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Patrick C. Coyne

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A HUGE WIN FOR EQUAL PAY: WOMEN'S NATIONAL TEAMS GRAB THEIR BIGGEST VICTORIES YET IN RECENT CONTRACT DISPUTES

"It's not about the money, it's about the message we send. We are sending the equality message out that this is the right thing to do."¹

I. INTRODUCTION

The gender-based pay gap in the American workforce is no secret.² The gap has narrowed over time, but persistent and systematic pay inequality remains impossible to deny despite the narrowing gap.³ The pay gap covers virtually all industries, and sports are not immune either, as reports suggest pay gaps exist to varying extents in sports like golf and basketball.⁴ In the realm of sports, the equal pay discussion often deteriorates due to the assumption that women's sports are less popular than men's, with opponents of equal pay arguing that women should be paid in

1. Kira Cochrane, *Billie Jean King: It's Not About the Money, It's About the Equality Message*, THE GUARDIAN (June 23, 2013) (quoting Billie Jean King), <https://www.theguardian.com/sport/2013/jun/23/billie-jean-king-equality-message> [<https://perma.cc/8N4C-2494>] (discussing story of Billie Jean King, champion of equal pay for women in tennis during 1970s and her famous "Battle of the Sexes" match against Bobby Riggs, whom she defeated, in 1973).

2. See Anna Brown & Eileen Patton, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/04/03/gender-pay-gap-facts/> [<https://perma.cc/4ATC-P38D>] (tracking gender pay gap among workers, annually and estimating that "17-cent gender pay gap for all workers in 2015 has narrowed from 36 cents in 1980," but also that, "[i]n 2015, women [still only] earned 83% of what men earned").

3. See *id.* (discussing potential reasons for gender gap persisting may include more women taking significant time away from work to care for family than men and overrepresentation by women in lower-paying occupations). The article also discusses how "part of the pay gap may also be due to gender discrimination. In the 2013 survey, women were about twice as likely as men to say they had been discriminated against at work because of their gender (18% vs. 10%)." *Id.* The article also explains that "77% of women and 63% of men said this country needs to continue making changes to give men and women equality in the workplace." *Id.*

4. See John Walters, *Taking a Closer Look at the Gender Pay Gap in Sports*, NEWSWEEK (Apr. 1, 2016, 12:23 PM), <http://www.newsweek.com/womens-soccer-suit-underscores-sports-gender-pay-gap-443137> [<https://perma.cc/TTV7-GYJ4>] (comparing alleged disparities in Women's Soccer pay, after filing of their complaint with Equal Employment Opportunity Commission, with women in other sports, and noting tennis is "by far the most lucrative sport for female athletes, and also the most gender-equitable").

accordance with the popularity of their sports.⁵ However, despite those overly-broad assertions, several well-grounded arguments support equal pay, including, but not limited to: “[e]qual pay for equal work,” the moral justification and the underlying policy for protection against pay discrimination in U.S. law; women playing the same sports as men for the U.S. and performing better than their male counterparts; and, women’s team players may bring more economic benefit to their league or governing body than their male counterparts do to their equivalent organizations.⁶

Until recently, the National Teams for Women’s Soccer and Ice Hockey were not immune to this phenomenon of pay disparity.⁷ The United States’ Women’s National Soccer and Hockey Teams have existed and competed internationally since the mid-1980s and early 1990s, respectively.⁸ Each Team has been highly competitive

5. See Andrew Das, *Pay Disparity in U.S. Soccer? It’s Complicated*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html> (discussing rationales given by U.S. Soccer President Sunil Gulati for compensation to Women’s players, including how even though Women “broke viewing records” related to television ratings during most recent World Cup, “ratings for men’s games have been more than double those for women’s games, on average, since 2012,” and “[e]xcluding World Cup games, the men’s team’s ratings are almost four times as high”).

6. U.S. EQUAL EMP. OPPORTUNITY COMM’N, FACTS ABOUT EQUAL PAY AND COMPENSATION DISCRIMINATION, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> [<https://perma.cc/3JZF-X5U4>] (last visited Dec. 30, 2017) (“The right of employees to be free from discrimination in their compensation is protected under several federal laws enforced by the US Equal Employment Opportunity Commission.”). For further discussion on the rationales for equal pay based on revenue and performance, especially as it relates to the Women’s Soccer dispute, see *infra* notes 76–81 and accompanying text.

7. See Kevin Allen & A.J. Perez, *U.S. Women Agree to New Deal with USA Hockey; Will Play at World Championships*, USA TODAY (Mar. 28, 2017, 11:08 PM), <https://www.usatoday.com/story/sports/hockey/2017/03/28/usa-hockey-women-dispute-world-championships/99538056/> [<https://perma.cc/B2AC-E5DM>] (detailing newly agreed contract between United States Women’s National Hockey Team and USA Hockey, and including details such as that “players will make around \$70,000 each per year, although they could make more than \$100,000 in Olympic years if they win gold”); see also Graham Hays, *U.S. Soccer, Women’s National Team Ratify New CBA*, ESPN (Apr. 5, 2017), <http://www.espn.com/espnw/sports/article/19082314/us-soccer-women-national-team-ratify-new-cba> [<https://perma.cc/E2RW-VSHW>] (reporting on newly ratified collective bargaining agreement between United States Women’s National Soccer Team and United States Soccer Federation, which “is expected to cover a five-year period that includes both the 2019 FIFA Women’s World Cup in France and the 2020 Olympics in Tokyo”). For further discussion on the resolution of the Women’s Soccer deal, see *infra* notes 133–138 and accompanying text. For further discussion of the resolution of the Women’s Hockey deal, see *infra* notes 139–145 and accompanying text.

8. See *IIHF World Women’s Championships*, INT’L ICE HOCKEY FED’N, <http://www.iihf.com/iihf-home/history/all-medallists/women.html> (last visited Aug. 21, 2017) (listing each IIHF World Women’s Championship played, by year, beginning in 1990); see also *U.S. WNT Flashback—20th Anniversary of First-Ever Match: Who*

and successful since its formation, with both winning multiple prestigious medals, including gold, in their respective World Championship and Olympic competitions.⁹ All the while, equal pay issues have also been a backdrop to the Teams' successes, and players, such as Women's Soccer captain Carli Lloyd, have taken strong stances on the issue.¹⁰ Equal pay issues have existed alongside the successes of each Team almost since their respective formations, but greater revenue and growth of each sport in the near future are expected because of the most recent successes of each Team, making the time ripe for the female athletes to receive the pay commensurate with their economic value they provide to their governing bodies.¹¹

Scored First?, U.S. SOCCER (Aug. 18, 2005), <http://www.ussoccer.com/stories/2014/03/17/12/57/u-s-wnt-flashback-20th-anniversary-of-first-ever-match-who-scored-first> [<https://perma.cc/7GJQ-X67X>] (detailing early history of U.S. Women's Soccer, such as first U.S. Women's Soccer games that took place in 1985 and that it was either Emily Pickering or Michelle Akers who scored first goal in Team's history).

9. *See History: U.S. Soccer Team Honors*, U.S. SOCCER (last visited Aug. 29, 2017), <https://www.ussoccer.com/about/history/awards> [<https://perma.cc/3C67-NYZ2>] (recounting historical achievements of Women's and Men's Teams, including four Olympic gold medal wins for Women and four FIFA World Player of the Year Individual Award winners); *see also U.S. Women's Hockey Olympic History and Records*, USA HOCKEY, <http://teamusa.usahockey.com/page/show/2906622-u-s-women-s-olympic-history-and-records> [<https://perma.cc/82CB-P2CU>] (last visited Aug. 29, 2017) (stating Women's National Ice Hockey Team has played in every Winter Olympic Games since competition began in 1998, winning gold medal in 1998 Olympic games, three silver medals since then, and one bronze medal as well). The Women's National Ice Hockey Team also won its most recent gold medal, and its first at the Olympics since 1998, in February of 2018, when it defeated Canada 3-2 in a shootout. *See* Matthew Futterman, *U.S. Women Break Canada's Grip on Hockey Gold*, N.Y. TIMES (Feb. 21, 2018), <https://www.nytimes.com/2018/02/21/sports/olympics/usa-womens-hockey-canada.html> (reporting on Women's Hockey Team's gold medal victory, in which it defeated Canadian team that had won previous four gold medals).

10. *See* Carli Lloyd, *Carli Lloyd: Why I'm Fighting for Equal Pay*, N.Y. TIMES (Apr. 10, 2016), https://www.nytimes.com/2016/04/11/sports/soccer/carli-lloyd-why-im-fighting-for-equal-pay.html?_r=0 (explaining that while improvements have been made since days of no salaries and no health benefits for players, team still considered striking two years prior over equal pay issues). In her piece, Lloyd also added that she and fellow players filed the complaint with the Equal Employment Opportunity Commission ("EEOC") because they felt they had, "gotten nowhere negotiating with [their] federation for years, and it became clear to us that nothing had changed." *Id.*

11. *See* Das, *supra* note 5 (discussing context surrounding timing of EEOC complaint being filed by several Women's National Team players, including record levels of profit and popularity following World Cup victory and ongoing collective bargaining negotiations taking place at time); *see also* Alan Taylor, *USA Wins the 2015 Women's World Cup*, THE ATLANTIC (July 6, 2015), <https://www.theatlantic.com/photo/2015/07/usa-wins-the-2015-womens-world-cup/397763/> [<https://perma.cc/3NQW-NFJE>] (describing U.S. Women's National Team's 5-2 victory over Japan to win its third FIFA World Cup title in 2015, in which midfielder Carli

The United States Women's National Soccer Team Players Association ("the Players Association") was no stranger to conflict with its governing body, the United States Soccer Federation ("the Federation"), prior to their most recent contract dispute.¹² The parties had litigated in prior years, and their ongoing dispute came to a head in the spring of 2016.¹³ Similarly, the Women's National Hockey Team settled its own contract dispute with its own governing body, USA Hockey, just days before the Soccer Team's resolution.¹⁴ While the history between the parties in the hockey dispute may not have been as contentious as relations between the parties in the Soccer dispute, the Hockey Team was still able to make a very real threat of boycotting an upcoming World Championship event.¹⁵ The subsequent resolutions of the disputes between the players and their governing bodies were each huge steps forward for achieving the goal of equal pay for women in sports.¹⁶ There are still disparities between the earning potential of female players and their male counterparts, but the new deals give the players pay that is far more equitable in light of what the Men's Team

Lloyd scored three goals and which was estimated to be watched by more than more than twenty-five million viewers on television).

12. See generally *U.S. Soccer Fed'n, Inc., v. U.S. Women's Nat'l Soccer Team Players Ass'n*, 190 F. Supp. 3d 777 (N.D. Ill. 2016) [hereinafter *USSF v. USWNT*]. See also *id.* at 787 (holding that Memorandum of Understanding between parties incorporated unmodified terms of expired CBA first agreed to in 2005, and thus players could not strike based on "no-strike clause" that was included).

13. See *id.* at 781–83 (discussing factual background and dispute between parties); see also Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), <https://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html> (discussing filing of EEOC complaint by players and describing details included in it, which was larger part of National Team's ongoing legal battle with Federation). For further background on the buildup to this dispute, see *infra* notes 69-75 and accompanying text.

14. See Allen & Perez, *supra* note 7 ("Members of the U.S. women's national hockey team agreed to a four-year contract with USA Hockey on Tuesday night.").

15. See Scott Allen, *U.S. Men's Hockey Players May Boycott World Championships in Solidarity with Women's Team*, WASH. POST (Mar. 26, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/03/26/u-s-mens-hockey-players-may-boycott-world-championships-in-solidarity-with-womens-team/?utm_term=.28456c29d40e [<https://perma.cc/JLR2-SK5Q>] (discussing how Men's National Hockey Team planned to boycott their own World Championship event alongside women). The same article also discussed a statement by the NHL Players Association following USA Hockey's efforts to recruit other women to play in the tournament in the event of a boycott. *Id.* The statement read, in part, as follows: "It is important that the best American women players be on the ice for the World Championship and the notion of seeking replacement players will only serve to make relations, now and in the future, much worse." *Id.*

16. For further discussion on the progress made by the resolution of these disputes as it relates to broader equal pay efforts, see *infra* notes 180–211 and accompanying text.

players receive, and represent strong first steps toward true equality in the future.¹⁷

This Comment examines, from a legal standpoint, whether each dispute represents an equal pay issue based on gender discrimination, and how the resolution of each dispute resulted in “equitable pay” that represents affirmative steps toward potentially achieving true equal pay in the future.¹⁸ Part II of this Comment discusses the laws regulating equal pay in America, as well as the legislation and the contracts that established the relationships between the players and their respective governing bodies.¹⁹ Part III of this Comment argues that, while neither Team achieved the same pay, dollar-for-dollar, as their male counterparts, they achieved “equitable pay” and put their sports in better positions to grow in coming years at the professional and grassroots levels.²⁰ Finally, Part IV of this Comment provides a summary of the key issues discussed and conclusions made based on the new deals, and what the deals might mean for the ultimate goal of truly equal pay.²¹

II. BACKGROUND

A. Look at Equal Pay Laws in America: The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964

Two separate laws allow private rights of action alleging gender-based discrimination to be brought against another party, such as those the players on the US Women’s National Soccer Team brought in their Equal Employment Opportunity Commission (“EEOC”) complaint: The Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.²²

17. For further discussion on how the new deals will impact players outside of those who play for the National Teams and how the new deals stand to improve their situations, see *infra* notes 111–211 and accompanying text.

