statutes and regulatory actions. Some private companies have adopted pay transparency policies that exceed legal requirements.

A. Federal Pay Transparency

Although the National Labor Relations Board has long taken the position that employees must be permitted to discuss their compensation as part of their right to engage in concerted activity,\textsuperscript{146} many employees still report that employers either prohibit, restrict, or discourage discussions or inquiries about pay.\textsuperscript{147} Accordingly, the OFCCP in September 2015 published a final rule revising regulations implementing Executive Order 11246 to protect federal contractor employees who inquire about compensation.\textsuperscript{148} The revised regulations took effect on January 11, 2016, and apply to all covered contracts entered into or modified as of that date.\textsuperscript{149} They prohibit federal contractors

\begin{itemize}
  \item \textsuperscript{142} Andrea Vittorio, \textit{Shareholders Ask Retailers to Mind the Pay Gap}, BLOOMBERG BNA (Jan. 10, 2017), https://www.bna.com/shareholders-ask-retailers-n73014449531/;
  \item \textsuperscript{144} Id.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} Id.
\end{itemize}
and subcontractors from discharging or otherwise discriminating against employees and job applicants for discussing, disclosing, or inquiring about compensation. The regulations also require federal contractors to incorporate a prescribed nondiscrimination provision into existing employee handbooks and disseminate it to employees and applicants.

B. State Laws Promoting Pay Transparency

States also have enacted pay transparency laws. Among other states, California, Connecticut, Delaware, Maryland, Massachusetts, New York, and Oregon bar employers from stopping employees from discussing or inquiring about pay and prohibit retaliation for such conduct. An overview of a handful of these laws, and comparisons and contrasts among them, follows.

California’s FPA not only states that employers may not prohibit employees from discussing their own or others’ wages, it also creates a private right of action for employees who claim retaliation. Similarly, New York’s Achieve Pay Equity Bill prohibits employers from forbidding employees to inquire about, discuss, or disclose their own or other employees’ wages. Unlike California, however, New York states that employers “may, in a written policy provided to all employees, establish reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages,” although such limitations must be consistent with state and federal law and “may include prohibiting an employee from discussing or disclosing the wages of another employee without such employee’s prior permission.” Employers must also comply with New York Department of Labor regulations that state that time, place, and manner limitations may not be so restrictive as to “unreasonably or effectively preclude[] or prevent[] inquiry, discussion, or disclosure of wages,” and must be content-neutral, narrowly tailored, and “leave open ample alternative channels for the communication of information.” Unlike California, the New York law contains a pro-

155. N.Y. LAB. LAW § 194(4)(b) (McKinney 2016).
vision similar to one contained in the OFCCP pay transparency regulation\textsuperscript{157} denying protection in some circumstances to employees with job duties affording access to other employees’ compensation.\textsuperscript{158}

Massachusetts’ new equal pay legislation also prohibits employers from forbidding employees from discussing or inquiring about pay and prohibits retaliation.\textsuperscript{159} It also prohibits employers from contracting with employees to avoid pay transparency obligations, or otherwise trying to exempt themselves from the law’s requirements.\textsuperscript{160} The law does, however, permit employers to prohibit employees who have access to the pay data of others due to their job responsibilities from disclosing other employees’ compensation information without first obtaining the other employee’s permission.\textsuperscript{161} Employers are not required to disclose employee wages to any third party.\textsuperscript{162}

Maryland’s equal pay law precludes employers from prohibiting employees from inquiring about, discussing, or disclosing their own or co-workers’ wages, or requesting that employers provide reasons for employee wage levels.\textsuperscript{163} Like New York, Maryland allows employers to maintain written policies with reasonable workday limitations on the time, place, and manner for wage discussions consistent with the Commissioner of Labor and Industry’s standards and other state and federal laws.\textsuperscript{164}

\footnotesize{\begin{itemize}
\item \textsuperscript{157.} See 41 C.F.R. §§ 60-1.4(a)(3), (b)(3) (2016).
\item \textsuperscript{158.} N.Y. LAB. LAw § 194 (McKinney 2016). The law states that it “shall not apply to instances in which an employee who has access to the wage information of other employees as a part of such employee’s essential job functions discloses the wages of such other employees to individuals who do not otherwise have access to such information, unless such disclosure is in response to a complaint or charge, or in furtherance of an investigation, proceeding, hearing, or action under this chapter, including an investigation conducted by the employer.” Id.
\item \textsuperscript{159.} MASS. GEN. LAWS ch. 149, § 105A(c)(1) (2017).
\item \textsuperscript{160.} Id. § 105(c).
\item \textsuperscript{161.} Id.
\item \textsuperscript{162.} Id. § 105A(c)(1).
\item \textsuperscript{163.} MD. CODE, LAB. & EMPL. § 3-304.1 (LexisNexis 2017). Maryland prohibits employers from taking adverse employment actions against employees who: (1) inquire about another employee’s wages; (2) disclose their own wages; (3) discuss another employee’s wages, if those wages have been disclosed voluntarily; (4) ask the employer to provide a reason for the employee’s wages; or (5) aid or encourage another employee’s exercise of rights under the Maryland law. Id.
\item \textsuperscript{164.} Id. Additionally, Maryland does not: (1) require employees to discuss or disclose their wages; (2) diminish employees’ rights to negotiate terms and conditions of employment; (3) limit an employee’s rights under a collective bargaining agreement; (4) oblige employers or employees to disclose wages; (5) permit disclosure of proprietary information, trade secrets, or information that is otherwise protected by law without written consent of the employer; or (6) permit employees to disclose wage information to an employer’s competitor. Id.
\end{itemize}}
C. Private Company Pay Transparency Policies Going Beyond Law

Beyond the requirements of legislative and regulatory action promoting pay transparency, several companies voluntarily adopted transparency policies. For example, GoDaddy allows employees to compare their salaries to those of other employees holding the same positions and provides employees with pay statements that indicate their salary level and range.165 Similarly, Jet.com sets fixed salaries for specific positions, prohibits employees from negotiating salaries, and makes all salary information available to employees and investors.166 Whole Foods permits employees to look up the salary and bonus of any other employee, including the CEO.167 Newer companies are adopting similar practices. Data analytics startup SumAll includes every employee’s salary in a company-wide Google Doc, which the company believes will reduce employee turnover and raise workplace satisfaction.168 Social media management platform Buffer makes publicly available a spreadsheet that reveals by name each employee’s pay, as well as the formula used to set the salary.169

IV. Pay Audits

In response to the increased regulatory, legislative, and litigation focus on equal pay, smart employers are adopting more robust compensation monitoring processes. Chief among these are pay audits. Audits assess whether the company has either a pay gap or, according to one or more potentially applicable legal standards, a pay equity problem. Distinguishing between audits aimed at assessing the “pay gap” and those targeted at “pay equity” is crucial. Pay gap audits, which calculate the ratio between compensation paid to male and female employees, are conducted for a variety of reasons, including preparation for a possible public disclosure.170 Most often, however, employers conduct pay equity audits to assess the risk of litigation or to enable attorneys to provide advice on improved compensation practices. This section describes some common types of pay audits and offers guidance and prac-

166. Id.
167. Id.
170. Although pay audits most often address gender-based compensation differences, they can examine pay disparities between any two groups of employees defined by other factors such as race or ethnicity.
tice tips to develop and conduct audits. The best approach for a particular company depends on multiple factors, including the impetus for the audit, whether litigation is threatened or ongoing, and the company’s particular business needs.

A. Pay Gap Audits

Employers considering a public statement of pay data should first determine what their data show. Most often, employers obtain a privileged analysis to determine whether they have a pay gap. These audits are typically nationwide, although pay gap audits can be conducted on subsets of a company’s employees. Because the goal of the audit is to compare men’s and women’s average earnings, these audits would not usually control for all variables that legitimately impact pay, such as an employee’s specialty or company role. Such aggregate data in large companies may indicate statistically significant disparities driven solely by the number of employees in the model (i.e., the “effect size” problem).

Particularly if an employer is considering public disclosure of pay gap statistics, it is crucial that analysis and results are accurate and reliable. Accordingly, the best practice is to work with an experienced statistician or labor economist to conduct statistical analysis. It also is essential to ensure the underlying data on which the analysis is based is complete and accurate. If underlying data is derived from more than one source, it is crucial to have an experienced statistician or labor economist reconcile such information into a usable database. Similar reconciliation will be necessary to assess both current and historical data.

B. Pay Equity Audits

Pay equity audits, which assess a company’s pay practices against one or more potentially applicable statutory or regulatory standards, are significantly more complicated than pay gap analyses. The most common type of pay equity analysis creates a statistical model using multiple regression factors to compare the pay of different groups of employees. In some cases, paired or “cohort” comparisons also are used. Pay equity audits compare average earnings of men and women after controlling for a robust set of variables. They determine whether comparable employees who, depending on the applicable law or jurisdiction, could be “similarly situated” employees, or employees who perform “equal” or “substantially similar” work, are neverthe-

171. See, e.g., RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 8:3 (2016) (“Statistical significance is affected by the number of observations, so that for large samples, spurious significance can result.”); Rick Jacobs et al., Unintended Consequences of EEO Enforcement Policies: Being Big is Worse Than Being Bad, 28 J. BUS. & PSYCHOL. 467, 468 (2013) (“One of the truisms of statistical power analysis is that virtually any difference between groups will be ‘statistically significant’ if large samples are used.”).
less paid unequally. Accordingly, a critical first step in any pay equity analysis is determining which employees to compare.

In most cases, and particularly for jobs involving specialized, unique, and advanced skills, aggregating dissimilar employees into a single statistical model will yield invalid results. Thus, it is imperative initially to identify appropriate comparators in light of diverse state and federal standards. Overreliance on factors such as job title or level to identify comparators could produce invalid results and generate false positives unless every employee with the same job title and level is truly doing the same type of work on projects of comparable difficulty and importance. On these bases, courts have regularly rejected analyses that rely uncritically on job title alone to identify comparators.\(^{172}\) In some cases, employers may find jobs are so specialized and unique that comparable groups large enough for statistical analysis do not exist, rendering any meaningful statistical analysis impossible.

In addition to identifying appropriate comparator groupings, a pay equity analysis also must identify and incorporate legitimate factors that could explain pay disparities. Potential examples may include time with the company, time at the particular job level, organization, performance rating, or prior experience. But understanding which factors influence pay at a particular company, or within a particular company division, is a highly individualized exercise. An experienced statistician or labor economist can determine which variables would be expected to correlate with pay and thus should be included in the model. Industrial-organizational psychologists and human resources experts can best identify the variables actually influencing pay, particularly if the relevant factors are unique to a particular industry. A pay equity analysis may be challenged if it omits relevant variables, or if

\(^{172}\) See, e.g., Warren v. Solo Cup Co., 516 F.3d 627, 630–31 (7th Cir. 2008) (rejecting Title VII compensation claim when plaintiff could not show she was similarly situated to more highly skilled co-worker); Sims-Fingers v. City of Indianapolis, 493 F.3d 768, 772 (7th Cir. 2007) (rejecting federal EPA and Title VII compensation claims because “[t]he jobs of the managers of the different parks in the sprawling Indianapolis park system are nonstandard, mainly because the parks are so different from one another”); Coser v. Moore, 739 F.2d 746, 753 (2d Cir. 1984) (rejecting compensation discrimination claim by female non-tenured professors [NTPs], finding that “[t]he NTP rank itself merely establishes outside parameters for salary and does not reflect the tasks or responsibilities of a particular job except in a highly general fashion”); Knight v. Brown, 797 F. Supp. 2d 1107, 1127 (W.D. Wash. 2011), aff’d, 485 F. App’x 183 (9th Cir. 2012) (employee not “similarly situated” to others with same job title (security sergeant) in same county agency because of differences in seniority and shift); Ren v. Univ. of Cent. Fla. Bd. of Trustees, 390 F. Supp. 2d 1223, 1230–31 (M.D. Fla. 2005), aff’d sub nom., 179 F. App’x 680 (11th Cir. 2006) (rejecting discrimination claim of plaintiff who did not “share[] the same supervisor or evaluators” and “held position[] in different department[]” than proposed comparator); Nettles v. Daphne Utils., No. 13-0605-WS-C, 2015 WL 4910983, at *6 (S.D. Ala. Aug. 17, 2015) (job duties of clerk handling accounts receivable “fundamentally different” than clerk handling accounts payable because latter job “was more difficult, more complex, more time-consuming, and required more skill, effort and responsibility”).
variables included are biased or discriminatory (i.e., "tainted" variables). Accordingly, it is critical to determine carefully which factors to include in analysis. It is also important to determine if there are non-quantifiable legitimate pay determinants that cannot be accurately captured by, or controlled for, in a statistical model.

As with pay gap analyses, the underlying data must be complete and accurate. Errors or gaps in the data set, typically information aggregated from multiple sources, can lead to inaccurate or unreliable results. Accordingly, questions or uncertainties about the quality of the data should be addressed and reconciled before any analysis.

C. Establishing and Preserving Attorney-Client and Work-Product Privileges

Employers typically conduct pay analyses under direction of legal counsel to preserve attorney-client privilege and work-product protections. Ultimately, reliance on both attorney-client privilege and work product is advisable to encourage candid discussions about compensation practices, identify potential pay disparities, and develop appropriate remedial steps.

1. Attorney-Client Privilege

As the U.S. Supreme Court has recognized, protecting attorney-client privilege is important to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Retaining outside counsel to direct the analysis, including the work of retained statisticians or labor economists, is more likely to foster candid discussions about an employer’s compensation practices and allow exploration of a wider range of possible models without concern that those discussions may be subject to discovery in any future litigation or taken out of context.

Retaining outside counsel to direct pay audits, rather than relying solely on in-house teams, also avoids arguments about whether in-house counsel are functioning in a business role by providing advice for a “business,” as opposed to “legal,” purpose and thus operating outside the scope of the privilege. In fact, some courts have held that retaining outside counsel may create a rebuttable presumption that counsel was “hired ‘as such’ to give ‘legal [rather than business] advice.” Engagement letters for outside counsel can make this clear by affirmatively stating that the company is seeking legal advice.

Any third-party experts retained by outside counsel can, in turn, work under retention agreements specifying that their analysis will be done under the lawyer’s direction and for the purpose of giving legal advice.

2. Work-Product Doctrine

Pay equity audits may also obtain work product protection if created “in anticipation of litigation.” Work product is a limited protection only. Further, the law in many jurisdictions is unsettled regarding what is needed to make litigation “anticipated.” Specifically, some courts have determined that “[t]he mere prospect of litigation is not enough,” and that the party asserting the protection must establish a “nexus between the preparation of the document and . . . specific litigation.” Even if protected by attorney-client privilege, pay equity audits may not qualify for work-product protection if performed without reference to, or contemplation of, litigation regarding compensation decisions. But as other courts have explained, “a document created because of anticipated litigation . . . does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation,” and thus work-product protection applies “[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation.”

Similarly, agency enforcement actions and OFCCP inquiries and audits can trigger work-product protection. In Abdallah v. Coca-Cola Co., for instance, the employer, after receiving a scheduling letter from the OFCCP, retained outside counsel to advise on compliance with OFCCP affirmative action requirements and assist with the company’s audit. The district court recognized that “[d]ocuments produced for the [OFCCP] have been held to be prepared in anticipation of litigation and protected as work product.” It then determined that documents outside counsel prepared were “for the purpose of assisting [in-house] counsel in advising the company in response to the anticipated audit and in anticipation of any action that might be

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179. United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998).
181. Id. at *2.
182. Id. at *5 (citing West v. Marion Labs, No. 90-0661-CV-W-2, 1991 WL 517230 (W.D. Mo. Dec. 12, 1991)).
taken” by the OFCCP. Further, the district court observed that “[l]itigation may generally be expected from agency investigations,” and “[a]n investigation by an agency represents more than a remote possibility of future litigation, and provides reasonable grounds for anticipating litigation.”

D. Interpreting Results and Determining Next Steps

When employers identify statistically significant disparities in either a pay gap audit or pay equity audit, management must carefully consider its next steps. Employers will want to investigate and better understand the causes of any observed disparities and may ultimately decide that some pay adjustments are appropriate. However, compensation adjustments should not be made before considering whether legitimate factors or explanations, including ones that may have been overlooked in the initial model (or that may not be susceptible to statistical modeling), explain the observed differences.

Employers can take one of several approaches in response to a pay gap audit. In some instances, employers may seek to publicize the results. It is important to confirm first the accuracy and robustness of the analysis, particularly if the employer is a publicly traded company subject to oversight by the Securities and Exchange Commission. If the analysis indicates unexplained disparities, the employer may want to drill down with a more robust pay equity analysis that, unlike a nationwide pay gap audit, attempts to control for the full range of variables that legitimately inform pay. Employers may also want to investigate whether other legitimate business reasons, such as changes in market demand for a given skill set over time, inform pay differences among employees. Employers should also consider whether any waiver of attorney-client privilege and work-product protection could potentially result from publicly disclosing the results of a pay gap audit.

Pay equity audit results also present employers with several options. Most employers focus on divisions or segments of the company that show statistically significant pay disparities. Employers will want to take another look at the variables included in the initial model. The presence of statistically significant disparities in segments of a company simply means that the difference in pay is unlikely to have occurred by chance on the assumption that the model has appropriately controlled for all relevant variables impacting pay across all the employees and segments studied. Previously omitted, legitimate

183. Id. at *8.
184. Id. at *5.
185. This is because materially false or misleading statements made by an SEC-regulated company can, in some circumstances, trigger penalties. See, e.g., 15 U.S.C. § 77k(a) (2012) (assigning liability to issuers for misleading statements in its registration statement for a public offering).
variables, such as length of service with a particular department or a particular product team, may have further explanatory power. Cohort analyses comparing two or more employees whom the initial model treated as comparators may reveal other nondiscriminatory factors that legitimately impact pay and explain seeming disparities.

Next steps may also involve determining whether there are any outliers—whether female or male, highly compensated or not—who could have skewed the analysis. For example, a single employee who was “red circled” (i.e., who chose to move to a lower-level role within the company without being required to take a pay cut) can create the appearance of a problematic disparity when a legitimate explanation exists. This is particularly true if relatively small groups of employees are compared. Understanding sources of any compensation outliers can therefore be important before completing the analysis.

Prudent employers may also look more broadly at policies or practices that could cause any observed disparities to mitigate future risk. This process may include evaluating performance management or evaluation systems that impact pay and promotions, as well as practices for determining starting pay of entry-level hires, lateral recruits, and intra-company transfers. Finally, employers may consider making targeted and appropriate pay adjustments, which should take the form of increasing identified employees’ pay, rather than reducing anyone’s compensation.

Employers can also use the lessons of the pay equity audit to inform best practices going forward. In addition to evaluating policies for determining compensation, employers are well advised to renew focus on documentation and record-keeping regarding pay decisions. In particular, employers may want to provide additional training or guidance regarding the benefits of contemporaneous documentation of factors that inform decisions about setting starting salaries and any subsequent pay adjustments.

Conclusion

The spotlight on equal pay is likely to continue. Recent and anticipated legislative changes, government enforcement efforts, public disclosure pressures, and increased compensation discrimination litigation will continue to challenge companies seeking to ensure that their compensation systems are fair, reasonable, and defensible. Properly conducted pay audits are an important tool for employers in addressing these developments. Accordingly, understanding how best to structure and interpret those audits will likely remain an employer priority going forward.
Big-Time College Athletes’ Status as Employees

Richard T. Karcher*

Introduction

[A]thletes on grants are contractual employees of an athletic program. They sell their talents as sports entertainers in exchange for athletic scholarships. They cannot be compared to regular students because the latter are consumers, not sellers. Athletes are like staff members whom the university hires on the basis of their skills to do particular jobs.1

A person who provides services to another on a contractual basis in return for a benefit is either an employee or independent contractor.2 The characterization of the relationship determines applicability of state workers’ compensation statutes as well as state and federal labor laws.3 Employees receive various rights and benefits from workers’ compensation and labor laws, but independent contractors generally do not.4 College athletes awarded a grant-in-aid (GIA)5 receive contractual benefits from universities in return for athletics-related services. But college athletes receiving GIAs are designated as neither employees nor independent contractors in any of the documents forming the

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3. Id. at 31.
4. Id. at 32.
5. College athletes do not technically receive a “scholarship” (financial aid provided on the basis of academic merit) in return for performing athletic-related services for a university. Rather, they receive a “grant-in-aid” (GIA). The NCAA Division I Manual defines a full GIA as “financial aid that consists of tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance.” NAT’L COLLEGIATE ATHLETIC ASS’N, 2017–2018 DIVISION I MANUAL, art 15.02.5 (2017), available at http://www.ncaapublications.com/productdownloads/D118.pdf [hereinafter NCAA MANUAL]. Courts and others often refer to a GIA as a scholarship—this Article uses the terms interchangeably.
contractual relationship with the university—including the National Letter of Intent (NLI), the financial aid agreement, and university publications such as catalogues—or the 415-page National Collegiate Athletic Association (NCAA) Division I Manual governing every aspect of the university-athlete relationship. Athletes are not designated as employees or independent contractors because universities, through the voluntary association known as the NCAA, collectively and unilaterally define the university-athlete relationship on a “take it or leave it” basis. By designating GIA recipients as “student-athletes,” universities seek to avoid obligations of workers’ compensation and labor laws that accompany employee status, as well as the connotation that athletes perform “work” deserving payment as independent contractors.

For over fifty years, athletes receiving GIAs have sought compensation and benefits from universities by filing workers’ compensation claims for sports-related injuries and antitrust claims alleging universities conspire to fix the price of athletes’ services at the cost of a full GIA. Then in 2014, football players at Northwestern University sought to unionize under federal labor law. While unionization of college athletes may seem like a revolutionary idea, it was only a half-century ago that professional athletes lacked union representation.

As revenues in the Football Bowl Subdivision (FBS) and Division I men’s basketball continue to grow exponentially in the twenty-first century, player values are suppressed to increase profits. Conflicts can arise between athletes playing revenue-generating sports and uni-

7. See generally NCAA Manual, supra note 5.
8. See Mitten et al., supra note 6, at 106; see also Brian Welch, Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes to Sign Away Their Image Rights, 44 J. Marshall L. Rev. 533 (2011).
9. The NCAA crafted the term “student-athlete” and mandated its use in place of “players” and “athletes” in response to the threat posed by the Colorado Supreme Court’s 1953 ruling in University of Denver v. Nemeth that athletes could be identified as employees by state industrial commissions and the courts. 257 P.2d 423, 427 (Colo. 1953) (reasonable to call football player an employee because his “job and other remuneration incident . . . came to an end when he ceased to ‘make good’ in football”); see Walter Byers, Unsportsmanlike Conduct: Exploiting College Athletes 69–70 (1995); Murray Sperber, Onward to Victory: The Crises That Shaped College Sports 445–46 (1998).
10. William Gould IV, Glenn Wong & Eric Weitz, Full Court Press: Northwestern University, A New Challenge to the NCAA, 35 Loy. L.A. Ent. L. Rev. 1, 31 (2014). “Not until the mid-1960s did players realize that, for all their status in the outside world, if they were to force owners to change the structure of the players’ market they would have to engage in full-fledged collective bargaining under real and professional union leadership.” Paul Weiler et al., Sports and the Law: Text, Cases and Problems 275 (4th ed. 2011).
versities over how to divide profits. But will college athletes force universities to change the structure of the players’ market, as professional athletes did to team owners in the second half of the twentieth century?

This Article addresses the legal status of FBS football and Division I men’s basketball players as employees. Part I analyzes the application of the National Labor Relations Act (NLRA) to these athletes, viewed through the lens of professional athletes. Part II addresses National Labor Relations Board (NLRB) precedent regarding college students’ employment status from the 1970s through the 2016 Columbia University decision that student assistants are statutory employees. Although the status of graduate student assistants as employees may be on fragile ground under a Republican-majority NLRB, this historical framework is relevant for understanding why GIA athletes should be viewed as statutory employees. Part II also analyzes the decisions of the NLRB and its Regional Director in Northwestern University. Part III discusses application of state workers’ compensation statutes and the Fair Labor Standards Act (FLSA) to college athletes and explains how their employment status under the NLRA relates to rights under these statutes.

I. The NLRA and Professional Sports Leagues

Section 7 of the NLRA gives workers the right to (1) form a labor organization, (2) bargain collectively through a representative of their choosing, and (3) engage in “concerted activities for the purpose of . . . mutual aid or protection,” such as picketing and strikes. Section 8(a) prohibits employers from interfering with workers’ exercise of these rights. The NLRB and federal courts have jurisdiction to enforce the NLRA.

