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 **VaSHHRA**
The Virginia Society for Healthcare
Human Resources Administration

 **SCHHRA**
South Carolina
Healthcare
Human Resources Association

 **NCHHRA**

Must-Know Recent Developments in Employment Law

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A wider lens on workplace law

What We'll Cover

- Minimizing the Risk of Whistleblower Activity
- Harassment in the Workplace: #MeToo's Undeniable Impact
- Preventing Workplace Violence and Bullying
- Vaccination Requirements: Dealing with Increased Resistance from Health Care Workers
- Addressing Pay Equity Issues In Healthcare
- Navigating the Conflict Between Federal and State Marijuana Laws



Minimizing the Risk of Whistleblower Activity



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Discussion Question

One of your practice managers has had sub-standard performance for the last two years. The budget is very tight, and the practice is receiving multiple complaints from patients as well as physicians. The vice-president for the practice group has applied pressure on the manager to make improvements, but they are still receiving complaints. The manager has just reported coding and billing irregularities, claiming two of the physicians are falsely coding procedures to increase charges. The vice-president wants to terminate the practice manager.

What should you do? If possible set forth a step-by-step process.



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Retaliation vs. Whistleblowing (similar / at times connected)

**Protected
Activity**

- **Retaliation** – where employer takes adverse action against employee, applicant, or former employee, because he/she engaged in some protected activity (individual rights).
- **Whistleblowing** – where employee or other person discloses information regarding (1) a violation or suspected violation of any law, rule, or regulation, or (2) any act or suspected act of gross mismanagement, malfeasance, misfeasance or gross waste of public funds or gross neglect of duty (not individual rights).



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Federal Laws With Retaliation/Whistleblower Provisions:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- Fair Labor Standards Act (FLSA)
- Equal Pay Act (EPA)
- National Labor Relations Act (NLRA)
- Occupational Safety and Health Act (OSHA)
- False Claims Act (FCA)
- Sarbanes-Oxley Act of 2002 (SOX)



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Avoiding Whistleblower / Retaliation Claims

1. Respond to employee complaints

- Do not take complaint personally
- Maintain confidentiality
- Implement strong anti-retaliation policy
- Train managers and supervisors
- Remove authority of alleged discriminator to make employment decisions about accuser
Investigate thoroughly
- Notify complainant about outcome of investigation



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Avoiding Whistleblower and Retaliation Claims

2. Assess the risks before taking adverse action

- Consider the **complaint**
- Consider **timing**
- Consider the **response** to the complaint
- Consider the **consequences**
- Consider the **employee**

3. Properly **deal** with performance issues

- **Objectively document** performance
- Be **fair**
- **Never fire on the spot**



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Avoiding Whistleblower Suits

- Develop a **compliance program**
- Include a **code of conduct**
- Implement a **whistleblower policy**
- Consider an **anonymous reporting** mechanism/hotline
- **Train all employees** on code of conduct
- **Train managers/supervisors** on how to react to report of unlawful activity
- **Promptly investigate** complaints and issue **appropriate discipline**
- Exercise prudence in **complying with** government **contract and grant funding requirements**
- **Audit** billing practices, quality issues and compliance to **avoid False Claims Act suits**



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Harassment in the Workplace: #MeToo's "Undeniable Impact"



Protesters march through Midtown Manhattan as they rally against Supreme Court nominee Judge Brett Kavanaugh, Oct. 1, 2018 in New York.



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Discussion Question

Angelina, a surgical nurse, resigned last week to work for another hospital. You just received a demand letter from her attorney claiming Angelina has been harassed for the last year by one of the surgeons. The surgeon is known for being very volatile, and you have received complaints from other employees that he is belittling and hostile when he feels nurses are not performing their duties properly in the OR. You investigated Angelina's complaint about six months ago and concluded the physician acted inappropriately. You therefore sent the matter through the medical executive committee, but you are unclear what action was taken.