18. For further discussion on whether each resolution can be said to have achieved “equal pay” in a dollar-for-dollar legal sense, see *infra* notes 146–179 and accompanying text.

19. For further discussion on the background of the disputes and laws relevant to them, see *infra* notes 22–93 and accompanying text.

20. For an analysis on how each Team can be considered to have achieved “equitable pay” and the potential broader impacts that may come of the new deals, see *infra* notes 95–211 and accompanying text.

21. For a summary of the key issues and conclusions made in this Comment, see *infra* notes 212–224 and accompanying text.

22. See Amy Steketee Fox, *U.S. Women’s Soccer Team’s EEOC Charge Spotlights Wage Discrimination Issues*, 26 NO. 5 IND. EMP. L. LETTER 5 (2016) (discussing each legal avenue, and main difference between two being that while successful showing of discrimination under Title VII requires showing of intent on employer’s part, there is no intent requirement under EPA). See generally Equal Pay Act of 1963, 29

1. *The Equal Pay Act of 1963*

The Equal Pay Act (“the EPA”) is codified at 29 U.S.C. Section 206(d) and is part of the Fair Labor Standards Act (“FLSA”).²³ Generally, the EPA prohibits employers, who are subject to it, from discriminating “between employees on the basis of sex by paying wages to employees” of one sex at a rate less than employees of another sex, when such employees perform “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”²⁴

Importantly, the EPA only applies to relationships between “employers” and “employees,” under the Act, and not, for example, to relationships held by independent contractors.²⁵ Moreover, according to sections of the Code of Federal Regulations applicable to the EPA, “[t]he equal work standard does not require that compared jobs be identical, only that they be substantially equal.”²⁶ The EPA protects men and women equally, but was “motivated by concern for the weaker bargaining position of women.”²⁷ It is also of note that an employer who violates the EPA may not reduce the wage rate of any other employee in order to comply with it, and plaintiffs bringing EPA claims are not required to show that an employer intended to discriminate.²⁸

U.S.C. § 206(d) (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(1)–2000e(17) (2012).

23. See 29 C.F.R. § 1620.1 (2017) (discussing basic applicability of Equal Pay Act as it is part of Fair Labor Standards Act under 29 U.S.C. § 206(d)). The Fair Labor Standards Act is codified at 29 U.S.C. §§ 201–219 (2012).

24. 29 U.S.C. § 206(d)(1) (prohibiting sex discrimination against employees in workplace).

25. See 29 U.S.C. § 203(d) (“‘Employer’ includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.”); see also 29 U.S.C. § 203(e) (defining “employee” as “any individual employed by employer” and by public agency in certain circumstances, but not at other times, such as when individual volunteers “their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries”).

26. 29 C.F.R. § 1620.13(a) (defining what “equal work” means under EPA); see also 1 DANIEL B. ABRAHAMS, ET AL., FAIR LABOR STANDARDS HANDBOOK FOR STATES, LOCAL GOVERNMENT, AND SCHOOLS ¶¶ 710–14, 1998 WL 35159406 (noting that “substantially equal” test permits finding that two jobs are equal for EPA purposes even though one job involved tasks not required by other).

27. 29 C.F.R. § 1620.1(c) (“Men are protected under the Act equally with women. While the EPA was motivated by concern for the weaker bargaining position of women, the Act by its express terms applies to both sexes.”).

28. See 29 U.S.C. § 206(d)(1) (“[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.”); see also Fox, *supra*

A “plaintiff must make a *prima facie* showing that the employer paid different wages to an employee of the opposite sex for substantially equal work” when bringing an EPA claim.²⁹ There are four affirmative defenses that an employer may raise after a plaintiff has asserted a *prima facie* case of gender-based discrimination under section 206(d)(1).³⁰ The four exceptions include when a employer pays employees based on: “(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.”³¹ Under the EPA, an employee who prevails on a discrimination claim stands to recover the money that was withheld from them as a result of the gender discrimination.³²

2. *Title VII of the Civil Rights Act of 1964*

42 U.S.C. Section 2000e provides Title VII of the Civil Rights Act of 1964 and offers another avenue for bringing causes of action related to gender-based discrimination claims.³³ The same statute also created the EEOC, the governmental agency with which the Women’s Soccer Team filed their wage discrimination complaint.³⁴ Title VII prohibits several forms of discrimination, including wage discrimination on the basis of sex.³⁵ A key difference between claims brought under Title VII and the EPA is that after establishing a *prima facie* case under Title VII, an employee must demonstrate the employer *intended* to discriminate based on gender for the case to succeed on its merits, rather than simply showing that

note 22 (“Unlike in Title VII wage discrimination claims, an employee filing an EPA lawsuit is not required to demonstrate that the employer intended to discriminate.”).

29. *Byrd v. Ronayne*, 61 F.3d 1026, 1033 (1st Cir. 1995) (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1994)).

30. *See id.* (listing affirmative defenses).

31. *Id.*; *see also* ABRAHAMS, ET AL., *supra* note 26, at ¶ 714 (noting that EPA fails to define what constitutes “any other factor other than sex,” and that while legislative history of EPA indicates term is to be broad in nature, few defendants have prevailed when invoking this defense).

32. *See* 29 U.S.C. § 206(d)(3) (“For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.”).

33. *See* 42 U.S.C. §§ 2000e(1)–(17).

34. *See* 42 U.S.C. § 2000e-4 (creating Equal Employment Opportunity Commission and establishing it be composed of five members appointed by President with advice and consent of Senate).

35. *See* 42 U.S.C. § 2000e-2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

discrimination occurred, as is the case for claims brought under the EPA.³⁶ While Title VII requires a showing of intent to discriminate where an EPA claim does not, case law suggests Title VII is otherwise far broader in the discrimination it covers.³⁷ For example, and potentially crucially for the pending Women's Soccer EEOC complaint, plaintiffs bringing Title VII causes of action are not required to show "equal work" was performed by employees of each sex, which could make it easier to succeed, if a case were to reach the merits stage, under Title VII if intent to discriminate can be shown.³⁸ Moreover, Title VII is friendlier to plaintiffs in the dam-

36. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–57 (1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) (refining approach taken in *McDonnell Douglas*, and providing three-step, burden shifting framework to be applied in disparate treatment cases brought under Title VII). Under this approach, "first, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Id.* at 252–53. If the plaintiff makes that showing, "the burden shifts to the defendant 'to articulate some legitimate nondiscriminatory reason for the employee's rejection.'" *Id.* at 253 (quoting *McDonnell*, 411 U.S. at 802). Finally, if the defendant meets their burden, then the burden shifts back to the plaintiff again, who must show by a preponderance of the evidence that the reasons offered by the defendant were not the true reason, but rather that the defendant intended to discriminate against the plaintiff based on some characteristic like race or gender. *Id.* See also 42 U.S.C. § 2000e-2(h) (establishing that it shall not be unlawful for employer to provide different standards of compensation or different terms pursuant to bona fide seniority or merit system "provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin"); see also Fox, *supra* note 22 ("Unlike in Title VII wage discrimination claims, an employee filing an EPA lawsuit is not required to demonstrate that the employer intended to discriminate.").

37. See, e.g., *Washington Cty. v. Gunther*, 452 U.S. 161, 170 (1981) (holding Title VII's prohibition of discrimination is to be read broadly, and incorporation of EPA's affirmative defenses into Title VII do not limit claims brought under it to those based equal pay for "equal work"). The majority opinion in *Washington Cty.* also cited past interpretations of Title VII as "prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of religion, sex, or national origin." *Id.* at 180 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976)). It further noted Congress's intent when passing Title VII was "to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes" when petitioners sought to interpret Title VII more narrowly. *Id.* (quoting *L.A. Dep't. of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)).

38. See *id.* at 168 (affirming judgment of Court of Appeals that held "claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity, or quality of production," or "any other factor other than sex"). Compare 29 U.S.C. § 206(d)(1) (describing how "[n]o employer having employees subject to" the act shall discriminate by paying less wages to employees of the opposite sex when such employees perform "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions") with 42 U.S.C. § 2000e-2(a) (including no requirement of showing of "equal work"). See also U.S. EQUAL EMP. OPPORTUNITY COMM'N, TYPES OF DISCRIMINATION,

ages it makes recoverable, as plaintiffs who succeed on Title VII claims may recover back pay, compensatory damages, attorney's fees, and even punitive damages in certain circumstances.³⁹ Beyond those distinctions, the options are fundamentally similar in that they serve as prohibitions against discrimination in the workplace and allow for the same affirmative defenses.⁴⁰

B. Players and Teams: The Working Relation Between Each Team and Its Governing Body

With the relevant laws identified, it is also necessary to understand the relations between the Teams and their governing bodies to understand how the law might apply to their disputes.⁴¹

1. "Employee" or "Independent Contractor"?

Employment law makes a distinction between "employees" and "independent contractors" that is relevant for the purposes of disputes between athletes and their governing bodies.⁴² It can be un-

<https://www.eeoc.gov/laws/types/equalcompensation.cfm> [<https://perma.cc/T3G7-AMS7>] (last visited Sept. 22, 2017) ("Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement under Title VII . . . that the jobs must be substantially equal.").

39. 42 U.S.C. § 2000e-5(g)(1) ("[T]he court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief as the court deems appropriate."); *see also* 42 U.S.C. § 1981a(b)(2) ("Compensatory damages awarded under this section shall not include back pay, interest on back pay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964."); Fox, *supra* note 22 (noting also that punitive damages will be "subject to caps based on the employer's size").

40. *See* 42 U.S.C. § 2000e-2(a)-(d) (stating general prohibition against discrimination); *id.* § 2000e-2(h) (listing same defenses as found in EPA).

41. For a discussion on the employment relationships between each of the Teams and their governing bodies, see *infra* notes 49-68 and accompanying text.

42. *See, e.g.,* Judith E. Kramer, *Employee or Independent Contractor? Pitfalls of Misclassification*, 11 NO. 7 FED. EMP. L. INSIDER 7 (2014) (discussing importance of properly classifying workers as "employees" for ability to make use of certain benefits, including that "[e]mployees, but not independent contractors, are protected by federal workplace protection laws such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSH Act), the Family and Medical Leave Act (FMLA), and similar state workplace laws"). *See also* HR Series, § 1:70. *Independent Contractors*, 1 FAIR EMP'T PRACTICES § 1:70 (2018) ("The EPA excludes independent contractors from coverage because the person working for an employer must be an employee for his or her employment to be covered."); Michael B. Snyder, § 6:135. *Title VII, ADEA, and ADA*, 1 COMP. AND BENEFITS § 6:135 (2018) ("The ADEA and Title VII do not cover independent contractors as there is no employer-employee relationship."). For a discussion on the Soccer Team's status as employees of the Federations, see *infra* notes 49-57 and accompanying text. For further discussion on the Hockey Team's status as independent contractors, but also how

clear at times whether actors are categorized as “employees” or “independent contractors.”⁴³ When trying to make this categorization, a greater degree of certainty that players are employees puts them more neatly under the reach of the FLSA, EPA, and Title VII, providing them protection under employment discrimination law, while less certainty makes the issue far more convoluted, generally only able to be saved by a court’s broad reading of the applicable law if the issue reaches that point.⁴⁴

Courts apply an “economic reality” test to determine whether an individual is an “employee” or an “independent contractor,” factoring whether the relationship between an individual and an employer demonstrates “economic dependence.”⁴⁵ Courts weigh several factors when applying the “economic reality” test, but “economic dependence” is the main focus of any inquiry.⁴⁶ To determine whether the relationship demonstrates economic dependence, courts have examined “whether an individual is ‘in

that might change with their new deal, see *infra* notes 176–179 and accompanying text.

43. See, e.g., Michelle L. Evans, *Establishing Employee or Independent Contractor Status*, 108 AM. JUR. PROOF FACTS 3D 247 § 2 (2009) (explaining intricacies of employee-independent contractor distinction and explaining “when clarification of the worker’s status is not made at the beginning of the relationship, problems can arise in the future surrounding the worker’s status” and that when this happens, “and there is no agreement to review to clarify the relationship of the parties, courts will look to certain factors to determine the worker’s status with the company”).

