The Editors’ Page
Stephen F. Befort & Laura J. Cooper

Labor and Employment Decisions from the
Supreme Court’s 2015-2016 Term
Thomas C. Goldstein

Better Process, Better Results: Integrating Mediation and
Arbitration to Resolve Collective Bargaining Disputes
Joshua M. Javits

An Equal Opportunity Paradox for Federal Contractors
Jon A. Geier, Kenneth W. Gage, Tammy Daub, & Regan Herald

Video Games in Job Interviews: Using Algorithms to Minimize
Discrimination and Unconscious Bias
David D. Savage & Richard Bales

The Rights of School Employee-Coaches Under Title VII and
Title IX in Educational Athletic Programs
Kim Turner

On Ice: The Slippery Slope of Employer-Paid Egg Freezing
Nicole M. Mattson

Workers’ Compensation: The Hazard of Adopting the
Increased-Risk Doctrine When Interpreting “Arising out of”
Paige Haughton
The Editors’ Page

The November 8, 2016, presidential election shook the world. When Americans awoke the following day, feelings of jubilation and dread rebounded with virtually equal prevalence. And, while the Trump administration has launched its tenure with a flurry of activity, the impact of the new leadership on U.S. law and policy remains uncertain.

The realm of labor and employment law is not immune to this uncertainty. Speculation abounds as to future law and policy changes. Some executive actions—such as the rescission of President Obama’s Executive Order on transgender bathroom access—have already been implemented. Some regulatory changes—such as withdrawal of proposed Department of Labor regulations concerning overtime pay and fiduciary obligations—are likely. But the contours of specific legislative changes remain murky. President Trump has expressed support for nationwide right-to-work legislation, but Senate approval of such a measure is far from certain. At the other end of the spectrum, President Trump has spoken publicly about the importance of paid leave for caregivers, but congressional support for such a measure does not appear strong. Finally, what precedents will be reversed as Trump appointees join the Supreme Court, National Labor Relations Board, and Equal Employment Opportunity Commission?

The labor and employment bar clearly is abuzz about what the future may hold. This focused consternation is illustrated by the fact that several of the articles in this issue include speculation about how the new administration will impact the future direction of labor and employment law.

In this time of uncertainty, one thing is certain. The ABA Journal of Labor & Employment Law is at the ready to chronicle any significant new developments. We will be looking for conference papers and scholarly submissions of practical utility to Section members. As you prepare papers for the November CLE conference and the various midwinter meetings, please give serious thought to contributing to this discussion.

This issue opens with the annual Supreme Court Review by Thomas C. Goldstein, an experienced Supreme Court litigator at Goldstein & Russell, P.C., co-founder of SCOTUSblog, and Secretary of the ABA Section of Labor and Employment Law. In Labor and Employment Decisions from the Supreme Court’s 2015–2016 Term, Goldstein summarizes labor and employment decisions from the Court’s most recent term, two of which were left unresolved after Justice Antonin Scalia’s death, and analyzes how they will impact practitioners. He also predicts how the newly fully staffed Court will analyze cases upcoming in the 2016–2017 term.

Both labor and management are increasingly utilizing a hybrid dispute resolution system, mediation-arbitration (med-arb), for both collective bargaining and contract grievance disputes as a quicker, less costly
resolution strategy than traditional stand-alone dispute resolution mechanisms. In *Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes*, Joshua M. Javits relies on his experience as a mediator-arbitrator for major airline disputes to describe med-arb’s process in practice. He highlights which industries would benefit most from its use and offers practical pointers to parties seeking to reinvigorate their own collective bargaining processes.

The Department of Labor’s Office of Federal Contract Compliance (OFCCP) measures federal contractors’ compliance with affirmative action hiring requirements by determining whether qualified candidates were hired at rates consistent with what would be expected in a neutral selection process. In *An Equal Opportunity Paradox for Federal Contractors*, management attorneys Jon A. Geier, Kenneth W. Gage, Tammy Daub, and Regan Herald argue this method forces contractors to meet specific hiring quotas and fails to identify and eliminate workplace discrimination. To help contractors meet the OFCCP’s statistical compliance test, the authors detail OFCCP’s electronic hiring requirements and provide strategic and practical guidance on how to implement and maintain hiring procedures to avoid liability under federal antidiscrimination laws.

Employers are increasingly relying on algorithms in the hiring process to narrow the applicant pool efficiently. Some have recently utilized video games to evaluate skills that cannot be identified from typical job applications. In *Video Games in Job Interviews: Using Algorithms to Minimize Discrimination and Unconscious Bias*, Richard Bales, a law professor at Ohio Northern University, and David Savage, a third-year law student, discuss whether employer algorithm use results in disparate impact and disparate treatment discrimination. The authors argue that although algorithms are susceptible to such discrimination, it can be avoided by careful design and monitoring, and, if used properly, they can even avoid unconscious bias more effectively than human assessment.

In *The Rights of School Employee-Coaches Under Title VII and Title IX in Educational Athletic Programs*, Kim Turner draws on her experience as a plaintiffs’ attorney enforcing Title IX to discuss under what circumstances a coach-employee facing workplace discrimination should proceed under Title VII, Title IX, or both. She highlights the advantages and disadvantages of proceeding under each statute, and explains how the plaintiff’s goals, exhaustion requirements, statute of limitations, and preemption issues will impact a coach’s decision to proceed under one or both statutes.

In *On Ice: The Slippery Slope of Employer-Paid Egg Freezing*, Nicole M. Mattson, a third-year law student at Denver Sturm College of Law and this year’s winner of the ABA Section of Labor and Employment Law and The College of Labor and Employment Lawyers national law student writing competition, discusses how egg-freezing furthers workplace gender equity by giving women more control over career and family de-
cisions. Mattson explains, however, that employers offering egg-freezing benefits could unintentionally face liability under antidiscrimination and job-protected leave laws and warns that egg-freezing, even when offered with the best intentions, could detrimentally impact workplace culture.

Paige Haughton, a third-year law student at the University of Minnesota Law School and the Journal’s Editor-in-Chief, discusses the three most commonly used doctrines courts rely on to determine whether an injury “arises out of” employment in *Workers’ Compensation: The Hazard of Adopting the Increased-Risk Doctrine When Interpreting “Arising out of.”* She contends the actual-risk doctrine and increased-risk doctrine are inconsistent with the purpose of workers’ compensation and argues that states should instead adopt the positional-risk doctrine because it provides fair outcomes for employees and is consistent with the system’s goal of providing an easily administered remedy. The article includes a comparative chart of states’ current approaches to the issue.

*Professor Stephen F. Befort*
*Professor Laura J. Cooper*
*Editors*
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:

Labor and Employment Decisions from the Supreme Court’s 2015–2016 Term

Thomas C. Goldstein*

Introduction

The Court’s October 2015 Term provided several important labor and employment rulings, including two cliffhangers that remain unresolved. This Article reviews these decisions. Part I describes two highly anticipated cases—an agency shop case and an employer-mandated contraceptive case—that the Court did not decide on the merits. Part II discusses Heffernan v. City of Paterson,1 a First Amendment retaliation case concerning an employer’s mistaken belief that an employee engaged in political activity. Part III examines the procedural decisions of the Court’s 2015 Term. Part IV discusses the Court’s ERISA-related holdings. The Article concludes by anticipating issues the Court will address in its 2016–2017 Term.

I. The Court’s Unresolved Decisions

The most anticipated decision of the 2015 Term, Friedrichs v. California Teachers Ass’n,2 turned out to be uneventful. In Friedrichs, the Court was poised to decide whether to overturn Abood v. Detroit Board of Education,3 which held public sector unions could collect dues from workers represented by a union, even if not themselves union members.4 Unions rely on these “agency shop” arrangements to fund costly bargaining and contract grievance processes.5 After oral argument, it appeared a five-Justice majority was prepared to overrule Abood and hold public sector agency shop arrangements violated the First

---

* Thomas C. Goldstein is a partner of Goldstein & Russell, P.C. and an appellate advocate. He is best known as one of the nation’s most experienced Supreme Court practitioners. Mr. Goldstein has taught Supreme Court Litigation at Harvard Law School since 2004 and previously taught the course at Stanford Law School for nearly a decade. Mr. Goldstein is also the co-founder and publisher of SCOTUSblog, one of the most widely read Supreme Court blogs.
1. 136 S. Ct. 1412 (2016).
2. 136 S. Ct. 1083 (2016) (Mem.).
4. Id. at 212.
5. Id. at 221–22.
Amendment.\textsuperscript{6} Overruling \textit{Abood} could have substantially undermined the viability of public sector unions.

The Court ultimately left the issue unresolved in a four-four tie after Justice Antonin Scalia’s death.\textsuperscript{7} As with any four-four split, the Court affirmed the Ninth Circuit’s ruling,\textsuperscript{8} adhering to \textit{Abood} without setting any national precedent.\textsuperscript{9} But the unions’ victory is likely to be short-lived. Unions surely anticipated Hillary Clinton’s presidential victory and appointment of a Justice sympathetic to \textit{Abood}. Now that Justice Neil Gorsuch is serving on the U.S. Supreme Court and has filled Justice Scalia’s seat, \textit{Abood} is once again on life support. Anti-union organizations are already preparing the next \textit{Friedrichs}-type case to present the issue again to the Court, likely within the next two years.

A similar situation occurred in a major dispute over the Affordable Care Act’s contraception mandate,\textsuperscript{10} presented by several consolidated cases, including \textit{Zubik v. Burwell}.\textsuperscript{11} Religious non-profit employers challenged a regulatory requirement mandating that they either provide contraceptive care under their health plans or notify the government or their insurer that they object to doing so.\textsuperscript{12} In effect, the employers’ notification triggered insurers directly to offer contraception to employees.\textsuperscript{13} The religious employers argued that complying with the notification requirements violated their religious beliefs because it facilitated use of certain forms of contraception they deemed immoral.\textsuperscript{14}

In an unusual opinion, the Court resolved the cases by remanding them to the circuit courts to consider whether contraceptive care could be provided without the religious non-profits having to provide notice.\textsuperscript{15} In response to a judicial inquiry, the employers had indicated that their religious views would be adequately accommodated if they played no role in the process, and the government confirmed that the insurance plans “could be modified to operate in the manner posited in the Court’s order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage.”\textsuperscript{16} The Justices took care to clarify that they were not ruling on any aspect


\textsuperscript{7} \textit{Friedrichs}, 136 S. Ct. 1083.

\textsuperscript{8} \textit{Friedrichs} v. California Teachers Ass’n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014).

\textsuperscript{9} \textit{Friedrichs}, 136 S. Ct. 1083.


\textsuperscript{11} 136 S. Ct. 1557 (2016).

\textsuperscript{12} \textit{Zubik}, 136 S. Ct. 1557 (2016).


\textsuperscript{14} See Supplemental Brief for Petitioners, \textit{supra} note 13, at 15.

\textsuperscript{15} \textit{Zubik}, 136 S. Ct. at 1560.

\textsuperscript{16} \textit{Id}.
of the non-profits’ claims. The Court very likely chose this narrow disposition because Justice Scalia’s death precluded a majority ruling—which would probably have favored the religious organizations.

II. First Amendment Retaliation

The Court did reach a decision in a quirky First Amendment employment case, *Heffernan v. City of Paterson*. Heffernan was a police officer in Paterson, New Jersey. The chief of police was told that Heffernan had picked up a lawn sign supporting the incumbent mayor’s opponent in the upcoming municipal election. As a result, the chief reassigned Heffernan.

Heffernan alleged that the city retaliated against him in violation of the First Amendment. The twist was that Heffernan had not engaged in free speech or political association on his own behalf. He picked up the sign as a favor to his mother, but the police chief mistakenly thought he did it for himself. The city contended that because Heffernan was not expressing any political views, he had no First Amendment protection.

The Supreme Court held that the chief’s mistake did not affect its First Amendment analysis. Heffernan could sue under the First Amendment. The Court concluded that the chief’s motive, despite its reliance on false information, was the key factor. It reasoned that the harm to the employee—and the effect of inhibiting protected speech and association by other employees—was the same regardless of the employer’s mistake. The Court did not express an opinion on the city’s defense that Heffernan was not reassigned as political retribution, but pursuant to a neutral policy prohibiting certain officers from being involved in political campaigns.

*Heffernan* provides employees with greater protection against retaliation for political expression. Government employers cannot avoid retaliation liability by arguing that an employee did not actually en-
gage in constitutionally protected free speech if the employer intended to discipline an employee for doing so.

III. Procedural Controversies

The Justices decided several cases involving important procedural questions unique to labor and employment litigation. Most noteworthy is Tyson Foods, Inc. v. Bouaphakeo,\footnote{31. 136 S. Ct. 1036 (2016).} which involved a dispute over the extent to which the employer failed to meet its obligation under the Fair Labor Standards Act (FLSA) to pay employees for time spent “donning and doffing” protective gear at work.\footnote{32. Id. at 1042.} A jury awarded a class of more than 3,000 employees nearly $3 million in damages.\footnote{33. Id. at 1041, 1043.}

Because the payment owed to each employee varied, the Court had to determine whether, and to what extent, the employees could proceed as a single class or in a single collective action.\footnote{34. Id. at 1041.} Some employees were paid only for time spent donning gear, and some spent more time than others because they wore different gear.\footnote{35. Id. at 1042.} Critically, the employer lacked records of the amount of time employees spent donning and doffing.\footnote{36. Id.}

The issue reached the Court against the backdrop of rulings showing the Court’s hostility to employment class actions, such as Wal-Mart Stores v. Dukes.\footnote{37. 564 U.S. 338, 352 (2011) (“respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question why was I disfavored.”).} But here, the Justices held that the employees could proceed collectively to establish Tyson’s liability.\footnote{38. Tyson Foods, 136 S. Ct. at 1049.} The Court relied on Anderson v. Mt. Clemens Pottery Co.,\footnote{39. 328 U.S. 680 (1946).} which held that employers’ statutory duty to maintain time records triggers liability if the absence of those records prevents employees from proving the time each spent performing compensable work.\footnote{40. Id. at 687.} Because Tyson Foods had not maintained records of the time employees spent donning and doffing gear, the Court allowed the plaintiffs to rely on a study estimating average times for different parts of the plant.\footnote{41. Tyson Foods, 136 S. Ct. at 1047.}

*Tyson Foods* is an important victory for employees seeking to bring FLSA collective actions. Frequently, employees with different responsibilities at a single facility will seek compensation for different amounts of time. Pursuing all claims individually would burden the
courts and the parties. The Court’s decision allows these claims to be adjudicated efficiently. That said, the Court left unresolved one major concern for employers: how to distribute funds from any judgment or settlement. It did not resolve whether and how lower courts should ensure that only individual employees actually entitled to compensation receive it.

In another important procedural controversy, CRST Van Expedited, Inc. v. EEOC, the Court considered whether a defendant must prevail on the merits to be awarded attorneys’ fees in a frivolous Title VII suit. For plaintiffs, lower courts had imposed substantial barriers to plaintiffs’ ability to recover attorneys’ fees if they had not prevailed on the merits. But here, the Court unanimously held that defendants are different because they “prevail” whenever the plaintiff fails to change the status quo, regardless of how that occurs. However, the Court left open whether the employer must secure a preclusive judgment against the plaintiff to be eligible for fees.

The EEOC is also a litigant in another procedural case, this one already decided in the 2016 Term. In EEOC v. McLane Co., an employer refused to comply with an EEOC subpoena seeking certain data. When the EEOC sued, the district court refused to fully enforce the subpoena. The Ninth Circuit reversed, holding—in the ruling now before the Supreme Court—that it would review the district court’s decision de novo. Before the Supreme Court, the government changed positions and now agrees with the employer that the district court’s ruling should be reviewed deferentially. This happens occasionally, as the Solicitor General’s Office—which litigates on behalf of the federal government in the Supreme Court—reassesses the sometimes aggressive positions taken by agencies in the lower courts. In response, the Court ap-

42. Id. at 1050.
43. Id.
44. 36 S. Ct. 1642 (2016).
45. Id. at 1645–46.
46. See, e.g., Marquart v. Lodge 837, Int’l Ass’n of Machinists, 26 F.3d 842, 851–52 (8th Cir. 1994).
47. CRST Van, 36 S. Ct. at 1652.
48. Id. at 1653.
50. EEOC v. McLane Co., 804 F.3d 1051, 1054 (9th Cir. 2015), vacated and remanded, 137 S. Ct. 1159 (2017).
51. Id. ("The district court granted in part and denied in part the EEOC’s request for enforcement.").
52. Id. at 1056, 1059.
54. See, e.g., US Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013) (Solicitor General changed its position about a rule interpreting ERISA benefit reimbursement); see also Lincoln Caplan, The Chief Justice Loses His Cool, N.Y. TIMES: EDITORIAL PAGE
pointed a private attorney to defend the Ninth Circuit’s decision. This is how the Court typically handles a case if neither party will defend the lower court’s ruling, particularly when the Solicitor General will not defend a ruling favorable to a federal agency. Ultimately, the Supreme Court decided the case consistently with the government’s revised position, which tracked the view of other courts of appeals. The Justices unanimously held that a district court’s decision of whether to enforce or quash a subpoena is reviewed for abuse of discretion. The Court reasoned that this standard has long been applied to administrative subpoena rulings. Further, district courts are better suited to determine whether a subpoena is appropriate.

The remaining procedural case from the 2015 Term involves filing deadlines and another change in the government’s position. In Green v. Brennan, the plaintiff, a federal post office employee, brought a constructive discharge claim. At issue before the Supreme Court was whether the employee brought the claim too late. Green had signed an agreement to resign in December 2009, submitted a letter of resignation in February 2010, and left his job in March 2010. Forty-one days after he submitted his resignation, Green contacted an Equal Employment Opportunity counselor.

The law provides that a federal employee’s discrimination claim is timely if the employee contacts the Equal Employment Opportunity counselor within forty-five days of “the matter alleged to be discriminatory.” The court of appeals deemed Green’s claim untimely because his resignation was not alleged to be discriminatory. The government refused to defend that ruling in the Supreme Court, agreeing instead with Green that the relevant date triggering the filing obligation was the date he resigned.

---

55. McLane Co. v. EEOC, 137 S. Ct. 461 (2016) (Mem.) (“Stephen B. Kinnaird, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the position that a district court's decision to quash or enforce an EEOC subpoena is subject to de novo review.”).
56. See, e.g., Pepper v. United States, 562 U.S. 476, 487 (2011) (Court appointed an amicus curiae to defend court of appeal’s judgment).
57. McLane Co. v. EEOC, 137 S. Ct. 1159, 1167 (2017).
58. Id. at 1170.
59. Id. at 1168.
60. Id. at 1167.
62. Id. at 1774.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id. at 1775.
68. Id. at 1776.
The Supreme Court rejected both proposed interpretations and held that Green had timely presented his claim. The Court reasoned that the employee’s constructive discharge claim was not complete until the employee actually resigned. However, the Court left open the factual question of when Green actually resigned, i.e., the agreed-upon date of resignation (as the government argued) or the date Green submitted his formal letter of resignation (as Green maintained). The ruling avoids the anomaly of employees filing constructive discharge claims before actually resigning, which could have been a trap for unwary employees.

In the cases discussed above, the government acted as the employer or as an employment law enforcer. Its further role in interpreting federal statutes was at issue in Encino Motorcars, LLC v. Navarro. The Fair Labor Standards Act provision at issue exempts from overtime any “salesman . . . primarily engaged in selling or servicing automobiles . . . .” Over time, the Department of Labor has repeatedly switched positions over whether the exemption includes “service advisors” who sell automobile service. The regulation challenged before the Supreme Court provided that service advisors were not exempt.

The Court held that the regulation was not entitled to any deference because the Department had failed to give a reasoned explanation for switching its regulatory position. But the Court stopped there and declined to decide the ultimate question of how to read the statute itself, leaving that to the lower courts. The decision has little immediate effect, leaving the overtime eligibility of service advisors uncertain. But more broadly, Encino signals to federal agencies that their decisions to reverse significant policies will not receive substantial deference unless accompanied with a serious explanation for the change. That holding may come into play as the Trump administration decides whether to reverse an array of Obama-era regulations.

IV. ERISA Decisions

Deference to the government’s position is also at issue in a series of ERISA cases upcoming in the 2016–2017 term, including Advocate
Health Care Network v. Stapleton. 79 A statute provision exempts from ERISA a pension or welfare plan “established and maintained . . . by a church . . . .” 80 For a considerable period of time, various federal agencies have read the exemption to extend far more broadly than plans established directly by churches to include plans established by entities associated or affiliated with churches. 81 For example, Advocate Health Care Network claims the exemption benefit even though it is not a church and has more than 33,000 employees and $4.6 billion in annual revenues. 82 The employer’s effort to secure support for its broad reading of the exemption will depend heavily on how much the Court is willing to defer to an agency’s longstanding statutory interpretation.

Two other ERISA cases bear mentioning. Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan 83 involves the recurring issue of subrogation. 84 There, an employee injured in a car accident received benefits from both his ERISA-covered health insurance plan and the driver who caused the accident. 85 The employee spent the money from the health insurance plan. 86 The plan then sued the employee under ERISA, invoking the plan’s subrogation provision. 87

The Court held that the plan could not recover. 88 Under the Court’s precedent, the plan could only pursue an “equitable”—not “legal”—remedy. 89 The Court noted that equitable remedies could only attach to specific money, but here the money had been spent. 90 The ruling will require ERISA plans to try to monitor plan participants’ pending lawsuits against third-parties for health costs to keep funds paid by the plan segregated, if at all possible. 91

Preemption, another recurring ERISA issue, was the focus of Gobeille v. Liberty Mutual Insurance Co. 92 A Vermont statute intended

---

80. Stapleton, 817 F.3d. at 522; see also 29 U.S.C. § 1002(33)(A); 33(C)(i) (2012).
81. Stapleton, 817 F.3d. at 530; see also Jeffrey A. Herman, Resolving ERISA’s “Church Plan” Problem, 31 A.B.A. J. LAB. & EMP. L. 231 (2016).
82. Stapleton, 817 F.3d. at 520.
83. 136 S. Ct. 651 (2016).
84. Id. at 655 (a subrogation clause requires “a participant to reimburse the [employee benefits] plan if the participant later recovers money from the third party for his injuries”).
85. Id. at 655–56.
86. Id.
87. Id.
88. Id. at 655.
90. Montanile, 136 S. Ct. at 659.
91. Id.
to help reduce health care costs by creating a database cataloging health care expenditures. The statute required health insurers, including ERISA plans, to provide the state with a variety of data, including health care claims payments. The insurer alleged the Vermont statute was barred by an ERISA provision that preempts state laws that “relate to” an ERISA plan.

The Court struck down the statute. The opinion stresses that ERISA itself imposes significant recordkeeping requirements on covered plans—requirements that the Court viewed as central to the statutory scheme. The Court concluded that the prospect that states could adopt inconsistent reporting regimes—indeed, potentially fifty different regimes—created too great a risk of interference with the federal scheme.

Interestingly, the Obama administration argued that the statute was not preempted, taking the view that it would facilitate implementation of the Affordable Care Act. In response, Justice Breyer suggested, in a separate opinion, that the federal government could require production of the data itself and provide it to the states.

Conclusion

Although the Supreme Court set no precedent in *Friedrichs* or *Zubik*, the Court issued important decisions regarding the First Amendment and ERISA that clarified important procedural issues for employment and labor litigants. The 2016 Term became far more interesting when the Justices announced they will consider the legality of arbitration clauses in employment contracts that bar class-wide arbitration. Three recently granted petitions for certiorari present this question, on which the circuit courts are currently divided.

---

93. *Id.* at 940.
94. *Id.* at 941.
95. *Id.* at 943.
96. *Id.* at 947.
97. *Id.*
98. *Id.*
100. *Gobeille*, 136 S. Ct. at 949 (Breyer, J., concurring).
102. See Brief for Respondent Murphy Oil USA, Inc. in Support of Granting the Petition for a Writ of Certiorari at 1, NLRB v. Murphy Oil USA, Inc., No. 16-307 (U.S. filed Nov. 10, 2016) (arguing that the Supreme Court should grant certiorari because of circuit splits).
The Obama administration and some lower courts took the position that such provisions violate the Norris-LaGuardia Act and the National Labor Relations Act because they violate employees' statutory right to act collectively. If the government’s view changes, as anticipated in the Trump administration, the issue will be presented to the Court very differently. The implications of a ruling either way would obviously be sweeping.

103. See, e.g., Epic Sys. Corp., 823 F.3d at 1154–56 (employer arbitration provision prohibiting employees from seeking collective, representative, or class legal remedies violated National Labor Relations Act).
Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes

Joshua M. Javits*

Introduction

Just weeks before holiday travelers took to the skies in November 2016, Southwest Airlines pilots wrapped up four years of collective bargaining negotiations with a new collective bargaining agreement featuring two-digit pay increases and an enhanced retirement package.1 The negotiations, which entered federal mediation two years earlier, concluded on a high note, with more than eighty-four percent of pilots approving the final proposal.2 The journey to that point, including lengthy negotiations, three successive pilot negotiating committees, and a contract ratification failure,3 mirrors that of many major airlines, whose labor relations are governed by the Railway Labor Act (RLA) of 1926.4 Protracted collective bargaining, long typical of the airline and rail industries, now occurs throughout the private sector. In the past, threats of strikes served as powerful catalysts for stalled negotiations.5 In this age of diminished union density and a fast-growing,

---

* Joshua M. Javits is a neutral mediator and arbitrator. He is a member of the National Academy of Arbitrators; on the rosters of the American Arbitration Association, Federal Mediation Conciliation Service, and National Mediation Board (NMB); and serves on numerous permanent arbitration panels. He was Chairman and a Member of the NMB from 1988 to 1993 and a Grievance Chair for the International Monetary Fund from 2007 to 2011. Mr. Javits served on four railroad Presidential Emergency Boards, appointed by Presidents George W. Bush and Barack Obama. He would like to thank Cory Shindel and Matthew Luby for their research assistance in the preparation of this Article.

2. Id.
3. See id.
global economy, labor strife threatens to permanently drive away business and jobs to an ever-expanding number of competitors. As a result, contract negotiations linger for longer periods while mounting frustration and economic turbulence raise the stakes of provisions related to pay, benefits, and working conditions.

Mindful of the economic and psychological toll exacted by unsettled contract disputes, labor and management in many industries are exploring creative alternatives to the traditional collective bargaining process. Increasingly, parties are turning to mediation-arbitration (med-arb), a hybrid dispute resolution process, to resolve collective bargaining disputes.

Med-arb starts with mediation of a dispute by a third-party neutral who, in the event that no voluntary agreement is reached, renders a final and binding decision as the arbitrator. This process, which marries the adaptability of mediation with the finality of arbitration, serves as an efficient alternative for parties seeking productive negotiating relationships and a measure of control.

For more than twenty-five years, I have arbitrated and mediated several thousand cases in a variety of industries. I have also mediated several hundred collective bargaining disputes and have specialized experience in airline and railroad negotiations as a member of the National Mediation Board (NMB). Labor and management have recently expressed growing interest in med-arb. In the last few years, I have engaged in an increasing number of these cases. Parties may choose med-arb because it is quicker, costs less, provides more certain resolution, and is less formal than traditional collective bargaining and interest arbitration. The approach may offer special advantages for sectors in which self-help actions, including strikes and lockouts, are limited, prohibited, or unlikely.

Part I of this Article introduces med-arb as a hybrid dispute resolution process and discusses how med-arb commonly works. Part II presents med-arb in practice through the author’s experience as a mediator-arbitrator in an airline industry case. This Part offers nu-

6. See id. ("The weaker unions grew, the fewer their strikes. In the early 1950s, there were roughly 350 strikes in the United States every year. Over the past decade, there have been roughly 10 to 20 per year.").

7. Karen L. Henry, Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes, 3 Ohio St. J. on Disp. Resol. 385, 396 (1988) ("While [med-arb] has been used in a variety of arenas such as nursing, journalism, shipping, public utilities, saloons, teamsters, and education, its greatest success has been in resolving interest disputes . . . in fields where a strike is either statutorily proscribed . . . or where the parties cannot risk the cost of a strike . . . ").

merous lessons learned that may be applied beyond the airline industry to the public and private sectors generally. Part III explains the advantages of med-arb compared to traditional collective bargaining. Part IV describes med-arb’s use beyond collective bargaining in the resolution of grievances arising during the contract term. The Article concludes by discussing med-arb’s adaptability and urges parties to analyze their needs, goals, and circumstances on a case-by-case basis to determine the most appropriate dispute resolution tool.

I. Uses, Goals, and Phases of Med-Arb

Unions and management generally use med-arb to resolve two types of disputes: individual or group grievances (grievance med-arb) or disputes arising during collective bargaining negotiations (collective bargaining med-arb). Although the two types differ in subject matter, they share a similar process. This Article focuses primarily on med-arb as an alternative to traditional collective bargaining and interest arbitration. Part IV discusses med-arb’s use in grievance resolution.

Med-arb offers a unique approach to interest arbitration by affording parties maximum control over bargaining while ensuring timely and final agreements without strikes or shutdowns. In med-arb, a single neutral serves a dual role as both mediator and arbitrator. The neutral begins as a mediator and, if unable to achieve full agreement, assumes the role of an arbitrator, empowered to render a final and binding decision on all issues.

The parties must agree to use med-arb and actively participate in the process, ideally reaching consensual resolution before binding arbitration becomes necessary. The goal of the process is to secure “a final and binding result the parties themselves would have reached had they been able to resolve their dispute without the intervention of a third party.” Thus, the neutral acts in the parties’ interests to the maximum extent possible and does not impose independent decisions upon them.

Med-arb enables parties to resolve collective bargaining disputes within a set period and at reduced cost by averting the need to engage
separate neutrals regarding the same issues. The streamlined approach’s benefits are especially pronounced if parties can resolve some, but not all, issues during mediation.

Before med-arb commences, the parties meet and agree to the process: the time frame, schedule, and order of subjects for each phase; the selection of the mediator-arbitrator; the number of issues to be considered in each phase; and the use of subject matter experts, among other elements. A protocol agreement reflects the parties’ engagement and commitment, which facilitates an efficient and productive process. This contrasts with the traditional process, in which various factors may be beyond the parties’ control.

A. Mediation Phase

In traditional mediation, a third-party neutral facilitates negotiations to help parties resolve disputes. “[T]he third party’s function is to clarify the issues, appeal to the parties’ reasoning processes by using the arts of persuasion, and (when specifically authorized by the parties) make recommendations to them.” The mediator may also help sequence and group issues for discussion and call for sessions with experts or leaders.

Importantly, mediators lack authority to impose solutions upon the parties, who ultimately determine for themselves how to resolve substantive issues. In med-arb, the mediator proceeds similarly, but potentially possesses arbitral authority. The neutral derives power from the potential to act as the ultimate decider of any remaining issues and must carefully calibrate whether and when to use such influence.

The first stage of med-arb closely resembles traditional mediation. Each party meets and communicates separately with the mediator, who clarifies the facts and issues and probes the parties to determine their real interests and thoughts on how to resolve the disputes at hand. Next, the parties meet jointly with the mediator who tries to

---

16. Joe Tirado, Binding Mediation: A New Form of Amiable Composition, 9:3 N.Y. DISP. RESOL. LAW., Fall 2016, at 44.
17. Id.
19. Id. at 56–57.
21. Id. at 140.
22. Id. at 139.
23. Kagel, supra note 8, at 241.
24. Id. (citing Sam Kagel & John Kagel, Using Two New Arbitration Techniques, 95 MONTHLY LAB. REV. 11, 12 (1972)).
25. Fullerton, supra note 18, at 55 (“Mediators often meet separately with each party to explore facts and beliefs that could affect the outcome of mediation . . . ”).
develop common understandings and explore options for resolution. Finally, the mediator secures a final written agreement.\textsuperscript{26}

The mediator's success depends on identifying the parties' needs and wants, not simply those that the neutral might deem desirable or wise.\textsuperscript{27} Consistent with this role, in the opening mediation phase of med-arb, neutrals should be reluctant to use the power they may ultimately assume as arbitrators.

B. "Muscular" Mediation

Despite a skilled mediator's assistance, parties may find themselves at loggerheads or in negotiations that do not progress. At this juncture, the mediator-arbitrator may exercise the clout afforded by the dual role and offer an opinion on how issues may be resolved.\textsuperscript{28} When the parties flail, drift, or get stuck on a seemingly irresolvable issue, the neutral's authority to be an interest arbitrator can be a useful catalyst.\textsuperscript{29} However, "the line between appropriate pressure to settle and inappropriate coercion" remains imprecise.\textsuperscript{30} Parties have a right to make "free and informed choices as to process and outcome" in dispute resolution.\textsuperscript{31} Neutrals must be sensitive to the parties' desires and proceed cautiously in exercising arbitral authority to ensure they do not interfere with the parties' right to self-determination.\textsuperscript{32}

C. Arbitration Phase

While mediation offers parties exclusive control over the outcome, traditional arbitration delegates this role to a third party with final decision-making authority.\textsuperscript{33} Arbitration involves a more formal adjudicative process, including the presentation of evidence, hearing of witnesses, and reliance upon relevant standards and principles.\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{26} Id. at 56 (if agreement is reached, med-arb is terminated; if no agreement, med-arb commences).
\item \textsuperscript{27} Id. at 54–55.
\item \textsuperscript{28} Christopher Honeyman, Hybrid Processes, Beyond Intractability (July 2003), http://www.beyondintractability.org/essay/hybrid-roles (In med-arb, a neutral's "pressure can take the form of an implied threat of an adverse decision if one party is seen as being 'unreasonable'.")
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Blankenship, supra note 9, at 25.
\item \textsuperscript{31} Model Standards of Conduct for Mediators, Standard I.A (AM. Arbitration Ass'n et al. 2005).
\item \textsuperscript{32} Id. at Standard I.B.
\item \textsuperscript{33} Gould, supra note 20, at 141. Parties may limit an arbitrator's authority by agreement. Notably, even in cases in which a party feels the arbitrator has overstepped the neutral's limited authority, courts are very hesitant to overturn the decision. \textit{See}, e.g., Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2000) (quoting E. Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000)) ("[I]f an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'").
\item \textsuperscript{34} Elkouri & Elkouri, How Arbitration Works 7-18, 7-25 to 7-29, 8-3, 8-7 to 8-55 (Kenneth May ed., 7th ed. 2012). Arbitrators may decide like matters distinctly, but "will
In traditional cases, arbitrators decide matters based on the record before them, which may reflect technical issues and not necessarily reflect each parties’ underlying needs and concerns.\footnote{See United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960) ("An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.").} Seeking to avoid ex parte communications, arbitrators virtually never meet or communicate separately with a party; rather, the parties meet jointly so both sides can hear and rebut each other’s arguments.\footnote{See Code of Prof’l Responsibility for Arbitrators of Labor-Mgmt. Disputes § 2(D)(1)(a)-(b) (Nat’l Acad. of Arbitrators et al. 2007). In more formal arbitrations, “[t]he arbitrator should . . . have no contact of consequence with representatives of either party while handling a case without the other party’s presence or consent.” Id. § 2(D)(1)(a); see also Honeyman, supra note 28.}

By contrast in med-arb, the parties’ priorities are better reflected in any subsequent arbitration\footnote{Daniel Ish, Commentary, Mediating Grievances, Nat’l Acad. of Arb. Proc. 96, 102 (1993).} because the mediator has become familiar with the parties’ real concerns and the direction of negotiations on those issues during the mediation phase.\footnote{Blankenship, supra note 9, at 18. Parties may choose to limit the arbitrator’s use of confidences from mediation out of concern about bias. Id. at 22–23. In such cases, the arbitrator will still possess familiarity with the basic issues and positions of the parties that may speed resolution of disputes. Id.} The neutral’s intimate understanding narrows the focus to permit more expedited adjudication than would be available in ordinary interest arbitration.\footnote{Id. at 18.} Thus, parties may submit shorter briefs and oral arguments because many of the underlying facts and positions have already been developed and understood by the neutral during mediation.\footnote{See Pappas, supra note 10, at 168.} This abbreviated review is a distinct advantage over ordinary independent arbitration that is often expensive and time consuming.\footnote{Fuller, supra note 18, at 56 (“The med-arb process has no governing ethical code of its own. For ethical guidance one must look to the Mediator Standards and the Arbitration Code.”).}

D. Ethical Considerations for the Med-Arb Process

Identifying appropriate ethical standards for mediator-arbitrators requires a unique blend of the separate ethical models for mediators and for arbitrators.\footnote{Fullerton, supra note 18, at 56 (“The med-arb process has no governing ethical code of its own. For ethical guidance one must look to the Mediator Standards and the Arbitration Code.”).} Model ethical rules for mediators demand strict confidentiality.\footnote{Model Standards of Conduct for Mediators, Standard V (Am. Arbitration Ass’n et al. 2005).} Mediators become privy to contract subjects and terms, as well as more personal confidences (such as the parties’ poten-
tial areas of concession), that may not be shared with the public or other parties. Med-arb potentially brings these confidences within the purview of the arbitrator, who traditionally would not possess private knowledge of this kind and would instead decide the matter on the record alone. A neutral’s prior understanding of the parties’ confidences and positions creates potential for mediation to “taint” the process, as well as the ultimate outcome in arbitration.

