



Proceedings

A monthly newsletter from McGraw-Hill Education



May 2017 Volume 8, Issue 10

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Dear Professor,

Summer is almost here! Welcome to McGraw-Hill's May 2017 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 8, Issue 10 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the May 2017 newsletter topics with the various McGraw-Hill business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. The North Carolina legislature's repeal of House Bill 2 (HB2) and its aftermath;
2. The United States Department of Justice's and newly-appointed Attorney General Jeff Sessions' review of local police practices;
3. Bill O'Reilly and Fox's Payment of \$13 million to settle multiple sexual harassment complaints filed against him;
4. Videos related to a) Cloud computing company Salesforce's effort to close the gender pay gap within its organization and b) an order by the Occupational Safety and Health Administration (OSHA) that Wells Fargo reinstate a fired whistleblower and pay him \$5.4 million in restitution, the largest amount of restitution OSHA has ever ordered for a single whistleblower;
5. An "ethical dilemma" related to the pay gap between male and female workers in the United States; and
6. "Teaching tips" related to Article 3 ("Bill O'Reilly, Fox Have Paid \$13M to Settle Multiple Sexual Harassment Complaints") and Video 2 ("Wells Fargo Told to Pay Whistleblower \$5.4 Million") of the newsletter.

I wish all of you a safe, restful and enjoyable summer, and I look forward to new McGraw-Hill Education Business Law Newsletter publications in the 2017-2018 academic year!

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Of Special Interest

This section of the newsletter covers three (3) topics:

- 1) The North Carolina legislature's repeal of House Bill 2 (HB2) and its aftermath;
- 2) The United States Department of Justice's and newly-appointed Attorney General Jeff Sessions' review of local police practices; and
- 3) Bill O'Reilly and Fox's Payment of \$13 million to settle multiple sexual harassment complaints filed against him.

Hot Topics in Business Law

Article 1: "With HB2 Repeal, NC Still an Outlier"

<http://www.newsobserver.com/news/politics-government/state-politics/article142260859.html>

According to the article, the flashpoint in the new law that repeals North Carolina House Bill 2 (HB2) is a temporary restriction on cities and counties' anti-discrimination protections.

While that provision spurred HB2 opponents to denounce the compromise enacted recently, it allowed Republicans in the N.C. General Assembly to say they stood their ground even while surrendering the requirement that restroom use in government facilities match someone's sex at birth.

The repeal deal bans until 2020 new local laws dealing with public accommodations or private employment. That modification of HB2's clampdown on local ordinances is part of an ongoing national debate over discrimination and whether state lawmakers or locally elected officials have the final say on local issues. Both controversies came together when Charlotte tried to expand LGBT protections against the wishes of the legislature.

Rep. Sarah Stevens, a Republican from Mt. Airy who was a key negotiator in the repeal deal, said in a news conference Thursday the new law addresses legislators' main concerns by ensuring restroom privacy and reining in city councils and boards of commissioners. It secures the state's authority over regulation of public bathrooms, showers and locker rooms, and its moratorium blocks localities "that go out and do this kind of foolishness."

North Carolina is one of only three states that restrict or prohibit local non-discrimination ordinances.

"Most states recognize it's perfectly legal and appropriate for local ordinances to be passed to provide further protections for LGBT people, for veterans, for victims of domestic violence," Rose Saxe, a senior staff attorney at the American Civil Liberties Union, said Friday.

In North Carolina, the ACLU and Lambda Legal sued a year ago on behalf of six students and employees at UNC-Chapel Hill, N.C. Central University, UNC-Greensboro and the UNC School of the Arts alleging HB2 violated their



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constitutional rights. That lawsuit is still pending; the effect of HB2 repeal is not yet known. Tennessee pre-empted localities from adopting LGBT protections in 2011. As in Charlotte, Nashville had mandated that companies couldn't discriminate against employees based on sexual orientation or gender identity.

The legislature and Gov. Bill Haslam responded with a bill prohibiting Nashville and other cities from passing non-discrimination measures that are broader than state law. LGBT-rights advocates sued in state court and lost in 2014. Their case was dismissed on appeal when it was determined they didn't have standing to sue; but the court didn't address whether the law itself was constitutional.

In Arkansas in 2014, the city of Fayetteville prohibited businesses and landlords from discriminating based on sexual orientation, gender identity, socioeconomic background, marital or veteran status. It was repealed in a special election that was called for voters to enact or reject the ordinance, in a campaign fought by religious conservatives.

Jerry Cox, president of Arkansas Family Council, told the University of Arkansas public radio station at the time the ordinance "stirred things up in such a way that wouldn't have occurred, I think, if people would've just left well enough alone."

"This is about a lot more than just fairness or equality, or civil rights, or any of these other things," he said. "It's really about advancing a political and social agenda that is way out of step with the people of Arkansas and the people of Fayetteville."

The next year the state passed a law banning cities and counties from enacting ordinances that exceed state discrimination protections by including sexual orientation and gender identity. Fayetteville toned down its original ordinance and sent it back to the voters for another election, where it was approved.