The demand letter claims the harassment continued to occur and also includes claims of negligent retention of the physician and assault and battery based on the physician allegedly throwing some instruments down on a tray and almost hitting Angelina.

What facts support and hurt the hospital, and how can its processes be improved to minimize future claims?



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Reviewing the Basics: What Is Sexual Harassment?

The two forms of sexual harassment are:

- Quid pro quo
 - Latin for "this for that" or "something for something"
 - Strict liability for Managers
- Hostile work environment
 - Speech or conduct severe and/or pervasive enough to create an abusive or hostile work environment.



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Data on #MeToo's First Year

- Sexual harassment **complaints** are **up across the U.S.** with the feds and with **HR departments**.
- According to the Equal Employment Opportunity Commission (EEOC):
 - About **7,500 harassment complaints** were filed from **October 2017** to **September 2018**, a **12 % increase** over the previous year.
 - Harassment complaints **rose** despite **overall complaints dropping**.
 - **Visits** to the EEOC's sexual harassment **webpage** more than **doubled** after the #MeToo movement became a national conversation.
 - The EEOC filed **41 harassment lawsuits** over the past year, a **50 percent increase** from the previous year. The agency targeted companies as **large** as United Airlines and as **small** as a Dollar General in Maryland to resolve cases in which companies would not admit wrongdoing.

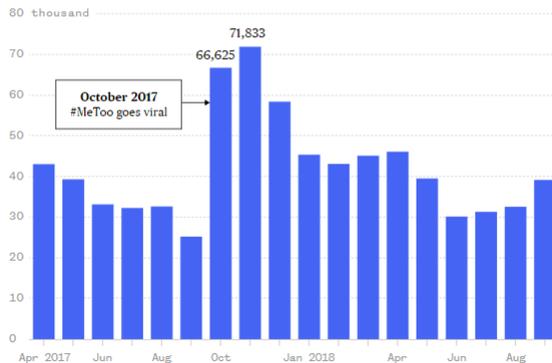


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The #MeToo effect

Traffic to the U.S. Equal Employment Opportunity Commission's page about sexual harassment spiked with the start of the #MeToo movement. With the rise in traffic came an increase in harassment charges brought to the EEOC, more lawsuits filed as a result of those charges, and more money recovered for victims of sexual harassment.



Source: The U.S. Equal Employment Opportunity Commission
Graphic: Jiachuan Wu / NBC News



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Healthcare Industry Particularly at Risk

TWO DOCTORS ACCUSED OF SEXUAL HARASSMENT HAVE COST NYC HOSPITAL SYSTEM NEARLY \$500,000 IN SETTLEMENTS

BY NEW YORK DAILY NEWS | JUNE 15, 2018



The city hospital system has paid nearly \$500,000 to settle lawsuits accusing two of its high-level doctors of being sexist.

DEC 21, 2017 MORE ON COMPLIANCE & LEGAL

UConn Health sexual harassment verdict a wake-up call for providers

The upheld decision means that hospitals and other organizations can be held liable when they should have known what was happening.

Nurse accuses Cedars-Sinai of failing to prevent sexual harassment by surgeon

Ayla Ellison (Twitter | Google+) - Wednesday, December 20th, 2017 Print | Email

Ani Chopourian vs. Catholic Healthcare West (2012)

A federal jury in California judgment in U.S. dismissed a trial in which Sacramento alleged a doctor's tenure. The complaint morning by saying, After attorneys on the case decreased the attorneys reached a

Is there a Weinstein in your hospital? Dealing with sexual harassment

by Kelsy Ketchum | December 14, 2017 | 0 Comments

Facebook 0 | Like 0 | LinkedIn 0

Recently, sexual harassment claims have become widespread, and every industry is dealing with the fallout. The ideal world would be one with no harassment claims, but we're not there yet. If your hospital is affiliated with Cedars-Sinai, alleges that he, assaulted her on July 17. She hit him on the back of the head after she inquired about a patient, he then grabbed her arm and said, "I'm not going to let you go." She was captured on a security video camera. She filed a lawsuit against the Cedars-Sinai Affiliates board of directors. She claims her work hours were reduced. She claims no meaningful work was done against Ms. Rickey based on her sexual harassment and discrimination. She claims that the hospital's policies did not shield you from this attack.