The NLRB may certify a union to represent employees in collective bargaining if a majority of employees vote in favor of representation in an election. The process typically begins with a union’s organizing campaign. If the union demonstrates a thirty percent “showing of interest” among employees, it may petition the NLRB to conduct a

12. College athletics, like the sports industry generally, illustrates “a basic truth about employment (and other) relationships: intense and visible conflicts about how to divide up the available revenues are more likely when the size of the pie is changing dramatically rather than remaining constant or growing incrementally.” Weiler et al., supra note 10, at 274.
13. Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. No. 90 (Aug. 23, 2016).
14. Id. at 13.
17. Id. § 157.
18. Id. § 158(a).
19. See Mitten et al., supra note 6, at 487.
secret-ballot election.\textsuperscript{20} Section 9(a) of the NLRA requires a simple majority of votes cast in favor of the union to certify the union as employees’ exclusive bargaining representative.\textsuperscript{21}

Before an election, the NLRB must first define the “unit appropriate for purposes of collective bargaining.”\textsuperscript{22} The test is whether the union’s proposed employee group has a sufficient “community of interest.”\textsuperscript{23} In professional sports, it is assumed that all active players in the league (such as all Major League Baseball teams), rather than just a single team, comprise the appropriate bargaining unit.\textsuperscript{24} On the management side, teams in a league together negotiate a collective bargaining agreement with the players’ union that applies equally to players on all teams.\textsuperscript{25} The collective bargaining process in professional sports is thus “necessarily a multi-party phenomenon,” and “[n]either labor nor management is internally monolithic.”\textsuperscript{26}

A typical professional sports league “is comprised of several franchises bearing few similarities, economically or otherwise,” and franchise owners have diverse personalities.\textsuperscript{27} Players’ unions represent athletes with vastly different positions, roles, skill sets, and market values. Nevertheless, the unique structure and operation of professional sports makes a single, league-wide unit much more functional for bargaining than multiple single-team units. In \textit{North American Soccer League v. NLRB},\textsuperscript{28} for example, the Fifth Circuit affirmed the NLRB’s finding that a league-wide bargaining unit was appropriate because the league exercised significant control over essential aspects of teams’ labor relations, including selection, retention, and termination of players; terms of individual players’ contracts; dispute resolution; and player discipline.\textsuperscript{29}

The NLRA requires employers to negotiate with unions over certain mandatory subjects of bargaining, including “wages, hours, and terms and conditions of employment.”\textsuperscript{30} For example, if FBS players in the Big Ten Conference were to unionize, their universities would have an immediate obligation to bargain with them over these mandatory subjects of bargaining.\textsuperscript{31} In professional sports, initial collective

\textsuperscript{20.} See \textit{Weiler et al.}, supra note 10, at 297.
\textsuperscript{21.} See 29 U.S.C. §158(a).
\textsuperscript{22.} \textit{Id.} § 159(b).
\textsuperscript{23.} \textit{Id}.
\textsuperscript{25.} \textit{Id.}
\textsuperscript{26.} \textit{Id.} at 384.
\textsuperscript{27.} \textit{Id}.
\textsuperscript{28.} 613 F.2d 1379 (5th Cir. 1980).
\textsuperscript{29.} \textit{Id.} at 1380.
bargaining agreements mostly addressed job security, pensions, minimum salaries, and fringe benefits.\textsuperscript{32} Since the late 1960s, collective bargaining’s main focus has shifted to restraints on player mobility (e.g., the draft, free agency, etc.) and salaries (e.g., salary caps, “luxury” taxes, etc.) due to sports’ changing economic landscape.\textsuperscript{33}

Unlike employers in other industries, employers in professional sports leagues actually favor a unionized workforce. Team owners “need” players to unionize to create and enforce league-wide rules and policies that restrict player mobility and salaries.\textsuperscript{34} Importantly, while agreements among employers restricting labor market competition are normally subject to antitrust scrutiny, they are immune in this context under the “non-statutory labor exemption” as the product of good faith bargaining between unionized employees and employers.\textsuperscript{35} If unions of college athletes bargained with a multiemployer group of universities, universities and the NCAA would benefit from the non-statutory labor exemption.\textsuperscript{36} In other words, college athletes could no longer file antitrust lawsuits against the NCAA and universities.\textsuperscript{37} Moreover, unionizing would prevent players from challenging NCAA eligibility decisions in court because collective bargaining likely would result in a contract providing final, binding arbitration to resolve such disputes.\textsuperscript{38}

Several factors make unionized workplaces in professional sports unique from other industries.\textsuperscript{39} For example, the average length of a professional athlete’s career is approximately three years, far shorter than the average worker’s career.\textsuperscript{40} This creates short-term pressure for athletes’ unions to prioritize improvements in wages and working conditions.\textsuperscript{41} Players’ unions must constantly focus on communication with athletes about union issues because turnover is much higher than in other industries.\textsuperscript{42} Players’ unions also face the logistical chal-

\textsuperscript{32} See Mitten et al., supra note 6, at 491.
\textsuperscript{33} Id.
\textsuperscript{36} See Edelman, supra note 31, at 2356.
\textsuperscript{37} For a recent analysis of the influence of antitrust on college football, see Thomas A. Baker III & Natasha T. Brison, From Board of Regents to O’Bannon: How Antitrust and Media Rights Have Influenced College Football, 26 Marq. Sports L. Rev. 331 (2016); see also Brian L. Porto, Neither Employees Nor Indentured Servants: A New Amateurism for a New Millennium in College Sports, 26 Marq. Sports L. Rev. 301 (2016).
\textsuperscript{39} See Masteralexis, supra note 34, at 206.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
lenges of representing members from multiple teams dispersed throughout the United States, and, in some sports, Canada as well. There are great disparities in talent and compensation among athletes in players’ unions, and most have little job security. Collective bargaining agreements in professional sports normally have longer terms than in other industries, as well—four to five years, rather than three.

College athletes in revenue-generating sports have much in common with unionized professional athletes. For example, FBS and National Football League (NFL) players share the following:

- Average careers of three to four years with corresponding job security concerns;
- Identical job duties and substantially similar game and practice schedules;
- Susceptibility to the same varieties of potentially career-ending injuries;
- Similar safety concerns regarding play and equipment;
- Teams dispersed both regionally and nationally;
- League rules restricting player transfers between teams;
- Disciplinary actions (suspension or termination) for violating team or league rules;
- Disparate levels of skill and talent;
- Competition among teams to secure players’ services;
- Disparate team revenues and profits; and
- Licensing value in athletes’ names and likenesses.

The NLRB has recognized, moreover, that FBS football “resemble[s] a professional sport” in that “institutions that have FBS teams are engaged in the business of staging football contests from which they receive substantial revenues.” And like professional sports, the “product” of FBS football requires “direct interaction among the players and cooperation among the various teams.” To that end, universities formed the NCAA to set and enforce uniform rules governing competition.

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43. Id.
44. Id.
45. See Weiler et al., supra note 10, at 333.
48. Id.
49. Id.
while commonalities between FBS players and professional athletes might support viewing “student-athletes” as employees, the structure of college sports suggests that unionization would, as in professional sports, require league-wide bargaining units.50

II. NLRB Decisions on the Employment Status of Student Assistants and Northwestern University Football Players

The issue of whether college athletes are “employees” under the NLRA arises within a legal framework that has wrestled with the question of whether university teaching and research assistants are statutory “employees.”

A. NLRB Decisions Regarding Student Assistants

Controversy over whether graduate student teaching assistants are universities’ statutory employees under the NLRA began at the turn of this century at New York University.51 There, the Board decided that graduate assistants52 were employees with the right to engage in collective bargaining under the NLRA.53 The decision reversed more than twenty-five years of NLRB precedent.54 The NLRB, however, reversed itself again just four years later in Brown University.55

1. Brown University

In Brown University, the United Auto Workers sought to represent a unit of approximately 450 graduate students employed as teaching assistants, research assistants, and proctors at Brown, a private university.56 The NLRB Regional Director applied New York University and found that the graduate students were statutory employees and constituted an appropriate collective bargaining unit.57

On review, Brown argued that in New York University the NLRB “did not adequately consider that the relationship between a research

50. See id. at 4–5.
51. 332 N.L.R.B. 1205 (2000).
52. This included students who worked either “as teachers or researchers.” Id. at 1206.
53. Id. at 1205 (rejecting argument that graduate assistants cannot be statutory employees merely because they are predominantly students).
57. Id.
university and its graduate students is not fundamentally an economic one but an educational one.” Brown also contended that “support to students is part of a financial aid program that pays graduate students the same amount, regardless of work, and regardless of the value of those services if purchased on the open market (i.e., hiring a fully-vetted Ph.D.).” Brown asserted: “Common sense dictates that students who teach and perform research as part of their academic curriculum cannot properly be considered employees without entangling the [NLRA] into the intricacies of graduate education.”

The NLRB agreed with Brown, overruled New York University, and concluded that “the Board’s 25-year pre-NYU principle of regarding graduate students as nonemployees was sound and well reasoned.” Relying on decisions from the 1970s, including Adelphi University, Leland Stanford, and St. Clare’s Hospital, the NLRB held that graduate student assistants are not university employees, but rather “are primarily students and have a primarily educational, not economic, relationship with their university.”

The NLRB highlighted the following factors from Leland Stanford that supported the “primarily students” principle:

(1) the research assistants were graduate students enrolled in the Stanford physics department as Ph.D. candidates; (2) they were required to perform research to obtain their degree; (3) they received academic credit for their research work; and (4) while they received a stipend from Stanford, the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support.

By relying on the “primarily students” principle in Brown University, the NLRB avoided the common law test applied in New York University, under which “an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.” The dissent contended

58. Id. at 486.
59. Id.
60. Id.
61. Id. at 487.
64. 229 N.L.R.B. 1000 (1977).
66. Id.
68. Brown Univ., 342 N.L.R.B. at 490 n.27 (citing Town & Country Elec., 516 U.S. at 94). Thus, the key common law test for employee status is “whether there is both benefit and control.” Gould IV, Wong & Weitz, supra note 10, at 33.
that by ignoring the common law test the majority “overstepped its authority, overlooked the economic realities of the academic world, and overruled [New York University] without ever coming to terms with the rationale for that decision.”

The NLRB repeatedly emphasized in Brown University that the teaching and research duties of graduate assistants are an “integral” part of the educational program. This rationale, the Board explained:

is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process.

It is, perhaps, not a coincidence that the NCAA included similar language in its constitution. Article 1.3.1 states: “A basic purpose of [the NCAA] is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”

2. Columbia University

In 2016, the NLRB overruled Brown University in Columbia University. The NLRB disavowed the “primarily students” principle and held that undergraduate and graduate student assistants who have a common-law employment relationship with their universities are statutory employees under the NLRA. Applying the common law test to research assistants, the NLRB found the requisite control and benefit because “Columbia directs the student research assistants’ work and

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69. Brown Univ., 342 N.L.R.B. at 500. But see Town & Country Elec., 516 U.S. at 94 (NLRB’s interpretation of “employee,” as used in the NLRA, “is entitled to considerable deference,” unless court determines that “departure from the common law of agency with respect to particular questions and in a particular statutory context, renders its interpretation unreasonable”).

70. See, e.g., Brown Univ., 342 N.L.R.B. at 483 (“[for] graduate student assistants . . . supervised teaching or research is an integral component of their academic development”); id. at 489 (“[T]he role of teaching assistant and research assistant is integral to the education of the graduate student.”).

71. Id. at 489 (quoting St. Clare’s Hosp. & Health Ctr., 229 N.L.R.B. 1000, 1002 (1977)).

72. NCAA MANUAL, supra note 5, art. 1.3.1 (emphasis added).

73. Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. No. 90 (Aug. 23, 2016).

74. Id. at 13.
the performance of defined tasks is a condition of the grant aid.”

Rejecting the reasoning in *Brown University*, the NLRB explained that:

> The fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and employer is the primary one—a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the [NLRA].

Thus, under *Columbia University*, “student” and “employee” are not mutually exclusive roles: “[A] graduate student may be both a student *and* an employee; a university may be both the student’s educator *and* employer.”

### B. NLRB Decisions Regarding College Athletes

#### 1. Regional Director’s Decision in *Northwestern University*

In 2014, football players at Northwestern University, a private university and member of the NCAA’s Big Ten Conference, petitioned the NLRB for a union election, seeking to organize as the College Athletes Players Association (CAPA). Northwestern’s football team included 112 players, eighty-five of whom received a full GIA of $61,000 each academic year for tuition, fees, room, board, and books. CAPA contended that football players receiving GIAs from Northwestern were “employees” within the meaning of the NLRA and, therefore, “are entitled to choose whether or not to be represented for the purposes of collective-bargaining.”

#### A. APPLICATION OF THE COMMON LAW TEST

The NLRB Regional Director agreed with CAPA that Northwestern football players receiving GIAs were “employees” within the meaning of the NLRA. Applying the common law definition of “employee,” the Regional Director found that “players receiving scholarships to perform football-related services for [Northwestern] under a contract for hire in return for compensation are subject to [Northwestern’s] con-

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75. *Id.* at 18.
76. *Id.* at 5 (footnote omitted).
77. *Id.* at 7.
78. Decision and Direction of Election, Northwestern Univ., Case 13-RC-121359, at 1, 23 (NLRB Mar. 26, 2014). The Regional Director concluded that the College Athletes Players Association (CAPA) is “a labor organization” within the meaning of the NLRA after it demonstrated it was established to represent and advocate for the rights of collegiate athletes in collective bargaining with respect to “health and safety, financial support, and other terms and conditions of employment.” *Id.* at 23. A “substantial portion” of the players signed authorization cards seeking to have CAPA represent them for the purpose of collective bargaining. *Id.*
79. *Id.* at 3. If a player enrolled in summer classes, a full GIA increased to approximately $76,000 per year. *Id.* at 3 n.4.
80. *Id.* at 2.
81. *Id.* at 14.
The Regional Director relied upon three principal reasons: (1) scholarship football players perform services for the benefit of Northwestern for which they receive compensation; (2) scholarship football players are “under strict and exacting control” by Northwestern in the performance of their duties as football players; and (3) “walk-ons” (players who do not receive a GIA) are distinguishable from scholarship players and are not employees because they do not receive compensation for athletic services and do not sign a “tender” or otherwise enter into any type of employment contract with Northwestern.

i. Scholarship athletes receive compensation for services. The Regional Director noted that football players perform valuable services for Northwestern—its football program generated revenues of approximately $235 million during the nine-year period from 2003 to 2012, has an “immeasurable positive impact” on alumni giving, and increases applicants for enrollment. To field the most competitive team possible, players are “initially sought out, recruited and ultimately granted scholarships because of their athletic prowess on the football field,” making it clear that a GIA is compensation for athletic services. Although the players “do not receive a paycheck in the traditional sense,” the scholarships constitute “a transfer of economic value,” because Northwestern pays the players’ tuition, fees, room, board, and books throughout the four or five years they perform football duties for Northwestern. Moreover, “[t]he fact that the [university] does not treat these scholarships or stipends as taxable income is not dispositive of whether it is compensation.”

ii. Northwestern’s control over football players. The Regional Director explained that Northwestern and its football coaches exercised extensive employment-type control over players. During a six-week training camp before the start of the school year, coaches “prepare and provide daily itineraries to the players which set forth, hour by hour, what football related activities the players are to engage in from as early as 5:45 a.m. until 10:30 p.m., when they are expected to be in bed,” and control “the location, duration, and manner in

82. Id.
83. Id. at 14–15.
84. Id. at 15–16.
85. Id. at 17. However, the Regional Director noted, walk-ons could become employees if later awarded a GIA. Id.
86. Id. at 14.
87. Id.
88. Id.
89. Id.
90. Id. at 15–16.
91. Id. at 15.
which the players carry out their football duties.”92 Football games
themselves are a large time commitment—“if the team is playing an
away game, it is not unusual for the players to have to spend
25 hours over a two day period traveling to and from the game, attend-
ing practices and meetings, and competing in the game.”93 Further,
coaches “have control over nearly every aspect of the players’ private
lives by virtue of the fact that there are many rules that they must fol-
low under threat of discipline and/or the loss of a scholarship.”94 Players’
academics, too, are controlled because they often cannot enroll in
certain courses due to conflicts with scheduled practices and must
miss classes for travel to football games.95

Circumstances at Northwestern are consistent with research
about college athletics generally that shows that coaches closely mon-
itor football and basketball players’ lives and duties and carefully con-
trol their activities during the season and year-round.96 A 2015 NCAA
study revealed that FBS football players reported the highest weekly
in-season time commitment of all sports—a median of forty-two
hours per week.97

iii. Scholarship “tenders” are employment contracts. Scholarship
football players are required to sign a “tender” before each scholarship
period that sets compensation and “serves as an employment contract
and also gives the players detailed information concerning the dura-
tion and conditions under which the compensation will be provided
to them.”98 The Regional Director noted that, because NCAA rules pro-
hibit players from receiving any additional compensation or otherwise
profiting from their athletic ability or reputation, “scholarship players
are truly dependent on their scholarships to pay for basic necessities,
including food and shelter.”99 A player’s scholarship can be reduced or
canceled by the head football coach for a variety of reasons and “is
clearly tied to the player’s performance of athletic services.”100 Scholar-
ships can be canceled for voluntary withdrawal from the team or vi-
oilation of team rules.101

92. Id.
93. Id. at 15–16.
94. Id. at 16.
95. Id.
96. See Robert A. McCormick & Amy Christian McCormick, The Myth of the
97. NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA GOALS STUDY OF THE STUDENT-ATHLETE
GOALS_convention_slidebank_jan2016_public.pdf. In 2010, the same study reported a
median weekly time commitment of thirty-nine hours for FBS football players. Id.
98. Decision and Direction of Election, Northwestern Univ., Case 13-RC-121359,
at 14 (NLRB Mar. 26, 2014).
99. Id.
100. Id. at 15.
101. Id.
B. DISTINGUISHING FOOTBALL PLAYERS FROM THE GRADUATE STUDENT ASSISTANTS IN BROWN UNIVERSITY

Northwestern argued that its football players are not employees, but rather are “more akin to [the] graduate students in Brown University.”\textsuperscript{102} The Regional Director, however, found that Brown University’s critical four factors were not present at Northwestern because “players’ football-related duties are unrelated to their academic studies, unlike the graduate assistants whose teaching and research duties were inextricably related to their graduate degree requirements.”\textsuperscript{103} However, the Regional Director noted that even if the Brown University factors were considered, Northwestern’s players would still be deemed employees.\textsuperscript{104}

First, players were not “primarily students” because they “spend 50 to 60 hours per week on their football duties during a one-month training camp prior to the start of the academic year and an additional 40 to 50 hours per week on those duties during the three or four month football season.”\textsuperscript{105} This is “more hours than many undisputed full-time employees work at their jobs,” and “many more hours” than the players spend on their studies and attending classes.\textsuperscript{106}

Second, players’ athletic duties are not a core element of their educational degree requirements.\textsuperscript{107} Unlike Brown graduate assistants, “scholarship players do not receive any academic credit for playing football” and “are also not required to play football to obtain their undergraduate degree, regardless of which major they pursue.”\textsuperscript{108} The Regional Director was not persuaded that the player-university relationship was primarily academic because players learn “great life lessons from participating on the football team” and “important values such as character, dedication, perseverance, and team work.”\textsuperscript{109} Rather, he thought the relationship was “an economic one that involves the transfer of great sums of money to the players in the form of scholarships.”\textsuperscript{110}

Third, unlike graduate student assistants, faculty members do not oversee players’ athletic duties; rather, football coaches who are not faculty members supervise their activities.\textsuperscript{111} According to the Regional Director: “This critical distinction certainly lessens any concern that im-

\textsuperscript{102} Id. at 2.
\textsuperscript{103} Id. at 18. The four factors were: “(1) the status of graduate assistants as students; (2) the role of the graduate student assistantships in graduate education; (3) the graduate student assistants’ relationship with the faculty; and (4) the financial support they receive to attend [the university].” Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 19.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
posing collective bargaining would have a ‘deleterious impact on overall educational decisions’ by the [university’s] academic faculty.”112

Fourth, the university offers prospective students GIAs only if they intend to provide athletic services, which include playing in games and attending all practices, workouts, and meetings.113 Moreover, players can lose GIAs if they “voluntarily withdraw” from the team.114

Concluding that Northwestern’s football players were statutory employees, the Regional Director ordered an election among “all football players receiving football grant-in-aid scholarship[s] and not having exhausted their playing eligibility.”115

2. The NLRB’s Decision on Review in Northwestern University

The NLRB granted Northwestern’s request for review, saying that the Regional Director’s decision “raised substantial issues warranting review.”116 However, the NLRB did not address the merits of the Regional Director’s “employee” finding, instead concluding “it would not effectuate the policies of the [NLRA] to assert jurisdiction.”117 The NLRB noted that the case presented “novel and unique circumstances,” and that its decision:

is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.118

All but seventeen of the 125 colleges and universities participating in FBS football are state-run and thus not “employers” under section 2(2) of the NLRA.119 As Northwestern is the only private school in the Big Ten Conference, the NLRB cannot assert jurisdiction over any other conference members.120 Further, a “single-team” bargaining unit

112. Id.
113. Id. at 20.
114. Id.
118. Id. at 3.
119. Id. at 5.
120. Id.
would be “unprecedented” as all professional sports have league-wide bargaining units. The NLRB explained that even if Northwestern football players could be analogized to professional athletes, collective bargaining in professional sports “has never involved a bargaining unit consisting of a single team’s players, where the players for competing teams were unrepresented or entirely outside the Board’s jurisdiction.”

A single-team bargaining unit would raise practical concerns. Team sports “must be carried out jointly by the teams in the league or association involved,” and “there is no ‘product’ without direct interaction among the players and cooperation among the various teams.” The league must set common rules for all teams and must have authority to enforce rules on eligibility, practice, and competition, all of which are necessary to “ensure the uniformity and integrity of individual games, and thus league competition as a whole.” This approach, the NLRB explained, creates “a symbiotic relationship among the various teams, the conferences, and the NCAA.” Consequently, labor issues that involve only Northwestern and its players would affect the NCAA, the Big Ten Conference, and other universities.

Perhaps the most significant aspect of the NLRB’s decision was that the Board assumed, without deciding, that the players were “employees” under the NLRA. Thus, the Board’s decision did not overrule the Regional Director’s determination that the scholarship players were employees; if anything, it implies that they are. The NLRB highlighted that “scholarship players do not fit into any analyt-

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123. Id.

124. Id.

125. Id.

126. Id.

127. Id. at 6–7. The NLRB invited interested parties to address whether it should “recognize grant-in-aid scholarship football players as ‘employees’ under the Act, but preclude them from being represented in any bargaining unit or engaging in any collective bargaining.” Notice and Invitation to File Briefs, Northwestern Univ., Case 13-RC-121359, at 1 (NLRB May 12, 2014).

128. See John F. Birmingham, Jr., NLRB Calls Audible—No Union for Northwestern, Nat’l L. Rev. (Aug. 24, 2015), http://www.natlawreview.com/article/nlrb-calls-audible-no-union-northwestern#sthash.NJqHL0sh.dpuf (“While so ruling, the Board did not overrule the Regional Director’s determination that the players were ‘employees.’ In fact, if anything, it implied that they were.”); see also Lester Munson, Free to Tweet: Northwestern’s Restrictions on Football Players Ruled Unlawful, ESPN.COM (Oct. 10, 2016), http://www.espn.com/espn/otl/story/_/id/17765516/nlrb-rules-northwestern-restrictions-unlawful (“But even as the NLRB refused to take jurisdiction over the situa-
ical framework that the Board has used in cases involving other types of students” and in this regard, “bear little resemblance to the graduate student assistants” in Brown University and New York University. In combination, the Regional Director’s decision, the Board’s decision on review, and Columbia University suggest that scholarship college athletes are statutory employees under the NLRA.

The NLRB also clarified that its decision not to assert jurisdiction was limited to GIA football players at Northwestern. The NLRB did not close the door to possible future petitions from FBS players. Nevertheless, given the distinctive multiemployer bargaining structure of sports leagues, it is unlikely that FBS players at private universities could successfully petition to unionize because the NLRB could not regulate the many public universities within each athletic conference.

129. Northwestern Univ., 362 N.L.R.B. No. 167, at 3. In a footnote, the NLRB agreed with a key Regional Director finding that, “[u]nlike those graduate assistants, the scholarship players are undergraduates, and—with the potential exception of students seeking undergraduate degrees in physical education—the football activities they engage in are unrelated to their course of study or educational programs.” Id. at 4 n.10. The Board’s subsequent decision in Columbia University, which overruled Brown University, concluded that both undergraduate and graduate student assistants are statutory employees. Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. No. 90, at 13 (Aug. 23, 2016).