Opponents' lawsuit over the city ordinance went to the state Supreme Court, which in February ruled that the ordinance was an unlawful expansion of state law. The court didn't address the underlying question of whether the ordinance was constitutional.

The city's attorney told The Arkansas Democrat-Gazette that the ordinance would remain in effect until a lower court judge rules.

Neither the Arkansas nor Tennessee controversies reached the level of national attention North Carolina's HB2 did, but in each state the laws were divisive.

"Absolutely. It didn't make the national news but it was a statewide regular headline for some time," said Janine Parry, a University of Arkansas political science professor. She said there has been talk of attempting a statewide initiative granting broad protections.



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Case law on the topic goes back to the mid-1990s, when Denver tried to prevent discrimination based on sexual orientation. The ordinance was blocked in a statewide referendum establishing a constitutional amendment to prohibit cities and counties from recognizing homosexuals as a protected class.

But in a split, precedent-setting ruling, in *Romer v. Evans*, the U.S. Supreme Court found the Colorado law failed to meet the equal protection clause in the U.S. Constitution because it served no legitimate government interest.

The tactic of pushing for state laws pre-empting local ordinances may have been pioneered by the tobacco industry in the early 1990s. The industry launched state-level campaigns to repeal or prevent local efforts to control tobacco use, such as protecting people from secondhand smoke, according to a study by the Journal of the American Medical Association.

The trend more recently has seen city and county officials challenging state laws that narrowly protect against discrimination, including in Florida and Indiana.

“We’re seeing some states are trying to expand, in other states cities and localities are passing non-discrimination protections without backlash,” the ACLU’s Saxe said. “HB 142 (North Carolina’s HB2 repeal bill) is really unique. It’s the only state that goes farther and has restroom language. We haven’t seen that elsewhere.”

House Speaker Tim Moore elaborated on the issue at the news conference on Thursday after HB 142 was passed. Under North Carolina law, the legislature grants authority to local governments through individual laws rather than through a broad delegation of power.

But there remains uncertainty in the law, and Moore said he thinks future court rulings will clarify the matter. The issue extends beyond discrimination, into such issues as control over building codes. “We now have control over cities out trying to pass ordinances all over the state that may contradict and conflict,” he said. “We don’t need a patchwork.”

Moore said imposing the moratorium on local ordinances until the end of 2020 gives this General Assembly and the one that follows in two years plenty of time to come up with agreeable restrictions on ordinances. It also follows the next gubernatorial election.

Moore also noted North Carolina is now in line with about 30 other states that don’t include sexual orientation or gender identity in their anti-discrimination laws.

While anti-discrimination ordinances that had been in effect in a handful of North Carolina cities are back on the books, following the repeal of HB2, other localities can’t follow suit before December 2020.



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“If you have cities or counties that get outside the lane, we will do it,” Moore said. “I think a lot of the cities have seen the blow-back. I would say that a lot of folks in Charlotte city government probably had buyers’ remorse once all this happened. I would be surprised if they wanted to go down any road like this.”

Discussion Questions

1. Describe North Carolina House Bill 2 (HB2).

Fundamentally, North Carolina’s House Bill 2 (HB2), enacted by its state legislature on March 23, 2016:

- a. Required that at a public bathroom facility, an individual must use the restroom that is consistent with the gender designation on his/her birth certificate (not the gender to which the person identifies);*
- b. Rescinded the right of individuals to sue in state court for many types of discrimination; and*
- c. Declared the state government as the governing entity within the state to establish a minimum wage for workers (prohibiting cities from passing local ordinances increasing the minimum wage within their borders).*

Although HB2 is most commonly referred to as the “bathroom bill,” it was much more than that, essentially a state government assertion of power, “pushing back” against municipal authority.

2. As the article indicates, the North Carolina legislature’s HB2 repeal bans until 2020 new local laws dealing with public accommodations or private employment. In your reasoned opinion, is it proper for a state legislature to prohibit a local government (e.g., the city of Charlotte, North Carolina) from passing local ordinances that enhance anti-discrimination protection for protected categories of individuals (e.g., transsexuals)? Why or why not?

This is an opinion question, so student responses may vary. For those who favor “grass roots” government, what better governing authority than municipalities and other local governments?

3. Currently, Title VII of the Civil Rights Act of 1964 does not specifically prohibit discrimination on the basis of sexual orientation. Should it? Why or why not?

This is an opinion question, so student responses may vary. Arguably, Title VII’s prohibition against gender discrimination could be interpreted to extend to discrimination on the basis of sexual orientation. In your author’s opinion, the question of whether Title VII applies to sexual orientation discrimination is an issue “ripe for review” by the United States Supreme Court.



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Article 2: "Why DOJ's New Review of Police Agreements Matters"

<http://abcnews.go.com/Politics/justice-departments-review-police-agreements-matters/story?id=46566294>

According to the article, one of the key -- and most controversial -- roles the Justice Department has come to play is policing the police in the United States.

The DOJ has reviewed the Chicago and Baltimore police departments, and it has investigated police-involved shootings, such as the fatal shooting of Michael Brown, in Ferguson, Missouri, and other fatal encounters with law enforcement, such as the death of Freddie Gray in Baltimore. Both incidents sparked a wave of protests across the country.

