Welcome!

Ninth Annual Labor & Employment Fall Seminar

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Wednesday, September 13, 2023

AMUNDSEN DAVIS

Key Legal Trends & Developments Impacting Employers

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On November 1, 2022, SmithAmundsen and Davis I Kuelthau formally combined to form Amundsen Davis, LLC, a full service business and litigation law firm helping clients across the U.S.

Agenda

- Pregnant Workers Fairness Act
- Federal Labor Law Developments
- Artificial Intelligence, Algorithms and the EEOC
- Paid Leave Update
- Pay Transparency Laws

Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023
- Proposed regulations published August 11, 2023
- Comment period open until October 10, 2023

What Does the PWFA Require?

- Covered Employers must provide "reasonable accommodations" for a worker's limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship" (significant difficulty or expense). The PWFA applies only to accommodations. Although the Americans with Disabilities Act (ADA) already requires employers to accommodate pregnant employees' medical conditions to the extent that those conditions rise to the level of a "disability" within the meaning of the ADA -- the PWFA requires employers to provide reasonable accommodations for pregnancy-related medical conditions regardless of whether the condition constitutes a "disability."
- Covered employers must accommodate pregnant employees even if they cannot perform all essential functions of their position, so long as their inability to do so is temporary, the essential job function can be performed in the "near future," and the inability to perform the essential function can be reasonably accommodated.

Who Is Protected by the PWFA?

- "Qualified employees" (and job applicants) of "covered employers" who have known limitations related to pregnancy, childbirth, or related medical conditions and are "qualified employees."
- "Qualified employees" are defined as (a) those who can perform the essential functions of the role with or without reasonable accommodation, or (b) those whose inability to perform an essential function of the role is temporary and can be reasonably accommodated.

Are You a Covered Employer?

“Covered employers” include private and public sector employers with at least 15 employees, Congress, federal agencies, employment agencies, and labor organizations.

Examples of Reasonable Accommodations for Pregnant Workers

Some examples of possible reasonable accommodations:

- ability to sit or drink water
- receive closer parking
- have flexible hours
- receive appropriately sized uniforms and safety apparel
- receive additional break time to use the bathroom, eat, and rest
- take leave or time off to recover from childbirth
- and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

What does the PWFA prohibit?

Covered employers cannot:	Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer;
	Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation;
	Require an employee to take paid or unpaid leave if another reasonable accommodation can be provided that would let the employee keep working;
	Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation); or
	Interfere with any individual's rights under the PWFA.

Other Federal Laws That May Apply to Your Pregnant Workers

Other laws that apply to workers affected by pregnancy, childbirth, or related medical conditions, include:

- **Title VII** (enforced by the EEOC), which:
  - Protects an employee from discrimination based on pregnancy, childbirth, or related medical conditions; and
  - Requires covered employers to treat a worker affected by pregnancy, childbirth, or related medical conditions the same as other workers similar in their ability or inability to work;
- **Americans with Disabilities Act (ADA)** (also enforced by the EEOC), which:
  - Protects an employee from discrimination based on disability; and
  - Requires covered employers to provide reasonable accommodations to a person with a disability if the reasonable accommodation would not cause an undue hardship for the employer.
  - While pregnancy is not a disability under the ADA, some pregnancy-related conditions may be disabilities under the law.
- **Family and Medical Leave Act** (enforced by the U.S. Department of Labor), which provides covered employees with unpaid, job-protected leave for certain family and medical reasons; and
- **PUMP Act** (Providing Urgent Maternal Protections for Nursing Mothers Act) (enforced by the U.S. Department of Labor), which broadens workplace protections for employees to express breast milk at work.

The PWFA does not replace federal, state, or local laws that are more protective of workers affected by pregnancy, childbirth, or related medical conditions. More than 30 states and cities have laws that provide accommodations for pregnant workers.

EEOC Proposed Regulations

4 pregnancy accommodations that would be reasonable and should be granted in almost every circumstance: (1) allowing extra time for bathroom breaks, (2) allowing extra time for food and drink breaks; (3) drinking water on the job and (4) sitting or standing as necessary.

On the EEOC's "nonexhaustive list" of conditions that generally fall within the scope of the law are "current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions."

The law covers accommodations for postpartum anxiety and depression, infertility treatments and menstrual cycles.

EEOC Proposed Regulations (continued)

- Unlike the Americans with Disabilities Act, the draft regulations also allow for **temporary suspension of essential job functions** as long as an employee will be able to perform them "in the near future."
- The EEOC defines "in the near future" as "generally 40 weeks," and allows for additional recovery time as well. An employer can challenge this suspension if they believe it will cause "undue hardship."**

Enforcement and Remedies

- The PWFA does not apply retroactively.
- Employees may bring a private lawsuit against their employer for violation of the PWFA after exhausting all administrative remedies. Relief for private-sector employees is the same as provided under Title VII, and may include reinstatement, back pay, front pay, compensatory damages, punitive damages, and attorneys' fees.
- The EEOC and the Attorney General have the same investigatory and enforcement powers under the PWFA as they have under Title VII.
- Employers who can prove that they have provided some reasonable accommodation or engaged in good faith efforts to identify and provide a reasonable accommodation may have a defense to a damages claim brought under the PWFA.
- Nursing employees recently received the legal right to break time and a private place for lactation at work through the PUMP for Nursing Mothers Act, which was enacted by President Joe Biden in December alongside the PWFA. The EEOC's proposed guidance would allow the agency to enforce lactation-related workplace requirements in addition to the Department of Labor, and provide for broader protections than the PUMP Act itself does.

Action Items

- Train your supervisors about the PWFA. They should know how to recognize a request for accommodation, what to do/say and NOT do/say when they receive a request.
- Make sure that your HR team understands the company's obligations and prepare for potential accommodations.
- Be on the lookout for the EEOC's final regulations.

Federal Labor Law Developments

Confidentiality and Non-Disparagement Clauses Narrowed

- *Maclaren Macomb* (2/21/2023): The Board held that an employer violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act") by presenting severance agreements to furloughed employees that contained broad confidentiality and non-disparagement clauses.
- The Board examined the language of the severance agreements and concluded that the clauses interfered with, restrained, or coerced employees' exercise of Section 7 rights.
- The Board held that the language of a severance agreement alone, and therefore, the mere act of presenting it to an employee, without the need for any additional evidence of coercive behavior by an employer, could potentially violate the Act.
- **For non-supervisory employees:**
  - **non-disparagement clauses are now limited to prohibiting only statements that are "so disloyal, reckless or maliciously untrue as to lose the Act's protection;" and**
  - **confidentiality clauses must be narrowly drafted to only include protected information such as trade secrets.**

Confidentiality and Non-Disparagement Clauses Narrowed (continued)

Additional guidance from the NLRB General Counsel includes:

- Severance agreements are not unlawful per se.
- The decision will be applied retroactively (note 6 month SOL).
- Employees cannot waive their right to lawful confidentiality and/or non-disparagement clauses.
- The decision may apply to non-compete clauses, no solicitation clauses, no poaching clauses, broad liability releases, and covenants not to sue.
- Confidentiality provisions that are "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications," remain potentially lawful. This is in contrast to provisions that, "have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties …" which are prohibited.
- While supervisors are generally not protected by the NLRA, the Act does protect supervisors from being retaliated against because of their refusal to act on the employer's behalf in committing an unfair labor practice—that is, where an employer retaliates against a supervisor "who refuses to proffer an unlawfully overbroad severance agreement."
- A supervisor would be protected under the NLRA where their employer provides them with a severance agreement that prevents a supervisor "from participating in a Board proceeding."

