



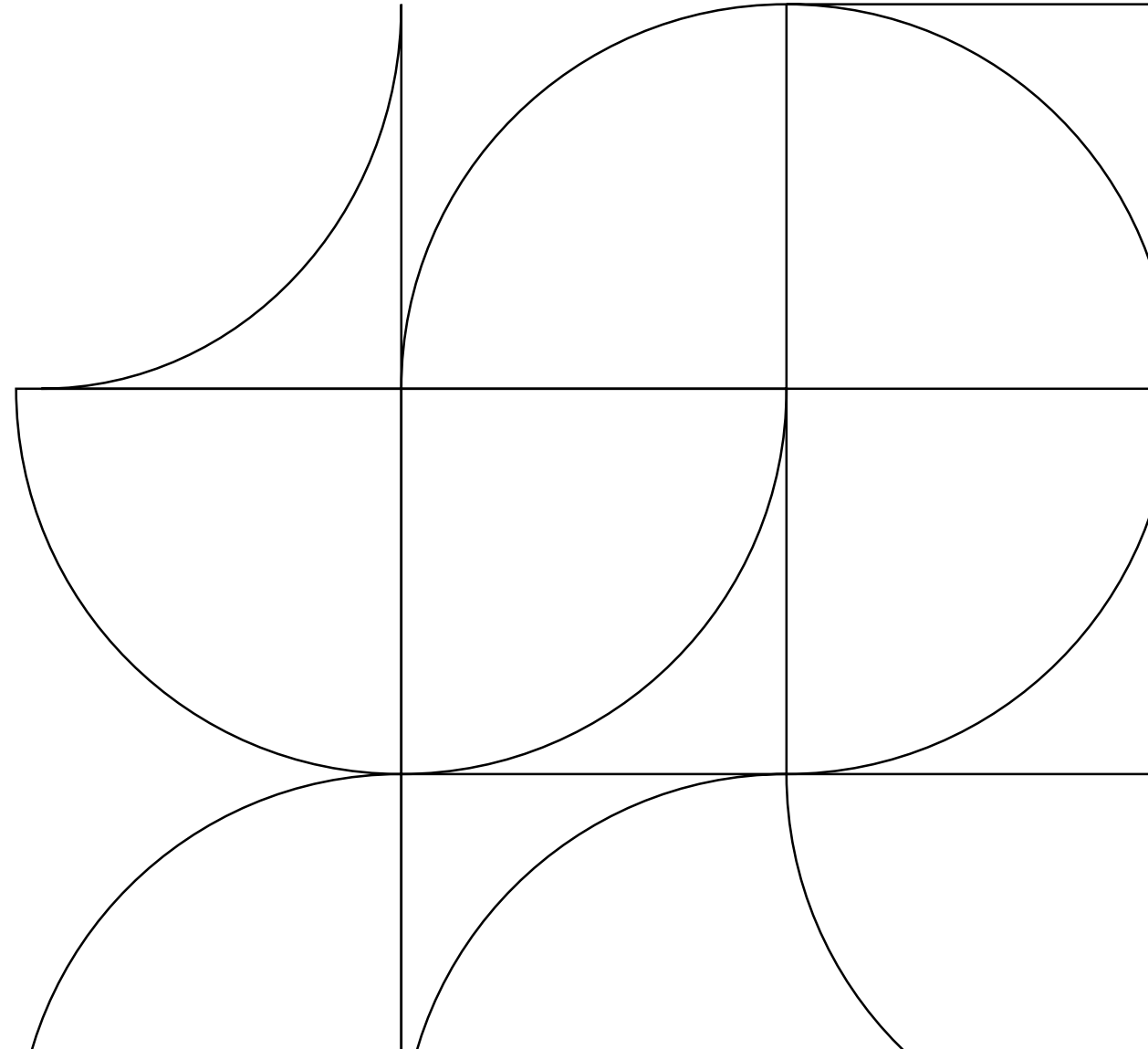
All Rise!