130. Their status as statutory employees was subsequently confirmed in memoranda issued by the NLRB General Counsel. In an Advice Memorandum regarding a charge that limiting athletes’ speech and use of social media in Northwestern University’s Football Handbook constituted unfair labor practices, the General Counsel concluded that the rules were unlawful and required Northwestern modify or rescind the rules. See Nat’l Labor Relations Bd., Advice Memorandum on Whether Northwestern University’s Football Handbook Rules Were Unlawfully Overbroad 1 n.1 (Sept. 22, 2016) (“We assume, for purposes of this memorandum, that Northwestern’s scholarship football players are statutory employees.”). In a subsequent memorandum, the General Counsel concluded that “based on: the record developed in Northwestern University, which includes information about NCAA rules that significantly control the activities of Division I FBS scholarship football players; other public information; and the Board’s recent decision in Columbia University, . . . scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA.” Nat’l Labor Relations Bd., GC 17-01, General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context 16 (2017).


132. Id. at 6 (“[W]e are declining jurisdiction only in this case involving the football players at Northwestern University; we therefore do not address what the Board’s approach might be to a petition for all FBS scholarship football players (or at least those at private colleges and universities).”); see also McCann, supra note 113, at 1 (the Northwestern University decision “is a carefully limited—and not necessarily permanent—setback for college athletes).

133. Northwestern Univ., 362 N.L.R.B. No. 167, at 5 (“[I]n all of our past cases involving professional sports, the Board was able to regulate all, or at least most, of the teams in the relevant league or association.”).
C. State Labor Law Constraints on Unionization

Most profitable college football and basketball teams are at public universities, subject to state, not federal, labor laws. This jurisdictional reality raises unique challenges not affecting professional sports leagues. Some states afford broad collective bargaining rights to public employees, while others limit or prohibit public sector collective bargaining. Thus, as the NLRB noted in *Northwestern University*, “there is an inherent asymmetry of the labor relations regulatory regimes applicable to individual teams.”134 Professional sports leagues do not have this patchwork regulation problem because no professional teams are state-run organizations subject to state labor laws.

In the wake of the Northwestern unionization effort, states have begun amending existing labor laws specifically to prohibit GIA athletes at public universities from obtaining collective bargaining rights. Michigan and Ohio, which together operate three Big Ten universities, enacted laws expressly excluding GIA athletes from their labor statutes’ definition of “employee.”135 Other states may follow Michigan and Ohio and adopt similar exclusions to thwart athletes’ unionization at public universities.

D. The Possibility of Congressional Action to Prevent Unionization

Congress could, by amending the NLRA, prevent unionization at private institutions. Within two months of the Regional Director’s decision in *Northwestern University*, the House of Representatives held a hearing to examine the decision’s potential consequences.136 Opponents of unionization argued that the NLRB should not drive major changes in college athletics.137 Some were concerned that the NLRB is “not in a position to consider all of the collateral consequences” of treating some college athletes as employees and believed that “[i]f

134. *Id.*
the federal government is to change the legal status of student-athletes, that judgment should be deliberated by the Congress, not announced by the NLRB.”138 The chairman of the House Education and the Workforce Committee said that Northwestern University “takes a fundamentally different approach that could make it harder for some students to access a quality education.”139 Thus, even if the NLRB asserted jurisdiction in Northwestern University, Congress could have amended the NLRA to preclude employee status for college athletes.

### III. Workers’ Compensation and the FLSA

#### A. The College Athlete as “Employee” Under Workers’ Compensation Law

Injured college athletes have had little success seeking workers’ compensation benefits. In determining if an athlete is an “employee” of a college or university under state workers’ compensation statutes (in the absence of a statutory exclusion),140 courts have generally considered whether the university had the right to control the athlete’s activities and whether a contract of hire existed between the university and athlete.141

In answering the question of whether a “contract of hire” exists, courts try to determine the parties’ intentions or expectations.142 It is undisputed that the university and athlete have a contractural relationship in which the athlete agrees to play a sport for the university in exchange for various benefits with monetary value.143 The key documents evidencing an express contract between the university and

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138. Id. (letter to Representative Kline from president of the American Council on Education).

139. Id.

140. A few states expressly exclude GIA college athletes from workers’ compensation statutes. California excludes “[a] student participating as an athlete in amateur sporting events sponsored by a public agency or public or private nonprofit college, university, or school, who does not receive remuneration for the participation, other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto.” CAL. LAB. CODE § 3352(k) (West 2017). New York says that the term “employee” shall not include persons who are members of a supervised amateur athletic activity operated on a non-profit basis . . . N.Y. WORKERS’ COMP. § 2(4) (McKinney 2017). Hawaii states that “employment” does not include “[s]ervice for a school, college, university, college club, fraternity, or sorority if performed by a student who is enrolled and regularly attending classes and in return for board, lodging, or tuition furnished, in whole or in part.” HAW. REV. STAT. § 386-1 (2017). Oregon and Vermont expressly exclude college athletes from coverage as well. See OR. REV. STAT. § 656.027(13) (2017); VT. STAT. ANN. tit. 21 § 601 (14(b)) (2017).

141. See, e.g., Waldrep v. Texas Emp’rs Ins. Ass’n, 21 S.W.3d 692, 702 (Tex. App. 2000) (requiring evidence that university directed football player’s “work” to find employee status).

142. See id. at 698 (discussing whether National Letter of Intent is a “contract for hire”).

143. See Mitten et al., supra note 6, at 105–06.
athlete consist of the National Letter of Intent (NLI) and the financial aid agreement. Pursuant to the NLI, prospective college athletes agree to attend a university in exchange for the university’s promise to provide a full academic year of financial aid. The agreement commits the university to financial assistance in exchange for the athlete’s promise to attend the university and play a sport.

In *Waldrep v. Texas Employers Insurance Ass’n*, the Texas Court of Appeals addressed both the control and contract tests for employee status under a workers’ compensation statute. Waldrep enrolled at Texas Christian University (TCU) in August 1972 and received a full GIA plus ten dollars per month for incidentals in exchange for playing football for TCU. In October 1974, Waldrep sustained a severe spinal cord injury in a game and was paralyzed below the neck. In 1991, he filed a workers’ compensation claim, and the Texas Workers’ Compensation Commission awarded benefits. The Texas Employers Insurance Association appealed to the district court, and a jury found that Waldrep failed to prove he was a TCU employee at the time of his injury.

On appeal, the Texas Court of Appeals found that TCU exercised control and direction over all football players. Nevertheless, Waldrep’s acceptance of a GIA “did not subject him to any extraordinary degree of control over his academic activities.” It is unclear why the court concluded that universities do not exercise control over an athlete’s academic activities, because athletic departments provide academic counseling programs, tutoring programs, class monitors, and study halls, not all of which are voluntary. The court also failed to acknowledge the myriad NCAA academic standards and requirements to which athletes must adhere to retain eligibility and GIAs.

With regard to whether the GIA was a contract of hire, the court focused on the parties’ expectations, concluding that no such contract existed. The court relied on: (1) that the NCAA has strict rules against “taking pay for participation in sports;” (2) that Waldrep and

144. *Id.* at 105.
145. *Id.* at 106.
146. *Id.* at 105.
147. 21 S.W.3d 692 (Tex. App. 2000).
148. *Id.* at 696.
149. *Id.*
150. *Id.*
151. *Id.* at 696–97.
152. *Id.*
153. *Id.*
156. *Waldrep*, 21 S.W.3d at 701–02.
TCU did not treat the financial aid as “pay,” or “income,” as he was never placed on TCU’s payroll or paid a salary, no social security or income tax was withheld, and Waldrep never filed a tax return; (3) that during recruitment, the parties never considered Waldrep an employee or employed by TCU; and (4) that Waldrep knew he needed to maintain certain academic requirements to play football; thus, his academic responsibilities determined whether he could play football.157

There are several reasons to take Waldrep with a grain of salt. First, the court’s emphases on NCAA rules that prohibit “pay” and how a GIA is treated for payroll and tax purposes are misplaced, because for workers’ compensation, compensation for non-gratuitous services need not be in the form of salary or wages.158 Second, the court acknowledged that “Waldrep clearly presented evidence that TCU exercised direction or control over some of his activities while a student at the university,” and that “the jury might have found this sufficient to prove that TCU had the right to direct the means or details of Waldrep’s activities, but the jury declined to do so.”159 Finally, the court highlighted that “college athletics has changed dramatically over the years since Waldrep’s injury,” and that its decision to affirm the jury’s verdict was “based on facts and circumstances as they existed almost twenty-six years ago.”160 The court added: “We express no opinion as to whether our decision would be the same in an analogous situation arising today; therefore, our opinion should not be read too broadly.”161

Because employee status analysis under the NLRA and workers’ compensation statutes is virtually the same, the NLRB Regional Director’s findings and conclusions in Northwestern University162 support reversing the precedent that GIA athletes are not employees under workers’ compensation statutes. The Regional Director’s findings regarding the university’s extensive employment-type control over football players163 demonstrate that GIA athletes meet the con-

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158. See, e.g., Coleman, 336 N.W.2d at 226 (“In return for his services as a football player, [Coleman] received certain items of compensation which are measurable in money, including room and board, tuition and books.”); Van Horn v. Indus. Accident Comm’n, 219 Cal. App. 2d 457, 464 (1963) (form of remuneration is immaterial in assessing whether consideration was paid for college athlete’s services; “direct compensation in the form of wages is not necessary to establish the [employment] relationship so long as the service is not gratuitous”).

159. Waldrep, 21 S.W.3d at 702.

160. Id. at 707.

161. Id.


163. Id.
control test for workers’ compensation purposes. Waldrep suggested that the outcome could be different in light of changed circumstances since Waldrep’s 1974 injury. One significant such changed circumstance is the exponential increase in university revenue generated by students’ athletic activities. Northwestern’s football program, for example, generated $235 million between 2003 and 2012.

B. The College Athlete as “Employee” Under the FLSA

The FLSA mandates a minimum wage and overtime pay for most employees. Unlike the NLRA, the FLSA definition of “employer” includes public universities. Under the FLSA, (1) an “employee” is “any individual employed by an employer,” and (2) “employ” means “to suffer or permit to work.” The term “work,” however, is not defined. Courts have thus determined that “status as an ‘employee’ for purposes of the FLSA depends on the totality of circumstances rather than on any technical label” and requires examination of “the ‘economic reality’ of the working relationship.”

In assessing whether a college athlete meets the “employee” definition, or if intercollegiate athletics constitutes “work,” for purposes of the FLSA, the Department of Labor (DOL) explains:

As part of their overall educational program, public or private schools and institutions of higher learning may permit or require students to engage in activities in connection with . . . intramural and interscholastic athletics and other similar endeavors. Activities of students in such programs, conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school or institution, are not work of the kind contemplated by [the FLSA] and do not result in an employer-employee relationship between the student and the school or institution. Also, the fact that a student may receive a minimal payment for participation . . . would not necessarily create an employment relationship.

In Berger v. NCAA, the Seventh Circuit found that members of the University of Pennsylvania women’s track and field team were not employees for FLSA purposes. The court concluded that the “economic reality” of the university-athlete relationship is defined by “a re-

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164. Waldrep, 21 S.W.3d at 707.
167. Id. § 203(d).
168. Id. § 203(e)(1).
169. Id. § 203(g).
170. Berger v. Nat’l Collegiate Athletic Ass’n, 843 F.3d 285, 290 (7th Cir. 2016) (quoting Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992)).
172. 843 F.3d 285 (7th Cir. 2016).
173. Id. at 290.
vered tradition of amateurism in college sports.” The court found the DOL’s position that participation in “interscholastic athletics” is not “work” persuasive and rejected the plaintiffs’ contention that “NCAA-regulated sports” should be treated differently from “student-run activities.” “Because NCAA-regulated sports are . . . ‘interscholastic athletic’ activities,” the court stated, “we do not believe that the [DOL] intended the FLSA to apply to student athletes.” Simply put,” the court held, “student-athletic ‘play’ is not ‘work,’ at least as the term is used in the FLSA,” and therefore “student athletes are not employees and are not entitled to a minimum wage under the FLSA.”

Berger’s discussion of the economic reality of the athlete-university relationship did not account for several important considerations, including the university’s right to control or dictate the athlete’s activities, the university’s right to discipline or fire the athlete, and the form of payment in exchange for services that benefit the university. Instead, the Seventh Circuit stated that “participation in collegiate athletics is entirely voluntary” and that “student athletes—like all amateur athletes—participate in their sports for reasons wholly unrelated to immediate compensation.” This rationale is flawed because all “work” subject to the FLSA can be considered “entirely voluntary.” In addition, college athletes participate in sports for reasons unrelated to compensation because compensation is not available due to the fact that NCAA member schools have collectively and unilaterally implemented rules prohibiting compensation. The court essentially decided college athletes are not employees under the FLSA because universities have always operated the business of college sports without treating them as employees, yet players choose to participate anyway.

The most critical limitation of Berger, though, is that it involved only non-scholarship athletes in a non-revenue sport, and thus left the employment status of GIA athletes in revenue sports unresolved. In a concurring opinion, Judge David Hamilton added “a note of caution,” that “the plaintiffs in this case did not receive athletic scholarships and participated in a non-revenue sport.” Judge Hamilton explained:

I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called

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174. Id. at 291 (quoting Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984)).
175. Id. at 293.
176. Id.
177. Id.
178. Berger, 843 F.3d at 293.
179. Id. at 294 (Hamilton, J., concurring).
revenue sports like Division I men’s basketball and FBS football. In those sports, economic reality and the tradition of amateurism may not point in the same direction. Those sports involve billions of dollars of revenue for colleges and universities. Athletic scholarships are limited to the cost of attending school. With economic reality as our guide, as I believe it should be, there may be room for further debate, perhaps with a developed factual record rather than bare pleadings, for cases addressing employment status for a variety of purposes.181

The Regional Director’s findings in *Northwestern University* and the NLRB’s decision on review (declining jurisdiction *without* explicitly reversing the Regional Director) suggest that *Berger* may have been decided differently if the plaintiffs were scholarship athletes in revenue sports. In other words, *Northwestern University* strongly supports the position that scholarship athletes in revenue sports are employees under the FLSA, even if non-scholarship athletes in non-revenue sports are not university employees under the FLSA “economic reality” test.

**Conclusion**

Big-time college sports is the only industry in which competitors collectively and unilaterally prescribe a status other than employees or independent contractors to workers. The pertinent question is whether calling them “student-athletes” should have any bearing on their legal status as “employees.” In *Northwestern University*, the Regional Director provided a detailed explanation of why these athletes meet the statutory definition of employees under the NLRA.182 On review, the NLRB implicitly acknowledged that they are employees under the NLRA.183 And in *Columbia University*, the NLRB flatly rejected the “primarily students” principle to conclude that “a graduate student may be both a student and an employee; a university may be both the student’s educator and employer.”184 Put simply, a “student-athlete” may be both a student and an employee; a university may be both the athlete’s educator and employer. Unfortunately for these college athletes, however, state and federal legislators have the power to change their employment status at any time with one stroke of a pen.

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184. Trs. of Columbia Univ. in the City of N.Y., 364 N.L.R.B. No. 90, at 7 (Aug. 23, 2016).

Stephanie D. Gironda* and Kimberly W. Geisler**

Introduction

Employment practices liability insurance (EPLI), in some form, has existed for decades. Stand-alone EPLI policies emerged in the late 1980s with low coverage limits and coverage of only the costs of defending wrongful termination claims.1 They arose to fill the gap left by general commercial liability policies that typically excluded employment practices claims.2 In the early 1990s, insurance companies began offering EPLI policies that included both indemnity and defense costs.3 This coincided with enactment of federal employment laws such as the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), and insurers’ expansion of the types of employment claims EPLI covered to include racial discrimination and sexual harassment claims.4 Large jury verdicts under the Civil Rights Act of

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2. Klenk, supra note 1, at 324.

3. Montelone, supra note 1, at 1.

1991 and renewed public attention to sexual harassment prompted increased sales of EPLI.\(^5\) Today, EPLI is key to risk management for employers of all sizes, although large corporations are more likely to purchase policies. A 2014 analysis of the EPLI market found that forty-one percent of companies with more than one thousand employees had stand-alone EPLI.\(^6\) Small and mid-size companies have also been attracted to EPLI because a single significant adverse verdict could be devastating.\(^7\)

As EPLI becomes more widespread, attorneys need to understand the structure of a typical EPLI policy and, for employment defense counsel specifically, the special challenges of working with EPLI insurers. This Article provides a guide to typical EPLI policy provisions, as well as issues faced by attorneys representing insureds and plaintiffs. Part I offers an overview of policy provisions that employment lawyers typically encounter. Part II discusses issues facing EPLI defense counsel, including tips for avoiding conflicts of interest arising from the “tripartite relationship.” Part III examines strategies for plaintiffs’ counsel to maximize coverage under EPLI policies.

I. Typical EPLI Policy Provisions

EPLI covers a business and typically extends to officers, employees, and former employees.\(^8\) The filing of a lawsuit, an administrative complaint, an arbitration claim, or a simple demand letter may trigger coverage.\(^9\) Oral demands are usually insufficient to constitute a claim because of uncertainty about proof and timing.\(^10\) Claims first presented as lawsuits are deemed made upon the insured’s receipt of the summons or similar process.\(^11\) Standard EPLI policies usually place on the insurer both the duty to indemnify and the duty to defend.\(^12\) The duty to defend is broader than the duty to indemnify because insurers often must defend claims that do not result in dam-

\(^5\) Montelone, supra note 1, at 2; see also L. Kathleen Chaney, Employment Practices Liability Insurance, 30 COLO. L. W. 125, 125 (2001) (“The rapid expansion of the EPLI market is attributable to a steady increase in the frequency and severity of employment related claims over the last decade.”).


\(^7\) Id.


\(^9\) Montelone, supra note 1, at 8.

\(^10\) Id.

\(^11\) Id. at 8–9.

ages.\textsuperscript{13} Insurers accept the duty to defend in exchange for the right to control the litigation.\textsuperscript{14}

Most EPLI policies are written on a claims-made basis, meaning coverage is triggered when a claim is first made against an insured during the term of the policy.\textsuperscript{15} Policies usually require that claims be reported to the insurer as soon as practicable, but not later than a prescribed period of time after policy expiration.\textsuperscript{16} Some older policies may have reporting requirements that are either completely open-ended or require insureds to report claims before the policy expires.\textsuperscript{17} Many EPLI policies also contain an awareness provision that allows insureds to report potential claims during the policy period, thereby securing coverage for any actual claim made later.\textsuperscript{18}

For attorneys, another important facet of EPLI to consider is that coverage for defense expenses usually is part of the liability limit.\textsuperscript{19} Lawyers defending EPLI claims must adequately represent the insured although every billable hour eats into the funds available for indemnification of any future settlement or judgment.\textsuperscript{20} Additionally, defense expenses typically are subject to a self-insured retention or deductible.\textsuperscript{21} Retention amounts result from negotiations between insurers and policyholders and represent the extent of risk that insureds retain.\textsuperscript{22} Many insurers set minimum retentions to avoid exposure to “routine, non-severe claims.”\textsuperscript{23} There often is an inverse correlation between retention amounts and premiums—policies with high premiums have lower retentions and vice versa.

EPLI covers damages in excess of the retention arising from covered employment practices.\textsuperscript{24} Generally, EPLI covers judgments, settlements, back pay and front pay awards, pre-judgment and post-judgment interest, attorneys’ fees and costs, and defense expenses.\textsuperscript{25} However, EPLI typically excludes punitive damages (unless coverage

\textsuperscript{13} Id. at 70.
\textsuperscript{14} Id. at 74.
\textsuperscript{15} Writing policies on a claims-made basis “provides two important benefits to the carrier: it minimizes the insurer’s responsibility for risks that existed prior to the underwriting and implementation of its loss prevention program, and it allows the insurer to quickly adjust in the face of an unexpected negative loss history by eliminating the long tail of coverage that exists under occurrence-based policies.” Id. at 58.
\textsuperscript{16} Montelone, supra note 1, at 4.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 5.
\textsuperscript{19} Chaney, supra note 5, at 127 (“A majority of EPLI policies are ‘defense within limits’ policies.”).
\textsuperscript{20} The Working Paper, supra note 8, at 2.
\textsuperscript{21} Chaney, supra note 5, at 127. Generally, the retention includes defense costs and applies on a per claim basis. Id.
\textsuperscript{22} Montelone, supra note 1, at 4.
\textsuperscript{23} Id.
\textsuperscript{24} Chaney, supra note 5, at 126.
\textsuperscript{25} Montelone, supra note 1, at 9.
is permitted by applicable state law); fines, penalties, and taxes; amounts due under an employment contract; stock options and deferred compensation; and injunctive relief, such as reinstatement or providing ADA accommodations. To be covered, claims must be made by parties defined in the policy. Depending on the policy, this may exclude leased workers, temporary workers, former employees, or applicants for employment. Most EPLI policies define each “employment practice” as one claim. Thus, if more than one person makes a claim for the same employment practice, the coverage available under the policy to pay those claims will be limited to a single limit of liability.

Although early EPLI policies covered only wrongful termination claims, policies today include a wider range of employment practices. Beyond constructive and retaliatory discharge, almost all policies cover various forms of discrimination and retaliation, including racial and sexual harassment. Some policies contain a catch-all category covering claims of discrimination based on other protected categories, such as sexual orientation and gender identity—claims not expressly protected by federal statutes but which may be covered by state or local law. Most policies also cover FMLA violations and all forms of harassment. Despite the breadth of modern policies, most still exclude claims based on workers’ compensation, the Employee Retirement Income Security Act of 1974 (ERISA), unemployment compensation, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), wage and hour laws, the National Labor Relations Act, and breach of contract.

26. In some states, it is unlawful to provide coverage for punitive damages because doing so allows insureds to transfer punishment for their harmful conduct to insurers—defeating the purpose of punitive damages. Chaney, supra note 5, at 127.
27. Montelone, supra note 1, at 9–10.
28. Chaney, supra note 5, at 126.
29. Id.
30. Id.
31. Montelone, supra note 1, at 10.
32. Id.
33. Id.
34. “Harassment coverage has been broadened to include harassment of a non-sexual nature. Broadened definitions of harassment often include coverage for harassment [] which creates a hostile work environment that interferes with performance, or creates an intimidating, hostile, or offensive work environment.” Van der Veer, supra note 4, at 190.
35. Some insurers now offer coverage for wage and hour claims with low coverage limits. However, coverage is often limited to defense costs. See, e.g., CRC Group, State of the Market: Wage and Hour 1, 6 (Oct. 2016), https://www.crcins.com/docs/professional/WageHour.pdf.
36. Chaney, supra note 5, at 127; The Working Paper, supra note 8, at 2. The exclusion for breach of contract usually does not extend to claims by employees attempting to defeat their at-will status by alleging that an employee handbook constitutes a contract of employment. See Montelone, supra note 1, at 12.
EPLI policies also regularly exclude claims for bodily injury and property damage, which are more likely covered by general liability policies or other forms of insurance. However, EPLI often covers claims for mental anguish or emotional distress associated with covered losses. EPLI also excludes intentional wrongdoing. While discrimination is an intentional act, the intentional wrongdoing exception is generally limited to situations in which final adjudication establishes intentionality. Because so few employment cases are decided on the merits, this exception is rarely of real consequence. Importantly, this exception will not exclude sexual harassment claims based on an employee-harasser’s wrongdoing because any liability the business incurs would be vicarious rather than direct.

EPLI policies vary widely with respect to the duty to defend and the related right to select defense counsel. Insurers that assume the duty to defend normally reserve the right to select defense counsel. Insurers tend to use a pre-approved list of firms or individual attorneys with employment litigation experience in a particular market. Insureds with experience with a particular firm may seek to include a policy provision naming that firm as pre-selected counsel. Even if the insured’s preferred counsel is not pre-approved before policy issuance, the insurer may consent to the insured’s selection after a claim arises. Nevertheless, insurers are more likely to approve such requests if made during policy negotiations.

