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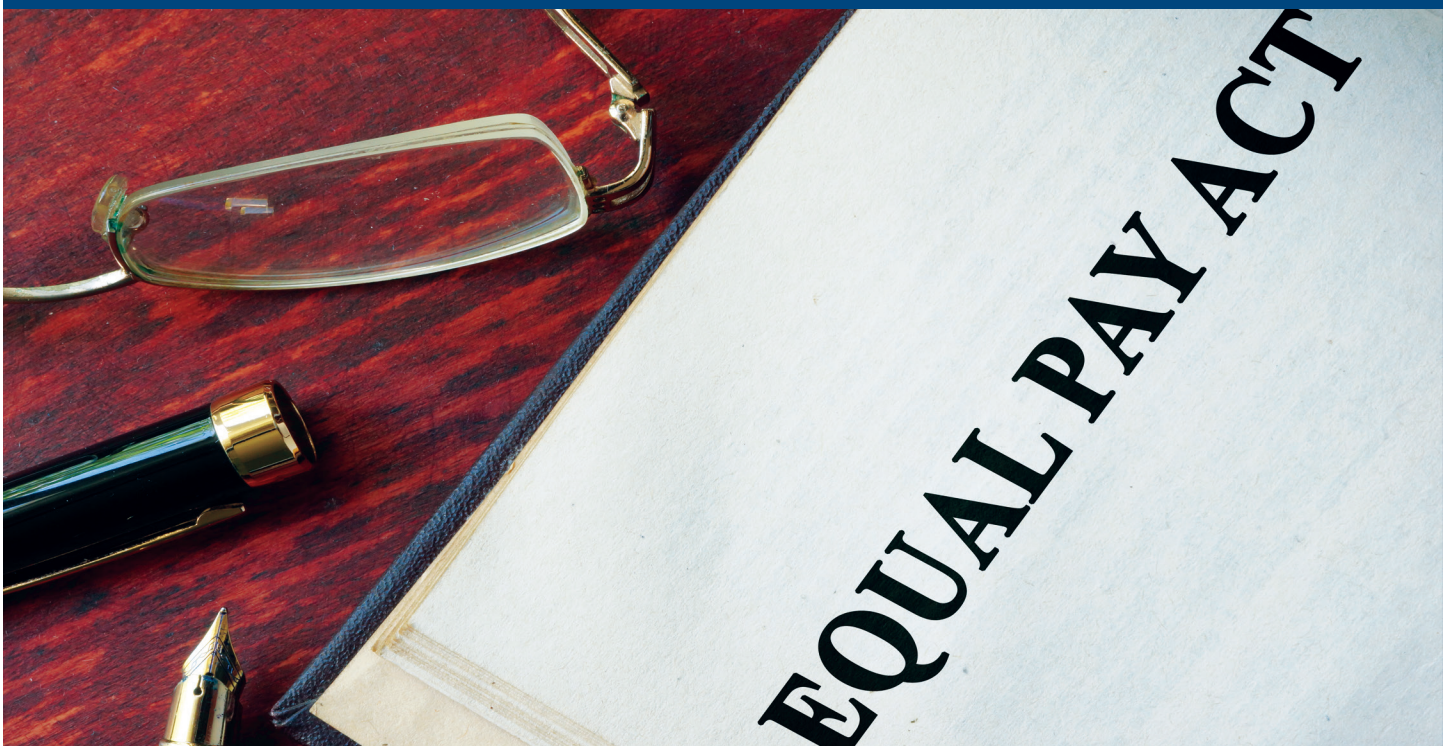
The Voice

February 19, 2020 Volume 19, Issue 7

This Week's Feature



Equal Pay Act and Title VII Primer

By Tara Paulson

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Quote of the Week

"Chance is the first step you take, luck is what comes afterward."

— Amy Tan (b. Feb. 19, 1952), *The Kitchen God's Wife.*

This Week's Feature

Equal Pay Act and Title VII Primer

By Tara Paulson

Since the #TimesUp movement, which started in 2017, as a result of a series of scandals that broke out, revealing that a multitude of Hollywood actresses were paid significantly less than their male counterparts, there have been almost daily headlines showcasing the filing of pay discrimination lawsuits. This article provides a primer on the laws requiring fair pay, their legal obligations and requirements, and the history leading up to these laws.

What Is the Equal Pay Act?

The Equal Pay Act of 1963 (EPA), which amends the Fair Labor Standards Act of 1938, is a federal law that prohibits pay discrimination based on sex. 29 U.S.C. § 206 (2018). To raise a claim under the EPA successfully, an employee must show that "an employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Legislative history has indicated that the employee has the burden of proof on this issue.