A Legal Update on Employment
Issues Affecting the Newspaper
Industry

February 19, 2020

Seyfarth Shaw LLP

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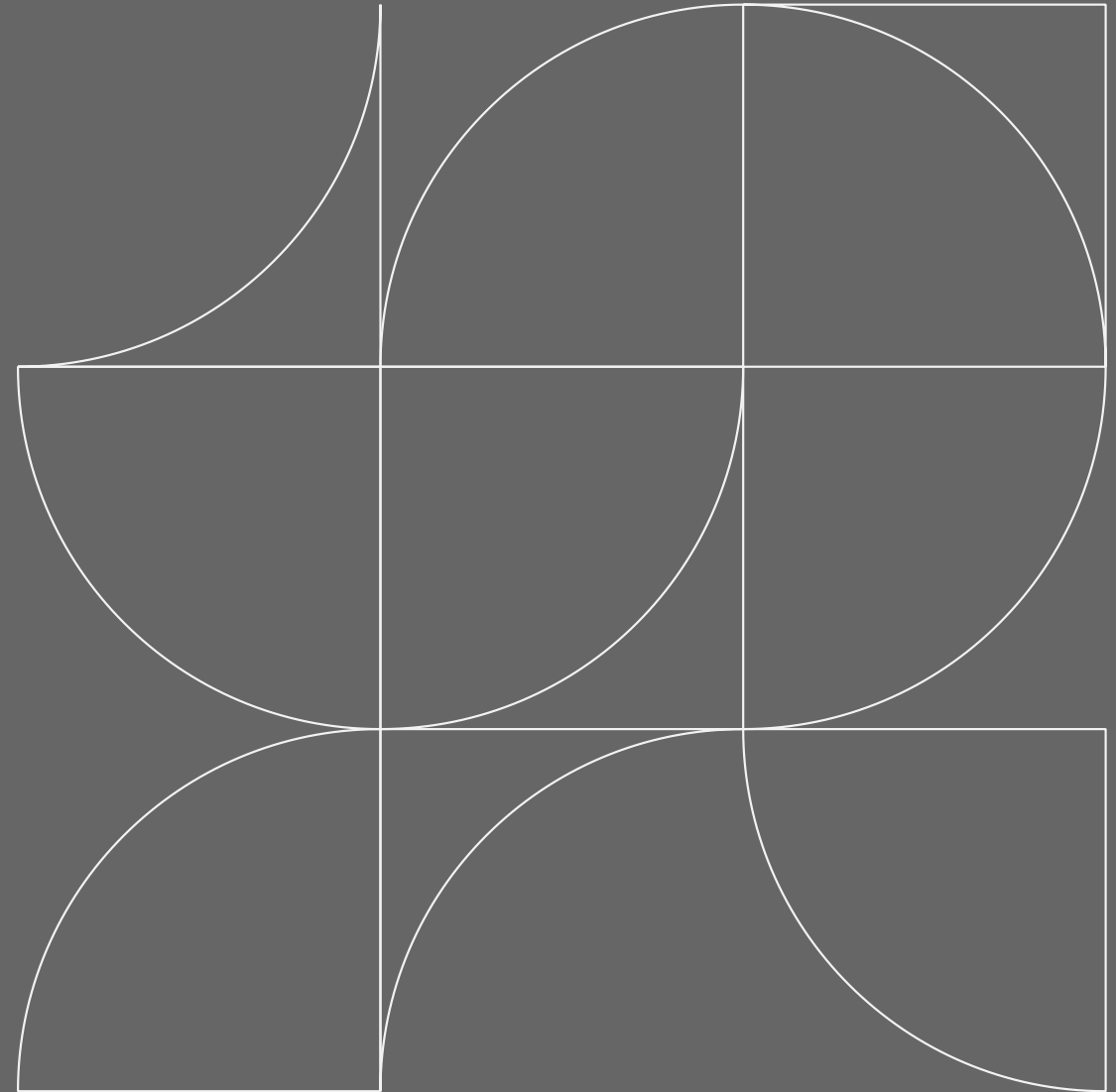