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Healthcare Industry Particularly at Risk

Why?

- Bodies and body parts and functions are seen and discussed all day every day, so **boundaries** of appropriate speech and conduct **may be blurred**;
- Employees often to work in **close proximity** with physical contact;
- **Hierarchical nature** of hospitals may empower would-be harassers while discouraging victims from reporting due to fear of retaliation;
- **Gender imbalance** (66% of physicians male / 83% of nurses female) exacerbates the power dynamic;
- Employees may experience sexual harassment from a **variety of additional sources** (patients and their family members, third party vendors, non-employee service providers).



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How the Mighty Have Fallen



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The Accused: An Ever-Expanding List

#MeToo Brought Down 201 Powerful Men.

#MeToo movement has singled out more than 400 high-profile people

By BLOOMBERG JUN 25, 2018 | 10:10 AM

These 9 Politicians Have Resigned for Sexual Misconduct in the Wake of #MeToo

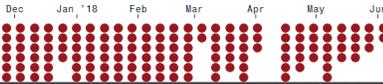


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celebrities, politicians, CEOs, and others who have been accused of sexual misconduct since April 2017

After Weinstein, the Flurry of #MeToo Headlines Haven't Stopped

When each individual's allegations were first reported in media, by week



The 97 Men (and One Woman) Taken Down by the #MeToo Movement

- OBEBECK
- MCCLURE
- RICE
- TRUMP
- VON TRIER
- GRASH
- QUERRERO
- BUSH
- HALPERN
- CARTER
- CORN
- MASTERS
- SEAGAL
- TAKEL
- KREISBERG
- LARSEN
- HENRY
- JEREMY
- STALLONE
- FRANKEN



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And the List Goes On . . .

Updates on famous men facing similar accusations are published periodically. The list continues to grow.

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Dec	Jan '18	Feb	Mar	Apr	May	Jun
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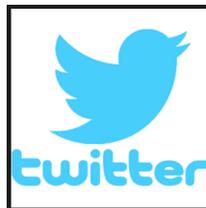


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Beware: Cyber-Harassment

With the advent of social media, harassment can now occur **24 hours a day.**



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Beware: Cyber-Harassment

- **Virtual harassment** - harassment through a social media site, for example, “friending” a co-worker on Facebook and then sending offensive messages (or repeated requests for a date)
- **Textual harassment** - harassing, intimidating, or inappropriate text messages
- **Sexting** - sexually explicit or offensive photos or videos sent via electronic media
- **Cyberstalking** - harassing an employee by following him or her on blogs, posts, and social websites



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How Can We Prevent Harassment and Minimize Legal Exposure?

- Lead by **example**.
- **Timely investigate**.
- Have a **policy in place**, and **consistently enforce** it.
- Revisit your policy
(have **complaints come to HR**)
- Have **appeal process**
(for anyone not satisfied with how a complaint was handled)
- Implement **annual training**



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Discussion Question

You have just received a call from an irate wife of one of your directors claiming he is having an extra-marital affair with a co-worker. There is not a direct reporting relationship, but the female is in a non-managerial position in another department. You had heard rumors of the affair but received no other information until now.

What, if anything, should you do?

Assume the wife comes to the hospital and confronts the woman allegedly having an affair with her husband. Does that change your approach? If so, in what way?