II. Issues Facing EPLI Defense Counsel

Counsel EPLI insurers retain to defend employment claims face a variety of challenges arising from the “tripartite relationship” among the attorney, the insurer, and the insured. While all three share

37. Montelone, supra note 1, at 11.
38. Id.
39. Van der Veer, supra note 4, at 192-93 (“Prohibiting insurance coverage for intentional conduct is based on two premises. First, no individual or entity should profit from his own malfeasance. Second, many courts will declare void any coverage for acts or conduct that harms others.”).
40. Montelone, supra note 1, at 12.
41. James B. Dolan, Jr., The Growing Significance of Employment Practices Liability Insurance, GPsolo Mag. (Sept. 2005), www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/employmentinsurance.html (“There is widespread agreement that, if the named insured is held vicariously liable for an employee’s wrongful acts, coverage exists for the named insured but not for the wrongdoing employee.”).
42. The Working Paper, supra note 8, at 3.
43. Id.
44. Id. (“If the employer requests specific counsel during policy negotiations and the counsel is qualified to handle labor and employment matters, most carriers will allow an employer to designate its own counsel.”).
45. Id.
the basic goal of defending the claim, the insurer and the insured may disagree on strategy. For example, an employer seeking to protect its reputation may desire vindication at trial, while the insurer may prefer settling within policy limits to avoid additional defense costs.\(^{47}\) Sometimes, though, an insured may want to settle a claim quickly to avoid damaging relations with another business, even though the insurer would prefer pursuing litigation vigorously to obtain a more favorable settlement offer.\(^{48}\) The seeds of potential conflicts between insurers and insureds can be sown at the beginning of litigation, such as when an employee brings both covered and non-covered claims or when the insurer only defends a claim under a reservation of rights. Defense counsel is often placed in the middle, trying to balance the interests of the insurer and the insured. This section surveys common issues employment defense counsel face in the tripartite relationship.

A. Who Is the Client?

Navigation of ethical questions starts with attorneys knowing whom they represent.\(^{49}\) Depending on the jurisdiction, counsel will have one client (the insured employer) or two clients (both the insured and the insurer).\(^{50}\) The label “client” comes with several rights, including the right to sue a lawyer for malpractice, to confidentiality, and to conflict-free representation.\(^{51}\) According to the Restatement (Third) of the Law Governing Lawyers, an attorney-client relationship arises when:

“(1) [A] person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and (2) either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .”\(^{52}\)

This basic statement of law is not particularly helpful to the attorney attempting to resolve the conflicts posed by the tripartite relationship. Most states follow the “two-client theory,” meaning that “both the insured and the insurer are clients of the defense attorney.”\(^{53}\) The two-client theory is based on the expectation that most cases settle quickly.

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\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Amber Czarnecki, Ethical Considerations Within the Tripartite Relationship of Insurance Law—Who Is The Real Client?, 74 DEF. COUNS. J. 172, 173 (2007) (“The very nature of the tripartite relationship, the hiring of an attorney by a non-party to represent another party to a lawsuit, leaves the defense attorney to wonder whether he has one client or two.”).

\(^{50}\) Anderson, supra note 46, at 385.


\(^{52}\) RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

\(^{53}\) Czarnecki, supra note 49, at 174; see also ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 96-403, n.2 (1996) (“Today, absent a contrary agreement as to
within policy limits and that conflicts of interest are rare. In many two-client states, substantive law identifies the insured as the “primary” client. A growing minority follow the “one-client theory,” making the insured employer the attorney’s only client, despite the insurer paying the attorney. The one-client theory seeks clarity for attorneys and alleviation of fears that “allowing an insurer to have an attorney-client relationship weakens the attorney’s loyalty to the insured.” It will become even more important for employment attorneys to familiarize themselves with these rules as more states adopt the one-client theory. Accurately identifying the client is critical to navigating the ethical and practical challenges likely to arise in the tripartite relationship.

B. Who Controls the Defense?

Once the client is identified, the attorney, insurer, and insured must determine who controls the defense, a question especially important in two-client jurisdictions. Because insurers pay for the defense, EPLI policies usually allow them to steer the defense and control costs with litigation management guidelines. Such guidelines articulate insurers’ rules and procedures for defense counsel to follow:

Litigation management guidelines typically include a statement of the insurer’s goals (quality legal services at the lowest possible cost); a delineation of the respective duties of the claims professionals and the attorney; standard procedures for handling lawsuits, including required periodic consultations with or submissions to the claims manager to permit insurer direction of the case; an enumeration of tasks which require the insurer’s prior approval . . . and staffing guidelines and limitations.

Increasingly, EPLI carriers use internal or external auditors to review legal bills to ensure compliance with guidelines. Such detailed billing guidelines can influence an attorney’s litigation judgment.
For example, an attorney may be unlikely to pursue a particular course of action if an insurer refuses to pay for it.\textsuperscript{63} EPLI carriers frequently require pre-approval for fundamental litigation tools, such as “(1) hiring an expert; (2) hiring an investigator; (3) taking depositions; (4) videotaping depositions; (5) filing motions; (6) undertaking discovery; (7) expenditures for travel; (8) computerized legal research; and (9) determining how many attorneys may attend depositions, hearings, and trials.”\textsuperscript{64} These limits present potential conflicts of interest between insurers and insureds that may force attorneys to consider their ethical duties to both parties.

The ABA’s Model Rules of Professional Conduct articulate general principles governing litigation management guidelines. Model Rule 1.8(f) states:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected . . . .\textsuperscript{65}

Similarly, Rule 5.4(c) provides that: “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”\textsuperscript{66}

Because of the potential for conflicts in these situations, several states offer ethical guidance to lawyers operating under litigation management guidelines.\textsuperscript{67} Other states more strictly hold that insurer-issued litigation guidelines violate rules of professional conduct.\textsuperscript{68} Still other jurisdictions allow litigation guidelines if the insured gives informed consent after full disclosure of the “possible risks and implications of the limitations.”\textsuperscript{69} Finally, a few states determine whether litigation guidelines are acceptable on a case-by-case basis.\textsuperscript{70}

The ABA maintains that litigation guidelines do not usually raise ethical concerns because insureds impliedly consent to them when they contract for insurers to pay costs of defense and indemnifica-

\begin{itemize}
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Czarnecki, \textit{supra} note 49, at 182.
  \item \textsuperscript{65} MODEL RULES OF PROF’L CONDUCT r. 1.8(f) (AM. BAR ASS’N 1983).
  \item \textsuperscript{66} MODEL RULES OF PROF’L CONDUCT r. 5.4(c) (AM. BAR ASS’N 1983).
  \item \textsuperscript{67} Moats, \textit{supra} note 59, at 538–39.
  \item \textsuperscript{68} Id. (collecting authority); see also In re Rules of Prof’l Conduct and Insurer Imposed Billing Rules & Procedure, 2 P.3d 806, 814 (Mont. 2000) (billing guidelines conflicted with counsel’s duties to client).
  \item \textsuperscript{69} Moats, \textit{supra} note 59, at 539.
  \item \textsuperscript{70} Id.
\end{itemize}
tion. However, the ABA advises that attorneys who believe that their professional judgment is impaired by litigation guidelines should consult with both insureds and insurers. In consultation, insurers can agree to withdraw or modify an offending guideline or insureds can agree to limited representation. If the three parties cannot agree on litigation strategy, “the resulting conflict between the insurer’s directives and the insured’s immediate interests requires the lawyer to withdraw from representing the insurer and to protect the immediate interests of the insured in the litigation.”

Insurers’ detailed billing requirements may also present problems for insureds and counsel, especially if insurers employ third-party auditors. These issues go beyond mere inconvenience. For example, a bill’s detailed time entry may reveal confidential information regarding the insured’s representation. Although EPLI policies usually grant the insurer access to the insured’s confidential information, attorneys still owe certain duties to the insured-client under the Rules of Professional Conduct. Model Rule 1.6(a) states that: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation . . . .”

The ABA has cautioned against “disclosure of confidential information to a third party auditor absent the insured’s informed consent.” Indeed, disclosure of confidential information to a third-party auditor may result in waiver of the attorney-client privilege. However, the ABA “recognizes the propriety of submission of detailed bills and other confidential information to the client’s insurer unless

72. Id.
73. Id.
74. Id.
75. Anderson, supra note 46, at 391 (“In addition to house counsel, insurers increasingly have been using outside auditing services to review bills submitted to insurers by defense counsel in an effort to reduce costs.”).
76. “Time sheets and ‘[b]illing records may . . . reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided to the insured. This information generally is protected by the confidentiality rule or the attorney-client privilege or both.” Murov, supra note 71, at 307 (quoting ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 01-421 (2001)).
77. Czarnecki, supra note 49, at 183.
78. MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 1983).
79. Murov, supra note 71, at 307 (citing ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 01-421 (2001)).
80. Id. at 308 (citing state ethics opinions); see also United States v. MIT, 129 F.3d 681 (1st Cir. 1997) (privileged billing information given to government auditors waived attorney-client privilege).
disclosure will adversely affect ‘a material interest of the insured.’\textsuperscript{81} In sum, an attorney should consult with the insured and, if possible, get written consent before (1) disclosing information to the insurer that could materially affect coverage, and (2) disclosing information to a third-party auditor.\textsuperscript{82}

C. Who Controls Settlement?

Perhaps no part of a case presents such fertile ground for conflicts between the insurer and the insured as settlement. Traditionally, insurers maintained the exclusive right to settle covered claims.\textsuperscript{83} However, as the prevalence of employment practices claims grew, employers demanded more control over settlement.\textsuperscript{84} In response, insurers began including “hammer clauses” in policies to limit their exposure if employers refuse to accept a settlement the insurer favors.\textsuperscript{85} A hammer clause, also known as a “consent to settle” provision, provides that:

\begin{quote}
[I]f the insurer can obtain an opportunity to settle, that is, an offer that the plaintiff has stated he or she would accept, then, if the insured refuses to consent to the insurer settling the claim, the insurer's liability under the policy will be capped at the amount of the foregone settlement plus defense expenses incurred through that point in time.\textsuperscript{86}
\end{quote}

A hammer clause “permits the insured to object to a settlement opportunity, but it requires the insured to bear the cost of making a bad decision.”\textsuperscript{87} Some hammer clauses are less severe, only requiring insureds “to pay a percentage of the defense costs or indemnity beyond the rejected settlement amount.”\textsuperscript{88}

Regardless of specific policy language regarding settlement control, defense counsel will face a difficult situation if the insured and the insurer disagree about settlement. Settlement offers may reveal differences in the motives and goals driving the insurer and the insured employer. There is often tension between the insurer’s desire to settle “quickly and cost-effectively” and “the insured’s desire to fight the claim in employment-related cases, which are often emotional.

\begin{footnotes}
\item[81.] Murov, supra note 71, at 307 (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-421).
\item[82.] Id. at 309.
\item[83.] Klenk, supra note 1, at 339. If the insurance policy gives the insurer the right to control settlement, the insurer may be considered the insured's agent for purposes of settlement. See Caplan v. Fellheimer Eichen Braverman & Kaskey, 68 F.3d 828 (3d Cir. 1995) (insured could not prevent liability insurer from entering into settlement agreement on insured's behalf).
\item[84.] Klenk, supra note 1, at 339.
\item[85.] Id.
\item[86.] Montelone, supra note 1, at 7.
\item[87.] Klenk, supra note 1, at 340.
\end{footnotes}
and viewed as precedent-setting by the insured." In other situations, employers may desire a quick resolution to avoid embarrassment or bad publicity, while insurers want to continue litigation in hope of a lower settlement. The EPLI policy’s structure may also lead to conflicts when a settlement offer is made. For example, the insured may be especially resistant to settle if the proposed amount is within the self-insured retention. Similarly, an insurer may want to reject an offer at or near policy limits if a larger judgment seems likely because the insurer’s indemnification duty is capped by the policy’s coverage limit. However, an insurer’s refusal to settle within policy limits may create grounds for a bad faith claim by the insured.

Difficult situations also arise if a settlement proposal includes reinstatement of a terminated employee. While many employment laws, including Title VII and the ADA, permit reinstatement as a form of equitable relief, most terminated workers prefer not to accept reinstatement. Counsel should anticipate conflicts between employers (who must deal with the practical problems of re-integrating a terminated employee) and insurers (who may favor reinstatement to reduce a monetary settlement). If an employee desires reinstatement—or a court order requires it—counsel for insureds should determine if the policy addresses reinstatement and communicate with both the employer and insurer to explain potential conflicts and complications with reinstatement.

Counsel must remember that the insured employer always retains the right to reject the insurer’s desired settlement. Even if policy language explicitly gives the insurer the right to settle, an employer may choose to pursue litigation even if doing so amounts to a policy breach. The ABA addressed this situation in a Formal Opinion, stating:

89. Id. at 265. Employers who refuse to settle risk losing coverage altogether because the refusal may be deemed a violation of the “cooperation clause” found in most policies. Id. at 267.

90. Id. at 265–66.


92. Murov, supra note 71, at 323 (“The insurer . . . has nothing to lose by rejecting a policy limits settlement offer and trying the case, as, if it loses, its liability is policy limits in absence of some other basis of liability.”).

93. Id. at 324.

94. Id. at 320–22.

95. Joseph E. Slater, The American Rule That Swallows the Exceptions, 11 EMP. RTS. & EMP. POL’Y J. 53, 81 (2007) (“[T]he reinstatement remedy is problematic in practice. The majority of workers discriminated against decline reinstatement. One can imagine why a reasonable worker would not wish to return to a company that had illegally fired her, but lengthy delays make this attitude even more likely . . . .”).

96. See Nebel & Horstman, supra note 91, at 14 (“As a party to the suit, it is always the insured’s decision whether to settle or proceed to trial. Choosing to proceed to trial when the insurer wishes to settle may jeopardize the insured’s insurance coverage, but this is a choice to be made by the insured nonetheless.”).
If a lawyer for an insured knows that the insured objects to a settlement, the lawyer may not settle the claim against the insured at the direction of the insurer, without giving the insured an opportunity to reject the defense offered by the insurer and to assume responsibility for his own defense at his own expense.97

Lawyers who participate in settlement against the insured’s wishes have been held liable for malpractice.98 Even if the insurer has a contractual right to settle without the insured’s consent, counsel must be aware of ethical obligations to follow client wishes.99 A lawyer with an irreconcilable conflict between the insured and the insurer over settlement may have no choice but withdrawal.100

As a practical matter, insurers use good business judgment in their relationships with employer-clients. Insurers are likely to negotiate with insureds to reach consensus rather than to enforce hammer clauses. Counsel can lay the groundwork for avoiding these conflicts early on by ensuring that both insureds and insurers have realistic expectations about the litigation’s costs and potential outcome. An attorney’s early candid assessment of a case’s strengths and weaknesses and the employer’s potential monetary liability, injunctive relief, and negative publicity in the event of an adverse verdict can inform later negotiations between the insured and the insurer at the settlement stage.

III. Issues Facing Plaintiffs’ Counsel

Plaintiffs’ attorneys want to maximize the possibility that EPLI will cover a settlement or award. Plaintiffs’ counsel need to draft complaints to ensure coverage, but EPLI must also be considered throughout representation because coverage influences negotiation and litigation decisions.

EPLI policy coverage varies, making it critical for plaintiffs’ counsel to know coverage limits before litigation begins. Because it is difficult to obtain a defendant’s policy before litigation, plaintiffs’ counsel should know which claims are generally covered by EPLI in the employer’s region. In the alternative (or in addition), plaintiffs’ counsel can simply ask defense counsel if the employer is covered. Defense counsel are often willing to reveal the existence of an EPLI policy, although generally not its specific terms, before litigation.

Counsel should carefully draft the complaint to include claims covered by EPLI. Drafting is easy if a plaintiff has a strong claim that insurance will invariably cover, but it becomes more complex if the covered claim is weak. Counsel must weigh the benefits of includ-
ing a claim covered by EPLI in the complaint against the negatives of pressing a weaker claim, including possible dismissal. This choice becomes more complicated if the covered claim arises under federal law but the plaintiff would prefer to litigate in state court. Including a federal law claim risks removal to federal court, while foregoing the claim may keep the suit in state court. Of course, the client must be fully informed and understand the reasons for counsel’s decisions.

It is imperative for a plaintiff’s attorney to obtain the defendant’s EPLI policy as soon as possible after litigation commences. Federal Rule of Civil Procedure 26 requires initial disclosure of “any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action.”¹⁰¹ Thus, counsel may obtain a defendant’s EPLI policy very early in litigation under federal rules. In state courts, plaintiffs’ counsel should examine state civil procedure rules to determine the earliest time to request a defendant’s insurance policy.¹⁰² Until the defendant’s EPLI policy is reviewed, plaintiffs’ counsel may not know which claims are covered by the policy. In addition, policy limits vary substantially, making it critical for plaintiffs’ counsel to know the limits before discussing settlement.

There are other issues for plaintiffs and their lawyers to discuss. If a plaintiff’s claims are covered by EPLI and not subject to a policy exception or exclusion, the plaintiff must decide the litigation strategy. One strategy is to exceed the defendant’s deductible as quickly as possible so that the plaintiff will have access to a larger settlement from the insurer. Another strategy is to limit expenses (by restricting motion practice, for example) because defense costs are part of the total policy limits and a plaintiff would prefer that money be allocated to settlement rather than litigation expenses.

Conclusion

The increasing prevalence of EPLI is unsurprising. Federal and state employment claims have increased, as have employers’ corresponding desires to protect themselves and their businesses from potentially crippling liability. Attorneys for both insureds and plaintiffs must understand standard EPLI policy terms and the impact of those terms

¹⁰² Some state courts require initial disclosure of an insurance agreement without a request by the plaintiff. See, e.g., MINN. R. CIV. P. 26.01. Other state courts require plaintiffs to wait until written discovery to request a copy of a defendant’s insurance policy. See, e.g., ALA. R. CIV. P. 26. In New Jersey, the rule is: “A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.” N.J. R. 4:10-2(b). Although not stated in the rule, it is common practice in New Jersey to include a request for a defendant’s insurance policy at the end of a complaint.
on coverage. Defense counsel must recognize challenges and ethical issues that may arise in the tripartite relationship among employers, insurers, and defense attorneys. Plaintiffs' attorneys need to recognize how these issues impact their clients' claims from complaint filing through litigation and settlement negotiations.
Wearable Technology and Implications for the Americans with Disabilities Act, Genetic Information Nondiscrimination Act, and Health Privacy

Kevin J. Haskins*

Introduction

Wearable technology excels at providing health data. Yesterday’s pedometer has been relegated to the dustbin while today’s fitness trackers, like those from Fitbit, Jawbone, Garmin, and Apple, track not only heart rate and burned calories, but also sleep patterns, walking patterns, sweat, diet, and a host of other health attributes when paired with mobile apps for tracking mood, fertility, and medication. Although many of these devices are designed for the consumer market, they have become increasingly common in the workplace, often as part of employee wellness programs. Companies are also finding wearable devices useful for enhancing worker safety. Devices capable of monitoring a worker’s hydration, temperature, movement, and external hazards are already available, and research is continuing into how to use these tools as a “technological guardian angel” for workers.

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Unsurprisingly, workplace proliferation of wearable technology raises many legal questions. In particular, the intersection of wearable technology and health implicates issues under the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and health privacy laws like the Health Insurance Portability and Accountability Act (HIPAA).

Part I of this Article addresses the ADA and how its prohibitions on disability-related inquiries and discrimination may affect uses of wearable technology in the workplace. Part II addresses corollary issues under GINA. Part III concludes with an overview of HIPAA and how its privacy protections relate to workplace deployment of wearable technology.

I. Wearable Technology and the ADA

A. Wearable Technology and Disability-Related Inquiries

The ADA prohibits employers from administering medical examinations and making other disability-related inquiries to current employees unless the examination or inquiry “is job-related and consistent with business necessity.” Equal Employment Opportunity Commission (EEOC) enforcement guidance notes that a “medical examination” is any procedure or test “that seeks information about an individual’s physical or mental impairments or health.” That same guidance also defines a “disability-related inquiry” as any question “likely to elicit information about a disability.”

Because wearable devices are adept at tracking health data and providing health analytics, employers’ use of these devices may violate the ADA’s prohibition on medical examinations and disability-related inquiries. The multiple health parameters that wearable devices track, and the granular nature of the information they can provide, means that wearable technology can give end-users, whether employers or employees, a detailed picture of the wearer’s health. Even if a company’s deployment of a wearable device lacks intent to conduct a medical examination, the device can still elicit information about an employee’s

7. Id.
disability. Wearable devices that monitor blood glucose or cardiac conditions, for example, could disclose an employee’s diabetes or asthma.

Consequently, workplace use of wearable technology presents a risk under the ADA because it can provide an employer with employees’ health-related information that it would not otherwise have and that may relate to or disclose an employee’s underlying disability. Given this risk, companies deploying wearable technology should be prepared, at minimum, to explain to employees what information the technology collects, the limits on collection, and why the technology is job-related and consistent with business necessity.

There are two employer wearable technology practices that present fewer ADA legal risks: use of wearable technology in connection with employee wellness programs and use of wearable technology for safety-sensitive positions.

B. Wearable Technology and Employee Wellness Programs

Employers commonly offer employee wellness programs and, by some estimates, forty to fifty percent of them use health trackers. One reason for this increase is that the ADA specifically allows employers to conduct medical examinations and disability-related inquiries as part of voluntary wellness programs. Thus, the ADA permits employers to use wearable devices in connection with voluntary wellness programs, even though such use may constitute a medical examination or disability-related inquiry.

The EEOC’s current rules on workplace wellness programs do not directly address use of wearable technology as part of wellness programs,
but describe how these programs can comply with the ADA and GINA, while also remaining consistent with HIPAA’s wellness program rules. The rules address the critical definition of “voluntary.” Although previous ADA regulations allowed employers to ask health-related questions and conduct medical examinations as part of a “voluntary” wellness program, the regulations did not define “voluntary.” Now, the rules clarify that, for a wellness program to be considered voluntary, employers may not require employees to participate in the program, deny employees access to health coverage for choosing not to participate, or take adverse actions based on employees’ failure to participate.

The rules also contain other requirements that indirectly affect wearable technology use. For example, employers must provide a notice that clearly explains what medical information will be obtained from employees in a wellness program. The rules also require that wellness programs be “reasonably designed to promote health or prevent disease.” In other words, wellness programs must actually promote health and cannot include burdensome time requirements for participation, involve unreasonably intrusive procedures, or be used to shift insurance costs or gain sensitive medical information that would otherwise violate the law. The ADA also requires employers to reasonably accommodate employees with disabilities to be able to participate in wellness programs. Thus, if an employee’s disability or other condition precludes wearing the technology, employers should consider reasonable accommodations that would allow participation in the wellness program without the technology.

In addition, the rules include two confidentiality provisions that affect wearable technology use. First, information from wellness programs may be disclosed to employers only in an aggregate form that does not identify specific persons. Second, employers may not require employees to agree to sales of health information or waivers of confidentiality as a condition for participating in a wellness program or receiving an incentive.
C. Wearable Technology and Safety-Sensitive Positions

The ADA’s requirement that medical examinations and disability-related inquiries must be “job-related and consistent with business necessity” provides another potential legal use of wearable technology in the workplace.\textsuperscript{24} The EEOC says that an inquiry is “job-related and consistent with business necessity” if an employer “has a reasonable belief, based on objective evidence, that (1) an employee’s ability to perform essential job functions will be impaired by a medical condition, or (2) an employee will pose a direct threat due to a medical condition.”\textsuperscript{25}

Using wearable devices as an early warning system for employees in safety-sensitive positions might fall within this exception. For example, outfitting forklift operators with wearable devices that measure enzymes in sweat and send alerts if the operators become dehydrated or overly fatigued presumably (1) relates to employees’ ability to perform essential job functions, and (2) addresses whether their physical condition poses a direct threat of harm. In addition, EEOC guidance suggests that medical inquiries may be warranted in certain circumstances in which safety is at issue.\textsuperscript{26}

However, for an inquiry to be “job-related and consistent with business necessity,” an employer must have a reasonable belief, based on objective evidence, that an employee will be impaired or will pose a direct threat due to a medical condition.\textsuperscript{27} The standard arguably presumes that an observable medical condition already exists which gives rise to a reasonable belief that a medical inquiry is warranted due to the risk of impairment or a direct threat. When wearable technology is instead used to detect a medical impairment before it even occurs, the elements of reasonable belief and objective evidence that might support the technology’s use are arguably absent.

In this area, much may depend on the particular data wearable technology collects. Wearable devices that detect environmental hazards like carbon monoxide, provide geolocation data, or enhance mobility or sensory perception, for example, may not raise any ADA concerns because they neither track employees’ medical conditions nor elicit information about a disability. Rather, the use of these devices may raise other concerns, including issues regarding invasion of privacy and liability for accidents related to use of wearable technology.\textsuperscript{28}

The more continuously a wearable device monitors employees’ health

\textsuperscript{25} Disability-Related Inquiries, supra note 6, § 5.
\textsuperscript{26} Id. §§ 18, 21 (periodic medical inquiries may be appropriate for employees in positions affecting public safety and when required by other federal laws or regulations).
\textsuperscript{27} Disability-Related Inquiries, supra note 6, § 5.
conditions, and the more detailed the information provided, the more seriously the ADA is implicated.