However, there are four court-approved exceptions to the EPA when an employer makes different payments to employees based on (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a differential based on any factor other than sex. Many states and local governments have enacted legislation to narrow the scope of the "catchall" fourth exemption by limiting the factors that an employer may cite as a legitimate explanation for its pay disparities. The most common prohibition is restricting an employer's ability to use past salary history when setting compensation. Remedies under the EPA range from compensatory damages, punitive damages, attorneys' fees, back payment of wages and compensation, or injunction proceedings.

What Is Title VII of the Civil Rights Act of 1964?

Title VII of the Civil Rights Act of 1964 (Title VII) is a federal law that prohibits employers from discriminating against employees based on sex, race, color, national origin, and religion. 42 U.S.C.A. § 2000(e) (2016). To raise a claim under Title VII successfully, a plaintiff must show that (1) she is a member of a protected class, and (2) she was paid less than similarly situated nonmembers of her class for work requiring substantially the same responsibility.

What is referred to as the "Bennett Amendment" is a "technical amendment" to Title VII and was designed for the purposes of resolving any future conflicts between Title VII and the EPA. *Walter v. KFGO Radio*, 518 F. Supp 1309, 1316 (D.N.D. 1981). To further clarify, claims for sex-based wage discrimination may be brought under both the EPA and Title VII, even though no member of the opposite gender holds an equal but higher paying job, "provided that the challenged wage rate is not exempted under the Equal Pay Act's affirmative defenses...." *Wash. Cty. v. Gunther*, 452 U.S. 161, 162 (1981).

Pre-EPA and Title VII

Before the EPA's enactment, women's presence in the workforce was significantly lower than men's. Further, in the early twentieth century, women made up only about 25 percent of the American workforce. During this time, the Supreme Court, in various cases, struggled with determining whether policy that sought to protect women in the workforce in various capacities held greater weight than the right to contract freely with their employer.

For example, in the 1908 case *Muller v. Oregon*, the Supreme Court held that Oregon's limit on the number of working hours of women was constitutionally allowed and noted that "the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). In 1918, in *Adkins v. Children's Hospital of the District of Columbia*, the Supreme Court declared women to be "of lawful capacity," upholding the right to contract with their employer. *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525, 554–55 (1923). However, just 14 years later, as a result of the Great Depression, women were seen as inferior and in desperate need of protection. Thus, in *West Coast Hotel v. Parrish*, the Supreme Court determined that it was more important for women and children to be protected through a fixed minimum wage than to have the right to contract with their employer. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–400 (1937). The Supreme Court

overruled *Adkins* and held that women did not have an unlimited right to contract with their employer.

As a result of the military's need for men during World War II, women became significantly more active in the workforce. Between 1940 and 1945, the percentage of women in the workforce grew by 50 percent. Yet, females were paid less than the males who previously held those jobs. Consequently, women began to demand equal pay and labor disputes broke out. Therefore, in 1942, President Franklin D. Roosevelt issued an executive order creating the National War Labor Board to deal with these disputes to prevent any halt of production. Additionally, labor unions got involved to help women fight for equal pay; however, this help was motivated by a desire to keep wages high for men who would eventually return to the workforce and their roles.

Three years later, Congress introduced but failed to pass the "Women's Equal Pay Act," which would have made it illegal for women to be paid less than men for work of "comparable quality and quantity." After the war ended, men returned home, and federal and civilian policies allowed employers to replace female workers with male workers. For women who were able to keep their jobs, employers reclassified women's jobs and as a result lowered their compensation. Several more bills seeking equal pay for women throughout the 1950s failed to pass.

At last, Congress enacted the Equal Pay Act of 1963, making it one of the first laws in American history aimed at reducing gender discrimination in the workplace. President Kennedy signed the EPA as an amendment to the Fair Labor Standards Act. The EPA of 1963 was followed by the Civil Rights Act of 1964, which ended segregation in public places and strengthened gender equality laws by making it illegal to discriminate on the basis of sex, race, religion, color, or national origin.

Post-EPA and Title VII

Since the enactment of the EPA, Congress has passed various statutes to further protect women in the workforce. For example, in 1978, the Pregnancy Discrimination Act prohibited employers from discriminating against pregnant employees based on pregnancy, childbirth, or related medical conditions. 48 U.S.C. § 2000e(k) (2018). Furthermore, the Family and Medical Leave Act of 1991 allowed parents of newborns, regardless of the parent's gender, to take time off to care for the child. 29 U.S.C. § 2601 (2018). In 1996, the National Committee on Pay Equity originated "Equal Pay Day," which symbolizes how far into the year women must work to earn what men earned in the previous year.