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Common Mistakes

- Dating employees who report directly or indirectly to you
- Extra-marital affairs
- Dating vendors
- Airing dirty laundry on social media



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Preventing Workplace Violence and Bullying



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Health Care Workers Especially Vulnerable

- OSHA - 5 percent of nearly 25,000 assaults occurred in health care and social services
- Department of Justice - health care 4 times more likely to be victims than private industry
- Bureau of Labor Statistics - violence-related injuries 4 times more likely in health care industry
- Joint Commission - violent incidents often result from:
 - patients who are mentally ill, use controlled substances, or are in police custody
 - patients who have received bad news about a diagnosis, or have engaged in criminal activity.
 - other factors: presence of weapons and domestic disputes among patients or visitors.



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Health Care Workers Especially Vulnerable

- From verbal abuse to physical assaults, healthcare workers on a daily basis face threats to their safety as they care for patients.
- In November 2018, a **shooting at Mercy Hospital in Chicago left four people dead.**
- Other hospitals encountered incidents of gun violence, including the **University of Kansas Medical Hospital, Westchester Medical Center in New York, Mount Sinai Hospital in Chicago, and the University of Alabama at Birmingham Highlands Hospital.**

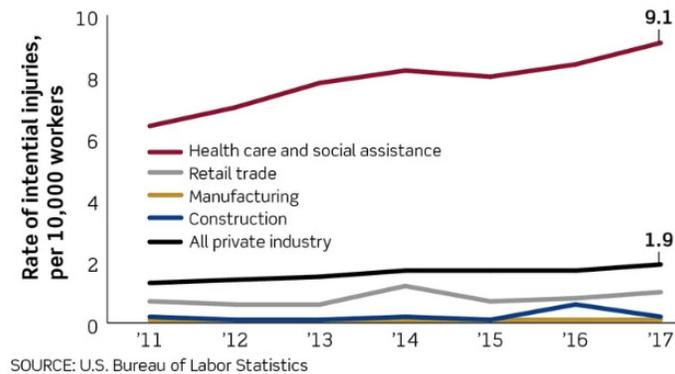


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Intentional worker injuries on the rise

Health care and social assistance workers experience intentional injuries by another person at far greater rates than the private industry overall. This includes only injuries involving days away from work.



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Workplace Violence and the ADA



- *Barnum v. The Ohio State Univ. Med. Ctr.* (2016)
 - Employee's co-workers reported concerns about her well-being following a divorce. Plaintiff indicated she had suicidal thoughts
 - Employer required her to undergo a psych evaluation. She sued under the Americans with Disabilities Act (ADA), claiming that her supervisors regarded her as disabled and required an impermissible medical exam
 - Court: Behavior raised questions over employee's ability to perform her job. The exam was job related and consistent with business necessity



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Workplace Violence – Requiring Employees to Undergo Counseling



- *Kroll v. White Lake Ambulance* (2012)
 - Employee exhibited erratic behavior and angry outbursts.
 - Employer required EAP or mental health counseling to continue working
 - Court said counseling may be medical exam under ADA



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Workplace Violence – Requiring Employees to Undergo Counseling



- *Bellehumeur v. Windsor Factory Supply Ltd.* (2015)
- Employee made threatening statements at work and allegedly threatened to kill his co-workers. Employee blamed his disability.
- Plaintiff was no longer a “qualified individual” once he made his “violent threats” and therefore he was not “entitled to protection under the ADA.”



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Ways to Confront and Stop Workplace Bullying

To confront and stop workplace bullying:

- Establish an anti-bullying policy that explains what bullying is and that is unacceptable behavior
- Train managers and all other employees on the policy
- Establish processes for reporting, investigating and resolving complaints
- Conduct periodic employee attitude surveys to determine if workplace bullying is not being reported



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Threats of Suicide

- According to Nurse.org:
 - **Nurses are 23% more likely to commit suicide than women in general**, namely because of inherent stress of the job and easy access to lethal doses of medication.
 - Nurses are four times more likely to commit suicide than people working outside of medicine.
- Interestingly, **suicide rates for physicians have been declining** because of aggressive support systems that have been put into place, and the reconstruction of work-life balance for many specialties.