Agenda

- 01** **Labor Developments**
Spotlight on Union Organizing in the Nation's Newsrooms
- 02** **Litigation Pain Points and Defenses**
Ways to Optimize Risks
- 03** **New and Pending Legislation to Watch**

Labor Developments: Spotlight on Union Organizing in the Nation's Newsrooms

Michael J. Rybicki, Partner, Seyfarth Shaw LLP



Update on Organizing

- An Unprecedented Level of Organizing Activity
- New Trends
 - Impacting Newspapers Historically Not Receptive to Organizing
 - Internally Generated Activity



Update on Organizing: Union Organizing Successes

The following is a partial list of recent successful newspaper organizing efforts by the NewsGuild:

- *Los Angeles Times*
- *Morning Call* (Allenton)
- *Missoula Independent*
- *Lakeland Ledger* (FLA)
- *Sarasota Herald-Tribune*
- *The Florida Times-Union*
- *Chicago Tribune*
- *Hartford Courant*
- *The Virginia Piolet and Daily Press*

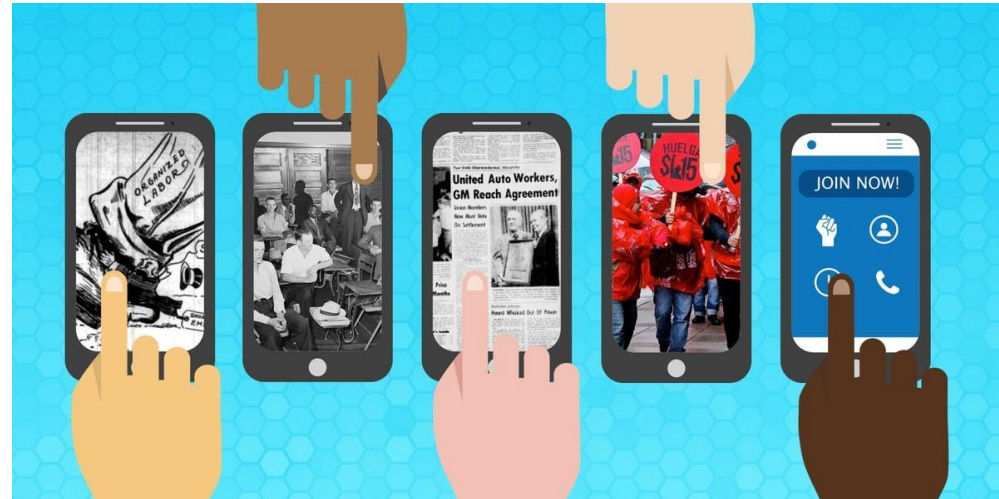


- *Omaha World Herald*
- *Southern Illinoisan*
- *Daily Hampshire Gazette*
- *Arizona Republic*
- *Columbian* (WA)
- *Daily Progress* (VA)
- *Miami Herald*
- *Caspar Star-Tribune* (W)
- *Newport News Daily Press*

- The NewsGuild has also successfully organized magazines (e.g., *Fortune Magazine*, *New York Magazine*) and a number of digital producers (e.g., *Law 360*, *BuzzFeed*).
- Additionally, the Writers Guild of America (East) has been even more successful than the NewsGuild organizing digital producers (e.g., *Huffington Post*, *Salon*, *The Intercept*, *Gawker*, *Thrillist*, *Gizmodo Media Group*, *ThinkProgress*, *Al Jazeera*, etc.).

Update on Organizing: Millennials and Unionization

- Tech savvy millennial content producers are **not** impervious to unionization
- Millennials are at the forefront of organizing efforts
- Organizing includes digital operations





Prior Guild President
Bernie Lunzer



New Guild President
Jon Schluess

Update on Organizing: Changes at the NewsGuild – Millennial Ascendant?