On January 29, 2009, President Barack Obama signed his first piece of legislation into law: the Lilly Ledbetter Fair Pay Act of 2009. Ledbetter Act, 42 U.S.C. § 2000e-5(e)(3)(A) (2012). The Ledbetter Act created the "paycheck rule" for the filing timelines in compensation discrimination claims, reversing the Supreme Court's holding in *Ledbetter v. Goodyear Tire & Rubber Co.* Ledbetter Act, 42 U.S.C. § 2000e-5(e)(3)(A). *See also Ledbetter*, 550 U.S. at 621 ("[A] pay-setting decision is a discrete act that occurs at a particular point in time....We therefore affirm the judgment of the Court of Appeals."). As a result, an unlawful employment practice, and thus "the day the discrimination took place," is renewed with each paycheck. This allows female employees previously subjected to years of hidden compensation discrimination to bring timely claims against their employers. *See Ledbetter*, 550 U.S. at 645 (Ginsburg, J., dissenting) ("Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials.").

Tara Paulson is a partner in **Rembolt Ludtke LLP**'s Lincoln, Nebraska, office, and her practice primarily focuses on employment and labor issues. She has significant experience in employment litigation, including matters involving federal, state, and local employment laws. In addition to her employment litigation practice, Ms. Paulson regularly represents clients in responding to administrative charges, counsels employers regarding various labor and employment law issues, negotiates and prepares employment and separation agreements, reviews and revises employee handbooks, and drafts personnel policies. She is the DRI Employment and Labor Law Committee *The Voice* chair.

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

Paul J. DeMarco and John M. Bergquist


Parsons Lee & Juliano PC attorneys and DRI members Paul J. DeMarco and John M. Bergquist, Birmingham, Alabama, recently secured a defense verdict on behalf of an aircraft tool manufacturer in a wrongful death product liability case that was tried in the United States District Court for the Northern District of Alabama. The wrongful death action was brought by the estate of an FAA-licensed aircraft mechanic who sustained a fatal head injury when he was struck by the propeller of a single-engine airplane while he was performing maintenance on the engine.

The plaintiff alleged that the differential pressure tester was negligently and/or wantonly designed and that its instructions were defective such that the tool manufacturer was liable to the deceased under the Alabama extended manufacturer's liability doctrine and under common law product liability, based on negligence and/or wantonness and failure to warn.

After a five-day trial, the case was submitted to the jury on the Alabama extended manufacturer's liability doctrine claim and the common law product liability claims based on negligence. The defendant pleaded contributory negligence and assumption of the risk as defenses while denying that the differential pressure tester was the proximate cause of the injury. During the course of the trial, defense counsel achieved admissions from multiple witnesses that they made a series of mistakes while performing maintenance on the single-engine airplane, including standing in the path of the propeller and failing to follow the tester's instructions, which would have prevented the accident from occurring.

Michael A. McCaskey, A. Jay Koehler, David J. Welch, Edward J. Keating, and Benjamin D. Lothson





Swanson Martin & Bell LLP attorneys and DRI members Michael A. McCaskey (partner), A. Jay Koehler (partner), David J. Welch (associate), Edward J. Keating (associate), and Benjamin D. Lothson (associate) won a $1.5 million award and defeated a $3.9 million counterclaim after a week of oral hearings tried before the AAA Construction Industry Tribunal. All five of the attorneys practice in the firm's Chicago office.

Swanson Martin & Bell LLP represented G&L Associates, Inc. in a dispute with general contractor James McHugh Construction Company. The dispute arose from a 13-story, mixed-use construction project known as Vue53, located in Chicago's Hyde Park neighborhood. The arbitrator issued a 44-page award after a week of live testimony from eight fact and expert witnesses. The arbitration resulted in a net judgment of $1,501,471.63 in favor of G&L, including an award of attorneys' fees and administrative fees.

McHugh, the general contractor for the Vue53 project, subcontracted G&L to supply and install certain exterior, architectural metal panels for the project. McHugh refused to pay G&L over $1 million, despite accepting G&L's work. After G&L initiated a lawsuit in the Circuit Court of Cook County for payment of McHugh's breach of contract, McHugh sought arbitration and filed a counterclaim seeking over $3.9 million against G&L and bondholder Hanover Insurance Company.

McHugh asserted that G&L and Hanover should bear responsibility for alleged delays on the project. G&L denied McHugh's counterclaim and argued that McHugh caused the claimed delays on the project. G&L also argued that McHugh had previously received compensation for the damages claimed in McHugh's counterclaim by way of a separate settlement agreement with the building owner.

The award resulted in a net judgment against McHugh of $1,501,471.63 after offsets of McHugh's partial counterclaim award. The case name was *McHugh Construction v. G&L Associates, Inc. and Hanover Insurance* (Cook County Case No. 2018 CH 03016).