44. For further discussion on the application of each statute, see *supra* notes 23–40 and accompanying text.

45. See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (citing *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)) (“To determine whether an individual falls into the category of covered ‘employee’ or exempted ‘independent contractor,’ courts look to the ‘economic reality’ of the relationship between the alleged employee and alleged employer and whether that relationship demonstrates dependence.”).

46. See *id.* at 1311–12 (listing factors). Factors include:

- (1) the nature and degree of the alleged employer’s control as to the manner in which the work is to be performed;
- (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of workers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanency and duration of the working relationship;
- (6) the extent to which the service rendered is an integral part of the alleged employer’s business.

Id. at 1312 (footnote omitted). The Eleventh Circuit further noted that all factors were relevant to determine a worker’s status, but none were dominant, and applied them while ultimately seeking whether there was “economic dependence” and if they indicated “usual path” of employee or independent contractor. *Id.* (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311–12 (5th Cir. 1976)).

business for himself,'” and thus an independent contractor, “or is ‘dependent on finding employment in the business of others,’” and is an employee instead.⁴⁷ Ultimately, if the workers in question act like or have tendencies of “employees” in the course of their work, an employer’s effort to nonetheless label them as “independent contractors” will not be dispositive, and the FLSA and available protections of Title VII and the EPA may still protect the workers under the “economic reality” test.⁴⁸

2. *Collective Bargaining Agreements: Women’s Soccer*

Players for the U.S. Women’s National Soccer Team are “employees” of the Federation based on the collective bargaining agreement between the parties, and, as a result, the National Soccer Team’s dispute avoids the potential complexities of determining the players’ statuses under EPA and Title VII.⁴⁹ The National Labor Relations Act (“NLRA”) is the main body of law governing collective bargaining at the federal level between employers and employees, and by explicitly excluding “independent contractors” from its definition of protected “employees” the Act makes it clear that only “employees” may collectively bargain.⁵⁰ In general, the NLRA governs collective bargaining at the federal level, but state laws regulate collective bargaining and collective agreements as well.⁵¹ Given that collective bargaining is governed by federal and

47. *Id.* (quoting *Mednick v. Albert Enters., Inc.*, 508 F.2d 297, 301–02 (5th Cir. 1975)).

48. *Cf. Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (holding that employees of slaughterhouse labeled as “independent contractors” were actually employees, and thus protected by FLSA, and that relationship was not dependent on label they were given nor isolated factors, “but rather upon the circumstances of the whole activity”).

49. *See* Complaint for Anticipatory Breach of Contract and for Declaratory Relief [hereinafter Complaint] at 4, *USSF v. USWNT*, 190 F. Supp. 3d 777 (N. D. Ill. Feb. 3, 2016) (No. 1:16-cv-01923), 2016 WL 462452 (“The Players Association is the exclusive collective bargaining representative of all players selected to play for the Women’s National Team, who are, therefore, employees of US Soccer.”).

50. *See* 29 U.S.C. § 152(3) (2012) (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer . . . but shall not include . . . any individual having the status of independent contractor.”).

51. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012); *Collective Bargaining*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/collective_bargaining [<https://perma.cc/J7UQ-QRFN>] (last visited Apr. 25, 2018) (providing definition of “collective bargaining”). (“The main body of law governing collective bargaining is the National Labor Relations Act (NLRA). It explicitly grants employees the right to collectively bargain and join trade unions State laws further regulate collective bargaining and make collective bargaining enforceable under state law.”).

state statutory laws and administrative agency regulations, the aforementioned labor laws apply to collective bargaining agreements and the relationships between parties to them.⁵²

The U.S. Women's National Soccer Team is relatively young compared to the Federation and the Men's National Soccer Team, but the players and the Federation share an employer-employee relationship nonetheless, based on their history of collective bargaining.⁵³ The Federation "has served as a member of the Fédération Internationale de Football Association ("FIFA") since 1914 and is recognized by the U.S. Olympic Committee as the national governing body for the sport of soccer in the United States."⁵⁴ The U.S. Women's National Soccer Team has only collectively bargained with the Federation since 2001, but had competed as a team for over a decade before that point, and a court would likely have found the team to be independent contractors during that time period.⁵⁵ The Players Association is a labor organization that has served as the "collective bargaining representative of all players on the Women's National Soccer Team" in each of the negotiations, and thus the players have been employees of the Federation since 2001.⁵⁶ The employer-employee relationship has been lengthy and is firmly established today, as the Players Association and the Federation have agreed to two more CBAs since 2001, including one in 2005, which ran through 2012, and, most recently, in April 2017.⁵⁷

52. See CORNELL L. SCH. LEGAL INFO. INST., *supra* note 51 (discussing applicable laws to collective bargaining agreements).

53. See *USSF v. USWNT*, 190 F. Supp. 3d at 780–81 (providing undisputed facts in 2016 litigation between Federation and Players Association that demonstrate existence of employer-employee relationship between parties through collective bargaining agreements). In its complaint, the Federation acknowledges that U.S. Women's National Team players are employees. See Complaint at 4, *USSF v. USWNT*, 2016 WL 462452 (stating U.S. Women National Team players are employees of federation).

54. *USSF v. USWNT*, 190 F. Supp. 3d at 781 (discussing also how Federation "oversees and fields numerous national soccer teams, including the Women's National Soccer Team").

55. See *id.* at 780 (describing how first agreement was entered into in March 2001 and was in effect through December 31, 2004); see also *History: Timeline*, U.S. SOCCER, <https://www.ussoccer.com/about/history/timeline> [<https://perma.cc/3WR2-AZNL>] (last visited Aug. 28, 2017) (showing that team won first-ever FIFA Women's World Championship in 1991, as well as CONCACAF championships in 1991 and 1995).

56. *USSF v. USWNT*, 190 F. Supp. 3d at 781 (noting Players Association is also "governed by a Constitution and By-Laws, which were enacted on March 23, 2001," and, "[u]nder Article IV of the Constitution and By-Laws, the Players Association is governed by three Players' Representatives and, at the discretion of the membership, one Executive Director"); see also Complaint at 4, *supra* note 49.

57. See *id.* ("A second collective bargaining agreement ("the 2005 CBA") was executed on January 12, 2006, covering the time period from January 1, 2005

3. *The Ted Stevens Olympic Amateur Sports Act: Women's National Hockey Team*

The status of players for the U.S. Women's National Ice Hockey Team is less clear, on the other hand, because first, they have a very different relationship with their governing body, USA Hockey, and second, they were seeking a "living wage" rather than "equal pay."⁵⁸ Congress enacted the Ted Stevens Olympic and Amateur Sports Act ("Ted Stevens Act") in 1998 and effectively reorganized the U.S. Olympic Committee, chartering the Committee as a federal corporation.⁵⁹ The Ted Stevens Act has many enumerated purposes, but dictating that athletes are covered employees of their governing bodies is not expressly one of them.⁶⁰ The Ted Stevens Act, however, provides for the general duties of the governing bodies it recognizes, including that the national governing bodies, and in this case USA Hockey, shall "provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis."⁶¹ USA Hockey is the governing body for ice hockey in America and is recognized by the U.S. Olympic Committee as such under the Ted Stevens Act.⁶² In terms of the soccer dispute, the Federation is also the governing body of soccer in the United States, but from this

through December 31, 2012."); *see also* Hays, *supra* note 7 (discussing newly ratified CBA and that "the deal replace[d] a working arrangement that was a source of contention long before it officially expired on Dec. 31").

58. *See Update on Women's National Team Issues*, USA HOCKEY (Mar. 17, 2017, 3:15 PM), http://www.usahockey.com/news_article/show/771106?referrer_id=752796 [<https://perma.cc/ZS8A-LRF9>] (addressing issues surrounding contract dispute, such as how players sought "living wage" from USA Hockey, which would imply USA Hockey employed players, in March 2017, and also what USA Hockey sees its role as in developing game of hockey).

59. *See* Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–220529 (2012). The act notes that the corporation has "perpetual existence" and that within statute "United States Olympic Association" is synonymous with "United States Olympic Committee." *Id.* § 220502.

60. *See id.* § 220503 (noting purposes of corporation include, but are not limited to: "(1) establish[ing] national goals for amateur athletic activities and encourage[ing] the attainment of those goals; . . . (5) promot[ing] and support[ing] amateur athletic activities involving the United States and foreign nations; . . . promot[ing] and encourage[ing] physical fitness and public participation in amateur athletic activities"). To see all fourteen listed purposes, see § 220503.

61. *Id.* § 220524(6). For further discussion of the relevance of this provision of the Ted Stevens Act, see *infra* notes 170–171 and accompanying text.

62. *See* § 220523(a)(7) (granting authority to "designate individuals and teams to represent the United States in international amateur athletic competition" but not Olympic games, and allowing governing bodies to make recommendations as to who should represent the United States at these games).

point the relationships the Federation and USA Hockey have with its players appears to differ.⁶³

Whereas the Federation and the Women's Soccer Players Association have openly had collective bargaining agreements for much of their history, USA Hockey has taken a much different approach to its relationship with its players and has been adamant during negotiations that it is not an employer of the players.⁶⁴ In a statement released during the dispute, USA Hockey re-asserted that "[t]he U.S. Women's National Team is not a standing team, meaning that it is not a full-time team with a full-time commitment" and that "[a]ll participation is voluntary."⁶⁵ The time commitment by the players selected for the team and rigor of the work they do is highly demanding, to the point that for many it is nearly impossible to hold full-time jobs.⁶⁶ Prior to the resolution of their dispute with USA Hockey, however, most signs—such as the contents of USA Hockey's March 17 statement, and the fact that the Women's Team's contract before the 2014 Sochi Olympic Games acknowledged their status as independent contractors—generally suggested that the law categorizes the players as independent contractors instead of employees.⁶⁷ As discussed previously, labels are not dispositive in independent contractor-employee distinctions, and the new deal could carry implications on these players' statuses as workers.⁶⁸

63. *U.S. Soccer Reaching New Heights*, U.S. SOCCER <http://www.usoccer.com/about/> [<https://perma.cc/MAQ2-YTC7>] (last visited Aug. 28, 2017) ("As the governing body of soccer in all its forms in the United States, U.S. Soccer has played an integral part in charting the course for the sport in the USA for more than 100 years.").

64. *See* USA HOCKEY, *supra* note 58 (asserting in statement, stance that "[f]rom the outset USA Hockey has been clear it will not employ players; however, that does not mean USA Hockey is opposed to a yearly agreement which outlines allocation of direct athlete support and other training resources that USA Hockey is willing to provide to players").

65. *Id.* (noting that players are identified from pool and invited to participate in U.S. Women's National Team activities from there, with participation lasting roughly sixty to seventy days per year).

66. *See* Seth Berkman, *U.S. Women's Hockey Team Sees 'A Lot of Progress' Toward a Deal*, N.Y. TIMES (Mar. 20, 2017), <https://www.nytimes.com/2017/03/20/sports/hockey/us-womens-hockey-team-sees-progress-toward-deal.html?mcubz=0> (updating on status of negotiations three days after USA Hockey's statement was released and discussing difficulties women's players have balancing rigors of time-commitment to Team with maintaining their own livelihoods, including that some players use U.S. Olympic Committee stipends "to pay rent or buy groceries").

67. *See id.* (noting same contract also "granted USA [H]ockey a royalty-free worldwide license for the organization and third parties to use their names and likenesses, and left USA Hockey with no liability for taxes").

68. For further discussion on determining whether a worker is considered an employee or an independent contractor, see *supra* notes 42–48 and accompanying

C. Recent History of Each Team and Buildup to Each Resolution

1. *Women's Soccer*

The dispute between the Federation and the Women's National Team's Players Association took place over several years, and the two parties have met in court before.⁶⁹ In 2013, during negotiations for a new Collective Bargaining Agreement ("CBA") between the parties, the Federation filed suit against the Players Association, seeking damages for anticipatory breach of contract as well as a declaratory judgment after the Soccer Team threatened to boycott its upcoming world championship tournament.⁷⁰ The Federation argued that a Memorandum of Understanding ("MOU") the parties had agreed to prior to the expiration of their 2005 CBA had incorporated unmodified terms of that 2005 CBA, including a pivotal "no strike, no lockout" provision.⁷¹

The parties had agreed to a CBA in 2005 ("old CBA") that covered through December 31, 2012, and as it was expiring in the fall of 2012 the parties agreed to and executed a MOU that was essentially a placeholder until a new CBA could be reached.⁷² The MOU was also to "encompass all terms of the 2005 CBA that were not modified or amended by the MOU."⁷³ Despite several contentions

text. For further discussion on the implications of the new deal as it relates to this issue, see *infra* notes 175–179 and accompanying text.

69. See *USSF v. USWNT*, 190 F. Supp. 3d 777, 781–83 (N.D. Ill. 2016) (detailing factual background of dispute between parties).

70. See *id.* at 780 (addressing procedural background and basic context of case, including that case arose "out of the parties' disagreement about the terms of the collective bargaining agreement" and that "[f]ollowing expedited discovery" each party "filed cross-motions for summary judgment").