Right of Employer to Discipline Employee Who Engages in Offensive Conduct Narrowed

Lion Elastomers (5/1/2023): The decision reverts back to cloaking employees with an extra layer of protection to use offensive language and engage in similar misconduct in connection with union organizing and other protected activity.

- Outbursts to management in the workplace" considers the place, subject-matter, nature of employee's outburst, and whether it was provoked by an ULP, a la Atlantic Steel.
- Social media posts "and most conversations among employees in the workplace" are considered under a "totality of the circumstances" analysis.
- Abusive picket-line conduct takes into account whether non-strikers reasonably would have been coerced or intimidated.

Employment Policies Evaluated Under an Employee-Friendly Framework

Stericyle, Inc. (8/11/2023) - The Board reversed its own 2017 decision and created a new framework for evaluating whether a written employment policy constitutes an unfair labor practice in violation of the National Labor Relations Act (NLRA).

New standard: An employment policy is **presumptively unlawful** if the policy could be reasonably interpreted to chill an employee's rights under Section 7 of the NLRA.

- The interpretation must be made from the point of view of a lay employee.
- An employer can only rebut that presumption if the employer proves that the policy advances a legitimate, substantial business interest and that the employer cannot advance that interest with a narrower rule.

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Employers Are Forced to Either Recognize or File a Petition for Election

Until now, employers faced with a union demand for recognition based on signed authorization cards could refuse to voluntarily recognize the union and insist that the union file a petition for an election with the NLRB.

Cemex Construction Materials Pacific, LLC (8/25/2023): Employers now faced with a union demanding recognition based on a purported majority through signed authorization cards will have two options, either: (i) recognize and bargain with the union; or (ii) within two weeks, file a petition for an election ("RM petition") with the NLRB to test the union's majority status or the appropriateness of the proposed bargaining unit.

Employers Are Forced to Either Recognize or File a Petition for Election (continued)

Under the Board's new *Cemex* standard, if an employer commits any ULPs during an election, no matter how minor, the Board may dismiss the petition and issue a bargaining order, which would force the employer to recognize and bargain with the union based on its card-based majority.

**The decision will be applied retroactively. This means that it will affect all employers in the midst of a union organizing campaign, in addition to those employers that will face unionization efforts in the future.

Employers that are either in the midst of an organizing campaign or may be subject to an organizing campaign in the future, if they do not want to voluntarily recognize the union, need to be sure that that they (a) timely file an RM petition with the NLRB and (b) avoid conduct that can be construed as a ULP, or else the employer risks facing a bargaining order.

Employer's Right to Act Unilaterally Narrowed

8/30/23: NLRB overturned a decision that established an employer's authority to unilaterally change their workers' work conditions before a first CBA and after the expiration of a previous CBA.

Now – (1) an employer cannot make unilateral changes to work terms and conditions for a unionized workforce that does not yet have a first CBA, even if consistent with the employer's regular past practice; and (2) an employer may not rely on a management rights clause in an expired CBA to make unilateral changes during bargaining over a successor CBA.

Employee Protected Conduct Expanded: Action of One

8/31/2023: The NLRB overturned a prior decision in which the Board held that single-worker protests were only protected by the NLRA when accompanied by prior group discussions about shared concerns or some other evidence of "concerted activity."

Now, "concerted activity" has expanded to single protests that could prompt future group actions.

Employee Protected Conduct Expanded: Action on Behalf of Non-Employees

American Foundation for Children (8/31/2023) – Board reversed its 2019 decision, now holding that concerted activity by employees on behalf of nonemployees is protected by the NLRA when it can benefit employees.

Basically, employers may not punish employees for signing petitions or taking other group actions to improve working conditions for non-employees.

The Board reasoned that efforts by employees toward non-employees (e.g., interns) can benefit employees by improving their own working conditions or by leading nonemployees to later return the help they have received.

NLRB General Counsel Memoranda

The GC confirmed her intention to push for the Board to impose a more restrictive standard that would require employers to show specific business reasons justifying the decision to replace strikers. Advice Memorandum (12/30/2022).

Overly broad non-disparagement and confidentiality clauses in severance agreements constituted unlawful restrictions on Section 7 rights. Memorandum GC 23-05 (3/22/2023).

Most non-compete agreements violate federal labor law. Memorandum GC 23-08(5/30/23).

Action Items

Reassess employment, severance, and settlement agreements to ensure compliance with *McLaren Macomb*.

Train managers and supervisors to seek counsel before disciplining or discharging an employee for engaging in outbursts, using inappropriate language (even if racist or profane), or engaging in similar misconduct, including on social media.

Reevaluate your employment policies and practices in light of the new *Stericycle, Inc.* framework from the perspective of a lay employee and whether or not it could be reasonable interpreted to chill an employee's Section 7 rights under the NLRA. Make sure that your policies (esp. confidentiality and workplace communications) specifically include a disclaimer stating the employer's policies should not be interpreted as restricting Section 7 rights.

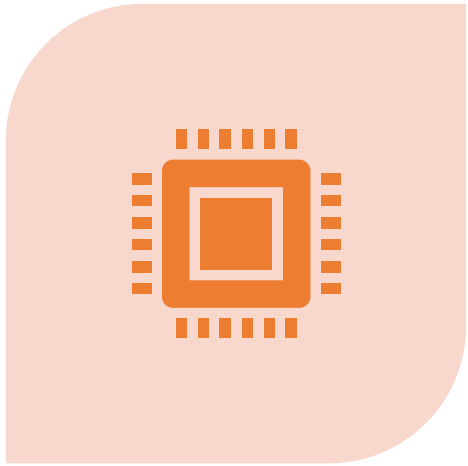
Closely examine your workplace rules to ensure avoidance of a technical violation of the Act that could invalidate an election, no matter how minor the violation is.

Train your managers and supervisors on how to identify a union organizing drive, and the do's and don'ts in that context.

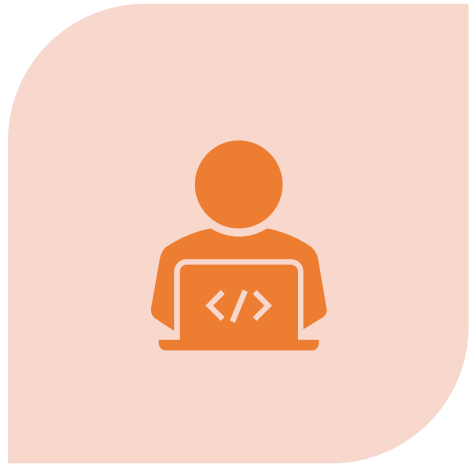
Train your managers and supervisors regarding the new protections for single-worker protests and action taken on behalf of non-employees.

Artificial Intelligence, Algorithms, and the EEOC

EEOC's "Artificial Intelligence and Algorithmic Initiative"



COMMISSION HAS MADE CLEAR IT DOES NOT SEEK TO STOP THE ADOPTION OF AI AND OTHER COMPUTER ASSISTED TECHNOLOGIES BUT WARNS EMPLOYERS THAT THEY WILL BE HELD LIABLE IN THE EVENT THE TECHNOLOGICAL TOOLS THEY USE HAVE A *DISPARATE IMPACT* ON THE BASIS OF PROTECTED CHARACTERISTICS.