The Fight Against Data Scraping

Why LinkedIn's Appeal to the Supreme Court Should Matter to Anyone Who Uses Social Media

By Laura Clark Fey and Hannah Zimmerman


LinkedIn is challenging the U.S. Court of Appeals for the Ninth Circuit's September ruling that the data aggregation and analytics company, hiQ Labs, Inc., can "scrape" personal data of users from LinkedIn's platform, analyze the data, and sell its findings to employers. Earlier this month, the Supreme Court granted an extension for LinkedIn to submit its petition for a writ of certiorari. The Ninth Circuit found that LinkedIn "has no protected property interest in the data contributed by its users"; that the Computer Fraud and Abuse Act (CFAA), which prohibits intentionally accessing a computer without authorization, is not violated when data is scraped from websites where such data is publicly available; and that any privacy interests that LinkedIn users have in their personal data are not significant enough to outweigh hiQ's interest in continuing its business, which depends on accessing, analyzing, and communicating information from LinkedIn. The Ninth Circuit's decision conflicts with a 2003 decision by the U.S. Court of Appeals for the First Circuit in *EF Cultural Travel BV v. Zefer Corp.*, which held that where a publicly available website explicitly bans data scrapers (*e.g.*, in its terms of service), further access by data scrapers is "without authorization" under the CFAA.

Data scraping is a process through which a computer program (often referred to as a "bot") extracts data from another program or codebase. In this case, hiQ uses bots to scrape data from LinkedIn users' public profiles (including name, job title, work history, and skills); analyzes the information to identify, for example, employees at risk of being poached or that are likely searching for a new job; and sells its findings to employers. After discovering hiQ's actions, LinkedIn sent the company a cease-and-desist letter, asserting that hiQ was in violation of its User Agreement and the CFAA, in addition to other laws, and demanding that hiQ stop accessing and copying data from its servers. The letter further stated that LinkedIn had installed technical measures to prevent hiQ from accessing LinkedIn's website through systems that detect, monitor, and block data scraping activity. However, the Ninth Circuit ruled that "where the default is free access without authorization," selective denial of access is a "ban" and not a lack of "authorization" under the CFAA.

If the Supreme Court grants certiorari, the case will have broad privacy implications. For example, the *New York Times* recently reported on Clearview AI, a company that has created a facial recognition app that has raised privacy concerns. The app allows users to upload a person's photo, and, using a facial recognition algorithm, returns public photos of that person collected from websites, including Facebook, YouTube, Twitter, Instagram, and Venmo, as well as links to the websites where those photos appear. The app relies on Clearview's database of more than three billion photos, created by a data scraping program that automatically collects images of people's faces across the internet (and that likely violates many websites' terms of service). Should the Supreme Court rule in favor of hiQ, more companies like hiQ and Clearview AI could mine and use individuals' personal information contained on publicly available websites regardless of the websites' terms of service and without fear of violating the CFAA. Such a ruling would undermine the effectiveness of website terms of service explicitly prohibiting users from scraping data from websites, and narrow the CFAA's application to websites that password-protect or use other barriers to help ensure that information is not available to the public.

Regardless of which way the Supreme Court rules, this case in one that privacy professionals will be closely watching and analyzing.

Laura Clark Fey, Privacy Law Specialist (IAPP), is the principal at Fey LLC. She is the chair of the DRI Center for Law and Public Policy Electronic Privacy Working Group.