71. See *id.* at 782 (noting that in 2005 CBA, "no-strike, no lockout" clause "barred the Players Association from authorizing, encouraging, or engaging in any strike, work stoppage, slowdown or other concerted interference with activities of Federation during the term of the agreement and barred the USSF from engaging in a lockout during term of the agreement").

72. See *id.* at 781–82 (explaining MOU was implemented when negotiations became complicated by "the need to address the integration of the Women's National Team into the newly-formed National Women's Soccer League" and as deadline to launch that league approached, "several issues remained unresolved").

73. *Id.* at 784 (deciding terms of MOU demonstrated it was partially integrated contract, in large part because "[i]n contravention of the parties' practice in all of their prior CBAs, the MOU [did] not contain an 'integration' clause declaring it to be a fully integrated contract."). The MOU also contained "substantial gaps" that demonstrated "it was intended to be supplemented by external documents." *Id.* These gaps included use of terms like "floater" and "tier I player" used in the MOU without being defined (but which were defined in the 2005 CBA), and providing terms for sponsorship appearance requests by the Federation without defining "sponsorship appearance." *Id.*

by the Players Association that they were not bound to the MOU, the court ultimately concluded that the players were indeed bound to the MOU, and the MOU incorporated the unmodified terms of the 2005 CBA, including the no-strike, no-lockout provision.⁷⁴ Accordingly, if the Soccer Team was going to negotiate a new CBA that provided equal pay, it could no longer threaten to strike as leverage in the process.⁷⁵

In March of 2016, five players filed a complaint with the EEOC, “the federal agency that enforces civil rights laws against workplace discrimination.”⁷⁶ In doing so, their contract dispute was fully set in motion by their allegations that “they earned as little as 40 percent” of what players on the United States Men’s National Team earned.⁷⁷ The players provided compelling figures in their complaint that, despite becoming the Federation’s “main economic engine,” they are usually only paid “half as much-or less” than players on the Men’s Team.⁷⁸ Moreover, the Federation’s position became increasingly difficult when the female players linked their pay to the Men’s pay, because it “has collective bargaining agreements with both teams, but the financial terms differ widely.”⁷⁹ In response to the complaint, the Federation argued “that not only was the players’ pay collectively bargained, but that the players had insisted more than once on a salary-based system as a means of economic security,” instead of a “bonus-centric plan” like the Men’s

74. *See id.* at 784–85 (arguing, for example, that MOU was not binding because it was not in form of signed writing and that it “constituted an unenforceable secret side agreement”).

75. *See id.* at 787 (“Because the undisputed material facts establish that the MOU incorporates the unmodified terms of the 2005 CBA, including the no-strike, no lockout provision . . . this Court will grant summary judgment on USSF’s declaratory judgment claim.”).

76. Das, *supra* note 13 (describing details included in Team’s EEOC complaint, as well as counters by Federation such as figures cited which it said “showed the men’s national team produced revenue and attendance about double that of the women’s team, and television ratings that were ‘a multiple’ of what the women attract”).

77. *Id.* (“The five players, some of the world’s most prominent women’s athletes, said they were being shortchanged on everything from bonuses to appearance fees to per diems.”).

78. *Id.* (adding how players said “they exceeded revenue projections by as much as \$16 million in 2015, when their World Cup triumph set television viewership records and a nine-game victory tour in packed stadiums produced record gate receipts and attendance figures”). For further discussion on these figures, see *infra* notes 103–120 and accompanying text.

79. Das, *supra* note 13. For further discussion on the significance of the collective bargaining agreement as it relates to the difference between the soccer and hockey disputes, see *infra* notes 172–174 and accompanying text.

players have.⁸⁰ The players “made vociferous demands for ‘equal pay’ with the men’s national team” for much of their dispute before shifting to using the phrase “equitable and fair” to describe their goals later in the negotiation. Nonetheless, the female players have generally sought fair compensation and equal treatment on issues of “travel, accommodations, per diem payments and inclusion in decision-making.”⁸¹

Ultimately, ratification of a new CBA took place and the dispute was mostly resolved, except for the five players’ EEOC complaint, about a year later on April 5, 2017.⁸² The exact terms of the deal remained private for the most part but “is expected to include significant increases in both direct and bonus compensation for national team players,” as well as other improvements such as “enhanced travel benefits” and “per diems equal to the men’s national team.”⁸³ However, despite all the improvements, the five players have not withdrawn the EEOC complaint, and the dispute still remains unresolved, which could carry further equal pay implications going forward.⁸⁴

2. *Women’s Hockey*

The Women’s National Hockey Team resolved their own contract dispute just days before the Soccer Team.⁸⁵ Similar to Women’s Soccer, the Women’s Hockey Team threatened to boycott

80. Das, *supra* note 13. Russell Sauer who is outside counsel for Federation further noted that “[t]he truth is, the players are claiming discrimination based on a more conservative structure, based on guaranteed compensation rather than pay to play, which they themselves requested, negotiated and approved of not once, but twice.” *Id.*

81. Andrew Das, *Negotiations Intensify over New Deal for U.S. Women’s Soccer Team*, N.Y. TIMES (Apr. 2, 2017), <https://www.nytimes.com/2017/04/02/sports/soccer/negotiations-intensify-over-new-deal-for-us-womens-soccer-team.html> (discussing buildup to ratification of new Women’s Soccer CBA and differences between women’s and men’s respective CBAs).

82. See Hays, *supra* note 7 (“Members of the U.S. women’s national team and U.S. Soccer ratified a new collective bargaining agreement, both sides announced [on April 5, 2017].”).

83. *Id.* (reporting available terms of new deal). Concerning the new deal, midfielder Megan Rapinoe stated, “I am incredibly proud of this team and the commitment we have shown through this entire process.” *Id.* Rapinoe further noted that “[w]hile I think there is still much progress to be made for us and for women more broadly, I think the [Women’s National Team Players Association] should be very proud of this deal and feel empowered moving forward.” *Id.*

84. See *id.* (“The EEOC complaint has yet to be resolved, and it was not immediately clear what effect the new agreement would have on that process.”). For further discussion on the potential implications of the EEOC complaint’s resolution, see *infra* notes 148–162 and accompanying text.

85. See Allen and Perez, *supra* note 7 (“Members of the U.S. women’s national hockey team agreed to a four-year contract with USA Hockey”).

their own World Championship tournament just weeks before it was set to begin.⁸⁶ Whereas players on the Women's Soccer Team were clearly employees of the Federation and were bound by a "no strike, no lockout" provision in their own agreement, the Women's Hockey Team employment relationship with USA Hockey was not as clear, and the players were not bound by a "no strike, no lockout" agreement, making their threat of a strike much more legitimate than the Soccer Team's.⁸⁷

Technical labels of the players aside, before the contract dispute was resolved there were significant pay disparity issues between the Women and Men's Hockey players.⁸⁸ Fundamentally, the Women's Team sought a "living wage," based on how much time they devote to the Team and the lower earning potential they have relative to the Men's National Team players outside national competition.⁸⁹ With Men's Team players receiving the same medal bonuses from the U.S. Olympics Commission as women, and without the players being considered "employees" of their governing body like the Soccer Team is, their situation was a bit different than that of the female soccer players.⁹⁰

86. Jackie Wattles & Ahiza Garcia, *Pay Fight Between USA Hockey and Women's Players Intensifies*, CNNMONEY (Mar. 18, 2017, 6:42 PM), <http://money.cnn.com/2017/03/18/news/usa-womens-hockey-equal-pay/index.html> [<https://perma.cc/AP6W-9TLC>] (discussing what players were asking for from USA Hockey, roughly \$68,000 per year with other benefits, and what USA Hockey was offering, \$24,000 annual base salary with \$7,500 gold medal bonus, as dispute was ongoing and Team was set to boycott upcoming World Championship event).

87. See USA HOCKEY, *supra* note 58 (making point in official statement, one that was consistently made, that players are not employees of USA Hockey, through language such as follows: "[p]roviding players a living wage implies USA Hockey employs players and it does not. Simply, USA Hockey does not pay players a salary—women or men—and instead provides training stipends and support to help put athletes that participate on our national teams in the best possible position to compete"). For further discussion on the reality of the boycott threatened by the women's hockey Team, see *supra* note 15 and accompanying text.

88. See Wattles & Garcia, *supra* note 86 ("The players say USA Hockey doesn't offer them a living wage, and that the men's hockey team is afforded more benefits and marketing help.").

89. See *id.* (discussing also that players "want the opportunity to compete in more games throughout the year," as right now, "they only engage in about nine-competitions during a non-Olympic calendar year"). For further discussion of disparities in pay between the male and female National Hockey Team players, see *infra* notes 121–132 and accompanying text. For further discussion on the impact a "living wage" could have on the female players' status as "employees" versus "independent contractors" of USA Hockey, see *infra* notes 175–179 and accompanying text.

90. *Id.* ("Players on the USA Men's Hockey team are offered the same amount in medal bonuses from the U.S. Olympics Commission. But most USA Men's Hockey players also have the chance to earn big money in the NHL, where the minimum contract is \$650,000.").

At bottom, there was a disparity that the women sought to eliminate, and they did just that by reaching a new contract in March of 2017.⁹¹ In early April, the Women's Team defeated Team Canada in the Gold Medal Game for the 2017 International Ice Hockey Federation Women's World Championship 3-2 in overtime, the Team's fourth consecutive championship and its seventh in eight years.⁹² In a matter of weeks, the Team had scored massive victories both off-ice with its new contract, and on-ice with its most recent gold medal.⁹³

III. ANALYSIS

New collective bargaining agreements and contracts for the Women's Soccer and Hockey Teams, respectively, resolved major aspects of each dispute.⁹⁴ However, with the Soccer EEOC complaint still being investigated, and considering the reported terms of the new contract in Hockey, there are still potential equal pay issues at play.⁹⁵ While, even after their new deals, Women's National Soccer and Hockey Team players will generally have less earning potential than their male counterparts, because of factors like the availability of lucrative professional leagues in which to play, the resolutions of each dispute represent affirmative steps forward toward closing this gap one day.⁹⁶

The statutes, regulations, and case law that provide a framework for analyzing equal pay issues are well established, but where each of these disputes fall within that framework is less clear at the

91. See Allen & Perez, *supra* note 7 (discussing resolution of dispute and its reported terms).

92. See Johnette Howard, *U.S. Women Didn't Bend Under Pressure, They Flourished*, ESPN (Apr. 8, 2017), http://www.espn.com/olympics/hockey/story/_/id/19109408/iihf-women-world-championship-2017-us-women-win-fourth-straight-worlds-title [https://perma.cc/M7Z9-XZMF] (discussing Women's victory in light of their recently ended boycott and after their loss to same Canadian team in gold medal game of 2014 Sochi Olympic games).

93. See *id.* (discussing World Championship victory in light of recently settled dispute, and that "[i]t was the Americans' seventh world title in eight years, and it put a perfect capstone on an unprecedented journey that they never believed would end any other way").

94. For further discussion of the resolution of these disputes, see *supra* notes 82-93 and accompanying text.

95. For further discussion of the EEOC complaint and the implications its resolution might carry, see *infra* notes 163-167 and accompanying text. For further discussion on the potential implications of the Women's Hockey contract resolution, see *infra* notes 168-179 and accompanying text.

96. For further discussion on how the deals represent affirmative steps taken towards equal pay and places the parties in better bargaining position for future negotiations, see *infra* notes 192-196 and accompanying text.

outset.⁹⁷ An analysis of each dispute requires an understanding of what compensation players received before each dispute was resolved, especially as it compared to their male counterparts, to determine whether there was a disparity in pay that could have been the result of discrimination.⁹⁸ Terms of each new deal were kept private, but reports have allowed for insight into some of the key provisions.⁹⁹ An evaluation of the presumed terms will allow an assessment of the improvements made, and how compensations now compare to male counterparts.¹⁰⁰ Further, assessing the terms of the new deals will determine whether the equity-based goals of each Team were met.¹⁰¹ Finally, each new deal and their terms, both individually and taken together, will have equal pay implications in the future for each respective party, and for women in the sports they play more broadly.¹⁰²

A. Pay Structures Before Each Deal for the Soccer and Hockey Teams

1. U.S. Women's National Soccer Team

The reported contents of the EEOC complaint filed by five members of the Women's National Team provide the clearest insight as to disparities that may have historically existed between pay for male and female players.¹⁰³ The overarching complaint by the players is that they earn far less than the Men's National Team play-

97. For a discussion on the framework of equal pay law, see *supra* notes 23–40 and accompanying text.

98. For a discussion on Women's Soccer compensation before their new collective bargaining agreement, see *infra* notes 103–120 and accompanying text. For a discussion on Women's Hockey compensation before their new contract, see *infra* notes 121–132 and accompanying text.