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Discussion Question

One of your nurses has been going through a terrible divorce. It has devastated her. Two employees have approached their manager concerned about the employee's well-being. They overheard the employee say she just felt there was no reason to live and had thought about killing herself. The employee has continued to come to work and do her job, although she has appeared to be distracted.

What, if anything, should you do?



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Vaccination Requirements: Dealing with Increased Resistance from Health Care Workers



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Employees on the Offensive

- During 2018, employees continued to file cases seeking exemptions from vaccinations on religious grounds.
- Cases typically involve employers who either categorically deny vaccine exemption requests or refuse to offer alternatives.



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Employees' Grounds for Stating a Claim

- To state a claim under federal law an **employee** needs to **show** that he or she
 - has a **sincerely held** religious **belief** that conflicts with a work policy (such as a vaccination requirement),
 - **shared** that **belief** with the **employer**; and
 - and was **disciplined** for failing to comply with the policy.



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“Religion” Defined

- Per the Equal Employment Opportunity Commission (“**EEOC**”), this term can include new or uncommon religions, as well as ones that may seem “**illogical**,” “**unreasonable**,” or **lack belief in divine beings**.
- EXAMPLE: One federal district court found that employee’s **vegan lifestyle** could plausibly constitute a religious belief, so long as the employee’s commitment was sincerely held in a manner similar to traditional religious views.



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An Employer's Possible Defense to a Claim

- One **Possible Defense**: requested accommodation will cause “**undue hardship.**”
 - May seem an easy burden to meet in cases involving non-vaccinated health care workers, but not necessarily.
 - Each case is different and must be evaluated accordingly.



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EEOC v. St. Vincent Hospital and Health Center, Inc.



- A hospital asked a records clerk, sonographer, and **four registered nurses who refused vaccinations to provide clergy attestation** of the validity of their religious beliefs with their exemption requests.
- When they **failed to do so**, they were **fired**.
- The **employees sued**, alleging failure to accommodate their religious beliefs.
- The hospital **settled for \$300,000**, offered **reinstatement**, and promised to **end its policy of automatically rejecting vaccination requests not accompanied by clergy attestation**.



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EEOC v. Baystate Medical Center



- A medical center allegedly gave a **Christian human resources employee the option of wearing a mask** after she refused to get a vaccination.
- The medical center **suspended her without pay** when a superior saw her **without a mask**.
- The **EEOC** has **alleged** that the mask **policy is unreasonable** because others had a **hard time understanding her when she spoke**.
- The EEOC claims that allowing her to remove the mask while speaking **would pose no undue hardship** to the hospital, given her **lack of patient contact**.
- The case is **still pending** in a U.S. District Court in Massachusetts.



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Hustvet v. Allina Health System



- Vaccination issues also generated a **disability accommodation decision in 2018**.
- The **employee refused** to take steps to develop immunity to **rubella**.
- Granting summary judgment to the employer, the Eighth Circuit Court of Appeals found that the **employee was not “disabled”** because her alleged **“chemical sensitivities and allergies” did not substantially limit** any of her major life activities.
- In addition, even assuming the plaintiff had a disability, her **claim failed as a matter of law**. The rubella requirement was mandated to ensure that patient-care providers **would not spread disease**. Thus, it was **job related, consistent with business necessity**, and **did not violate the ADA** or the Missouri Human Rights Act.



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Addressing Pay Equity And Employee Classification Issues In Healthcare



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Equal Pay Act (EPA) of 1963

- Part of the Fair Labor Standards Act of 1938
- Enforced by the EEOC
- Prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.



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What is the Gender Wage Gap?