Update on Organizing: All the Old Issues...



While union organizing efforts frequently are precipitated by property-specific issues, a number of common threads have emerged (although not in every instance):

- Employee frustration over extended periods with few, if any, pay increases coupled with an escalating cost for benefits;
- Employee anger over “lavish” executive pay and/or “excessive” returns for investors;
- A belief that employers are no longer committed to “quality” journalism, frequently coupled with the belief that the only thing that matters to owners/investors is short-term profits, regardless of whether this is “gutting” the news organization;
- Employee anxiety over constant reductions in staff; and
- Employee concerns with respect to a change in ownership.

Update on Organizing: Some “Millennial” or “Trending” Issues...



- Diversity in staffing and news coverage
- Assertions of pay disparity
 - “Transparent and equitable compensation”
- Reporter “integrity” / “editorial freedom”
- Allegations of harassment / #MeToo

**Update on
Organizing:**
All of the Old
Issues & One
“New” BIG ONE

**STATUS
QUO**

Update on Organizing: Warning Signs



- **WARNING:** Management may not see any warning signs unless it looks really hard for them.
- **Stealth Campaigns:** Campaigns are being conducted in a manner designed to minimize the detection of organizing activity before the Guild is prepared to disclose it.
- Coupled with the “**ambush election**” rules put in place by the Obama National Labor Relations Board, a successful stealth campaign may leave an employer with as little as three weeks to respond to union organizing.

Update on Organizing: Warning Signs



- Interaction with Guild-represented employees from other papers (e.g., on news assignments, at conventions, interactions with former co-workers *etc.*).
- The role of the internet.
- ***The grapevine goes dead.***
- Group meetings away from the workplace.
- The emergence of new leaders.
- Pro-company employees suddenly ostracized.

Update on Organizing

Employer Election Scorecard: Not So Good

- “Traditional” Employer Campaigns have NOT been working.
- Once a petition is filed or a demand for recognition is made, winning is extremely difficult.
- The importance of earlier detection.



Update on Organizing: Frontline Supervision

- *Trusted* supervisors and managers must be made aware of the early warning signs.
- They must be cautioned not to try to handle things on their own or “keep things quiet.”
- Don’t hope the problem will just go away – it won’t.
- They need to understand they are immediately to report signs of possible union activity up the chain of command.



Update on Organizing:

What Should Your Organization Be Doing Now?

- Cornerstones of effective union avoidance programs:
 - To be open and truthful to employees
 - To communicate as often as appropriate
 - To encourage and be responsive to employee feedback
 - Employee perceptions of fairness
- Recognizing the challenges facing the industry – where the second largest newspaper chain has filed for bankruptcy and the family that has owned it for more than 150 years will be losing control – management must nonetheless be sensitive to the issues that result in organizing elsewhere.
- Management needs make hardheaded assessments with respect to its vulnerabilities to organizing and have a game plan for dealing with it.
- Management needs to be vigilant to signs of union organizing and move immediately when those signs are detected: Don't hope the problem will just go away – it won't.



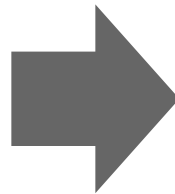
Update on Organizing – If An Employer Loses: Collective Bargaining

- Whether newly organized or in a longstanding relationship, Employers need to take a fresh look at what must change in labor agreements.
- The industry has fundamentally changed and Employer proposals and agreements must change as well to address new industry realities.