And many who have been victims of police violence have turned to the DOJ for help from departments they believe are not working in their best interest.

Attorney General Jeff Sessions has directed his Justice Department to "immediately review" current and proposed agreements to overhaul local police departments accused of unconstitutional and discriminatory policing.

And now Sessions wants to postpone a federal court hearing set for this week that would have allowed citizens of Baltimore to speak out about their embattled police force.

What does this mean, and why does it matter?

The Justice Department's Civil Rights Division has authority to investigate whether a police department's officers routinely and historically engage in a "pattern or practice" of unlawful policing -- in other words, whether the department's culture fosters civil rights violations.

If federal investigators uncover such a "pattern or practice," the Justice Department can negotiate a deal with the police force to change its ways, or -- if the police force won't cooperate -- the DOJ can file a federal lawsuit asking a court to force changes within the police agency.

The Justice Department opened twice as many "pattern or practice" investigations under President Obama as it did under President George W. Bush.

Of the more than 20 cases opened under the Obama administration, most have now been resolved through agreements or settlements -- known as "consent decrees."

Consent decrees often give the Justice Department authority to direct specific changes and initiatives within police departments, and agree to let judges oversee and enforce those changes.



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Sessions has long been skeptical of federal investigations into police departments accused of biased policing.

During his confirmation hearing to become attorney general in January, Sessions said, "There is concern that good police officers and good departments can be sued by the Department of Justice when you just have individuals within a department that have done wrong."

And only days after being sworn in as attorney general in February, Sessions criticized reports by his own agency that detailed "systemic" problems with police in Chicago and Ferguson, Missouri, where separate killings of unarmed black men sparked protests across the country in 2014.

While acknowledging he never read the actual reports, he called parts of them "pretty anecdotal and not so scientifically based."

More than a decade earlier, while serving as a senator from Alabama in 2002, Sessions warned a top Justice Department official that, "Just because someone says it's [a matter of] civil rights, maybe they haven't done their homework. Maybe they haven't studied the facts or researched the laws quite enough."

Recently, Sessions issued a memo to top Justice Department officials, directing them "to immediately review all Department activities – including ... existing or contemplated consent decrees."

Among the consent decrees being contemplated is a deal with the Baltimore Police Department. Federal and city attorneys negotiated a draft agreement last year to bring major changes to the police force, after the Justice Department released a scathing report documenting a history of excessive force and a pattern of "unconstitutional stops, searches, and arrests" that disproportionately targeted African Americans.

A federal judge is still deciding whether to sign off on the agreement, and a hearing was scheduled for Thursday to allow members of the public to weigh in on the matter. But on Monday night, the Justice Department filed a motion asking the judge to postpone the hearing until at least July.

"The Department must ensure that such contemplated consent decrees advance the safety and protection of the public, promote officer safety and morale, protect and respect the civil rights of all members of the public, respect local control of law enforcement, are rooted in timely and reliable statistics on crime and criminals, and do not impede recruitment and training of officers," the Justice Department's motion said.

Nevertheless, the motion said federal officials are "aware of the need for police reform in Baltimore and of the need to rebuild public confidence in law enforcement in Baltimore."



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The Baltimore Police Department — the very target of the Justice Department's investigation — opposes the Justice Department's latest move.

"Further delays only serve to erode the trust of the public in this process," a Baltimore Police Department spokesman said in a statement. "The Baltimore Police Department is continuing to move forward with reforms related to the forthcoming consent decree for the overall progress of the city of Baltimore."

The mayor of Baltimore agreed, saying city officials "strongly oppose any delay in moving forward." "I, along with Police Commissioner Kevin Davis and the citizens of Baltimore, recognize that reforming our police department is long overdue," Mayor Catherine Pugh said in a statement. "Much has been done to begin the process of building faith between the police department and the community it seeks to serve. Any interruption in moving forward may have the effect of eroding the trust that we are working hard to establish."

The mayor of Chicago, Rahm Emanuel, also issued a statement, saying he "can't speak for the federal government's" intentions.

"The reforms we have made over the past year are built on the principles of partnership and trust between our residents and our officers, and they laid the foundation for the 2017 reform plan we outlined just a few weeks ago," Emanuel said. "Through these ongoing reforms we will ensure our officers have the training and support they need to do a tough job well, we will strengthen the relationship with our residents, and we will make our city a stronger, safer place. Reform is in our self-interest and that is why Chicago has been, is, and always will be committed to reform."

Discussion Questions

1. As the article indicates, one of the key and most controversial roles the Justice Department has come to play is "policing the police" in the United States. Should the Justice Department monitor the police? Why or why not?

The United States Justice Department (DOJ) is ultimately responsible for seeing to it that the law is enforced in the United States. This is an overwhelming responsibility, but a responsibility of the DOJ nonetheless. Police use of excessive force and unconstitutional stops, searches and arrests are prohibited by law. In your author's opinion, this realization leads to the inescapable conclusion that the DOJ not only should, but must "police the police."