D. Wearable Technology and Discrimination

Discrimination claims are another risk of workplace use of wearable technology. The ADA prohibits discrimination on the basis of disability.29 Wearable technology can provide employers with a significant amount of employee-related health information to which they would not otherwise have access. When employers use wearable technology to evaluate job performance, employees could conceivably claim that discipline thereafter would not have been imposed but for the employer’s discovery of a medical or health condition disclosed by the technology. The risk is arguably lower if wearable technology is used as part of an employee wellness program because third-party vendors often receive collected employee information, and employers receive only aggregated data that does not identify particular employees.30 Even so, that “firewall” would not necessarily preclude an employee from claiming that an adverse action was based on a perceived disability, regardless of whether the collected information disclosed a disability, and regardless of whether the technology was part of a wellness program.

Wearable technologies also raise potential reasonable accommodation issues. As a general rule, employees must initiate discussions about the necessity of accommodations.31 However, EEOC guidance suggests that employers may have an obligation to initiate discussions if they know or have reason to know that employees are experiencing workplace problems due to a disability.32 Consequently, information that wearable technology collects may sometimes require employers to consider whether an employee’s physical condition is contributing to performance problems.33

Finally, the EEOC has increased its focus on uses of “big data,” including algorithms and predictive analytics for evaluating large amounts of information about employees.34 At a recent panel hosted by the EEOC that explored the use of big data in employment, panel-

32. Id.
33. See Haggin, supra note 4.
ists identified wearable devices in employee wellness programs as an area of concern, in part because little is known about how data analytics companies interpret data collected from wearable devices, and because the data such technology provides may often be unreliable. Given the EEOC’s interest in “big data” and how employers use it to make employment decisions, the EEOC will likely be interested in how wearable technology in the workplace contributes to this emerging issue.

II. Wearable Technology and GINA

GINA prohibits discrimination in employment on the basis of genetic information. The law defines “genetic information” as including information about a person’s genetic tests, genetic tests of that person’s family members, and the manifestation of disease or disorder in such family members (i.e., family medical history). Among other protections, GINA makes it unlawful to “request, require, or purchase genetic information of an individual or family member of the individual.”

For wearable technology, GINA raises many of the same risks and concerns as the ADA. If an employee must wear a device that collects genetic information, or must provide that information to use such a device, use of wearable technology could constitute an unlawful request for genetic information. Depending on the information collected, GINA, similar to the ADA, also presents risks of discrimination claims.

While GINA generally prohibits requesting, requiring, or purchasing genetic information, there is an exception if employers offer voluntary health or genetic services to employees or their family members as part of a wellness program. Many of the EEOC rules governing wellness programs under the ADA apply equally to GINA. Thus, much of the discussion and analysis of wellness programs under the ADA also applies to wellness programs under GINA.

Notably, a bill currently pending in the House of Representatives would make GINA inapplicable to workplace wellness programs. Under the proposed bill, employers would be able to impose financial

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37. 29 C.F.R. § 1635.3(c)(1) (2017).
38. 29 C.F.R. § 1635.8(a).
39. 29 C.F.R. § 1635.8(b)(2).
41. See supra section I.
penalties on employees who choose not to provide genetic information as part of a voluntary wellness program. The fate of this bill remains uncertain.

III. Wearable Technology and Health Privacy under HIPAA

Wearable technology that collects employees’ health-related information also implicates HIPAA, which establishes national standards for protecting individually identifiable health information—“protected health information” (PHI)—that covered entities and their business associates hold. The HIPAA Privacy Rule defines the circumstances under which covered entities may disclose PHI. The Security Rule lists procedures that covered entities must follow to ensure protection of PHI. The Breach Notification Rule requires covered entities and their business associates to provide notification of breaches of unsecured PHI.

However, HIPAA is inapplicable to employers as employers. Rather, HIPAA applies only to “covered entities” and their business associates. HIPAA defines a “covered entity” as a health plan, a health care clearinghouse, and most health care providers. Most employers that use workplace wearable devices that collect employees’ health-related information are thus not subject to HIPAA.

Whether HIPAA rules apply to workplace wellness programs depends on whether an employer independently offers the program or whether it is offered as part of a health plan. If an employer offers the program directly and independently of a health plan, HIPAA does not apply and any information collected from employees, including information collected from wearable devices, would not be HIPAA protected. However, if an employer includes a wellness program as part of a group health plan, HIPAA rules would protect any PHI collected from participants.

43. See Sharon Begley, House Republicans Would Let Employers Demand Workers’ Genetic Test Results, STAT (Mar. 10, 2017), https://www.statnews.com/2017/03/10/workplace-wellness-genetic-testing/. Penalties could include charging employees more for health insurance (if the employer offers a group health plan), or loss of pay. Id.
45. 45 C.F.R. §§ 160, 164.102-.106, 164.500-.534.
46. 45 C.F.R. §§ 160, 164.102-.106, 164.302-.318.
47. 45 C.F.R. §§ 160.102.
48. 45 C.F.R. § 160.103.
50. See Workplace Wellness Programs, supra note 50.
Interestingly, some wearable device manufacturers in an abundance of caution are designing products to be HIPAA-compliant even though it is not necessary for most workplaces. Fitbit, for example, announced in September 2015 that its devices were HIPAA-compliant, enabling sales to HIPAA-covered entities. In this quickly evolving area of wearable technology and employment, such a precaution likely also best serves the needs of employers and employees.

Conclusion

Wearable technology is fast becoming commonplace in workplaces. Businesses are increasingly incorporating wearable devices into their technology infrastructure, and each year offers new products capable of providing user information in more detail. For employers, this technology has tremendous potential—devices capable of tracking biometrics, geolocation, environmental hazards, and more will undoubtedly allow employees to perform their jobs better, faster, and more safely. But the ability of wearable devices to disclose employees’ health-related information also presents risks for employers. Wearable technology can provide employers with a significant amount of employee-related health information that might not otherwise be available and, in some cases, might disclose more information than permitted under the ADA; GINA; and privacy laws, including HIPAA. To minimize risk, employers should carefully consider the benefits of wearable technology before deployment. That analysis should include review of the employer’s business needs and how wearable technology can help meet them. Employers should then clearly explain to employees how wearable technology will be used, what information the technology collects, the limits on collection, and why the technology is necessary. Taking these steps may make it more likely that both employers and employees will be able to wear their technology without adverse consequences.

The Impact of Smart and Wearable Technology on Trade Secret Protection and E-Discovery

Brian D. Hall*

Introduction

We have entered the age of the “smart,” or digital, workplace, in which internet-based technology drives employee communication, collaboration, and productivity. Laptops, smartphones, and tablet devices permit employees to work from anywhere at any time. Social media and other technologies designed for the workplace permit employees to collaborate on projects in real time, even if in widespread locations. Technology that can be worn as a wristband, badge, headgear, or even clothing can measure employee productivity, engagement, health, and safety. The “Internet of Things,” which allows machines and appliances to communicate with each other, and mixed- or augmented-reality devices, such as Google Glass and Microsoft’s HoloLens, will profoundly affect how people do their jobs.

However, these new technologies also significantly impact employers’ legal obligations to their employees by creating new legal risks. Employers’ use of smart and wearable technology may result in unlaw-

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2. Id.
3. Id.
5. Id. The “Internet of Things” refers to “networked ‘smart devices’ equipped with microchips, sensors, and wireless communications capabilities,” of which smart and wearable technology is a “subset.” Id.
ful discrimination\(^6\) or invasion of employee privacy.\(^7\) Restrictions on employees’ use of this technology may interfere with employees’ Section 7 rights under the National Labor Relations Act.\(^8\) Two other potential legal problems may be less apparent: (1) smart and wearable technology’s impact on trade secret protection; and (2) its impact on document preservation and e-discovery in employment litigation. This Article describes these issues and offers suggestions for how employers can resolve them.

I. Trade Secret Protection

The rise of smart and wearable workplace technology creates new challenges for employer trade secret protection. The proliferation of smartphone applications, such as Snapchat, which enable employees to create self-deleting photos and videos, or applications like Facebook Live and Periscope, which allow live video broadcasting, may facilitate trade secret disclosure. Workplace adoption of the Internet of Things creates additional data transfers vulnerable to “hacking.” Smart glasses offering augmented reality can put warehouse inventory levels and designers’ drawings at greater risk of disclosure. Similarly, employers need to guard against products that permit flash drives and recording devices to be concealed in or disguised as other objects.\(^9\)

A. Defining Trade Secrets

The Uniform Trade Secrets Act (UTSA)\(^{10}\) has been adopted in some form by every state other than New York and Massachusetts.\(^{11}\) The UTSA defines a “trade secret” as information that: (1) “derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use;” and (2) “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”\(^{12}\) Federal law, by contrast, defines a “trade secret” as:

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7. Id. at 76–77.
10. UNIF. TRADE SECRETS ACT (UNIF. LAW COMM’N 1985).
12. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM’N 1985).
all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if . . . the owner thereof has taken reasonable measures to keep such information secret . . . [and] the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information . . . .

B. Trade Secrets Derive Independent Economic Value from Not Being Generally Known or Readily Ascertainable

For employers, the three most likely sources of trade secret information at risk from smart or wearable technology are: (1) steps taken to customize technology for a particular workplace; (2) data collected from the technology; and (3) analysis of that data to implement workplace policy and procedure changes. Each of these sources would certainly create economic value to the employer if kept secret from others.

For instance, some companies are testing or using wearable badges that monitor employees’ location, motion, and voice, thus enabling employers to identify patterns in interactions between employees and with customers. Such data would permit measurement of interactions over time to identify patterns associated with the most and least successful

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14. See, e.g., Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1291 (11th Cir. 2003) (citing Capital Asset Research Corp. v. Finnegan, 160 F.3d 683, 686 (1998)) (“[E]ven if all of the information is publicly available, a unique combination of that information, which adds value to the information, also may qualify as a trade secret.”); Metallurgical Indus. v. Fourtek, Inc., 790 F.2d 1195, 1202 (5th Cir. 1986) (quoting Imperial Chem., Ltd. v. Nat’l Distillers & Chem. Corp., 342 F.2d 737, 742 (2d Cir. 1965)) (“[A] trade secret can exist in a combination of characteristics and components each of which, by itself, is in the public domain, but the unified process, design and operation of which in unique combination, affords a competitive advantage and is a protectible secret.”); NaturaLawn of Am., Inc. v. W. Grp., LLC, 484 F. Supp. 2d 392, 399 (D. Md. 2007) (publicly available software may still constitute a trade secret if it has been customized and enhanced to make it unique).
15. See, e.g., Decision Insights, Inc. v. Sentia Grp., Inc., 311 F. App’x 586, 591 (4th Cir. 2009) (remanding to determine whether plaintiff’s software compilation constituted a trade secret under Virginia law); Isc-Bunker Ramo Corp. v. Altech, Inc., 765 F. Supp. 1310, 1321 (N.D. Ill. 1990) (data compilation constitutes a trade secret under Illinois law even if the plaintiff did not develop the data itself).
16. See, e.g., Glaxo Inc. v. Novopharm Ltd., 931 F. Supp. 1280, 1299 (E.D.N.C. 1996), aff’d, 110 F.3d 1562 (Fed. Cir. 1997) (trade secrets can consist of “data that would give a person skilled in the art a competitive advantage he might not otherwise enjoy but for the knowledge gleaned from the owner’s research investment”); Procter & Gamble Co. v. Stoneham, 747 N.E.2d 268, 275 (Ohio Ct. App. 2000) (non-compete agreement enforced to protect trade secrets, including marketing data analysis).
17. See Thierer, supra note 4, at 27–30 (discussing potential impacts of smart and wearable technology on various industries).
work groups or employees. An employer’s customization of technology—
e.g., which groups the employer measures and in which locations, as well
as the variables it measures and those which it ignores—would be valu-
able information to competitors. Similarly, and probably more impor-
tantly, companies presumably gain a competitive advantage by under-
standing data from employee badges, how that data is analyzed, the
workplace decisions based on that data, and the successes or failures
achieved based on that analysis.

C. Reasonable Security Efforts

Fortunately, while technology may be evolving and creating new
forms of trade secrets, most traditional methods for securing that in-
formation should still work. Under the UTSA and federal law, busi-
nesses must use reasonable efforts to maintain the secrecy of all infor-
mation claimed as a trade secret. Depending on the employer’s
operation, reasonable efforts may include taking precautionary mea-
sures in data storage and handling, hiring, agreements with third par-
ties, employment policies, and terminations.

1. Information Storage and Handling

Proper data storage and handling typically begins with naming
and labeling appropriate files as sensitive. A business might create
a data map of all its information, identifying its data storage devices
and containers, what data resides there, and where that data travels
internally and externally. Finally, a business should establish appro-
priate data handling procedures, including copying restrictions and
encryption requirements.

2. Employee Confidentiality and Non-Compete Agreements

Upon hiring, employers should obtain employee confidentiality
and non-compete agreements. Agreements should be broad enough
to protect trade secrets, but not so broad as to be unenforceable.
ployee handbooks and job descriptions should supplement confidentiality and non-compete agreements by emphasizing the importance of maintaining confidentiality of employer data. Finally, non-compete agreements should obligate departing employees to notify employers of any new employment obtained during the restricted period and require former employees to provide a copy of its non-compete agreement to prospective employers.

3. Third Party Due Diligence and Non-Disclosure Agreements

If employers must work with other companies to implement smart or wearable device programs, or to analyze data derived from such devices, they should investigate the reliability of companies with which they intend to conduct business and enter into non-disclosure agreements with them.25

4. Limit and Monitor Access

Access to trade secret information should be limited to employees on a need-to-know basis. Depending on a trade secret’s value and the effectiveness of measures to protect it from unwanted disclosure, employers should consider ensuring that no single employee knows all the trade secret’s aspects.26 Employee access should be monitored to prevent inappropriate access. Employers should regularly review information access procedures and revise them as needed.27 Employers need to establish procedures to terminate an employee’s access to trade secret information as soon as the need for access ends, such as when an employee is reassigned or departs.28 Finally, employers should be aware of new technologies that enable employees to conceal flash drives and other portable media devices in other objects.29

5. Employee and Vendor Background Checks

Periodic background checks (in accordance with the Fair Credit Reporting Act, analogous state laws, and EEOC guidance) should be required for all applicants, employees, and vendor employees who

§ 8.06 (AM. LAW INST. 2015). An employer has a protectable interest in its trade secrets and other confidential information. Id. § 8.07. See also, e.g., Del. Elevator, Inc. v. Williams, C.A. No. 5596-VCL, 2011 WL 1005181, at *13 (Del. Ch. Mar. 16, 2011) (employer made reasonable efforts to keep customer list confidential by having sales personnel and senior management enter into non-compete agreements, although other aspects of agreement were overbroad).

25. See, e.g., Rockwell Graphic Sys., Inc. v. DEV Indus. Inc., 925 F.2d 174, 180–81 (7th Cir. 1991) (defendant’s motion for summary judgment denied, in part, because vendors who accessed proprietary drawings were required to sign confidentiality agreements).


27. See id.

28. See id.

29. See Barbieri, supra note 9.
work in sensitive areas or who have access to confidential information.  

6. Employment Policies Restricting Photos and Recording

With the rise of technology enabling workers to broadcast photographs and video from almost anywhere, in high resolution and real time, employers should restrict use of such technology in sensitive areas and when working with trade secret information. Employers should also prohibit audio recording during meetings, including discussion of trade secrets. Any audio, photography, or video restrictions must be narrowly tailored to protect trade secret information while avoiding violation of employees’ rights to engage in union and other concerted and protected activity under the National Labor Relations Act.

7. Trade Secret Focused Exit Interviews

The exit interview is an employer’s last chance to remind employees of their obligations regarding non-competition and confidentiality, as well as under trade secret laws. Give departing employees a list of trade secrets and require employees to acknowledge receipt in writing. Ask departing employees to identify any future employment and document if the employee has agreed or refused to do so. The exit interview also provides a final reminder to terminate departing employees’ access to computers and other secured devices or sensitive areas; identify and review any suspicious computer or physical access before the last date of work; ensure return of company devices, keys, and other means of accessing data; and wipe any company information stored on employee-owned devices connected to company networks.

II. E-Discovery

Implementation of smart or wearable workplace technology programs raises litigation hold and e-discovery issues for employers. As with trade secret protection, employers need more judicial decisions to clarify document preservation responsibilities for each new technol-


31. See, e.g., Whole Foods Mkt., Inc., 363 N.L.R.B. No. 87, at *4 (2015) (ban on workplace recordings violated employees’ Section 7 rights), aff’d, Whole Foods Mkt. Grp. v. NLRB, 691 F. App’x 49 (2d Cir. 2017). But see Flagstaff Med. Ctr., 357 N.L.R.B. 659, 663 (2011) (hospital recording ban permissible because “privacy interests of hospital patients are weighty,” and hospital had a “significant interest in preventing the wrongful disclosure of individually identifiable health information”).

32. See, e.g., Tyson Foods, Inc. v. ConAgra, Inc., 79 S.W.3d 326, 332–33 (Ark. 2002) (burden on employer to clearly identify information considered a trade secret; employer could have used exit interviews to advise departing employees of information considered proprietary).

33. See id.
ogy. For now, employers should rely on established document retention and e-discovery principles, rather than the newness of a technology, to preserve evidence once litigation is reasonably anticipated. Employers must understand and document whether data is actually in their possession, custody, or control, and if so, where data resides and how it is transmitted.34

A. Ephemeral Messaging Apps

Ephemeral messaging apps (EMAs) complicate data preservation responsibilities. New EMAs emerge regularly. Messaging apps, such as Snapchat, Confide, Wickr, and Dust (formerly known as Cyber Dust), boast that they self-delete messages upon receipt or within a prescribed duration, theoretically leaving no trace of the message thereafter.35 Many EMAs were developed specifically for business settings. Dust, for example, has been described by one of the app’s financial backers as an alternative to face-to-face communication, ensuring that “nothing is discoverable.”36

EMAs can cause litigation hold and e-discovery issues because it may be extremely difficult, if not impossible, to recover messages sent using these apps. For litigation holds, a litigant can preserve only what is in its possession, custody, or control, and an EMA message may have been automatically deleted upon, or shortly after, receipt. Litigants cannot preserve data that third-party apps automatically delete. However, does reasonable anticipation of litigation require a company to cease using EMAs for communication related to the subject matter of anticipated litigation?

When attempting to discover communications shared through EMAs, litigants should use interrogatories to learn the extent and nature of the other party’s use of such apps. The substantial difficulty of attempting to reconstruct or retrieve EMA messages, however, may make requests for EMA messages exceed courts’ limits on the cost and proportionality of discovery requests. Federal Rule of Civil Procedure 26(b) permits courts to limit discovery requests when “the burden or expense of the proposed discovery outweighs its likely benefit,” considering the needs of the case, the parties’ resources, “the importance of the issues at stake in the action,” and “the importance of the discov-


35. Many mobile apps capable of saving Snapchat photos, video, and text have been rendered useless by app updates. However, many other (albeit more complicated) methods for saving Snapchat message content may still exist. See, e.g., Damon Beres, Android Users Can Secretly Save Any Snapchat Video Forever, HUFFPOST (Oct. 19, 2015), https://www.huffingtonpost.com/entry/save-snapchat-video_us_561e5771e4b028dd7ea5d393.

ery in resolving the issues." Absent a substantial showing that communications using EMAs will be highly relevant to the subject matter of the litigation and that metadata (if not the content) associated with those communications will be recoverable, Rule 26(b) likely will preclude such discovery. In this circumstance, litigants should seek an inference that the user is attempting to hide something, inferred from the user’s knowledge of how the EMA works and the user’s decision to use it.

B. Information Stored in the Cloud

Data obtained through wearable and other smart technology will be stored both on the device itself and, likely, in the cloud. Data stored in the cloud might be subject to discovery in employment litigation. For instance, employers may rely on cloud data to support employment decisions, raising questions about who may access the data. Even if relevant data is stored in employees’ personal cloud accounts, the employer may still be required to ensure employees preserve it. E-discovery obligations cannot be avoided simply by contracting with a third party to store data in the cloud. Businesses may actually face bigger challenges meeting their obligations in cloud-based environments because they do not have complete control over what happens to data stored with a cloud provider.

A salutary lesson of the consequences of an employer’s effort to avoid discovery by claiming lack of access to employee sales records data stored in a third party’s system is seen in a 2014 Ohio district court order against the employer:

37. FED. R. CIV. P. 26(b)(1).
40. See, e.g., Brown v. Tellermate Holdings Ltd., No. 2:11-cv-1122, 2014 WL 2987051, at *3–5 (S.D. Ohio July 1, 2014) (plaintiffs in age discrimination suit sought to compel discovery from employer of sales performance reports maintained by third-party website, and employer objected, saying that it lacked copies of reports, could not access historical reports, and was contractually prohibited from disclosing reports).
42. See Brown, 2014 WL 2987051, at *25 (employer’s failure to preserve sales performance reports maintained by third-party website was sanctionable when stated reason for plaintiff’s termination was inadequate sales performance); Brown v. Tellermate Holdings Ltd., No. 2:11-cv-1122, 2015 WL 4742686, at *12 (S.D. Ohio Aug. 11, 2015) (adverse inference jury instruction appropriate, among other sanctions, when missing sales performance reports were relevant to contested issues of employees’ sales performance).
1. Defendant Tellermate shall not be permitted to introduce salesforce.com records as evidence at trial or refer to those records at trial;

2. Defendant Tellermate is precluded from asserting that the Plaintiffs’ use or non-use of the salesforce.com application was in any way deficient or that it justified their termination;

3. If evidence at trial raises any contested issue about the sales conduct of the Plaintiffs or any other Tellermate salesperson, and the Plaintiffs show that missing salesforce.com data would corroborate their position, then the Court will give the jury an adverse inference instruction appropriate for the circumstances; and

4. The Plaintiffs will be permitted to testify as to what the salesforce.com records would have shown had they been properly preserved. Defendant Tellermate may rebut this testimony only through independent evidence, and not the salesforce.com records.43

C. Information Stored on Employee-Owned Devices

Employers operating a “bring your own device” workplace, in which employees may connect personal smartphones and other devices to employers’ networks for work purposes, face a different set of problems. Federal courts are divided on when and how parties seeking discovery can access data stored on employees’ personal devices.44 In Alter v. Rocky Point School District,45 an employee alleged she had been subjected to a hostile work environment based on her gender and was retaliated against for complaining.46 The plaintiff moved to compel discovery and for sanctions, arguing that her employer failed to implement a proper litigation hold, resulting in spoliation of evidence.47 The plaintiff had sought documents stored on employees’ personal computers that the district could not produce.48 The court ordered the district to identify key employees with relevant information and instruct them to preserve relevant documents on “whatever devices contained the information,” including personal computers.49

In Cotton v. Costco Wholesale Corp.,50 a Title VII race discrimination case, the court refused to order the defendant to produce text messages mentioning the plaintiff that were sent or received by two em-

44. See, e.g., In re Boehringer Ingelheim Pharm., Inc., 745 F.3d 216, 225 (7th Cir. 2014) (sanctions appropriate for defendant’s failure to preserve employees’ text messages on company-owned cell phones); Stinson v. City of New York, No. 10 Civ. 4228 (RWS), 2016 WL 54684, at *5 (S.D. N.Y. Jan. 5, 2016) (police department cell phones “were within the possession, custody, or control of the City, and were subject to the same preservation obligation as the City’s other [electronically stored information]”).
46. Id. at *1.
47. Id.
48. Id.
49. Id. at *10.
ployees using their personal devices. The court stated that there was no suggestion from the plaintiff “that Costco issued the cell phones to these employees, that the employees used the cell phones for any work-related purpose, or that Costco otherwise has any legal right to obtain employee text messages on demand.” Accordingly, the court found that “Costco does not likely have within its possession, custody, or control text messages sent or received by these individuals on their personal cell phones” and therefore denied the plaintiff’s motion to compel discovery.

Conclusion

Technology evolves at a significantly faster pace than the laws that regulate its use. This generalization is fully applicable to the spread of wearable and smart technology in the workplace. The law has a lot of catching up to do—until it does, employers should rely on traditional approaches to trade secret protection and evidence preservation.

51. Id. at *6.
52. Id.
53. Id.
The Age Discrimination in Employment Act at 50: When Will It Become a “Real” Civil Rights Statute?