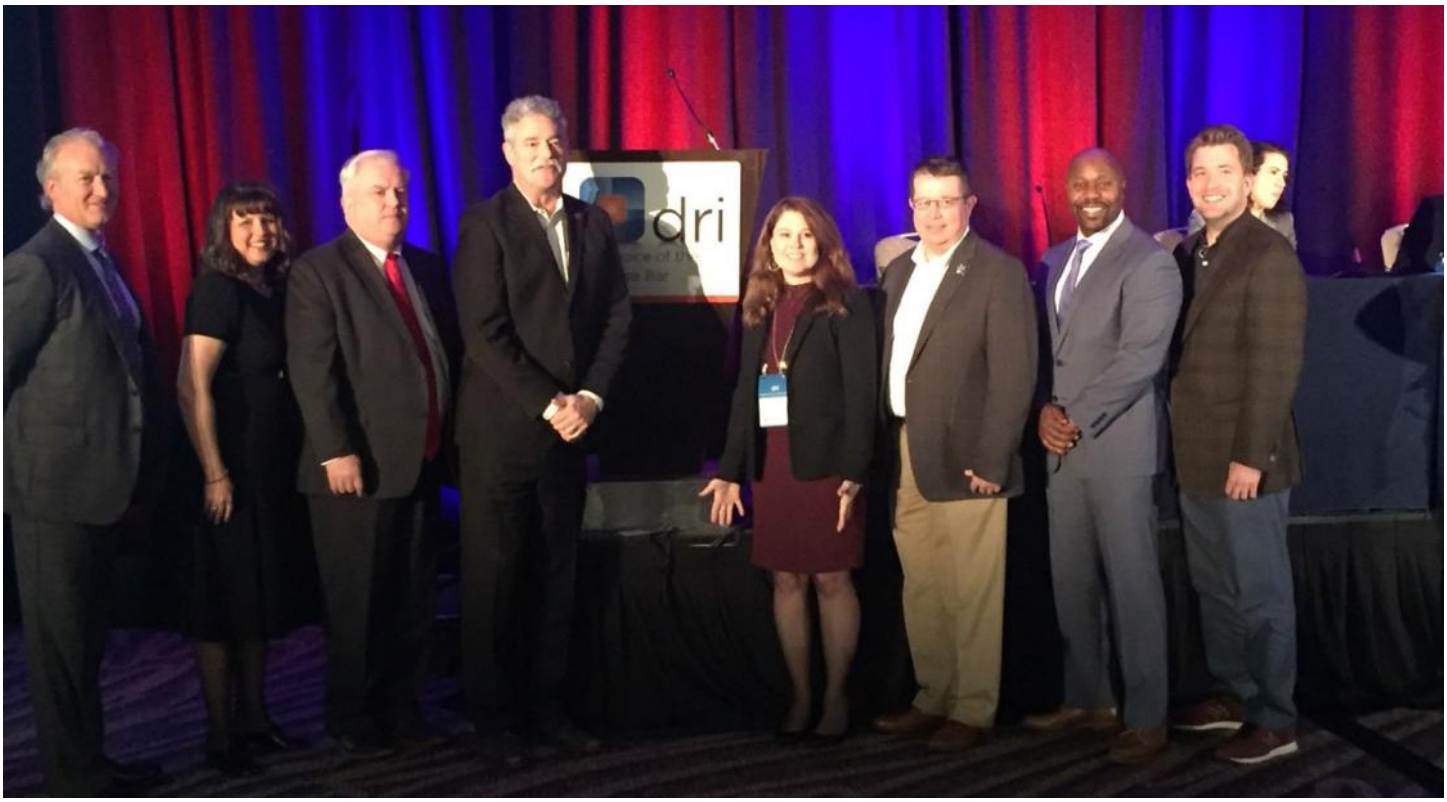
Hannah Zimmerman is an associate attorney with Fey LLC. Mary Colleen Fowler, a third-year law student at the University of Kansas School of Law and a law clerk with Fey LLC, contributed to this article.

This article originally appeared on the Fey LLC Data Privacy Blog.

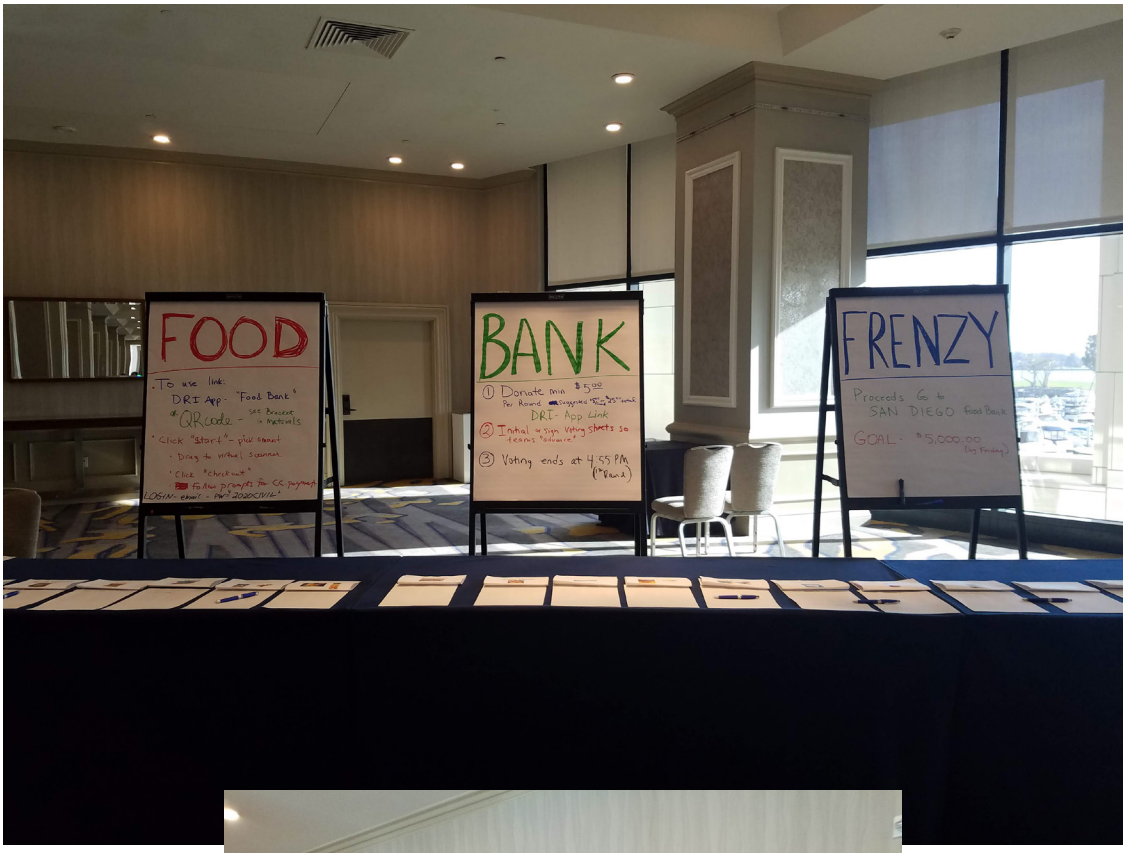
Governmental Liability Attorneys Support San Diego Food Bank