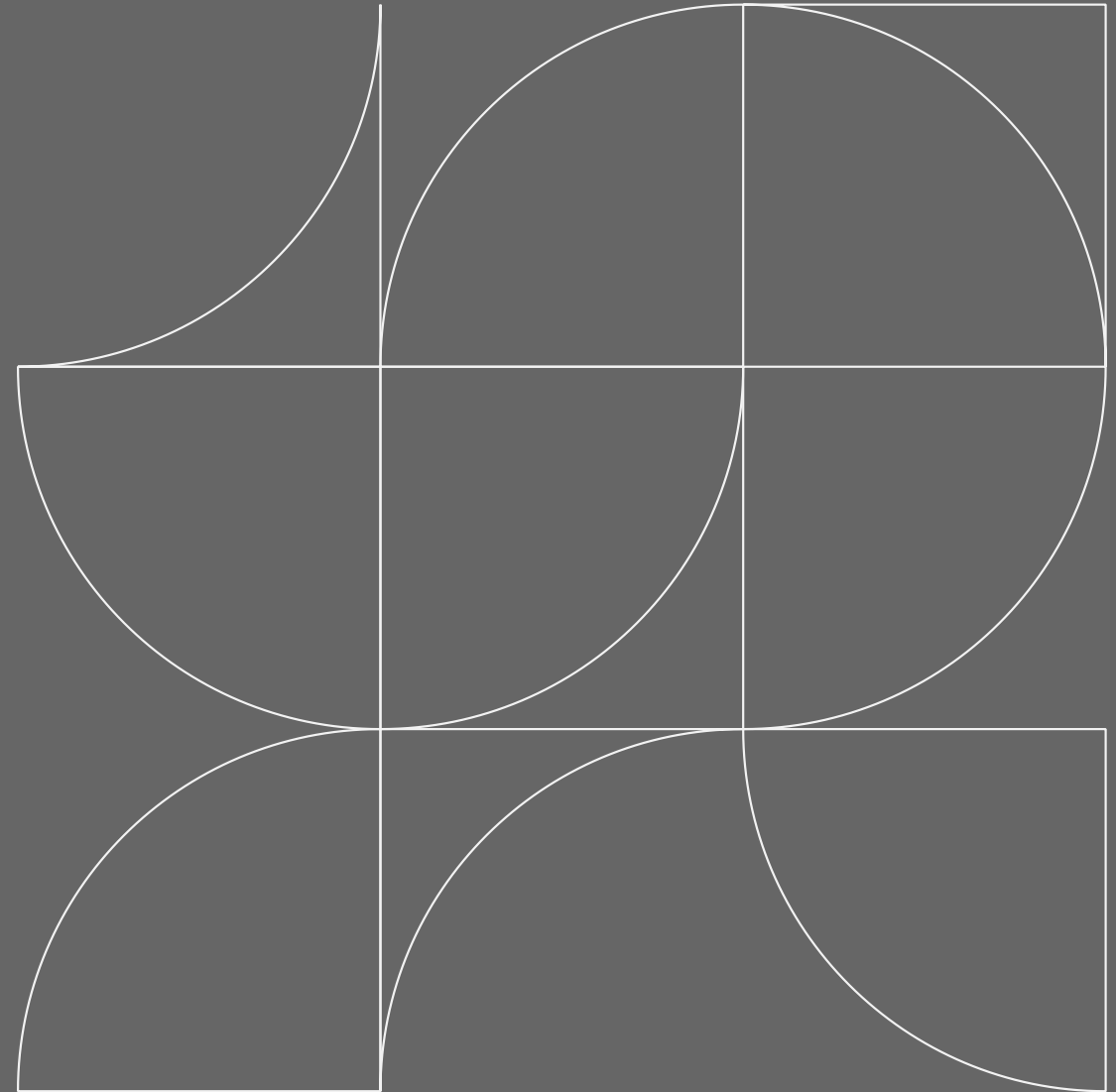
Conclusion: Unprecedented Challenges

- The adaption of 20th century organizing to the 21st century workplace has seen successful organizing drives at an unprecedented number of newspapers and prominent digital media outlets.
- As observed elsewhere, *“it calls into question all those confident predictions about the inevitable decline of unionism in the information-age economy.”*
- In addition to all of the other challenges media companies face in today’s difficult business environment, the risks of union organizing of news operations has never been greater.
- Avoiding unionization – or dealing with it where it occurs – will require creative approaches recognizing the new industry realities.