Parties typically address potential for mediator-arbitrator bias in three distinct ways. First, parties may ask an arbitrator to ignore confidences made during mediation. In traditional arbitration, if a party offers irrelevant or objectionable evidence during a formal hearing, it may be excluded. Confidences received during mediation may be similarly ignored by skilled arbitrators.

Second, parties may instead permit the neutral to use confidential information learned in mediation during the arbitration. This approach eliminates much of arbitration’s stilted and carefully crafted advocacy and instead focuses on the parties’ real underlying interests. It also enhances med-arb’s central benefit—finding a result that the parties would have reached had they been able to do so on their own. The combined med-arb process, using all available information, delivers the benefits of speed, informality, and lower cost. On the other hand, if the parties know that the mediator will use information learned in mediation in the arbitration, they may be reluctant to share their true concerns and priorities in mediation. For example, they may not think it strategic to reveal areas in which they are willing to make concessions.

44. See Fullerton, supra note 18, at 55 (discussing mediator reliance on confidential information).
45. Id. See Textile Workers Union of Am. v. Am. Thread Co., 291 F.2d 894, 901 (4th Cir. 1961) (affirming denial of union’s enforcement request because arbitrator went outside record and based decision on findings from different arbitration proceeding). See also Elkouri & Elkouri, supra note 34, at 4-14 (“[O]ften disclosures will be made by a party in the course of mediation that would not be made to the neutral functioning solely as arbitrator.”).
46. It is accepted practice in arbitration that “any offer made by either party during the course of conciliation [mediation] cannot prejudice that party’s case when the case comes to arbitration. It is the very essence of conciliation that compromise proposals will go further than a party may consider itself bound to go, on a strict interpretation of its rights.” Fulton-Sylphon Co., 8 LA 993, 996 (Greene 1947), quoted in Elkouri & Elkouri, supra note 34, at 932; see also Ish, supra note 37, at 102.
47. Pappas, supra note 10, at 177.
49. Kagel, supra note 8, at 244.
50. See generally Blankenship, supra note 9, at 16–21 (discussing advantages of med-arb).
Third, parties sufficiently concerned about the use of confidential information may select different neutrals to serve as the mediator and the interest arbitrator. The two neutrals may proceed independently or “overlap,” with the arbitrator present for all but the parties’ individual meetings with the mediator. Naturally, by using a separate arbitrator the mediator no longer enjoys the influence inherent when serving dual roles. In addition to increased time and expense, separate roles limit the arbitrator’s awareness of the parties’ underlying interests that might have led to a resolution more consistent with their true concerns.

Parties must determine the mediator-arbitrator’s role in light of their dispute’s unique circumstances. By clarifying whether, and to what extent, the arbitrator may use confidential information obtained during mediation, parties can assess the benefits and risks of each approach and choose the process that best fits their needs. Alternatively, the parties may intentionally not resolve the issue and allow the neutral to exercise judgment about whether some information gained in mediation may be employed to reach a reasonable and fair resolution.

E. Selection of the Mediator-Arbitrator

Selecting the right mediator-arbitrator is of paramount importance. A mediator-arbitrator should be knowledgeable about the relevant industry’s labor relations and trusted as a neutral by both sides. Even a mediator-arbitrator with deep knowledge of an issue should not dictate the issue’s outcome on the basis of that insight. Instead, the mediator-arbitrator’s expertise can accelerate understanding of the parties’ issues, and in turn, the negotiating process.

The neutral should act modestly and refrain from exerting excessive influence in mediation (intentionally or not) that can arise from the parties’ perception of the neutral as the ultimate decider. In

51. Fullerton, supra note 18, at 57.
52. Id.
53. See id. at 60 (“With informed consent, those who freely choose med-arb for its expediency over principle assume the risk of demonstrated flaws that may affect their specific case.”); Honeyman, supra note 28 (knowledge of the risks of shared neutral roles enables parties “to make creative uses of available neutral talents”).
54. See Blankenship, supra note 9, at 23 (“[P]arties to med-arb are free to fashion the process as they see fit and they can implement specific procedures or safeguards to deal with the confidentiality issues . . . . [T]his issue ultimately rests with the competence of the neutral and the trust the parties place in him or her.”).
55. See Martin C. Weisman, Med-Arb: The Best of Both Worlds, DISP. RES. MAG. 40, 41 (Spring 2013) (“The neutral’s personality, substantive expertise and experience all play significant roles in creating and promoting [the] trust” required for med-arb.).
the arbitration phase, the neutral should remain sensitive to knowledge about the parties’ inclinations gained in mediation.\footnote{Kagel, supra note 8, at 244.}

\section*{II. Med-Arb in Practice}

Med-arb offers a vibrant alternative for parties seeking to expedite and improve traditional collective bargaining.\footnote{Blankenship, supra note 9, at 14 (“In the labor arena, med-arb has apparently found its greatest success in resolving interest disputes (contract negotiation disputes) in fields where a strike is either prohibited or prohibitive.”).} It may prove particularly attractive in industries in which self-help is restricted or undesirable.\footnote{Id.} This Part presents an example of med-arb based on my experience in the airline sector, with the understanding that the process may be similarly applied in other industries and sectors, including those governed by the National Labor Relations Act (NLRA) and state labor laws. Naturally, mediation proceedings and deliberations require strict confidentiality.\footnote{SEE MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard V (AM. ARBITRATION ASS’N ET AL. 2005) (“A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.”).} The parties mentioned here—Compass Airlines and the Air Line Pilots Association, International (ALPA)—reviewed this Article prior to publication and approved discussions of my role as mediator-arbitrator as well as the content and form of their bargaining.\footnote{Discussion on file with author.}

\subsection*{A. Traditional Collective Bargaining under the Railway Labor Act}

Drafted in an age of violent and frequent strikes,\footnote{Mark A. Schuler, The Railway Labor Act of 1926 and Modern-Day Airline Labor Strife: Progress Toward Labor Peace Begins with Overruling Williams v. Jacksonville Terminal Co., 21 SEATTLE L. REV. 190, 191–92 (1997).} the Railway Labor Act seeks to neutralize relations in the transportation sector by extending to airline and railroad employees the rights of representation and collective bargaining and to management the promise of fewer strikes by delaying use of “self-help” measures.\footnote{Id. at 192; see Railway Labor Act of 1926, amended by Act of June 21, 1934, ch. 691, 48 Stat. 1185, 1186 (1934) (current version at 45 U.S.C. § 151a (2012)). The Act was amended in 1936 to include the expanding airline industry. 45 U.S.C. § 181 (2012).} The RLA directs parties “to exert every reasonable effort to make and maintain agreements” and prioritizes the avoidance of strikes through peaceful settlements.\footnote{45 U.S.C. § 152, First (2012). This requirement is analogous to the National Labor Relations Act’s duty to bargain in good faith. Id. § 151(a) (seeking to “avoid any interruption” in commerce and operation as well as “prompt and orderly settlement of all disputes”).}
Collective bargaining agreements (CBAs) in the railroad and airline industries remain in force indefinitely, but are typically subject to renegotiation on a specified “amendable date,” typically every three to five years. Collective bargaining begins with direct negotiations between the parties, which may endure for months, years, or indefinitely. In direct negotiations, negotiating teams representing management and unions bargain face-to-face without the facilitation of a neutral. During that time, parties frequently engage in “positional bargaining”—presenting opposing positions at the outset, pressing for these positions during negotiations, and ideally achieving an agreement through compromise.

If negotiations fail to progress, one or both parties may apply for mediation assistance from the NMB, an independent federal agency charged with administering sections of the RLA. The NMB uses its “best efforts” through mediation to resolve disputes arising from “changes in rates of pay, rules, or working conditions.”

If parties fail to reach an agreement or reach impasse in mediation, the NMB may propose voluntary but binding interest arbitration. Both parties must consent to arbitration for the offer to be deemed accepted. The RLA permits flexibility in the conduct of arbitration, but requires, at a minimum, that parties be provided “a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person.” The RLA permits parties and the arbitrator to determine how, and by what standards, arbitration decisions will be made.

In practice, arbitration is seldom used in collective bargaining disputes under the RLA because labor and management are reluctant, particularly after lengthy negotiations, to relinquish control over the

---

66. Id. at 22–23.
68. 45 U.S.C. § 154–55 (2012). The NMB may also intervene of its own accord in a dispute and require mediation in cases where negotiations have reached an impasse.
69. 45 U.S.C. § 155, First. The NMB may also intervene of its own accord in a dispute and require mediation in cases where negotiations have reached an impasse.
70. Id.
71. Id.
content of their CBAs to third parties unaffected by the outcome.\textsuperscript{74} Indeed, airline parties used voluntary arbitration in only 3.5% of contract negotiations from 1982 to 2002.\textsuperscript{75}

If either party refuses the NMB’s offer of interest arbitration, the agency may issue a notice releasing the parties from mediation. This triggers a thirty-day “cooling off” period, during which the parties may not change their behavior or the contract’s terms.\textsuperscript{76} Thereafter, the parties may engage in “self-help,” including strikes, lockouts, or unilateral implementation of new contract terms.\textsuperscript{77}

Alternatively, the NMB may recommend the creation of a Presidential Emergency Board (PEB) following any failed mediation that “threaten[s] substantially to interrupt interstate commerce” and to deprive a region of “essential transportation service.”\textsuperscript{78} PEBs seek to resolve the parties’ disputes and preserve the status quo for sixty days, after which the parties may use self-help.\textsuperscript{79} While the RLA envisions PEBs as the end of the statutory process, Congress may, of its own volition, become involved in settling a dispute.\textsuperscript{80}

\textbf{B. Med-Arb: An Alternative to Interest Arbitration}

In both the airline and railroad industries, the RLA bargaining process tends to take years and may require significant government intervention.\textsuperscript{81} The Supreme Court has characterized the process as “almost interminable.”\textsuperscript{82} The NMB has virtually unreviewable discretionary authority to release parties to self-help, but it hesitates to do so in light of the powerful economic impact of shutdowns in the transportation sector.\textsuperscript{83} A shutdown of freight railroads, which negotiate as a multi-employer group, would immediately affect a variety of industries, including agriculture, construction, manufacturing, mining, and

\begin{itemize}
  \item \textsuperscript{74} von Nordenflycht, \textit{supra} note 65, at 22.
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} 45 U.S.C. § 155, First (b) (2012).
  \item \textsuperscript{77} Pan Am. World Airways, Inc. v. Int’l Bhd. of Teamsters, Local 732, 894 F.2d 36, 38 (2d Cir. 1990).
  \item \textsuperscript{78} 45 U.S.C. § 160 (2012).
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Frequently Asked Questions: Mediation, at no. 28, Nat’l Mediation Bd., http://www.nmb.gov/services/mediation/frequently-asked-questions--mediation/; von Nordenflycht, \textit{supra} note 65, at 19 (Once cooling-off periods have expired, “the President can refer the case to Congress, requesting that body to legislate a settlement.”).
  \item \textsuperscript{82} Detroit, Toledo & St. Louis R.R. Co. v. United Transp. Union, 396 U.S. 142, 149 (1969).
  \item \textsuperscript{83} See Bldg. Maintenance, Serv. & R.R. Workers, Local 808 v. Nat’l Mediation Bd., 888 F.2d 1428, 1430, 1433 (D.C. Cir. 1991) (The scope of review of Board decisions—including determining whether the NMB acted outside of its authority in refusing to release a party from mediation—“is one of the narrowest known to the law.”).
\end{itemize}
energy. A shutdown of one of the four major airlines would immediately disrupt business and vacation travel for approximately 300,000 people per day and devastate business and hospitality sectors.

The NMB’s reluctance to release parties to self-help has compelled RLA unions and management to explore more efficient and predictable bargaining models. Med-arb provides an alternative to traditional interest arbitration under the RLA, enabling parties to preserve more control over the bargaining process on a known and accelerated timeline.

1. Med-Arb in the Airline Industry: Compass Airlines/Air Line Pilots Association

Compass Airlines arose from the 2005 bankruptcy of Northwest Airlines. A 2006 letter of agreement (LOA) between Northwest and ALPA created a new regional carrier to serve Delta flights in Minneapolis and Detroit. The LOA also specified med-arb to establish an initial CBA.

The LOA’s schedule mandated an expedited negotiation process, including about four months (120 days) of direct negotiations, one month (thirty days) of mediation, and finally, arbitration of up to ten issues. The parties reached agreement on most issues within six months. Based on that success, the parties voluntarily agreed to use med-arb for their 2012–2013 CBA negotiations. I served as the mediator-arbitrator for these second-round negotiations.

This time, the parties’ schedule specified six months of direct negotiations, three months of mediation, and two months for preparation and presentation of the interest arbitration case. In total, the LOA allowed eleven months to arrive at an agreement—a very short period for NMB airline flight crew negotiations, which average approximately three years at the NMB. The parties limited the arbitration to twenty issues each. Significantly, the parties determined the arbitrator should decide any remaining issues through a “regional carrier standard,” that is, by “selecting the proposal that more closely conforms to” that of similar carriers operating similar aircraft.


87. Id. at 1–2 (arbitrator’s jurisdiction defined as “[s]ubject to the provisions of this paragraph K, as to each open issue on which the Company and ALPA do not reach agreement through direct negotiations or mediation (limited to twenty (20) issues per party), the Neutral shall decide the issue by selecting the proposal that more closely conforms to the regional carrier industry standard for carriers operating the same or similar aircraft or by fashioning a determination that in his/her judgment conforms to the regional carrier industry standard for carriers operating the same or similar aircraft”).
The process began slowly because the parties sought to address multiple issues simultaneously. They met for only eighteen days of the six months set aside for direct negotiations, discussing and resolving few issues. Then, during the subsequent ninety-day mediation period, the parties resolved nearly all of their issues. In fact, the parties extended the mediation into part of the two-month period set for interest arbitration to resolve remaining issues. Only seven issues remained for interest arbitration, and, by the end, the parties drew extremely close on those issues.

A. Mediation Phase

Mediation commenced with an eye toward jumpstarting negotiations. Two parameters provided focus and baselines to guide and streamline the med-arb process. First, we identified similar carriers (comparators) in the regional industry whose contract provisions we would use as the industry standards for proposals under consideration.

Second, we generally defined the scope of the term “issue” so the parties could ascertain which kinds of disputed provisions could be submitted to the arbitrator for final decision. For example, the parties questioned whether the entire health insurance section was one issue or instead whether narrower aspects of health insurance constituted one issue (e.g., individual versus family premium rates, co-pays, out-of-pocket maximums). The parties determined that an issue was to be found somewhere in between: not a whole contract section, but not necessarily a single, isolated provision. Rather, an item or items with a strong interrelationship might be negotiated together. The parties did not create a more precise description because the conclusion depended on the subject matter and on common understandings between negotiators—something akin to “I will know it when I see it.”

These discussions, far from semantic exercises, enabled the parties to prioritize matters for discussion and develop realistic expectations of what negotiations could accomplish. Once mediation began, the parties engaged in creative problem-solving, frequently departing from practices of comparator airlines to consider their unique circumstances and needs.

We generally met twice a month. Between sessions, the parties worked on new sections, developed proposals, and crafted “what if”-style contingent proposals. As the mediator, I regularly sent summaries detailing accomplishments of the previous session and highlighting remaining issues. My communications also gave the parties specific assignments for upcoming sessions. Simultaneously, a joint labor-management drafting committee worked to craft contract language for issues on which the parties had agreed. Subject matter experts worked in joint committees on technical areas, such as retire-
ment and insurance, but refrained from exchanging proposals between negotiating sessions.

B. ARBITRATION PHASE AND FUTURE DISPUTES

During the arbitration phase, the parties each presented twenty issues in a joint session. Over several days, they jointly worked out numerous trade-offs and compromises to obtain resolutions. Seven issues remained for the neutral to resolve. Evidencing the parties' collaborative spirits, they outlined shared priorities on the remaining issues to ensure that my ultimate decision was consistent with their tacit agreement. This facilitated achieving med-arb's objective—to secure “[a] final and binding result the parties themselves would have reached had they been able to resolve their dispute without the intervention of a third party.”88 Satisfied with the process, both sides agreed to med-arb for their 2018 bargaining.

2. Lessons Learned

The Compass/ALPA med-arb experience offers several lessons for other parties seeking to reinvigorate their own collective bargaining processes. Flexibility in both the processes and the parties' expectations proved essential to the resolution of complex bargaining issues. The mediator-arbitrator's shifting role—at times facilitating discussions, nudging action, and suggesting solutions authoritatively—compelled the parties forward without resorting to costly, high-risk self-help.

While nuances of individual negotiations and participants vary, the considerations that follow may be useful in any med-arb process.

Embrace new perspectives. Med-arb gave the parties greater confidence that they would reach a deal, motivating them to work hard toward consensus. Compared to traditional negotiations and mediation, the parties' commitment to a new process energized them and promoted a more collaborative spirit.

Identify and Address Major Issues Early. The Compass/ALPA negotiations illustrate the efficiency of clarifying issues, definitions, and scope for the entire process at the outset. For example, by identifying the comparator airlines early, both Compass and ALPA understood the economic contours of the prospective agreement when mediation commenced. By reversing the order of the subjects to be addressed—placing factors affecting economics first—the parties understood the economic contours of the deal and could focus on the details in negotiations. This approach models that employed in nearly all commercial transactions.

Limit Issues for Arbitration. Dispute resolution was accelerated by limiting the number of issues that could be arbitrated. By permitting only a few issues to reach that end stage, the parties narrowed

88. Kagel, supra note 8, at 244.
their focus in mediation. Efficient and timely resolution promotes good will among the parties and, importantly, sidesteps potential changes in economics, staffing, and expectations that routinely undermine negotiations of extended duration.

**Limit the Duration of Med-Arb.** Negotiated airline CBAs frequently meet with failed union ratification votes. This may result from the inordinate duration of the bargaining process. Constituent expectations rise and frustration grows as negotiations continue. Bargaining unit members grow disenchanted with the lack of progress, and management becomes anxious about its ongoing devotion of resources to an uncertain end. A med-arb process that addresses major issues early and concludes negotiations within a year minimizes the likelihood of devastating contract rejections.

Designating a limited period for concluding the med-arb process likewise minimizes the effect of market and personnel changes inevitable in a dynamic economy. During the three years typical of airline industry negotiations, for example, economic changes and competition often cause parties to shift their assumptions and positions at the bargaining table—a significant impediment to progress. Changes to the players in collective bargaining (including members of negotiating committees, officials on master executive councils, and even management representatives) compound delay. New players may be unfamiliar with the subtle trade-offs of prior bargaining, and it takes time to rebuild the trust necessary for effective problem-solving. With a known end date for mediation and arbitration, parties can prioritize issues for discussion and obtain greater predictability amid an ever-shifting playing field.

**Stay Flexible.** Although a general idea of how and when to use mediation and arbitration existed at the start of the Compass/ALPA process, the parties ultimately used these tools in less predictable ways. Mediation was the steady oar. I acted as arbitrator only when necessary, for example, to give verbal input to both sides on how I would decide certain key issues. In other circumstances, different timing and uses of both mediation and arbitration might be appropriate. A plan is helpful, but flexibility is essential. Collective bargaining is a dynamic process. The dispute resolution process should flexibly reflect this dynamism.

---

89. von Nordenflycht, supra note 65, at 25 (“[A]necdotal evidence from the industry suggests that negotiations become particularly difficult—and hence lengthy—if the economic conditions facing the bargaining parties change significantly once bargaining has started.”).

90. See Blankenship, supra note 9, at 18.

91. Henry, supra note 7, at 397 (“Negotiation, not adjudication, is the cornerstone of med-arb when used as a substitute for interest arbitration.”).
**Do Not Be Afraid to Nudge.** The parties occasionally felt that they were at impasse or grew seriously discouraged. At such turns, I embraced the arbitration authority of med-arb and suggested a path to agreement. The parties assumed control from there. Modeling a viable alternative brought the parties back to a constructive give-and-take each time. By contrast, in traditional mediation, a mediator lacks decision-making authority, and the suggestion of alternative resolutions risks the appearance of bias or endorsement of a particular position. Mediators necessarily self-censor and hold back in this context, and matters remain unresolved. In med-arb, use of the arbitrator role offers potential resolution of key issues. The parties’ frustration gives way, and there may be a greater willingness to embrace suggestions from a neutral with authority.

**Reassure Parties and Accelerate the Process.** Parties typically move incrementally as they test each other’s depth of commitment to a position, but they often react without full information. Decisions are predictably less informed at the end of negotiations when commitment on big issues is necessary. Parties regretfully leave value on the table. As an alternative, the arbitrator might speak with each party and arrive at a suggested approach. This can reassure the parties and alleviate doubts that might otherwise prevent agreement.

**Use the “Arbitrator Made Me Do It” Card.** In traditional mediation, the power of persuasion frequently proves insufficient to overcome the parties’ risk avoidance. With final and binding authority as an arbitrator, the mediator-arbitrator may make suggestions that move parties from recalcitrance to action. “The arbitrator made me do it” rings a more convincing tone than “the mediator made me do it.” Although some may think that recommendations alone are impotent, the greater structure and formality of the process establishes a narrower range for settlement that positively affects negotiating dynamics.

### III. Comparison of Med-Arb and Traditional Bargaining

Parties engage in traditional interest bargaining in anticipation of a contract’s creation or amendment. Their process is often guided by terms and timelines set forth in a CBA. Management and unions exchange and press for desired contract terms, relying on information

---

92. See Kagel, supra note 8, at 242.
93. Id. at 244–45.
94. Id. at 245 (parties listen more attentively listen to mediator-arbitrators than traditional mediators, in part, for clues of the ultimate outcome).
95. Id.
96. Honeyman, supra note 28 (noting that med-arb suggestions “carry more weight than those of a ‘pure mediator,’ . . . because the mediator-arbitrator may have the final decision if the case is unresolved”).
about personalities and positions from prior negotiations. Parties engage in a delicate dance of interests, compromises, and risks that may endure indefinitely. In its ideal form, traditional bargaining unites parties who approach negotiations in good faith with a shared desire for efficiency, fairness, and resolution.\(^97\) Often, however, the uncertain duration and outcome of traditional bargaining breed discontent because deeply felt needs and desires remain unmet.

Despite these difficulties, some parties prefer traditional bargaining to alternative procedures for two reasons. First, the traditional process allows at least a threat of self-help (i.e., a strike or lockout) at its conclusion. The parties or their constituents might believe they can use this as leverage in negotiations, and, consequently, will be reluctant to relinquish this “ace up their sleeve.”\(^98\) Second, both unions and management hesitate to cede final authority over a contract to any individual, perhaps especially to a neutral third party with no stake in the outcome.\(^99\) Management resists transferring control over major financial and operational decisions to an arbitrator, and unions, in turn, resist giving up the right to self-help and its perceived leverage. Union members may be understandably reluctant to relinquish the most important power in the bargaining process—their ratification vote.

Med-arb, by comparison, offers a quicker and less volatile process, compelling parties to work, not through threats of delay and inaction, but with the promise of progress and finality.\(^100\) Parties in med-arb develop and agree to the process themselves, including a mutually desirable time frame for concluding a final agreement.\(^101\) Consequently, parties strongly influence the outcome.

Typically, med-arb begins with mediation and concludes with arbitration of a limited number of remaining issues. Because the parties know not all issues may reach arbitration, they must prioritize concerns and assume responsibility for resolving most bargaining issues in mediation. This commitment and structure may streamline and speed negotiations, potentially avoiding the changes in negotiating participants, the economy, and industry competition that frequently

\(^{97}\) Gould, supra note 20, at 113 (“Good faith bargaining is an attempt to consummate an agreement.”).

\(^{98}\) Henry, supra note 7, at 391 (“[S]trikes and lockouts have traditionally been the most effective albeit drastic means of promoting each parties’ bargaining position.”).

\(^{99}\) See Rissetto, supra note 73, at 147 (“When management and labor discuss or confront interest arbitration, everyone is uncomfortable. Collective bargaining has failed to result in an agreement, and some third person may be asked to complete the task.”).

\(^{100}\) Blankenship, supra note 9, at 21.

\(^{101}\) See Fullerton, supra note 18, at 56.
occur during multi-year bargaining. Improved communications and effective problem-solving methods can maximize each party’s goals and nourish a more constructive relationship in the contract period that follows. As an additional benefit, the process typically proves less costly than traditional bargaining because of defined and speedier mediation and arbitration periods and reduced expenses for planning, negotiating, and travel.

Perhaps most importantly, med-arb secures a definite agreement without resort to strikes, lockouts, or other uncertainty. This avoids much-feared disruptive economic impacts and potentially minimizes tension, threats, and posturing—typical, and perhaps necessary, means of leverage in traditional bargaining. Because med-arb typically ends in arbitration, ratification votes by bargaining unit members are seldom necessary. With confidence that an agreement will not meet rejection in a ratification vote and that negotiations will not be interminable, management and unions can make genuine and meaningful offers.

IV. Med-Arb of Grievances

Med-arb may be used beyond collective bargaining to resolve grievances that arise during the contract term. Virtually all private sector CBAs provide for resolving contract interpretation and application disputes in a multi-step grievance process, usually culminating in arbitration. Few CBAs, however, provide for med-arb of grievances. It is

102. See Blankenship, supra note 9, at 18 (“That med-arb possesses superior cost and time efficiency over separate mediation and arbitration proceedings is not fairly debatable.”).

103. Ish, supra note 37, at 98–99.

104. See Thomson, supra note 48 (benefits of med-arb include reduced time, expense, and inconvenience).

105. Henry, supra note 7, at 389–90.

106. Of course, an initial agreement to engage in med-arb may be subject to membership ratification, depending on the constitution and bylaws of the labor organization. See Transp. Workers Union v. Hawaiian Airlines, No. 08-00524, 2009 WL 972483 (D. Haw. Apr. 8, 2009).

107. Parties rarely invert the order of med-arb in a variation known as arb-med. In arb-med, an arbitrator (or panel of arbitrators) holds a full hearing and provides a written decision before trying to mediate a voluntary resolution between the parties. The arbitration decision provides a baseline alternative that ideally spurs the parties to craft a voluntary settlement of their own making. See Fullerton, supra note 18, at 58.

108. Kagel, supra note 8, at 243.


more common for agreements to require mediation of grievances, and then, absent resolution, arbitration by a different neutral, although many grievance procedures make no reference at all to mediation.\footnote{111. See Honeyman, \textit{supra} note 28 (distinguishing med-arb’s use of a shared neutral from the common, sequenced use of dispute resolution processes, “such as a grievance procedure that provides first for negotiation, then mediation, and finally for arbitration, where each of these processes is carried out by a different person”).}

Grievance med-arb enables informed and efficient decision-making in contract disputes, culminating in a settlement or binding arbitration decision. The process allows parties to raise their concerns, obtain a neutral evaluation of their dispute by a third party, and create a resolution that meets their shared needs. In so doing, med-arb avoids the win-lose result of pure arbitration, which can harm the parties’ relationship and lessen their ability to work together to resolve future conflicts. Grievance med-arb is typically less expensive, contentious, and time consuming than a series of arbitrations.

Moreover, med-arb can go beyond the narrow confines of a single pending grievance to reach consensual solutions that avoid future disputes. Grievance med-arb uses labor-management collaboration to resolve disputes that might otherwise accumulate in lengthy and formal arbitrations or arise as issues in future collective bargaining. The flexible process, created by the parties themselves, allows participants to address issues in creative ways that best meet their needs. If existing contract terms inadequately resolve a dispute and gap filling is required, the mediator-arbitrator is better able to predict the resolution parties would have reached in negotiations. The process might lead to a new solution, such as a letter of agreement or memorandum of understanding. The process promotes mutual trust and openness that allow the parties to respond quickly and fairly to dynamic economic conditions during the term of the CBA.

Grievance med-arb has been criticized for undermining enforcement of the parties’ contract terms by permitting resolution through trade-offs, similar to those in collective bargaining, that broaden the focus beyond the terms in dispute. However, the process is not intended to be a vehicle for continual renegotiation or reconsideration of contract terms, which would foster uncertainty and instability and undermine future bargaining. If a party attempts to expand issues beyond the existing contract’s terms in med-arb, the opposing party may request, and arbitrators may provide, formal arbitration hearings and formal decisions and awards based on evidentiary presentations alone. Of course, if the parties wish to use med-arb to address extra contractual issues, they may do so voluntarily.

At the end of their bargaining process using med-arb, the parties in the Compass/ALPA dispute requested my assistance in dealing with...
future grievances under their contract. The parties determined that my prior experience with the contract terms, the parties, and the compromises embodied in the agreement would foster a speedier and smoother grievance process, without need for extensive formal presentations of evidence to explain contract disputes.

The parties’ expectation proved accurate. During my work as a grievance mediator-arbitrator for the parties several times each year, the parties have engaged in constructive dialogue and arrived at resolutions relatively quickly. When the parties fail to reach agreement, despite facilitation, a statement of my likely findings in arbitration fosters more realistic assessments of positions and allows the parties to craft novel compromises. Full arbitration decisions, while occasionally issued during this process, were most often awards reflecting the consent of the parties, rather than my own independent solutions.

Changes to negotiating teams and other staff commonly occur during multi-year contracts, and the participants in the Compass/ALPA med-arb process are no exception. Union officials and members of the negotiating committees on both sides have changed significantly in the two years since the contract’s formation. As the mediator-arbitrator at the inception of negotiations, I remain one of the lone constants from the bargaining stage. This continuity is a distinct advantage of grievance med-arb and lends credibility to my assessments, which may be more important than the power I wield as an arbitrator with final and binding authority.

Generally, parties can call for an ad hoc mediator-arbitrator to resolve a particular grievance.112 My experience as the mediator-arbitrator for contract disputes at Compass/ALPA was rather unique. Regardless of which approach is used, a mediator-arbitrator’s familiarity with the issues, the contract, and the parties, along with the multiplicity of procedural tools, enables fair and quick grievance resolution.113

Conclusion

Med-arb provides a flexible and powerful process for achieving collective bargaining agreements when it aligns with parties’ desires and expectations. Each negotiation is unique, and the selection of the best dispute resolution approach demands consideration of the specific parties’ needs and circumstances.114 Parties must balance several factors, including the financial condition of the company, union cohesiveness,
company and union leadership and experience, personalities, and negotiating history when determining the appropriateness of med-arb.

For parties seeking constructive and more direct communications, speed, lower cost, and greater informality, med-arb proves a capable alternative to lengthier, more traditional collective bargaining.\footnote{See generally Blankenship, supra note 9, at 16–21 (discussing advantages of med-arb).} The process offers particular advantages in industries and circumstances where self-help, such as strikes and lockouts, are economically undesirable or unavailable.

Parties selecting med-arb for collective bargaining disputes enjoy great flexibility to create the process that best suits them and can best take advantage of this opportunity by meeting early to clarify procedures and goals in a written agreement.\footnote{See generally Fullerton, supra note 18, at 55.} The parties’ agreement should address such factors as how confidential information will be treated, how long mediation and arbitration periods will endure, and whether arbitration decisions will be rendered by the arbitrator’s discretion or through “final offer” arbitration. By collaboratively defining their med-arb process and goals at the outset, parties are prepared to negotiate solutions that satisfy their mutual interests.

Med-arb may prove an awkward fit, however, for parties that typically use self-help or whose constituencies or historic relationships demand a strong bargaining style. In traditional bargaining, threats of economic force by employers or employees act as leverage to secure desired terms and agreements. Med-arb removes this tool from negotiators, and moreover, gives final control over the outcome to a neutral third party should the parties fail to reach agreement.

Various statutory frameworks, including the RLA, the NLRA, and state statutes, allow parties to craft individualized med-arb processes that promise finality while preserving significant party control. As industries evolve to meet new economic challenges and technological realities, parties will naturally adapt their bargaining priorities and positions. Med-arb enables them to deploy multiple flexible dispute resolution tools to resolve their disputes. Med-arb proves a fittingly dynamic tool for dynamic collective bargaining processes.
An Equal Opportunity Paradox for Federal Contractors

Jon A. Geier,* Kenneth W. Gage,** Tammy Daub,*** and Regan Herald****

Introduction

Employers who become federal contractors assume a litany of obligations, only some of which apply to non-contractor employers. Both federal contractors and non-contractors may “not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.”¹ But, unlike non-contractors, federal contractors must “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their [protected characteristics].”² Federal contractors must be especially mindful of abiding by these obligations because the potential consequences for noncompliance go far beyond the usual damages other employers face in discrimination cases. Contractors run the risk of losing a customer and, in some cases, a very significant customer—the federal government. Abiding by these obligations, however, is not always easy. To demonstrate this, consider the following hypothetical.

² Id.
Welookedatcloudsfrombothsidesnow.com (Cloud) builds and maintains data storage systems and holds multiple federal contracts with a variety of federal agencies. It has just received its first-ever scheduling letter from the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP or Agency) for a compliance evaluation of its establishment in Braintree, Massachusetts. The Braintree establishment is Cloud’s research and development facility. Approximately 750 people are employed there, primarily in engineering, scientific, and other technical specialties. Positions range from entry-level jobs to senior scientists as well as a management structure that supervises technical professionals. Like many high-tech firms, despite extensive good faith efforts, Cloud struggles with the representation of female, African-American, and Hispanic scientists. It therefore routinely sets goals for these groups in its affirmative action plans. In contrast, Cloud’s Asian professional scientific population is substantial. In some cases, it is statistically significantly above the calculated weighted availability, resulting in an underrepresentation for whites in several job titles. The representation of Asians in Cloud’s scientific manager and director positions is also above availability, albeit not significantly so.