99. See Allen & Perez, *supra* note 7 (reporting on terms of new Women's National Hockey Team contract); Hays, *supra* note 7 (reporting on terms of new Women's National Soccer Team CBA).

100. For a discussion on Women's Soccer compensation after their new collective bargaining agreement, see *infra* notes 133–138 and accompanying text. For a discussion on Women's Hockey compensation after their new contract, see *infra* notes 139–145 and accompanying text.

101. For further discussion on whether equitable pay goals were achieved in each dispute, see *infra* notes 146–179 and accompanying text.

102. For further discussion on implications related to the resolution of the Women's Soccer contract dispute, see *infra* notes 133–138 and accompanying text. For further discussion on Women's Hockey implications in light of their contract, see *infra* notes 139–145 and accompanying text.

103. See Das, *supra* note 5 (dissecting reports of inequalities based on contents of EEOC complaint and other available data, such as financial reports of Federation which players say shows, “their team’s on-field success had produced millions of dollars in revenue for U.S. Soccer in 2015 and was projected to do the same [in 2016]”).

ers, even though they have historically been more successful than the Men, and bring in greater revenue for the Federation.¹⁰⁴ The oft-alleged disparity is that Women are paid about a quarter of what Men's National players are, but a comprehensive look at the data suggests this assertion is too broad of a stroke.¹⁰⁵ A report by the New York Times found that the six top-paid male and female players each made at least \$1 million between 2008 and 2015.¹⁰⁶ However, when ranking players by compensation and gender in that time period, any equality there is diminishes down the list.¹⁰⁷ Ultimately, while there was a level of equality among the top players of each gender in terms of compensation, that list was top-heavy.¹⁰⁸ On these figures alone, a disparity appears to exist, but because each Team has their own CBA with the Federation, matters of "equal work" and agreed compensation require a deeper look.¹⁰⁹

For example, whereas most regular players on the Women's Soccer Team receive a base salary and a bonus for each game won, players on the Men's Team are part of a "pay-for-play" system.¹¹⁰ Men's Team players are only paid when they are called to play for matches, but when they do play, their compensation is much loftier thanks to their "bonus-centric" plan.¹¹¹ Fundamentally, the Women's Team pay structure is "a more conservative structure, based

104. See Das, *supra* note 13 (reporting Women's Team cited following disparity and rising revenue numbers in filed complaint: "[t]he men's team has historically been mediocre. The women's team has been a quadrennial phenomenon, winning world and Olympic championships and bringing much of the country to a standstill in the process").

105. See Das, *supra* note 5 ("In a wage-discrimination complaint filed with the Equal Employment Opportunity Commission in March, five top players on the women's team accused U.S. Soccer of paying them and their teammates about a quarter of what their counterparts on the men's national team receive.").

106. See *id.* ("According to figures provided by U.S. Soccer, since 2008 it has paid 12 players at least \$1 million. Six of those players were men, and six were women.").

107. See *id.* (finding also that "the best-paid woman made about \$1.2 million from 2008 to 2015, while the top man made \$1.4 million in the same period").

108. See *id.* (finding that twenty-fifth best paid "female player made just under \$341,000, while the corresponding male player made about \$580,000" in same time period, and also that number fifty ranked men's player was found to have earned ten times as much as fiftieth ranked female player).

109. For further discussion of the standards for claims brought under the EPA and Title VII, see *supra* notes 23–40 and accompanying text.

110. See Das, *supra* note 5 (noting most Women's players receive base salary of \$72,000 and bonus of \$1,350 for each game won, but that bonus is not received if match ends in tie or loss).

111. Das, *supra* note 13 ("A men's player, for example, receives \$5,000 for a loss in a friendly match but as much as \$17,625 for a win against a top opponent. A women's player receives \$1,350 for a similar match, but only if the United States wins; women's players receive no bonuses for losses or ties.").

on guaranteed compensation rather than pay to play.”¹¹² Moreover, the Women’s CBA does include other benefits that the Men’s does not, such as severance and injury pay, as well as “maternity leave at half pay.”¹¹³ The Federation “also pays the salaries of national team players who compete in” the National Women’s Soccer League (“NWSL”) which is the recently formed women’s professional soccer league in the United States.¹¹⁴ So, while the Women’s Team players receive some benefits and a more predictable method of compensation that the Men’s Team players do not, the Men still have far more lucrative options in professional leagues and do not rely on the Federation the same way many Women’s players do.¹¹⁵

Beyond the different pay structures, there were further disparities in compensation for the female and male players as well.¹¹⁶ For example, disparities complained about in the EEOC complaint, included differences in *per diem* payments received by members of each Team, as well as differences in compensation for sponsorship appearances.¹¹⁷ To be fair, the *per diem* disparity did not occur until the Men’s Team negotiated their most recent CBA in 2015, and the Federation did discuss making increases for the women to achieve equality—albeit ultimately failing to do so—in this respect before the new CBA was even negotiated.¹¹⁸ The last, and potentially most glaring, disparity of note comes from the difference between what players on each team receive as bonuses for their performance in

112. *Id.* The Federation’s outside counsel, Russell Sauer, noted Women’s Players Association had “negotiated and approved” of this structure in two previous collective bargaining agreements. *Id.*

113. Das, *supra* note 5.

114. *Id.* (noting “[t]he pay plans differ for the men’s and women’s national teams, who have their own players’ associations and their own collective bargaining agreements”).

115. See Brad Tuttle, *Women’s Soccer Gets a Parade & Huge TV Ratings, but Not Equal Pay*, TIME MONEY (July 10, 2015), http://time.com/money/3952058/womens-soccer-money/?xid=frommoney_soc_socialflow_twitter_money [<https://perma.cc/B7Z6-E6S8>] (noting in 2015 minimum and maximum pay for NWSL players was \$6,842 and \$37,800, respectively, whereas average men’s salary in Major League Soccer was over \$300,000, with median salary around \$100,000).

116. See Das, *supra* note 5 (addressing differences in per diem, sponsorship, and bonuses from FIFA World Cup, specifically \$15 difference each day for per diem, \$750 less per sponsorship appearance, and \$7 million difference when Men’s Team made it to second round of 2014 World Cup, but when Women won 2015 World Cup).

117. See *id.* (noting Federation paid women \$60 day for *per diem* expenses and \$75 to men, as well as \$3,750 for sponsorship appearance for men and \$3,000 to women).

118. See *id.* (explaining how problem only arose because women’s CBA never included clause “that would ensure that the payments remained equal in the event that the men . . . received a bump”).

the FIFA World Cup.¹¹⁹ Because the bonus amount is determined by FIFA, which pays far more to participants in the Men's World Cup than in the Women's tournament, the U.S. Women's Team sought a larger share of domestic revenue from the Federation in their EEOC Complaint.¹²⁰

2. *U.S. Women's National Hockey Team*

The contract dispute between the Women's National Hockey Team and USA Hockey involved a different equal pay issue because, in USA Hockey, the women and men receive the same compensation from the U.S. Olympic Committee in terms of medal bonuses.¹²¹ Here, the need for better pay for the women in this dispute was rooted substantially in the lower earning potential that Women's National Team players have each year than Men's National Team players.¹²² Whereas the National Hockey League ("NHL") is a firmly established professional league, the National Women's Hockey League ("NWHL") "is a young enterprise and struggling to stay afloat."¹²³ As a result, female players, if they even choose to play in the NWHL, generally have a much lower earning potential throughout the year compared to male players, and about half the Team works "one or two jobs in addition to training and competing" for the National Team.¹²⁴

119. *See id.* (noting Federation "received \$9 million when the men's team advanced to the second round of the 2014 World Cup in Brazil, but only about \$2 million when the women won the 2015 World Cup in Canada").

120. *See Das, supra* note 13 (noting women sought more revenue from sources "like sponsorships and television contracts," and that "U.S. Soccer financial reports hint at a richer future involving the team: The federation's budget projections for 2016 include \$2.3 million for a 10-game victory tour after this summer's Olympics").

121. *See Wattles & Garcia, supra* note 86 (comparing \$68,000 base salary women's national players sought from USA Hockey as negotiations took place in March 2016, with what players for USA Men's Hockey Team earn playing professionally in NHL, "where the minimum contract is \$650,000").

122. *See id.* (discussing lower earning potential that women have compared to men who can play in NHL, where salaries are far more lucrative and secure than in NWHL).

123. *Id.*; *see also* Seth Berkman, *Champion for Women's Hockey Wills Pro League into Third Year*, N.Y. TIMES (Mar. 19, 2017), <https://www.nytimes.com/2017/03/19/sports/hockey/national-womens-hockey-league-dani-rylan.html?action=click&contentCollection=Hockey&module=RelatedCoverage®ion=Marginalia&pgtype=article> (detailing efforts by founder Dani Rylan to establish NWHL and struggles to fund it since its inception, including trying to secure sponsors and selling television networks on the league, as well as lawsuit from one businessperson seeking return of investment they made).

124. Wattles & Garcia, *supra* note 86 (discussing how in NHL minimum contract is \$650,000 while in NWHL contracts range from just \$14,000–\$18,000 for players per year).

Prior to their new contract, the Women's Hockey Team received "up to \$2,000 dollars per month in training stipends from the United States Olympic Committee," each year, as well as an additional \$1,000 per month from USA Hockey in the six-month period leading up to the Games during Olympic years, and the players sought an increase in the stipend provided during the months leading up to the Games.¹²⁵ During the dispute, female hockey players took the stance that they deserve a more consistent paycheck because they are not committed to a professional league throughout the entire year, and, therefore, "perform more duties and spend more time training with USA Hockey."¹²⁶ They also sought more support to grow the game of women's hockey in general in the United States in the form of a more well-funded development program.¹²⁷

Smaller yet perhaps more troubling disparities existed in terms of how Women and Men's players were treated by USA Hockey itself, which the players sought to rectify through negotiations.¹²⁸ For example, in previous years, male players had been allowed to bring a guest to world championship games, have their transportation paid for, and stay in their hotel rooms until the end of the event, all while receiving "breakfast, game tickets and an apparel package."¹²⁹ On the other hand, female players were not allowed

125. Seth Berkman, *No Resolution in Pay Dispute Involving U.S. Women's Hockey Team*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/sports/hockey/usahockey-womens-team-boycott.html> (describing growing support for Women's Hockey Team as dispute intensified, including from United States Senators and major figures in professional sports).

126. Wattles & Garcia, *supra* note 86 (noting during negotiations USA Hockey offered to increase its \$1,000 per month stipend to \$3,000 per month during six-month lead up to Olympics, but had not made concessions for increases outside six-month window).

127. See Kevin Allen & Christine Brennan, *Examining Dispute Between USA Hockey, Women Players*, USA TODAY (Mar. 16, 2017, 8:13 PM), <https://www.usatoday.com/story/sports/hockey/2017/03/16/usa-hockey-womens-team-boycott-world-championship/99281294/> ("The NHL gives USA Hockey an \$8 million grant annually, and the women want to see some of that money go into women's programs.").

128. See Ahiza Garcia, *While the U.S. Men's Team Sat Business Class, the Women Sat in Coach*, CNN MONEY (Mar. 24, 2017, 11:22 AM), <http://money.cnn.com/2017/03/24/news/companies/usa-hockey-womens-pay-dispute/index.html> [<https://perma.cc/QQC3-6Q98>] (discussing disparities revealed by USA Hockey player handbooks for 2013 and 2014 IIHF competitions and perks Men's Team received but Women's Team did not, such as ability to bring guest to competitions who had transportation paid for and could stay in same room as player).

129. *Id.* (discussing one reason for disparities was how cost-prohibitive providing equal accommodations would be, such as how player demands "would result in total player compensation in an Olympic year of approximately \$210,000 per player if the team attains a silver medal and \$237,000 for a gold medal").

to bring a guest and, instead, had to share a room with a teammate, and while Men's Team players traveled to their games in business class, the Women's Team players were seated in coach class.¹³⁰

Ultimately, however, players on the Women's and Men's National Teams were receiving the same medal bonuses from the U.S. Olympic Committee, which may have made the Women's position during the dispute seem better than it really ever was, even if those medal bonuses were never actually a form of guaranteed income.¹³¹ Although the pay structure of the NHL and NWHL are beyond USA Hockey's control, there was clearly room to grow in terms of how players of each gender were being treated by USA Hockey in corresponding competitions, and the players had a strong argument that the time they put into preparing to compete for the National Team and supporting USA Hockey should have resulted in a "consistent paycheck."¹³²

B. New Deals: Terms of Resolution for Each Dispute

1. *Women's Soccer*

The Players Association and the Federation finally struck a deal, after years of negotiations, on April 5, 2017.¹³³ While terms of

130. *See id.* (adding also that according to handbooks, "USA Hockey paid for the disability insurance of players on the men's team but not for players on the women's team," as additional disparity); *see also* Norah O'Donnell, *Team USA Members on Historic Fight for Equal Pay in Women's Soccer*, CBS NEWS: 60 MINUTES (Nov. 20, 2016), <https://www.cbsnews.com/news/60-minutes-women-soccer-team-usa-gender-discrimination-equal-pay/> [<https://perma.cc/JM77-PHFV>] (interviewing players for CBS special on US Women's National Soccer Team in which it was revealed that Women travel to games flying in coach class, but Men have in their agreement to fly first class).