Laurie A. McCann*

Introduction

President Lyndon Johnson’s 1967 message to Congress urging enactment of legislation to prohibit discrimination against older workers emphasized that “[h]undreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination.” Prior to passage of the Age Discrimination in Employment Act (ADEA or the Act), approximately half of all private-sector job openings explicitly barred applicants over age fifty-five, and one quarter barred those over forty-five. “Help Wanted” ads could state that only workers under thirty-five need apply, and employers had unbridled authority to retire older workers based solely on age. Not surprisingly, twenty-seven percent of unemployed workers, and forty percent of the long-term unemployed, were forty-five and older.

The ADEA is a product of the civil rights era. Age was proposed as a protected class under the Civil Rights Act of 1964. Though not ultimately included, that law directed the Secretary of Labor to study age discrimination and report to Congress. The ADEA’s enactment in 1967, contemporaneous with the Equal Pay Act of 1963, the Civil Rights...
Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968, was an integral part of congressional actions to define and protect civil rights in the 1960s. President Johnson viewed the ADEA as a fundamental component of both his civil rights legacy and his efforts to address the significant problems facing older Americans.6

Since the ADEA’s enactment, the employment landscape for older workers has significantly brightened. Congress amended the Act several times, gradually strengthening its protections. Upper age limits on coverage were eliminated,7 banning mandatory retirement for almost all workers.8 Age discrimination in the provision of employee benefits was prohibited, and significant protections were added for older workers asked to waive their rights and claims under the Act as part of a reduction-in-force.9 Yet, much room for improvement remains.

Part I of this Article describes how rampant hiring discrimination, the principal problem the ADEA was intended to address, continues to plague older workers. Part II describes the ADEA’s effectiveness in areas other than hiring. Part III explores one possible explanation for the ADEA’s limited effectiveness—the perception that ageism differs from other forms of discrimination. Finally, Part IV delves into potential improvements to the ADEA that could better achieve its objectives.

I. The ADEA’s Primary Goal of Promoting Hiring Older Workers Is Still Just a Goal

Addressing age discrimination in hiring is the ADEA’s “primary purpose.”10 The Act makes it unlawful to “fail or refuse to hire”11 any individual because of age and prohibits age-related specifications in job postings.12 Today, older workers are the age group least likely to be unemployed13—a testament to the ADEA’s effectiveness. Over the

6. President Johnson also shepherded enactment of Medicare, Medicaid, the Older Americans Act, and improvements to Social Security. See, e.g., Chronology, SOC. SEC. ADMIN, https://www.ssa.gov/history/1960.html (last visited Jan. 18, 2018) (detailing the developments in Medicare, Medicaid, the Older Americans Act, and Social Security during the Johnson administration).
8. Some occupations, such as pilots, certain positions in the military or law enforcement, and state judges in most jurisdictions, still encounter mandatory retirement. Kerry Hannon, Is It Time To Abolish Mandatory Retirement?, FORBES (Aug. 2, 2015, 8:00 AM), https://www.forbes.com/sites/nextavenue/2015/08/02/is-it-time-to-abolish-mandatory-retirement/#28d6a6b540db.
past few decades, older workers have been staying in the workforce longer, with workers aged sixty-five and older representing the fastest growing age category in the workforce. Yet, age discrimination in hiring remains ubiquitous, and the ADEA’s goal of alleviating long-term unemployment among older workers remains unrealized. Older workers still experience far longer periods of unemployment and remain disproportionately represented among the long-term unemployed. In 2014, “[o]n average, 45 percent of older jobseekers (ages 55 and older) were long-term unemployed (out of work for 27 weeks or more) . . . .”

Despite the ADEA’s protections, employers continue to engage in covert and indirect discriminatory behavior against older job applicants. Examples of recruiting and hiring practices that harm older jobseekers include caps on maximum years of experience, recruiting only from college campuses, and requiring job candidates to be “digital natives.” According to an AARP survey, two-thirds of workers between forty-five and seventy-four have encountered age discrimination in the workplace, with an overwhelming majority describing it as “very or somewhat common” in a variety of professions.


16. O’Meara, supra note 4, at 22 (“Although the ADEA has become more significant than was ever imagined in 1967, the problem at which it was addressed,” i.e., long-term unemployment among older workers, “has not been alleviated.”).

17. The average duration of unemployment of older jobseekers (aged fifty-five and over) reached 54.7 weeks in May 2011, after first exceeding one year in the prior month. The comparable figure for jobseekers under fifty-five was far lower (38.9 weeks). In May 2011, the share of fifty-five and over jobseekers among the long-term unemployed reached 57.8 percent. Rix, supra note 13, at 4 tbl.3.


20. Giang, supra note 19.

percent of older, unemployed respondents seeking employment believed that age had a negative effect on their job prospects, naming age discrimination as one of the most significant barriers. 22

II. The ADEA’s Effectiveness Outside of the Hiring Context

When drafting the ADEA, Congress borrowed language prohibiting other forms of discrimination from Title VII of the Civil Rights Act of 1964 23 and inserted it verbatim into the ADEA. 24 This approach should have ensured that age discrimination victims would enjoy rights comparable to other groups, and, for approximately the ADEA’s first thirty years, it mostly did. 25 In recent years, however, “[i]t has not worked out that way.” 26

Instead, the Supreme Court and other federal courts have emphasized differences between the two statutes to diminish the ADEA’s protections and “have repeatedly thrown up barriers to age discrimination suits.” 27 For example, in Gross v. FBL Financial Services, Inc., 28 the Supreme Court held that Congress’s decision to amend Title VII by codifying “mixed-motive” claims, while not similarly amending parallel ADEA provisions, suggested that Congress “acted intentionally,” 29 and thus that the ADEA does not authorize mixed-motive claims. 30 By imposing a heightened burden of proof on age discrimination victims, the Court “relegat[ed] [older workers] to second-class status among victims of discrimination.” 31 Not long after the Supreme Court decided Gross, congressional representatives introduced the Protecting Older Workers Against Discrimination Act (POWADA) to restore the burden of proof and ensure application of the same standards to all employment discrimination claims. 32
Although POWADA has been introduced in subsequent congressional sessions, it has yet to receive serious consideration.\(^{33}\)

Courts have further distinguished the ADEA from Title VII by rejecting the “disparate impact” theory of discrimination for plaintiffs who allege age discrimination in hiring. In 2016, the U.S. Court of Appeals for the Eleventh Circuit, en banc, concluded that the ADEA’s text did not permit disparate impact claims.\(^{34}\) The court reasoned that, because section 4(a)(2) of the Act (the provision generally allowing disparate impact claims\(^{35}\)) was modeled on section 703(a)(2) of Title VII,\(^{36}\) and Congress in 1972 added “applicants for employment” to section 703(a)(2) without amending section 4(a)(2) to include this phrase, Congress must not have intended section 4(a)(2) to protect applicants.\(^{37}\) However, a federal district court in California disagreed.\(^{38}\) In 2015, a case currently pending in the U.S. Court of Appeals for the Seventh Circuit raised the same issue.\(^{39}\)

### III. Efforts to Distinguish Ageism from Other Biases Are Misguided

Court decisions distinguishing age discrimination from other forms of discrimination illustrate a greater social problem. Age discrimination is not denounced with the same vigor as other types of discrimination. As the television talk show host Bill Maher commented: “Ageism is the last acceptable prejudice in America.”\(^{40}\) Yet, as Congressman Claude Pepper, a chief proponent and sponsor of the ADEA, noted: “Ageism is as odious as racism or sexism.”\(^{41}\) Like racism or sexism, age discrimina-

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34. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016). The Eleventh Circuit reasoned that the text of section 4(a)(2) preceding the word “otherwise” (i.e., the portion describing prohibited practices and including “any individual”) must be construed as a “subset” of the subsequent text. Id. at 963. Consequently, the court stated that “section 4(a)(2) protects an individual only if he has ‘a status as an employee’” id., and that “[a]pplicants who are not employees when alleged discrimination occurs do not have a ‘status as an employee,’” and therefore cannot pursue claims under section 4(a)(2). Id. at 964.
36. Lorillard v. Pons, 434 U.S. 575, 584, 584 n.12 (1978). The Supreme Court explained in City of Jackson that Congress’s use of identical language in the ADEA and Title VII shows that it intended the two statutes’ protections to be the same as to (1) whom they protect, and (2) what they protect. City of Jackson, 544 U.S. at 233–34.
37. Villarreal, 839 F.3d at 978–79.
tion segregates on the basis of a characteristic that individuals neither choose nor have the power to change.\textsuperscript{42}

The term “ageism” was coined by Dr. Robert N. Butler in 1969 to describe the “deep and profound prejudice against the elderly which is found to some degree in all of us.”\textsuperscript{43} He described ageism as:

A process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender. . . . Ageism allows the younger generations to see older people as different from themselves; thus they subtly cease to identify with their elders as human beings.\textsuperscript{44}

Though the term “ageism” is generally recognized, “[a]lmost half a century later, it’s barely made inroads into public consciousness, not to mention provoke outcry.”\textsuperscript{45}

Secretary of Labor W. Willard Wirtz concluded in his report to Congress preceding enactment of the ADEA that discrimination in the context of age “means something very different . . . from what it means in connection with discrimination involving—for example—race.”\textsuperscript{46} This seemingly innocuous statement may have initiated the analytical separation of age discrimination from other civil rights issues or, at the very least, exacerbated it. This belief led Secretary Wirtz to conclude, and more significantly, to advise Congress that although it would be “easy” to extend the solutions devised for other forms of discrimination to age discrimination, it would also be “wrong.”\textsuperscript{47} The ramifications of that recommendation have continued to this day to diminish older workers’ rights profoundly. Viewing age discrimination as less wrong or malevolent than other forms of discrimination caused Congress to devise a separate statutory scheme, rather than to include ageism within Title VII.\textsuperscript{48} Subsequent legislative efforts, most notably the Civil Rights Act of 1991, worsened the divide by strengthening Title VII and ignoring the ADEA. “This view of age discrimination—if it is indeed generally shared (consciously or otherwise) by judges, juries, EEOC administrators, lawyers, employers and even, perhaps employees—may have

\begin{thebibliography}{99}
\bibitem{42} Howard Eglit, 3 Age Discrimination 1-4 (1986).
\bibitem{44} Id. at 12.
\bibitem{45} Ashton Applewhite, This Chair Rocks: A Manifesto Against Ageism 14 (2016).
\bibitem{46} Wirtz Report, supra note 2, at 2.
\bibitem{47} Id. at 1.
\bibitem{48} By contrast, many states did not segregate age from other protected classes in their own anti-discrimination statutes, but instead enacted omnibus civil rights acts that place age on equal footing with other protected traits. See, e.g., Scamman v. Shaw’s Supermarkets, Inc., 157 A.3d 223, 232 (Me. 2017), as corrected (Mar. 23, 2017) (“against the background of prior federal antidiscrimination statutes,’ . . . namely, Title VII and the ADEA—the [Maine] Legislature enacted a unitary antidiscrimination statute that is similar to Title VII but that includes age as a protected characteristic. Unlike Congress, the Maine Legislature did not create a separate statutory scheme specific to age discrimination.”) (internal citation omitted).
\end{thebibliography}
This separation is unjustified. For example, although Secretary Wirtz commented that while, for the most part, age discrimination does not result from “dislike or intolerance” or from “feelings about people entirely unrelated to their ability to do the job,” the same can be said about sex discrimination. Instead, like older workers, women’s workplace struggles stem more from stereotypes and unfounded assumptions about their ability to do the job and the appropriate role for women in our society. Title VII, like the ADEA, intends to ensure employment decisions are based on a person’s actual ability to do a job, rather than on stereotypes. While there may not be agreement over the underlying reason for age discrimination, there is no question that the ADEA has never recovered from the initial casting of ageism as “different” than other types of discrimination. As a consequence, the Act is not perceived as a “real” civil rights statute, but instead, as a second-class protection.

IV. What Needs to Change for the ADEA to Be Respected as a “Real” Civil Rights Statute?

Certain steps must be taken for the ADEA to achieve its broad and remedial purposes to eliminate arbitrary workplace age discrimination and ensure that older employees are judged “based on their ability rather than age.”

A. Ageism Must Be Condemned with the Same Vigor As Directed at Other Forms of Discrimination

Historically, Congress, the courts, and society have viewed age discrimination as less malevolent than race, gender, and other forms of discrimination. Workplace age issues are perceived more as economic issues and not as fundamental civil rights issues. Justice Thurgood Marshall, dissenting in Massachusetts Board of Retirement v. [References 49-54]
Murgia, an unsuccessful equal protection challenge to a mandatory retirement policy, lamented:

There is simply no reason why a statute that tells able-bodied police officers, ready and willing to work, that they no longer have the right to earn a living in their chosen profession merely because they are 50 years old should be judged by the same minimal standards of rationality that we use to test economic legislation that discriminates against business interests.

Simply put: “Age discrimination is illegal. But when compared with discrimination against racial minorities and women, it is a second-class civil rights issue.” There must be a comprehensive and concerted effort to recognize that age discrimination is as debilitating to workers and as harmful to society as other discrimination.

B. Older Applicants Must Be Able to Bring Disparate Impact Claims

Hiring discrimination is notoriously difficult to challenge because it is hard to detect. Jobseekers lack sufficient information about a company’s hiring processes and the relative qualifications of competitors to suspect potential claims. They may have a “gut feeling” or “hunch” that a decision was based on age, but a “hunch” will not establish discrimination.

Easily detected forms of bias, such as job postings that transparently specify age-related requirements (like maximum years of experience, or that an applicant must be a “digital native”), likely deter applications from older persons. They, nevertheless, commonly go unchallenged as jobseekers focus their time and resources on jobs elsewhere. Only a minuscule number of charges—154 of 20,144 age discrimination charges in fiscal year 2015—alleged unlawful job advertising. Current EEOC regulations governing employment advertisements and pre-employment inquiries are weak and do little to deter improper employer behavior or to protect of older workers’ rights.

This context makes the outcome of the burgeoning controversy over whether section 4(a)(2) of the ADEA permits disparate impact hiring claims so critical. Although the disparate impact theory is

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56. Id. at 322 (Marshall, J., dissenting).
60. See, e.g., 29 C.F.R. §§ 1625.4 & 1625.5 (2017) (stating: “Help wanted notices or advertisements that ask applicants to disclose or state their age do not, in themselves, violate the Act,” and a “request on the part of an employer for information such as Date of Birth or age on an employment application form is not, in itself, a violation of the Act”).
often the best—if not the only—means to challenge such discrimina-
tion,61 employers are seeking to convince courts that job applicants
may not bring disparate impact claims under section 4(a)(2) of the
ADEA.62 Clarity that applicants may bring disparate impact claims
under section 4(a)(2) is crucial to combat some of the most pernicious
hiring practices, such as limits on maximum years of experience and
exclusive on-campus recruiting. Without the disparate impact theory
to ferret out subtle hiring discrimination, older workers risk extended
long-term unemployment.

C. The Gains of the Older Workers Benefit Protection Act
Must be Preserved

In 1990, Congress sought to strengthen the ADEA’s protection of
older workers by enactment of the Older Workers Benefit Protection
Act (OWBPA).63 The OWBPA “made it harder for companies to cajole
employees, upon termination, to give up their ADEA rights—especially
in the context of a large-scale group layoff, in which individual employ-
ees have little-to-no leverage.”64 Congress accomplished this goal by
commanding that “[a]n individual may not waive any right or claim
under [the ADEA] unless the waiver is knowing and voluntary.”65 The
OWBPA also specified strict requirements that a defendant-employer
would have to prove “in a court of competent jurisdiction” for the
court to find the waiver enforceable.66 The Supreme Court later reaf-
irmed the need to construe the statute strictly and refused to “open
the door to an evasion of the statute” because the OWBPA “incorporates
no exceptions or qualifications.”67

Although the OWBPA has helped to ensure that older workers are
more informed about rights before signing them away in difficult cir-
cumstances, there have been some troubling judicial decisions inter-
preting such waivers. In McLeod v. General Mills, Inc.,68 the U.S.
Court of Appeals for the Eighth Circuit upheld a waiver requiring

assumed that . . . discrimination can be adequately policed through disparate treatment
analysis, the problem of subconscious stereotypes and prejudices would remain.”).
62. See Rabin v. PricewaterhouseCoopers LLP, 236 F. Supp. 3d 1126 (N.D. Cal.
2017); Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016) (en banc);
appeal docketed, No. 17-1206 (7th Cir. Feb. 1, 2017).
63. Pub. L. No. 101-433, 104 Stat. 978 (1990). As the Supreme Court noted, the
Older Workers Benefit Protection Act (OWBPA) “is designed to protect the rights and
in part, 854 F.3d 420 (8th Cir. 2017), reheg granted, judgment vacated (May 11, 2017), on
rehg, 856 F.3d 1160 (8th Cir. 2017) (citing S. Rep. No. 101-263, at 32 (1990)).
68. 856 F.3d 1160 (8th Cir. 2017).
any dispute over the validity of the release to be resolved through individual arbitration, despite the OWBPA’s clear command that employers must prove waiver validity “in a court of competent jurisdiction.” The issue is emerging in other cases. This litigation will undoubtedly affect the OWBPA’s continued vitality. Will employers be able to evade the OWBPA’s “strict, unqualified statutory stricture on waivers” by inserting a mandatory arbitration provision into a severance agreement? Employers should not be able to evade the OWBPA’s clear command that they “shall” prove in “a court of competent jurisdiction” that a waiver of rights or claims was knowing and voluntary.

In a related development, IBM Corporation instituted a policy making it harder for older laid-off workers to pursue age discrimination claims. The company no longer requests waivers from terminated employees in exchange for severance benefits, relieving IBM of the requirement to disclose the job titles and ages of impacted employees as well as the eligibility factors used to select employees for termination. Instead, the company avoids disclosure by offering severance to impacted employees who agree to individual arbitration. This approach deters lawsuits because it is harder for workers to determine if older workers were targeted.

D. Advocates for Older Workers Must Fight to Confine and Reverse the Damage Done by the Hazen Paper Decision

In *Hazen Paper Co. v. Biggins*, the Supreme Court held that termination of an employee solely to avoid vesting of the employee’s pension did not violate the ADEA. *Hazen Paper* had two adverse consequences for older workers. First, plaintiffs now had to prove that the employer was motivated by “inaccurate or stigmatizing stereotypes” about older workers. Second, it became irrelevant that the employer’s adverse action was based on a factor highly correlated with age.

Writing for the unanimous court in *Hazen Paper*, Justice O’Connor stated:

> It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age . . . . Congress’[s] promulgation of the

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70. *Oubre*, 522 U.S. at 427.
72. *Id.* § 626(f)(1)(H).
74. *Id.*
76. *Id.* at 613.
77. *Id.* at 606.
78. *Id.* at 613.
ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.\textsuperscript{79}

Relying on \textit{Hazen Paper}, lower courts began to require proof that employer actions were motivated by such “stigmatizing stereotypes” or unfounded assumptions.\textsuperscript{80}

There can be no question that one of the reasons Congress enacted the ADEA was to challenge unproven stereotypes that employers might harbor regarding decreased abilities of older workers.\textsuperscript{81} However, there is no basis in the language of the ADEA or its legislative history to restrict its reach only to stereotype-based employment decisions. Section 4(a)(1), which prohibits discrimination in the terms, conditions, and privileges of employment, does not require that discrimination be based on “inaccurate and stigmatizing stereotypes.” Section 4(a)(1) makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age . . . .”\textsuperscript{82} The ADEA’s legislative history, the basis of the dicta regarding stereotypes in \textit{Hazen Paper}, cannot revise and limit the Act’s statutory prohibitions.\textsuperscript{83} Doing so thwarts the will of Congress by severely curtailing the ADEA’s broad protections.

In addition, the ADEA’s purposes are broader than just inaccurate and stigmatizing stereotypes. It prohibits arbitrary discrimination to promote the employment of older workers and to help workers and employers find ways to resolve problems arising from the impact of age on employment.\textsuperscript{84} In \textit{City of Los Angeles Department of Water \\& Power v.}

\textsuperscript{79} Id. at 610.

\textsuperscript{80} See, e.g., Dilla v. West, 4 F. Supp. 2d 1130, 1142 (M.D. Ala. 1998) (because of “\textit{Hazen Paper}’s broader principle that age discrimination occurs only when ‘the problem of inaccurate and stigmatizing stereotypes’ about older workers are operative,” employer’s policy to hire only air traffic controllers younger than thirty-one was not discriminatory because it was intended to address concerns about retirement-eligible employees leaving); Sperling v. Hoffman-La Roche, 924 F. Supp. 1346, 1390 (D.N.J. 1996) (“In this case, proximity to retirement and eligibility for retirement benefits are correlated with age. However, none of the deposition testimony relied on by plaintiffs suggest that the decisions made by those managers were based on denigrating stereotypes about older workers. Rather, the testimony suggests that the managers were using proximity to retirement and eligibility for retirement benefits as a means to minimize the adverse effect that Operation Turnabout would have on Roche employees.”).

\textsuperscript{81} EEOC v. Wyoming, 460 U.S. 226, 231 (1983) (“[Age discrimination] was based in large part on stereotypes unsupported by objective fact . . . . Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers.”).


\textsuperscript{84} 29 U.S.C. § 621(b) (2012) (“It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary
Manhart, the Supreme Court held that even the use of accurate and non-stigmatizing stereotypes violated Title VII. Because the prohibitions of the ADEA and Title VII are identical, liability under either statute clearly does not depend on whether inaccurate stereotypes or accurate facts motivate the employer. Indeed, the ADEA prohibits an employer from denying or reducing employee benefits based on age, even though Congress was aware when enacting the ADEA that the cost of providing certain benefits to older workers can be higher than providing the same benefits to younger workers.

Hazen Paper also “rejected the view that factors like seniority and pension status are the statutory ‘equivalents’ of age.” The Court said that an employer does not violate the ADEA merely by relying upon a criterion correlated with age. Nothing in Hazen Paper, however, transforms factors that are defined by age (e.g., retirement eligibility) into age-neutral, legitimate considerations for employment decisions. Hazen Paper held that when an employer bases a decision on a factor that, while “empirically correlated with age,” is nonetheless “analytically distinct” from age, the employer does not necessarily “analytically distinct” from age, the employer does not necessarily violate the ADEA because the employer could “take account of one while ignoring the other.”

The facts of Hazen Paper provide a clear example of this concept. The employer fired a sixty-two-year-old just a few weeks before his company’s pension plan vested. Vesting required employees to have ten years of experience with the employer. The unanimous Court ruled that because vesting resulted from years of service, not age, termination to prevent vesting did not violate the ADEA. The Court reasoned that “because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily ‘age-based.’

age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”

86. Lorillard v. Pons, 434 U.S. 575, 584 (1978) (“the prohibitions of the ADEA were derived in haec verba from Title VII”).
90. Id. at 608.
91. Id. at 611.
92. Id.
93. Id. at 607.
94. Id. at 608.
95. Id. at 617.
96. Id. at 611.
However, Justice O’Connor emphasized limits to the Court’s holding. First, although “there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee’s age,” an employer who assumes a correlation between age and another factor and targets employees based on that assumed correlation “engages in age discrimination.” In other words, “the ‘correlated’ language in Hazen applies only where the employer’s decision is ‘wholly’ motivated by factors other than age . . . . The key is what the employer supposes about age . . . .” Second, Justice O’Connor emphasized that the Court was not considering “the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service . . . and the employer fires the employee in order to prevent vesting.” Rather, the Court’s holding was “simply that an employer does not violate the ADEA just by interfering with an older employee’s pension benefits that would have vested by virtue of the employee’s years of service.”