The company relies generally on targeted campus recruiting to fill its entry-level technical positions. Current employees are actively involved in the campus interviewing and recruiting process and in the selection of new employees. Cloud’s applicant tracking system is deficient in a number of ways. Requisitions often remain open for extended time periods and the data is often insufficient to identify whether a particular candidate was “considered” as defined in OFCCP’s Internet Applicant Rule. Similarly, the disposition codes used to explain why a candidate was “knocked out” at any step in the selection process are vague and recruiters do not use them consistently.

The applicant data reflects that the percentage of Asian candidates for the eight job titles in the entry-level technical job group was more than 70% in a combined applicant pool of more than 3,000 candidates. Although the overall selection rate was less than 3%, only 35% of the candidates who received offers were Asian. While that percentage of Asian hires is well above external availability measures, the difference between the actual and expected selection rate (based on Asian representation in the applicant pool) still yields a statistically significant adverse result to Asian candidates. Upon further review of applications received, Cloud knows that many of the candidates who self-identified as Asian applied from their home countries in Asia and many others applied from U.S. colleges and universities while in the United States on student visas. Cloud does not inquire about a candidate’s eligibility to work in the United States with or without sponsorship.
The Cloud hypothetical is a realistic representation of the circumstances experienced by numerous federal contractors in high tech industries. They face a Catch-22. Contractors that depend on the highly competitive STEM (science, technology, engineering, and mathematics) labor market often receive extraordinary numbers of Asian candidates, numbers far above the availability measures from U.S. Census data or any other reliable and available benchmarks for the qualified labor pool. This can result in allegations by the OFCCP that, despite an otherwise high representation of Asians in the incumbent workforce, and no evidence of anti-Asian bias in decision-making, the contractors have violated Executive Order 11246 by discriminating against Asians in hiring because of race on a class-wide basis. This paradoxical scenario can be especially frustrating to contractors that regularly hire Asian applicants and maintain workforces well-represented with Asian employees at all employment levels, but under-represented in other protected groups.3

Indeed, the OFCCP filed two enforcement actions in late 2016 and early 2017 that illustrate the proverbial rock and hard place facing federal contractors. In Office of Federal Contract Compliance Programs v. Palantir Technologies Inc.,4 the OFCCP alleged discrimination against Asian applicants because 44% of hires (11 of 25) were Asian, compared to a candidate pool that was 85% Asian. Yet, in Office of Federal Contract Compliance Programs v. Oracle America, Inc.,5 the OFCCP alleged discrimination against non-Asian applicants because 82% of hires were Asian, compared to a candidate pool that was 75% Asian.6 In both cases, the contractor’s hiring of Asian applicants exceeded availability according to national labor market statistics. Yet, the OFCCP alleges that Oracle discriminated against non-Asian applicants, but that Palantir discriminated against Asian applicants.

This Article reviews applicable legal principles that, together with the realistic Cloud scenario, frame the paradox that contractors frequently face and offers practical and strategic guidance to mitigate these risks. Part I summarizes the disparate treatment and disparate impact theories of proof. Part II describes the OFCCP’s aggressive investigative and enforcement approach in recent years that has frus-

---

3. Among the absurd results in this paradox is that whites are often statistically significantly underrepresented in some technical jobs or job groups, but the Executive Order 11246 regulations, albeit with good historical reasons, do not contemplate establishing placement goals for whites. See 41 C.F.R. § 60-2.16(c) (2016) (“The contractor must establish a percentage annual placement goal at least equal to the availability figure derived for women or minorities, as appropriate, for that job group.”) (emphasis added).
6. Id.
trated federal contractors. Part III summarizes the OFCCP's Internet Applicant Rule (IAR) and explains how careful implementation can help manage the applicant flow "denominator." Finally, Part IV provides practical and strategic advice to guide contractors using the IAR and other techniques.

I. The Applicable Legal Framework

The OFCCP is responsible for monitoring federal contractors' compliance with Executive Order 11246. Through a well-established administrative process, it investigates contractors' compliance with the Executive Order, including requirements that they not discriminate in violation of Title VII of the Civil Rights Act of 1964 and that they "take affirmative action." Based upon evidence gathered during compliance examinations, the OFCCP makes judgments about the contractor's compliance with the Executive Order. If it finds deficiencies, the OFCCP must make "reasonable efforts . . . to secure compliance through conciliation and persuasion" before commencing an enforcement proceeding. Among other relief, the OFCCP can seek debarment, the ultimate sanction for businesses relying on federal contracts.

Title VII's established principles of liability and relief are used to analyze claims of potential discrimination based on race, color, religion, sex, or national origin. Contractors must be careful to avoid claims of disparate treatment, as well as claims of disparate impact. The OFCCP may pursue either or both in its enforcement action. Increasingly, the OFCCP has pursued discrimination claims on behalf of whites and males.

A. Disparate Treatment Theory

The disparate treatment theory of discrimination requires proof of intentional discrimination against an employee or group of employees on the basis of a protected trait. An employer whose discrimination is analyzed within the disparate treatment theory may have discrimi-

---


9. 41 C.F.R. § 60-1.20(a) (2016).

10. 41 C.F.R. § 60-1.20(b).


ated through a pattern or practice or, instead, engaged in individual discrimination. To establish a pattern or practice of disparate treatment, the OFCCP must show by a preponderance of evidence that the discrimination was the company’s standard operating procedure. The agency must provide “convincing proof of a company-wide discriminatory policy” and demonstrate that “discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.” Pattern-or-practice disparate treatment claims ordinarily include “a combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of the employer’s intent to treat the protected class unequally.” “Anecdotal evidence consists of statements from minorities or women who can show that they met all contractor requirements but still did not receive the benefit at issue, and any firsthand accounts of discriminatory acts by the contractor supporting the statistical inference.” Notwithstanding the OFCCP’s pursuit of hiring discrimination claims based entirely on statistical evidence and without any anecdotal evidence, numerous courts

13. See, e.g., id. at 336.
15. Teamsters, 431 U.S. at 366; see also EEOC v. Bloomberg, 778 F. Supp. 2d 458, 468 (S.D.N.Y. 2011) (“To succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant’s standard operating procedure.”) (internal citation and quotation marks omitted).
16. EEOC v. Mavis Discount Tire, Inc., 129 F. Supp. 3d 90, 103–04 (S.D.N.Y. 2015) (citing Mozee v. Am. Commercial Marine Serv. Co., 940 F.2d 1036, 1051 (7th Cir. 1991)); see also Bloomberg, 778 F. Supp. 2d at 469; Coates v. Johnson & Johnson, 756 F.2d 524, 532 (7th Cir. 1985). If the agency’s prima facie case consists primarily of statistical evidence, the defendant cannot overcome the prima facie showing simply by articulating a legitimate, nondiscriminatory reason for individual employment decisions. Instead, the defendant must tailor its defense to the nature of the agency’s proof to demonstrate that a pattern or practice of discrimination does not exist. Teamsters, 431 U.S. at 360 n.46. In order to do so, the defendant must demonstrate that the agency’s statistical methodology lacks integrity or that the statistical disparities can be explained by non-discriminatory factors. Segar v. Smith, 738 F.2d 1249, 1267–68 (D.C. Cir. 1984); see also Bazemore v. Friday, 478 U.S. 358, 403–04 n.14 (1986) (to rebut a prima facie case of discrimination, a defendant must do more than raise theoretical objections to data or to the statistical approach taken to meet its obligations).
17. Fed. Contract Compliance Manual, supra note 11. The OFCCP’s now-rescinded 2006 Standards stated that in systemic compensation cases it “will seldom make a finding of systemic discrimination based on statistical analysis alone, but will obtain anecdotal evidence to support the statistical evidence.” Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35, 124, 139 (June 16, 2006). “Except in unusual cases, OFCCP will not issue [a Notice of Violation] alleging systemic compensation discrimination without providing anecdotal evidence to support OFCCP’s statistical analysis.” Id. at 35, 140; see id. at 35, 133. The 2006 Standards specifically referred to many of the above-cited Title VII cases that confirm the importance of anecdotal evidence to systemic disparate treatment claims. See id.
have confirmed that anecdotal evidence is a critical component of a systemic disparate treatment claim.\textsuperscript{18}

Disparate treatment discrimination—intentional discrimination—is easier for contractors to prevent and identify. For the vast majority of responsible contractors, it is a rare and isolated occurrence. While unfortunate for the person affected, it rarely occurs on a class-wide basis. It is relatively easy for contractors to comply with the obligation not to discriminate intentionally. Compliance with the obligation not to unintentionally discriminate, however, is far more challenging.

B. Disparate Impact Theory

Both treatment and impact theories of discrimination require proof that the contractor discriminated “because of” a protected characteristic. In contrast to the disparate treatment theory, however, disparate impact claims shift the focus from discriminatory intent to discriminatory effect. Identifying discrimination before it happens, therefore, is far more challenging. Indeed, determining whether disparate impact discrimination has occurred is inherently a backward-looking exercise focused on a facially race- or gender-neutral process.

OFCCP disparate impact cases challenging facially neutral selection procedures are governed by the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines).\textsuperscript{19} To establish a disparate impact case, the OFCCP “must show that a facially neutral employment practice causes a significant discriminatory impact on a protected class,” and that, to the extent the employer is able to show the challenged practice is job-related and consistent with business necessity, “other . . . procedures exist that would serve the defendant’s legitimate business interest without causing an adverse impact.”\textsuperscript{20}

\textsuperscript{18. See Morgan v. United Parcel Serv. of Am., Inc., 380 F.3d 459, 471 (8th Cir. 2004) (“[Plaintiffs] adduced no individual testimony regarding intentional discrimination . . . . Although such evidence is not required, the failure to adduce it ‘reinforces the doubt arising from the questions about validity of the statistical evidence.’”) (citations omitted); Garcia v. Rush-Presbyterian-St. Luke’s Med. Ctr., 660 F.2d 1217, 1225 (7th Cir. 1981) (“Plaintiffs did not present in evidence even one specific instance of discrimination.”); accord Coser v. Moore, 739 F.2d 746, 752 (2d Cir. 1984) (“[statistical] evidence must be weighed in light of the failure to locate and identify a meaningful number of concrete examples of discrimination . . . .”); Valentino v. United States Postal Serv., 674 F.2d 56, 69 (D.C. Cir. 1982) (“[W]hen the statistical evidence does not adequately account for the diverse and specialized qualifications necessary for (the positions in question), strong evidence of individual instances of discrimination becomes vital to the plaintiff’s case.”) (internal citation and quotation marks omitted); United States v. Johnson, 122 F. Supp. 3d 272, 366 (M.D.N.C. 2015) (lack of anecdotal evidence “burden[ed] [the] suggested inference” of statistical studies); Bakewell v. Stephen F. Austin State Univ., 975 F. Supp. 194 32 ABA J OURNAL OF LABOR & E MPLOYMENT LAW 189 (2017)

\textsuperscript{19. 41 C.F.R. § 60-3 (2016).}

In *Smith v. City of Jackson*, the Supreme Court reaffirmed the plaintiffs’ obligation to identify the particular practice responsible for an alleged disparity. The *Smith* plaintiffs’ age discrimination claim attacked the employer’s compensation plan. The Court explained that the plaintiffs’ statistical showing was deficient because they had “done little more than point out that the pay plan at issue [was] relatively less generous to older workers than to younger workers.” The plaintiffs did not, as required by *Wards Cove*, “identify any specific test, requirement, or practice within the pay plan that [had] an adverse impact on older workers.” Moreover, disparate impact plaintiffs must use reliable statistical evidence to show that the identified practice caused the alleged disparities.

The Supreme Court reaffirmed these principles in 2015 in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* It remains the law that “a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.” Otherwise, the Court said, “disparate-impact liability...‘would almost inexorably lead’ governmental or private entities to use ‘numerical quotas,’ and serious constitutional questions then could arise.”

---

re relevant part at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012). Thus, to state a disparate impact claim, the OFCCP “must begin by identifying the specific employment practice that is challenged.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988); see also *Wards Cove*, 490 U.S. at 656 (The plaintiff must offer evidence “isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.” (quoting *Watson*, 487 U.S. at 994)). An exception to this requirement exists where “the complaining party can demonstrate to the court that the elements of a respondent’s decision making process are not capable of separation for analysis.” 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2012).

22. *Id.* at 241.
23. *Id.* at 230.
24. *Id.* at 241.
25. *Id.* (citing *Wards Cove*, 490 U.S. at 652).
26. *See Watson*, 487 U.S. at 994 (“[P]laintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”). “[S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation.” *Id.* at 995.
28. *Id.* at 2523.
29. *Id.* (quoting *Wards Cove*, 490 U.S. at 653); see also *Bennett v. Nucor Corp.*, 656 F.3d 802, 817 (8th Cir. 2011) (“[T]he plaintiffs’ expert...failed to identify any specific employment practices responsible for the alleged disparate impact in promotion decisions.”); *EEOC v. Freeman*, 961 F. Supp. 2d 783, 799–800 (D. Md. 2013) (agency failed to identify the particular aspects of the defendant’s policies that allegedly caused the disparate impact).
II. The Paradox Facing Federal Contractors: OFCCP's Near Exclusive Reliance on Statistics

When assessing potential hiring discrimination in recent years, the OFCCP has issued Notices of Violation (NOVs) to contractors without any recitation of anecdotal evidence of discriminatory intent and without identifying any specific employment practice responsible for an alleged disparate impact. Instead, it relies almost exclusively on simple statistical analysis to determine whether candidates with relevant qualifications and experience were selected for hire at rates consistent with what would be expected in a neutral selection process. The Agency's analysis compares the selection rate for applicants in each demographic group (the number of those who received offers divided by the number of Internet Applicants) and calculates whether the selection rates are as expected. If not, it calculates whether the difference in the actual versus the expected selection rate is so great that it raises an inference of discrimination. The OFCCP has issued NOVs based on these calculations alone, while at the same time ignoring evidence that the contractor hired (and continues to hire) Asian applicants in substantial numbers at all levels of its organization and that interviews of dozens of employees produce no evidence of anti-Asian animus. This paradox is presented to Cloud and many contractors today.

The OFCCP's approach presents contractors with a threat of disparate treatment and impact exposure. These risks pressure contractors to engage in hiring by numbers, which itself is potentially illegal. The Agency's aggressive investigation and enforcement strategies have not gone unnoticed. The OFCCP's approach was criticized by the U.S. Senate Committee reviewing the Agency's performance. In the Senate Appropriations Report, the Committee stated:

30. See 42 U.S.C. § 2000e-2(j) (2012) ("Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race . . . ."); 41 C.F.R. § 60-2.16(e)(1–4) (2016); see also Ricci v. DeStefano, 557 U.S. 557, 581–82 (2009) ("allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate impact liability would encourage race-based action at the slightest hint of disparate impact," amounting to a "de facto quota system"); Torgerson v. City of Rochester, 643 F.3d 1031, 1045 (8th Cir. 2011) ("Congress explicitly commands that Title VII shall not be interpreted to require preferential treatment . . . on account of an imbalance in the number or percent of those employed, compared to the relevant number or percent in the community"); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1276 (11th Cir. 2000) ("Indeed, if employers could be held liable for an unlawful disparate impact on account of statistical workforce imbalances per se, then they would be forced to use numerical quotas and other forms of preferential treatment in their hiring and promotion policies, in express contravention of Title VII . . ."); EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292, 296, 305 (7th Cir. 1991) (Supreme Court has cautioned "employers not to engage in hiring quotas").
The Committee is concerned that OFCCP has lost its focus on identifying and addressing real employment discrimination and is imposing excessive compliance burdens on contractors. More specifically, OFCCP appears to prioritize specific quota results rather than equal consideration and opportunity because of its reliance on statistical analysis in evaluating contractor hiring practices. OFCCP should focus on actual discriminatory treatment instead of presumed discrimination based solely on benchmarks that may not be uniformly applicable. **Strict and exclusive use of statistical significance tests effectively requires contractors to use a quota hiring system in violation of the Civil Rights Act to avoid adverse impact claims by OFCCP.**

If the OFCCP establishes a prima facie case of disparate impact, a contractor must be prepared to challenge that evidence in a number of ways that may be particularly appropriate in situations like the Cloud hypothetical. Once the OFCCP has established a prima facie showing that a specific employment practice has an adverse impact, or that the overall selection process has an adverse impact if the hiring practices cannot be separated, the burden of proof shifts to the employer to demonstrate the challenged practice is job-related and consistent with business necessity. In *Griggs v. Duke Power Co.*, the Court did not distinguish business necessity and job-relatedness as two separate standards. The Court stated: “The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited.”

In cases brought pursuant to the Executive Order, an employer must demonstrate that the challenged practice is job-related and consistent with business necessity in accordance with the Uniform Guidelines. The Uniform Guidelines delineate the minimum acceptable methods contractors must use to demonstrate the job-relatedness and business necessity of a selection criterion. The Uniform Guidelines apply to all selection procedures used to make employment decisions. In pertinent part, the regulations state:

The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be

---

34. Id. at 431.
35. Id.
37. See id.
38. Id. § 60-3.2(C).
discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines . . . .

The Uniform Guidelines also specifically contemplate that selection rate differences may not necessarily signify adverse impact:

Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.

Defendants claiming an atypical pool, according to the Department of Labor’s Administrative Review Board, bear the burden of showing that its recruitment efforts created a pool of unqualified applicants, thus explaining selection disparity.

Courts too have cautioned against uncritical reliance on applicant flow for selection rate comparisons where it might not adequately reflect the pool of qualified persons. Historically, this occurs in situations in which the application process discouraged or “chilled” applications from certain protected groups (i.e., employers that discouraged African-American applicants) and the available labor market data suggested that the applicant flow for the position did not reflect the larger number of actually available qualified applicants in the protected group. The large Asian applicant flow present in the Cloud hypothetical, and in the recent experience of many federal contractors, clearly demonstrates that Asian candidates have not been discouraged from expressing interest in employment—indeed, the opposite is true.

The atypical applicant pool phenomenon can also occur the other way—that is, where the applicant pool reflects a disproportionately high percentage of the protected group at issue. In those circum-

39. *Id.* § 60-3.3(A).
40. *Id.* § 60-3.4(D).
43. *See* e.g., Williams v. City of New Orleans, 729 F.2d 1554, 1562 (5th Cir. 1984) (en banc) (general population statistics used where applicant flow was distorted); Hammon v. Barry, 826 F.2d 73, 78 n.7 (D.C. Cir. 1987) (general statistics used where applicant flow may have been skewed). There are a number of possible explanations for the extraordinarily high Asian applicant flow for technical positions. First, U.S. high-tech companies are among the largest and most sophisticated employers in the world and people want to work for them. Second, due to the highly competitive labor market for such talent, many employers are reluctant to limit the consideration of candidates to avoid missing the proverbial diamond in the rough, which results in enormous applicant pools with very low selection rates. Third, there is at least a perception that high-tech employers are willing to sponsor and obtain work visas for foreign nationals with these skills, and the possibility of working and living in the United States is very attractive to
stances, courts allow employers to use Census or labor market data as proper comparator evidence. 45

The OFCCP itself acknowledged the need to think critically about applicant flow in responding to comments concerning the Internet Applicant Rule in 2005. 46 It stated:

OFCCP . . . will compare the proportion of women and minorities in the contractor’s relevant applicant pool with labor force statistics or other data on the percentage of women and minorities in the relevant labor force. If there is a significant difference between these figures, OFCCP will investigate further as to whether the contractor’s recruitment and hiring practices conform with E[xecutive] O[rdner] 11246 standards. 47

The Agency also responded by saying it “does not agree that it should rely exclusively on availability data compiled by contractors, although the OFCCP will generally consider such data. The OFCCP must ensure that such data is accurate for compliance monitoring and enforcement purposes.” 48 Unfortunately, the OFCCP has not fulfilled its promise to investigate further situations like that facing Cloud.

III. Managing the Applicant Denominator: the OFCCP’s Internet Applicant Rule

New hiring technologies offer employers a wealth of possibilities to find the very best talent to drive a business strategy forward by relying on new technology to hire employees. However, evaluating the virtual tsunami of résumés submitted to the contractor’s career page, LinkedIn, and other sources can be a tremendous challenge. If not done properly, the contractor may be liable for disparate impact or disparate treatment claims if the selection rate analysis denominator calculated by the OFCCP is not statistically representative of the applicant pool. It is therefore important for contractors to know how to manage the denominator.

For that, it is critical to understand the OFCCP’s 2005 Internet Applicant Rule (IAR), which modified contractor recordkeeping requirements to address the increasing use of electronic technologies

many foreign nationals. Finally, in today’s market, anyone from anywhere in the world can express interest in a position with the click of a mouse.

45. Social scientists agree that external labor market data can be used as a proxy measure of a demographic group’s availability if there are problems with the use of actual applicant data. See WALTER B. CONNOLLY, JR. ET AL., USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION ch. 5 (2015); RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 4.3 (2016).


47. Id. (emphasis added) (internal quotation marks omitted).

48. Id. (emphasis added).
and the Internet in hiring. 49 Under the revised regulations, contractors must solicit and maintain certain demographic information in connection with electronic hiring processes 50 for all “Internet Applicants.” 51 The revised regulations define Internet Applicant as an individual who satisfies the following four criteria:

Expresses Interest in Employment. The individual submits an expression of interest in employment through the Internet or related electronic data technologies;

Possess Basic Qualifications. The individual’s expression of interest indicates the individual possesses the Basic Qualifications for the position;

Considered for a Particular Position. The contractor considers the individual for employment in a particular position; and

Does Not Withdraw from Consideration. The individual at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position. 52

If an employer confines its “consideration” of candidates to those who meet the other parts of the Internet Applicant definition, it need only include those Internet Applicants in its adverse impact analyses. If the employer does not do so, or does not follow the rules consistently, all job seekers assessed or screened for the position, whether they possess the basic qualifications or not, must be included in adverse impact analyses reported to the OFCCP during a compliance evaluation. 53


50. By definition, the Internet Applicant Rule is implicated only if the hiring process involves at least some Internet or other electronic consideration of applicants. See Obligations of Contractors and Subcontractors, 41 C.F.R. § 60-1.3 (2016); 70 Fed. Reg. at 58,961.

51. The regulations require contractors to preserve for two years any personnel or employment record made or kept by the contractor, including “job advertisements and postings, applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position,” as well as records that identify, “where possible, the gender, race, and ethnicity of each applicant or Internet Applicant.” See Record Retention, 41 C.F.R. § 60-1.12(a), (c)(ii) (2016). Under the 2014 revisions to the Vietnam Era Veterans’ Readjustment Assistance Act, as amended (VEVRAA) at 41 C.F.R. Part 60-30, and Section 503 of the Rehabilitation Act of 1973, as amended at 41 C.F.R. Part 60-741 (Section 503), the record retention for these same types of records was lengthened to three years. Although the Executive Order 11246 regulations were not revised, the three-year record retention period should be applied to satisfy VEVRAA and Section 503.

52. See 41 C.F.R. § 60-1.3 (2016) (emphasis added).

53. Id. § 60-1.12(d) (2016).
A. Contractors Should Consider Only Candidates Who Express Interest in a Particular Position

The first criterion of the Internet Applicant test requires that the person express interest in employment. Contractors must maintain consistent and uniform procedures to limit what constitutes an expression of interest. An expression of interest generally includes submission of an application or résumé, posting a résumé on the employer’s career website for a specific job, or posting a résumé on an external résumé database for a specific job with the employer.

The regulations provide that the expression of interest must be tied to a particular position. If a candidate, for example, sent a résumé to the recruiting department without specifying which job opening the application was for, the person could be excluded from consideration and thus from the Internet Applicant definition. However, the requirement of expressed interest in a particular position can be deemed waived if the employer disregards particularized expressions of interest to expand the available pool or considers applicants who have not expressed interest in a particular position.

In other words, expressions of interest should remain particularized and exclusive until the candidate affirmatively indicates otherwise. Candidates should be considered only for the positions to which they applied. If a contractor wants to consider someone who has not expressed interest in a particular position, the contractor should contact the person and request an affirmative expression of interest in the position. The contractor’s processes for handling expressions of interest should be consistent and documented.

B. Contractors Should First Screen for “Basic Qualifications”

The Internet Applicant definition also requires that an expression of interest indicate that a candidate possesses the “Basic Qualifications” for the particular position. There are four requirements for qualifications to be considered “basic.” The qualification must be: (1) determined in advance of candidate consideration, (2) non-comparative, (3) objective, and (4) related to performance in the position at issue.

1. Basic Qualification Requirements

A. Basic Qualifications Must be Determined in Advance of Any Consideration of Candidates

Basic Qualifications (BQs) must be determined in advance of the employer’s consideration of any expressions of interest for the partic-
ular position. The manner of complying with this requirement depends on whether jobs are advertised. If a position is advertised (e.g., the employer posts a job description), BQs must be included in the advertisement as “qualifications . . . that [applicants] must possess in order to be considered for the position.” Qualifications not indicated as requirements for an advertised position may not be used to exclude persons from the definition of Internet Applicant. For positions not filled by using posted job descriptions or advertisements (for example, because of an urgent need that must be filled without following standard posting procedures), there must be a record that the BQs were established before considering candidates. If the employer cannot show the qualifications were established before candidates were considered, qualifications are not “Basic Qualifications” and may not limit the group of Internet Applicants.

B. Basic Qualifications Must Be Non-Comparative and Objective

To ensure that contractors measure applicants without referencing other candidates and consider only the information within the applicants’ resumes and applications, the BQs must be non-comparative and objective. In support of this rule, the OFCCP explained: “One way to tell [whether] an advertised, basic qualification is objective is that a third-party [with sufficient technical knowledge], unfamiliar with the employer’s operation, would be able to evaluate whether the job seeker possesses the qualification without more information about the employer’s judgment.” Examples of non-comparative objective criteria include licenses, degrees, specific experience or years of experience, and language skills.

C. Basic Qualifications Must Be Relevant to Performance of the Particular Position

BQs must be “relevant to performance of the particular position and enable the contractor to accomplish business-related goals.” In establishing this requirement, the OFCCP was careful to note that the requirement does not mean that BQs must be “consistent with business necessity.” Instead, the requirement is intended to impose “a reasonable limit on the nature of the qualifications used only to define recordkeeping obligations.”

59. See id.
60. Id.
61. 70 Fed. Reg. at 58,957.
62. 41 C.F.R. § 60-1.3.
63. 70 Fed. Reg. at 58,957.
64. Id. In its summary of the revised regulations implementing the VEVRAA and Section 503, the OFCCP emphasized that it is unlawful for contractors to use qualification standards that screen out or tend to screen out a veteran or any person with a disability (IWD) unless the standard is shown to be job-related for the specific position in question and consistent with business necessity. See Affirmative Action and Nondiscrimi-
D. STRATEGIC USE OF BASIC QUALIFICATIONS

Contractors should think of BQs as gatekeepers. BQs determine who may become an applicant for a particular position. However, it is important to keep in mind that BQs can be more stringent than minimum qualifications for a position. A minimum qualification is the lowest level qualifications a candidate must possess to perform successfully the position’s duties. By contrast, a BQ is any qualification that is non-comparative, objective, and relevant to position performance. BQs should include minimum qualifications that satisfy these three criteria (so that individuals who do not possess the lowest level qualifications are not considered) and may also include other qualifications (something above the lowest level qualifications to perform the position’s duties).65

To use BQs as a gatekeeper, contractors should determine in advance and include in any job postings all qualifications that are objective, non-comparative, and relevant to performance that may be used to eliminate candidates from consideration. Contractors may not modify BQs during the hiring process for a particular position to limit those considered Internet Applicants. While contractors may use other criteria to select successful candidates during the process,66 only qualifications established prior to the selection process can be called BQs and be used to determine whether a person satisfies the second criterion of the Internet Applicant Rule.

As a result, it is far more efficient for contractors to create a list of BQs and later remove unnecessary ones to get a reasonably sized and well-qualified applicant pool. Contractors can apply BQs seriatim to assess the size of the resulting pool and determine whether to apply additional BQs. Contractors do not have to identify specifically in the job posting which advertised qualifications are BQs rather than subjective, comparative qualifications.67 Contractors can always con-
sider such qualifications during the selection process to help determine the best candidates.

Many contractors use BQs such as grade point average, college major, years of relevant experience (for experienced hires), attendance at an accredited school, foreign language fluency (when relevant), and experience with certain technology or platforms. Using such BQs for entry-level jobs could avoid later claims of adverse impact in the hiring process.

The OFCCP has said that, in the absence of demonstrated disparate impact, BQs need not meet the job-related and consistent-with-business-necessity standard for defending against disparate impact claims. The OFCCP, however, reserves the right to assess whether BQs cause a disparate impact. As a result, when establishing BQs, contractors should periodically assess who is eliminated by each articulated BQ, and if any have an adverse impact based on gender, race, or ethnic groups, to assure themselves that BQs are job-related.

2. Contractors Should “Consider” Only Candidates Who Expressed Interest in the Particular Position and Satisfy the Basic Qualifications

A. “Consideration” Requirements

A person is not an Internet Applicant unless “considered for” employment in a particular position.\(^68\) A contractor “considers” someone for employment if “the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.”\(^69\) Contractors both comparatively and subjectively review a candidate’s qualifications (both as to the candidate and as compared to others in the pool).

B. Effective Data Management Tools for Limiting the Group of Internet Applicants

 Contractors need not “consider” all candidates who apply for a position. In addition to the strategic use of BQs, contractors may use other non-substantive bases to eliminate candidates from consideration. If contractors eliminate a candidate for some reason other than substantive assessment of the candidate’s qualifications, the candidate was not “considered” and may be excluded from the definition of Internet Applicant.\(^70\) This includes candidates who are eliminated because they do not follow required application process protocols (if protocols are consistently enforced) or are eliminated by facially neutral data management techniques (DMTs) that do not adversely impact a protected group.\(^71\)

---

\(^68\) 41 C.F.R. § 60-1.3 (2016).
\(^69\) Id.
\(^70\) See id.
\(^71\) 41 C.F.R. § 60-1.3; 70 Fed. Reg. 58,946, 58,950 (Oct. 7, 2005).
In connection with the Internet Applicant Rule, the OFCCP provides guidance on how to manage the large volumes of job application data. Specifically, the Internet Applicant Rule permits a contractor to use DMTs to reduce the number of expressions of interest considered. In today’s competitive job market, however, recruiters and company talent acquisition leaders universally find DMTs an obstacle to achieving critical business imperatives. Many employers fight to attract top talent from the same Internet pool of prospective candidates. Recruiters want and need the ability to focus on finding the right talent, rather than a random sample of talent.

That said, after contractors initially screen out those who lack the BQs for the particular position (proceeding through as many BQs as needed to narrow the pool until all are exhausted), at least as to some positions, contractors may use one or more of the following DMTs to limit the pool of Internet Applicants:

- Eliminate candidates with incomplete applications;
- Consider only candidates who applied before (or after) a specified date;
- Impose absolute numerical limits on how many candidates who possess the BQs will be considered (e.g., the first fifty candidates); or
- Use random sampling to select candidates for consideration (e.g., by considering only every tenth applicant or using a random number table to generate through random selection those contractors want to screen).

Contractors may apply more than one DMT to the same job sequentially until the pool is sufficiently limited. Because DMTs are intended to manage data and are tied to the number of applicants and not the position at issue, DMTs may vary across requisitions, including requisitions for the same job title. Contractors should use appropriate disposition codes, maintain a record of all DMTs used, and indicate which candidates were eliminated because of DMTs (including candidates not considered because the position was filled before the contractor reviewed the candidate’s résumé and qualifications).

3. Candidate Does Not Withdraw from Consideration

The final prong of the Internet Applicant definition criterion is that the applicant has not withdrawn from consideration prior to receiving an offer or otherwise indicated no further interest in the posi-

---

72. See 41 C.F.R. § 60-1.3; 70 Fed. Reg. at 58,961.
73. 70 Fed. Reg. at 58,962.
74. 41 C.F.R. § 60-1.3.
Contractors may conclude a person has withdrawn from consid-
eration based on an express indication of lack of interest in the posi-
tion; a passive demonstration of disinterest (failure to respond to re-
quest or requisition-related communications); or “information the
individual provided in the expression of interest, such as salary re-
quirements or preferences as to type of work or location of work, pro-
vided that the contractor has a uniformly and consistently applied pol-
icy or procedure of not considering similarly situated job seekers.” Contractors should maintain records regarding candidates eliminated because of an indication of disinterest. An employer that uses expres-
sions of interest to determine whether candidates are no longer inter-
ested must ensure such indications are consistently used to draw the
same conclusion of disinterest for all candidates and such candidates
are consistently excluded from consideration.

IV. Practical Advice to Contractors to Mitigate Risk

Until the OFCCP takes a more critical approach to its investiga-
tions and enforcement strategy, the paradox faced by Cloud and other
similarly situated real federal contractors leaves them vulnerable to
Notices of Violations, enforcement proceedings, and accompanying eco-
nomic risks. The interim solution to reducing risks lies in acquiring and
developing an effective applicant tracking system; regular training and
monitoring of the staffing organization and hiring managers; a vigor-
ous, disciplined, and strategic application of the Internet Applicant
Rule; and periodic diagnostic analysis under attorney-client privilege.
Each of these recommendations is addressed below.

A. Acquisition of an Effective Applicant Tracking System

Most applicant tracking systems (ATS) on the market offer an
“OFCCP compliant” package. However, buyer beware—some ATS deli-
ver far greater compliance than others. Before acquiring a new or im-
proved ATS, someone with expertise with IAR requirements must re-
view its candidate-facing and recruiter-facing functionality to ensure
it is, in fact, fully OFCCP compliant. Among other things to evaluate
in such a review is whether the ATS can customize “knock out” ques-
tions for a candidate seeking open positions. Examples include (de-
pending on the position): Are you able to work overtime? Are you will-
ing to work different shifts? Are you available to work weekends?

Similarly, an ATS should permit questions to help determine
whether a candidate meets the position’s BQs—questions to assess a
candidate’s educational background, as well as years of experience
performing certain functions, skills, and licenses. Often, using such

75. See id.
76. See id.; 70 Fed. Reg. at 58,962.
77. See 70 Fed. Reg. at 58,962.
questions is more efficient than keyword searches of candidates’ résumés. It is also important to determine if the ATS will permit customization of disposition codes. Finally, confirm the ATS can generate the records required to be maintained.

B. Training and Monitoring Recruiters and Hiring Managers

Contractors must develop comprehensive sourcing, selection and recordkeeping policies, and guidance documentation. They should provide periodic training on those policies and practices to recruiters, hiring managers, and other human resources generalists. The policies and guidance should cover such topics as:

- how to open and manage a requisition;
- the development of basic and preferred qualifications;
- the strategic use of data management techniques;
- consistent application of disposition codes, including, but not limited to, accurate disposition of candidates not considered; and
- effective use of external data bases to source candidates.