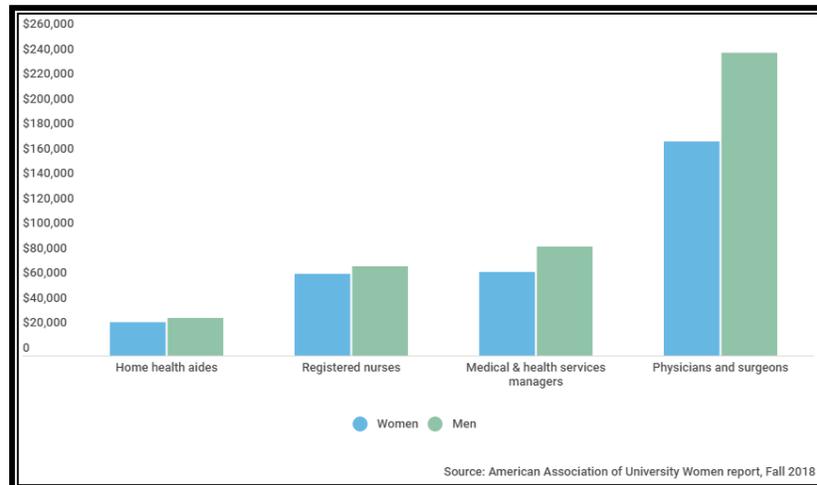
- A measure of what women are paid relative to men.
- **Calculated** by **dividing women's wages by men's wages**
- Often **expressed** as a **percent**
- The results express how much a woman is paid for each dollar paid to a man
- This gender pay ratio is often measured for year-round, full time workers and compares the annual wages of the median man with that of the median woman



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Median Salary by Gender



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Top 10 Professions with Highest Pay Gaps

- Financial managers;
- **Physicians/surgeons**;
- Accountants and auditors;
- Supervisors of retail workers;
- **RNs**;
- Marketing and sales managers;
- Lawyers;
- Chief executives;
- **Medical & health services managers**; and
- Education administrators.



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More Health Care Stats . . .

In 2017:

- Gap between male and female physicians/surgeons in 2017 was \$19,543,000,000
 - **Female physicians/surgeons** were paid **71%** of what **male physicians** and surgeons were paid.
- Gap between male and female **RNs** was \$12,509,000,000.
 - **Female RNs** were paid **92%** of what **male RNs** are paid.
- Gap between male and female medical and health services managers was \$9,287,000,000.
 - **Female medical and health services managers** were paid **77%** of what male medical and health services managers were paid.



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Did You Know?

- More women hold bachelor's degrees than men
- In the US, **women** are **50%** of the **labor force** and **40%** of **primary wage earners**
- It is reported that women take home **82.9** cents for every dollar earned by men
- The wage gap gets worse with age

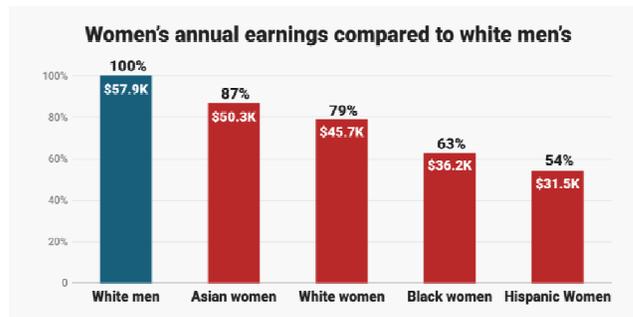


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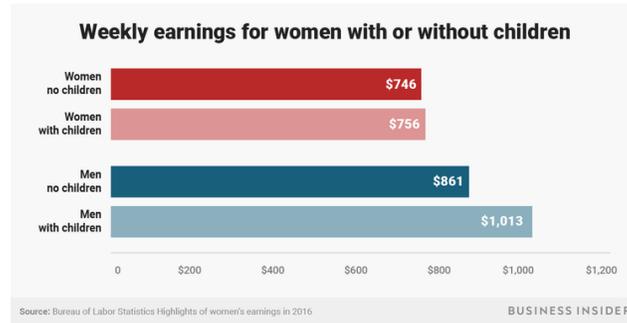
The Wage Gap for Women v. White Males



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“The Mommy Penalty?”