COMPUTERIZED TOOLS CAN OFTEN REDUCE BIASES. THE COMMISSION ENCOURAGES SELF—ANALYSIS.

Examples of the Types of Technology Implicated

- Company scans resumes for certain keywords and excludes those that lack the identified criterion.
- Company uses a “chatbot” or other AI to conduct initial screening before deciding who to interview.
- Employer installs tools on employee’s computers that track productivity based on keystrokes.
- Software and algorithms that rank candidates or employees based on identified criteria.
- Various tests or tools designed to select for preferred personality traits, aptitudes, physical or cognitive abilities, etc.

EEOC Guidance

The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees

Visual Disabilities and AI Decision-Making Tools (part of larger guidance entitled Visual Disabilities in the Workplace and the Americans with Disabilities Act)

18 May 2023

12 May 2022

23 July 2023

Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964

Disparate Treatment

Intentional discrimination on the basis of some protected characteristic.	A person or group of people are treated less favorably because of their race, color, sex, national origin, etc. or
	A person or group of people are afforded preferential treatment because of their protected characteristic.

Includes unconscious bias.

Disparate Impact

Criteria are not obviously discriminatory on their face but have a "disproportionately large negative effect" on the basis of some protected characteristic, e.g., criteria that exclude people with a certain protected characteristic at a disproportionately higher rate.

Criteria that have a disparate impact are unlawful unless the employer can show they are job-related and consistent with business necessity and that no similarly effective but less discriminatory alternatives exist.

Often involves statistical analysis. Difference must be "substantial." See 4/5th or 80% rule set forth at 29 CFR 1607.4(D).

Key Points to Remember

Anti-discrimination laws, including an employer's obligation to provide reasonable accommodations for disabilities, apply equally to applicants and employees. The right to reasonable accommodation applies to applicant screening, interviewing, and onboarding process.

Employers have an ongoing obligation to ensure that their processes, whether human or computerized, do not have an adverse impact on the basis of any protected characteristic.

Reliance on a vendor is not a valid defense!

Best Practices

Clearly advise applicants, in writing, how they can request reasonable accommodation. Remember, anti-discrimination laws, including the obligation to provide reasonable accommodations for disabilities, apply equally to applicants and employees.

Focus on the true requirements of the job. Is the trait / skill / experience truly job-related and consistent with business necessity? Are there alternative ways to test for or measure the job-specific skills?

Vet your vendors. What steps have they taken to assess whether their tools have a disparate impact on protected groups?

Actively monitor for potential disparate impacts on an ongoing basis. Might individuals be disadvantaged if they have a disability, are not a native English speaker, etc.?

Paid Leave, An Emerging Trend

CA Paid Sick Leave Law

24 hours of paid sick leave per year

Applies to nearly all employees

Can be used for employees illness, medical appointments or to care for a family member who is ill or has medical appointment

IL Paid Leave for All Workers Act
Effective 1/1/2024

40 hours of paid leave per year to be used for ANY PURPOSE

Applies to nearly all workers (very limited exceptions)

Accrues at a rate of one hour of paid leave for every 40 hours worked

Must permit leave to be used in 2 hour increments (or smaller)

Unused leave can be carried forward

Frontloading permitted and can eliminate obligation to carryover unused leave

Posting requirement

MN Paid Earned Sick and Safe Leave Effective 1/1/2024

- Employees working at least 80 hours per year in MN
- Earn 1 hour for every 30 hours worked up to 48 hours per year
- Can use for:
  - employee's own illness or medical appointments
  - Family member's illness or medical appointments
  - Absence due to domestic abuse, sexual assault, stalking of employee or family member
  - Closure of school or care facility due to weather or public emergency
  - When directed by health authority or health care professional.
- Family member is defined very broadly!
- More details available here: https://www.dli.mn.gov/sick-leave

Insurance Based Paid Family and Medical Leave

- California
- Colorado (2024)
- Connecticut
- Delaware (2026)
- Massachusetts
- Maryland
- Minnesota (in 2026)
- New Hampshire (voluntary)
- New Jersey
- New York
- Oregon
- Rhode Island
- Vermont (voluntary)
- Washington
- Washington DC

Pay Transparency Laws

Legislative Efforts to Combat Pay Inequities

Pay Transparency Laws

- Require disclosure of wage / compensation / range for position to applicant.
- Require wage / compensation / range in job postings and advertisements.
- Wage reporting / pay data disclosure requirements.

Pay History Bans and Other Less Onerous Efforts to Combat Pay Inequity

- Protections for applicants who refuse to provide wage / compensation history.
- Ban or limit inquiries about wage or compensation history.
- Ban or limit the use of wage or compensation history in making hiring or wage decisions.

Illinois: 2021 Equal Pay Act Amendments

Who? Businesses with 100 or more employees in Illinois (or who report to IL or were based out of IL) and required to file EEO-1.

What? Must apply for an Equal Pay Registration Certificate (EPRC) by submitting demographic and wage data to IL DOL along with an Equal Pay Compliance Statement certifying average compensation for female and minority employees is not consistently lower than average compensation for male and non-minority employees.

When? Deadline extended to 3/2024. Every two years thereafter.

EPRC Data for Each Employee

- First and last name
- Last 4 digits of SSN
- Gender
- Race
- Ethnicity (Hispanic/Latino or Not Hispanic/Latino)
- Wages
- Hours worked
- Date of hire
- Termination date (if applicable)
- EEO-1 job classification
- Job title
- County in which the employee worked

Illinois: 2023 Equal Pay Act Amendments

Effective **1/1/2025** Employers with 15 or more employees must:

- Include "**pay scale and benefits**" information in job postings for positions to be physically performed, at least in part, in Illinois, **and** positions that will be physically performed outside of Illinois, but report to a supervisor, office, or other work site in Illinois.
- Disclose pay scale and benefits to an applicant before offer and before discussion of compensation and at the applicant's request.
- Make and preserve records that document the pay scale and benefits for a position. Dept of Labor may initiate investigations of alleged violations and impose civil penalties.

“Pay Scale and Benefits” Defined

The wage or salary, or the wage or salary range, and a *general description of the benefits and other compensation*, including, but not limited to, bonuses, stock options, *or other incentives* the employer reasonably expects in good faith to offer for the position, set by reference to any applicable pay scale, the previously determined range for the position, the actual range of others currently holding equivalent positions, or the budgeted amount for the position, as applicable.

Uncertainty remains. Look for the IL DOL to publish guidance.

Illinois 820 ILCS 112/10

Cannot ban or take action against an employee for discussing wages with others (can prohibit those with access to other employees' wages data from disclosing information without the employee's consent).

Unlawful to screen applicants based on wages or salary history.

Unlawful to request or require disclosure of wage or salary history.

Unlawful to seek wage or salary history, including benefits or other compensation, of job applicant from any current or former employer.

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California: Pay Scale Disclosures

Section 432.3 of the CA Labor Code – revised effective 1/1/2023

Prohibits all employers from relying on wage history in hiring decision or setting pay rates or seeking wage history about an applicant.

May consider wage history if *voluntarily disclosed* and may inquire about wage expectations.

All employers must provide pay scale to applicants and current employees and keep records of job title and wage rate history for all employees for the duration of their employment and for three years after employment ends.

CA Labor Code § 432.3 National Impact?

Requires employers with 15 or more employees, ***even if only 1 is located in CA***, to include pay scales in job postings, including postings by third parties.