In addition to a commitment to training, which should be periodically refreshed due to turnover in staffing personnel, contractors should monitor recruiter compliance with policies and guidance on a bi-annual or quarterly basis to ensure proper recordkeeping and full compliance with the IAR. Delaying review until after a compliance evaluation has been scheduled is asking for trouble.78

C. Disciplined and Strategic Implementation of the Internet Applicant Rule

Contractors must also develop a disciplined and strategic approach to implementing the IAR. One of the contractor-friendly aspects of the IAR is the ability to reduce applicant flow. Reducing appli-

---

78. If a contractor retains a staffing firm to use selection procedures to screen job seekers on the contractor’s behalf, the contractor has the same recordkeeping requirements as if it screened job seekers itself. See Documentation of Impact and Validity Evidence, 41 C.F.R. § 60-3.15(D)(6) (2016); see also OFCCP FAQs: Frequently Asked Questions for the Employer, U.S. DEPT. OF LAB., http://kb.dol.gov/DOLArticlePage?agency=OFCCP&parentCatValue=Employer&article=ka1i0000000WFFbAAO (last visited Feb. 11, 2017). The OFCCP’s other recordkeeping rules require federal contractors and subcontractors to keep and maintain records regarding their selection process, such as information about applicants and hires. See, e.g., 41 C.F.R. § 60-1.12. Use of a recruiting firm in the hiring process does not relieve a contractor of its recordkeeping obligations under 41 C.F.R. § 60-1.12; the contractor will be held accountable if the specified records are not maintained. Because the obligation to maintain records belongs to the contractor, not the staffing firm, contractors should consider entering into agreements with staffing firms that require providing contractors with OFCCP-mandated records.
cant volume avoids the statistical realities of the “law of large numbers”: as applicant volume increases, adverse impact becomes more likely. Here are some ways to reduce applicant flow:

- **Create well-defined BQs to eliminate candidates from applicant flow early in the hiring process.** Lateral hire positions likely will have more extensive BQs than entry-level or campus hire positions.

- **Use multiple, specific, and precise BQs.** This will permit explaining and defending a contractor’s selection decisions at each step of the hiring process. Highly precise BQs will also assist in defending the use of “atypical applicant flow” principles discussed above where, if like Cloud, the adverse impact resulted from an extraordinary number of applicants from a protected group. If a contractor can demonstrate that the applicant flow of the protected group was less qualified than the highest selected group, the contractor will be better able to defend using a different, and lower, availability benchmark (e.g., the Census code availability) against which to compare selections.

- **Strategically use “knock out” and “eligibility” questions.** These need not be applied to all requisitions, even for the same title. For example, there may be some requisitions for which a contractor will not sponsor a candidate who will require sponsorship now or in the future. Although not technically BQs, contractors should also strongly consider asking a two-part ICE question about eligibility to work in the United States and apply those answers strategically to further reduce applicant flow. In other words, contractors could consider candidates ineligible if they require immediate sponsorship to work in the United States. This will permit contractors to move forward with candidates who are currently eligible to work (i.e., because they are currently on a student visa), but who may require sponsorship in the future. Additionally, contractors could decide to try to fill some openings without anyone who will need future sponsorship.\(^7^9\)

- **Rely on “interest” questions.** Asking whether an applicant is able to work weekends, shifts, or overtime is critical with respect to

---

79. Employers may lawfully ask the following questions: (1) Are you currently authorized to work lawfully in the United States?, and (2) Will you now or in the future require sponsorship to work lawfully in the United States? See Letter from Katherine A. Baldwin, Deputy Special Counsel, U.S. Dept. of Justice, to Karen Moody, Assistant At’y Gen., Md. Transp. Auth. (Sept. 27, 2010) (on file with U.S. Dept. of Justice) (a company “may ask candidates for the position whether they will require sponsorship for a visa”). If an employer does not wish to provide sponsorship, it may say so in its advertisements. Id. (An “employer may state in its job postings that it will not sponsor applicants for work visas.”).
some requisitions. Answering “no” to these types of interest questions for jobs that require weekends, shift work, or overtime is the equivalent of withdrawing interest in the position.

- **Carefully consider the use of a DMT.** DMTs need not be used for all requisitions and typically are most helpful with high volume applicant positions, such as for call centers, but are increasingly helpful as entry-level engineering or technical positions in high-tech and financial services industries. Employers in highly competitive industries often insist on reviewing every candidate to avoid missing the “diamond in the rough” or the “needle in the haystack.” However, if there are hundreds or thousands of candidates, using a DMT of 250 or 500 applicants at a time should generally identify sufficient highly qualified candidates from which to make selections.

- **Use carefully conceived and requisition-based talent acquisition.** Use of so-called “evergreen” requisitions (i.e., requisitions that remain open for extended periods of time) often create record-keeping issues and make it more difficult to defend selection decisions because the quality of the applicant pool can change over time. Thus, candidates with lesser qualifications may be selected at one time, while more qualified candidates were bypassed at prior or subsequent times when better qualified candidates are available. Even if multiple position requisitions are used, the requisitions should expire after a reasonable time (e.g., three months).

- **Avoid so-called “passive” recruiting**—in which recruiters import candidates into the ATS who appear to have both basic and preferred qualifications without requiring them to express interest in a specific position. Sourced candidates must affirmatively express interest in open positions.

**D. Periodic Diagnostic Analysis Under the Attorney-Client Privilege**

Each year of an affirmative action plan should start by issuing a privilege protocol memorandum from internal or external legal counsel to the team responsible for preparing plans. Preparation includes gathering data and conducting analysis of hiring, promotions, terminations, and compensation. In addition to analyzing hiring transactions for the prior twelve months, careful contractors should conduct periodic diagnostic statistical analysis of hiring during the current plan year. Here are some suggestions for that analysis:

- An offers-and-hires analysis should be conducted by both AAP job group and job title.
• If there is any bottom-line impact, a steps analysis must be conducted to determine whether any particular step in the selection process is driving the impact. A job-title analysis will also provide insights as to whether only certain titles have flags.

• If a structured interview or other test is identified as driving the impact, a contractor should consider conducting a job analysis and preparing validation evidence in accord with the Uniform Guidelines.

• In job titles with flags, a further drill-down to the requisition level analysis should be considered (perhaps depending upon the number of selections). For example, a “multiple pools” analysis by requisition may eliminate statistical indicators.

Conclusion

Compliance with the Executive Order, as well as the myriad of other requirements imposed on federal contractors, is challenging. The vast majority of responsible contractors take their nondiscrimination and affirmative action obligations very seriously. Indeed, many leading contractors have been (and remain) leaders in implementing policies and practices that have transformed the U.S. workplace over the last half century. For example, the 2016 LGBT Executive Order raised few eyebrows in the executive suites or hallways of most federal contractors because they already included sexual orientation and gender identity as protected characteristics in internal equal employment opportunity policies. Contractors have been among the leaders in making commitments to hire veterans. Many contractors commit the human and financial capital to support the spirit and intent of the Executive Order, VEVRAA, and Section 503.

However, the issues raised in this Article are real. OFCCP investigators should consider all of the facts and circumstances proffered by a contractor to assess whether discrimination “because of” protected characteristics has occurred, regardless of whether the Agency can state a prima facie case of disparate treatment or disparate impact discrimination. Applicant pools that suggest availability of certain protected groups materially inconsistent with availability data that the OFCCP has otherwise said can be relied upon should be scrutinized carefully. The Agency should reasonably evaluate what may be contributing to the difference and consider the plausibility of explanations other than discrimination for the difference in selection rates. Finally, if the Agency reasonably believes there is a facially neutral selection practice that is adversely impacting a protected group, it should identify that practice during the compliance evaluation and in conciliation discussions so contractors can fairly respond.
Video Games in Job Interviews: Using Algorithms to Minimize Discrimination and Unconscious Bias

David D. Savage* & Richard Bales**

Introduction

On a summer day in 2002, Billy Beane sat in a roomful of baseball scouts trying to create a list of high school and college athletes his team hoped to draft seven days later.1 Beane, in his fifth year as general manager of the Oakland Athletics, a Major League Baseball team, grew tired of the players his scouts suggested, most of whom never reached the major leagues.2 He decided that comments from his scouts about players, such as “[t]here might be some . . . family issues here . . . I heard the dad had spent some time in prison”3 or “[t]his kid wears a large pair of underwear . . . [a] body like that can be low energy . . . [i]t’s not natural,”4 were not the qualities scouts should consider when selecting a player to draft.6 Beane wanted to analyze the players’ statistics.7 He wanted to know which players hit the ball, drew the most walks, and struck out hitters most often.8 Beane hired Paul DePodesta, a Harvard graduate, to analyze statistics using algorithms to calculate who performed best on the field.9 Using algorithms focused on performance to make operational decisions throughout the 2002 season, Beane replaced the best players Oakland lost in free

---

* David D. Savage is a J.D. candidate (May 2017) at Ohio Northern University, Claude W. Pettit College of Law. He received his B.S. in Criminal Justice from Defiance College in 2014.

** Richard Bales is a Professor of Law at Ohio Northern University, Claude W. Pettit College of Law.

2. Id. at 15–18.
3. Id. at 24.
4. Id. at 34.
5. Id. at 36.
6. Id. at 15–18.
7. Id. at 18–19.
8. Id. at 18, 36–37.
9. Id. at 17–19.
agency with unknown or overlooked players and made the playoffs with one of the league’s lowest payrolls.10

Beane’s bold and unprecedented use of algorithms to evaluate baseball players set an example for objectively identifying the best talent within a large pool while saving money.11 Employers have achieved similar success using algorithms to select employees.12 For many years, companies used computerized résumé-tracking systems based on algorithms to scan résumés for key words or phrases important for the job.13 Some companies use algorithms in more sophisticated ways. Some have applicants take quizzes or play games to assess qualities, including cognitive abilities, work ethic, problem-solving skills, and motivation, that cannot be seen from a résumé.14 These employers can winnow from thousands of applicants those most likely to perform the best and stay the longest.15

Although analyzing game or quiz performance with algorithms seems like an objective means to evaluate applicants, some say the practice16 may lead to disparate treatment17 and disparate im-

---

11. LEWIS, supra note 1, at 21–42, 270.
13. Pinola, supra note 12; Skillings, supra note 12; Weber, supra note 12.
14. Casti, supra note 12; Rampell, supra note 12.
17. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977) (disparate treatment occurs when an employer intentionally treats members of a protected class less favorably than others).
pact discrimination violating Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA).

Critics express concern that algorithms, often derived from information about current employees, will discriminate against underrepresented groups if existing employees do not proportionately represent the applicant pool. For example, use of a video game to screen applicants may disadvantage older applicants if they do not perform as well as millennials. Further, algorithms may not prevent unconscious bias from affecting employers’ hiring practices.

However, carefully designed and periodically evaluated algorithms can avoid disparate treatment and disparate impact discrimination and avoid unconscious bias. This Article argues that despite the fear that algorithms will cause employment discrimination, a

---

18. Id. at 336, n.15 (disparate impact occurs when a facially neutral employment practice in fact discriminates against one group).
23. McGowan, supra note 21; Shana Lebowitz, 3 Unconscious Biases That Affect Whether You Get Hired, BUS. INSIDER (July 17, 2015, 11:47 AM), http://www.businessinsider.com/unconscious-biases-in-hiring-decisions-2015-7. Unconscious bias tends to occur in the job hiring process during applicant interviews. Id. Employers and employer representatives, such as supervisors and human resources professionals, tend to like people similar to themselves. Id. If employers see their own qualities reflected in the applicant, they gravitate toward that person. Id. Even though employers try to avoid characterizing classes or classifications of candidates, they may unconscious assume certain groups perform better than others, such as believing men perform better than women on mathematical tasks. Id. Unconscious bias may affect employers’ perception of job candidates’ competence. Id.
24. Could Video Games Be the Next Job Interview?, ALL TECH CONSIDERED (Dec. 1, 2013, 8:13 AM), http://www.npr.org/sections/alltechconsidered/2013/12/01/246999632/playing-the-game-to-get-the-job (showing video games provide information of a person’s skills and potential); Pinola, supra note 12 (showing résumé trackers use objective criteria to identify candidates).
study of video game use in the hiring process shows that it provides better and fairer ways to evaluate applicants without discrimination.

Part I describes how algorithms have been utilized in hiring and provides details about two video games, “Wasabi Waiter” and “Firefly Freedom,” used to evaluate applicants. Part II examines the debate over whether algorithms, and particularly their use in video games, cause hiring discrimination. Finally, Part III discusses how the use of “Wasabi Waiter” and “Firefly Freedom” can achieve greater success than human evaluations in both avoiding disparate impact and disparate treatment claims and reducing unconscious bias in employee selection.

I. Background

Workers today, especially millennials, no longer envision spending an entire career at one company.\(^{25}\) Although the average number of applicants per job has remained low, some companies receive large quantities of applications for certain openings.\(^{26}\) Many of these companies have looked to algorithm-based résumé-tracking systems to help sort and evaluate applicants.\(^{27}\) Widely used résumé-tracking systems, however, have limitations that have led some companies to use algorithm-based video games to identify whether applicants possess desired qualifications.\(^{28}\)

A. Job Market Changes Have Led to Large Numbers of Job Applicants

Millennials (born between 1980 and 1996) move more freely between jobs than any other generation.\(^{29}\) A 2016 Gallup poll showed that twenty-one percent of millennials had changed jobs within the last year, three times more than non-millennials.\(^{30}\) Sixty percent of millennials were open to a different job opportunity, compared to forty-five percent of non-millennials.\(^{31}\) On average, millennials switch jobs every two years for a number of reasons, including better job opportunities, low workplace engagement, and the absence of a compelling reason to stay in a current position.\(^{32}\)


\(^{27}\) Castì, supra note 12; Pinola, supra note 12.

\(^{28}\) Castì, supra note 12.

\(^{29}\) Adkins, supra note 25.

\(^{30}\) Id.

\(^{31}\) Id.

Before the Internet was in widespread use, those seeking employment were limited to information from published newspaper and magazine notices and referrals from family and friends. Now, the Internet facilitates casual and efficient nationwide job searches. For example, the popular job search website, LinkedIn, has 400 million users and includes a job search tool connecting job seekers with posted employer vacancies. LinkedIn’s “apply now” button can transmit job seekers’ profiles directly to potential employers.

Job search engines have significantly increased the number of job applicants. On average, 118 people apply for a single job posting. Some companies are overwhelmed by the number of applicants. In 2011, Starbucks received 7.6 million job applications for 65,000 corporate and retail job openings, and one million people applied for 2,000 positions at Proctor & Gamble. Goldman Sachs received 250,000 job applications from millennials for 2016 summer positions. Companies facing the tall task of screening so many applicants have used algorithm-based tools to identify efficiently the far smaller number of candidates appropriate for a manager’s review.

B. Algorithms Incorporated into the Job Hiring Process

Originally, algorithm-based tools were very basic. Résumé-tracking systems could scan résumés for pre-selected key words and phrases to identify résumés to be reviewed by human eyes. However, these systems improved over time. They now do more than identify

---

34. See id.
35. Kimi Puntillo, Technology Is Changing the Job Market, COLUM. BUS. (June 27, 2016), https://www8.gsb.columbia.edu/articles/columbia-business/technology-changing-job-market-%E2%80%94-how-can-you-navigate-it (demonstrating other job search websites, including Indeed, which aggregates postings from job boards, news sites, and employers. SimplyHired allows searching LinkedIn or Facebook connections to a job; and JobMo consolidates job postings from sites such as Indeed and SimplyHired to identify additional openings).
38. Smith, supra note 37.
40. Id.
41. Brinded, supra note 26. Other Wall Street members receive large numbers of applications. Id. The Bank of America’s Merrill Lynch investment banking division offered jobs to only 3% of applicants, and Citigroup’s investment banking division offered jobs to only 2.7% of applicants. Id. Morgan Stanley receives about 8,000 applications annually for about 100 positions. Id.
42. Weber, supra note 12.
43. Skillings, supra note 12.
44. Id.
45. Id.
key words and phrases. Contemporary tracking systems have four steps. First, the system removes all résumé styling and separates the text into recognized words and phrases. Second, it sorts these words and phrases into specific categories, such as education, contact information, skills, and work experience. Third, it matches the employers’ desired keywords against the résumé’s words and phrases. Fourth, it scores the résumé on a relevancy scale representing the applicant’s value to the employer. Résumés of candidates with sufficiently high scores are then reviewed by a human. The ability of résumé-tracking systems to sort quickly through thousands of applications has led to its wide adoption by both large and small companies nationwide, including over 90% of Fortune 500 companies.

Résumé-tracking systems have weaknesses, however. On average, a résumé-tracking system decreases applicants’ chances of obtaining a job interview by 75% if they fail to include key words or phrases, regardless of their qualifications. Thus, highly qualified applicants who omit selected key words or phrases may be eliminated. Also, résumé-tracking systems consider only some elements of a candidate’s qualifications. They might, for example, include education, work experience, contact information, and skills. They do not assess cognitive abilities, work ethic, problem-solving skills, or motivation. Because experts believe these additional factors best predict workplace success, newer tools use algorithms to analyze these qualities. These tools often take the form of online quizzes or games that can make detailed personality assessments that can efficiently identify the most promising candidates.

46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Pinola, supra note 12.
52. Skillings, supra note 12.
56. Levinson, supra note 54.
57. Id.
58. Casti, supra note 12; see also Alsever, supra note 12 (eBay designed algorithms using information on tenure, compensation, promotions, and feedback scores from managers to predict which workers would likely quit; General Electric correlates human resources data and worker profiles with successful executives’ career paths to identify candidates for key promotions).
59. Rampell, supra note 12.
C. Video Game Algorithms

In March 2016, eight percent of U.S. companies used predictive analytics involving algorithms. Many of these companies use video games to obtain and analyze data from a large number of applicants to find candidates having the company’s desired abilities and personality traits. The data to be analyzed are tailored to the particular job and assess such qualities as “how creative, cautious, adept at multitasking or easily distracted, among other attributes, potential job applicants are.” “Wasabi Waiter,” developed by Knack, and “Firefly Freedom,” used by Deloitte, are examples of such games.

“Wasabi Waiter” places the applicant in the role of a server at a sushi restaurant who must decide which dishes to recommend to customers. The game’s designer, Guy Halfteck, explains:

The player has to engage in multiple micro-decisions, think about prioritizing, about [the] sequence of taking actions, about persisting when the game becomes more challenging . . . . The game collects all the data points about the entirety of the behavior during the game . . . . Then we analyze that data to extract insight into the intellectual and personal makeup of that person.”

“Firefly Freedom” takes place in a forest world where applicants must catch fireflies to provide light for a family during the winter. The applicant fires pieces of fruit at a jar to release fireflies trapped inside. However, one of the ten pieces of fruit will smash the jar, letting all fireflies escape, reducing the applicant’s score to zero. The game tests whether applicants will quit while ahead or risk losing everything to get more fireflies. Statistics compiled from this game analyze applicants’ risk appetite, mental agility, and persistence.

II. The Debate over Whether Algorithms Discriminate

Algorithms’ growing use in hiring raises the question of whether they result in discrimination. Some contend algorithms invite discrimination because their creators rely, in building their formulas, on
past hiring decisions that may have been discriminatory. Video game algorithms, in particular, may cause age discrimination if younger applicants’ experience playing video games disadvantages older candidates. However, the gap between age groups’ performance on video games is not as wide as some might assume. Legal scholars have suggested that disparate treatment and disparate impact law is ineffective in responding to algorithms. However, proponents explain that cost-effective algorithms can be designed to avoid discrimination.

A. The Argument That Algorithms Discriminate

Both legal scholars and the media are concerned that using algorithms in hiring causes discrimination. Much of this concern arises from a 2014 White House report warning that algorithms could allow companies to discriminate against certain groups, including minorities and low-income persons. Such discrimination can be built into algorithms under the guise of statistical assessment. Algorithm creators rely on employers’ past hiring data to build predictive formulas to match their best workers’ traits with job applicants’ data. If a company has not historically hired people from a particular racial or ethnic group, its algorithm will systematically exclude such people from consideration. For example, Silicon Valley has long been criticized for its white-male-dominated workplaces. Algorithms based on such existing workforce demographics may not advance employee diversity.

Video games such as “Wasabi Waiter” and “Firefly Freedom” generate fear that older applicants will be systematically excluded. While many millennials are accustomed to playing video games and may not mind playing one in the initial job hiring process, older persons less familiar with video games might struggle. Video games

73. See infra Section II(A).
74. See infra Section II(A).
75. See infra Section II(B).
76. See infra Section II(A).
77. See infra Section II(B).
78. See infra Section II(A).
79. Volz, supra note 21 (citing Big Data: Seizing Opportunities, Preserving Values, supra note 21).
81. Alsever, supra note 12; McGowan, supra note 21.
82. Volz, supra note 21.
85. Rampell, supra note 12.
86. Id.
test characteristics such as response time, attention to detail, levels of emotion, and responsiveness. Millennials may perform better than older applicants at these games and may score higher on the desired characteristics.

Rejected candidates may seek to challenge use of algorithm-based games as discriminatory. However, legal scholars realize that it would be hard for plaintiffs to prove disparate treatment or impact claims under Title VII’s existing framework. Algorithms analyze vast amounts of information, making it unlikely that an employer would intentionally alter each calculation to treat a protected class disparately. Disparate impact claims are also unlikely to prevail. Successful plaintiffs would have to identify the exact algorithm that discriminated against a specific group—a difficult task because of the complexity of algorithmic design. Even if plaintiffs sought to prove the algorithm as a whole resulted in discrimination, they would need to engage in costly discovery to learn how applicants in the targeted group were denied employment by the algorithm.

Some legal scholars have sought alternatives to address algorithm-caused discrimination. For example, in her article, Data-Driven Discrimination at Work, Pauline T. Kim, a law professor at Washington University in St. Louis, argues that the rigid framework of Title VII should be broadened to disallow what she calls “classification bias.” Kim defines “classification bias” as “the use of classification schemes that have the effect of exacerbating inequality or disadvantage along lines of race, sex or other protected characteristics.” Instead of requiring plaintiffs to identify the biased algorithm causing discrimination, Kim would require employers to prove that data created by their algorithms are accurate and do not discriminate against any group.
B. The Argument That Algorithms Do Not Discriminate

Algorithms’ proponents contend that algorithms can be effective, non-discriminatory job performance predictors.\(^99\) Algorithm-based video games allow companies to lower the costs of initial hiring process stages, which can run as high as $3,000 for each new employee.\(^100\) They also enable employers to identify quickly the most qualified applicants among large numbers of candidates.\(^101\) While applicants often have equal or similar résumé content, algorithm-based tests allow employers to see which have qualifications not revealed by paper documents.\(^102\)

Algorithm supporters challenge the White House’s conclusion that algorithms will likely discriminate.\(^103\) Algorithm creators are aware that their formulas risk unintentional discrimination, so they seek to eliminate potentially discriminatory factors. For example, Evolv, a San Francisco start-up company that creates hiring algorithms, omits the distance between applicants’ homes and the employer’s location, even though data show that workers with longer commutes are more likely to quit.\(^104\) Evolv knows that because racial and ethnic communities are often geographically segregated, considering residence location risks discrimination.\(^105\) Monitoring results can identify disparities and periodic updates can eliminate potential unfairness toward any group.\(^106\)

Video game proponents similarly argue that games are superior to résumés for assessing job-relevant qualities and skills.\(^107\) As Knack’s founder, Guy Halfteck, explains: “Traditional scores only look at written test abilities. They do not begin to measure the factors likely to have most bearing on your success: social skills or personality traits—how you deal with stress, how you collaborate with people, how much you listen . . . .”\(^108\) Halfteck assures skeptics that games do not discriminate based on age because people of all ages play mobile games like “Wasabi Waiter” well.\(^109\)

---

99. See infra Section II(B).
100. Casti, supra note 12.
102. Id.
103. Volz, supra note 21.
104. Id.
105. Id.
106. William Terdoslavich, Building a Better Algorithm, Dice (Aug. 29, 2016), http://insights.dice.com/2016/08/29/building-better-hiring-algorithm/ (algorithms should undergo periodic updates, ranging from once every eighteen months to every four years, to maintain validity).
108. Id.
109. Id.
III. Analysis

Critics of algorithm-based hiring correctly identify algorithms’ potential for hiring discrimination.110 If algorithms intentionally disadvantage certain types of applicants or eliminate a group from consideration they would constitute illegal disparate treatment.111 Algorithms can also unintentionally cause disparate impact discrimination.112 As with any type of employment hiring practice, discrimination may occur if proper precautions are not taken. However, algorithms should not be presumptively viewed in such negative light. Used properly, algorithms can evaluate job applicants more fairly than face-to-face employer-applicant interviews. Specifically, video games such as “Wasabi Waiter” and “Firefly Freedom” assess applicants in the initial hiring process in a less discriminatory way.

A. How “Wasabi Waiter” and “Firefly Freedom” Evaluate Applicants

While not applied specifically to hiring, an experiment in which people were asked to play “Wasabi Waiter” identified the best employee ideas without discriminating.113 Hans Haringa, an executive in Royal Dutch Shell’s GameChanger unit, was interested in whether “Wasabi Waiter” could help identify people who would offer potentially disruptive business ideas, that is, those with outside-the-box workplace creativity.114 The unit “solicit[s] ideas promiscuously from inside and outside the company, and then play[s] the role of venture capitalists, vetting each idea, meeting with its proponents, dispensing modest seed funding to a few promising candidates, and monitoring their progress.”115 The unit’s process generally succeeds in finding these sources of creativity, but the process takes more than two years and less than ten percent of ideas warrant the unit’s further research and development.116 With Knack’s help, Haringa conducted an experiment to see if the same results could be reached more quickly.117

Using a database of all the ideas GameChanger had received over several years, Haringa asked 1,400 idea contributors to play two of Knack’s video games, one of which was “Wasabi Waiter.”118 Haringa in-

110. See supra Section II(A).
111. See Barocas & Selbst, supra note 16, at 694–701; King & Mrkonich, supra note 16, at 563 (discussing disparate treatment claims involving algorithms).
112. See Barocas & Selbst, supra note 16, at 701–12; King & Mrkonich, supra note 16, at 563–76 (discussing disparate impact claims involving algorithms).
114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
formed Knack how well three-fourths of these idea generators had done in identifying business ideas, and Knack used the gameplay data of these contributors to create gameplay profiles comparing strong and weak idea contributors. Knack analyzed the remaining idea contributors to predict which had done best at identifying disruptive business ideas. Without knowing any identifying information about contributors, including class or classification characteristics, Knack correctly identified the top ten percent of successful idea generators. This identification was based only on personal factors such as “‘mind wandering’ (or the tendency to follow interesting, unexpected offshoots of the main task at hand, to see where they lead), social intelligence, ‘goal-orientation fluency,’ implicit learning, task-switching ability, and conscientiousness.”

Deloitte, an accounting firm that provides “audit, consulting, financial advisory, risk management, tax, and related services” to clients uses “Firefly Freedom” for non-discriminatory evaluation of interns. It uses “Firefly Freedom” to select people with a variety of backgrounds that have high potential for success.” Rob Davies, author of the article, Everything to Play for as Employers Turn to Video Games in Recruitment Drive, played Deloitte’s video game, and his experience shows how employers can avoid discrimination. In addition to catching fireflies, the game also had simpler tests to measure how quickly players tapped the screen and whether they remembered a color sequence. The game’s designer, Arctic Shores, analyzed and reported to Davies the data from his twenty-eight minutes of gameplay. The results showed Davies “‘tend[ed] to be fairly motivated by tangible rewards’ . . . ‘[was] as quick at learning new things as most people’ and . . . ‘may not display either the truly breakthrough thinking required for step-change, nor the extreme due diligence required in high-stakes situations.’” Davies’ experience playing “Firefly Freedom” demonstrates how Deloitte looks only at personal performance qualities when evaluating interns rather than focusing on an applicant’s personal characteristics that can lead to discrimination.
These examples show that “Firefly Freedom” and “Wasabi Waiter” can identify applicants with desired qualities in a manner traditional hiring processes cannot duplicate. If used in smart, safe, and effective ways, video games can reduce discrimination in hiring.

B. Video Games Can Avoid Disparate Treatment and Disparate Impact Discrimination

Some critics argue that plaintiffs cannot effectively litigate hiring discrimination caused by algorithms under current law. Despite these claims, discriminatory algorithms can be effectively identified using disparate treatment and disparate impact frameworks. A properly prepared attorney can conduct necessary discovery and find appropriate expert witnesses to prove if algorithm-based discrimination exists. Attorneys can also examine both the employer’s algorithm itself and the data it generates when sorting applications to determine if discrimination occurred. Neither of these glimpses into discovering hiring discrimination is available when humans sort through résumés. Any hiring practice, including algorithms, can be discriminatory because of intentional, reckless, or negligent human behavior. However, if employers use algorithms intelligently, they can evaluate job applicants using video games in a manner that reduces disparate treatment and disparate impact discrimination.

It will be difficult to establish a prima facie case of disparate treatment against an employer using video games in hiring. Such employers have considered neither class nor classification of applicants when analyzing candidate results. Either of these glimpses into discovering hiring discrimination is available when humans sort through résumés. A lawyer trying to determine whether discrimination was present in this process can conduct discovery by requiring that the creator provide the measurable data it obtained from applicants who played the game as well as the algorithms used to analyze the data. An expert (another video game developer) can examine the data and algorithms to determine if discrimination, whether intentional or unintentional, is present. If these actions show the algorithm has a disparate impact, it is easier to identify the specific hiring criterion causing the impact than it is when hiring is done by different humans, using different hiring criteria, within the company.

130. See supra Section II(A).
131. For an in-depth explanation of disparate impact and disparate treatment frameworks, see Employment Discrimination Law, ch. 2–3 (Lindemann et al., eds., 5th ed. 2015).
132. For example, when job applicants play games like “Wasabi Waiter” and “Firefly Freedom,” the company must send the gathered data to the game creator for analysis, and the creator returns the results to the company. Davies, supra note 12; Peck, supra note 10. A lawyer trying to determine whether discrimination was present in this process can conduct discovery by requiring that the creator provide the measurable data it obtained from applicants who played the game as well as the algorithms used to analyze the data. An expert (another video game developer) can examine the data and algorithms to determine if discrimination, whether intentional or unintentional, is present. If these actions show the algorithm has a disparate impact, it is easier to identify the specific hiring criterion causing the impact than it is when hiring is done by different humans, using different hiring criteria, within the company.
133. For a review of disparate treatment framework, see Employment Discrimination Law, supra note 131, at ch. 2–3.
134. See Davies, supra note 12; Peck, supra note 10. When Davies played “Firefly Freedom,” he was not asked about any personal characteristics such as race, religion, gender, ethnicity, color, or age. Davies, supra note 12. An employer can ensure that no one has an unfair advantage due to technology by having all applicants go to the same location and play the video game on the same device. See, e.g., id. An independent party can administer the video game so the employer cannot observe any characteristics of applicants during the process.
play data from applicants, they send it to video game developers for analysis.135 Without considering any class or classification (because no such information was acquired from game players), the developer analyzes all data produced by its algorithms and identifies the most qualified candidates.136 Employers that rely on these assessments do not consider applicants’ class or classification under Title VII or the ADEA because the algorithm did not collect such information. Rather, the process identifies applicants with characteristics related to job success, such as emotional intelligence, cognitive skills, working memory, and propensity for risk-taking, and the employer can select a small group from the large pool of initial applicants for the next hiring process stage.137 The employer can even have the developer select the smaller group of applicants based on these characteristics without the employer being aware of any applicant’s class or classification.138 If employers use algorithm-based video games to evaluate job applicants without knowledge of protected classes, disparate treatment claims are far less likely to arise than if a human evaluates job applicants with ready access to information (such as physical address or first name) that may indicate race, sex, or another protected characteristic.

Disparate impact claims, however, are still possible.139 Although algorithms analyze players’ video game statistics in “Wasabi Waiter” and “Firefly Freedom” neutrally, algorithms could unintentionally discriminate against a protected class or classification140 in the absence of preventive actions to avoid inclusion of discriminatory factors.141

Game developers have a company’s best performers play a game to design algorithms to identify applicants sharing the same workplace characteristics of successful employees.142 If a company does not have a history of hiring a certain category of persons, particularly those from protected classes, algorithms using past hiring data may systematically exclude this group from consideration.143 However, when video game developers have the best workers play video games, they do not consider the player’s identity.144 The developers simply

---

135. Davies, supra note 12.
136. Id.
137. Lohr, supra note 12; Peck, supra note 10.
138. Peck, supra note 10. This process would be similar to the résumé tracking systems that the majority of the Fortune 500 companies use to analyze the résumés of the thousands of applicants to pick a smaller group for employer evaluation. See supra Section I.
139. See Barocas & Selbst, supra note 16, at 701–12; King & Mrkonich, supra note 16, at 563–76 (discussing disparate impact claims involving algorithms).
140. Id.; Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (“Proof of discriminatory motive . . . is not required under a disparate-impact theory.”).
141. See infra Section III(C).
143. Volz, supra note 21.
144. Peck, supra note 10.
have the employee play the game to identify personal characteristics of successful workplace performers, such as emotional intelligence, cognitive skills, working memory, and propensity for risk-taking. Developers focus on workplace characteristics of successful employees, not group identities of applicants. Although results are preliminary, research suggests it is unlikely a protected group will perform worse than other applicants in all relevant categories of workplace production.

Research on one protected class tends to disprove one of the most common arguments that video games will cause discrimination: video game algorithms will cause age discrimination because older people who may not regularly play video games will perform worse than millennials. The argument assumes that the traits video games test, including response time and attention to detail, will decrease with age. However, a study conducted in 2014 undermines this expectation.

Researchers at Simon Fraser University in Canada used video games to study the age at which motor performance begins to decline. Persons aged sixteen to forty-four played a video game called “StarCraft 2,” and researchers analyzed their gameplay using several different statistical analyses. “StarCraft 2” is more complex than, but similar to, “Wasabi Waiter” and “Firefly Freedom.” Its object is to defeat the opponent’s army while managing the player’s civilization and military growth. The game is played in real time, so players must make split-second decisions and conduct small actions to defeat the enemy. Researchers found that cognitive function, such as reaction time, begins to decline at age twenty-four. However, even though older players had slower reaction times, their gameplay did not suffer. Older players compensated for slower reaction times by using simpler and more streamlined strategies. Basically, as reac-

145. Id.; Lohr, supra note 12.
146. Peck, supra note 10.
147. But see Anashkina, supra note 22 (certain groups may be disadvantaged if employers include video games in the hiring process).
148. Rampell, supra note 12.
149. Anashkina, supra note 22; Casti, supra note 12.
152. Thompson et al., supra note 150.
153. Id.; Tanoos, supra note 151.
154. Tanoos, supra note 151; Thompson et al., supra note 150.
155. Tanoos, supra note 151; Thompson et al., supra note 150.
156. Tanoos, supra note 151; Thompson et al., supra note 150.
157. Tanoos, supra note 151; Thompson et al., supra note 150.
tion times decreased, ability to utilize a better strategy increased.\textsuperscript{158} Age discrimination claims based on video game applicant screening are not likely to be successful because even though reaction time decreases with age, the ability to plan and employ an effective strategy increases.\textsuperscript{159}

Companies that intelligently create and administer video games in initial hiring stages can accomplish several purposes. Video games allow employers to select efficiently a small group from a large number of candidates to interview and can decrease disparate treatment and disparate impact discrimination. Video games can also reduce unconscious bias in evaluation of job candidates.

C. Video Games Can Reduce Unconscious Bias

Unconscious bias plays a role in human evaluation of job candidates.\textsuperscript{160} For example, “[m]anagers often gravitate to people most like themselves, make gender-based assumptions about skills or salaries, or reject candidates who have non-white names . . . .”\textsuperscript{161} Having applicants playing video games like “Wasabi Waiter” and “Firefly Freedom” during the initial hiring process allows employers to choose the best candidates without considering anyone’s class or classification.\textsuperscript{162} Selected candidates continue to the next stage of the hiring process without unconscious bias of human decision-makers influencing selection.\textsuperscript{163} Although unconscious bias could arise during later interviews, video games using algorithms can at least eliminate unconscious bias in the first stage.