131. *See* Wattles & Garcia, *supra* note 86 (noting players had said USA Hockey's offers were "misleading because they conflate[d] USA Hockey's payments with money that comes from the U.S. Olympic Committee, which offers the same medal bonus to athletes across all sports and genders"); *see also* Allen & Brennan, *supra* note 127 (noting players did not count USOC bonuses or Direct Athlete Support as part of any deal USA Hockey offered, and providing following example to illustrate point: "By comparison, in 2016, USA Swimming gave star Katie Ledecky \$75,000 for each gold in addition to the \$25,000 that she received from the USOC for each gold").

132. Wattles & Garcia *supra* note 86 ("And because the women's team players aren't tied up in a professional league all year they perform more duties and spend more time training with USA Hockey. That's why, the team says, they deserve a consistent paycheck."); *see also* Garcia, *supra* note 128 ("[T]he players say their case is about more than money. They want better job benefits for IIHF games—equal to those given to their male counterparts").

133. *See* Grant Wahl, *U.S. Women, U.S. Soccer Agree to New CBA, End Labor Dispute*, SPORTS ILLUSTRATED (Apr. 5, 2017), <https://www.si.com/planet-futbol/2017/04/05/uswnt-us-soccer-women-cba-labor-talks-agreement> [<https://perma.cc/J3Y6-YW3Q>] (reporting on new deal that had been struck and basic terms of it, such as

the deal have mostly remained private, reports so far indicate substantial improvements that should allow players to live far more comfortably as they compete for the National Team and continue to grow the game domestically.¹³⁴ Moreover, the new deal also includes terms that will create a stronger relationship between U.S. Soccer and the NWSL, which should further strengthen the natural, symbiotic relationship between the two organizations and help grow the game of women's soccer domestically.¹³⁵

Significant gains with respect to compensation, one of the more divisive issues during the dispute, were made as well.¹³⁶ The new CBA reportedly includes an increase in base pay of over thirty-percent, as well as improved bonuses, which was one area where pay disparity had been most glaring previously and that was most important to the players to rectify.¹³⁷ While this was one of the main points of contention for the bulk of the dispute, it seems, based on the details that have been made available, that at this point the more conservative, salary-based structure has stayed intact with the new CBA, albeit with significantly increased compensation.¹³⁸

“ability of the WNTPA to control group likeness rights for licensing and non-exclusive rights in sponsorship categories where U.S. Soccer does not have a sponsor”).

134. See *id.* (including, for example, “[e]nhanced ‘lifestyle’ benefits for the players with respect to travel and hotels; per diems that are equal to those of the men’s team; and greater financial support for players who are pregnant and players adopting children”).

135. 133 See *id.* (“The new CBA includes: A commitment from U.S. Soccer to pay the NWSL salaries for allocated players; a return commitment by the players to compete in the NWSL; a requirement for the improvement of NWSL standards.”). For further discussion on how these terms should help grow the game of Women’s Soccer domestically, see *infra* notes 184–191 and accompanying text.

136. See Andrew Das, *Long Days, Google Docs and Anonymous Surveys: How the U.S. Soccer Team Forged a Deal*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/sports/soccer/uswnt-us-soccer-labor-deal-contract.html?smid=tw-share&_r=0 (describing how Women’s Soccer Team worked together to find success at bargaining table, such as by collaborating “to propose changes as small as a single word in page after page of precise contract language,” and then rehearsing “what they would say at each negotiating session, and even decid[ing] who would say it”).

137. See *id.* (“The agreement includes a sizable increase in base pay for the players . . . and improved match bonuses that could double some of their incomes, to \$200,000 to \$300,000 in any given year.”). For further discussion on the issue of bonuses, see *supra* notes 105–115 and accompanying text.

138. See O’Donnell, *supra* note 130 (discussing why prior deals were agreed to when players may have felt they were unfair, and including commentary from Team co-captain Becky Sauerbrunn on this matter who said, “[w]e didn’t know how to fight and in which ways we could fight”). When asked whether the players thought they should be paid more than the Men’s Team, Carli Lloyd, also a co-captain, replied, “[y]eah, absolutely,” because “[w]e win. We’re successful. Should get what we deserve.” *Id.* For a discussion on this salary based pay structure, see *supra* notes 110–115 and accompanying text.

2. *Women's Hockey*

Just days before the Women's Soccer Team struck its new deal, the Women's Hockey Team struck a new deal of its own with USA Hockey on March 28, 2017.¹³⁹ Much like the Women's Soccer deal, the Hockey Team's deal made significant improvements to compensation and lifestyle benefits for the players, while also making strides to foster further growth of the game.¹⁴⁰ The deal reportedly assures the players will earn "around \$70,000 each per year, although they could make more than \$100,000 in Olympic years if they win gold," and given that this is a base salary the players received the consistent paycheck they sought.¹⁴¹ The minimum compensation also does not include medal bonuses from the U.S. Olympic Committee, just as the players sought to avoid.¹⁴² Furthermore, the players saw their monthly training stipends from USA Hockey increase and come in at a consistent, year-round basis with their new deal, and will now receive a \$2,000 monthly training stipend year-round regardless of whether it is an Olympic year.¹⁴³

As for the glaring disparity that had existed between travel accommodations for the Men's and Women's Teams to competitions, the new deal is also reported to include terms for improved and

139. See Allen & Perez, *supra* note 7 (reporting on available terms of new deal just weeks after threat by Team to boycott upcoming World Championships, and how team's IIHF World Championship title defense would begin just three days later against Canada).

140. See *id.* ("The deal also includes the formation of a Women's High Performance Advisory Group that will contain former and current members of the women's national team. This group will offer advice in helping USA Hockey advance girls and women's hockey."). For further discussion of the new Women's Soccer CBA, see *supra* notes 133–138 and accompanying text.

141. Allen & Perez, *supra* note 7 (reporting "[t]he breakdown includes USA Hockey creating an annual fund of \$950,000 to be divided among the 23 players The range for the fund in 2017 is \$850,000 to \$950,000"); see also Ahiza Garcia, *Women's National Team Agrees to 4-Year Deal with USA Hockey*, CNN MONEY (Mar. 29, 2017, 12:38 AM), <http://money.cnn.com/2017/03/28/news/usa-hockey-womens-pay/index.html> [<https://perma.cc/VD44-968X>] ("The women's players were asking for a \$68,000 annual salary as well as for benefits like child care, maternity leave, and the ability to compete in more games throughout the year.").

142. See Allen & Brennan, *supra* note 127 (explaining during negotiations USA Hockey was offering "deal that would allow players the opportunity to pocket \$85,000 if they win the gold medal," but how much of that increase came from USOC raising gold medal bonus to \$37,500, and how "players don't count the USOC bonuses, or the Direct Athlete Support, as being part of what USA Hockey is offering"). For further discussion of the negotiations between players and USA Hockey and the terms each side was seeking, see *supra* notes 125–130 and accompanying text.

143. See *id.* (noting that \$2,000 amount is maximum of range from \$750 to \$2,000 players would receive from USOC, so USA Hockey has agreed to makeup difference each month, year-round).

equal accommodations going forward.¹⁴⁴ The new deal also includes the formation of a “Woman’s High Performance Advisory Group” to assist in efforts to grow girl’s and women’s hockey domestically.¹⁴⁵

C. Did Either Team Achieve Truly “Equal Pay”?

There can be no question that after each agreement the teams and their players are in a far better and more equitable position than they were before the disputes were resolved.¹⁴⁶ Yet, the new deals gave each party of players a form of “equitable pay,” rather than truly “equal pay,” and certain signs, such as the EEOC complaint not being withdrawn, indicate some issues still remain open.¹⁴⁷

1. *Equitable Pay Resolution in Soccer*

Based on the available remedies for violations of Title VII or the EPA, it makes sense why five players have not withdrawn the complaint.¹⁴⁸ If the players who filed the complaint can show violations under either of those causes of action, assuming that their claims were brought under each, compensation may be available for the discrimination and resulting unequal pay prior to their new deal.¹⁴⁹

Broadly speaking, making those showings turns on a few key issues.¹⁵⁰ In a successful claim brought under the EPA, the players

144. *See id.* (“In addition, the women’s players will receive the same accommodations as men’s players for the world championships.”). For further discussion on travel disparities prior to the new deal, see *supra* notes 128–130 and accompanying text.

145. *USA Hockey & USWNT Moving Forward Together*, USA HOCKEY (Mar. 28, 2017, 6:13 PM), http://www.usahockey.com/news_article/show/773291 [<https://perma.cc/BD34-57EN>] (discussing how Group will be composed of “former and current players from the U.S. Women’s National Team program, along with volunteer and staff leadership” and will grow game in areas “including programming, marketing, promotion, and fundraising”).

146. For further discussion on aims of “equitable pay” held by the teams, see *infra* notes 160–164, 168–171 and accompanying text.

147. *See Hays, supra* note 7 (reporting on ratification of new CBA and that following new deal “[t]he EEOC complaint [had] yet to be resolved, and it was not immediately clear what effect the new agreement would have on that process”).

148. *See* 29 U.S.C. § 206(d)(3) (providing relief for claims brought under EPA); 42 U.S.C. § 2000e-5 (providing relief for discrimination claims brought under Title VII). For further discussion on remedies available in each cause of action, see *supra* notes 32 & 39 and accompanying text.

149. For further discussion on remedies available in each cause of action, see *supra* notes 32 & 39 and accompanying text.

150. For a discussion on bringing a successful claim under the EPA or Title VII, see *supra* notes 23–39 and accompanying text.

would have to show that their employer paid them less than men for a job that required equal work performed under similar working conditions.¹⁵¹ Strictly evaluating the Federation's past compensation to the male and female players, this much seems easy to establish: at bottom, female players have made far less than comparable male players.¹⁵² There has been some question about whether they can be considered to be performing "equal work" for EPA standards, but that factor should not be dispositive given the language and purposes of the statute.¹⁵³ Ultimately, the male and female athletes are each players for the U.S. competing virtually year round with the aim of winning World Championships and Olympic medals, and it would seem unequitable to hold the "equal work" standards against the female players when standards for how and when they compete are set by third parties.¹⁵⁴

Rather, if the Women's Soccer players were to run into any trouble with making their EPA claim, it should, and probably would, be with respect to the fourth affirmative defense available under the Act, which is "a differential based on any other factor other than sex."¹⁵⁵ In this case, the fact that the Players Association agreed to CBAs and the terms therein twice before makes a compelling case that the differential is "based on any factor other than sex."¹⁵⁶ Thus, while tying their pay to the Men's pay allowed the female players to shed light on the issue of pay disparities in the

151. See 29 U.S.C. § 206(d)(1) (prohibiting sex discrimination against employees in workplace). For further discussion on required showings for a successful claim under the EPA, see *supra* notes 23–32 and accompanying text.

152. See O'Donnell, *supra* note 130 (quoting goalkeeper Hope Solo during dispute who described general disparity in pay between men's and women's compensation, and said, "[w]hen you break it down per game, I think it's about three times as much"); see also § 206(d)(1) (listing one defense to EPA claim as "a differential based on any other factor other than sex"). For further discussion on the alleged disparities between compensation for Women's and Men's team players, see *supra* notes 103–120 and accompanying text.

153. See Das, *supra* note 5 (explaining how qualification for Women's World Cup requires playing five games in single two-week tournament, whereas qualifying for Men's tournament requires playing sixteen games over two years). *But see* 29 C.F.R. § 1620.14 ("What constitutes equal skill, equal effort, or equal responsibility cannot be precisely defined. In interpreting these key terms of the statute, the broad remedial purpose of the law must be taken into consideration.").

154. See Das, *supra* note 5 (noting how "the women play more games on a year-to-year basis and must win them to claim their bonuses, effectively requiring them to work harder and perform better just to keep pace").

155. 29 U.S.C. § 206(d)(1). For further discussion on the affirmative defenses available to a claim brought under the EPA, see *supra* notes 30–31 and accompanying text.