After Hazen Paper, numerous lower courts have issued opinions holding that employer decisions based on retirement eligibility when eligibility is defined by age are “nothing less than age discrimination by another name.” In EEOC v. Local 350, Plumbers & Pipefitters, the defendant union’s policy prohibited retired union members from seeking work through the union’s hiring hall. The Ninth Circuit held that age was a “but-for” cause of the plaintiff’s exclusion because the union’s policy, on its face, discriminated because of retirement status, which was itself defined by age. Similarly, in Huff v. UARCO, Inc., the Seventh Circuit ruled that requiring retirement-eligible employees terminating employment to accept a payout of pension benefits over time, while offering a lump sum payout option to other retirement-ineligible terminating employees, violated the ADEA. Huff explained:

Because age is an express condition of receiving a benefit, we think that the instant case presents a close approximation of the case Hazen Paper declined to decide . . . . Nothing in Hazen Paper prohibits a finding that UARCO's expressly age-related policy violates the

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97. Id. at 609.
98. Id. at 612–13.
100. Hazen Paper, 507 U.S. at 613.
101. Id.
103. 998 F.2d 641 (9th Cir. 1993).
104. Id. at 643.
105. Id. at 646.
106. 122 F.3d 374 (7th Cir. 1997).
ADEA . . . This is not a case where there is merely a correlation between age and the denial of a particular benefit. UARCO’s policy draws an express line between workers over fifty-five and those under.107

In Johnson v. State of New York,108 the state sought to hide behind Hazen Paper to avoid liability for terminating employees after they reached the Air National Guard’s (ANG) mandatory retirement age of sixty.109 In rejecting this ploy, the Second Circuit explained:

The State's reliance on Hazen Paper is unavailing. The flaw in the State's argument is that the decision to require dual status, with consequent mandatory retirement at 60 . . . is not merely correlated with age; unlike Hazen Paper, the employer's decision here in fact implements an age-based criterion. Regardless of the State's reasons for requiring that certain of its civilian employees maintain ANG membership, there can be no doubt that Johnson's age "actually played a role . . . and had a determinative influence" on the decision to terminate his employment.110

Older workers' advocates must be vigilant to ensure that Hazen Paper is not inappropriately applied to restrict the ADEA's protections further. Reminding courts when facts present "the special case" left undecided by Hazen Paper, and refuting attempts to require proof of stereotypical thinking (or pointing out where such thinking is actually at work), can produce good results.111

E. The ADEA Should Be Amended to Provide for Compensatory and Punitive Damages

In the Civil Rights Act of 1991, Congress provided for compensatory and punitive damages under Title VII and the Americans with

107. Id. at 388.
108. 49 F.3d 75 (2d Cir. 1995).
109. Id. at 79 ("The State . . . insists that its dismissal of Johnson was motivated, not by age, but by the legitimate reasons underlying the dual status requirement. The State relies upon Hazen Paper.").
110. Id. at 79–80; see also Erie Cty. Retirees Ass'n v. Cty. of Erie, 220 F.3d 193, 211 (3d Cir. 2000) (employer offered Medicare-eligible retirees health insurance coverage inferior to non-Medicare eligible employees but the age discrimination claim of the Medicare-eligible retirees was not barred by Hazen Paper because Medicare eligibility is explicitly age-based, making the case "parallel to the 'special case'"); Barney v. Haveman, 879 F. Supp. 775, 780 (W.D. Mich. 1995) (clarifying what Hazen Paper did, and did not, decide); EEOC v. California Micro Devices Corp., 869 F. Supp. 767, 771 (D. Ariz. 1994) (terminating employees based on stated intent to retire "presents issues that Hazen did not address.").
111. See, e.g., Tramp v. Associated Underwriters, Inc., 768 F.3d 793 (8th Cir. 2014) (claim that employee was terminated because her age affected employer’s health insurance cost included fact issue of what employer supposed about age in making employment decisions; reasonable jury could conclude employer believed its health care premiums and age were not analytically distinct); Hilde v. City of Eveleth, 777 F.3d 998 (8th Cir. 2015) (employee was not promoted to police chief; age discrimination claims under ADEA and Minnesota Human Rights Act survived because city provided no evidence that commissioners doubted employee’s commitment to the job for any reason but for his age-based retirement eligibility).
Disabilities Act, but not under the ADEA. The emotional trauma and injury discrimination inflict can be as significant for victims of age harassment as it is for those sexually harassed. “Studies have shown that older workers who have been terminated find the resulting loss of self-esteem even more devastating than the loss of income, and the impact is felt not only by the person fired but also by the worker’s entire family.”112 As Justice Marshall observed dissenting in Murgia: “Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness.”113

Congress’s failure to provide for compensatory and punitive damages in age discrimination cases implies that older workers do not deserve these remedies. The ADEA’s provision of double liquidated damages for willful violations114 is no substitute because it doubles the amount of back pay awarded, but does not compensate for other types of injuries, such as the emotional toll that age discrimination inflicts.

**Conclusion**

Although age discrimination continues, the legal rights and remedies of older workers would be drastically reduced without the ADEA’s protections. In short, the Act has done some good but needs to do more. The ADEA generally eliminated mandatory retirement and explicit age limits in hiring. It declares rights to be free of age-based harassment and age bias in the provision of benefits, training opportunities, and promotions, among other guarantees. Without the ADEA, older workers would have greater difficulty getting hired and remaining employed. Absent the ADEA, employers could discriminate against older workers with impunity. However, until we acknowledge that ageism is just as unacceptable as other types of discrimination, older workers will remain vulnerable.

In 1997, the ADEA’s thirtieth anniversary, age discrimination scholar Howard C. Eglit commented that Secretary Wirtz might have been correct:

> Ageism is not equivalent, either in its genesis nor its manifestations, to racism. Thus, the eradication of age bias—either generally, or at least in specific settings—is perhaps a more realistic aspiration than is the imminent demise of racist thinking and racist actions. Perhaps in ten, twenty, or thirty years the ADEA will have become

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a legislative artifact—interesting for what it was and what it did, but
no longer necessary. Or perhaps not.115

Unfortunately, twenty years later, the answer is “perhaps not.” The
ADEA is still critically important in safeguarding older workers’ rights,
yet there is still a long way to go in the fight to eradicate workplace age
bias.

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Are Discretionary Demotions, Layoffs, and Terminations Valid Reemployment Positions for Returning Veterans?: Uncertain Applications of the Escalator Principle under the Uniformed Services Employment and Reemployment Rights Act

Jacob C. Harksen*

Introduction

Suppose a widget manufacturer employs three machine operators: Allen, Brown, and Carr. All three have the same position, job title, and terms and conditions of employment. Allen and Brown perform their jobs equally well, producing sixty widgets per hour, and have equal seniority and modest or no disciplinary history. Carr, despite having greater seniority than Allen and Brown, has been the employer’s lowest performing employee, producing only fifty widgets per hour, and is often tardy or absent. Carr is a member of the Army Reserve who has been on active duty for two years.

While Carr was on active duty, the company restructured operations to take advantage of more efficient technology. Three new positions were created and the previous operator positions were eliminated along with the old machines. Allen was promoted to a management position with higher pay and benefits. Brown was retrained for a position programming the new machinery, but Brown’s pay and benefits remain the same. Davis, a new employee, was hired for a lower-paying maintenance and supply position, the duties of which were previously performed by each machine operator individually.

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Carr returned from active duty and sought reemployment under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).\(^1\)

The company and you, its attorney, know that the company likely must reemploy Carr under USERRA.\(^2\) You may also know that Carr’s reemployment right is not limited to a return to his previous position. Rather, a returning servicemember is generally entitled to “the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay.”\(^3\) “This position is known as the escalator position.”\(^4\) Determining Carr’s proper escalator position, however, is far from simple. Given Carr’s prior performance and disciplinary record, the company likely would prefer to reemploy Carr, if at all, in the maintenance position currently held by Davis. Can the company lawfully demote Carr upon reemployment?

This scenario may be familiar to many employers, and the issues it presents are increasingly important for employers to navigate correctly.\(^5\) Employers of members of the Reserve Components (RCs),\(^6\) in particular, now must respond to significant changes in the patterns of military leave. As part of a “Total Force” policy, RCs have been “integrated” with the Active Components (ACs),\(^7\) transforming RCs “from a strategic to an operational reserve.”\(^8\) Consequently, RCs are activated more frequently and for longer durations.\(^9\) Today, “employers . . . are more likely to experience a duty-related employee absence and . . .

\(^2\) Id. § 4312(a) (Subject to certain eligibility requirements, “any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter . . . .”).
\(^3\) Id. § 4313(a)(2)(A) (emphasis added).
\(^5\) This scenario bears some resemblance to the facts in Milhauser v. Minco Products, Inc., 855 F. Supp. 2d 885, 899 (D. Minn. 2012), aff’d, 701 F.3d 268 (8th Cir. 2012), and Rivera-Melendez v. Pfizer Pharmaceuticals, LLC, 730 F.3d 49 (1st Cir. 2013).
\(^6\) Reserve Components (RCs) include the Army National Guard, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. 10 U.S.C. § 10101 (2012).
\(^8\) Nat’l Sec. Research Div., RAND Corp., Supporting Employers in the Reserve Operational Forces Era 1 (Susan M. Gates et al. eds., 2013) [hereinafter RAND study].
\(^9\) Id. at 1–4. The total number of duty days served by RC members more than doubled from 1993 to 1996, from 5.3 million to 12–13 million. Id. at 3. After September 11, 2001, the total climbed to “68.3 million duty days in 2005,” before declining to 37.2 million in 2010, but this number still far exceeds the norm when USERRA was enacted. Id.
the absence is likely to be longer than it would have been when USERRA was passed.”

In effect, “the cost of maintaining a large professional military has been externalized and shifted from the government to the employer.”

Much can change at a business while a servicemember is on military leave, making it difficult to reemploy servicemembers upon return from duty. In 2015, a high proportion of complaints received by both the Employer Support of the Guard and Reserve (ESGR) (forty-one percent), and the Veterans’ Employment and Training Service (VETS) (thirty-nine percent) involved reemployment issues. This indicates that employers’ reemployment decisions are frequently challenged by returning servicemembers and frequently result in filing of formal USERRA complaints. Uncertainty about the appropriate escalator position for returning servicemembers can be further compounded when promotion, demotion, and termination decisions are made on the basis of employer discretion rather than solely on seniority.

This Note analyzes how the escalator principle applies to discretionary reemployment decisions and particularly the circumstances in which a returning servicemember might be disadvantaged by the rule’s application. Part I describes USERRA provisions and Department of Labor (DOL) regulations applicable to reemployment decisions. Part II identifies possible claims that our hypothetical widget manufacturer might face. Part III analyzes recent cases in which courts applied the escalator principle to “automatic” terminations and discretionary promotions. This Note argues that, reading these cases together, if automatic termination is a valid reemployment position, and if the escalator principle applies to discretionary promotions, the escalator principle applies equally to discretionary demotions and discharges.

I. Statutory Background of Veterans’ Reemployment Rights

USERRA’s statutory scheme is complex and provides far-reaching protections to returning servicemembers. Employers must understand USERRA’s purposes and its key provisions on reemployment, discrimination, and discharge, as well as DOL regulations, including the esca-

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10. Id. at 4. A 2011 Department of Defense (DOD) survey found that one-third of RCs were activated in the previous two years and 93.6 percent of those activations lasted more than thirty days. Id. Similar activation rates have occurred since at least 2008. Id.


12. RAND study, supra note 8, at 49. “More than one-third of employers . . . agreed or strongly agreed that employing RC members is a challenge because of their military obligations.” Id. Part of this challenge may stem from “a lack of employer awareness about the requirements of USERRA.” Id. at 71.

lator position rule, to make timely and correct reemployment decisions. Missteps can expose employers to liability in a variety of ways.

A. **USERRA Is Broadly Intended to Benefit Servicemembers But Not to Grant Preferences in Hiring or Retention**

USERRA is a “comprehensive” remedial and entitlement statute.\(^\text{14}\) In essence, the Act provides servicemembers a right to be reemployed by their former employers,\(^\text{15}\) prescribes the position to which a returning servicemember should be reemployed,\(^\text{16}\) prohibits discrimination on the basis of uniformed service,\(^\text{17}\) and protects reemployed servicemembers from discharge without cause.\(^\text{18}\) “While combining to form comprehensive protection from the point of rehire to untimely dismissal, each provision is nonetheless functionally discrete.”\(^\text{19}\) The Act’s coverage is also unusually broad, applying to all employers, whether public or private, regardless of workplace size.\(^\text{20}\)

USERRA states that its purposes are:

1. to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
2. to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
3. to prohibit discrimination against persons because of their service in the uniformed services.\(^\text{21}\)

The Act should be “liberally construed” for servicemembers’ benefit.\(^\text{22}\) To the extent consistent with USERRA, “[courts] can and should use relevant pre-USERRA case law as a guide toward understanding USERRA.”\(^\text{23}\)

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16. Id. § 4313.
17. Id. § 4311.
18. Id. § 4316(c). The leave’s length determines how long “for cause” protection lasts. Id.
19. Francis, 452 F.3d at 304.
23. Francis, 452 F.3d at 303; 20 C.F.R. § 1002.2 (2016).
USERRA is not, however, a veterans’ preference statute. It does not, for example, provide veterans with preference over others in federal or state hiring or in retention in the event of a reduction in force (RIF). The Act secures for servicemembers the same benefits enjoyed by other employees and makes disparate treatment of servicemembers unlawful, but “was not intended to give returning servicemembers special benefits not provided to other employees.” USERRA’s protections and entitlements “cannot put the employee in a better position than if he or she had remained in the civilian employment position.”

B. Reemployment Rights under USERRA

USERRA entitles servicemembers to be “promptly reemployed” by their former employers. To be eligible, they must meet several conditions, but need not obtain advance permission from employers to take military leave. Similarly, servicemembers need not decide or inform employers whether they intend to return to employment after completing military service. Even explicit attempts to waive reemployment rights, whether oral or in writing, are ineffective.

An employer cannot rely on “the timing, frequency, and duration of the person’s training or service, or the nature of such training or service (including voluntary service),” to deny reemployment rights, unless military service exceeds five years. But USERRA permits three affirmative defenses to an otherwise valid reemployment obligation. First, if “the employer’s circumstances have so changed as to make such reemployment impossible or unreasonable,” the employer need not reemploy the servicemember. Congress intended this defense as a “very limited exception,” available only if “reinstatement...
would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran.\textsuperscript{36} Hiring a replacement worker does not make reemployment “impossible or unreasonable,” even if reemployment would require terminating or laying off the replacement.\textsuperscript{37} Second, an employer need not reemploy a servicemember if “assisting the employee in becoming qualified for reemployment would impose an ‘undue hardship’ on the employer.”\textsuperscript{38} Third, an employer need not reemploy a servicemember whose position was “for a brief, nonrecurrent period and there is no reasonable expectation that such employment would continue indefinitely or for a significant period.”\textsuperscript{39} It is the employer’s “burden to prove . . . that any one or more of these defenses is applicable.”\textsuperscript{40} If a returning servicemember meets all reemployment requirements and no affirmative defenses are available, the employer must offer reemployment.\textsuperscript{41} Employers must also make reemployment decisions quickly.\textsuperscript{42} Servicemembers should be reemployed “as soon as practicable under the circumstances,” generally within two weeks of a reemployment application.\textsuperscript{43}

If the leave was longer than ninety days, an employer may offer reemployment in either “the position in which the person would have been employed” if not for the absence for military service, or in “a position of like seniority, status and pay.”\textsuperscript{44} For any leave, if the servicemember cannot become qualified for the escalator position after reasonable employer efforts, the employer may reemploy the person in the position held before the leave.\textsuperscript{45} If the employee cannot become qualified after reasonable employer efforts (for any reason “other than disability incurred in, or aggravated during, service”) for either the escalator position or the prior position, the employer may offer reemployment “in any other position which is the nearest approximation to” the escalator position first, or to the prior position, “which such person is qualified to perform, with full seniority.”\textsuperscript{46}

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37. 20 C.F.R. § 1002.139(a) (2016).
40. Id. § 4312(d)(2); 20 C.F.R. § 1002.139.
42. Servicemembers are entitled to be “promptly reemployed.” Id.
43. 20 C.F.R. § 1002.181.
45. Id. § 4313(a)(1)(B), (2)(B).
46. Id. § 4313(a)(4). Structurally, at least, section 4313 presumes that the escalator generally will move upward during an employee’s absence for military service. The order of priority USERRA assigns to possible reemployment positions would make little sense if applied in reverse—to say that if an employee is not qualified for a lower escalator position, reemployment should be to the person’s prior position.
\end{flushright}
C. The Escalator Position Principle

The Act presumes that a returning servicemember is entitled to the position “that he or she would have attained with reasonable certainty if not for the absence due to uniformed service.” This is known as the employee’s “escalator position,” the starting point for reemployment decisions. The principle was first recognized by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.* The Court stated that, under a precursor to USERRA, a returning servicemember “does not step back onto the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.” Application of the rule will not necessarily result in a promotion—the touchstone is what position the servicemember would have attained with reasonable certainty. Depending on the circumstances, the rule may have positive, negative, or no consequences. “The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events.”

USERRA leaves unclear application of the escalator principle in cases of discretionary employer decisions, particularly layoffs, terminations, and demotions. Part of the interpretive difficulty stems from an apparent conflict in DOL regulations. On the one hand, the regulations clearly contemplate that, if the employee had been present at work instead of on military leave, the employee could have been “promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events.” But the rule does not specify whether “intervening events” include only “automatic” employer actions, such as retention and advancement decisions made exclusively on a seniority basis, or whether they also include discretionary employer decisions. On the other hand, another regulation states that “[t]he Act does not prohibit lawful adverse job consequences that result from the employee’s restoration on the seniority ladder.” That regulation offers, as an example of an adverse consequence, a circumstance in which “an employee’s seniority or job classification would have resulted in the

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47. 20 C.F.R. § 1002.191.
48. Id.
49. Id. § 1002.192.
51. Id.
52. 20 C.F.R. § 1002.194.
53. 20 C.F.R. § 1002.191.
54. Cases attempting to resolve these ambiguities (or indicating problematic applications of the rule) are discussed in Part III.
55. 20 C.F.R. § 1002.191.
56. 20 C.F.R. § 1002.194.
employee being laid off during the period of service." The regulations, like USERRA’s text, do not clearly answer whether the escalator principle applies to discretionary decisions to demote, lay off, or discharge returning employees.

D. Temporary Protection from Discharge Without Cause

USERRA section 4312 entitles servicemembers to reemployment, but does not guarantee continued employment. Following reemployment, section 4312 “does not prevent the employer from terminating [the employee] the next day or even later the same day.” However, once reemployed, section 4311 prohibits disparate treatment of servicemembers, and section 4316(c) “prevents employers from summarily dismissing those employees for a limited period after they are rehired.”

Under section 4316(c), for a specified period of time, even an otherwise at-will employee cannot be discharged “except for cause.”

For claims of wrongful discharge under section 4316(c), “the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that [the employee] had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.” This burden makes it difficult for employers to prevail on summary judgment. The difficulty of defending a discharge decision under section 4316(c) makes it even more important that the employer’s initial reemployment decision be correct. After reemployment, an employer cannot reassign or discharge the employee without cause for up to 180 days or more. Attempts to “have it both ways”—by reemploying a servicemember to satisfy section 4312’s reemployment obligations, only to immediately terminate the employee for cause under section 4316(c)—are likely to face close judicial scrutiny and may very well violate both USERRA provisions.

E. USERRA Prohibits Discrimination on the Basis of Uniformed Service

USERRA makes it unlawful for an employer to deny “initial employment, reemployment, retention in employment, promotion, or

57. Id.
60. Id. at 304; see also 38 U.S.C. § 4316(c).
61. Francis, 452 F.3d at 308. The length of time a veteran is protected from discharge without cause depends on length of military service. See 38 U.S.C. § 4316(c).
62. 20 C.F.R. § 1002.248(a) (2016).
63. Francis, 452 F.3d at 308.
64. 38 U.S.C. § 4316(c).
65. See, e.g., Vahey v. Gen. Motors Co., 985 F. Supp. 2d 51, 59–60 (D.D.C. 2013) (To satisfy § 4312, a servicemember should be “actually reemployed in good faith, with at least the possibility of continued employment of indefinite length.”).
any benefit of employment” to any applicant, member, or veteran of a uniformed service on the basis of that application, obligation to serve, or former service.\footnote{38 U.S.C. § 4311(a); see also 38 U.S.C. § 4303(2) (defining “benefit of employment”).} An employer is liable for discrimination if an employee’s uniformed service is “a motivating factor in the employer’s action.”\footnote{38 U.S.C. § 4311(c).} A claimant has the initial burden to prove that “a status or activity protected by USERRA was one of the reasons” for the employer’s adverse action,\footnote{20 C.F.R. § 1002.22 (2016).} but need not show that it was the sole reason.\footnote{Leisek v. Brightwood Corp., 278 F.3d 895, 898–99 (9th Cir. 2002) (describing shifting burdens of proof in USERRA discrimination claims); see also H.R. Rep. No. 103-65, pt. 1, at 24 (1993) (explicitly rejecting “sole factor” interpretation).} A discriminatory motivation may be inferred “from a variety of factors.”\footnote{Leisek, 278 F.3d at 900 (These factors include “proximity in time between the employee’s military activity and the adverse employment action, inconsistencies between proffered reason and other actions of the employer, an employer’s expressed hostility towards members protected by the statute together with knowledge of the employee’s military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.” (quoting Sheehan v. Dep’t of the Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001))).} The burden then shifts to the employer to prove “the affirmative defense that it would have taken the action anyway,” regardless of the claimant’s protected status or activity.\footnote{Leisek, 278 F.3d at 900 (reversing summary judgment where, despite a legitimate reason to terminate, employer did not establish “as an uncontroverted fact that it would have terminated [plaintiff] even if he had not been active in the [National Guard]”).} Merely having a legitimate basis for an employment decision is insufficient to avoid liability. The employer must prove it would have taken the same action regardless of the employee’s protected status.\footnote{20 C.F.R. § 1002.22.}

II. Applying USERRA to the Hypothetical

Assume that Carr returned from military service after two years and satisfied all of USERRA’s reemployment prerequisites. Must the widget manufacturer reemploy Carr? If so, in what position? What potential USERRA claims are likely to arise? Can the company lawfully reemploy Carr at the lower maintenance position?

First, if the company declines to reemploy Carr at all, he could (and likely would) bring a claim under section 4312 for failure to reemploy.\footnote{38 U.S.C. § 4312 (2012).} A section 4312 claim would not require Carr to show that military service was “a motivating factor” for the employer’s decision.\footnote{Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299, 303 (4th Cir. 2006); 20 C.F.R. § 1002.33.} To avoid liability, the company would have to prove one of the affirmative
The company could argue that because of restructuring its “circumstances have so changed as to make reemployment impossible or unreasonable.” But here there is no evidence the company suffered a severe economic loss. It is still operating with at least three employees. Even needing to terminate or lay off another employee would not make reemploying Carr “impossible or unreasonable.” The company might argue that Carr’s proper escalator position is termination because the former job no longer exists. However, employees Allen and Brown were not terminated, and the position now held by Brown is essentially Carr’s prior position. If Carr were terminated under these circumstances, the employer could face a claim under section 4311 for disparate treatment, as Carr would be the only employee terminated rather than reassigned.

Assume, then, that the company lays off Davis and reemploys Carr at the lower position. Carr can still bring a section 4312 claim for failure to be reemployed at the proper escalator position, claiming that, based on greater seniority, the proper escalator position is the higher position now held by Allen. If the decision to promote Allen was seniority-based, Carr, with greater seniority, might have a strong claim to the higher position. If the decision was instead based on subjective factors, the outcome depends on whether the escalator principle applies to discretionary promotions, or is applicable only if the promotion decision is seniority-based or otherwise “automatic.” If the escalator principle applies only to seniority-based promotions, and this decision was instead discretionary, Carr would not be entitled to the higher position, but might be entitled to Carr’s previous position. If the escalator principle applies to discretionary promotions, Carr likely loses, absent proof that promotion would have been reasonably certain.