"Pay scale" is the wage range the employer reasonably expects to pay for the position, exclusive of bonuses, tips, benefits, and commissions (though piece rate commissions must be disclosed).

According to the CA labor commissioner, the job posting requirement applies to postings for any position that *might* be filled in California either in person *or remotely*. Authorizes penalties of up to $10,000!

California: Pay Data Disclosure

Section 12999 of the CA Government Code

By May 10, 2023, and "on or before the second Wednesday of May of each year thereafter," private employers with 100 or more employees must submit a pay data report to the department covering the prior calendar year…"

Separate report required for private employers with 100 or more employees hired through labor contractors. Accepting deferral request for the labor contractor employee report but not for the payroll employee report.

Law applies even if only <u>one</u> of the organization's employees is actually in CA!! See https://calcivilrights.ca.gov/paydatareporting/faqs/ III.C. and Cal. Code Regs., Title 2, § 11008(d)(1)(C).

CA Pay Data Report Specifics

The number of employees by race, ethnicity, and sex in each of the 10 specific job categories, examples include executive and senior level officials and managers, sales workers, administrative support workers, laborers and helpers, and service workers.

The number of employees by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey.

Within each job category, for each combination of race, ethnicity, and sex, the median and mean hourly rate.

Total number of hours worked by each employee counted in each pay band.

Colorado Revised State § 8-5-201

"An employer shall disclose in each posting for each job opening the hourly or salary compensation, or a range of the hourly or salary compensation, and a general description of all of the benefits and other compensation to be offered to the hired applicant."

Per guidance this means a general description of any bonuses, commissions, or other forms of compensation offered as well as a general description of all benefits, including health ins., retirement, PTO and anything reported for federal tax purposes but not "minor perks."

Excludes jobs performed and postings entirely outside of CO.

Also, must make "reasonable efforts" to make promotional opportunities known to all current employees (inside CO) *on the same day* and *prior to making a promotion decision*.

Administrative enforcement only. Fines ranging from $500 to $10,000 *per violation* BUT, only one violation per job opportunity or promotional opportunity, and minimal enforcement so far.

Must keep records of job descriptions and wage rate history of each employee during the period of employment and for two years after employment ends.

Record keeping violations give rise to a rebuttable presumption in sex-based equal pay claims (under 5-5-102) that the records that should have been maintained would support the plaintiff's claim.

Connecticut Gen. Stat. § 31-40z

Prohibits employers from:

Inquiring about wage history (though can disclose voluntarily);

Penalizing employees for:

- Disclosing or discussing their own wages or that of another employee, if the other employee disclosed the information voluntarily;
- Inquiring about another employee's wages;
- BUT employer is not required to disclose wages paid to another employee.

Must provide wage range for position:

To applicants upon request or if not requested, before providing an offer of compensation;

To current employees upon hire, upon a change in position and upon request.

Provides for a private cause of action and recovery of compensatory damages, punitive damages, recovery of attorneys' fees and costs, and equitable relief.

Proposed legislation requiring wage ranges to be included in job posting was introduced in 2023 and referred to committee. CT H.B. 5243

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Hawaii SB1057

EFFECTIVE 1/1/2024 Employers with 50 or more employees must include in job postings the hourly rate or salary range that "reasonably reflects the actual expected compensation" for the position.

Unclear whether the employer must employ at least 50 employees *in Hawaii.*

Expands equal pay protections beyond sex to include all protected categories under state anti-discrimination laws.

Maryland MD Code Labor and Employment, §§ 3-304.1 and 3-304.2

Employers may not prohibit employees from inquiring, discussing, disclosing wages (exception for those who have access to other employee's wage information by virtue of their position).

Must provide wage range to applicants upon request.

May not ask applicants for wage history or rely on wage history when making hiring decisions or setting wages (with exceptions for voluntary disclosures by applicant to negotiate a higher rate).

Proposed legislation that would go further referred to committee.

Nevada Rev. Stat. § 613.133

All employers must provide wage and salary rate to applicants automatically when they complete an interview.

Prohibits employers / employment agencies from seeking wage history about or relying on wage history when making hiring decisions or setting pay rates but allows inquiry about wage expectations.

Individual liability possible: “In addition to any other remedy or penalty, the Labor Commissioner may impose against an employer or employment agency or any agent or representative thereof that is found to have violated any provision of this section an administrative penalty of not more than $5,000 for each such violation.”

New York Lab. Law § 194-b

Effective September 17, 2023: When advertising to fill a job, promotion or transfer opportunity to be performed, at least in part, in NY, or performed outside of NY, but reports to a supervisor, office, or work site in NY, must disclose:

Compensation or a range of compensation (i.e. min and max that employer in good faith believes to be accurate) and

Job description if such a description exists.

Rhode Island Gen. Laws 1956, § 28-6-22

Prohibits employers from seeking wage history from an applicant; requiring an applicant's prior wages meet a minimum or maximum to be considered; or relying on wage history when making hiring decisions or setting pay rates (exceptions for voluntary disclosures by applicant to negotiate a higher rate).

Must provide wage range:

To applicants prior to discussing compensation and upon request;

To employees upon hire, when moving to a new position, and upon request

Washington Rev. Code §§ 49.58.100 & 110

Employers with 15 or more employees:

- Job postings that include qualifications for desired applicants must disclose wage scale or range and a general description of all benefits and other compensation to be offered. Other compensation includes retirement plans, PTO, and other benefits related to compensation.
- No open ended scales i.e., “up to $30 / hour” or “$50,000 / year and up.”
- Applies to remote positions that could be performed in WA.
- Upon request, must provide wage scale or salary range to an employee offered internal transfer or promotion prior to discussing compensation and upon request.

Several States Ban Use or Inquiry of Pay History

- Alabama
- Delaware
- Maine
- Massachusetts
- Minnesota New legislation effective 1/1/2023
- New Jersey
- Oregon
- Vermont
- Push for pay transparency requirements likely.

Legislation Proposed But Not Yet Passed

Alaska

Montana

South Dakota

Missouri

Kentucky

West Virginia

Virginia

Georgia

A Different Approach…

Michigan and Wisconsin (for now…)

- No ban.
- State legislature prohibits localities from implementing wage history bans.

Local Ordinances

- Cincinnati
- Cleveland
- Toledo
- Jersey City
- San Francisco
- Kansas City
- New York City
- Ithaca, NY
- Albany Co, NY
- Westchester Co, NY
- Suffolk Co, NY
- Philadelphia
- Washington D.C.

Pay Transparency at the Federal Level

Will EEO-1 Component 2 pay data reporting obligations return?

2016 EEOC added obligation to include pay data in EEO-1 reporting

Discontinued under the Trump administration

Be on the lookout for a return of Component 2 reporting. EEOC has signaled the requirement will return

Salary Transparency Act, proposed in March 2023 and referred to committee. Would require wage range to be included in job postings, require employers to provide wage range information to applicants prior to discussing compensation, and require wage range information to be provided to employees upon request.

Best Practices

Audit pay rates periodically with an eye toward actual or perceived disparities linked to gender, race, or other protected characteristics. Are existing pay disparities justified by legitimate, non-discriminatory work-related criteria?

Train managers to respect employees' right to discuss terms and conditions of employment, including pay.

Ensure your policies provide clear guidance for employees to report pay-related grievances (as well as pay related errors).