2. What specific constitutional provisions empower the Justice Department to "police the police?"

Several constitutional provisions come into play in terms of the Justice Department's right and responsibility to "police to police." They include:



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- a. *The 5th and 14th Amendments to the United States Constitution, which guarantee due process related to “life, liberty and property”;*
 - b. *The Equal Protection Clause of the Constitution, which guarantees all individuals the right to equal protection under the law; and*
 - c. *The Supremacy Clause of the United States Constitution, which declares that federal laws shall constitute the supreme “law of the land.”*
3. As the article indicates, during his confirmation hearing to become attorney general in January 2017, Jeff Sessions said, "There is concern that good police officers and good departments can be sued by the Department of Justice when you just have individuals within a department that have done wrong." Assess this statement.

“Good” police officers and “good” departments follow the dictates and guidance of the United States Constitution. Also, under basic principal-agent law, if the agent harms a third party in the course and scope of the agency, the principal is liable for such harm. It is well-settled law that if an employee commits a wrongful act in the course and scope of employment, the employer is responsible for the resulting harm. If a police officer commits a wrongful act while policing, the police department and the municipality/local government are liable for the harm. Such a rule promotes better hiring, training and monitoring practices, thereby reducing the possibility that wrongful acts will occur.

Article 3: “Bill O’Reilly, Fox Have Paid \$13M to Settle Multiple Sexual Harassment Complaints”

<http://www.chicagotribune.com/news/nationworld/ct-bill-oreilly-sexual-harassment-20170401-story.html>

According to the article, Fox News star Bill O'Reilly and the network have paid out some \$13 million to five women over the past 15 years to settle a series of harassment allegations against the opinionated host, according to a published report in the New York Times.

The settlements, three of which had been previously undisclosed, were in exchange for the women's agreement not to sue the company, which has been beset by allegations of sexual harassment by its co-founder and former chairman, Roger Ailes, the Times found. Ailes was ousted by 21st Century Fox, the parent company of Fox News, last summer.

O'Reilly - the top-rated attraction on cable news for many years - generated lurid headlines in 2004 for his dispute with Andrea Mackris, who alleged that he had harassed her repeatedly while she was a producer of his program "The O'Reilly Factor." Macris settled her claims for a reported payout of \$9 million in 2004.

In January of this year, O'Reilly settled another harassment claim, lodged by former Fox News presenter Juliet Huddy, for an undisclosed sum.



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But the Times found three other complaints and payouts involving O'Reilly, dating back to 2002. Fox settled two of them, and O'Reilly privately settled a third in 2011. The latter agreement was so secret that 21st Century Fox was unaware of it until last year, the paper said.

The payments by Fox on behalf of Ailes and O'Reilly are the focus of an ongoing investigation by the U.S. attorney general's office in New York. Prosecutors are probing whether the company made adequate disclosures about them to investors. Securities law requires publicly traded companies - such as 21st Century Fox and its predecessor company, News Corp. - to disclose "material" events affecting the company's finances. Both 21st Century Fox and News Corp. are controlled by Rupert Murdoch and his family.

Murdoch is a longtime friend and political ally of President Donald Trump, who fired the federal attorney in Manhattan, Preet Bharara, in March after Bharara refused to resign as part of a general ouster of U.S. attorneys appointed by the Obama administration.

The undisclosed complaints unearthed by the Times against O'Reilly were made by women who either worked for him or appeared on "The O'Reilly Factor," and included allegations of verbal abuse, lewd comments and phone calls in which the women said it sounded as if O'Reilly was masturbating.

The paper identified the three women who complained about O'Reilly as Rachel Witlieb Bernstein, a producer who claimed that O'Reilly had verbally abused her in 2002 in front of colleagues; Rebecca Gomez Diamond, a Fox Business Network host, who reportedly recorded conversations with O'Reilly and settled in 2011; and former Fox anchor Laurie Dhue, who settled last year.

All three women have left Fox and are bound by confidentially agreements about their settlements, the paper said.

Fox hasn't said whether O'Reilly was ever disciplined as a result of the allegations. Ailes received \$40 million when he was forced out of the company last summer. He remains a Fox consultant.

Fox News declined to comment and referred reporters to statements issued by 21 Century Fox and O'Reilly.

O'Reilly's statement, posted on his website, said: "Just like other prominent and controversial people, I'm vulnerable to lawsuits from individuals who want me to pay them to avoid negative publicity. In my more than 20 years at Fox News Channel, no one has ever filed a complaint about me with the Human Resources Department, even on the anonymous hotline.

"But most importantly, I'm a father who cares deeply for my children and who would do anything to avoid hurting them in any way. And so I have put to rest any controversies to spare my children.



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He added, "Those of us in the arena are constantly at risk, as are our families and children. My primary efforts will continue to be to put forth an honest TV program and to protect those close to me."

21st Century Fox, now headed by Murdoch's sons James and Lachlan, said, in its statement, that it "takes matters of workplace behavior very seriously. Notwithstanding the fact that no current or former Fox News employee ever took advantage of the 21st Century Fox hotline to raise a concern about Bill O'Reilly, even anonymously, we have looked into these matters over the last few months and discussed them with Mr. O'Reilly. While he denies the merits of these claims, Mr. O'Reilly has resolved those he regarded as his personal responsibility. Mr. O'Reilly is fully committed to supporting our efforts to improve the environment for all our employees at Fox News."