Of course, unconscious bias could infect algorithm design.\textsuperscript{164} Algorithms can reproduce biases inherent in their creators because creators determine which factors the algorithms will weigh.\textsuperscript{165} Addition-

\begin{itemize}
\item \textsuperscript{158} Tanoos, \textit{supra} note 151; Thompson et al., \textit{supra} note 150.
\item \textsuperscript{159} \textit{Id.} Simon Fraser University’s study is consistent with psychology research showing how aging affects brain function. Research shows that the brain’s ability to empathize, define, ideate, prototype, and test improves with age. Amanda Enayati, \textit{The Aging Brain: Why Getting Older Just Might Be Awesome}, CNN (June 19, 2012, 11:11 AM), http://www.cnn.com/2012/06/19/health/enayati-aging-brain-innovation/. Older people have a greater capacity for empathy because they learn it over time. \textit{Id.} Empathy is important in the workplace because it facilitates finding patterns and seeing the big picture when designing and solving problems. \textit{Id.} While younger people may react quicker and have better short-term memory, they do not have as diverse life experiences and often offer only linear problem solving approaches. \textit{Id.} Older people rely on diverse life experiences affording a broader range of problem-solving ideas. \textit{Id.}
\item \textsuperscript{160} See \textit{supra} text accompanying note 23 for a discussion of unconscious bias.
\item \textsuperscript{161} Leigh Alexander, \textit{Is an Algorithm Any Less Racist than a Human?}, GUARDIAN (Aug. 3, 2016, 2:00 PM), https://www.theguardian.com/technology/2016/aug/03/algorithm-racist-human-employers-work.
\item \textsuperscript{162} See Davies, \textit{supra} note 12; Peck, \textit{supra} note 10.
\item \textsuperscript{163} See Peck, \textit{supra} note 10.
\item \textsuperscript{164} See Alexander, \textit{supra} note 161.
\item \textsuperscript{165} \textit{Id.}
\end{itemize}
ally, if unconscious bias influences identification of job-related characteristics, candidate selection will also be biased.166

While unconscious bias may influence both human hiring decisions and algorithms,167 precautions can eliminate unconscious bias more effectively from algorithms than from human brains. Algorithms designed by collecting multiple people with different backgrounds, perspectives, and biases can identify and eliminate unconscious bias that could be present if designers worked individually.168 Computer scientists at the University of Utah, University of Arizona, and Haverford College demonstrated this process.169 University of Utah Professor Suresh Venkatasubramanian led these computer scientists in a project to create a method to avoid unconscious bias in algorithms.170 The group designed two algorithms to work in tandem.171 The first algorithm incorporates the Title VII disparate impact framework172 to test whether an algorithm is discriminatory.173 If proven discriminatory, the second algorithm changes the data set to remove discriminatory effects.174 Developers can add this method to the existing precautions of “Wasabi Waiter” and “Firefly Freedom” to limit the discriminatory effects of their algorithms.175 Running these video games algorithms through the algorithms the computer scientists created could eliminate unconscious bias at a much higher rate than humans trying to eliminate it from their behavior during hiring. Although algorithms could cause discrimination, video games such as “Wasabi Waiter” and “Firefly Freedom,” with additional reviews for possible algorithm bias, are more effective at avoiding discrimination at pre-interview stages of the hiring process than human review of applicants and résumés.176

168. See Alexander, supra note 161 (“[A]ny algorithm can—and often does—simply reproduce the biases inherent in its creator, in the data it’s using, or in society at large.”)
169. Young, supra note 167.
170. Id.
171. Id.
172. Id. For a review of disparate impact framework, see EMPLOYMENT DISCRIMINATION LAW, supra note 131, at ch. 2–3.
173. Young, supra note 167.
174. Id.
175. See supra Section III(A).
176. A company requiring job applicants to play a video game at the beginning of the hiring process must reasonably accommodate those unable to play the video game because of a qualifying disability protected by the Americans with Disabilities Act (ADA). CHARLES A. SULLIVAN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 487–88 (8th ed. 2012). For example, if a blind person can perform the essential functions of a job, the employer must provide a means of evaluation other than having the person play a video game. Id. The employer could conduct an initial in-person
Conclusion

To find the best job candidates out of thousands of applicants, some companies require applicants to play video games that use algorithms to determine who could best perform the job.177 Some assert that the use of algorithms in hiring can cause both disparate treatment and disparate impact discrimination under Title VII and the ADEA and can reflect their creators’ unconscious bias.178 Certainly, any practice not carefully designed, applied, and evaluated can cause workplace discrimination.179 However, having applicants play video games such as “Wasabi Waiter” and “Firefly Freedom” in initial hiring stages can facilitate nondiscriminatory evaluation of all candidates.180 If employers take proper precautions, algorithms can more effectively avoid unconscious bias than human assessment.181 Video games using algorithms to identify applicants with characteristics that predict exceptional workplace performance can be a cost-effective alternative to avoid the discriminatory potential of human evaluation.

interview or have a proctor read test questions and alternative answers to the candidate. The employer must provide reasonable accommodations to ensure that all candidates, regardless of disability, will have equal employment opportunity. Id.

177. Casti, supra note 12; Rampell, supra note 12.
178. See supra Section II(A).
179. See supra Section III(A)–(C).
180. See supra Section III(A)–(C).
181. See supra Section III(C).
The Rights of School Employee-Coaches Under Title VII and Title IX in Educational Athletic Programs

Kim Turner*

Introduction

School employee-coaches may remedy unlawful employment practices under Title VII and Title IX. Questions of whether, when, and how to bring claims under one or both statutes are complex. This Article explores under what circumstances school employees, particularly coaches, have the right under Title VII and/or Title IX to address sex discrimination and retaliation within educational programming at the primary, secondary, and post-secondary levels. Specifically, in the athletics context, how do coaches, whether also teachers, directors,

---

* Kim Turner is a senior Staff Attorney for the Gender Equity & LGBT Rights Program and the Fair Play for Girls in Sports Project of the non-profit Legal Aid At Work (formerly the Legal Aid Society-Employment Law Center) in San Francisco. She focuses on enforcing Title IX on behalf of girls and young women in federally funded K–12 schools, particularly in low-income areas, in addition to the organizational focus on workers’ rights. She wishes to thank Elizabeth Kristen, Kristen Galles, Juliana Franco, David Nahmias, and Amis Pan for their contributions to this Article.

or professors, who are subjected to either discrimination, retaliation, or both, evaluate and vindicate their rights?

Both Title VII and Title IX are theoretically available to a coach-employee to address workplace discrimination concerning the coach’s employment conditions, as well as female players’ experiences—insofar as these conditions relate to and affect the coach’s employment. However, employees deciding whether to proceed under Title VII and/or Title IX must analyze multiple factors, including the varying approaches courts take throughout the United States in resolving these claims. First, one must consider whether the alleged unlawful acts were directed solely at the coach or against the coach and female athletes in the school—female athletes being the historically underrepresented sex. Second, one must evaluate the coach’s goals and whether desired remedies, such as reinstatement, monetary damages, or injunctive relief are available. Third, one must review administrative prerequisites, such as exhaustion requirements, that present potential avenues and roadblocks to relief. Fourth, one should consider statute-specific questions such as the required standards to establish unlawful conduct and applications of preemption principles.

This Article explores how these considerations affect whether coaches should proceed under Title VII, Title IX, or both. Part I provides background on Title VII and Title IX and discusses how Title IX requires gender equity in athletics in federally funded educational institutions. Part II explains what factors coaches should consider when deciding to bring Title VII and Title IX claims, such as varying patterns of discrimination; varying approaches to suits, goals, and implications; administrative exhaustion differences; the scope of actions and relief; and standards and treatment of retaliation under each statute. Part III examines courts’ divergence concerning whether Title VII preempts claims under Title IX. The Article concludes by highlighting the ramifications of proceeding under Title VII, Title IX, or both.

5. This analysis is restricted to coach-employees rather than coach-volunteers. “It is generally held that unpaid volunteers are not employees for the purpose of the civil rights statutes because they are not susceptible to discriminatory practices, and the remedy of back pay would be inappropriate for them.” Farrell et al., 45A Am. Jur. 2d Job Discrimination § 112 (2d ed. 2017). Yet, a volunteer may not be seeking backpay in bringing a civil rights case. See Marie v. Am. Red Cross, 771 F.3d 344, 353 (6th Cir. 2014) (“[R]emuneration is not an independent antecedent requirement, but rather it is a non-dispositive factor that should be assessed in conjunction with the other . . . factors to determine if a volunteer is an employee.”).

6. If the coach suffers discrimination or retaliation because of the athletes’ sex, and not due to the coach’s sex, a Title IX claim is arguably the only available mechanism for redress.
I. Background
A. Title VII and Title IX

In bringing a discrimination claim, a coach must choose whether to sue under Title VII, Title IX, or both. Title VII of the Civil Rights Act, which prohibits employment discrimination, initially excluded educational institutions when passed in 1964.7 Congress amended the law in 1972 to include educational institutions.8 Title VII prohibits employers from firing, failing to hire, or in any way discriminating against an employee because of the employee’s sex.9 Title IX of the Education Amendments of 1972 prohibits educational institutions from engaging in sex discrimination.10 Title IX became law in June 1972,11 eight years after Title VII and several months after Title VII’s amendment to include educational institutions.12 Specifically, Section 901(a) of Title IX provides that “no person,” on the basis of sex, shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”13 Title IX and its regulations proscribe sex discrimination, including in employment, and requires educational institutions to make non-discriminatory employment decisions.14 Title IX further prohibits segregation or classification of applicants or employees due to sex in any manner that may adversely impact applicants’ or employees’ opportunities or status.15 Both Title VII and Title IX can remedy compensation inequities.16

---

7. “This Title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.” Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.
9. 42 U.S.C. § 2000e-2 (2012). Title VII also prohibits discrimination based on race, color, national origin, religion, and pregnancy. While neither Title VII nor Title IX explicitly mention sexual orientation or gender identity, courts have held that each statute’s definition of “sex” encompasses sexual orientation and gender identity. See, e.g., G.G. ex. rel. Grimm v. Gloucester City Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016), cert. granted, 137 S. Ct. 369 (2016) (deferring to Department of Education regulations requiring schools to treat transgender students in a manner consistent with their gender identity to avoid a Title IX claim); Rene v. MGM Grand Hotel, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (openly gay man facing sexual orientation-based harassment may state Title VII cause of action).
14. Id.; see also 34 C.F.R. § 106.51–.61 (2016).
15. See 34 C.F.R. § 106.52–.57.
16. See id. § 106.54 (Title IX prohibits discriminatory compensation). Title IX can be implicated in addition to Title VII, which also prohibits an employer from discriminating based on gender when setting or changing compensation. 42 U.S.C. § 2000e-2(a)(1) (2012). The Equal Pay Act, not discussed at length in this Article, also forbids employers from paying employees at a rate less than employees of the opposite sex for equal work on jobs requiring the same skill, effort, and responsibility performed under the same conditions. 29 U.S.C. § 206(d) (2012).
Title VII did not cover educational employees at the time the law was initially being considered and legislated—thus, Title IX was developed in the context of Title VII’s failure to address discrimination in educational institutions. Moreover, nothing in the plain language of Title IX suggests that employment in federally funded educational institutions is not covered by the statute’s prohibition on discrimination. Thus, Title IX protects students and employees from sex discrimination in any federally funded educational program or activity.

B. Title IX Progress and Persistent Athletics-Related Inequities

Although gender discrimination within educational sports has lessened to some degree in recent decades, stark inequities persist between female and male athletes, between coaches of female athletes versus male athletes, and between female and male coaches. Currently, many more girls and women play interscholastic competitive sports in elementary, middle, and high school than before 1972—over 3.3 million females play high school sports today, compared to approximately 310,000 before Title IX. Nearly 193,000 women currently play varsity sports within the National Collegiate Athletic Association (NCAA), compared to only 30,000 before Title IX. Despite these great strides, boys and men continue to dominate educational athletic programs, even though “[w]omen now make up more than half of all undergraduates,” and girls comprise roughly half of all pri-

17. See N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521, 530–31 (1982) (“Congress easily could have substituted ‘student’ or ‘beneficiary’ for the word ‘person’ if it had wished to restrict the scope of § 901(a).” The “postenactment [legislative] history of Title IX . . . confirms Congress’s desire to ban employment discrimination in federally funded education programs.”); Henschke v. N.Y. Hosp.-Cornell Med. Ctr., 821 F. Supp. 166, 172 (S.D.N.Y. 1993) (“it is the opinion of this Court that the legislative history of Title IX demonstrates an intent on the part of Congress to have Title IX serve as an additional protection against gender-based discrimination in education programs receiving federal funding regardless of the availability of a remedy under Title VII”).


19. No carve-out exists for employment under Title IX. See N. Haven, 456 U.S. at 530 (“employment discrimination comes within the prohibition of Title IX”). Further, Title IX regulations expressly state that Title IX stands independently of sex discrimination claims under other statutes, such as Title VII and the Equal Pay Act. 34 C.F.R. § 106.6(a) (2016) (“The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by . . . Title VII of the Civil Rights Act of 1964 . . . the Equal Pay Act . . . and any other Act of Congress or Federal regulation.”).


23. Id.
mary and secondary school student bodies. In fact, male students have
over one million more athletic participation opportunities at the high
school level and over 60,000 more athletic participation opportunities
at the post-secondary level than female students. Despite clear
prohibitions within Title IX and other laws against gender-based
discrimination in interscholastic athletics among federally funded ed-

ucational institutions, many female athletes in primary, secondary,
and post-secondary athletic programs face inequitable treatment,
which also affects their coaches.

Sports participation among females is linked to improved physical,
mental, academic, and economic outcomes for girls and women. But
participation often hinges on having well-resourced, supported, expe-
rined, and dedicated coaches. Girls who play sports receive better
grades and are significantly more likely to graduate. The sports-
academic success correlation is particularly strong for girls of color.
Graduation rates for African-American female athletes are higher
than for their non-athlete counterparts. Similarly, Latina athletes re-
port receiving higher grades than non-athletes, and the percentage of
Latina athletes scoring in the top quartile of standardized tests exceeds
that of non-athlete Latinas. At the collegiate level, students who earn
sports scholarships graduate at higher rates than the general student
body. Further, youth sports participation is linked to later employ-
ment success. Executive businesswomen attribute involvement in
sports to their success by providing leadership skills, discipline, and
the ability to work on a team. Finally, economist Betsey Stevenson
finds that girls who participate in high school sports have higher

24. NAT’L FED’N OF STATE HIGH SCHOOL ASS’NS, supra note 20, at 55.
25. Dusenbery & Lee, supra note 22.
26. See, e.g., id. (percentage of female coaches coaching women’s teams has steadily
dropped since Title IX).
27. See WOMEN’S SPORTS FOUND., BENEFITS—WHY SPORTS PARTICIPATION FOR GIRLS AND
28. See id.
29. See NAT’L WOMEN’S LAW CTR., FINISHING LAST: GIRLS OF COLOR AND SCHOOL SPORTS
girlsfinishing last_report.pdf (“Although often overlooked, girls—particularly girls of
color—drop out at high rates. . . . Playing sports increases the likelihood that they
will graduate from high school, have higher grades, and score higher on standardized
tests.”).
30. See id.
31. FEMINIST MAJORITY FOUND., EMPOWERING WOMEN IN SPORTS, in THE EMPOWERING
32. See NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA RECRUITING FACTS (July 2016),
33. New Nationwide Research Finds: Successful Women Business Executives Don’t
Just Talk a Good Game . . . They Play(ed) One, PR NEWSWIRE (Feb. 8, 2002), http://www.
prnewswire.com/news-releases/new-nationwide-research-finds-successful-women-
rates of labor force participation and earn seven percent higher wages later in life.34

Yet, many female athletes and their coaches face discrimination, preventing girls and women from experiencing a truly level playing field. Coaches of female teams, similar to the athletes they oversee, are often subject to inequity in the terms and conditions of their employment and receive subpar opportunities, treatment, and benefits.35 A recent Women’s Sports Foundation study revealed that among coaches of female teams, “[a]lmost half (48%) of the female [college] coaches [surveyed] and just over a quarter of the male coaches (27%) in the study reported ‘being paid less for doing the same job as other coaches.’”36 Further, “[t]hirty-three percent of female coaches indicated that they were vulnerable to potential retaliation if they ask for help with a gender bias situation” and “[m]ore than 40% of female coaches said they were ‘discriminated against because of their gender,’ compared to 28% of their male colleagues.”37 The National Federation of State High School Associations notes that retaliation against complainants, including coaches, is one of the top ten sports law issues impacting secondary school athletics programs.38 More often, coaches of


35. Although female athletes are typically the underrepresented sex, they should experience equity in participation opportunities through Title IX. The athletes playing school-sponsored sports should receive the same treatment and benefits regardless of gender, including equal access to equipment, supplies, teams, coaching quality, facilities, fundraising opportunities, and more. For more information on Title IX equity requirements in educational sports programming, see generally Nat’l Women’s Law Ctr., Check It Out, Is the Playing Field Level for Women and Girls at Your School? (Sept. 2000), https://nwlc.org/wp-content/uploads/2015/08/Checkitout.pdf.


38. See Lee Green, Top Ten Sports Law Issues Impacting School Athletics Programs, Nat’l Fed’n of Athletics Ass’ns (May 20, 2015), https://www.nfhs.org/articles/top-ten-sports-law-issues-impacting-school-athletics-programs/ (“The typical high school sports retaliation suit involves a coach, student-athlete or parent who either voices concerns to school officials regarding an alleged Title IX issue or files a formal complaint to the U.S. Office for Civil Rights (OCR) and then suffers some form of disadvantageous treatment or negative consequences from school personnel as ‘blowback’ for having expressed his or her point of view on the issue.”).
female teams have fewer privileges and female coaches represent a smaller share of coaches of male or female student teams.39

Coaches often know firsthand about gender disparities in athletic programs that prevent female athletes from experiencing equitable educational environments and inhibit coaches from doing their jobs. One of Title IX’s basic requirements is that schools provide female students with equal athletic participation opportunities in proportion to their enrollment in the school40—a requirement that schools often flout. For example, if female students comprise forty-nine percent of the student body, female student-athletes should be approximately forty-nine percent of the athletic program unless the school demonstrates a history and continuing practice of adding female participants or that females do not wish to play in greater numbers.41 But across the nation, girls make up just forty-two percent of high school sports participants,42 leaving a seven percent gap between girls’ enrollment and their sports participation. Thus, schools do not offer sufficient sports opportunities for females, additionally reducing opportunities to coach female teams.

Title IX also requires gender equality with regard to the quality and quantity of facilities, uniforms, and scheduling of games and practices, among other program components experienced by male and female athletes and teams.43 Coaches often scramble to equalize such treatment and benefits to no avail. Despite clear mandates, compared to male student-athletes, girls and women play on worse fields and in second-rate gyms, receive inferior uniforms, and play games and practice at inconvenient times when parents, guardians, school staff, and others struggle to attend.44 Female athletes may have to use distant off-campus fields and gyms, while male athletes are centrally located


40. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979); see also Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 856–57 (9th Cir. 2014) (affirming district court’s judgment that 6.7% is an unacceptable gap between girls’ enrollment and participation in athletics); Biediger v. Quinnipiac Univ., 691 F.3d 85, 91, 105–07 (2d Cir. 2012) (describing a non-compliant 3.62% disparity between female enrollment and female athletic participation).

41. See Ollier, 768 F.3d at 854.

42. See NAT’L FED’N OF STATE HIGH SCH. ASS’NS, supra note 20, at 55.


on campus. Female athletes commonly lack medical and training services, such as appropriate injury-related prevention and support. These are just some inequities girls and women face when institutions violate the law, negatively impacting their coaches.

II. Considerations for Coaches’ Rights Under Title VII and Title IX

A. Varying Patterns of Discrimination

Whether discrimination is based on the gender of the coach or the athlete dictates whether the coach may bring a Title VII or Title IX claim. Coaches who notice inequities may be understandably frustrated because discrimination can hinder being able to effectively assist players. They may report concerns to athletic directors, principals, superintendents, school boards, or other administrators. Coaches may cite both inequities against female athletes and those they themselves experience. Whether coaches complain about discrimination toward themselves or their female players implicates whether they should bring a Title VII or a Title IX claim.

If coaches speak up on behalf of their teams, they may face retaliation. Common forms include threats of termination or other adverse conduct, reduction in pay or benefits, reassignment, constraints on efforts to continue coaching the team, suspension, or termination. In Jackson v. Birmingham Board of Education, a school teacher who became the high school girls’ basketball coach complained about inequities in the female sports program, such as his team’s limited access to practice opportunities compared to male players and lack of reasonable school gym access. After being terminated for his complaints, Coach Jackson brought a Title IX retaliation claim. The Supreme Court held that Jackson was entitled to pursue a retaliation claim as a coach.

46. A union collective bargaining agreement (CBA) may also govern a coach’s employment. Contract issues, such as whether the CBA governs the dispute, impact the nature of a coach’s complaint processes regarding on-the-job inequities. However, discrimination and retaliation claims such as those brought under Title VII or Title IX are not generally preempted by a CBA, depending on the terms of the CBA. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 59–60 (1974) (employee not precluded from litigating discrimination claims under Title VII despite existence of arbitration clause governing all disputes arising under a collective bargaining agreement); Nelson v. Univ. of Maine Sys., 914 F. Supp. 643, 651 n.8 (D. Me. 1996) (allowing Title IX claim notwithstanding CBA).
47. 544 U.S. 167 (2005).
48. Id. at 171–72.
49. Id.
50. Id. at 183–84.
The Supreme Court’s *Jackson* decision validated the plaintiff’s argument that “Title IX’s private right of action encompasses suits for retaliation.”\(^{51}\) The Court additionally agreed that “teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.”\(^{52}\) However, thousands of coaches nationwide are still standing in the same shoes as Jackson, noticing long-running, deep-seated inequities. Many coaches are mistreated and fearful about speaking up due to potential adverse action. Those who complain must cautiously proceed and weigh their options to vindicate their rights. Coaches of female athletes who encounter discrimination and/or retaliation must determine how to avail themselves of administrative and judicial remedies. In fact, players also may experience retaliation when a coach complains and is subsequently demoted or fired, thereby destabilizing the female students’ team and program.\(^{53}\) Thus, in defining the claim, the coach must clarify whether discrimination or retaliation targeted the coach alone, other coaches of female teams, the female athletes, or some combination thereof.\(^{54}\)

### B. Varying Approaches to Suit, Goals, and Implications

While a coach may bring claims individually and apart from female athletes, inequities experienced by female athletes and any complaints made by the coach about such inequities may be factually relevant and central to the case. For example, in *Harker v. Utica College*,\(^{55}\) a college women’s basketball coach brought Title VII and Title IX claims regarding employment inequity and discriminatory administration of the female athletic program, such as unequal booster club funding.\(^{56}\) In *Weaver v. Ohio State*,\(^{57}\) the discharged coach of a female field hockey team claimed Title IX retaliation, along with Title VII and Equal Pay Act claims, arising in part from complaints she made regarding poor field quality harming her athletes.\(^{58}\) The court rejected Weaver’s claims in part because “there [was] no evidence that plaintiff ever framed her complaints concerning the field

\(^{51}\) *Id.* at 178.

\(^{52}\) *Id.* at 181.

\(^{53}\) *See* Ollier v. Sweetwater Union High Sch. Dist., 768 F.3d 843, 871 (9th Cir. 2014) (affirming judgment in favor of high school female athletes’ class Title IX retaliation claim regarding, in part, the termination of their coach after he complained about gender inequities as to the team, although the coach was not a plaintiff).

\(^{54}\) *See* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1158–59, 1163 (C.D. Cal. 2015) (upholding student-athletes’ federal Title IX claims based on allegations that university and its employees harassed and discriminated against them for sexual orientation).


\(^{56}\) *Id.* at 381–83.


\(^{58}\) *Id.* at 791.
in terms of Title IX sex discrimination” and because complaints were more akin to “unfair treatment in general,” suggesting coaches should be explicit in complaints about how gender imbalances potentially pose legal violations.\textsuperscript{59} In \textit{Miller v. Board of Regents of the University of Minnesota},\textsuperscript{60} several coaches of female teams at the University of Minnesota-Duluth asserted Title VII sex-based discrimination claims, Title IX retaliation claims, and other claims based on inequity in employment and the treatment of female athletes.\textsuperscript{61} Thus, a coach may pose a complaint regarding both the unequal treatment she experienced on the job and the inequity faced by her players as student-athletes.

A coach of female athletes may bring a Title IX employment-related claim within the same suit as the female athletes asserting their own Title IX claims. In \textit{Biediger v. Quinnipiac University},\textsuperscript{62} athletes filed a Title IX athletic participation claim when Quinnipiac University proposed eliminating its women’s volleyball team.\textsuperscript{63} The coach, Robin Sparks, filed a Title IX claim for discrimination in employment, which survived the defendants’ motion to dismiss.\textsuperscript{64} Ultimately, “Plaintiffs agreed to sever their other theories for Title IX relief, including Coach Sparks’s individual retaliation claim . . . .”\textsuperscript{65} Notably, Coach Sparks did not assert Title VII claims.\textsuperscript{66} Similarly, in \textit{Paton v. New Mexico Highlands University},\textsuperscript{67} female athletes asserted Title IX claims along with their coaches, who brought successful Title IX retaliation claims stemming from complaints of unequal treatment.\textsuperscript{68} Coaches and athletes bringing claims together may help a court better understand the common discriminatory environment experienced by both athletes and coaches.\textsuperscript{69} Thus, a coach-employee should contemplate whether to bring a Title VII and/or Title IX suit alone or in concert with athletes to anticipate and address any possible conflicts of interest that could arise in such a case.\textsuperscript{70}

Coaches who report inequity and discrimination that could impact female athletes and trigger retaliation must evaluate their goals to de-

\textsuperscript{59.} Id. at 793–94.
\textsuperscript{60.} No. 15-cv-03740-RHK-LIB, 2015 WL 5721601 (D. Minn. Sept. 28, 2015).
\textsuperscript{61.} Id.
\textsuperscript{62.} 691 F.3d 85 (2d Cir. 2012).
\textsuperscript{63.} Id. at 91.
\textsuperscript{64.} See \textit{Biediger v. Quinnipiac Univ.}, No. 3:09-cv-621, 2010 WL 2017773, at ¶1 n.1 (D. Conn. May 20, 2010) (“Robin Lamott Sparks, the Quinnipiac University women’s volleyball coach, is also a named plaintiff in this case. She, however, is suing only on her own behalf and is not claiming to represent the putative class at issue here.”).
\textsuperscript{65.} \textit{Biediger}, 691 F.3d at 92 n.2.
\textsuperscript{66.} Id.
\textsuperscript{67.} 275 F.3d 1274 (10th Cir. 2002).
\textsuperscript{68.} See \textit{id.} at 1274–76.
\textsuperscript{69.} See generally \textit{Biediger}, 691 F.3d 85; \textit{Paton}, 275 F.3d 1274.
\textsuperscript{70.} See generally \textit{Biediger}, 691 F.3d 85; \textit{Paton}, 275 F.3d 1274.
cide how to proceed. First, they should consider whether they seek reinstatement. Second, if they were paid or received other benefits, they should consider whether to seek damages, including emotional distress damages. Relatedly, female coaches should evaluate whether they were paid less than male counterparts and whether to seek compensation for gender-based pay differences. Third, they should consider whether to seek injunctive relief to make program changes. Such changes could be limited to those affecting the coach or also encompass the entire athletic program. For example, a coach may seek improved anti-sexual harassment and anti-discrimination policies, changes to the athletes’ treatment and benefits, or both. Coaches’ goals will implicate their statutory and administrative strategies.

Some plaintiffs opt to proceed under state law as opposed to federal law. In a 2016 case, a head women’s basketball coach at San Diego State University won a $3 million verdict in state court using state law claims, without relying on Title IX or Title VII. The case addressed unequal treatment for women coaches and athletes. Claims for monetary damages against a state-funded entity, such as a state university or public school, have separate procedural require-

72. Id. Note, in general, at the high school level, girls’ teams more often have “walk-on” coaches versus teacher-coaches (although such walk-on coaches are nonetheless regularly paid, even if it is simply a small stipend). Where girls’ teams have more walk-on coaches than boys’ teams, there also may be a Title IX violation. Walk-on coaches usually have less access to the student body for recruiting purposes, fewer options to use school facilities, less teacher-level stature, and fewer overall privileges in comparison to those afforded permanent teacher-coaches who are more often male and overseeing male teams. See generally Inglewood Teachers Ass’n v. Inglewood Unified Sch. Dist., No. LA-CE-2503, 1989 WL 1701137 (Cal. PERB 1989).
75. See generally Biediger v. Quinnipiac Univ., 691 F.3d 85, 91 (2d Cir. 2012) (plaintiffs sought injunctive relief); Paton v. N.M. Highlands Univ., 275 F.3d 1274, 1280 (10th Cir. 2002) (same).
77. See generally Biediger, 691 F.3d at 91; Paton, 275 F.3d at 1280; Weaver, 71 F. Supp. 2d at 798; Harker, 885 F. Supp. at 392.
79. Id.
80. See id.
ments.82 A plaintiff may be required to notify a government entity before filing suit, depending on state law.83

C. Exhaustion Under Title VII and Lack Thereof Under Title IX

Unlike Title IX, a major implication of proceeding under Title VII is its exhaustion requirement.84 In California, among other states, if an employer violates Title VII and the issue cannot be resolved through a union or with the employer directly, the employee must first file a charge with the federal Equal Employment Opportunity Commission (EEOC) or the state counterpart, such as the California Department of Fair Employment and Housing (CDFEH).85 In fact, a coach cannot file in court until the appropriate EEOC or CDFEH administrative procedure has been exhausted and a “right to sue” letter issued.86 The employee must file a charge with the EEOC within 300 days of the discriminatory act.87 Notably, in states lacking an agency with a workshare agreement with the EEOC, employees only have 180 days to file a charge with the EEOC.88

After conducting an investigation, the EEOC will determine whether there is reasonable cause to believe an employee’s charge is

---

82. See, e.g., Roe ex rel. Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1039 (E.D. Cal. 2009) (“As Gustine Unified School District is an arm of the state, it is protected by the Eleventh Amendment and is immune from Plaintiff’s state law claims in this Court. The Eleventh Amendment does not, however, bar Plaintiff’s claims against the individual defendants because . . . they are sued in their individual capacity.”).

83. California, like many other states, requires plaintiffs to present written claims to public entities, which must be acted upon or rejected before a plaintiff can sue for money damages against a public entity, such as a school, for nearly all types of claims. See CAL. GOV’T CODE §§ 905, 905.2, 945.4 (1963); Munoz v. State, 33 Cal. App. 4th 1767, 1776 (Cal. Ct. App. 1995).


85. See e.g., Martin v. Lockheed Missiles & Space Co., 29 Cal. App. 4th 1718, 1726–27 (1994) (“an EEOC right-to-sue notice satisfies the requirement of exhaustion of administrative remedies only for purposes of an action based on Title VII”).

86. Id. at 1726. To prevent denial of civil claims because the plaintiff failed to exhaust all remedies, the employee must state claims in the EEOC charge, even though failure to exhaust may be equitably excused by the court. See, e.g., Atkinson v. Lafayette Coll., No. Civ.A 01-CV-2141, 2003 WL 21956416 (E.D. Pa. 2003) (“The Court finds that [former athletic director] Plaintiff’s Title VII retaliation claims cannot be presented to this Court because the allegations in her Complaint do not fall ‘fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.’”) (citation omitted).


88. Id.
true.89 If the EEOC decides that reasonable cause does not exist, the
agency dismisses the charge and notifies the aggrieved party and
the respondent.90 After dismissal, the EEOC will notify the aggrieved
party of the right to sue.91 An employee generally must complete this
administrative process before filing suit under Title VII, a critical dif-
fERENCE with Title IX.92 If, however, the EEOC decides there is cause
to believe discrimination occurred, the agency may attempt to resolve
the matter informally.93 If the EEOC cannot reach agreement with the
employer, the agency may sue on behalf of the employee.94 If the EEOC
decides not to sue, the agency will issue a right-to-sue letter.95 After receiv-
ing an EEOC right-to-sue letter, the employee has ninety days to file a
lawsuit.96

In stark contrast to such detailed Title VII exhaustion require-
ments, Title IX plaintiffs need not exhaust administrative remedies
before bringing private actions.97 In Cannon v. University of Chicago,
the Supreme Court stated that "[b]ecause the individual complainants
cannot assure themselves that the administrative process will reach a
decision on their complaints within a reasonable time, it makes little
sense to require exhaustion."98 Courts have rejected defendants' claims
that exhaustion is required under Title IX.99 Title IX’s lack of administra-
tive exhaustion requirements has subsequently led certain courts to pro-
nounce that potential Title IX employment discrimination claims must
first be filed under Title VII if the relevant facts implicate Title VII.100
However, other courts reject funneling coaches’ employment discrimina-

89. Id.
91. What You Should Know, U.S. EQUAL EMP. OPPORTUNITY COMM’N (last visited
renderforprint=1; see alsoinfra text accompanying notes 94–96.
92. What You Should Know, supra note 91.
93. Id.
94. Id.
95. Id.
96. Id.
98. Id. at 706 n.41 (1979). Cannon emphasized the need for an implied private
right of action under Title IX because an administrative complaint “does not assure
those persons the ability to activate and participate in the administrative process . . . ”;
“the complaint procedure . . . does not allow the complainant to participate in the inves-
tigation or subsequent enforcement proceedings”; and “even if those proceedings result
in a finding of a violation, a resulting voluntary compliance agreement need not include
relief for the complainant.” Id. at 706 n.41.
99. Id. Accord Greater L.A. Council on Deafness, Inc. v. Cmty. Television of
S. Cal., 719 F.2d 1017, 1021 (9th Cir. 1983) (exhaustion not required under § 504 of
the Rehabilitation Act because it incorporates Title IX’s administrative procedures,
and the Supreme Court has found these inadequate); Shuttleworth v. Broward Cty,
268 (S.D. Tex. 1980) (“In pursuing a private action [under Title IX], individual plaintiffs
are not required to exhaust their administrative remedies before filing suit.”).
100. See, e.g., Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995).
tion claims through the Title VII apparatus and permit immediate Title IX claims.101

The statute of limitations for Title IX tracks the most analogous state statute.102 In many states, the statute of limitations for Title IX is at least one year, notably longer than the 300 days afforded by the EEOC to file a charge and obtain a right-to-sue letter, thus, providing Title IX plaintiffs with longer timelines.103 Should the employee wish to make an administrative complaint to the U.S. Office for Civil Rights (OCR) instead of pursuing litigation, the employee must file within 180 days of the discriminatory act, with certain exceptions for continuing violations.104 OCR may refer the charge to the EEOC or maintain jurisdiction concurrently with the EEOC depending on the nature of the complaint.105

D. Scope of Action and Relief

The type of relief afforded, at one point in history, was a major consideration in whether to pursue a Title VII or Title IX claim. Title IX now generally provides rights and remedies analogous to those afforded under Title VII—the right to sue and seek injunctive, declaratory, and monetary damages (albeit without the caps imposed by Title VII).