Ensure all job postings comply with applicable laws and pay particular attention to those that could be filled by someone working remotely from a different jurisdiction.

Train hiring managers and recruiters on applicable pay inquiry laws.

Be on the look out for future changes in the law!

For Further Info and Updates

Visit our website at www.amundsendavislaw.com

and blog at www.laborandemploymentlawupdate.com

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Questions? Thank you for joining us!

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Break

Coming up:

- 1:45 – 2:30

Managing and Maintaining a Diverse Workforce with Heather Bailey and Julie Proscia

- 2:30 – 2:45

Break

- 2:45 – 3:45

Data Privacy and Security Concerns for Employers with Molly Arranz and John Ochoa

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Managing and Maintaining a Diverse Workforce

Presented by:
Heather Bailey
Julie Proscia

On November 1, 2022, SmithAmundsen and Davis I Kuelthau formally combined to form Amundsen Davis, LLC, a full service business and litigation law firm helping clients across the U.S.

Overview

- Understand the importance and value of diversity, equity & inclusivity in the workplace.
- Become aware of what factors might be leading to unconscious biases.
- Develop strategies to continue challenging bias in your everyday, especially in hiring.
- What it means to be an Ally.

Start From the Beginning

- Everyone has bias
- Bias IS NOT Inherently Bad – what you do based on bias could potentially be harmful.
- Being different and recognizing differences is “okay.”
- Every person’s worldview is shaped by values, perceptions, assumptions, and expectations.

Pop Quiz Time!

- **QUESTION** – Am I Biased?
- **ANSWER** – YES!!!
- **REASON** – Each of us have implicit, affinity and explicit bias etc. based on personal experiences
- Knowledge is Power!

Everyone Has Bias

- Bias, like diversity, can run the gamut from your favorite sports team, alma mater, to race, gender, age, weight, handshakes, and politics.

- There are 2 types of biases:
  1. Conscious bias (also known as **explicit bias**); and
  2. Unconscious bias (also known as **implicit bias**).

Why Does This Matter?

- Unconscious biases develop at an early age: biases emerge during middle childhood and appear to develop across childhood, and have real-world effects on behavior…

BUT

- Unconscious biases are flexible, and a person can take steps to minimize the impact of unconscious bias.

Why Does This Matter – Real World?

Just one example….

- Fictitious resumes with White-sounding names sent to help-wanted ads were more likely to receive callbacks for interviews compared to resumes with African-American sounding names. Resumes with White-sounding names received 50% more callbacks for interviews (Bertrand & Mullainathan, 2004).
- Unconscious bias, **if left unchecked by you**, can turn into discrimination… which leads to decrease in morale, increase in turnover, and litigation. **ALL BAD!**

Diversity Defined

- Understand and respect individual differences.
- Keep an open mind towards others who are different from you. **Remember that not everyone sees things the same way you do.**
- Remember that diversity is much more than skin color, gender, gender identity, sexual orientation, religion or ethnic background.

Diversity (continued)

Remember the many ways we are all diverse: personality, thinking style, values, habits, likes and dislikes, education, knowledge, goals, ambitions, energy level, political views, lifestyle, social activities, job title, duties and department, sense of humor, sensitivity, creativity, intellectual ability, geographical upbringing, cultural experiences, children, grandchildren, health issues, financial circumstances, and **many, many other factors that usually evolve and change over time.**

Equity Defined

- Equity is the process of ensuring that practices and programs are impartial, fair and provide equal possible outcomes for every individual.
- Equity recognizes that everyone doesn't begin in the same place in society. Equity advocates for those who may have been historically disadvantaged, making it difficult for them to be successful. What is "fair" as it relates to equity isn't a question of what is the same but rather the point from which a person begins. Equity takes into account historical and other factors in determining what is fair.

Inclusion Defined

- Inclusion is intentionally including people who might otherwise be excluded or marginalized.
- Creating an environment in which everyone is valued and respected and has the same opportunity to contribute in a meaningful way.
- Requires all of us to be intentional about taking steps to overcome our implicit or unconscious biases to counteract our natural tendency toward those who look, think or act the way we do and with whom we share similar experiences, background, attitude, or other traits.

How Does Bias Affect Our Actions?

- Our Perception
  - How we see people and perceive reality.
- Our Attitude
  - How we react towards certain people.
- Our Behavior
  - How receptive/friendly we are towards certain people.
- Our Attention
  - Which aspects of a person we pay most attention to.
- Our Listening Skills
  - How much we actively listen to what certain people say.
- Our Micro-affirmations
  - How much or how little we comfort certain people in certain situations.

What Is “Unconscious” Bias?

- Preferences – both natural or influenced.
- Biological instinct is to prefer those who are similar to us.
- Often called “intuition,” social categorization occurs as a way to decipher friend from foe – bypasses logical thinking.
- There are more than 150 identified types of unconscious bias.

Most Common Workplace Types of Unconscious Bias

- **Affinity Bias**

The tendency to gravitate to people like ourselves.

- **Halo Effect**

The tendency to think everything about a person is good because you like that person.

- **Perception Bias**

The tendency to form stereotypes and assumptions about groups that make it impossible to objectively judge the individual(s).

Most Common Workplace Types of Unconscious Bias (continued)

- **Confirmation Bias**

The tendency for people to seek information that confirms your preexisting beliefs and assumptions.

- **Groupthink**

Occurs when individuals try too hard to fit into a group and then mimic others or hold back opinions and thoughts. This causes them to lose their identity.

Most Common Workplace Types of Unconscious Bias (continued)

- **Ageism**

Age discrimination is based on the belief that older employees aren't as competent or capable of performing a job as younger employees. This idea could be a result of a person's belief that a person's age is related to their work abilities, knowledge, or skill.

- **Gender Bias**

Gender bias is when one particular sex is treated more favorably than the other sex. This means that a person can receive better treatment in the form of hiring, getting promotions, or other work perks without involving harassment like quid pro quo.

Examples of Unconscious Bias

- Assigning a tech project? *Give it to the Generation Y!*
- Going to a ballgame? *Invite the boys, girls hate sports!*
- Hiring for a traveling sales position? *Hire the male because the female with kids can't travel!*

HOW UNCONSCIOUS BIAS LEADS TO DISCRIMINATION

STEREOTYPE

Widely held, preconceived and oversimplified image or idea about a person, group, or thing.[5]

Over time, stereotypes can become unconscious biases.

UNCONSCIOUS BIAS

An automatic association or attitude about race or gender, for example. Operates beyond our control and awareness. Informs our perception of a person or social group. Can influence our decision-making and behavior toward the target of the bias. Is a powerful predictor of our behavior.[6]

PRE-JUDGING

An attitude about a person or group of people that is based on a belief or stereotype.

BEHAVIOR

Based on preconceptions and unchecked assumptions. Can create in-groups and out-groups by favoring one group over another.

DISCRIMINATION

An ACTION that follows prejudicial attitudes. Denial of opportunity or unequal treatment regarding selection, promotion, etc.[7]

CATALYST.ORG

Microaggressions

- Microaggressions can be a byproduct of unconscious bias. This term refers to everyday verbal or non-verbal actions that can come off as insulting, negative, or derogatory. Microaggressions can be intentional or unintentional.
- Examples include interrupting or dismissing women when they're talking, assuming pronouns, or making remarks about someone's appearance.
- Educate your employees so that they can recognize these behaviors and give them the tools they need to retrain themselves not to repeat them.