156. *Id.*; see also O'Donnell, *supra* note 130 ("The federations' lawyers responded to the EEOC complaint saying 'any differences in the compensation paid men and women players are driven by factors other than gender.'").

first place, the fact that they have two separate CBAs will make it difficult for them to show that the unequal pay was on the basis of sex, rather than something like independent negotiations between each of the parties and the Federation separately.¹⁵⁷

Proving a Title VII claim is unlikely to be any easier either, given the requirement to show intent as a part of a successful claim.¹⁵⁸ In the case of a Title VII claim, it is not clear what the players thought they might be able to show to prove the discrimination was intentional, but gathering such evidence is no easy task.¹⁵⁹ Without clear direct or circumstantial evidence to establish that the aim was to discriminate the players based on gender, the otherwise broad nature of Title VII will not be of much use to the players.¹⁶⁰ The EEOC will either decide that there was employment-based discrimination against the female players and that there was an equal pay issue, or that there was no provable gender-based discrimination at the time the complaint was filed.¹⁶¹ Because of the fourth affirmative defense that the Federation could raise and because the Federation could argue that the difference in pay was based on the structure agreed to in the 2005 CBA, while the complaint to the

157. Das, *supra* note 13 (“[I]n linking their compensation to the men’s pay, the women’s players put U.S. Soccer in a difficult position. The federation has collective bargaining agreements with both teams, but the financial terms differ widely.”).

158. See 42 U.S.C. § 2000e-2(h) (establishing that it shall not be unlawful for employer to provide different standards of compensation or different terms pursuant to bona fide seniority or merit system “provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin”). For further discussion on the standards to prove a claim brought under Title VII and the importance of showing intent, see *supra* notes 36–39 and accompanying text.

159. See ALEXA ASHWORTH, ET AL., FEDERAL PROCEDURE, LAWYER’S EDITION, TITLE VII CASES; WHEN PROOF OF INTENT IS REQUIRED § 50:966 (Feb. 2018 update) (providing background on intent requirement of Title VII claims, such as how burden of proof is on plaintiff to show intent, and “[e]mployers are unlikely to leave a smoking gun admitting discriminatory motive”).

160. See, e.g., *Washington Cty. v. Gunther*, 452 U.S. 161, 170 (1981) (holding Title VII’s prohibition of discrimination is to be read broadly, and incorporation of EPA’s affirmative defenses into Title VII does not limit claims brought under it to those based on equal pay for “equal work”). For a discussion on the broad nature of claims Title VII covers, see *supra* note 37 and accompanying text.

161. See *U.S. Soccer Asks EEOC to Dismiss U.S. Women’s Wage Complaint*, SPORTS ILLUSTRATED (June 1, 2016), <https://www.si.com/planet-futbol/2016/06/01/us-soccer-uswnt-eoc-wage-discrimination-equality> [<https://perma.cc/8GHU-LLRW>] (reporting just over one year before contract dispute was resolved that Federation had asked EEOC to dismiss players’ wage complaint, which it ultimately did not do).

EEOC was valid it seems unlikely the players will succeed on it at this time.¹⁶²

However, while the new CBA did not achieve “equal pay” to the Men’s Team players, in that it does not provide the same compensation, dollar-for-dollar, and follows a different structure than the Men’s compensation, it did achieve “equitable pay.”¹⁶³ In fact, as talks progressed, the conversation shifted to one focused on “equitable pay” rather than “equal pay,” in large part because the salary structure the players sought from the Federation “was fundamentally different from the Men’s structure.”¹⁶⁴ The new deal suggests that base and bonus compensation was not ultimately the only goal and that differences that continue to exist in areas such as FIFA bonus payments that are beyond the control of either party are mitigated by progress in other areas.¹⁶⁵ For example, the new CBA provides for the Federation to pay the Women’s professional club salaries, where the men do not receive that same treatment in their CBA.¹⁶⁶ The EEOC complaint was pivotal in the negotiation process regardless of whether gender discrimination took place or not because the complaint demonstrated how serious the players were and creating the legitimate chance of legal consequences for the Federation.¹⁶⁷

162. See 29 U.S.C. § 206(d)(1) (stating employer’s fourth affirmative defense is that “payment is made pursuant to . . . a differential based on any other factor other than sex”). For further discussion about the holistic impact of the deals taken together, see *infra* notes 180–211 and accompanying text.

163. Das, *supra* note 136 (“Yet while the women’s players can claim significant gains, including on noneconomic issues like travel and working conditions, the new deal does not guarantee them equal pay with the men’s national team, which the women had made the cornerstone of their campaign for much of the past year.”).

164. Wahl, *supra* note 133 (reporting on newly agreed to CBA and including comments from interview with Women’s Soccer co-captain Becky Sauerbrunn from *U.S. Women’s Team Strikes* podcast).

165. See Das, *supra* note 136 (discussing how reality of not achieving truly equal pay with men was viewed as consequence of different pay structures and eight-figure gap in FIFA bonus payouts, but also how this reality was “balanced by progress elsewhere”).

166. See Wahl, *supra* note 133 (elaborating on notion that new deal was one of “equitable” rather than “equal” pay, by co-captain Becky Sauerbrunn explaining how salary structure sought includes Federation paying for club salaries, treatment Men do not receive, which makes their structure “fundamentally different” from Men’s structure).

167. See Lloyd, *supra* note 10 (discussing how filing EEOC complaint was not about “how much [Lloyd] love[s] to play for [her] country,” but rather, “[i]t had everything to do with what’s right and what’s fair, and with upholding a fundamental American concept: equal pay for equal play”).

2. *Equitable Pay Resolution in Hockey*

In the case of the Women's Hockey Team, it is not clear that there was ever any gender discrimination issues at play in a legal sense under the EPA or Title VII, unless the perks the Men's players received were to be counted as pay discrimination.¹⁶⁸ The U.S. Olympic Committee was paying Men's and Women's Team players equally, but the men also had a far more lucrative and secure professional league to fall back on than the women did during the dispute.¹⁶⁹ However, there is a compelling case to be made that prior to the deal, USA Hockey was not fulfilling its duties as a governing body to provide *equitable* support to the female players, given these circumstances and the language of the Ted Stevens Act.¹⁷⁰ Moreover, the women absolutely received different, lesser travel accommodations than the Men's Team, furthering the argument in support of the notion that inequality was present, at least to some extent.¹⁷¹

In the case of the Women's Hockey Team compared to the situation of the Women's Soccer Team, though, it was always going to be the case that in terms of potential legal remedies available their options were always going to be more limited because they are not technically employed by USA Hockey.¹⁷² By not technically being "employees" of USA Hockey and thus not being covered by the same laws as the Women's Soccer Team, the Women's Hockey Team actually had increased flexibility in their dispute to take mea-

168. For a discussion on pay structure for Women's Hockey before the settlement of their dispute, see *supra* notes 121–132 and accompanying text.

169. For a discussion on the stability and security of the NHL as compared to the NWHL, see *supra* notes 122–124 and accompanying text.

170. See 36 U.S.C. § 220524(6) ("For the sport that it governs, a national governing body shall—provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis."); see also Travis Waldron, *16 Senators Back U.S. Women's Hockey Fair Pay Boycott*, HUFFINGTON POST (Mar. 27, 2017, 4:21 PM), http://www.huffingtonpost.com/entry/senators-womens-hockey-boycott_us_58d95e6be4b0f805b3222a51 [<https://perma.cc/3STG-GZDQ>] (discussing letter sent by sixteen United States Senators in support of Women's Hockey Team during negotiations and boycott, and citing Ted Stevens Act to demonstrate USA Hockey was "legally required to provide equitable support and encouragement for participation by women"). For further discussion on the Ted Stevens Act and its purposes, see *supra* notes 58–68 and accompanying text.

171. For a discussion on disparities related to travel and lifestyle accommodations, see *supra* notes 128–130 and accompanying text.

172. See USA HOCKEY, *supra* note 58 (providing USA Hockey's stance that players were not employed by USA Hockey while contract dispute was ongoing). For further discussion on the distinction between "employees" and "independent contractors," see *supra* notes 42–48 and accompanying text.

tures like threatening a boycott.¹⁷³ And while this distinction will prevent them from potentially recovering back pay from USA Hockey like the Soccer Team may be able to from the Federation, they were ultimately still able to leverage their threat to boycott to help achieve a new deal, the same way the Soccer Team did with their EEOC complaint.¹⁷⁴

There is no doubt that the new contract between the players and USA Hockey is a huge improvement on the previous one, as it should allow the players to earn the consistent paycheck and living wage they deserve based on their commitment to the National Team and growing the game in the United States.¹⁷⁵ What will be really interesting to see going forward, though, is what impact this new contract will have on the Women's Team players status as independent contractors to USA Hockey, or whether they might instead be able to be considered as "employees" to the governing body instead.¹⁷⁶ Based on the consistent paychecks that the players will now be getting from USA Hockey going forward, it could very well be the case that in future negotiations or disputes the Team's players will find themselves protected by the FLSA based on an "economic reality" test.¹⁷⁷ The new contract will present an interesting

173. For an analysis on why the Hockey Team's players are not technically "employees" of USA Hockey but rather "independent contractors," see *supra* notes 64–68 and accompanying text. For further discussion on why the Women's Soccer Team could not legally carry out their threat to boycott their Olympics, see *supra* notes 72–75 and accompanying text.

174. See O'Donnell, *supra* note 130 (providing transcript to interview with several players from Women's Soccer Team, and asking why EEOC complaint was filed, to which Becky Sauerbrunn answered "[w]e wanted to put pressure on them and so with the EEOC complaint it seemed like a no brainer for us"). For further discussion of potential remedies available to the Soccer Team through their EEOC complaint, see *supra* notes 32 & 39 and accompanying text. For further discussion on the Hockey Team's planned boycott, see *supra* notes 86–87 and accompanying text.

175. See Isabel Angell & T.J. Raphael, *The US Women's National Hockey Team Went After Equal Pay and Fair Treatment—and Won*, PRI (Mar. 30, 2017, 10:30 AM), <https://www.pri.org/stories/2017-03-30/us-womens-national-hockey-team-went-after-equal-pay-and-fair-treatment-and-won> [<https://perma.cc/3SD9-CR8F>] (quoting forward Jocelyne Lamoureux-Davidson after completion of deal, who said, "[a]ll those things they were providing the men, we felt by the Ted Stevens Amateur Sports Act, they're obligated to provide that for us. We were able to accomplish that in the agreement"). For further discussion on the new contract and the reported terms therein, see *supra* notes 139–145 and accompanying text.

176. For further discussion on women's hockey team's status as "independent contractors," see *supra* notes 58–68 and accompanying text.

177. See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (citing *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)) (discussing "economic reality" test). For further discussion on the distinction between "employees" and "independent contractors," as well as the "economic reality" test used to determine the appropriate label, see *supra* notes 42–48 and accompanying text.

question of whether the Women's players will have "economic dependence" on USA Hockey in the future, especially if NWHL salaries remain low and players rely on USA Hockey as their primary source of income.¹⁷⁸ In that respect, the Women's Hockey Team's new contract could hold significance in addition to the improved, consistent paychecks, and could allow them further legal protections as actual employees of USA Hockey in years ahead, similar to those of the Soccer Team.¹⁷⁹

D. Continuing to Grow, Together

Taken together, each of the new deals puts women in general in a better position with respect to closing the gender pay gap one day.¹⁸⁰ Despite the differences in legal nuances involved with each dispute, there were several similarities between them, and even a sense of mutual support among the players of each Team, before they were ultimately resolved days apart from each other.¹⁸¹ In addition to the improvements made in compensation and lifestyle benefits with each deal, observers should not overlook the larger impact each of these deals should have on the games of women's

178. For further discussion of the "economic dependence" factor, see *supra* notes 45–48 and accompanying text. For further discussion of the NWHL and the troubles it has had financially so far, see *supra* notes 122–124 and accompanying text. For a discussion on the Women's Soccer Team's status as employees of the Federation based on their collective bargaining agreements, see *supra* notes 53–57 and accompanying text.

179. For further discussion of USA Hockey's stance that the players are not employees of USA Hockey during the dispute, see *supra* notes 64–65, 85–87 and accompanying text.

180. See Frank Pingue, *Ice Hockey-U.S. Women's Team Settle Pay Dispute, Avoid Boycott*, REUTERS (Mar. 28, 2017, 12:50 PM), <http://www.reuters.com/article/us-icehockey-usa-dispute/ice-hockey-u-s-womens-team-settle-pay-dispute-avoid-boycott-idUSKBN16Z2DV> [<https://perma.cc/5A6Z-HFVC>] (quoting USA Hockey executive director, Dave Ogreaan, after resolution of hockey contract dispute, "[w]e look forward to the future with great anticipation. This process has, in the end, made us better").