Litigation Pain Points and Defenses: Ways to Optimize Risks

Richard B. Lapp, Partner, Seyfarth Shaw LLP



Independent Contractor Issues



- Inconsistent Patchwork of Legal Requirements
 - Common Law of Agency
 - Economic Realities
 - ABC Test
- Risk Minimizers
 - Re-evaluating Existing Relationships
 - Strong Independent Contractor Practices
 - Secondary Defenses
 - Mandatory Arbitration Agreements (With Class Waivers)
 - Waiver and Release Language

State Wage and Hour Litigation



- Hot Topics
 - Exempt Status
 - Off-The-Clock Work
 - Accurate Time Records
- Proactive Approaches to Minimizing Risks
 - Arbitration Agreements
 - Audits
 - Training
 - Documentation

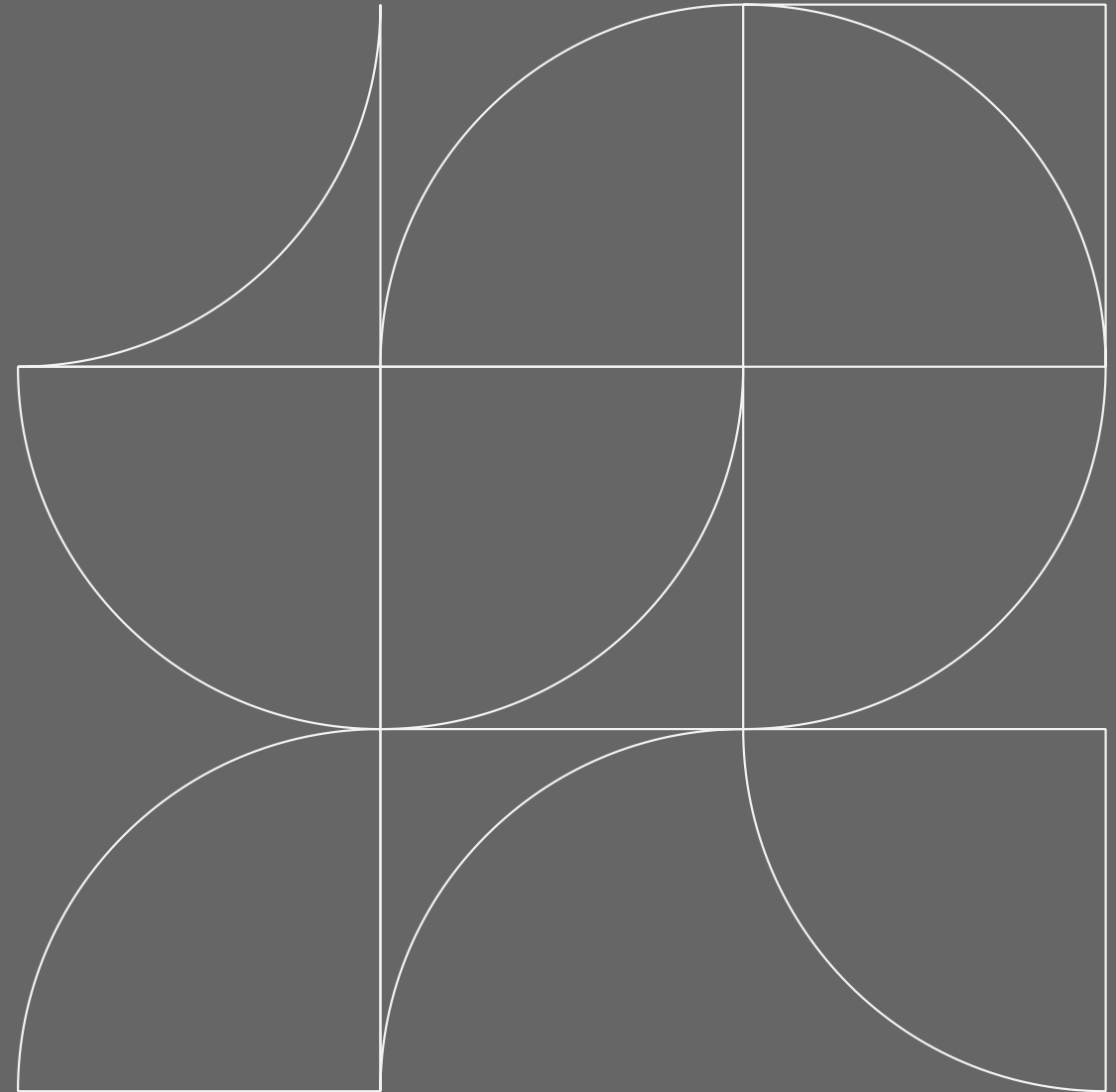
Equal Pay Litigation



- What is Equal Work?
 - Reporters
 - Photographers
 - Editors
- Proving Legitimate Reasons for Differences in Pay
- Prior Salary – The Risks
- Documentation
- Audits

New and Pending Legislation to Watch

Camille A. Olson, Partner, Seyfarth Shaw LLP



Federal



Employment Discrimination