How to Minimize Unconscious Bias in the Workplace

We cannot eradicate unconscious bias, BUT we can identify it and minimize its presence and impact in the workplace. HOW?

1. Conduct Awareness Training
2. Identify the type of bias likely to occur
3. Develop policies to check unconscious bias

Conduct Awareness Training

- Awareness training is designed to mitigate prejudice and discrimination, facilitate effective collaboration among colleagues, and help employees move from tolerance to acceptance.
- Offer a safe place for employees to learn what unconscious bias is, identify their own biases, and how to minimize bias in their day-to-day decisions.

Identify Types of Bias

- What is most likely to occur?
- When is it most likely to occur?
- What is the impact?

Examples:

- Halo effect example: Look at who gets the better projects and higher performance evaluations.
- Affinity bias example: Are we hiring all alums, etc.?

Create Checks

Develop policies, procedures and groups to check unconscious bias:

- Remove bias in job descriptions.
- Where are we recruiting from?
- Standardized interview questions/Implement Structured Interviews. Team of interviewers?
- Remove identifying name/race information from initial paper/resume screen.
- Administer (unbiased) skills testing.

Create Checks (continued)

- Have HR review discipline and performance evaluations.
- Cross Supervise – Different perspectives!
- Make a conscious effort to include all parties at the table.
- Create a Diversity Committee.
- Survey current employees (both minority employees and majority employees).
- Survey departing employees.

Create Checks (continued)

- Blondes have more fun and tall people get jobs?

Maybe…

- Beauty Bias

60% of CEOs in the US are over 6 foot tall, where only 15% of the total population is over 6 foot tall.

Circling Back

- Diversity can only strengthen an organization.
- Identify bias, accept that everyone has it, and move forward.
- Train managers and employees.
- Create polices and open lines of communication.
- Continue dialogues.

The Benefits of Diversity

- **Increased adaptability.** A team of people from different backgrounds can provide a greater variety of perspectives and solutions to problems.
- **Better customer service.** Diverse people bring a greater range of skills and abilities, along with empathy for different cultures, which can better meet the needs of guests around the world.
- **Increased innovation:** Different ideas bring different results.
- **Better recruitment and retention.** Welcoming candidates regardless of race, gender, age, or background means you can hire from a larger pool of talented people.

Benefits to a Diverse Workforce

- Increased adaptability. A team of people from different backgrounds can provide a greater variety of perspectives and solutions to problems
- Diverse employees brings about creative solutions and innovation
- Better employee morale
- Increased productivity
- Greater revenue, market share and profits
- Clients looking for diverse vendors
- Social relations and reputation
- Talent attraction - Welcoming candidates regardless of race, gender, age, or background means you can hire from a larger pool of talented people
- Employee retention with the best talent
- Employee empowerment & loyalty

How to Be an Ally… Where to Begin?

A = Always Advocate For The Oppressed

L = Listen, Learn From The Oppressed

L = Leverage Your Privilege

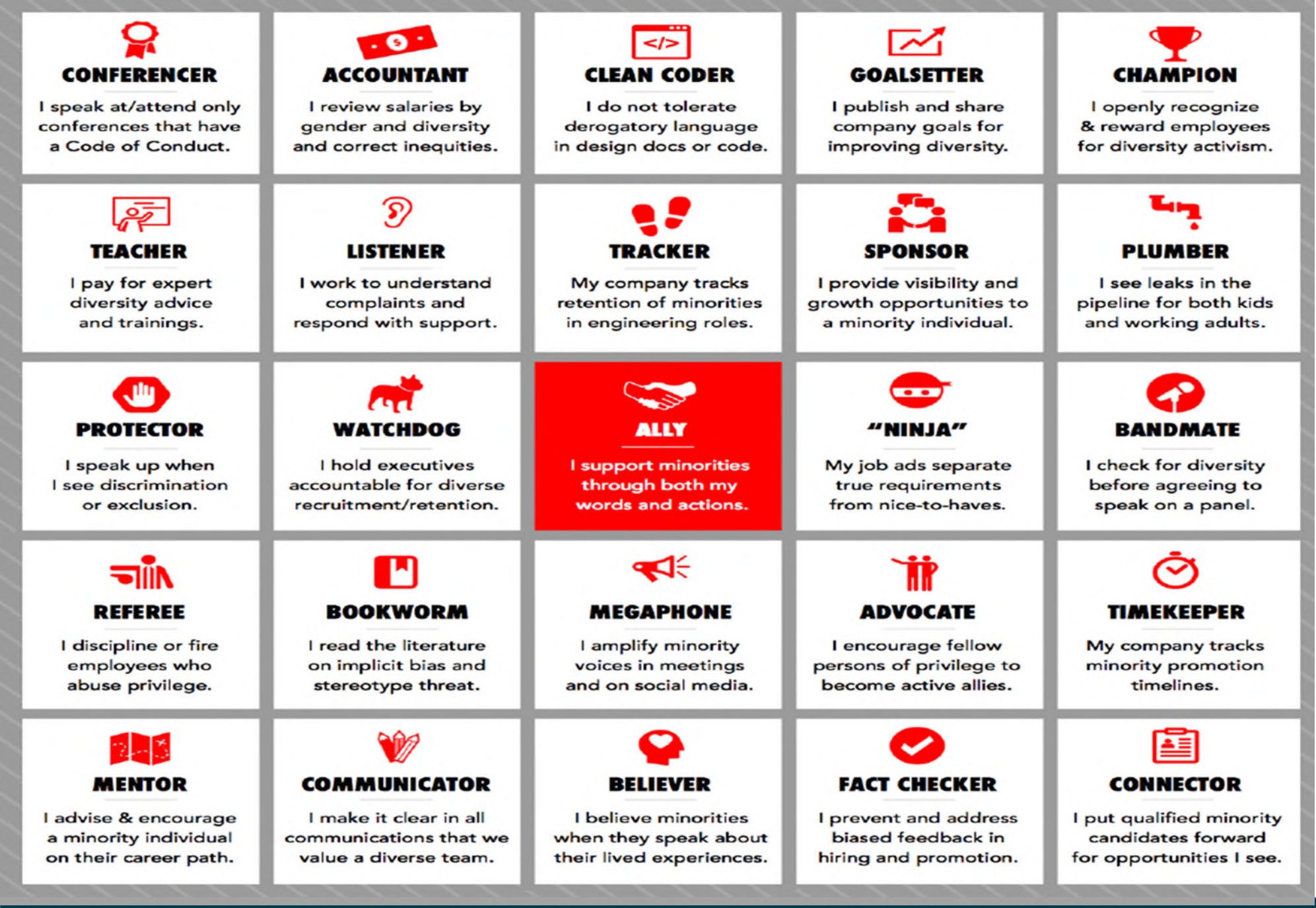
Y = Yield The Floor

Allyship Defined

- Allyship is an active and consistent practice of using power and privilege to achieve equity and inclusion while holding ourselves accountable to marginalized people's needs.
- It's not just about white men.
- You don't need to announce "Hey, I'm an Ally!"