On January 30–31, 2020, attendees of the DRI Civil Rights and Governmental Tort Liability Seminar descended on San Diego and generously donated $2,047 to the Jacobs and Cushman San Diego Food Bank. With one dollar resulting in five meals, DRI seminar attendees' contributions added up to 10,235 meals. Seminar attendees played the Food Bank Frenzy, modeled after the NCAA March Madness Tournament. Thirty-two teams started in the first round of the bracket challenge. Seminar attendees donated on average $25 each to "play" in the tournament. Participants voted for their teams to advance in each round. Due to a strong LSU presence at the conference, the LSU Tigers quickly took a fierce lead over the competition and won the last round. For entertainment during the "frenzy," Axon VR generously loaned a virtual reality headset, permitting participants to engage in a simulation of a law enforcement officer responding to an emergency call.

On Friday, January 31, 2020, Jim Floros, CEO of the food bank, met with DRI Civil Rights Governmental Tort Liability Seminar Steering and Planning Committee members. Special appreciation is given to steering and planning committee members, specifically, Paul Mullins, Monté Williams, David MacMain, Jody Corbett, Mary Erlingson, Natalia Isenberg, Laurie Miller, Tricia Ambrose, Martha Thompson, and Diane Pumphrey, for their pre-seminar and onsite support, as well as DRI staff Dominique Hartsfield and Alex Nowak and volunteers Harry Norton, Jr., Terry Norton, Chris Balch, Lee Ledet, Cathy St. Pierre, and Tara Johnston.



Pictured from left to right: Committee Chair David MacMain, Committee Co-Vice Chair Jody Corbett, Program Chair Paul Mullins, San Diego Food Bank CEO Jim Floros, Philanthropic Committee Chair Natalia Isenberg, Committee Co-Vice Chair Chris Heigele, Program Vice Chair Monté Williams, Marketing Chair Kevin Allen.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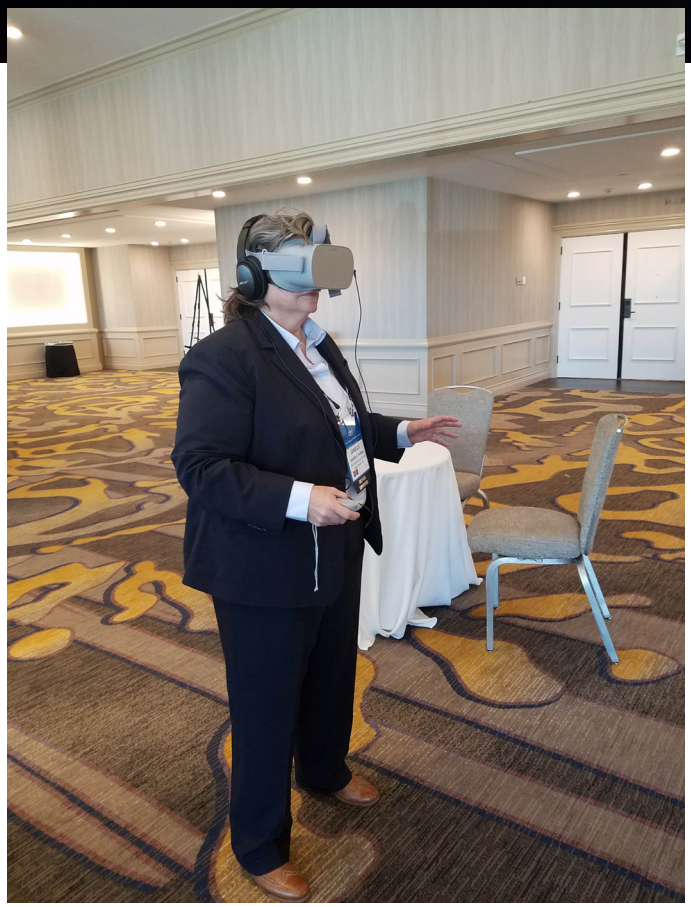
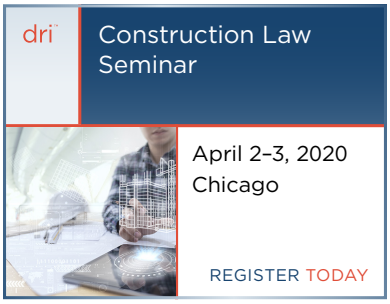
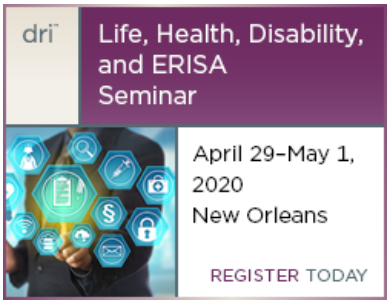