The relevant history of Title IX begins with Cannon, in which the Supreme Court acknowledged an implied private right of action for Title IX enforcement.106 In *North Haven Board of Education v.\textsuperscript{107}
the Supreme Court recognized that Title IX incorporated private rights of action to remedy employment discrimination by educational institutions.\textsuperscript{108} \textit{North Haven} also explicitly upheld the validity of Title IX regulations pertaining to employees in federally funded educational institutions.\textsuperscript{109} In \textit{Franklin v. Gwinnett County Public Schools},\textsuperscript{110} a high school student brought a Title IX action seeking damages for intentional gender-based discrimination in connection with sexual harassment and abuse by a coach-teacher. The Court held that monetary damages were available in Title IX enforcement actions, and relief was not limited to back pay and prospective relief.\textsuperscript{111} The clear availability of punitive damages under Title VII, lacking under Title IX, may impact a complainant’s course of action.\textsuperscript{112} Yet, there are no statutory caps on damages under Title IX as opposed to the caps imposed by Title VII.\textsuperscript{113} Notice that issues arise with regard to damages must be heeded.\textsuperscript{114}

\textbf{E. Standards Under Title VII vs. Title IX}

There are similar frameworks for asserting coaches’ sex discrimination or retaliation claims under Title VII and Title IX. Several circuits agree that Title VII’s burden-shifting analysis applies to Title IX claims.\textsuperscript{115} The Department of Justice explains its position with this

\textsuperscript{107} 456 U.S. 512 (1982).
\textsuperscript{108} \textit{Id.} at 524 (Title IX intended to close loopholes in civil rights legislation, such as Title VII, which previously did not apply to employment discrimination regarding work at educational institutions).
\textsuperscript{109} \textit{Id.} at 538 (“Examining the employment regulations [Subpart E] . . . we nevertheless reject petitioners’ contention that the regulations are facially invalid.”). Under § 902 of Title IX, the Department of Health, Education, and Welfare (HEW) (preceding the Department of Education/OCR), interpreted “person” in § 901(a) of Title IX to encompass employees as well as students and issued regulations (Subpart E) prohibiting federally funded education programs from discriminating on the basis of sex with respect to employment. \textit{See id.} at 516–17.
\textsuperscript{110} 503 U.S. 60 (1992).
\textsuperscript{111} \textit{Id.} at 65, 69–71.
\textsuperscript{112} \textit{Compare} Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 529 (1999) (“punitive damages are available in claims under Title VII”), \textit{with} Mercer v. Duke Univ., 50 F. App’x 643, 644 (4th Cir. 2002) (citing Barnes v. Gorman, 536 U.S. 181 (2002)) (holding that “the Supreme Court’s conclusion in \textit{Barnes} that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX”).
\textsuperscript{113} 42 U.S.C. § 1981a-(b)(3) (2012) (limitation on compensatory and punitive damages for Title VII claims); Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 680 (1999) (Kennedy, J., dissenting) (“there are no damages caps on the judicially implied private cause of action under Title IX”) (the majority did not hold otherwise on this issue).
\textsuperscript{114} Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 181–82 (2005) (explaining “private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue” and that “recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979 . . .”) (citation omitted).
\textsuperscript{115} \textit{See} Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8th Cir. 1996) (method of evaluating Title IX gender discrimination claims is the same for Title VII cases); Murray v. N.Y.U. Coll. of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995); Preston v. Virginia \textit{ex rel}. New
language: “In resolving employment actions, the courts have generally held that the substantive standards and policies developed under Title VII to define discriminatory employment conduct apply with equal force to employment actions brought under Title IX.”

Further, the Department “takes the position that Title IX and Title VII are separate enforcement mechanisms.”

To survive summary judgment on a Title IX claim, a plaintiff must establish a prima facie discrimination case. Under both Title IX and Title VII, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its adverse action. To prevail, the plaintiff must then show that the defendant’s purported reason for the adverse action is pretext for a discriminatory motive. Although the burden shifts between the parties, the plaintiff bears the ultimate burden of demonstrating that the defendant engaged in discrimination. “Because it is well settled that Title VII does not require proof of overt discrimination, direct proof of discriminatory intent is not required” for Title IX claims.

River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994) (Title VII considerations shape contours of rights under Title IX); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 831–32 (10th Cir. 1993); Lipsett v. Univ. of P.R., 864 F.2d 881, 899 (1st Cir. 1988) (applied Title VII burden-shifting analysis in employment context to Title IX claim).


117. Id. (“Individuals can use both statutes to attack the same violations. This view is consistent with the Supreme Court’s decisions on Title IX’s coverage of employment discrimination, as well as the different constitutional bases for Title IX and Title VII.”).

118. Llamas v. Butte Cmty. Coll. Dist., 238 F.3d 1123, 1126 (9th Cir. 2001); Lipsett, 864 F.2d at 899; Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1126–27 (E.D. Cal. 2006).

119. See Llamas, 238 F.3d at 1126.

120. Id.


University’s decisions with respect to athletics are even more “easily attributable to the funding recipient and . . . always—by definition—intentional.” . . . Institutions, not individual actors, decide how to allocate resources between male and female athletic teams. Decisions to create or eliminate teams or to add or decrease roster slots for male or female athletes are official decisions, not practices by individual students or staff. Athletic programs that fail effectively to accommodate students of both sexes thus represent “official policy of the recipient entity” and so are not covered by Gebser’s notice requirement.

602 F.3d 957, 968 (9th Cir. 2010) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)) (school liable for monetary damages in private litigation under Title IX for teacher/student sex harassment if school had actual knowledge of misconduct and was deliberately indifferent).
F. Retaliation

Courts have found that Title IX retaliation claims should follow Title VII standards, although some courts suggest different analytical standards. To establish a retaliation claim under either Title VII or Title IX, the plaintiffs must show: (1) they engaged in protected activity, (2) they suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action. In Ollier v. Sweetwater Union High School District, the Ninth Circuit stated: “The Supreme Court ‘has often looked to its Title VII interpretations . . . in illuminating Title IX,’ so we apply to Title IX retaliation claims ‘the familiar framework used to decide retaliation claims under Title VII.’” Thus, Title VII and Title IX retaliation claims apply similar analyses. Some courts have been more amenable to Title IX retaliation claims than Title IX discrimination claims and have more narrowly defined the elements of Title VII and Title IX retaliation claims.

III. Preemption

Whether or not Title IX in fact preempts Title VII is a key and central issue for how such statutes do and do not operate in concert. While

---

123. In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that “[t]he text, structure, and history of Title VII demonstrate that a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.” 133 S. Ct. 2517, 2534 (2013). Yet, “*Nassar*, a Title VII case, went to some lengths to differentiate Title VII from Title IX with regard to prohibitions on retaliation.” Varlesi v. Wayne State Univ., 643 F. App’x 507, 518 (6th Cir. 2016) (appellate court affirmed district court finding for plaintiff in which Title IX retaliation claim hinged on protected activity being a significant factor in defendant taking adverse action, as opposed to the “but for” cause); see also Miller v. Kutztown Univ., No. 13-3993, 2013 WL 6506321, at *3 (E.D. Pa. Dec. 11, 2013) (court rejected argument “that Title IX retaliation claims must be proven according to traditional principles of but-for causation”).


125. 768 F.3d 843 (9th Cir. 2014).

126. Id. at 867.

127. See, e.g., Lowrey v. Texas A &M Univ. Sys., 117 F.3d 242, 252 (5th Cir. 1997) (“[T]itle IX affords an implied cause of action for retaliation under 34 C.F.R. § 100.7(e) and [| the employees of federally funded educational institutions are members of the class for whose special benefit this provision was enacted.”); Lowrey, 11 F. Supp. 2d at 911 (“Because a Title IX retaliation claim only covers conduct protected by Title IX, a plaintiff may only recover under Title IX when the defendant retaliated against her ‘solely as a consequence of complaints alleging noncompliance with the substantive provisions of Title IX.’”). Applying similar reasoning, a district court within the Third Circuit cited case law suggesting opposition to an alleged violation of Title IX is insufficient to establish a Title VII retaliation claim, finding the anti-retaliation provisions of Titles VII and IX non-identical and thus, ruling the plaintiff could not use the anti-retaliation aspect of Title VII as evidence of activity opposing Title IX inequities. Lamb-Bowman v. Delaware State Univ., 152 F. Supp. 2d 553 (D. Del. 2001).
there is a circuit split, as described further below, Title IX is a necessary, additional civil rights protection afforded to educational employees to counter sex-based discrimination, along with Title VII.128 Several courts find Title IX should not be used to circumvent administrative processes imposed by Title VII.129 Whereas several others find Title IX is a necessary additional civil rights safeguard with Title VII, rejecting preemption.130 And several courts finding Title IX is preempted by Title VII nevertheless find that a Title IX retaliation claim may proceed alongside a Title VII discrimination claim.131 Discussion above as to how such claims are similarly and distinctly addressed further elucidates as to why a plaintiff would seek to assert one or another claim or both. Notably, the courts finding Title IX is preempted by Title VII regularly overlook the Supreme Court’s holding in *North Haven*, and related opinions, refusing to reject Title IX’s employment-specific regulations and the acknowledged implied private right of action for employment-related discrimination in educational institutions.132 These differences may be critical to plaintiffs framing their claims.

A. Courts Holding Title VII and Title IX Do Not Preempt Each Other

A district court in the First Circuit found plaintiffs may assert a gender discrimination or harassment claim under both Title VII and Title IX. In *Plaza-Torres v. Rey*,133 a teacher alleged she was forced to resign because she was continually sexually harassed by a student.134 The court, relying on *New Haven*, was not persuaded by the defendant’s argument that the plaintiff’s sexual harassment claim should have been filed under Title IX rather than Title VII.135 The court held that either statute was available:

Subsequent discussions of the [*North Haven* decision] suggest that an employee of an educational institution may bring a private cause of action for sex discrimination/sexual harassment under

128. Note that many key decisions discussed do not address these issues in the context of educational athletic programs. However, the variance in such fact patterns does not necessarily affect the substantive outcome, which renders these decisions instructive for potential coach claims. The discussion here offers only a sampling of recent decisions.

129. *See, e.g.*, Lakoski v. James, 66 F.3d 751, 758 (5th Cir. 1995).


134. *Id.* at 180.

135. *Id.*
Title IX or Title VII. Thus, absent a decision to the contrary by the U.S. Supreme Court or the First Circuit Court, we refuse to hold that the availability of a cause of action for sex discrimination in employment under Title IX preempts a cause of action under Title VII. Instead, in keeping with the current case law, we hold that a plaintiff, employee of an educational institution, who has suffered sex discrimination in his/her employment may file a cause of action under Title VII or Title IX. 136

A district court in the Fourth Circuit held that Title IX retaliation claims are not preempted by Title VII in *Jones-Davidson v. Prince George’s County Community College*. 137 The court noted the Fourth Circuit “has not squarely addressed whether Title VII preempts employment discrimination claims brought under Title IX,” but explained “there is some authority within this circuit suggesting that Title VII and Title IX employment discrimination claims can proceed simultaneously, particularly where the plaintiff seeks equitable relief . . . ”138 The court “reject[ed] Defendant’s argument that Plaintiff’s Title IX [retaliation] claim should be dismissed because it is duplicative of the Title VII claim.” 139 In *Preston v. Virginia ex rel. New River Community College*, 140 the Fourth Circuit considered a Title IX retaliation claim and found “[a]n implied private right of action exists for enforcement of Title IX . . . [which] extends to employment discrimination on the basis of gender by educational institutions receiving federal funds.” 141

In *Ivan v. Kent State University*, 142 the Sixth Circuit permitted the plaintiff to bring both Title IX and Title VII claims. 143 There, the court rejected the notion “that Title VII preempts an individual’s private remedy under Title IX” so as to avoid Title VII’s detailed, express, and comprehensive provisions. 144 Thus, simply because Title VII presents a well-developed remedial scheme does not militate toward Title VII’s preemption of Title IX, even beyond retaliation claims.

A district court held in the Tenth Circuit that Title VII does not preempt Title IX in *Fox v. Pittsburg State University*. 145 The court noted that “[t]he Tenth Circuit has not addressed whether Title IX applies to allegations of sexual harassment perpetrated by one university

---

136. *Id.* (citations omitted). See also *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988) (plaintiffs may assert Title IX claim for gender discrimination).
138. *Id.* at *2.
139. *Id.* (court reviewed plaintiff’s Title IX and VII claims together, but ultimately found factual allegations fell short of prima facie retaliation claim).
140. 31 F.3d 203 (4th Cir. 1994).
141. *Id.* at 205–06 (citation omitted).
143. *Id.* at *2 n.10.
144. *Id.*
employee on another university employee," but concluded that "the balance of authority in other circuits and jurisdictions recognize Title IX liability for employee-on-employee sex discrimination and harassment."146 In *Russell v. Nebo School District*,147 the federal district court in Utah similarly denied the defendant’s motion to dismiss an elementary school employee’s Title IX sex discrimination claims brought with a Title VII claim for sex discrimination, harassment, retaliation, among other causes of action.148 The *Russell* court stated "federal courts are split on the issue" but "conclu[ed] that Title VII does not preempt Title IX and [thus] the Nebo Defendants’ motion on this issue [was] denied."149 Other district court decisions in the Tenth Circuit also suggest Title VII and Title IX discrimination claims may proceed simultaneously.150

**B. Courts Holding Title VII Preempts Title IX**

The Fifth Circuit held that Title VII preempts Title IX claims in *Lakoski v. James*.151 Lakoski, a university professor, brought Title IX and Section 1983 claims for sex discrimination after being denied tenure.152 Lakoski did not, however, bring Title VII claims, leading the court to reverse the district court’s judgment for the plaintiff.153 The Fifth Circuit held that Title IX cannot be used to “bypass [] the remedial process of Title VII” because “Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.”154 The court explained: “We are persuaded that Congress intended Title VII to exclude a damage remedy under Title IX for individuals alleging employment discrimination.”155 The court added: “Title IX prohibits the same employment practices proscribed by Title VII . . . [and] individuals seeking money damages for employment discrimination on the basis of sex in federally funded educational institutions may not assert

146. *Id.*
148. *Id.* at *3.
149. *Id.* (court relied on Winter v. Pa. State Univ., 172 F. Supp. 3d 756, 775 (M.D. Pa. 2016) (“[I]f Congress intended for Title VII to preempt employment discrimination claims under Title IX, it could have drafted Title IX, which was enacted after Title VII, to state as much.”) (emphasis in original)).
150. See, e.g., *Mehus v. Emporia State Univ.*, 295 F. Supp. 2d 1258, 1272 (D. Kan. 2004) (volleyball coach’s Title IX and Title VII discrimination claims permitted). In *Mehus*, as in other cases, the court relied on *Cannon, Franklin, and Bell* to support the plaintiff’s implied right of action under Title IX regarding employment discrimination, sustainable with Title VII claims. *Id.*
151. 66 F.3d 751, 758 (5th Cir. 1995).
152. *Id.* at 752.
153. *Id.* at 758.
154. *Id.* at 753.
155. *Id.* at 755.
Title IX either directly or derivatively through § 1983.”\textsuperscript{156} Lakoski suggests that when a plaintiff coach brings within the Fifth Circuit a Title IX claim for sex discrimination against an educational institution, for money damages, the court may reject such a claim, contending Title VII is the only statutory vehicle to vindicate such rights through the courts, whereas Title IX is the manner by which to compel federal funds removal.\textsuperscript{157} However, for Title IX retaliation claims, the Fifth Circuit recognized an implied private right of action in \textit{Lowrey v. Texas A&M University System.}\textsuperscript{158} There, the Fifth Circuit supported a private right of action on the basis that “[T]itle VII does not afford a private remedy for retaliation against employees of federally funded educational institutions who complain about noncompliance with the substantive provisions of [T]itle IX.”\textsuperscript{159} The court explained that a “private right of action for retaliation would serve the dual purposes of [T]itle IX, by creating an incentive for individuals to expose violations of [T]itle IX and by protecting such whistleblowers from retaliation.”\textsuperscript{160}

Within the Seventh Circuit, a district court in Illinois, in \textit{Ludlow v. Northwestern University},\textsuperscript{161} held that “Ludlow’s Title IX claim is one for employment discrimination and therefore preempted under Title VII . . . .”\textsuperscript{162} Relying on Lakoski, the court dismissed the claim with prejudice.\textsuperscript{163} But in \textit{Burton v. Board of Regents of the University of Wisconsin System},\textsuperscript{164} a district court of Wisconsin noted that “Ludlow was not a retaliation case,” holding “Title VII does not preempt [plaintiff’s] Title IX retaliation claim.”\textsuperscript{165} Thus, certain Seventh Circuit district courts have followed the Fifth Circuit’s Lakoski-Lowrey approach in permitting Title IX retaliation claims, but not discrimination claims that arguably can be brought under Title VII.\textsuperscript{166}

An Eighth Circuit district court also agreed with the Fifth Circuit’s holding that Title VII preempts Title IX. In \textit{Capone v. University

\textsuperscript{156}. Id. at 758. The Fifth Circuit attempted to distinguish Supreme Court Title IX jurisprudence: “Unlike Dr. Lakoski’s suit, neither \textit{Cannon} nor \textit{Bell} nor \textit{Franklin} required the Court to address the relationship between Title VII and Title IX.” Id. at 754. Note that Lakoski “limit[ed] [its] holding to individuals seeking money damages under Title IX directly or derivatively through § 1983 for employment practices for which Title VII provides a remedy, expressing no opinion whether Title VII excludes suits seeking only declaratory or injunctive relief,” thus opening the door for non-monetary Title IX discrimination employee claims in the Fifth Circuit. Id. at 753.

\textsuperscript{157}. See id. at 752.

\textsuperscript{158}. 117 F.3d 242, 254 (5th Cir. 1997).

\textsuperscript{159}. Id.

\textsuperscript{160}. Id.

\textsuperscript{161}. 125 F. Supp. 3d 783 (N.D. Ill. 2015).

\textsuperscript{162}. Id. at 791.

\textsuperscript{163}. Id.


\textsuperscript{165}. Id. at 840.

\textsuperscript{166}. See id.
of Arkansas, a district court in Arkansas held that “[i]n Lakoski v. James, the Fifth Circuit . . . was ‘not persuaded that Congress offered Title IX to employees of federally funded educational institutions so as to provide a bypass to Title VII’s administrative procedures.’”

Further, the court stated that it “agrees with the Fifth Circuit’s reasoning in Lakoski, and rules that Ms. Capone may not assert a private right of action under Title IX for sex-based employment discrimination that falls within the ambit of Title VII.” Similarly, in Cooper v. Gustavus Adolphus College, a Minnesota district court cited Lakoski in “join[ing] others in . . . concluding that there is no private action for damages available to a college employee under Title IX for sex discrimination” in light of “Title VII remedies for employment discrimination.”

Eleventh Circuit district courts have found Title VII preempts Title IX, such as in Torres v. School District of Manatee County, where a district court of Alabama noted that “[n]either the Supreme Court nor the Eleventh Circuit have addressed the issue of whether Title VII preempts Title IX when school employees seek redress for discrimination and retaliation unrelated to their students.” Ultimately, Torres reasoned:

If the Court were to hold otherwise, it would “eviscerate Title VII’s technical and administrative requirements, thereby giving plaintiffs who work at federally funded institutions unfettered ability to bring what are in reality Title VII sexual discrimination claims without adhering to the same rules required of every other employment discrimination plaintiff in the country.”

Thus, several courts find Title VII, rather than Title IX, is the sole means for educational employees, such as coaches, to address discrimination, but some recognize certain exceptions for Title IX retaliation claims.

168. Id. at *4 (“disagree[ing] with the Preston Court’s characterization of North Haven Board of Education v. Bell, 456 U.S. 512 (1982), as extending the Cannon private right of action ‘to employment discrimination on the basis of gender by educational institutions receiving federal funds’”). Capone noted “the Supreme Court has never directly addressed this issue, and only a few circuit courts of appeals have; the Eighth Circuit does not appear to be among them.” Id. at *3.
169. Id. at *4.
171. Id. at 193.
173. Id. at *5.
174. Id. at *6. See also Morris v. Wallace Cmty. Coll.-Selma, 125 F. Supp. 2d 1315, 1343 (S.D. Ala. 2001) (“In light of the weight of authority that a Title IX claim of employment discrimination may not be maintained to the extent that Title VII provides a parallel remedy, and of the plaintiff’s failure to provide any support for a contrary conclusion, the Court rules that the plaintiff’s Title IX claim is precluded by Title VII.”).
C. Courts Split or Undecided on Preemption

Second Circuit district courts vary on the preemption issue. For example, a court within the Southern District of New York held in *AB ex rel. CD v. Rhinebeck Central School District*,175 “Title IX was intended by Congress to function as an additional safeguard against gender-based discrimination in the context of federally funded education programs; notwithstanding the possibility of other available remedies, including without limitation those available under Title VII.”176 Another judge in the Southern District of New York in *Henschke v. New York Hospital-Cornell Medical Center*177 found that “the legislative history of Title IX demonstrates an intent on the part of Congress to have Title IX serve as an additional protection against gender-based discrimination in educational programs receiving federal funding regardless of the availability of a remedy under Title VII.”178 *Henschke* continued, “[t]here is no suggestion in either the Supreme Court opinion or the Second Circuit opinion in *North Haven* that the scope of Title IX’s protection against employment discrimination would not extend to an action by an individual who is also seeking relief under Title VII.”179 The Western District of New York court held otherwise in *Gardner v. St. Bonaventure University*,180 dismissing the plaintiff’s Title IX discrimination claim because Title IX would have allowed an “additional remedy” to that under Title VII.181 Second Circuit district courts have therefore diverged in approaching the preemption issue.

In the Third Circuit, a Western District of Pennsylvania court found in *Kazar v. Slippery Rock University of Pennsylvania*182 that Title VII preempts Title IX:

The [*Torres*] court explained, as the Fifth Circuit had done in *Lakoski*, that Congress did not intend for Title IX to be used to bypass the extensive remedial process of Title VII. This, as the court explained, would upset the carefully balanced remedial scheme set up by Title VII for dealing with employment discrimination cases and allow plaintiffs to ignore these requirements simply because they work at a federally funded educational institution.183

---

176. *Id.* at 153.
178. *Id.* at 172.
179. *Id.*
181. *Id.* at 127 (“to permit Gardner to pursue both a Title VII claim and a Title IX claim with regard to the alleged employment discrimination would provide Gardner with an additional remedy not available to Title VII claimants whose employers are not educational institutions in receipt of federal funds”).
183. *Id.* at *13 (citation omitted).
However, an Eastern District of Pennsylvania court did not find preemption in Winter v. Pennsylvania State University.\textsuperscript{184} In Winter, the court “conclude[d] that plaintiffs may pursue a private right of action seeking damages for employment discrimination claims against schools receiving federal funding and that Title VII would not preempt such a claim.”\textsuperscript{185} Third Circuit district courts are thus inconsistent on preemption.

Courts in neither the D.C. Circuit nor the Ninth Circuit have squarely addressed the preemption issue. One district court within the Ninth Circuit noted in Padula v. Morris,\textsuperscript{186} “the preemption issue has not been decided by the Ninth Circuit, [and] there is a split among the other circuits regarding Title IX’s preemptive effect on Title VII claims.”\textsuperscript{187}

\textbf{Conclusion}

Plaintiffs deciding whether to bring gender discrimination and/or retaliation claims under Title VII and Title IX should consider, among various factors, the manner in which one poses the complaint, the plaintiff’s goals, exhaustion requirements, the statute of limitations, available remedies, analytical standards applied to claims, and potential preemption. Several courts allow coach-employees to address their discrimination and related retaliation claims under both Title VII and Title IX if administrative requirements are met. Before certain courts, coach-employees may be more likely to succeed on a Title IX employment-related retaliation claim as opposed to a Title IX employment discrimination claim, based on Title VII preemption arguments forwarded by such courts. Yet, Title IX’s plain statutory language lacking a carve-out for employment, accompanied by explicit employment-related regulations, along with the implied right of action conferred by the Supreme Court, suggests that plaintiffs should be permitted to bring Title IX discrimination and/or retaliation claims in relation to on-the-job discrimination in the athletics context and beyond, along with or in lieu of Title VII.

In addition to preemption considerations, advantages and disadvantages of bringing Title IX and Title VII claims need to be considered. The clear availability of punitive damages under Title VII is

\textsuperscript{184} 172 F. Supp. 3d 756 (M.D. Pa. 2016).
\textsuperscript{185} Id. at 774 (rejects Lakoski analysis); see also Kemether v. Pa. Interscholastic Athletic Ass’n, 15 F. Supp. 2d 740 (E.D. Pa. 1998). In Kemether, the plaintiff alleged Title VII disparate treatment and Title IX discriminatory treatment with the court refraining from finding preemption. The court explained that the Title VII and Title IX claims could proceed simultaneously in part because “plaintiff went through the proper EEOC procedures, [and thus] there was no attempt on her part ‘to circumvent the remedial process of Title VII.’” Kemether, 15 F. Supp. 2d at 768.
\textsuperscript{187} Id. at *3 (citation omitted).
counterbalanced by the lack of statutory caps on damages in Title IX. Further, the lack of an administrative exhaustion requirement presents a clear-cut benefit to proceeding under Title IX instead of Title VII. Plaintiffs' counsel must explore both statutory routes and their interplay when deciding how to structure claims for employees alleging workplace discrimination in educational athletics and elsewhere in the campus context to ensure a level playing field for all.
On Ice: The Slippery Slope of Employer-Paid Egg Freezing

Nicole M. Mattson*

Introduction

Gender inequality is a complex workplace issue. Though women comprise half of today’s workforce, they are still “underrepresented at every level of the [talent] pipeline,” especially senior leadership and executive positions. One survey of 118 U.S. corporations asserted that, “at the rate of progress of the past three years, it will take more than 100 years for the upper reaches of U.S. corporations to achieve gender parity.” Significant economic outcomes are at stake. Another recent study calculates that further advancement of gender parity could add an estimated $4.3 trillion, or 10%, to the U.S. gross domestic product by 2025.

Yet translating the notion of gender equality into practical, effective workplace programs is no simple task—eliminating deeply-rooted inequality requires innovative thinking and time. One significant barrier to eliminating workplace gender disparity is the biological reality that, unlike men’s, women’s childbearing years are limited. Until recently, women had to choose between career advancement and starting a family, diminishing their career and pay trajectories.

---

* J.D., University of Denver Sturm College of Law, December 2017; MBA, University of Denver Daniels College of Business, November 2006. Ms. Mattson is the winner of the American Bar Association Section of Labor and Employment Law and The College of Labor and Employment Lawyers 2015–2016 Annual Law Student Writing Competition. She gratefully acknowledges Professors Debra Austin and Rachel Arnow-Richman for their support and guidance with this article and throughout law school.


2. Id. (alteration in original). Women comprise 46% of entry-level positions and 33% of director positions, but only 19% of C-suite positions. Id.


5. See, e.g., id.


7. See id. at 296–98; see also Women in the Workplace, supra notes 1 and 3.
Starting in late 2012, advances in reproductive technology afforded female workers a new way to have both a career and a family through egg freezing. While egg freezing was developed to preserve fertility for women undergoing cancer treatment, the procedure permits delayed childbearing for social reasons such as education, career development, and the desire to find the right partner.

Employers quickly capitalized on egg freezing technology to promote workforce gender equality. In 2014, Facebook and Apple started reimbursing employees up to $20,000 for egg freezing. The financial services industry followed when Citigroup and JP Morgan Chase added optional health insurance coverage for in vitro fertilization and elective egg freezing for medical reasons. In 2015, Richard Branson, founder of Virgin Group, stated that he wanted to adopt the egg freezing idea for his conglomerate of diverse businesses. In early 2016, the Pentagon announced a pilot program for military personnel who want to freeze their eggs or sperm prior to deployment. In late 2016, the Department of Veterans Affairs announced it would compensate wounded veterans for in vitro fertilization costs. While alluring

---


12. Id.


to young, ambitious professionals, employer-paid egg freezing programs precipitate several social, moral, and legal concerns.\(^{17}\)

This Article explores whether the potential benefits of employer-paid egg freezing programs outweigh their risks, including potential employment discrimination claims.\(^{18}\) Part I defines the egg freezing process and key terms. Part II considers the advantages and disadvantages of egg freezing for workers. Part III identifies relevant legal protections under anti-discrimination and job-protected leave laws and explains how employer-paid egg freezing programs may trigger legal liability. Part IV offers practical advice for employers.

### I. Freezing Eggs: It’s Not as Easy as It Sounds

A woman’s fertility peaks in her twenties and steadily declines until her mid-thirties, with a rapid decline by age forty.\(^{19}\) “Women become less likely to become pregnant and more likely to have miscarriages [as they age] because egg quality [and quantity] decreases.”\(^{20}\) Miscarriage rates quadruple from 20% at age 35 to 80% at age 45.\(^{21}\) Thus, women who want to postpone childbearing must choose between a burdensome egg freezing procedure and possible infertility, which for some women are not “real options.”\(^{22}\) To assess employer involvement in egg freezing, one needs to understand the detailed processes of egg harvesting and retrieval and in vitro fertilization. Although egg freezing has gained acceptance and understanding in recent years, it remains difficult and expensive for women who choose to freeze their eggs.\(^{23}\)

#### A. The Reproductive Technology of Egg Freezing

“Egg freezing promises, literally, to stop the biological clock, [and preserve] a woman’s eggs from the ravages of time until she is ready to use them.”\(^{24}\) Women have a finite number of eggs, determined at birth,

---

18. Because this Article is focused on employer-paid egg freezing for social reasons, egg freezing for medical reasons is generally outside the scope of this discussion.
20. *Age and Fertility, supra* note 19, at 5–6 (alteration in original).
23. See, e.g., Jennifer Gerson Uffalussy, *The Cost of IVF: 4 Things I Learned While Battling Infertility, Forbes* (Feb. 6, 2014, 3:00 PM), http://www.forbes.com/sites/learnvest/2014/02/06/the-cost-of-ivf-4-things-i-learned-while-battling-infertility/#152e3ecc2a79 (“On average, nationally, a ‘fresh’ IVF cycle costs $12,000, before medications, which typically run another $3,000 to $5,000.”).
but men produce sperm throughout their lifetime. That makes it easier for men to prioritize career development before starting a family without undermining their reproductive capacity. Both sperm and egg quality decrease with age, but the number of chromosomally normal eggs declines drastically at age thirty-five. Embryonic age-related chromosomal abnormalities are a primary cause of miscarriage.

Egg freezing (oocyte cryopreservation) allows women to delay childbearing into their thirties, forties, and early fifties—even after menopause, the biological end of a woman’s natural childbearing capacity. The live birth rate for women in their late thirties and early forties has more than doubled over the last thirty years. Some studies suggest this increase is correlated with technological advances in reproductive medicine, including egg freezing, in vitro fertilization, and frozen embryo transfer.

Frozen sperm and embryos have been successfully used in reproductive medicine for decades, but, until recently, freezing technology was not as effective for more delicate and less resilient female eggs. In the early 2000s, Italian researchers discovered vitrification, a flash freezing method to prevent formation of frozen crystals within eggs. In 2013, when the flash freezing technology showed clinical evidence of success, professional organizations that set reporting requirements and practice standards for reproductive medicine clinics and practitioners lifted the “experimental” label from egg freezing for medical purposes. Since then, egg freezing has become a hot, albeit controversial, topic for women seeking to preserve fertility while developing a career. Within a year, the average age of women pursu-

25. See, e.g., id.; Robertson, supra note 8, at 115.
26. Carbone & Cahn, supra note 6, at 299.
27. See, e.g., id.; Age and Fertility, supra note 19, at 4.
28. Age and Fertility, supra note 19, at 5; Tennenhouse, supra note 21.
30. National Vital Statistics Report, 64 CTR. FOR DISEASE CONTROL 1, 19 (2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf. The live birth rate per 1,000 women for all races, ages 35 to 39 in 1983 was 22.0, compared to 49.3 in 2013. The live birth rate for all races, ages 40 to 44 was 3.9 in 1983, compared to 10.4 in 2013.

32. Robertson, supra note 8, at 115.
33. Id.
34. Practice Committees, supra note 9, at 41.
35. See, e.g., Bennett, supra note 13; Rosenblum, supra note 10; but see Sabrina Parsons, Female Tech CEO: Egg-Freezing ‘Benefit’ Sends the Wrong Message to
ing egg freezing declined from 39 to 36,\textsuperscript{36} and the number of egg freezing cycles performed in the United States increased by almost 30\%.\textsuperscript{37} Studies now estimate that 2\% of babies born in the United States are conceived through advanced reproductive medicine.\textsuperscript{38}

B. The Egg Freezing Procedure

The process of egg freezing starts with a series of reproductive endocrinologist consultations, blood work, and gynecological procedures to confirm overall reproductive health and ovarian reserve.\textsuperscript{39} If a woman is a good candidate for egg freezing, she self-administers a three- to four-week course of egg follicle suppression medication, using birth control pills or hormone injections.\textsuperscript{40} Then, the woman injects egg stimulation hormones into her abdomen multiple times daily for approximately fourteen days and is tested through daily blood work and ultrasounds to confirm size and growth of eggs.\textsuperscript{41} “The purpose of the medications taken during treatment is to safely stimulate the ovaries to produce more mature eggs than are produced in a natural cycle.”\textsuperscript{42} A natural ovulation cycle typically produces one or two eggs,\textsuperscript{43} but a single stimulation cycle produces, on average, 15 eggs,\textsuperscript{44} within a range of 0 to 45.\textsuperscript{45} This process risks ovarian torsion from the developing egg quantity and ovarian size.\textsuperscript{46} This risk is mitigated by restricting physical activity for approximately two weeks during the harvest procedure.\textsuperscript{47}
The eggs are mature and ready to be retrieved when some follicles measure 15 to 20 millimeters diameter on daily ultrasounds. A shot is administered to induce ovulation, which releases all eggs from the ovaries into the fallopian tubes, and approximately thirty-five hours later, a reproductive endocrinologist retrieves the eggs with a long needle while the woman is under general anesthesia. Within a week after egg retrieval, a patient may develop ovarian hyperstimulation syndrome (OHSS), causing the ovaries to swell with fluid and become painful due to the injectable ovary stimulation hormones. OHSS symptoms usually are mild, but the condition can require hospitalization for kidney failure or blood clots. The prevalence of OHSS is unclear due to inconsistent reporting, but estimates suggest that up to 25% of women experience mild OHSS symptoms and up to 5% suffer severe symptoms.

After the egg harvest, quality can be assessed only by visual appearance and size because there is currently no screening mechanism for chromosomal abnormalities at this stage. Selected eggs are flash frozen immediately or within twenty-four hours if the eggs are monitored for continued growth. The eggs remain frozen until they are no longer needed, at which time unused eggs may be discarded. The procedure’s cost is between $9,000 and $20,000, plus $2,000 to $4,000 per cycle for stimulation medication, and a $500 to $1,000 an-
nual storage fee. The entire egg freezing process takes approximately four to six weeks and is rarely covered by insurance.

C. In Vitro Fertilization: Making Babies from Frozen Eggs

The process of stimulating, harvesting, and retrieving eggs is only the first step of in vitro fertilization and the embryo transfer process. When a woman chooses to use her frozen eggs, they are warmed and fertilized by sperm in vitro, using advanced reproductive technologies. Embryologists then observe the fertilized eggs for proper cell growth, which can be negatively impacted by fertilization failures, chromosomal abnormalities, egg degeneration, bacterial contamination, or even laboratory equipment failure. After several days of the fertilized egg’s successful cell growth, the resulting blastocysts may be biopsied for genetic testing and frozen for later implantation.

If a patient declines genetic testing, the selected embryo is transferred to the uterus using a guided catheter. Remaining embryos may be frozen indefinitely for future embryo transfer without compromising quality. Prior to embryo transfer, and after in vitro fertilization, a patient daily self-injects hormones for several weeks to prepare the uterine lining for embryo implantation. Successful embryo transfer and implantation progresses to a clinical pregnancy.