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Why is There a Pay Gap?

- Self-segregation into low-paying occupations?
- Education?
- Time in workforce?
- Experience?
- Discrimination?
- Bidding power?
- Low Pay cycle? (some states prohibit asking about salary)



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Proposed Theories on How to Address the Wage Gap

- **Conduct pay audits** (analyze their employees' salaries and make adjustments accordingly)
- **Prohibit retaliation for wage disclosure** (allow employees to inquire about other people's wage and know whether they are being shortchanged)
- **Ban the use of prior salary history** (do not assume prior salaries were fairly established by previous employers; instead, use market research to determine what a position is worth)



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Navigating the Conflict Between Federal and State Marijuana Laws



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Marijuana Under Federal Law

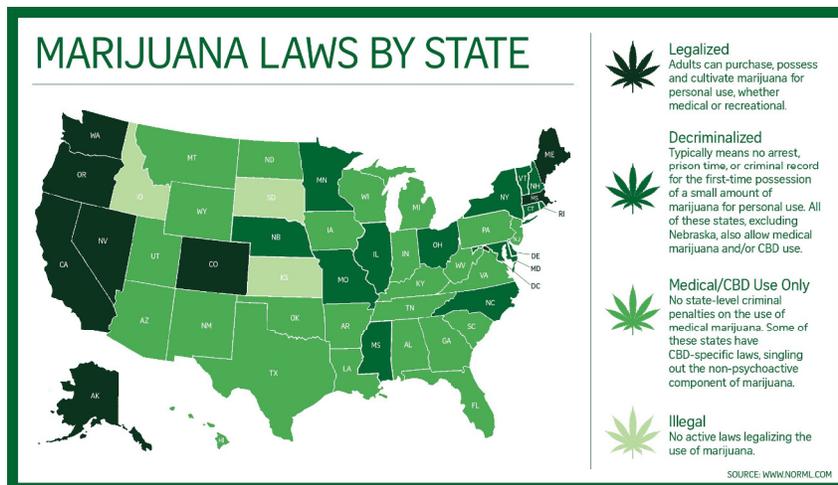
- Marijuana is classified as a Schedule I illegal drug by the federal Controlled Substances Act (“CSA”) that may not be used, possessed, manufactured, or distributed, even for medical purposes.
- Shift in enforcement by U.S. Attorney General with Trump Administration



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“Legalized” Marijuana



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No Laws Concerning Marijuana

Alabama, Idaho, Kansas, Kentucky, Mississippi, Nebraska, **North Carolina**, **South Carolina**, South Dakota, Texas, and Wyoming.



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Medical Marijuana

- **Non-Discrimination Provisions** – you cannot take adverse action against an employee (failure to hire, terminate, promotion, etc.) if they have a medical marijuana certification unless they are in possession, use, or impaired while at work.
 - Arizona, Arkansas, Connecticut, Delaware, Maine, Minnesota, Nevada, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, and West Virginia.
- **Right to enforce Drug-Free Workplace Policy** – which can include a pre-employment testing, post-accident, reasonable suspicion, and/or zero tolerance.
 - California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Massachusetts, Michigan, Missouri, Montana, New Jersey, Ohio, Oregon, Tennessee, Vermont, **Virginia**, Washington, and Wisconsin.



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Virginia Medical Marijuana Law

- Virginia permits physicians to **issue written certification to patients** and **dispense cannabidiol** containing at least **15% cannabidiol but not more than 5% THC** to treat any **diagnosed condition** or disease that **practitioner determines would benefit** from that use. Va. Code Ann. 54.1-3408.3
- This law **does not require employers** to **allow** it in the workplace **or accommodate** its use by employees.



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What to Do?

- Treat medical marijuana like other controlled substances
- **Involve your employment law partners**



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Questions



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