Construction Law Seminar, April 2–3, 2020



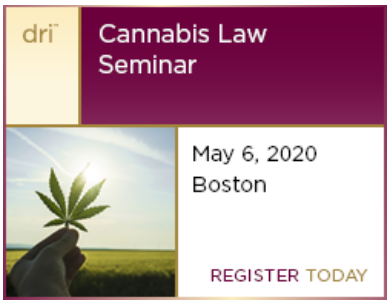
Are you prepared for the future of construction law? The construction industry is not immune to the challenges and opportunities that confront other sectors of the economy. Register to attend DRI's 2020 Construction Law Seminar, April 1–3 in Chicago, for a forward-looking program that prepares you for the next decade. Construction professionals, attorneys, and claims professionals will benefit from the seminar's hands-on, interactive sessions and networking. Register online by March 3 to save $100. Click here to view the brochure and to register for the program.

Life, Health, Disability, and ERISA Seminar, April 29–May 1, 2020



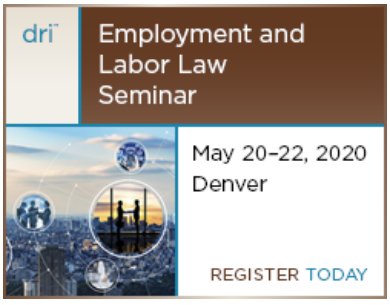
Join us for DRI's Life, Health, Disability, and ERISA Seminar, April 29–May 1 at the Sheraton New Orleans. Earn up to 12 hours of CLE by attending sessions on the latest developments in life, health, disability, and ERISA law. Walk away with tips that can meaningfully assist you in your day-to-day practices. Register online by March 30 to save $100. Book your room at the Sheraton New Orleans by March 30 to be eligible for the group rate of $259 single/double. Click here to view the brochure and to register for the program.

Cannabis Law Seminar, May 6, 2020



Don't just survive cannabis legalization…thrive! Attend DRI's 2020 Cannabis Law Seminar, May 6 in Boston, to learn how to navigate the complex pitfalls—and prospects—of cannabis legalization. Those with the knowledge base to guide clients deftly through a shifting regulatory and legal landscape will thrive. Download the brochure for a look at all of the sessions and networking events happening on-site and register online by April 6 to save $100. Reserve your room at the Boston Marriott Copley by April 6 to be eligible for the group rate of $319. Click here to view the brochure and to register for the program.

Employment and Labor Law Seminar, May 20–22, 2020



If you're a management-side employment and labor attorney or in-house counsel, you don't want to miss DRI's Employment and Labor Law Seminar, May 20–22 in Denver. Participate in sessions featuring the latest developments in matters critical to employers and those who advise them. Save $100 when you register by April 20. Click here to view the brochure and to register for the program.

Avoiding Hidden Catastrophes—The Healthcare Professional as a Witness, March 3, 2020, 12:00 pm–1:00 pm CST

Despite significant differences in personalities and emotional expression among healthcare professionals, physician and nursing witnesses are repeatedly dealt with in a universal manner when preparing for depositions in medical malpractice cases, resulting in ineffective, and often damaging, testimony. Among physicians, two primary personalities can be identified, while nursing staff can similarly be broken down into distinct personalities. Individual healthcare personalities must be identified and uniquely addressed early on, from both a cognitive and emotional perspective, to avoid destructive testimony that will unnecessarily increase both the value and exposure of the case. Click here to register.