O'Reilly and Fox continue to face allegations by former Fox personality Andrea Tantaros, who claimed, in a lawsuit filed last summer, that O'Reilly and Ailes sexually harassed her.

Discussion Questions

1. Define "sexual harassment."

According to the United States Equal Employment Opportunity Commission (EEOC), sexual harassment is a form of gender discrimination. It includes inappropriate touching, inappropriate comments of a sexual nature, or anything else of a sexual nature that would create a "hostile work environment."

2. As the article indicates, Bill O'Reilly and Fox have paid out some \$13 million to five women over the past 15 years to settle a series of harassment allegations against the host. Is this an admission of liability on the part of O'Reilly and/or Fox? Why or why not?

Legally, such settlement payments do not constitute an admission of liability by either Bill O'Reilly or Fox. Typically, included in the language of such settlement agreements is a provision indicating that payout is not a legal admission of liability. With that being said, many people believe that "where there is smoke there is fire," rationalizing that the defendants would not have paid such exorbitant amounts without the cases against them being strong.

3. In your reasoned opinion, should an employer be held legally responsible for sexual harassment committed by an employee? Why or why not?

This is an opinion question, so student responses may vary. The argument against such legal responsibility is that employers cannot police their employees every minute of the work day. Further, if the employer did not direct the employee to commit the wrongful act, the employer should not be responsible. The argument for such legal responsibility is that this will encourage the employer to police the work environment, create a culture unaccepting of sexual harassment, and thereby reduce the probability that sexual harassment will occur.



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Video Suggestions

Video 1: “Salesforce CEO: It Is ‘So Easy’ to Close Pay Gap”

<http://money.cnn.com/2017/04/04/news/companies/salesforce-equal-pay-women/index.html>

Note: In addition to the video, please see the following article included at the above-referenced internet address:

“Salesforce Just Spent another \$3 Million to Close Its Pay Gap”

According to the article, Salesforce announced last year that it spent \$3 million to close the gap between what men and women make. Now the tech company is doubling down on its commitment to equity.

Salesforce said recently it has raised the pay of 11% of its employees around the world after another evaluation of salaries. The changes, which cost an additional \$3 million, took effect recently.

The company examined salaries last year, comparing people with similar roles and adjusting for location, then corrected "unexplained differences" between men and women. As a result, 6% of employees had their pay raised. Both women and men received boosts.

This year's study also looked at bonuses and checked for differences in pay in the United States based on race and ethnicity -- not just gender.

"The need for another adjustment underscores the nature of pay equity -- it is a moving target, especially for growing companies in competitive industries," Salesforce executive Cindy Robbins said in a blog post.

The company, which provides cloud-based customer service tools for businesses, had 25,000 employees as of January 31, according to a company filing. That means about 2,750 workers had their salaries adjusted this year.

The announcement comes on Equal Pay Day, which symbolically marks how far into this year a woman would have to work to make her pay for last year equal to a man's.



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And it makes good on a longstanding promise from CEO Marc Benioff. He said that Salesforce was examining employee salaries and would take steps to ensure men and women were paid equally.

"My job is to make sure that women are treated 100% equally at Salesforce in pay, opportunity and advancement," Benioff said at the time.

Concerns about the treatment of women at tech companies have only ratcheted up since then. Problems at Uber, in particular, have put Silicon Valley under the microscope. Uber CEO Travis Kalanick had to order an "urgent" investigation in February after a former employee made allegations of sexism and harassment in a widely-read blog post.

Discussion Questions

1. Describe the Equal Pay Act of 1963.

The Equal Pay Act of 1963 was the first modern federal anti-discrimination law, predating the Civil Rights Act of 1964 by one year. The Equal Pay Act addresses one specific form of employment discrimination—pay discrimination based on gender. It was designed to address the “pay gap” between male and female employees for comparable jobs, skills, education and experience. Even though the Equal Pay Act was enacted fifty-four years ago, many would argue that gender-based pay discrimination still exists, although that gap has narrowed significantly over the decades.

2. As the article indicates, the Salesforce pay equity study checked for differences in pay in the United States based on race and ethnicity. What specific law requires employers to ensure pay equity on the basis of race and ethnicity?

The Civil Rights Act of 1964 prohibits employment discrimination (including pay discrimination) on the basis of gender, race, national origin, culture and religion.

3. U.S.-based technology companies are some of the most progressive organizations in the country. With that being said, are you surprised that a technology company like Salesforce allowed gender differences in pay to exist until those discrepancies were only recently remedied? Explain your response.

This is an opinion question, so student responses may vary. Your author was quite surprised by gender-based pay discrepancies in the technology sector, particularly since the technology industry is one of the most progressive sectors of the United States economy.