58. See, e.g., Abney, supra note 48, at 299; Mohapatra, supra note 8, at 386; Sarah Z. Wexler, Four Things You Need to Know About Freezing Your Eggs, HUFFINGTON POST (June 24, 2015, 9:00 AM), http://www.huffingtonpost.com/2015/06/24/freezing-your-eggs_n_7623822.html. The cost of egg freezing varies by the clinic and individual protocol. Some medications are more expensive; less expensive medications and diagnostic testing may be covered by insurance.


60. Rosenblum, supra note 10; Wexler, supra note 58.


62. Abney, supra note 48, at 298; Mohapatra, supra note 8, at 386.


65. See ART: Step-by-Step Guide, supra note 40 (Society for Assisted Reproductive Technology sets strict guidelines for the number of embryos to transfer); see also Mohapatra, supra note 8, at 386; Abney, supra note 48, at 298.


68. See Goodwin, supra note 22, at 29; ART: Step-by-Step Guide, supra note 40.
Approximately ninety percent of frozen eggs survive the thawing process. 69 On average, at least eight eggs are required to achieve one clinical pregnancy. 70 “The older [a woman’s age] at the time of egg freezing, the lower the likelihood [of] a live birth . . . .” 71 “[M]ost women undergo several cycles before pregnancy occurs, or until they suspend treatments.” 72 One complete egg freezing, in vitro fertilization, and embryo transfer cycle costs approximately $50,000, but costs may increase depending on factors such as how long eggs are stored. 73

II. The Advantages and Disadvantages of Employer-Paid Egg Freezing

This egg freezing process has several advantages in the employment context. Employer-paid egg freezing advances gender parity in the workplace, indirectly facilitates leveling the financial playing field between men and women, and supports long-standing public policy protecting female childbearing capability. Despite its advantages, however, employer-paid egg freezing may detrimentally affect workplace culture, and the procedure’s long-term health risks and success rates are generally unknown.

A. Advantages

1. Egg Freezing Advances Workplace Gender Parity

A compelling argument for egg freezing is that “‘egg insurance’ against future infertility [enables] equal participation in employment,” 74 thereby advancing workplace gender parity. 75 Female fertility peaks at the same time women invest time and energy in education and career advancement. 76 Egg freezing allows women to decide freely when to exit and re-enter the workforce to start or grow a family. 77 When an employer assumes the cost of egg freezing, women may con-
continue working until they are professionally and personally ready for children. As a result, women remain in the talent pipeline for senior leadership positions.

Employers also see egg freezing as a means to foster family-friendly workplaces. Facebook decided to pay for egg freezing for employees and their spouses in response to employee demand. Sir Richard Branson, founder of Virgin Group, views egg freezing as a “fantastic” choice for a woman who has not “met the man of her dreams” by her late thirties and states “it makes sense—the earlier you can freeze [the eggs], the better.” Both Apple and Facebook include egg freezing in their overall family benefit options. Family-friendly benefits may improve employers’ ability to attract and retain workers who have or want children.

Egg freezing also promotes women’s empowerment. Apple says egg freezing enables its female workforce to “do the best work of their lives.” Generally, egg freezing offers women the choice to develop a career before starting a family, and it gives a woman time to decide if she wants children. Preserved fertility offers “actual and symbolic freedom, security, and time.” One woman who froze her eggs said that her “future seemed full of possibility again,” and “[b]y freezing, you’ve done something about it . . . and that can pay off in both your work and romantic lives.” Egg freezing empowers women to extend their biological clocks while advancing their careers alongside male counterparts.

78. See id.
82. See, e.g., Carbone & Cahn, supra note 6, at 302–04; Robertson, supra note 8, at 120; Rosen, supra note 76.
83. Sydell, supra note 11.
84. See Robertson, supra note 8, at 120; Mohapatra, supra note 8, at 389–90.
87. Rosenblum supra note 10 (quoting Sara Elizabeth Richards, Motherhood, Rescheduled: The New Frontier of Egg Freezing and the Women Who Tried It (2013) (stories about women who decided to freeze their eggs)).
2. Employer-Subsidized Egg Freezing Levels the Financial Playing Field

Employer-paid egg freezing helps to level an uneven financial playing field. “[T]he cost [of egg freezing] is prohibitively high for most women . . . .”88 By subsidizing the high cost of the procedure, employers make egg freezing available to women who otherwise may not be able to afford it.89 Women with limited skills and economic resources tend to put childbearing first; women who freeze eggs tend to be middle-class and college-educated.90 Without employer assistance, “[e]gg freezing is likely to remain an elite practice, well beyond the reach of working class women who can’t afford to freeze their eggs, and who enjoy less workplace support for their family needs.”91

Employer-paid egg freezing may also neutralize the “fertility penalty—the loss of lifetime earnings as a result of taking time away from work to start a family early in one’s career.”92 Women may experience a greater loss of earnings than men because women take more time away from work before and after childbearing.93 Employer-paid egg freezing provides women broader access to reproductive technologies that allow delaying childbearing and thereby reduces their time away from the workforce at early stages in their careers when uninterrupted employment may be critical to advancement.94 Thus, it levels the financial playing field and minimizes the “fertility penalty.”

3. Employer-Paid Egg Freezing Furthers the Public Policy of Protecting Childbearing Capacity

Public policy and state laws have been designed to protect maternal capabilities since the early twentieth century.95 Women can bear children using donor eggs and sperm, but “[m]en cannot reproduce without an egg source and/or gestator.”96 Further, society benefits from protecting women’s capability to bear children.97 At a fundamental level, egg freezing and other advanced reproductive technologies

88. Richards, supra note 86 (alteration in original).
89. See Carbone & Cahn, supra note 6, at 306 (“Egg freezing is only available to women who can afford to pay and who can make the choice to wait to have children.”).
90. Id. at 297.
91. Id. at 289.
93. See Parsons, supra note 35 (women who have children are more likely than men to take extensive time off and are at a disadvantage for promotions and raises).
94. See Sydell, supra note 11 (“[C]overing the cost of egg-freezing as an elective procedure could help keep some good female employees.”).
95. See, e.g., W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937) (state may regulate minimum wage paid to female employees to promote female health, safety, and general welfare); Muller v. Oregon, 208 U.S. 412, 420 (1908) (state may constitutionally limit working hours of women because of strong interest promoting maternal capabilities).
96. Robertson, supra note 8, at 135 (alteration in original).
97. See e.g., Carbone & Cahn, supra note 6, at 311–13.
enable the reproductive capacity of more women and for a longer pe-
riod of their lives. In today’s workplace, this means that women
can have it all—a healthy family and a robust career.

A further indication that public policy makers seek to preserve
childbearing capacity as a social good is shown by recent action of
the U.S. Defense Department, which began offering egg freezing to
military families to help retain service members in 2016. The Penta-
gon sees it as a means to: (1) offer assurance to those injured during
deployment that they will still be able to have children using advanced
reproductive technologies, (2) retain women in their twenties and thir-
ties, and (3) allow for continued overseas deployments and military ca-
reer development. “Women who reach 10 years of service—what
[Defense Secretary Ashton] Carter calls ‘their peak years for starting
a family’—have a retention rate that is thirty percent lower than their
male counterparts.” The five-year pilot program costs an estimated
$150 million and will be offered through the military’s health plan.

B. Disadvantages

1. Egg Freezing Programs May Impair Workplace Culture

The availability of employer-paid egg freezing may create a work-
place culture that pressures women to delay childbearing to their det-
riment. This is especially true if women perceive egg freezing as a
requirement to remain competitive at work. Specifically, executives
and leaders in decision-making positions (the majority of whom are
men) may suggest implicitly that women who delay childbearing by
freezing eggs are more dedicated and ambitious and worthier of ad-
vancement. To be viewed favorably, female workers may undergo
the difficult procedure even if they had not previously planned to
delay childbearing.

Moreover, employer-paid egg freezing can foster what legal ethics
and health law professor Michele Goodwin refers to as the “double

98. See id. at 300.
99. Schmidt, supra note 15. The Pentagon also offers sperm freezing. Id.
100. Id.
101. Id.
102. Id.; see generally Combating Infertility During Military Service, PATH2PARENT-
HOOD, http://www.path2parenthood.org/library/handbooks-fact-sheets (select Combating
Infertility During Military Service download) (last visited Oct. 5, 2016) (discussing fer-
tility treatments before and after military service).
103. See Goodwin, supra note 22, at 53 (“Decisions to postpone pregnancy . . . are
not made by women but instead are forced by male-dominated hierarchical work institu-
tions.”); see also Carbone & Cahn, supra note 6, at 310 (women will feel pressure to com-
ply with terms traditionally imposed on men); Parsons, supra note 35 (discussing poten-
tial issues with employers providing egg freezing); Robertson, supra note 8, at 122–23
(women may feel as though they must freeze their eggs).
104. Robertson, supra note 8, at 122–23.
105. See, e.g., id. at 122–23; Parsons, supra note 35.
106. See Robertson, supra note 8, at 122–23.
bind,” in which women “believe they must choose between the pursuit of a career and early motherhood.”

Social pressure to freeze eggs may complicate that choice by creating interpersonal conflict or disruptive competition among female workers. Thus, an employer-paid egg freezing program could undermine its ultimate objective of promoting gender parity. Professor Goodwin cautions that “[egg-freezing] is not a replacement for equitable work policies and practices.”

Within an employer-paid egg freezing program, workers may also view their frozen eggs as commodities and view egg freezing as another employee benefit, such as education or parking reimbursement. A global reproductive market exists for donor eggs and sperm; currently, because of the difficult and risky process of egg harvesting and retrieval, the demand for donor eggs far exceeds the supply. Some workers may take advantage of an employer-paid egg freezing program and freeze their eggs simply to “sell” them for profit. Worse yet, the workplace may evolve into its own egg micro-market, in which younger, more fertile, workers openly broker with older, less fertile workers to buy and sell eggs. This could involve negotiation of contracts, pricing, and the potential relinquishment of parental rights by egg donors. Employers could become entangled in disputes over the ownership, custody, and posthumous use of frozen eggs such as those that have already arisen between couples. Workplace culture and productivity problems are likely to follow.

108. Cf. Robertson, supra note 8, at 122–23 (discussing the pressures employer-paid egg freezing will put on women); Rosenblum, supra 10.
109. Rosen, supra note 76.
110. Goodwin, supra note 22, at 54 (alteration in original).
111. See Robertson, supra note 8, at 124–25 (“Although their goal at the time of freezing is to reserve their own fertility, they will have to think of their eggs as possible future commodities. . . .”).
113. See Robertson, supra note 8, at 124–25.
115. Cf. id. at 652–56 (discussing issues related to contracting a woman to act as a surrogate).
116. See, e.g., York v. Jones, 717 F. Supp. 421, 422 (E.D. Va. 1989) (couple sued Virginia fertility clinic to transfer frozen embryo to California fertility clinic); Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1258 (Ariz. 2005) (plaintiffs asserted a wrongful death claim against clinic after the alleged negligent destruction of frozen embryos); In re Estate of Kievermagel, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008) (wife sought to get pregnant using stored frozen sperm of dead husband); In re Marriage of Witten, 672 N.W.2d 768, 782 (Iowa 2003) (frozen embryo disposition agreements entered into at the time of in vitro fertilization are enforceable and binding, subject to the right of either party to change their mind about disposition); In re C.K.G., 173 S.W.3d 714, 717–19 (Tenn. 2005) (unmarried couple disputed custody of triplets conceived with donor eggs);
2. Health Risks and Success Rates Are Unknown

Employers may question the wisdom of financing a medical procedure with unknown long-term health risks, questionable success rates, and little federal or state regulation.\(^{117}\) Important questions arise. What if clinical research ultimately shows that the stimulation drugs increase cancer risk? Who bears the psychological blame if an employee chooses to use eggs later in life, but they fail? Imagine the disbelief and betrayal homeowners might feel when, after paying property insurance for years, they file a claim and learn the policy was never valid. Similarly, employer-paid so-called baby or egg insurance programs offer no guarantees.\(^ {118}\)

While initial studies suggest that in vitro fertilization and other infertility treatments do not affect child development,\(^ {119}\) there are too few longitudinal studies to evaluate long-term effects of ovarian stimulation medications on otherwise healthy women and their children.\(^ {120}\) Some studies have shown a correlation between egg stimulation drugs and cancer in fertility patients and fetuses.\(^ {121}\) The new science of egg freezing does not yet offer reliable data regarding rates of successful pregnancies and live births after long-term egg freezing.\(^ {122}\)["Of the fifty percent of the U.S. [advanced reproductive technology] programs that report offering [egg freezing], over fifty percent of them have never thawed and inseminated frozen eggs and had live births thereafter."\(^ {123}\)]

The federal government has done little to address this lack of data. The only major legislation intended to regulate the fertility clinic industry is the Fertility Clinic Success Rate and Certification Act (FCSCA) of 1992, which requires fertility clinics to report annual suc-
cess rates to the Centers for Disease Control.\textsuperscript{124} Beyond the FCSCA, there is little federal regulation of reproductive technology, including egg freezing.\textsuperscript{125} When regulatory committees lifted the “experimental” label from the egg freezing procedure, they noted that egg freezing is recommended for medical reasons such as imminent chemotherapy, but “[t]here is not yet sufficient data to recommend oocyte cryopreservation for the sole purpose of circumventing reproductive aging in healthy women.”\textsuperscript{126} Further, they stated, “[m]arketing this technology for the purpose of deferring childbearing may give women false hope and encourage women to delay childbearing” when there are no data to support this application.\textsuperscript{127}

III. The Slippery Slope: Legal Risk in Employer-Paid Egg Freezing

Employers offering egg freezing to employees could face a number of legal risks. These employers will inevitably gain personal information about employees that could affect employment decisions. Improper use of such information may give rise to legal claims, including privacy and tort claims\textsuperscript{128} and Employee Retirement Income Security Act (ERISA) claims,\textsuperscript{129} against employers. Moreover, discrimination claims may arise under the Pregnancy Discrimination Act (PDA), Americans with Disabilities Act (ADA), and Family and Medical Leave Act (FMLA).\textsuperscript{130} Because egg freezing is relatively new to the

\textsuperscript{124} See Fertility Clinic Success Rate and Certification Act (FCSCA), 42 U.S.C. §§ 263a–263a-6 (2012) (requiring fertility clinics to report pregnancy success rates annually to the Centers for Disease Control); see also Goodwin, supra note 22, at 32 (Congress passed the FCSCA to promote assisted reproductive technologies, not regulate them).

\textsuperscript{125} See Carbone & Cahn, supra note 6, at 289.

\textsuperscript{126} Practice Committees, supra note 9, at 42 (alteration in original).

\textsuperscript{127} Id. at 41.

\textsuperscript{128} See, e.g., Genetic Information Nondiscrimination Act, 42 U.S.C. § 300gg-53 (2012) (prohibits health insurers from discriminating on the basis of genetic information); Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-6 (2012) (prohibits wrongful disclosure of individually identifiable health information); and state privacy tort law, RESTATEMENT (SECOND) OF TORTS § 652B (A M.LAW INST. 1977) (employer commits tortious invasion of privacy when it intrudes in a highly offensive manner into some matter in which a person has a legitimate expectation of privacy). An in-depth analysis of these risks is outside the scope of this Article.

\textsuperscript{129} See 29 U.S.C. § 1021 (2012) (protects employee benefit rights and creates employer liability for failure to meet requirements of group health plans). Employer-paid egg-freezing programs are arguably exempt practices because the payments come from general employer assets. However, a program may become part of an ERISA covered health or welfare plan if it is included in a group health plan; see generally Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 12–14 (1987) (discussing establishment of a “plan” under ERISA); Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982) (outlining four factors considered to determine whether welfare benefit structure is ERISA plan); see generally LEE POLK, 1 ERISA PRACTICE AND LITIGATION § 2:5 (2013). An in-depth analysis of these risks is outside the scope of this discussion.

work environment, no egg freezing cases have yet reached the courts. However, some discrimination cases have arisen from the in vitro fertilization process, which includes egg harvesting. A court considering a discrimination claim related to employer-paid egg freezing would likely consider such cases as persuasive legal authority.

A. Pregnancy Discrimination Act: Favoring Egg Freezing over Pregnancy

Employer-paid egg freezing poses a risk of liability under the PDA. Under Title VII, it is unlawful for an employer to discriminate based on race, color, religion, sex, or national origin. The PDA amended Title VII's anti-discrimination language to include sex discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .” The PDA uses a comparison framework in which “[c]ourts look for ‘equal treatment’ based on an evaluation of whether the employee claiming discrimination was treated less favorably in comparison to another employee who is ‘similarly situated.’” The PDA states that employers must treat pregnant women “the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work.”

Courts have generally agreed that the capacity to bear children affects only women and that an “[a]dverse employment action based on childbearing capacity will always result in treatment of a person in a manner which, but for that person’s sex, would be different.”


133. Id. § 2000(e)(k).

134. Maryn Oyoung, Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities, 44 McGeorge L. Rev. 515, 518 (2013); see also Troupe v. May Dep’t Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (department store saleswoman’s claim that she was fired for absences related to severe morning sickness failed due to lack of comparator evidence).


Over the last two decades, courts have found cognizable sex discrimination claims under the PDA based on infertility and in vitro fertilization. Employer policies and adverse employment actions related to infertility and in vitro fertilization can create litigation risks.

Egg freezing imposes burdens on women not imposed on men, implicating the PDA. The U.S. Supreme Court in 2015 addressed an employer policy that burdened pregnant workers more than non-pregnant ones. In Young v. United Parcel Service, the employer denied a pregnant driver’s accommodation request to reduce her lifting requirement from seventy pounds to twenty pounds. The employer placed the pregnant driver on an unpaid leave of absence but then accommodated non-pregnant drivers with on-the-job injuries, permanent disabilities, or failed Department of Transportation certifications. The Court vacated and remanded the lower courts’ granting of summary judgment for the employer, ruling that (1) the employee showed that the employer accommodated non-pregnant workers while failing to accommodate pregnant employees; and (2) the plaintiff’s claim could reach a jury by providing evidence demonstrating that the employer’s policies imposed a significant burden on pregnant workers, while “the employer’s legitimate non-discriminatory reasons were not sufficiently strong to justify the burden.”

What courts consider a “significant burden” is yet to be determined. In light of Young, Brian McDermott of Ogletree Deakins recommends that employers examine “any policies or programs that benefit non-pregnant workers but do not include pregnant workers.”

For example, consider a hypothetical scenario about Izzy, Polly, and Ellie. Each are technical supervisors at Parity, Inc., a technology services company that recently started paying for egg freezing. Izzy and her husband have been trying to conceive for several years with no success with and without in vitro fertilization. She has been diagnosed with infertility and has few options to bear children without advanced reproductive technologies. Polly is in her first trimester and experiences severe morning sickness. Ellie takes advantage of the test for Title VII actions established in L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).


139. Young, 135 U.S. at 1344.

140. Id.

141. Id. at 1347.

142. Id. at 1354 (internal quotations omitted).


144. Id.
company's new egg freezing benefit, hoping to use her frozen eggs after she has developed her career.

Here, Parity could be liable under the PDA: (1) if Parity were to pay $20,000 for Ellie’s egg freezing procedure but not for Izzy’s infertility treatments, which are procedurally identical to egg freezing prior to in vitro fertilization; and (2) if Parity were to accommodate a different schedule for Ellie while she pursues the egg freezing procedure but does not for Polly when she experiences severe morning sickness. In both scenarios, Parity favors Ellie, a non-pregnant worker, over Izzy or Polly, pregnant workers or workers with pregnancy-related conditions.

Advocates of employer-paid egg freezing might argue that employers could still be liable for PDA violations even if employees pay for their own egg freezing because liability for PDA violations does not depend on how egg freezing is funded. While this is true, employer-paid egg freezing may create additional pressures on employees, thereby adding conflict among egg freezing, non-egg freezing, and pregnant workers.

Proponents may also contend that egg freezing is just one part of a broader benefit plan available to all female employees and spouses. Employees like Izzy might be able to use the benefit as part of her infertility treatments, while employees like Polly might be able to use the egg freezing benefit to postpone a second child. Also, other programs and benefits such as group health insurance, flextime, or telecommuting arguably offset the burden on infertile or pregnant workers. These arguments are valid if these benefits ameliorate the type of disparate burdens of concern to the Supreme Court in Young.\textsuperscript{145}

\section*{B. Americans with Disabilities Act: Accommodating Temporary Disability}

Employers paying for egg freezing should also be aware of potential liability under the ADA. The ADA, as amended in 2008, requires employers to provide reasonable accommodation to employees with a qualifying disability,\textsuperscript{146} defined as “a physical or mental impairment that substantially limits one or more of the major activities of [an] individual; [or] a record of such an impairment; or being regarded as having such an impairment.”\textsuperscript{147} To determine if a disability exists, courts consider whether there is (1) a physical or mental impairment, (2) a substantial limitation, and (3) whether a major life activity is limited.\textsuperscript{148} Congress intended the ADA’s definition of “disability” to be

\begin{footnotes}
\item[145] Young, 135 U.S. at 1354.
\item[147] Id. § 12102(1) (alteration in original).
\item[148] Id.
\end{footnotes}
construed broadly. Under the ADA, a disabled plaintiff can establish claims of (1) disability discrimination in regard to terms and conditions of employment or (2) the employer’s failure to make reasonable accommodation.

Ordinary pregnancy is generally not considered a disability under federal law, unless accompanied by a pregnancy-related medical condition. The Equal Employment Opportunity Commission (EEOC) issued guidance on pregnancy-related issues that states, “infertility that is, or results from, an impairment may be found to substantially limit the major life activity of reproduction and thereby qualify as a disability.” After a settlement between a Hawaiian resort retailer and an employee harassed after seeking fertility treatments, the EEOC recently stated that, “[W]orkers who undergo fertility treatments should be treated like any other employee with a disability—with equal and careful consideration of reasonable accommodation requests.”

Even prior to the 2008 amendment broadening the definition of “disability,” courts held that infertility is a qualified disability under the ADA. In LaPorta v. Wal-Mart Stores, Inc., the employer denied a female pharmacist an alternate schedule and time off for in vitro fertilization procedures. The court held that because “a woman suffering from infertility has a diminished ability to become pregnant by natural means,” infertility meets the definition of a physiological disorder limiting a major life activity: reproduction.
Also, because any physical impairment caused by the egg freezing procedure is typically temporary, it is important to note that a worker can be temporarily disabled. In *Summers v. Altarum Institute Corporation*, 158 a government contractor severely injured both legs and was unable to walk for seven months. 159 The Fourth Circuit held that “an impairment is not categorically excluded from being a disability simply because it is temporary,” 160 and “a sufficiently severe temporary impairment may constitute a disability.” 161 Thus, physical impairments such as ovarian torsion, or OHSS, resulting from egg harvesting could qualify as disabilities under the ADA.

To illustrate, consider again Izzy, Polly, and Ellie from the earlier hypothetical. Both Izzy and Polly likely qualify as disabled under the ADA. Izzy is entitled to reasonable accommodation for her infertility treatments, including in vitro fertilization, and Polly is entitled to reasonable accommodation for pregnancy-related illness. Ellie may also have a disability under the ADA. To elaborate, suppose the technical supervisor position requires lifting heavy technology equipment that weighs up to fifty pounds. When Ellie is one week into her egg stimulation injections, her daily ultrasounds reveal that she is harvesting thirty eggs. As a precautionary measure, Ellie’s physician recommends that she lift no more than five pounds. Although her condition is temporary and the egg freezing procedure is elective, Ellie now has an impairment that substantially limits her ability to lift with or without accommodation under the ADA. Under these circumstances, Ellie likely would qualify as disabled, and Parity would have to provide a reasonable accommodation.

Proponents of employer-paid egg freezing might argue that an employer’s obligation to provide reasonable accommodation to disabled workers does not depend on whether the employer or employee pays for the procedure. In other words, an employer must provide reasonable accommodation to an employee with a qualifying disability, regardless of whether it provides an egg freezing program. While this is true, an employer’s legal risk associated with ADA compliance increases with the decision to offer egg freezing. More employees will likely take advantage of this procedure if the employer pays. As more employees freeze their eggs, an employer increases the odds of employees having ADA-recognized temporary disabilities because egg freezing can cause temporary physical impairments. 162 Egg freezing is one of few, if any, employee benefits that increase the potential

---

158. 740 F.3d 325 (4th Cir. 2014).
159. Id. at 327, 330.
160. Id. at 333.
161. Id. at 327.
162. See supra section II(B)(2).
for temporary disabilities among workers, and thus, the risk of legal liability.

C. Family Medical Leave Act: Taking Time Away from Work

Finally, employers offering an egg freezing benefit must also be prepared to provide job-protected leave to the egg freezing employee. Under the FMLA, employers must provide eligible employees with twelve weeks of unpaid job-protected leave for various triggering events, including (1) the birth or adoption of a child, (2) the need to care for one's own serious health condition, or (3) the need to care for the serious health condition of a family member.\textsuperscript{163} Under FMLA regulations, a serious health condition involving continuing treatment by a health care provider includes "[a] period of incapacity of more than three consecutive, full calendar days . . . that also involves . . . [t]reatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider."\textsuperscript{164} FMLA-protected absences from work may be intermittent, such as when an employee needs time off for physician appointments or a surgical procedure.\textsuperscript{165} It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any [FMLA] right"\textsuperscript{166} or "discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by [the FMLA]."\textsuperscript{167}

Generally, elective procedures "are not serious health conditions unless continuing or inpatient care is required or unless complications develop."\textsuperscript{168} However, pregnancy and prenatal care are considered serious health conditions requiring continuing treatment.\textsuperscript{169} For example, infertility would qualify as a serious health condition if "the employee is incapacitated because of the condition or its treatment."\textsuperscript{170} Because pregnancy, infertility, and egg freezing are so inextricably connected, employers that offer egg freezing violate the FMLA if they explicitly or implicitly disallow time-off for the procedure or for care of a spouse undergoing the procedure.

Revisit hypothetical employees Izzy, Polly, and Ellie at Parity, Inc. Suppose Ellie’s eggs have been retrieved and frozen, but she has developed mild symptoms of OHSS. Similar to the ADA issue, both Izzy’s infertility and Polly’s pregnancy with severe morning sickness likely

\textsuperscript{164} Id. § 825.115(a)(2) (2016).
\textsuperscript{165} Id. § 825.120(a)(4).
\textsuperscript{166} Id. § 825.115(a)(2) (alteration in original).
\textsuperscript{167} Id. § 825.115(a)(2) (alteration in original).
\textsuperscript{168} Id. § 825.113(d).
\textsuperscript{169} Id. § 825.115(b).
\textsuperscript{170} Freeland Cooper, Employee Fired After Failed Fertility Treatment Gets Day in Court, 18:13 CAL. EMP’T L. LTR. 9 (2008).
would qualify for FMLA leave because both are serious health conditions. Ellie’s egg freezing will also qualify for FMLA leave under certain circumstances. For instance, while a “normal” egg stimulation cycle and harvest may not be a serious health condition, any form of OHSS likely would be, and Parity would have to provide Ellie job-protected leave while she cares for her own serious health condition.

The counterargument here would be similar to the counterargument under the ADA: that any additional burden created by employer-paid egg freezing is not significant enough to increase FMLA exposure. Further, while the prevalence of OHSS is unclear due to inconsistent reporting, only one in four women experience mild symptoms after egg retrieval, so most will not require additional time away from work. The potential increase in administrative burden to achieve FMLA compliance may not be reason enough to forego employer-paid egg freezing. As Parts II and III discuss, employers that offer egg freezing should carefully consider whether the overall advantages of egg freezing programs outweigh the disadvantages, including additional administrative burdens and the potential for legal liability.

IV. Advice for Employers: How Slippery Is the Slope for Employer-Paid Egg Freezing?

Proving discrimination claims on the basis of employer-paid egg freezing and pregnancy, disability, or job-protected leave is difficult. Employer-paid egg freezing itself does not automatically trigger legal liability, but may give rise to new sources of discrimination claims. If knowledge that a woman elected or declined to freeze her eggs influences an employment decision, an employee may have a prima facie discrimination case. Legal risk does not result just from offering an egg freezing program, but rather from lacking a thoughtfully designed plan under which the program is communicated, implemented, and administered.

An employer can mitigate its risk by including the egg freezing procedure within its group health insurance policy, thereby placing the administrative burden on a third party. The employer must still be mindful of potential health and welfare benefit plan liabilities. Unlike education reimbursement programs, egg freezing requires management of private health information. Such programs are best administered by an independent entity that can objectively and confidentially manage eligibility, payment, and expense reimburse-


172. See Paller, supra note 85, at 1597 (“[Egg freezing] patients face the risks of state-of-the-art technologies that require a greater disclosure of information and warnings than is provided under basic informed consent statutes.”).
ment. In fact, fourteen states “require insurers to either cover or offer coverage for infertility diagnosis and treatment,” some of which require the full cost of in vitro fertilization.\textsuperscript{173} As advanced reproductive technologies become more mainstream, insurance companies will likely increase coverage of at least some fertility procedures.

**Conclusion**

Should employers provide egg freezing as a benefit? Employer-paid egg freezing is probably one of the most empowering, but risky, benefits a company can offer. Women engaged in the onerous egg freezing process are burdened with daily hormone injections that put them at risk for serious health conditions. While employer-paid egg freezing advances workplace gender parity, levels the financial playing field, and furthers the public policy of protecting maternal capacity, it clearly differs from other employee benefits, such as paid maternity leave or education reimbursement. Workplace culture issues are created by (1) pressure on women to delay childbearing in favor of their career by freezing their eggs and (2) the potential commoditization of reproduction in the workplace. These cultural issues, combined with the potential legal risks and the fact that the long-term health risks and success rates of egg freezing are still generally unknown, should make employers pause before deciding to offer an egg freezing benefit.

If employers properly communicate, implement, and administer the benefit, employer-paid egg freezing could ameliorate workplace gender inequalities and enable women to overcome biological constraints to have both a family and a career. On the other hand, it may become just another trendy employee benefit that workers rarely use. In any case, reproductive medicine will surely advance, and its impact on the workplace will require employers to consider its legal, social, and ethical implications thoughtfully.

Workers’ Compensation: The Hazard of Adopting the Increased-Risk Doctrine When Interpreting “Arising out of”

Paige Haughton*

Introduction

The workers’ compensation system was designed to allow employees to recover for employment-related injuries regardless of fault. An employee need not prove an employer was negligent or otherwise contributed to the injury to receive benefits, and in return, the employer pays reduced benefits. This compromise provides efficient compensation to employees while reducing employer liability.

In a typical case reflecting this no-fault system, employees injured at work during working hours receive compensation if they establish a causal connection between the injury and employment, such as an injury occurring while performing work duties. Recently, however, states are increasingly requiring injured employees to prove either that the employer was negligent or responsible for putting the employee at an increased risk. In *Dykhoff v. Xcel Energy*, for example, an employee fell and injured her knee while walking to a required work meeting in company headquarters. The court held the employee could not receive workers’ compensation because she could not prove the employer did anything to increase her risk of injury at work. This outcome is not consistent with the purpose and history of the workers’ compensation system.

---

* University of Minnesota Law School, class of 2017; B.S., North Dakota State University, Political Science, 2014. The author would like to thank Professor Stephen F. Befort, Professor Laura J. Cooper, and the members of the ABA Journal of Labor & Employment Law for their help in writing this note, and her mom for inspiring her to write about workers’ compensation.

1. 1 Lex K. Larson et al., Larson’s Workers’ Compensation Law § 1.02 (2016).
2. Id. § 1.03(4).
3. Id.
5. See, e.g., Fetzer v. N.D. Workforce Safety & Ins., 815 N.W.2d 539 (N.D. 2012); Dykhoff v. Xcel Energy, 840 N.W.2d 821 (Minn. 2013).
6. 840 N.W.2d 821 (Minn. 2013).
7. Id. at 821, 823–24.
8. Id. at 828.
This new trend creates serious problems for employees injured at work. The increased-risk doctrine could preclude many deserving employees from recovering workers' compensation.\(^9\) This Note encourages states to adopt the positional-risk doctrine to determine fault in workers' compensation claims. Part I explores the history and purpose of workers' compensation and describes the approach most states use to determine fault. Part II explains how the increased-risk doctrine undermines the purpose of workers' compensation and leads to unfair outcomes. Part III argues that states should adopt the positional-risk doctrine instead. The Note's appendix provides a comparative chart of states' current approaches to fault determination in workers' compensation cases.

I. Background

A. History of Workers’ Compensation

1. Pre-Workers’ Compensation: Common Law Tort

To fully appreciate the purpose and legal issues surrounding today’s workers’ compensation system, it is necessary to understand the previous legal framework in the United States. Before workers’ compensation statutes were adopted, courts determined liability for work injuries under traditional tort law.\(^10\) The employee was required to show employer negligence.\(^11\) The three main employer defenses were the “fellow-servant” exception, “assumption of risk,” and “contributory negligence.”\(^12\)

*Priestley v Fowler*,\(^13\) an 1837 English case, illustrates the fellow-servant defense. In *Priestley*, an employee injured another employee by overloading a van.\(^14\) The court held the master (employer) should not be liable for the servant’s (employee’s) negligence after referring to “alarming” examples in which a master could be liable for “domestic mishaps due to the negligence of the chambermaid, the coachman, and the cook.”\(^15\) Five years later, in *Farwell v. Boston & Worcester Railroad Corp.*,\(^16\) a U.S. court relied on *Priestley* in holding a railroad not liable when its switchman injured another employee.\(^17\) *Farwell* held that if an employer took precautions in hiring and did not contribute to the

---

9. See e.g., id.
10. See Larson et al., supra note 1, § 2.05 (overview of historical relationship between workplace injuries and tort law).
11. See id. § 2.02–2.05 (illustrating early notions of vicarious liability and employers’ defenses to employees’ negligence claims).
12. Id. § 2.03.
14. See id. at 1030, 3 M. & W. at 1.
15. Larson et al., supra note 1, § 2.03.
16. 45 Mass. 49 (4 Met. 49) (1842).
17. Id. at 54–62.
injury, the employer would not be liable for its employee’s actions because it acted with due diligence.\textsuperscript{18}

\textit{Farwell} also relied in part on the assumption of risk defense, holding the employer not liable for the switchman’s behavior because “[t]he plaintiff . . . assumed the risks of the service which he undertook to perform; and one of those risks was his liability to injury from the carelessness of others who were employed by the defendants in the same service.”\textsuperscript{19} The rationale for the assumption of risk defense is that, if employees were free to work as they pleased, they were also free to refuse dangerous work; employees, by performing dangerous work, thus forfeit any legal claim if an injury occurs.\textsuperscript{20}

The third common law employer defense was contributory negligence.\textsuperscript{21} This allowed employers to escape liability if the employee contributed to the injury, even if by only a small degree.\textsuperscript{22} Because an employer could assert these three defenses, pre-workers’ compensation employers were not liable for the majority of workplace injuries.\textsuperscript{23} A commission in Illinois, for example, investigated 5,000 industrial accidents and found that “of 614 death cases, the families received nothing in 214 cases . . . and the other cases settled for small sums averaging a few hundred dollars.”\textsuperscript{24} In many of the settled cases, workers’ families were left with almost nothing after attorneys’ fees and funeral expenses were deducted.\textsuperscript{25}

Employers also struggled under the common law system because when they were found liable, the award size drastically varied.\textsuperscript{26} A 1910 New York commission report stated that employers usually paid nothing, but when found liable, they were required to pay up to $5,000.\textsuperscript{27} The strength of common law defenses and employers’ inability to predict their liability demonstrated the need for a new type of protection for workplace injuries.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{18} \textit{Id.} at 49.
\item \textsuperscript{19} \textit{Id.} at 54. \textit{See also Larson et al., supra note 1, § 2.03 (Priestley found the employer not liable for the employee’s injury because “the servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself . . . .” (quoting Priestley v. Fowler (1837) 150 Eng. Rep. 1030, 1032–33; 3 M. & W. 1, 6)).}
\item \textsuperscript{20} Larson supra note 1, § 2.03.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} Butterfield v. Forrester (1809) 103 Eng. Rep. 926; 11 EAST, 60; Larson et al., supra note 1, § 2.03.
\item \textsuperscript{23} Larson et al., supra note 1, § 2.05.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{27} Larson et al., supra note 1, § 2.05.
\item \textsuperscript{28} \textit{See Gregory P. Guyton, A Brief History of Workers’ Compensation, 19 Iowa Orthopaedic J. 106, 106 (1999) (These three defenses “were generally so restrictive they became known as the ‘ unholy trinity of defenses.”)).
\end{itemize}
2. Transition from Common Law Tort to Workers’ Compensation

Prussia was among the first countries to adopt a workers’ compensation system. In 1838, one year after Priestley, Prussian law made railroads liable to employees for all workplace injuries, except those caused by the employee’s own negligence or acts of God. In 1884, Germany adopted a workers’ compensation system. The German system included a Sickness Fund, composed of two-thirds of contributions from employees and one-third from employers; an Accident Fund, composed solely of employer contributions; and Disability Insurance, to which employers and employees made equal contributions. The system was motivated by the beliefs that “[i]t is the duty of the state to provide for the sustenance and support of those of its citizens who [cannot] . . . procure subsistence themselves” and that it should be a Christian concern to care for weaker members. In 1897, England enacted the first British Compensation Act.