A claim for Carr’s former position would be potentially the most uncertain because the escalator principle’s application here is unclear. Carr would argue that, if not entitled to a promotion, reemployment should be to Carr’s former position, or to a position of “like status and pay” (i.e., the job now held by Brown). The company would instead argue that the position Carr “would have attained with reasonable certainty if not for the absence due to uniformed service” is Davis’s maintenance position. That is, the company would argue it is reasonably certain Carr would have been demoted to the lower position had

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75. 20 C.F.R. § 1002.139(d).
76. Id. § 1002.139(a).
77. Id.
80. See id. § 4313(a).
Carr not taken military leave. For the company to prevail, it would need to establish that the escalator principle applies to discretionary demotion decisions. Even if that is true, and the company can prove that it would have demoted Carr with reasonable certainty if not for Carr’s deployment, it may still risk disparate treatment liability if Carr can show that military service was “a motivating factor” in the demotion.82

III. Recent Cases Addressing Uncertain Applications of the Escalator Principle

While federal courts have addressed some issues regarding the scope and application of the escalator principle, those decisions leave uncertain its application to discretionary demotions, layoffs, and terminations. Two things are clear from these cases: (1) in certain circumstances termination can be a valid reemployment position;83 and (2) the escalator principle generally applies to discretionary promotions.84

A. Termination as a Valid Reemployment Position

In *Milhauser v. Minco Products, Inc.*,85 the plaintiff was a maintenance technician for Minco, a circuit manufacturer.86 His work performance “was considered to be inconsistent and sometimes poor.”87 Milhauser was a member of the Air Force Reserves on military leave from March to June 2009.88 From 2008 to 2009, Minco’s customer orders declined, and it took cost-cutting measures, including a RIF in May and June of 2009.89 As part of the RIF, Milhauser’s supervisor identified four of seventeen maintenance employees for possible termination, including Milhauser.90 “Nominations were based on job duties, technical expertise, and subjective factors such as attitude and work ethic. Seniority was not an important factor.”91 Milhauser was not offered a transfer to a different department “because of [his] performance and behavior problems.”92 When Milhauser returned from military leave on June 3, 2009, he was terminated as part of the RIF.93

Milhauser sued Minco under USERRA, alleging discrimination on the basis of military service in violation of section 4311 and failure to

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82. 38 U.S.C. § 4311(c).
83. *See Milhauser v. Minco Prods., Inc.*, 701 F.3d 268, 273 (8th Cir. 2012).
85. 855 F. Supp. 2d 885 (D. Minn. 2012), aff’d, 701 F.3d 268 (8th Cir. 2012).
86. *Id.* at 887.
87. *Milhauser*, 701 F.3d at 270.
89. *Milhauser*, 701 F.3d at 270.
90. *Id.*
91. *Id.*
93. *Id.*
reemploy him in violation of section 4312. Minco claimed that changed circumstances (the decline in customer orders and corresponding losses) made reemployment impossible or unreasonable. Alternatively, Minco argued that Milhauser’s proper reemployment position was termination, “because he would have been terminated even if he had not left for service.” Milhauser moved for judgment as a matter of law (JMOL) on his section 4312 claim, arguing that “Minco’s economic difficulties and subsequent reductions in force were legally insufficient to find that employing him would have been impossible or unreasonable and that he was absolutely entitled to reemployment if the company had no affirmative defense.” The district court denied Milhauser’s motion, and the jury returned a verdict for Minco, finding that Milhauser failed to prove his discrimination claims and that, while Minco failed to prove the affirmative defense of changed circumstances, Minco had properly reemployed Milhauser at the “position” of termination.

After the jury’s verdict, Milhauser renewed his motion for JMOL, arguing that termination is not a valid USERRA reemployment position and that “the only situation in which application of the escalator principle may result in an adverse consequence upon reemployment is when a seniority ladder is implicated.” Minco maintained that, “because it was undergoing a company-wide [RIF], and because of Milhauser’s relative lack of skills, previous poor work performance and behavior issues, Milhauser would have been included in that reduction even had he remained continuously employed.” Therefore, Minco argued, “the escalator position in this case was termination.” The district court agreed, finding that termination is a possible reemployment position and that adverse consequences may result from application of the escalator principle “even in the absence of a seniority ladder.”

In its order denying JMOL, the district court raised the question whether the escalator principle applies at all to discretionary employer actions:

While the law regarding the exact application of the escalator principle is somewhat unclear, it appears possible that the escalator principle in general—whether it is an up-escalator entitling the employee to promotions or benefits, or a down-escalator resulting in an adverse consequence—may have been intended only to apply in sit-

94. Id. at 887.
95. Id. at 890.
96. Milhauser, 701 F.3d at 270–71.
97. Id. at 271.
98. Milhauser, 855 F. Supp. 2d at 890.
99. Id. at 890, 894.
100. Id. at 892.
101. Id.
102. Id. at 893–94.
uations in which the change in the employee’s position or status would have occurred without any exercise of discretion by the employer.\textsuperscript{103}

The district court noted, however, that Milhauser had not contended that the escalator principle applied only to automatic changes in an employee’s position; he had argued “only that seniority is the only situation which permits application of the escalator principle.”\textsuperscript{104} Milhauser’s use of the term “seniority” might have been intended to cover all non-discretionary changes, with seniority being only one example. The district court noted that “there are other non-seniority situations in which an employee’s position or status may change during his military leave.”\textsuperscript{105} The court pointed specifically to “job location, job classification, or shift assignment” as potential factors other than seniority that might adversely affect a reemployed servicemember.\textsuperscript{106} The court also referred to an early case in which a returning servicemember was lawfully reemployed in a position with a lower commission rate because all similarly situated employees received reduced commissions.\textsuperscript{107} The court noted that this “suggest[s] that a returning servicemember may suffer from an adverse consequence even when no issues of seniority are involved, at least when the adverse consequence applies to all similarly positioned employees evenly.”\textsuperscript{108}

The other non-seniority factors listed by the district court, however, lend themselves to “automatic” changes of employee positions. An employer may determine that, as part of a RIF, it must eliminate a “job location, job classification, or shift assignment” to improve profitability. Employees at a particular facility or job classification would thus be automatically laid off or terminated for being within the eliminated category. This could even apply to a single-employee category if it is not a specific employee chosen for termination, but rather the job classification the employee occupies.

Milhauser’s termination, however, arguably was not automatic. Milhauser was recommended for termination because of his “limited skills and lack of unique expertise,” as well as “performance and behavior problems.”\textsuperscript{109} The district court explicitly recognized this possibility, acknowledging that “[i]t was undisputed that Minco did not eliminate its entire Maintenance Department, but instead exercised discretion when deciding which four Maintenance Department em-

\textsuperscript{103} Id. at 896.
\textsuperscript{104} Id. (emphasis added).
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 895.
\textsuperscript{107} Id. at 896 (citing Levine v. Berman, 178 F.2d 440, 443 (7th Cir. 1949)).
\textsuperscript{108} Id. at 897.
\textsuperscript{109} Id. at 888.
ployees to terminate as part of the [RIF].” 110 But Milhauser “never argued that he could only be subjected to automatic changes in his position . . . [and] the Court [would] not grant JMOL in favor of Milhauser based on an argument Milhauser did not make.” 111 Despite not addressing the merits of the argument, the court noted that it raised the issue “because it appears to be an unclear area of law worthy of exploration.” 112

The court’s uncertainty about the escalator principle’s application to discretionary reemployment decisions might have partially resulted from the then-lack of precedent on whether the escalator principle applied to discretionary promotions. 113 The district court commented that the Supreme Court had previously held, under a USERRA predecessor, that “the employee is entitled only to any automatic promotions or benefits he would have received.” 114 And, at the time, under Eighth Circuit precedent:

To be entitled to a promotion or advancement in benefits, a returning serviceman must show that the advancement would have been awarded simply by virtue of continued employment. If a promotion is at least partially dependent on the employer’s discretionary determination of fitness and ability, the Act does not accord the veteran a right to an automatic promotion. 115

However, the district court noted that the DOL, when drafting final regulations, considered several comments advocating that the escalator principle apply “only in workforces where pay increases and promotions occur automatically.” 116 The DOL, however, declined to modify the regulation, opting instead for “application of a case-by-case analysis rather than a rule that could result in the unwarranted denial of promotions to returning servicemembers based on how the promotion was labeled rather than whether or not it was ‘reasonably certain.’” 117 The court recognized the conflict between existing case law and the regulations, writing that while “[t]he case law appears to suggest that an employee may only be entitled to benefits that would have automatically accrued without any discretion on the part

110. Id. at 898.
111. Id.
112. Id.
113. Id. at 896 (“The Court could not find, nor did the parties cite, cases in which the escalator principle was applied in an at will employment context when layoffs or terminations were involved. Thus, it is not clear to the Court how, if at all, the escalator principle applies in such a situation.”).
114. Id. at 897 (citing McKinney v. Missouri-Kansas-Texas R.R. Co., 357 U.S. 265, 271–72 (1958)).
115. Id. (quoting Goggin v. Lincoln St. Louis, 702 F.2d 698, 701 (8th Cir. 1983)).
116. Id.
117. Id. at 898.
of the employer,” the regulation’s text suggested that “no bright-line rule was intended.”

The Milhauser district court did not determine whether the escalator principle generally applies to discretionary promotions, but it recognized the possible significance of the question to its own decision:

If it is ultimately determined that the escalator principle only applies to automatically-accrued benefits, then it is possible that in the future a court might decide that the escalator principle applies in a consistent fashion when adverse consequences are involved: an employee may only be subject to adverse consequences that would have been automatically imposed without any employer discretion. The consequence may be due to application of a seniority ladder, or it may be due to across-the-board changes that automatically affect all employees with the same job title or responsibilities.

Limited by the facts of the case before it, the district court did not address whether the escalator principle applies to discretionary promotions, or whether it would apply “in a consistent fashion” to adverse discretionary decisions.

On appeal to the Eighth Circuit, Milhauser argued that termination is not a valid reemployment position and raised a new argument that, alternatively, “termination is only permissible when it would have occurred automatically without employer discretion.” Milhauser first argued that, because USERRA allows an employer to deny reemployment if changed circumstances make reemploying a veteran “impossible or unreasonable,” this affirmative defense “is the exclusive means under the statute for complete termination of a returning servicemember.” The court of appeals held that the jury’s finding that Milhauser’s proper reemployment position was termination was consistent with USERRA and its regulations, explaining that “[t]he escalator principle requires that an employee’s career trajectory be examined as if his or her employment ‘had not been interrupted by’ military service.” The court cited the DOL regulation that states: “Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated.” The court declined to consider Milhauser’s argument that only automatic terminations were permitted because he had not raised it in the district court. The court held that termination was a valid reemployment position without explicitly addressing

118. Id.
119. Id. (citing Levine v. Berman, 178 F.2d 440 (7th Cir. 1949)).
120. Milhauser v. Minco Prods., Inc., 701 F.3d 268, 272 (8th Cir. 2012).
121. Id. (citing 30 U.S.C. § 4313(a)(1)(A)).
122. Id.
123. Id. at 273 (quoting 20 C.F.R. § 1002.194 (2016)).
124. Id.
whether the escalator principle applies to discretionary reemployment decisions.\textsuperscript{125}

\textbf{B. The Escalator Principle Applies to Discretionary Promotions}

Not long after the Eighth Circuit decided \textit{Milhauser},\textsuperscript{126} the First Circuit held in \textit{Rivera-Melendez v. Pfizer Pharmaceuticals, LLC}\textsuperscript{127} that the escalator principle is not limited to automatic promotions, but applies equally to discretionary ones.\textsuperscript{128} The plaintiff was an Active Pharmaceutical Ingredient (API) Group Leader at Pfizer’s Puerto Rico manufacturing facility.\textsuperscript{129} Rivera-Melendez (Rivera) was on active duty in the Navy Reserves in Iraq from December 2008 to October 2009.\textsuperscript{130} Pfizer restructured its API Department in February 2009, eliminating the API Group Leader position and replacing it with two new positions: “API Team Leader and API Service Coordinator.”\textsuperscript{131} Pfizer informed the API Group Leaders (not including Rivera) they could apply for the new API Team Leader positions, and “if they were not among those selected . . . they would have three alternatives: (1) to apply to the new, non-exempt API Service Coordinator position; (2) to be demoted to the Senior API Operator position; or (3) to participate in a voluntary separation option.”\textsuperscript{132}

Rivera returned to work in October 2009 and was reemployed as an API Group Leader.\textsuperscript{133} However, because the API Group Leader position had by then been eliminated, he was assigned to “special tasks.”\textsuperscript{134} Rivera was appointed to the new API Service Coordinator position in May 2010.\textsuperscript{135} His salary and benefits remained the same, but his job responsibilities were reduced.\textsuperscript{136} He was not permitted to apply for an API Team Leader position.\textsuperscript{137}

Rivera sued Pfizer under USERRA, claiming it discriminated against him by denying the opportunity to apply for the API Team Leader position, and it failed properly to reemploy him because “he was entitled to be rehired to a supervisory (i.e., the API Team Leader) position upon his return from active duty.”\textsuperscript{138} The district court granted Pfizer’s motion for summary judgment, holding “that Rivera could not

\begin{itemize}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} 730 F.3d 49 (1st Cir. 2013).
\item \textsuperscript{128} \textit{Id.} at 50–51.
\item \textsuperscript{129} \textit{Id.} at 51.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.} at 52.
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.}
\end{itemize}
establish that he was entitled to be employed as an API Team Leader upon his return from active duty because the API Team Leader position was not Rivera’s ‘escalator position.’” In the district court’s view, Rivera “was not entitled to be reinstated as an API Team Leader because it was a position for which employees were selected based on managerial discretion and thus not an escalator position, which is an automatic promotion based on employee seniority.”

The district court based its reasoning on the Supreme Court’s decision in *McKinney v. Missouri-Kansas-Texas Railroad Co.*, which held that a returning servicemember “is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion by the employer.” Thus, according to the district court, Rivera would be entitled to be rehired at the higher position only if it was an “automatic promotion.” Because the district court viewed the escalator principle as inapplicable to discretionary promotions, it held that “Rivera could assert no entitlement to [the position] under USERRA.”

Rivera appealed, asserting “that the district court erred in holding that USERRA’s escalator principle and its associated reasonable certainty test apply only to automatic promotions,” and that genuine issues of material fact existed as to “whether it was reasonably certain that if not for the period of service, he would have attained the API Team Leader position.” The United States filed an amicus brief, agreeing with Rivera that the escalator principle applies regardless of whether promotions are automatic or discretionary. According to the government, “the proper inquiry was therefore ‘not whether the promotion was automatic or discretionary, but whether it was reasonably certain that [Rivera] would have applied for and received the promotion had he not been in active duty status.’” The court of appeals agreed with Rivera and the government and remanded “for reconsideration of the motion for summary judgment in light of the correct legal standard.”

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139. *Id.* at 53.
142. *Id.* at 272, quoted in Rivera-Melendez, 730 F.3d at 56.
143. Rivera-Melendez, 790 F.3d at 53.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 58.
The court of appeals faulted the district court’s reliance on McKinney for failing to consider the Supreme Court’s subsequent opinion in Tilton v. Missouri Pacific Railroad Co., in which the Court held that McKinney “did not adopt a rule of absolute foreseeability.” Rather, “Congress intended a reemployed veteran . . . to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service. This requirement is met if, as a matter of foresight, it was reasonably certain that advancement would have occurred . . . .” For the court of appeals, McKinney and Tilton, if read together, are consistent with the DOL’s construction of the escalator principle as “requir[ing] that a service member receive a missed promotion upon reemployment if there is a reasonable certainty that the promotion would have been granted.” Further, the court of appeals said the district court had misread the regulations as being intended only “to provide the employee with any seniority-based promotions that he would have obtained ‘with reasonable certainty’ had he not left his job to serve in the armed forces.” As the court of appeals noted, “nothing in section 1002.191 suggests that the escalator principle is limited to ‘seniority-based promotions.’” Because the district court erred in finding that the escalator principle and the reasonable certainty test apply only to automatic promotions,” the court of appeals vacated the grant of summary judgment to Pfizer and remanded for the district court to determine if a genuine issue of material fact existed as to “whether it [was] reasonably certain that Rivera would have been promoted to the API Team Leader position if his work at Pfizer had not been interrupted by military service.”

C. Reading Milhauser and Rivera-Melendez Together

The district courts in Rivera-Melendez and Milhauser appear to have had conflicting views on whether the escalator principle applies to reemployment decisions that are not based solely on seniority. In Rivera-Melendez, the district court viewed seniority as the sole factor entitling a returning servicemember to a promotion and saw the escalator position as “an automatic promotion based on employee seniority.” In other words, the district court assumed an “escalator position” was both a promotion and a decision based exclusively on seniority. The court of

150. Id. at 179, quoted in Rivera-Melendez, 730 F.3d at 56.
151. Id. at 181, quoted in Rivera-Melendez, 730 F.3d at 57.
152. Rivera-Melendez, 730 F.3d at 57.
153. Id.
154. Id. at 58; see also Milhauser v. Minco Prods., Inc., 855 F. Supp. 2d 885, 894 (D. Minn. 2012), aff’d, 701 F.3d 268 (8th Cir. 2012).
155. Rivera-Melendez, 730 F.3d at 57.
157. Id.
appeals disagreed because nothing in the regulations limited application of the escalator principle to seniority-based promotions.\textsuperscript{158} The district court’s interpretation was also inconsistent with the regulations that make clear that “the escalator principle may cause an employee to be re-employed in a higher or lower position, laid off, or even terminated.”\textsuperscript{159}

The \textit{Milhauser} district court, on the other hand, recognized that an employee’s escalator position might not be a promotion, but, unlike \textit{Rivera-Melendez}, it distinguished seniority-based and automatic changes.\textsuperscript{160} For the \textit{Milhauser} district court, an adverse consequence might legitimately result from non-seniority factors.\textsuperscript{161} This is consistent with the First Circuit’s opinion in \textit{Rivera-Melendez} because both opinions make clear that the escalator principle applies regardless of whether a reemployment decision is seniority-based.\textsuperscript{162}

The \textit{Milhauser} district court left unanswered whether the escalator principle applies to \textit{discretionary} decisions.\textsuperscript{163} It acknowledged that “[i]f it is ultimately determined that the escalator principle only applies to automatically-accrued benefits, then it is possible that in the future a court might decide that the escalator principle applies in a consistent fashion when adverse consequences are involved.”\textsuperscript{164} Resolving the question of the escalator principle’s application to discretionary promotions would be relevant because “[i]f a court were to find that the escalator principle can only result in a change in position when the change occurs automatically, then arguably the escalator principle should not have applied to Milhauser.”\textsuperscript{165} The First Circuit’s holding in \textit{Rivera-Melendez} answers this question: “the escalator principle and reasonable certainty test apply regardless of whether the promotion at issue is automatic or non-automatic,”\textsuperscript{166} providing strong support that the escalator principle also applies to discretionary decisions with adverse consequences.

Read together, these decisions suggest that USERRA’s escalator principle applies not only to discretionary decisions to promote, but

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  \item \textsuperscript{158} \textit{Rivera-Melendez}, 730 F.3d at 57.
  \item \textsuperscript{159} 20 C.F.R. § 1002.194 (2016) (emphasis added).
  \item \textsuperscript{160} \textit{Compare} Milhauser v. Minco Prods., Inc., 855 F. Supp. 2d 885, 898 (D. Minn. 2012), \textit{aff’d}, 701 F.3d 268 (8th Cir. 2012) (“Milhauser has never argued that he could only be subjected to automatic changes in his position . . . . Milhauser argues instead that seniority is the only factor that may result in an adverse consequence, and that does not appear to be the law.”), \textit{with Rivera-Melendez}, 2011 WL 5442370, at *1 (an escalator position is “an automatic promotion based on employee seniority.”).
  \item \textsuperscript{161} \textit{Milhauser}, 855 F. Supp. 2d at 895–96.
  \item \textsuperscript{162} \textit{Id.}; \textit{Rivera-Melendez}, 730 F.3d at 57.
  \item \textsuperscript{163} \textit{Milhauser}, 855 F. Supp. 2d at 898.
  \item \textsuperscript{164} \textit{Id}.
  \item \textsuperscript{165} \textit{Id}. Minco, the court recognized, arguably exercised discretion in selecting Milhauser for termination. \textit{Id} Milhauser, however, “never argued that he could only be subjected to automatic changes in his position.” \textit{Id}.
  \item \textsuperscript{166} \textit{Rivera-Melendez}, 730 F.3d at 50–51.
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also to discretionary decisions to demote, lay off, or terminate. Milhauser stands for the proposition that the escalator principle may result in adverse consequences, even termination, and that in determining the correct reemployment position an employer may consider factors other than seniority.\textsuperscript{167} The Milhauser district court raised the possibility that, if the escalator principle applied only to automatic promotions, it might apply “in a consistent fashion” to adverse employment decisions.\textsuperscript{168} Rivera-Melendez held that the escalator principle and reasonable certainty test apply to discretionary promotions.\textsuperscript{169}

The necessary corollary of applying the escalator principle to discretionary promotions is that the escalator principle must apply “in a consistent fashion” to adverse discretionary decisions.\textsuperscript{170} This is because USERRA and its regulations make clear that the “escalator” may move up or down during a servicemember’s absence.\textsuperscript{171} The law requires that servicemembers be treated, as nearly as possible, as if they had remained at work. A change in a veteran’s position upon re-employment depends on there being a “reasonable certainty” that the change would have occurred if the employee had not been on military leave.\textsuperscript{172} Neither USERRA or its regulations suggest that a reemployment decision should be analyzed differently if it would adversely affect a servicemember.

This interpretation is consistent with USERRA’s purposes. The Act is meant to protect servicemembers from a loss of position as a result of “absence due to uniformed service.”\textsuperscript{173} It is not a veterans’ preference statute.\textsuperscript{174} The reemployment rights USERRA provides cannot put employees in a better position than if they had not taken military leave.\textsuperscript{175} The escalator only puts the returning servicemember in the position that “would have [been] attained with reasonable certainty if not for the absence due to uniformed service.”\textsuperscript{176} Employers must examine an employee’s “career trajectory” as if employment had not been interrupted.\textsuperscript{177} If it is reasonably certain that the employee would have been promoted, then the proper escalator position is a promotion. But, likewise, if it is reasonably certain that, “if not for the period of uniformed service,” the employee would have been demoted, laid off,
or terminated, that is the employee’s appropriate escalator position under USERRA.\textsuperscript{178}

Such a result may seem harsh, but case law suggests it is not inconsistent with USERRA. The alternative would apply the escalator principle only to automatic changes, thus denying promotions to many who otherwise would have obtained them.\textsuperscript{179} One cannot take the good without the bad. If the escalator principle applies to discretionary decisions, it must apply regardless of whether they move an employee up or down.

Still, employers should act more favorably toward servicemember-employees than section 4312 requires. As suggested in Part II, the risk of facing a disparate-treatment claim under section 4311 is likely high if an employer makes a discretionary decision to demote or discharge.\textsuperscript{180} Reemploying a veteran at one position, only to demote or discharge the employee shortly thereafter, may instead make the employer liable for wrongful discharge under section 4316(c).\textsuperscript{181} Employers should make reemployment decisions carefully. If it would otherwise be appropriate to demote or discharge an employee for a discretionary reason, the employer should do so upon reemployment only if it can clearly establish that it would have made the same decision regardless of the employee’s absence for military leave.\textsuperscript{182} The escalator principle requires only “reasonable certainty” that the position to which a reemployed servicemember is assigned is the position the employee otherwise would have attained.\textsuperscript{183} But by making discretionary demotions and discharges only if an employer has actual certainty that it would have made the same decision had the employee not been on military leave, the employer can be sure it is complying both with section 4312’s reemployment requirements and section 4311’s anti-discrimination provisions.\textsuperscript{184}

**Conclusion**

USERRA entitles returning servicemembers to reemployment in the escalator position they would have attained with reasonable certainty if not for an intervening military leave. Depending on the cir-

\textsuperscript{178} 20 C.F.R. § 1002.191; see also Milhauser, 855 F. Supp. 2d at 899 (citing Fishgold, 328 U.S. at 286) (“If the employee had been demoted during his military leave, then upon his return, he would have lost his old position and would be entitled to only the inferior one.”).

\textsuperscript{179} See Rivera-Melendez v. Pfizer Pharm., LLC, 730 F.3d 49, 55 (1st Cir. 2013).

\textsuperscript{180} See supra text accompanying note 79.

\textsuperscript{181} See supra text accompanying notes 60–65.

\textsuperscript{182} See 20 C.F.R. § 1002.22.

\textsuperscript{183} Id. § 1002.191.

\textsuperscript{184} See, e.g., Leisek v. Brightwood Corp., 278 F.3d 895, 900 (9th Cir. 2002) (reversing grant of summary judgment where employer failed to establish “as an uncontroverted fact that it would have terminated [plaintiff] even if he had not been active in the [National Guard]”).
cumstances, the proper escalator position could be a promotion, demo-
tion, layoff, or termination. Neither USERRA nor its regulations spe-
cify whether the escalator principle applies to discretionary reemploy-
ment decisions or only to automatic changes.

Recent federal court decisions have substantially clarified the
scope and application of the escalator principle. It is now clear that ter-
mination can be a valid reemployment position and that termination
can be based on factors other than seniority. It has also been estab-
lished that the escalator principle applies to discretionary promotions.
Reading these decisions together suggests that the escalator principle
applies equally to discretionary demotions, layoffs, and terminations.

This result may adversely affect some veterans, but is consistent
with USERRA’s purposes and structure and is the necessary conse-
quence of applying the escalator principle to discretionary promotions.
 Nonetheless, to avoid liability for discrimination and wrongful dis-
charge, employers should generally refrain from making discretionary
demotions and discharges unless they can prove with actual certainty,
greater than the “reasonable certainty” required by law, that they would
have made the same decision regardless of the employee’s absence for
military leave.