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Video 2: “Wells Fargo Told to Pay Whistleblower \$5.4 Million”

http://www.huffingtonpost.com/entry/wells-fargo-whistleblower_us_58e2b77ae4b0f4a923b11af7?nme&

According to the article, federal regulators have ordered Wells Fargo to reinstate a fired whistleblower and shell out a whopping \$5.4 million in restitution.

According to the Occupational Safety and Health Administration, a Wells Fargo manager reported instances of bank, mail and wire fraud to supervisors as well as a company ethics hotline. Although he'd received good marks in the past, the manager was “abruptly dismissed” after speaking up.

The manager lost his job in 2010 and has not been able to find a new one. OSHA determined that his whistleblowing, protected under the Sarbanes-Oxley Act, was at least a contributing factor in his firing.

It was the largest amount of restitution the agency has ever ordered for a single whistleblower, Barbara Goto, regional administrator for OSHA in San Francisco, said in an interview.

“We take this very seriously,” Goto said. “Employees should feel free to work in an environment where they don't suffer retaliation for reporting something that needs to be reported. If that does happen, we will do our job.”

Vince Scanlon, a spokesman for Wells Fargo, said the company plans to fight OSHA's order. “We take seriously the concerns of current and former team members,” Scanlon said in an email.

“This decision is a preliminary order and to date there has been no hearing on the merits of this case. We disagree with the findings and will be requesting a full hearing of the matter.”

According to Goto, the amount of the order would reflect not only lost salary, but also other costs caused by unemployment, such as lost health benefits, having to dip into retirement savings, attorney' fees or emotional damages.

Wells Fargo has the option to appeal the order to an administrative law judge. While the bank may dispute the amount of the restitution, the San Francisco-based firm is required under law to immediately offer the fired manager his job back as the case makes its way through court. (OSHA does not release the names of whistleblowers.)

According to Scanlon, the bank manager worked in the wealth management group — not the community bank, which is at the center of Wells Fargo's fake account scandal.



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Last year, Wells Fargo acknowledged that its employees had opened up more than 2 million unauthorized accounts on customers' behalf. The accounts helped Wells Fargo employees meet their unforgiving sales goals, while customers got socked with fees they weren't aware of.

Wells Fargo was fined \$185 million by regulators for the malfeasance. The bank has estimated that the scandal could cost it an estimated \$1.7 billion through lawsuits and government investigations.

There are still a dozen ongoing investigations tied to the scandal.

Some Wells Fargo employees were trying to blow the whistle on the fake accounts scam as far back as 2005.

Discussion Questions

1. Who is a "whistleblower?" What is "whistleblower protection?"

A whistleblower is an individual who reports a violation of state or federal law to the appropriate authorities. In many instances, the whistleblower is an employee who reports his or her employer's legal violation(s) to the appropriate authorities. For example, an employee may realize that his employer is illegally dumping toxic materials in violation of the Environmental Protection Act. If the employee reports such a violation to the Environmental Protection Agency, the federal administrative agency responsible for policing the provisions of the Environment Protection Act, the employee is a whistleblower.

2. As the article indicates, the Occupational Safety and Health Administration (OSHA) ordered Wells Fargo to pay the whistleblower \$5.4 million in restitution. In your reasoned opinion, is this award appropriate, or is it excessive? Explain your response.

This is an opinion question, so student responses may vary. Restitution is defined as "recompense for injury or loss." Comparable words include compensation, reparation, reimbursement, repayment, and remuneration. As the article indicates, the amount of the restitution order would reflect not only lost salary, but also other costs caused by unemployment, such as lost health benefits, having to dip into retirement savings, attorney' fees or emotional damages. OSHA (or a trial jury, if called upon to resolve the matter) has a great deal of flexibility in deciding what amount of money would reasonably approximate the whistleblower's emotional distress—admittedly, this would be the most controversial component of the award.

3. Explain the "reinstatement" remedy of a wrongful termination action. In your reasoned opinion, is it advisable for a regulatory authority like OSHA or a court to order reinstatement? Why or why not?

The "reinstatement" remedy orders the employer to allow the employee to resume work at his or her previous position. In terms of whether it is advisable for a regulatory authority like OSHA or a court



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to order reinstatement, reasonable minds might differ, particularly since reinstatement creates an awkward reality—the employee is essentially returning to the “belly of the beast.” Despite the awkward nature of the situation, however, the employee is allowed to request his or her old job back, and if so ordered by the court, the employer must, in good faith, allow the employee to return to work at the same position.



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Of Special Interest

This section of the newsletter addresses the pay gap between male and female workers in the United States.

Ethical Dilemma

“Sheryl Sandberg: Pay Gap Holds Us All Back”

<https://www.usatoday.com/story/opinion/2017/04/04/pay-gap-women-equal-sheryl-sandberg-column/99954086/>

Note: In addition to the article, please see the video “Here’s What You Need to Know about...” at the above-referenced internet address.

Note: This is an opinion piece written by Sheryl Sandberg, COO of Facebook and founder of LeanIn.Org, which has launched the #20PercentCounts campaign to highlight the unfairness of the gender pay gap. To learn more, go to leanin.org/equalpay.