Workers’ compensation systems were not quickly adopted in the United States, despite a vocal movement protesting working conditions of industrial workers. Although workplace injuries rose in number during the industrialization era, employers continued to escape liability through reliance on common law defenses. A 1911 government report demonstrated that Americans realized change was necessary:

The old methods of manufacture, and even many of the old industries, have become obsolete and have been superseded by rapid, complicated, and hazardous methods growing out of improvements directed towards the cheapening of products, and the ancient relation of employer and employ[ee], under which the employ[ee] generally worked beneath the eyes of the employer, has ceased to exist.

Notwithstanding the great changes in the character of the employment and in the hazards, there has been for years practically no

---

29. Id. at 107.
30. Larson et al., supra note 1, § 2.06.
31. Id.
32. Id.
35. Larson et al., supra note 1, § 2.07.
36. See Guyton, supra note 28, at 107–08. In the early twentieth century, muckraker authors passionately described the horrors facing industrial workers. The Jungle, a novel about the horrors facing the industrial workers and workers in the stockyards, is a famous example. It contains graphic descriptions of the work environment, including the following passage: “[The fertilizer workers’] particular trouble was that they fell into the vats; and when they were fished out, there was never enough of them to be worth exhibiting . . . all but the bones of them had gone out to the world as Durham’s Pure Leaf Lard!” (emphasis omitted). Sinclair Lewis, The Jungle (1906).
37. See Guyton, supra note 28, at 107–08.
change in the law governing the relation; so that thoughtful persons are almost unanimously of the opinion that the law now governing employer and employ[ee], with respect to injuries done to the latter; in hazardous industrial occupations, is unjust to both employer and employ[ee] and a source of unfair oppression to the employer and a cause of unmerited hardship to the employ[ee].

After analyzing a published account of Germany’s workers’ compensation system and relying on a U.S. Department of Labor (DOL) report, Congress enacted a compensation statute covering some federal employees in hazardous positions in 1908. States followed suit. In 1910, New York compelled coverage for injuries to employees in hazardous occupations. After a New York state court held compulsory coverage was an unconstitutional taking, New York amended its Constitution in 1913 to allow a compulsory law and enacted another workers’ compensation statute. The U.S. Supreme Court upheld the constitutionality of New York’s law, and by 1920, forty-two states had adopted a compensation act.

B. The Core Principles of Today’s Workers’ Compensation System

Understanding workers’ compensation litigation requires background covering the system’s main principles:

(a) the basic operating principle is that an employee is automatically entitled to certain benefits whenever the employee suffers a “personal injury by accident arising out of and in the course of employment” . . .
(b) negligence and fault are largely immaterial . . .
(c) coverage is limited to . . . employee[s] . . .
(d) benefits . . . include cash-wage benefits, usually around one-half to two-thirds of . . . weekly wage, and hospital, medical and rehabilitation expenses . . .
(e) . . . in exchange for these modest but assured benefits, [employees] give up their common-law right to sue the employer for damages for any injury covered by the

38. Boyd, supra note 34, at 9–10 (alteration in original).
40. Act of May 30, 1908, Pub. L. No. 176, 35 Stat. 556 (1908). Under this statute, a variety of specified employees, or others “in hazardous employment . . . injured in the course of such employment . . . shall be entitled to receive for one year . . . the same pay as if [they] continued to be employed . . . [unless] the injury is due to the negligence or misconduct of the employee injured . . . .” Id.
41. Larson et al., supra note 1, § 2.07.
42. Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 441 (N.Y. 1911) (“[I]n its basic and vital features the right given to the employ[ee] by this statute does not preserve to the employer the ‘due process’ of law guaranteed by the Constitutions, for it authorizes the taking of the employer’s property without his consent and without his fault.”).
43. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 195–96 (1917). The New York law “require[d] every employer . . . [to] provide compensation . . . for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause . . . .” Id. at 192 (alteration in original).
44. Id. at 208.
45. Larson et al., supra note 1, § 2.08.
act . . . (h) the employer is required to secure its liability through private insurance, state-fund insurance in some states, or “self-insurance”; thus the burden of compensation liability does not remain upon the employer but passes to the consumer since compensation premiums, as part of the cost of production, will be reflected in the price of the product. 46

Under this “great compromise,” “benefits would be provided to injured workers without regard to fault and, in return, employers would face limited liability.” 47 In exchange for assurance of coverage, 48 employee workers’ compensation became the exclusive remedy. 49 While workers would not be made whole, they would receive limited damages for their injuries. 50 An employee who qualifies for workers’ compensation cannot recover compensatory or punitive damages as one could in a tort action, 51 but instead can obtain only the costs of medical care 52 and a portion of previous income. 53 “The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient . . . and most certain form, financial and medical benefits for the victims of work-connected injuries . . . and of allocating the burden of these payments to . . . the consumer of the product.” 54 Thus,

46. Id. § 1.01 (alteration in original).
48. Id. at 8–9 (growing delays, difficulties, and unpredictability of injured workers having to prove employer negligence led powerful labor unions to support radical changes).
49. See, e.g., ARIZ. REV. STAT. ANN. § 23-1022 (2016) (“The right to recover compensation pursuant to this chapter for injuries sustained by an employee or for the death of an employee is the exclusive remedy against the employer or any co-employee acting in the scope of his employment . . . .”)(emphasis added); IND. CODE § 22-3-2-6 (2016) (“The rights and remedies granted to an employee subject to IC 22-3-2 through IC 22-3-6 on account of personal injury or death by accident shall exclude all other rights and remedies of such employee . . . .”) (emphasis added); N.D. CENT. CODE § 65-05-06 (2016) (“The payment of compensation or other benefits by the organization to an injured employee, or to the injured employee's dependents in case death has ensued, are in lieu of any and all claims for relief whatsoever against the employer of the injured or deceased employee.”)(emphasis added).
50. See, e.g., IND. CODE § 22-3-3-8 (2016) (“With respect to injuries occurring on and after July 1, 1976, causing temporary total disability or total permanent disability for work, there shall be paid to the injured employee . . . compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages . . . not to exceed five hundred (500) weeks.”); MINN. STAT. § 176.101(a) (2016) (“For injury producing temporary total disability, the compensation is 66⅔ percent of the weekly wage at the time of injury.”).
51. LARSON ET AL., supra note 1, § 1.03(4) (only those injuries that produce disability and affect earning power are compensable and damages in other cases that would result in thousands of dollars are not awarded in workers' compensation cases).
52. See, e.g., N.Y. WORKERS' COMP. LAW § 13-g (McKinney 2015) (“Within forty-five days after a bill has been rendered to the employer by the hospital, physician or self-employed physical or occupational therapist who has rendered treatment pursuant to a referral from the injured employee's authorized physician . . . such employer must pay the bill . . . .”).
53. See supra note 50.
54. LARSON ET AL., supra note 1, § 1.03(2).
workers’ compensation is both a win-win system (employers pay limited damages, and employees do not have to prove fault) and a lose-lose system (employers pay even if not negligent, and employees are not made whole).

C. How Courts Determine Whether an Injury Is Compensable

Although each state has its own workers’ compensation statute, the main principle behind each law is that “benefits would be provided to injured workers without regard to fault and, in return, employers would face limited liability.” To obtain workers’ compensation coverage, an employee typically must prove that the injury (1) occurred in the course of employment and (2) arose out of employment. Typically, “in the course of employment . . . refers to the time, place, and circumstances of the incident causing the injury.” The “arising out of” requirement is more complicated. States differ in how they apply the “arising out of” requirement, but the three major interpretations of the phrase “arising out of” include the positional-risk, increased-risk, and actual-risk doctrines.

1. Positional-Risk Doctrine

Some states rely on the positional-risk doctrine, which states “[a]n injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he or she was injured.” This doctrine requires compensation even if the employee was injured by a neutral force and the only connection between the employment and the injury is that employment obligations placed the employee in the particular place and time. In Circle K Store No. 1131 v. Industrial Commission of Arizona, an employee fell and became injured while throwing away the employer’s trash. The employee’s job responsibilities included throwing out the trash after each shift. Thus, the court held the employee “would not have been at the place of injury but for the duties of her employment.” Consequently, the court found that her injuries “arose out of” her employment.

---

56. Larson et al., supra note 1, § 3.01.
58. Larson et al., supra note 1, § 3.01.
59. See infra Appendix.
60. Larson et al., supra note 1, § 3.05.
61. Id.
63. Id. at 894.
64. Id. at 898.
65. Id.
66. Id.
2. Increased-Risk Doctrine

Other states rely on the increased-risk doctrine, under which an employee must show the injury was caused by an increased risk connected to employment. If an employee was hit by lightning while working on a light pole, this doctrine would find the injury compensable because employment placed the employee at a greater height with close contact to metal, increasing the risk of injury. The Minnesota Supreme Court relied on the increased-risk doctrine in Dykhoff, holding the employee did not meet the “arising out of” requirement. In Dykhoff, an employee fell and dislocated her left patella while walking to a required training session at her employer’s general office. The court found that Dykhoff clearly satisfied the “in the course of” requirement “because her injury occurred within the time and space boundaries of her employment.” The court focused on whether the employee’s injury met the “arising out of” requirement. There was nothing particularly hazardous about the floor on which she fell; the court found it was “very clean, dry, and flat.” The court noted:

“(T)he phrase ‘arising out of’ means that there must be some causal connection between the injury and the employment.” This causal connection “is supplied if the employment exposes the employee to a hazard which originates on the premises as a part of the working environment, or . . . peculiarly exposes the employee to an external hazard whereby he is subjected to a different and a greater risk than if he had been pursuing his ordinary personal affairs.”

The court denied workers’ compensation coverage and found the employee did not prove the workplace exposed her to a risk of injury beyond what she would have faced in her everyday life.

3. Actual-Risk Doctrine

The third approach, the actual-risk doctrine, is concerned with whether the risk was specific to that particular job; it does not consider whether the employee could also have been exposed to that risk outside of employment. In Branco v. Leviton Manufacturing Co., for example, a Rhode Island court held an injury compensable when an employee was hit by an automobile while crossing a busy

67. Larson et al., supra note 1, § 3.03.
68. Id.
70. Id. at 823–24.
71. Id. at 826.
72. Id.
73. Id. at 827.
74. Id. at 826.
75. Id. at 831.
76. Larson et al., supra note 1, § 3.04.
77. 518 A.2d 621 (R.I. 1986).
road between the employee parking lot and the employer’s facility. The court reasoned “because [the] employer placed [the employee] in the position of having to negotiate [a busy road] each work day in order to reach his post, the risk entailed in crossing the highway must be considered a condition incident to his employment.”

In contrast, an employee stung by a bee at work is an example of an injury found not to be compensable under the actual-risk doctrine. In Dawson v. A & H Manufacturing Co., the court held that the risk of getting stung was not a risk of a stock boy’s employment. To be compensable under the actual-risk doctrine, the injury must be a “natural or necessary consequence or incident of the employment or of the conditions under which it is carried on.”

D. Most States Use Increased-Risk Doctrine

States disagree about which of the three approaches is best for determining whether an injury “arises out of” employment. Although many courts have adopted the positional-risk doctrine, other courts recently explicitly rejected positional-risk in favor of the increased-risk doctrine. The court in Dykhoff illustrates this shift. Before Dykhoff, Minnesota workers’ compensation cases relied on a test similar to the positional-risk doctrine when determining fault. In Dykhoff, however, the Minnesota Supreme Court adopted instead the increased-risk doctrine, holding an employee must show the employer exposed the employee to a condition that increased the risk of injury beyond that created by the employee’s non-work life.

Today, most states apply the increased-risk doctrine to determine compensability. Twenty-two states use the increased-risk doctrine, seventeen follow the positional-risk doctrine, seven states use the...
actual-risk doctrine, and five states do not explicitly rely on any of the three common doctrines.91

II. Problems with the Increased-Risk Doctrine

By applying the increased-risk doctrine, states undermine workers’ compensation’s purpose and deny employees fair outcomes.

A. The Increased-Risk Doctrine Is Inconsistent with the History and Purpose of Workers’ Compensation

1. The Increased-Risk Doctrine Requires Courts to Analyze Fault

The increased-risk doctrine is inconsistent with the purpose and history of workers’ compensation because it requires courts to analyze fault. Workers’ compensation seeks to create an easily administered solution for workplace injuries, in part by eliminating common law defenses that could be available in tort.92 “It is important to observe that all legislation prior to the workers’ compensation acts accepted the basic common law idea that the employer was liable to the employee only for the negligence or fault of the employer . . . .”93 In a regime in which employees were required to prove fault, few injured employees received compensation. Employers escaped liability for most injuries by relying heavily on common law defenses.94

Workers’ compensation sought a dramatic departure from common law negligence structures to compensate employees for more workplace injuries.95 In 1910, around the time workers’ compensation started to develop in the United States, a Conference of Commissioners on Compensation for Industrial Accidents was held in Chicago for the federal government and various states to discuss the main features of a new compensation system.96 One of the main issues was whether “all injuries [should] be covered, irrespective of negligence.”97 The conference decided that 50% of lost wages should be paid without regard to fault or negligence.98 As states created their own systems, they emphasized repeatedly that compensation would occur regardless of fault to ensure that employers could not rely on common law tort defenses to avoid liability.99 The proposed systems were essentially
regarded like accident insurance, another cost employers should bear.100

Today, however, some courts are starting to accept traditional tort defenses under the increased-risk doctrine. In *Dykhoff*, for example, the court denied compensation based in part because the employer properly maintained its floors.101 The court noted that the employer’s floor met safety standards for slipperiness and concluded the employee did not meet her burden to show the employer failed to maintain a safe work environment.102 The majority opinion also referenced the administrative judge’s determination that “the shoes Dykhoff chose to wear were an equally plausible explanation for Dykhoff’s fall.”103 In effect, the court held the employer was not liable because it maintained a safe work environment and the employee’s shoes may have contributed to the injury.104 This is exactly the kind of analysis workers’ compensation systems designed to eliminate.

A similar analysis appeared in Illinois in *Brady v. Louis Ruffolo & Sons Construction Co.*105 In *Brady*, an employee was injured when a truck drove through his office wall while he was sitting at his desk.106 The issue was whether the employer’s office walls were so thin as to put the front employee at risk from oncoming traffic.107 The court denied compensation saying, “[c]laimant did not present any evidence that another type of structure could reasonably have protected him from the occurrence.”108 Because the employee did not prove the employer’s fault or negligence, he could not recover for injuries that would not have occurred had he not been at his work desk. These cases show how the increased-risk doctrine allows courts to consider employer negligence when making workers’ compensation determinations. In such cases, common law tort defenses return, contravening workers’ compensation fundamental goal of eliminating such defenses.

2. The Increased-Risk Doctrine Precludes Prompt Relief

The increased-risk doctrine also interferes with the objective of providing injured employees an easily administered remedy109 by requiring courts to engage in a highly fact-intensive inquiry. For exam-

---

100. *Boyd*, supra note 34, at 10–11.
102. *Id.* at 828.
103. *Id.* at 827–28.
104. *Id.*
106. *Id.* at 922.
107. *Id.* at 923–25.
108. *Id.* at 925.
109. See *Boyd*, supra note 34, at 10–11 (“[T]he law should insure [sic] to the employ[ee] quick, practically immediate relief by way of support and medical attendance . . . .”) (alteration in original).
ple, the compensation judge hearing Dykhoff’s claim initially compared her testimony claiming the floor was hard, shiny, and slippery with the employer’s claim that the floor was “very clean, dry, and flat.” 110 This need for detailed, factually intense testimony only increases the costs of program administration and precludes prompt relief. 111

The doctrine also requires an employee to show that “he was exposed [to a risk] to a greater degree than the general public.” 112 The increased risk can be shown quantitatively or qualitatively. 113 This requires courts to identify the existence of and level of risks to the general public. 114 In Village of Villa Park v. Illinois Workers’ Compensation Commission, the court held that, in most situations, ascending and descending stairs is a neutral risk, meaning the general public is exposed to the risk to the same degree as an employee. 115 This reasoning would deny compensation for injuries sustained ascending and descending properly designed and maintained stairs. 116 The court, however, recognized that stair use by employees, if more frequent than such use by the general public, could result in an increased risk of injury. 117 Thus, here the court held an employee who climbed stairs six times daily should be compensated because he faced a greater risk of injury than the public. 118 How exactly the court reached that conclusion is unclear. What if an employee never climbs stairs outside of

110. Dykhoff v. Xcel Energy, 840 N.W.2d 821, 824 (Minn. 2013). Specifically, the court considered testimony that the flooring was made of marble and granite, and it was tested to show that the “coefficient of friction” was within safety specifications. Id. See also, e.g., Brady v. Louis Ruffolo & Sons Constr. Co., 578 N.E.2d 921, 922–23 (Ill. 1991) (“The exterior walls of the building were made of corrugated metal about ⅛ inch thick, and the interior walls of claimant’s office consisted of plywood affixed to wooden studs.”).

111. See, e.g., COLO. REV. STAT. § 8-40-102 (2016) (the intent of workers’ compensation is “to assure the quick and efficient delivery of disability and medical benefits to injured workers . . . .”); MINN. STAT. § 176.001 (2016) (“It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers . . . .”).

112. Jones v. Indus. Comm’n, 399 N.E.2d 1314, 1315 (Ill. 1980). See also Chaparral Boats, Inc. v. Heath, 606 S.E.2d 567, 568 (Ga. Ct. App. 2004) (employee hyperextended knee while walking quickly because she was late for work; court found this injury was not compensable because the employee would have been equally exposed to this risk apart from any condition of employment); Crites v. Ill. Workers’ Comp. Comm’n, No. 5-10-0304WC, 2011 Ill. App. Unpub. LEXIS 618, at *3, *13–14 (Ill. App. Ct. Apr. 21, 2011) (employee twisted his body while exiting crane and injured back; court found injury was not compensable because the act of turning and stepping down was no greater than that to which the general public is exposed).


114. See e.g., id.

115. Id.

116. Id.

117. See, e.g., id.

118. Id. at 890–91.
work, but was injured the one time she climbed stairs at work? The theory of the increased-risk doctrine is that employers should not be responsible for injuries workers would be exposed to outside of work,119 but the “general public” test does not accurately measure employees’ non-work risk exposure because employees have varying lifestyles.

In Dykhoff, for example, the court held the employee was not exposed to a greater risk of falling than the general public.120 What if one of the reasons she fell was because she was rehearsing a presentation for an upcoming meeting? Tripping while walking is a risk to which the public may be similarly exposed, but would the court consider whether she fell because she was preoccupied with her upcoming presentation, a risk she would not face outside of her employment? Similarly, what if the employee was injured while walking by turning a corner too quickly while sending a work-related text? Would the court hold that average people regularly send text messages while walking, and therefore the employee’s job exposed her to no greater risk than the general public? What if this was the first time she ever tried to send a text, but her job required her to multitask and text? Would the court compare her to a population not familiar with cell phones, or the majority of people in her state? These hypotheticals show that the increased-risk doctrine creates litigation issues that require courts to spend more time and resources to assess compensability. The increased-risk doctrine undermines the system’s objective to be quick, efficient, and easily administered.

B. The Increased-Risk Doctrine Results in Unjust Outcomes for Employees

The increased-risk doctrine also results in unfair outcomes for claimants. Workers’ compensation is referred to as “the great compromise”121 because benefits are provided to injured workers without regard to fault, and in return, employers face limited liability.122 Employers already benefit by paying less than full compensation, but applying the increased-risk doctrine would increase the circumstances in which they would pay nothing at all. Employees are supposed to benefit by receiving quick and efficient payments without proving fault. Under the increased-risk doctrine, however, employees must

119. See, e.g., Brady v. Louis Ruffolo & Sons Constr. Co., 578 N.E.2d 921, 924 (Ill. 1991) (“If an industrial accident is caused by a risk unrelated to the nature of the employment . . . but results instead from a hazard to which the claimant would have been equally exposed apart from his work, the injury cannot be said to arise out of the employment.”).
120. Dykhoff v. Xcel Energy, 840 N.W.2d 821, 827 (Minn. 2013).
121. See supra text accompanying notes 46–54.
prove that their occupation or employer placed them at an increased risk, requiring costly and lengthy litigation. Under the increased-risk doctrine, employees still cannot recover full benefits, but now they have lost the benefit of the legislated bargain. What had been the employer’s typical cost of doing business now becomes a cost transferred to injured employees. Additionally, even those employees able to demonstrate a right to compensation under the increased-risk doctrine face recoveries significantly delayed by coverage disputes. The increased-risk doctrine tips the scales of the bargain toward employers while giving nothing to employees in return.

III. States Should Adopt the Positional-Risk Test

Instead of following the increased-risk or actual-risk doctrines, states should use the positional-risk doctrine. The positional-risk doctrine considers whether the injury would not have occurred but for the fact that the conditions and obligations of employment placed the employee in the position where the injury occurred.

A. The Positional-Risk Doctrine Is Superior to the Increased-Risk Doctrine

The positional-risk doctrine is superior to the increased-risk doctrine because it is more consistent with the purpose and history of workers’ compensation. As observed in Dykhoff and other increased-risk cases, determining whether an employee was at an increased risk compared to the general public requires time, costly experts and data, and generally creates more issues for litigation. By comparison, the positional-risk doctrine is relatively easy to apply. It merely requires courts to determine whether an injury would not have occurred but for the conditions and obligations of employment placing the employee in the position where the injury occurred. This doctrine furthers the goal of ensuring that workers’ compensation remains a quick, efficient, and easily administered system.

Some courts rejecting the positional-risk doctrine argue that it is inconsistent with the rules of statutory interpretation because it melds two different statutory requirements—“in the course of” and “arising out of”—into one requirement. In Mitchell v. Clark County School Dis-

123. See generally Larson et al., supra note 1, § 3.03, and text accompanying notes 101–08.
125. See, e.g., Brady v. Louis Ruffolo & Sons Constr. Co., 578 N.E.2d 921, 922 (Ill. 1991) (court assessed depth of office wall to determine whether injury was compensable).
127. See supra text accompanying note 46–53.
128. See supra text accompanying notes 109–11.
The court noted that the Nevada workers’ compensation statute requires the claimant to show that the injury arose out of and in the course of employment. “Because the positional-risk test reduces the employee’s burden and requires only a showing that the employee sustained an injury on the job, it directly contravenes the language [of the statute].” Cases have shown, however, that causation analysis is still relevant in jurisdictions adopting the positional-risk test. In *Hampton v. Intech Contracting, LLC*, an employee working on a bridge became hypoglycemic. After becoming disoriented, he climbed on the bridge guardrail and jumped off. The court found that, although the bridge was maintained properly, the bridge’s condition was irrelevant. Instead, the court looked at the causal connection between the employee’s injury and his job, and held that, had the employee not been working on a bridge of that height, his injuries would not have been as serious. This court properly used the positional-risk doctrine to find the employee’s job contributed to the cause of his injuries.

**B. The Positional-Risk Doctrine Is Superior to the Actual-Risk Doctrine**

This positional-risk doctrine’s but-for causation analysis also makes it superior to the actual-risk doctrine. In *Lipsey v. Case*, an actual-risk case, a horse farm employee was viciously attacked by her co-worker’s dog. The employer allowed the dog to roam freely on the farm during working hours. The court held the employee’s injury did not arise out of her employment. The court determined that “[n]othing about the nature or character of her work, *i.e.*, the care and training of horses, reasonably could have exposed or subjected her to the danger of being bitten by a co-worker’s pet dog.” Because the court concluded the bite was not a natural incident of farm work, the employee could not recover under Virginia’s Workers’ Compensation Act. In the court’s analysis, the injury was not a foreseeable risk of the employee’s work, and thus no causal connection existed between

129. 111 P.3d 1104 (Nev. 2005).
130. *Id.* at 1106–07.
131. *Id.*
133. *Id.* at *1.
134. *Id.* at *2.
135. *Id.* at *4.
136. *Id.*
138. *Id.* at 106.
139. *Id.*
140. *Id.* at 107.
141. *Id.*
employment and the injury. The employee’s injury, however, did result from her employment. The employer allowed a dog to run freely at the workplace, creating the risk of the injury suffered. The employee would not have been bitten but for her employer exposing her to those conditions. The positional-risk doctrine, unlike the actual-risk doctrine, allows compensation for injuries caused by the employer or the conditions of employment, regardless of whether the incident giving rise to the injury was foreseeable.

C. The Positional-Risk Doctrine Is Consistent with the Objective That Employers Bear the Cost of Workplace Injuries as a Cost of Doing Business

One could argue that a liberal causation standard will increase employers’ workers’ compensation premiums. Increased costs could result from “moral hazard,” the concept that people will overuse insurance and alter behavior because they have the security of insurance. However, moral hazard is already accounted for by limiting workers’ compensation benefits. Workers’ compensation typically only pays two-thirds of an employee’s lost wages and related medical costs. Employees therefore already have no incentive to overuse or abuse the system.

An employer’s workers’ compensation premium could also increase because the positional-risk doctrine would compensate more injuries. It should be of no concern, however, that the positional-risk doctrine results in more compensable injuries. Workers’ compensation was designed to put this risk on employers for the very purpose of covering more workers. Workplace injuries are inevitable. When a workplace injury occurs, we first must consider: (1) Who can best bear the cost of a workplace injury? (2) Who can allocate the cost of that injury? (3) Who can better control the risk of an injury occurring? Employers are better situated both to bear the risk and allocate the risk because they can pass the extra cost to customers. This was understood in the early development of workers’ compensation:

142. See id. (“It simply is not apparent to a rational mind . . . that a causal connection exists between the conditions of [the] required work and [the employee’s] injury.”) (alteration in original).
143. Id. at 106.
145. Price V. Fishback & Shawn Everett Kantor, A Prelude to the Welfare State: The Origins of Workers’ Compensation 3 (2000) (“When introduced, the workers’ compensation programs also worked to prevent moral hazard by limiting the payments to two-thirds and often much less of lost earnings.”).
146. See, e.g., IND. CODE § 22-3-3-8 (2016) (compensation equal to two-thirds of average weekly wage); MINN. STAT. § 176.101(1)(a) (2016) (compensation is two-thirds of weekly wage at time of injury).
147. Larson et al., supra note 1, § 1.01.
It seems fitting that some device spreading this burden throughout the whole industry shall be created, and the employer protected from oppression by law suits and prolonged litigation, and the employee relieved from the necessity of seeking redress in the courts for loss of ability to earn a livelihood, of which he has been deprived by accident. . . . It seems more feasible to impose the whole burden upon industry because, like all the other losses growing out of depreciation in machinery and in the plant and other expenses, this added charge will be taken care of in the prices obtained by the employer for the products of the industry.\textsuperscript{148}

Additionally, employers can better control risks than employees. In \textit{Brady}, a case determining causation under the increased-risk doctrine, an employee needed permanent life support for injuries caused by a truck that barreled through his office wall.\textsuperscript{149} This injury was found non-compensable because the public was at equal risk of being hit by a truck driving off the street.\textsuperscript{150} The employee “was required to work eight hours a day, five days a week, in a thin-walled sheet metal structure that was situated less than 50 feet from a heavily traveled highway.”\textsuperscript{151} The employer could control this risk, while the employee could not. The employer chose its business location, its desks, and each employee’s location within the workplace.\textsuperscript{152} Employers are better able to bear, allocate, and control the risk of workplace injuries.

Some argue that certain risks, such as idiopathic falls, truly are not in employers’ control, so employers should not have to compensate employees for such injuries.\textsuperscript{153} But if employers do not compensate injured employees, who should bear the cost? How can a person be self-supporting after a disabling workplace injury? Should public welfare benefits support these employees? Should employers have no responsibility for life-altering injuries? Workers’ compensation contemplated this question and determined that a system of social insurance funded by employer contributions was the best response.\textsuperscript{154} “[T]he right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts . . . [based on] blame.”\textsuperscript{155} Workers’ compensation is designed to care for employees injured at work. The positional-risk doctrine allows workers’ compensation to do just that.

\textsuperscript{148} Boyd, supra note 34, at 10–11.
\textsuperscript{150} Id. at 925.
\textsuperscript{151} Id. at 924.
\textsuperscript{152} The employee did most of his work at a drafting table attached to an office wall. Id. at 922. “On the day of the injury, the force of the truck crashing through the building caused the drafting table to puncture [the employee’s] abdomen.” Id. (alteration in original).
\textsuperscript{154} See Larson et al., supra note 1, § 1.02.
\textsuperscript{155} Id.
Of the three major doctrines used by courts, the positional-risk doctrine is most consistent with workers’ compensation’s objectives. The positional-risk doctrine properly analyzes causation by examining how the employment setting contributed to the injury and aligns with the values of providing support and preventing destitution of injured employees.

**Conclusion**

Workers’ compensation was designed to be a faultless and efficient system to provide remedies for workplace injuries. The increased-risk doctrine is inconsistent with this purpose because it requires courts to consider fault and increases the need for litigation. The actual-risk doctrine is also inadequate because it does not properly analyze causation of workplace injuries. The positional-risk doctrine is most aligned with the system’s goals. It ensures more efficient compensation for workplace injuries. Employers retain their side of the “great compromise.” Employees also maintain their benefit of the bargain. When determining whether an injury “arises out of employment,” states should use the positional-risk doctrine because it best furthers the goals of the workers’ compensation system.
**Appendix**

<table>
<thead>
<tr>
<th>State</th>
<th>Risk Type</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Increased-Risk</td>
<td>Ex parte Trinity Industries, Inc., 680 So. 2d 262 (Ala. 1996)</td>
</tr>
<tr>
<td>Alaska</td>
<td>Increased-Risk</td>
<td>Temple v. Denali Princess Lodge, 21 P.3d 813 (Alaska 2001)</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Increased-Risk</td>
<td>Jivan v. Economy Inn &amp; Suites, 260 S.W.3d 281 (Ark. 2007)</td>
</tr>
<tr>
<td>California</td>
<td>Increased-Risk</td>
<td>South Coast Framing, Inc. v. Workers’ Compensation Appeal Board, 349 P.3d 141 (Cal. 2015)</td>
</tr>
<tr>
<td>Colorado</td>
<td>Positional-Risk</td>
<td>City of Brighton v. Rodriguez, 318 P.3d 496 (Colo. 2014)</td>
</tr>
<tr>
<td>Florida</td>
<td>Positional-Risk</td>
<td>D.L. Cullifer &amp; Son, Inc. v. Martinez, 572 So. 2d 1360 (Fla. 1990)</td>
</tr>
<tr>
<td>Indiana</td>
<td>Positional-Risk</td>
<td>Milledge v. Oaks, 784 N.E.2d 926 (Ind. 2003); Burdette v. Perlman-Roque Co., 954 N.E.2d 925 (Ind. Ct. App. 2011) (but personal-specific risks, such as pre-existing illnesses, are not covered under Indiana’s positional-risk doctrine)</td>
</tr>
<tr>
<td>State</td>
<td>Risk Type</td>
<td>Case</td>
</tr>
<tr>
<td>------------------</td>
<td>-------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Iowa</td>
<td>Actual-Risk</td>
<td>Lakeside Casino v. Blue, 743 N.W.2d 169</td>
</tr>
<tr>
<td>Kansas</td>
<td>Increased-Risk</td>
<td>Hensley v. Glass, 597 P.2d 641</td>
</tr>
<tr>
<td>Maryland</td>
<td>Positional-Risk</td>
<td>Livering v. Richardson’s Restaurant, 823 A.2d 687</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Increased-Risk</td>
<td>Dykhoff v. Xcel Energy, 840 N.W.2d 821</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Increased-Risk</td>
<td>White v. Mississippi Department of Corrections, 28 So. 3d 619</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Increased-Risk</td>
<td>In re Margeson, 27 A.3d 663</td>
</tr>
<tr>
<td>State</td>
<td>Risk Type</td>
<td>Case Details</td>
</tr>
<tr>
<td>------------------</td>
<td>-----------------</td>
<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Rejects Positional-Risk</td>
<td>Fetzer v. N.D. Workforce Safety &amp; Insurance, 815 N.W.2d 539 (N.D. 2012)</td>
</tr>
<tr>
<td>Ohio</td>
<td>Increased-Risk</td>
<td>Waller v. Mayfield, 524 N.E.2d 458 (Ohio 1988)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Rejects reliance on any of the three common doctrines, and instead looks at whether the employee was furthering employer’s interest</td>
<td>Lewis v. Workers’ Compensation Appeal Board (Andy Frain Servs., Inc.), 29 A.3d 851 (Pa. Commw. Ct. 2011)</td>
</tr>
<tr>
<td>Texas</td>
<td>Increased-Risk</td>
<td>Bond v. Employees Retirement System, 825 S. W.2d 804 (Tex. App. 1992)</td>
</tr>
<tr>
<td>Vermont</td>
<td>Positional-Risk</td>
<td>Cyr v. McDermott’s, Inc., 996 A.2d 709 (Vt. 2010)</td>
</tr>
<tr>
<td>Virginia</td>
<td>Combines increased-risk and actual-risk</td>
<td>Snyder City of Richmond Police Department, 748 S.E.2d 650 (Va. Ct. App. 2013)</td>
</tr>
<tr>
<td>State</td>
<td>Risk Type</td>
<td>Case</td>
</tr>
<tr>
<td>---------------</td>
<td>-------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Washington</td>
<td>Has only “in the course of employment” requirement</td>
<td>Dennis v. Department of Labor &amp; Industries, 745 P.2d 1295 (Wash. 1987) (en banc)</td>
</tr>
</tbody>
</table>

* Many of the above-listed cases do not explicitly state which doctrine the court relies on in interpreting “arising out of.” Because of this, some determinations rely on the author’s analysis of which doctrine most closely aligns with the court’s reasoning.