How to Be an Ally… (continued)

- Do not make assumptions – build trust, listen to others' experiences and ask questions
- Advocate for others around the table and those not around the table
  - Amplify their ideas, give credit
  - Sponsorship/Mentorship
  - Give visibility to those who may need it (admin, non-revenue generating jobs)
- Own your privilege
- Realize diversity and inclusion is everyone's job
- Realize that allyship is not one and done – it is continually evolving
- Educate and have accountability
  - If you need to apologize, simply apologize and learn from it
- Be a leader and practice inclusivity with others
- Partner with outside sources – get outside your social circle



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When You Hear [This]…Pay Attention…

- **That candidate wouldn't be a culture fit.**
- **That candidate doesn't have** [some qualification that doesn't exist on the job description but that more privileged candidates meet].
- **They wouldn't want** [cool new role] **because of the travel.**
- **I'd like to see them prove they can handle** [responsibility they've already done] **before promoting them.**
- **I don't want to lower the bar.**
- **There's not enough pipeline to hire more women or people of color.**
- [To the only woman in the room] **Can you take notes?**
- **I'm not racist/sexist/homophobic, but** [some derogatory comment].
- **Well, we're different** [when hearing about workplace challenges faced by underrepresented groups].
- **I've never seen** [some form of harassment just reported], **so I don't think it could happen here.**
- **I'm sure they didn't mean to offend anyone.**

Resources for Allies…

- 5/3 Diversity Toolkit:
  - https://www.53.com/content/dam/fifth-third/docs/education/inclusion-toolkit.pdf
- Guide to Allyship: https://guidetoallyship.com/
- White Fragility: Why It's So Hard for White People to Talk About Racism, by Robert Diangelo
- Allyship (& Accomplice): The What, Why, and How
  - https://medium.com/awaken-blog/allyship-vs-accomplice-the-what-why-and-how-f3da767d48cc
- 10 Steps to Non-Optical Allyship (Mireille Cassandra Harper social media post)
  - https://www.instagram.com/p/CA04VKDAyjb/?utm_source=ig_web_copy_link

Practice Tips

- Build Awareness – what is the current state of your Company and the values you strive to reach each day?
- Inspire Action! Develop a committee or programs to successfully implement and encourage the commitment to inclusivity.
  - Encourage/Support Affinity Groups
  - Encourage/Support Community Outreach
- Analyze your recruitment and outreach efforts.
- Audit internal pay equality practices and resources (i.e., health insurance, EAP, bathroom signage).
- Training, Training, Training for All!
  - Sensitivity
  - Diversity and Anti-Harassment
  - Unconscious Bias
- When in doubt, if you want to inspire change in your organization, reach out to an expert trained in this field to assist you to create and implement your plan.

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Break

Next:

- 2:45 – 3:45

Data Privacy and Security Concerns for Employers with Molly Arranz and John Ochoa

Data Privacy and Security Concerns for Employers

Presented by:
Molly Arranz
John Ochoa

On November 1, 2022, SmithAmundsen and Davis I Kuelthau formally combined to form Amundsen Davis, LLC, a full service business and litigation law firm helping clients across the U.S.

The Illinois Biometric Information Privacy Act

What is the Illinois BIPA?

- Passed in 2008 to protect against risk of identity theft resulting from biometric technology
- Applies to any “private entity” that collects, stores, or uses biometric information as to any individual in Illinois
- Applies regardless of how the biometric information is collected, stored or used and irrespective of the reason for the usage

Protection of Biometric Data –Why Do We Have a BIPA?

- Sensitive information – retina or iris scans, fingerprints, voiceprints, face geometry and the like – known as “biometric identifiers”
- These are biologically unique, and unlike passwords or social security numbers, if compromised, it leaves no recourse (i.e., you can’t change your fingerprint)

Pop Quiz:

From 2008-2014, how many BIPA class actions were filed?

A. 115
B. 32
C. 0
D. 11

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Pop Quiz:

How much money has been recovered in BIPA class action lawsuits in the last four and a half years?

A. $500,000
B. $50 million
C. $100 million
D. $200 million

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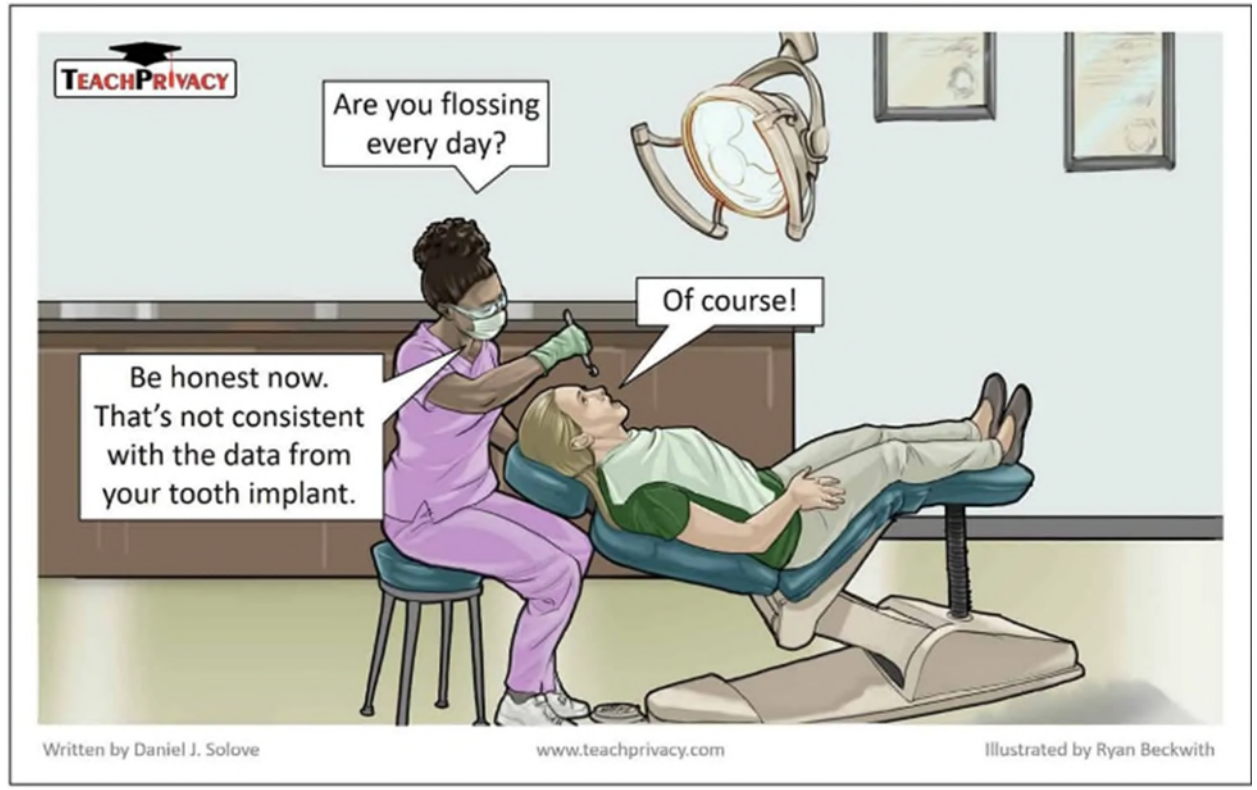
BIPA Packs a Punch

- Eye-Popping Statutory Damages--$1,000-$5,000
- Prevailing parties can be awarded attorney's fees
- Highly desirable for a class action – odds are if you are collecting biometric data for one person, you are doing the same for many others



Shooting-Fish-in-a-Barrel-Type Actions

- *Rosenbach v. Six Flags* –
  - No need to wait until compensable injury is suffered as BIPA has a "preventative and deterrent purpose[]"
  - "When private entities face liability for failure to [simply] comply with the law's requirements … [they] have the strongest possible incentive to conform to the law…"
- *Tims v. Black Horse Carriers* —
  - Five-year statute of limitations
  - We find that applying two different limitations periods or time-bar standards to different subsections of section 15 of the Act would create an unclear, inconvenient, inconsistent, and potentially unworkable regime as it pertains to the administration of justice for claims under the Act.
- *Cothron v. White Castle* —
  - Every clock-in or out (every use) of the clock is a separate, compensable injury
  - We reject White Castle's argument that we should limit a claim under section 15 to the first time that a private entity scans or transmits a party's biometric identifier or biometric information. No such limitation appears in the statute.