Tuesday, April 4, 2017 is Equal Pay Day in the United States. This means that on average, women in this country had to work all of 2016 plus this far into 2017 to catch up to what men earned last year.

In 2016, women on average were paid 80 cents for every dollar men earned. If you break the pay gap down by race and ethnicity, it’s even worse: black women were paid 63 cents; Latinas, 54 cents for every dollar white men made.

Women make up nearly half our workforce. They’re the primary breadwinner in more than 40% of American households with children — and in many families, they’re the only breadwinner. They work hard every day at every kind of work there is. Yet they’re still paid less than men.

We know how important achieving equality is for all of us. A world where women ran half of our companies and countries and men ran half of our homes would be a better world. Our companies would be more successful, our laws more just, and our children would gain from their fathers’ care as much as they do from their mothers’.

The pay gap holds us back from that goal. For millions of women, it’s a cold hard fact from the day they enter the workforce until the day they leave. It exists across occupations and industries, in every region, for part-time and full-time workers, no matter their level of education. In fact, it’s widest for women with college degrees.



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Despite its destructive effects, the pay gap persists year after year. One reason is doubt in some circles about whether it's real. I hear it all the time: Doesn't the pay gap exist because of women's choices — to spend more time at home with their families, go into lower-paying fields, not get the degree or ask for the promotion that leads to higher pay? Skeptics ask: Isn't this a matter of personal choices, not gender discrimination?

Let's put this misconception to rest forever. The gender pay gap exists not because women aren't educated enough or ambitious enough or hardworking enough. It's about structural barriers we need to dismantle. Cornell University economists Francine Blau and Lawrence Kahn analyzed the pay gap and found that when you control for education and experience, it's nearly unchanged. Women aren't earning less because they're not as educated or experienced as men. Quite the opposite: colleges have been graduating more women than men for over than thirty years.

Blau and Kahn found that a piece of the pay gap is due to "occupation and industry differences." Fields dominated by women tend to pay less than fields dominated by men. If you control for that, the pay gap shrinks by about half. But it's worth asking why jobs usually filled by women, like nursing assistants, pay less than jobs usually filled by men, like light truck drivers, even though both require similar qualifications. As more proof of the gender bias that underlies pay, when women move into a predominantly male profession, pay often declines for everyone.

After controlling for education, experience, and occupational and industry differences, the Cornell study found that a gender pay gap of about 8% remains. It can't be explained away.

The consequences are real and painful. If the pay gap were closed, the average working woman would earn over half a million dollars more in her lifetime. She'd get an annual income bump that would pay for a year and a half of groceries or nearly a full year of rent. The number of working women living in poverty would be cut in half. Men would benefit as well: think of all the struggling two-income couples where the woman getting paid fairly would increase the economic security of the entire family. There are national costs too. Last year, the pay gap in the United States amounted to \$513 billion in lost wages. That's nearly the entire GDP of Sweden.

Like many problems we face, the pay gap will be solved only if we all work together. Our elected officials have a vital role to play in passing and enforcing anti-discrimination laws. They should also, at long last, raise the federal minimum wage. Nearly two-thirds of minimum-wage workers are women. By raising the minimum wage, we'd reduce pay inequality and help a lot of families living in or near poverty.

Businesses should conduct pay audits by gender and race and ensure fairness in hiring and promotions. They can do this by putting in place clear and consistent criteria, training managers to spot gender bias in their decision making, and tracking outcomes to make sure they're not systematically passing up women or rating them more harshly.



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And all of us — men, women, employers, employees, colleagues — can step up and become stronger allies for women. That includes celebrating women who lead and making sure women get credit for their accomplishments. It also means supporting women when they negotiate for raises and promotions. Women often pay a penalty for negotiating for themselves: they're told they're too aggressive, too pushy. That's a social reality we can help change together.

It's just plain wrong that so many women are working hard every day for less money. It says we think women are less valuable, less capable, less deserving — notions that go against Americans' basic values of fairness and equality. Equal pay is about women's worth in our economy and society. There's nothing more fundamental than that.

Discussion Questions

1. In your reasoned opinion, is the gender pay gap referenced in the article real, or is it imagined? Explain your response.

This is an opinion question, so student responses may vary. Obviously, the scientific accuracy of the gender pay gap depends on the rigorous nature of the studies that address the issue—for example, whether the study properly compares male and female employees in terms of similarity of education, experience, skill, length of employment, etc.

2. In recognition of the fact that the Equal Pay Act has been federal law for fifty-four years (since 1963), how can the gender pay gap still exist?

If the current pay gap is real, that would seem to be indicative of continued employment-based gender discrimination. Obviously, enacting a law and ensuring complete compliance are two entirely different matters. The good news here is that even if the pay gap is real, it is narrowing over time.

3. In your reasoned opinion, will the gender pay gap narrow in the future? Why or why not?

This is an opinion question, so student responses may vary. If history is any guide, the gender pay gap will continue to narrow in the future, since it has narrowed over the fifty-four years since the Equal Pay Act became law. Another factor determining the future narrowing of the pay gap is public demand for it.