The Ghost of Treatment Past: Phantom Medical Bills, Medical Litigation Funding, and How to Fight Them, March 5, 2020, 12:00 pm–1:00 pm CST

Attendees of this webinar will hear from two seasoned trucking attorneys and an experienced medical billing professional with an extensive background in analyzing medical billing procedures and determining the reasonable value of medical services regarding medical funding used in personal injury and trucking litigation. Specifically, attendees will hear about the different types of medical funding models (doctors who self-finance, factoring, medical funding companies, among others); discovery tactics that can be used by defense lawyers to obtain relevant and critical medical funding information; and a case law overview addressing the relevance of medical funding discovery and the admissibility of medical funding information at trial. Additionally, attendees will learn examples of questionable billing practices (i.e., overcharging, upcoding, unbundling) and how billing experts can be used to help defense attorneys analyze whether the medical expenses incurred by a plaintiff were reasonable. Click here to register.

Mental Health and the Practice of Law, Part 1, A Challenge to Our Profession, March 10, 2020, 12:00 pm–1:00 pm CST

This webinar offers an in-depth discussion of the mental health challenges facing the legal profession. Lawyers experience mental illness issues and suicide far beyond those experienced by the general population. These issues take a toll not only on attorneys but on their clients as well, as made evident by the frequency with which mental health issues are discussed in disciplinary opinions. Learn how to recognize these issues in yourself and others, and how to respond to them when they arise, through the presentation of facts and law, and through the discussion of hypothetical situations. Click here to register.

Mental Health and the Practice of Law, Part 2, Legal and Ethical Considerations, March 17, 2020, 12:00 pm–1:00 pm CST

This webinar discusses the legal and ethical principles relating to mental health issues in the legal profession. Even before they start their careers, lawyers are faced with mental health disclosure obligations on their bar applications. These obligations follow the attorneys, though perhaps only by implication, for their entire careers. Lawyers' duties in this regard do not, however, end with self-inquiry; issues arise concerning the mental health of both colleagues and opponents. Learn here what legal and ethical obligations exist, and how to fulfill them. Click here to register.

Advocating DRI Membership Has Benefits for You

Are you interested in attending a DRI seminar or the Annual Summit, but do you need a little help to make those numbers work? What if DRI can put a seminar within your reach?

Did you know that that if you refer a new member to DRI and he or she joins, ou receive a $100 CLE credit, which can be redeemed for a DRI seminar or the Annual Summit? Bring on a second DRI member and that's a $100 CLE credit. Bring on a third member—you get the idea. That's money off the top of reduced DRI member registration fees. Instant savings for you and your firm.

You can easily save you or your firm more than the cost of your membership dues, connect your friends with the numerous benefits of DRI membership, and help their careers as well as your own. Use this DRI Membership Application *and get started*.

Yes, it's true! You can do well by doing good.

South Dakota

State Membership Chair

Jennifer L. Wosje, Attorney and Shareholder, Woods Fuller Shults & Smith PC

Areas of Practice: Insurance; personal, product, and professional liability; and workers' compensation.

DRI member since 2004.

Jennifer's experience with DRI: "I have served as the DRI state representative. I have also served as the state membership chair and as marketing liaison for the DRI Annual Meeting, and in these capacities, I have had the opportunity to attend several fun and exciting Leadership Conferences and regional meetings.

Fun Fact: "I have a minor in voice, so I love to sing whenever I get an opportunity. I am also a huge dog lover!"

State Representative

Paul W. Tschetter, Boyce Law Firm LLP

Areas of Practice: Administrative law, business and transactions, construction, litigation, and real estate and utilities.

DRI member since 2008.

Paul's experience with DRI: Paul is a past president of the South Dakota Defense Lawyers Association and currently serves on its board of directors. He is a member of the DRI Construction Law Committee.

Emily A. Chadbourne, Coughlin Betke LLP

Emily A. Chadbourne is an associate attorney with **Coughlin Betke LLP** in Boston, Massachusetts. Her practice focuses on the defense of civil litigation in Massachusetts and Connecticut. She represents corporations and individuals in various types of disputes, including product liability, premises liability, employment, transportation, construction, and commercial litigation. Ms. Chadbourne also has extensive experience with medical malpractice defense and health-care law.

She received her undergraduate degree from the University of Connecticut in 2011. Ms. Chadbourne graduated, *cum laude*, from New England Law, Boston, in 2015. During law school, she served as the managing editor of the *New England Law Review*. Ms. Chadbourne is currently admitted to practice in Massachusetts, the U.S. District Court of Massachusetts, and Connecticut.

In her spare time, she loves cooking, enjoying the Boston food scene, and exploring the New England outdoors.

Quote of the Week

"Chance is the first step you take, luck is what comes afterward."

— Amy Tan (b. Feb. 19, 1952), *The Kitchen God's Wife.*