- Pregnant Workers Fairness Act (PWFA, H.R. 2694)
 - Expands accommodation obligations to pregnant workers
- Protecting Older Workers Against Discrimination Act (POWADA, H.R. 1230 & S. 485)
 - Lessens burdens of proof of plaintiffs
- Paycheck Fairness Act (H.R. 7 & S. 270)
 - Bars salary history inquiries
 - Eliminates, in effect, differences in pay except in extraordinarily narrow circumstances amongst workers performing equal work

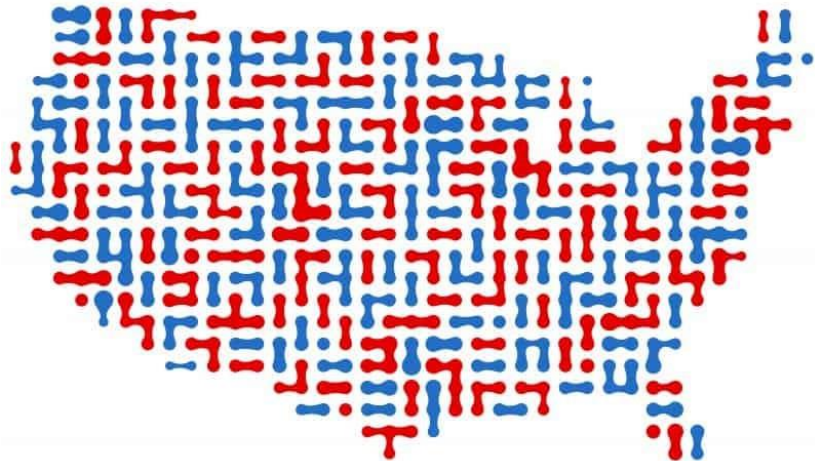
Federal



Union Organizing

- Protecting the Right to Organize Act (PRO Act, H.R. 2474 & S. 664)
 - Expands reach of the NLRA
 - Narrows Employee and Employer Rights in Favor of Expanded Union Rights
 - Expands Litigation and Remedies

State Developments



- Equal Pay Obligations and Prohibitions
 - Disclosure of Information
 - Relevant Factors Other than Sex
 - Prohibited Inquiries
- Non-Harassment
 - Training
 - Postings
 - Policy Revisions
- Independent Contractor – State Laws
 - AB 5 in California
 - Distributors and Freelancers

**thank
you**

Questions or Comments?