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Of Special Interest

This section of the newsletter will assist you in addressing Article 3 (“Bill O’Reilly, Fox Have Paid \$13M to Settle Multiple Sexual Harassment Complaints”) and Video 2 (“Wells Fargo Told to Pay Whistleblower \$5.4 Million”) of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Article 3—“Bill O’Reilly, Fox Have Paid \$13M to Settle Multiple Sexual Harassment Complaints”): “Facts about Sexual Harassment”

<https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>

“Facts about Sexual Harassment”

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.



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It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available. When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

Teaching Tip 2 (Related to Video 1—“Salesforce CEO: It Is ‘So Easy’ to Close Pay Gap”): “Facts about Equal Pay and Compensation Discrimination”

<https://www.eeoc.gov/eeoc/publications/fs-epa.cfm>

“Facts about Equal Pay and Compensation Discrimination”

The right of employees to be free from discrimination in their compensation is protected under several federal laws, including the following enforced by the U.S. Equal Employment Opportunity Commission: the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Title I of the Americans with Disabilities Act of 1990.

The law against compensation discrimination includes all payments made to or on behalf employees as remuneration for employment. All forms of compensation are covered, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits.

Equal Pay Act

The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require



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substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. Each of these factors is summarized below:

Skill

Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

Effort

The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

Responsibility

The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

Working Conditions

This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

Establishment

The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. In some circumstances, physically separate places of business may be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to separate work locations, the separate work sites can be considered part of one establishment.

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are known as "affirmative defenses" and it is the employer's burden to prove that they apply.



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In correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased.

Title VII, ADEA, and ADA

Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement that the claimant's job be substantially equal to that of a higher paid person outside the claimant's protected class, nor do these statutes require the claimant to work in the same establishment as a comparator. Compensation discrimination under Title VII, the ADEA, or the ADA can occur in a variety of forms. For example:

- a. An employer pays an employee with a disability less than similarly situated employees without disabilities and the employer's explanation (if any) does not satisfactorily account for the differential.
- b. An employer sets the compensation for jobs predominately held by, for example, women or African-Americans below that suggested by the employer's job evaluation study, while the pay for jobs predominately held by men or whites is consistent with the level suggested by the job evaluation study.
- c. An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity. For example, if an employer provides extra compensation to employees who are the "head of household," i.e., married with dependents and the primary financial contributor to the household, the practice may have an unlawful disparate impact on women.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on compensation or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII, ADEA, ADA or the Equal Pay Act.



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Chapter Key for McGraw-Hill Education Business Law Texts:

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Barnes et al., Law for Business	Chapters 4 and 25	Chapters 3 and 25	Chapters 3 and 25	Chapter 25
Bennett-Alexander & Hartman, Employment Law for Business	Chapters 3, 8 and 10	Chapter 8	Chapter 8	Chapter 8
Kubasek et al., Dynamic Business Law	Chapters 5 and 43	Chapters 2 and 43	Chapters 2 and 43	Chapter 43
Kubasek et al., Dynamic Business Law: Summarized Cases	Chapters 5 and 43	Chapters 2 and 43	Chapters 2 and 43	Chapter 43
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 5 and 24	Chapters 2 and 24	Chapters 2 and 24	Chapter 24
Liuzzo, Essentials of Business Law	Chapters 5 and 32	Chapters 2 and 32	Chapters 2 and 32	Chapter 32
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment	Chapters 3 and 51	Chapters 4 and 51	Chapters 4 and 51	Chapter 51
McAdams et al., Law, Business & Society	Chapters 5 and 13	Chapters 2 and 13	Chapters 2 and 13	Chapter 13
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 2 and 12	Chapters 5 and 12	Chapters 5 and 12	Chapter 12
Pagnattaro et al., The Legal and Regulatory Environment of Business	Chapters 6 and 20	Chapters 2 and 20	Chapters 2 and 20	Chapter 20
Sukys, Brown, Business Law with UCC Applications	Chapters 2 and 23	Chapters 1 and 23	Chapters 1 and 23	Chapter 23



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This Newsletter Supports the Following McGraw-Hill Education Business Law Texts:

- Barnes et al., Law for Business, 13th Edition ©2018 (1259722325)
- Bennett-Alexander et al., Employment Law for Business, 8th Edition ©2015 (0078023793)
- Kubasek et al., Dynamic Business Law, 4th Edition ©2017 (1259723585)
- Kubasek et al., Dynamic Business Law: Summarized Cases, 1st Edition ©2013 (0078023777)
- Kubasek et al., Dynamic Business Law: The Essentials, 3rd Edition ©2016 (007802384X)
- Liuzzo, Essentials of Business Law, 9th Edition ©2016 (07802319X)
- Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 16th Edition ©2016 (0077733711)
- McAdams et al., Law, Business & Society, 11th Edition ©2015 (0078023866)
- Melvin, The Legal Environment of Business: A Managerial Approach, 3rd edition ©2018 (1259686205)
- Pagnattaro et al., The Legal and Regulatory Environment of Business, 17th Edition ©2016 (0078023858)
- Sukys, Brown, Business Law with UCC Applications 14th Edition ©2017 (0077733738)