Shooting-Fish-in-a-Barrel-Type Actions (continued)

Rogers v. BNSF Railway Company —

- BIPA trial that went to verdict and immediately impacted other BIPA litigation
- Upon a motion for a new trial on damages, BNSF has the opportunity to reduce the **$228 million** judgment entered against it
- Dicta from White Castle: "the trial court would certainly possess the discretion to fashion a damage award that (1) fairly compensated claiming class members and (2) included an amount to deter future violations, without destroying defendant's business"
- BIPA provides that a prevailing party "**may**" recover liquidated damages for a violation of the statute

What is Not Working in Defending Against BIPA Claims

- Your physical presence in Illinois is **not** required;
- The physical storage of the data and the manner in which it is kept (i.e., an algorithm as opposed to the actual fingerprint) likely doesn't shift liability away;
- Using a temp agency may not allow you to point the finger at a different defendant;
- The fact that your biometric clock provider settled the BIPA case *against it* does not moot the claims *against you*.

How Do I Comply with BIPA?

- Before obtaining or using information, provide each person written notice that biometric information will be collected/stored/used, including an explanation of the purpose of its collection and the length of time
- Prior to collection, obtain the individual's express written authorization to collect and store their biometric information

How Do I Comply with BIPA? (continued)

- Develop and make **publicly available** a **written** policy establishing a retention schedule and guidelines for destroying biometric information
- Private entities are **prohibited** from disclosing or sharing biometric information with third parties without the **prior consent** of the individual
- Comply *now*! Other states have disclosure requirements for the collection, use and storage of biometric information

How Do I Comply with BIPA? (continued)

- Use the same data security precautions or measures that the company uses for "other confidential and sensitive information"
- This should go without saying: biometric identifiers are considered personal information, so an unauthorized access of the data could be deemed a breach – and trigger notice protocols
- FTC expects biometric data and information to be protected through "privacy by design"

Some takeaways…

- When it comes to the data you collect of your employees, be overly-transparent and overly-inclusive
- Consider what data you collect and store from consumers, customers and employees and evaluate whether it even smells of biometric data
  - Be overinclusive!
  - If you don't think it qualifies as biometric data, say that—but let your employees know what it is (i.e., we collect video, pictures, etc.)
  - Transparency, whether a legal requirement or not, is now the name-of-the-game
- Review your contracts with any third-party vendors that could be relevant to these disclosure requirements

New and Emerging Privacy Laws

- 11 states have now enacted privacy laws that provide consumers' (which is often defined broadly to include employees') rights and business obligations
  - It's not just California anymore
  - 4 more have active bills
  - 15 others have inactive bills, including the Illinois Data Privacy and Protection Act
  - It's important to think about your disclosures at the time of onboarding and throughout the course of employment; what do you tell your employees about their rights as to the data you collect?
- Use of Tracking Technology Leads to New Privacy Class Actions

The Illinois Genetic Information Privacy Act

What is the Illinois GIPA?

- Passed in 1998 to protect against breaches of an individual's privacy and anti-discriminatory practices resulting from genetic testing information
- Applies to any "employer" that collects, discloses, or uses genetic information as to any individual in Illinois

Protection of Genetic Data –Why Do We Have a GIPA?

- Genetic material – results of genetic tests, genetic tests of family members, and the "manifestation or possible manifestation of a disease or disorder in a family member of the individual"
  - Think: Not only DNA, RNA, and chromosomes, proteins, but also diseases or genetic disorders in either the employee OR his or her family members
- Discriminatory measures include asking applicants about family medical histories and using this data to make employment decisions

Key Provisions of GIPA

- Genetic testing, and information derived from it, may only be released to the individual tested and persons authorized in writing by the individual tested

- Insurers are prohibited from using information derived from genetic testing for non-therapeutic purposes such as
  - Determinations of eligibility
  - Computation of premiums
  - Pre-existing condition exclusions

Key Provisions of GIPA (continued)

- Prohibits employers from:
  - Requiring genetic testing as a condition of employment;
  - Using genetic testing results to affect terms of employment; or
  - Using such information in furtherance of a workplace wellness program

- No person may be compelled to disclose the identity of any person upon whom a genetic test is performed or the results of a genetic test that would identify the subject of the test.

Draconian Damages Structure

- GIPA provides for private right of action
- Larger Statutory Damages and Monetary Awards than those afforded by BIPA
- Statutory damages of $2,5000 per negligent violation, or actual damages, whichever are greater
- Intentional or reckless violations result in damages of $15,000 per violation
- Prevailing parties can be awarded attorney's fees

Notable Case Law

- *Sekura v. Krishna Shaumburg Tan, Inc.*—
  - The Illinois Appellate Court for the First Judicial District highlighted that the GIPA "provide[s] for a substantially identical, 'any person aggrieved' right of recovery" as BIPA.
    - Thus, may potentially allow plaintiffs to maintain a cause of action and seek damages resulting from alleged violations of the GIPA **without showing actual injury** as held in Rosenbach.
- Bridges v. Blackstone Group—
  - Ancestry.com was accused of sharing genetic information without individual's written consent when Blackstone acquired it in 2020
  - Court did not find that Blackstone compelled Ancestry to disclose genetic information
    - Win for defense bar; set forth limits for GIPA claims regarding corporate transactions

Recent Examples of GIPA Lawsuits

- *Page v. Ford Motor Co.*—
  - Ford was accused of allegedly improperly asking job applicants about their family medical histories and requiring job applicants to submit to a pre-employment physical as a condition of employment
- *Thompson et al. v. Amazon.com, Inc. (pending)*—
  - Amazon accused of allegedly requiring applicants to disclose genetic information and family medical history during the application and hiring process
- *McCaskill et al. v. FedEx Corp. (filed Aug. 11, 2023)*—
  - FedEx accused of violating GIPA by allegedly improperly requiring workers to disclose family medical history during employee interviews

Complying with GIPA: Ask Yourself

- Do you collect the genetic information, or medical histories of your customers, employees, or their family members in the course of your business?
- Does your company require “health screenings” as part of your application process, or as part of any employee health or wellness program?
- If you offer health insurance to individuals, do you collect genetic information, and if so, who do you disclose it to, and how do you use that information?

Best Practices

- Before collecting, using, or disclosing genetic information, ensure explicit and informed consent from individuals
- Use the same data security precautions or measures that the company uses for “other confidential and sensitive information”
  - Genetic information is also considered personal information!
- Train your organization against discriminatory practices based on genetic information

Takeaways

- With its large damages provisions and broad definition of "genetic information," GIPA should not be glossed over
  - Ensure compliance as state legislatures have increasingly recognized the proliferation of genetic testing and its use as a threat to individuals' privacy.
- Review your contracts with your any third-party vendors that could be relevant to these disclosure requirements

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