181. See Seth Berkman, *U.S. Women's Team Strikes a Deal with USA Hockey*, N.Y. TIMES (Mar. 28, 2017), <https://www.nytimes.com/2017/03/28/sports/hockey/usa-hockey-uswnt-boycott.html?mcubz=0> (discussing support Women's Hockey Team received leading up to resolution, including "from not only the National Women's Hockey League but also the N.H.L., the N.B.A., the W.N.B.A. the N.F.L., Major League Baseball and the United States women's soccer team"); see also Barry Svrluga, *The U.S. Women's Hockey Team Fights the Good Fight—and Wins*, N.Y. TIMES (Mar. 29, 2017), https://www.washingtonpost.com/sports/olympics/the-us-womens-hockey-team-fights-the-good-fight—and-wins/2017/03/29/28bce0ce-1432-11e7-ada0-1489b735b3a3_story.html?utm_term=.38515343c202 [<https://perma.cc/6AMR-AE7Q>] (discussing how Women's Team won contract battle, receiving support during process from women's tennis icon, Billie Jean King, and former U.S. Women's Soccer star, Julie Foudy).

soccer, women's hockey, and even for women's sports in general.¹⁸² Most obviously, in two of the country's major women's sports it is now the case that the top players have achieved far more equitable pay compared to their male counterparts and have also taken affirmative steps towards potential equal pay down the line.¹⁸³

Each new deal included major provisions to help foster the growth of the game for players outside of those at the highest level of competition, in addition to the significant gains made in compensation.¹⁸⁴ These provisions, which will provide the opportunity for the NWSL and girl's hockey in America to continue to grow, provide unique opportunities to improve the positions of female athletes of all skills and ages nationwide.¹⁸⁵ In the case of the Soccer Team's dispute, the Federation agreed to subsidize the NWSL salaries for players who take time away from that league to play for the National Team, in return for commitment by those players to

182. See Brown & Patton, *supra* note 2 (finding that while wage gap is smaller for women ages twenty-five to thirty-four, where women earn ninety cents for every dollar a man in same group earns, gender pay gap for all workers is still estimated to be of seventeen cents). For further discussion of the gender pay gap, see *supra* notes 2-6 and accompanying text.

183. For further discussion on the resolutions of each dispute, see *supra* notes 133-145 and accompanying text.

184. See Allen & Perez, *supra* note 7 (discussing formation of "Women's High Performance Advisory Group" to advance game of hockey for women of all ages and skill levels across country); see also Wahl, *supra* note 133 (reporting on newly ratified CBA in Women's Soccer dispute including provisions related to commitment by National Team players to play in NWSL, and commitment by Federation to subsidize those salaries to support NWSL financially). For further discussion on the specifics of these provisions, see *supra* notes 135 & 145 and accompanying text.

185. See generally 20 U.S.C. §§ 1681-1688 (2012) (covering part of Education Amendments of 1972 referred to as "Title IX" and generally prohibiting that any person be denied benefits or discriminated against on basis of sex when taking part in "any education program or activity receiving Federal financial assistance"). See also Beth Brooke-Marciniak & Donna de Varona, *Amazing Things Happen When You Give Female Athletes the Same Funding as Men*, WEFORUM (Aug. 25, 2016), <https://www.weforum.org/agenda/2016/08/sustaining-the-olympic-legacy-women-sports-and-public-policy/> [https://perma.cc/R6C8-HXHM] (presenting findings on importance of girls being provided opportunities to play sports, based on benefits that include "stay[ing] in school longer, suffer[ing] fewer health problems, enter[ing] the labor force at higher rates, and [being] more likely to land better jobs"). The same article considers Title IX to be the public policy "catalyst" that has increased "funding and institutional opportunities" for girls and women in sports, that has led to "a 545% increase in the percentage of women playing college sports and a 990% increase in the percentage of women playing a high school sport." *Id.*; see also Barbara Kotschwar, *Women, Sports, and Development: Does It Pay to Let Girls Play?*, PIIIE (Mar. 2014), <https://piie.com/publications/pb/pb14-8.pdf> [https://perma.cc/LD5L-TFTE] (advocating for Title IX to serve as instructive model for other countries to increase participation of female youth in sports based on empirical evidence that such increase in participation contributes to broader gender-equity and overall economic growth).

continue playing in the NWSL outside of the National Team.¹⁸⁶ Moreover, the CBA also requires improvements to be made in the NWSL, so while the agreement is between the Players Association and the Federation, even those players in the NWSL who might never come close to playing for the National Team will reap benefits of the new deal based on these improved standards.¹⁸⁷ It follows, then, that while the negotiating focused mostly on players at the top of the game who compete at an international level, the domestic game should grow for women as well, and players there could stand to see larger contracts for themselves as the sport grows in popularity and as revenues increase.¹⁸⁸

On the same note but as applied to the case in the Hockey Team's dispute, their deal contained a provision to form a "Women's High Performance Advisory Group" that will be focused to grow their game domestically for women in general as well.¹⁸⁹ The new steps being taken after the resolution of the Women's Hockey dispute are a testament to a commitment to grow the game for players of all levels and skills.¹⁹⁰ Just as in the case of the Soccer Team's dispute resolution, while the negotiations here focused on players at the top of the game for the most part, the provisions included should, in effect, allow the game as a whole to benefit domestically.¹⁹¹

186. See Wahl, *supra* note 133 (discussing terms of new deal including provisions related to NWSL commitment by both parties, such as requirement for improvement of NWSL standards).

187. See *id.* (quoting USWNT co-captain Becky Sauerbrunn on her hopes to hear EEOC findings soon, and adding that "from there, along with a CBA, we hope that gender equity will occur in this CBA and will benefit the player pool for many years going forward").

188. See Das, *supra* note 136 ("In addition to seeking improved, but not necessarily equal, pay, the players began to press for changes that they saw as vital to the long-term growth of their game.").

189. See Seth Berkman, *Contract Fight with U.S.A. Hockey Over, Hard Work Begins for Women's Team*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/sports/hockey/usa-hockey-womens-team.html> (suggesting formation of Women's High Performance Advisory Group was "key component" of new contract agreement, and also that group is similar to Canada's Women's High Performance Advisory Group that has also "fostered development on the youth level"). For further discussion of the resolution of the Women's Hockey dispute and the Women's High Performance Advisory Group, see *supra* notes 139–145 and accompanying text.

190. See USA HOCKEY, *supra* note 145 (quoting Donna Guariglia, who is treasurer of USA Hockey and former chair of USA Hockey's Girls' and Women's Section, in statement by USA Hockey after completion of deal, "[t]he action taken today is an important statement of USA Hockey's commitment and support of our women's national team program and female hockey overall").

191. See *id.* (including quotes from several players and parties to negotiations, such as Team captain Meghan Duggan, "[o]ur sport is the big winner today," and

Each of the new deals also puts the Teams in stronger bargaining positions for their next negotiations in coming years.¹⁹² The new Hockey and Soccer deals cover four- and five-year periods, respectively, and it stands to reason that the successes of each of these deals will allow each Team to make even more gains with their next deals.¹⁹³ With both deals including provisions to foster growth of each game at the lower levels, the professional soccer and hockey leagues could see increases in stability and popularity, and, ultimately, revenue.¹⁹⁴ Empirical evidence supports that an investment in girls' and women's sports supports greater gender-equity and general economic growth.¹⁹⁵ So, if this happens over the next several years, a positive feed-back loop could be established wherein each team will have a higher likelihood of being composed of the strongest players in their games, allowing them to continue their successes at the highest level and building stronger cases for even better deals the next time around.¹⁹⁶

Of course, all parties are happiest right after the completion of any new deal, but meeting potential for the growth of each sport

executive director of USA Hockey, Dave Ogrea, “[w]e look forward to the future with great anticipation”).

192. See Das, *supra* note 136 (quoting Becca Roux, the Women's Soccer union's executive director, “[w]e tried to completely change the methodology for how to define our value, and we made progress in that regard, and it changes the equation for the future”).

193. See Allen & Perez, *supra* note 7 (“Members of the U.S. women's national hockey team agreed to a four-year contract with USA Hockey on Tuesday night to avert a threatened boycott of the upcoming IIHF Championship in Plymouth, Mich.”); Hays, *supra* note 7 (“The new deal is expected to cover a five-year period that includes both the 2019 FIFA World Cup in France and the 2020 Olympics in Tokyo.”).

194. For further discussion on the Women's Soccer provisions, see *supra* note 135 and accompanying text. For further discussion on the Women's Hockey provisions, see *supra* note 145 and accompanying text.

195. See Tara Parker-Pope, *As Girls Become Women, Sports Pay Dividends*, N.Y. TIMES (Feb. 15, 2010, 4:05 PM), <https://well.blogs.nytimes.com/2010/02/15/as-girls-become-women-sports-pay-dividends/> [<https://perma.cc/LNT3-FAEV>] (analyzing studies that had recently been released to determine whether improvements in quality of life for young women could be direct result of athletic participation and concluding they provide “the strongest evidence yet that team sports can result in lifelong improvements to educational, work and health prospects”).

196. See Hays, *supra* note 7 (including comments by Federation president Sunil Gulati on new CBA, including that deal will, “over time strengthen the elite player development process at the grassroots level. We believe our continued partnership will ensure a bright future for our sport for years to come”); see also USA HOCKEY, *supra* note 145 (including comments from Jim Smith, president of USA Hockey in statement after completion of deal, who said, “[t]oday reflects everyone coming together and compromising in order to reach a resolution for the betterment of the sport. We'll now move forward together knowing we'll look back on this day as one of the most positive in the history of USA Hockey”).

presented by each deal can only become realities through constant commitment to achieving these ends in coming years.¹⁹⁷ Particularly in the case of the Women's National Soccer Team, whose 2015 World Cup championship fueled TV ratings and revenues for the Federation, it could be easy for decision-makers in soccer to get complacent and be satisfied with the sport's rising popularity as the National Team continues to dominate its competition.¹⁹⁸ Especially compared to women's hockey, which is comparatively a much smaller game in America, this potential stance, misguided as it would ultimately be, may even have some merit given that the Federation is simply so much larger than USA Hockey.¹⁹⁹ The Federation and game of soccer will likely only keep growing each year, and

197. See Berkman, *supra* note 189 (suggesting that with completion of new contract in Hockey dispute comes more difficult task of continuing to grow game domestically for female players of all ages, and describing that “[a]mid celebrations of Tuesday’s news, players recognized that their work was incomplete”); see also Steven Goff, *New U.S. Women’s Soccer Complaint Includes More Pay, Better Travel Arrangements*, PHILLY.COM (Apr. 5, 2017, 10:25 AM), <http://www.philly.com/philly/sports/soccer/US-womens-soccer-CBA-salary-per-diem-NWSL-travel-pregnancy.html> [<https://perma.cc/EY97-L573>] (reporting on newly ratified CBA between Federation and Players Association, and including quotes from players like midfielder Megan Rapinoe, who said of deal, “I am incredibly proud of this team and the commitment we have shown through this entire process. While I think there is still much progress to be made for use and for women more broadly, I think the [players] should be very proud of this deal and feel empowered moving forward”).

198. See Robert Tuchman, *Girls Soccer on the Rise Due to USA World Cup Victory*, FORBES (July 8, 2015, 7:15 PM), <https://www.forbes.com/sites/roberttuchman/2015/07/08/girls-soccer-on-the-rise-due-to-usa-world-cup-victory/#c7341be5d5fd> (providing statistics on television viewership of Women’s World Cup Final and growth of girls’ club soccer participation in last twenty years). Tuchman’s article explains that the World Cup Final match had about twenty-three million American viewers, far more than the roughly seventeen million viewers who watched the Men’s World Cup final between Germany and Argentina the previous year. *Id.* This viewership put the event on the same level as Game 7 of the 2014 World Series and Game 6 of the 2015 NBA Finals, and “blew out other ‘elite’ women’s sporting events like the Olympics and the WNBA Playoffs completely out of the water.” *Id.* Moreover, the article also noted that, “[a]ccording to U.S. Youth Soccer, girl’s club soccer participation is up 37% in the last twenty years, while participation in high school soccer programs has also seen a boost of 45% between 1999 and 2014.” *Id.*

199. Compare 2016-2017 Season Final Registration Reports, USA HOCKEY, http://assets.ngin.com/attachments/document/0127/0883/2016-17_Final_Report.pdf [<https://perma.cc/VP2R-2WXX>] (last visited Oct. 17, 2017) (providing “Registration Comparison by Group” to show 75,832 total females had registered with USA Hockey 2016-17 period, of which 18,040 were adults over age of nineteen and 57,792 were ages eighteen and under), with *US Youth Soccer at a Glance*, U.S. YOUTH SOCCER, http://www.usyouthsoccer.org/media_kit/ata glance/ [<https://perma.cc/Q5SF-X44H>] (last visited Oct. 17, 2017) (listing statistics about membership in U.S. Youth Soccer organization, such as group having three million members who are ages 5-19, and of which 48% are females, thus indicating an estimated participation of 1,440,000 females in US Youth Soccer).

the Federation could, at least in theory, be less inclined than USA Hockey to take the affirmative steps necessary to actively grow its game.²⁰⁰

Yet, in between the grassroots and the international levels of each sport lie professional leagues that leave the bulk of the sports' best players in a limbo that can be unforgiving.²⁰¹ Female athletes today are getting chances to compete and make money that their predecessors could have only imagined, but as it stands both the NWSL and NWHL are far from perfect in terms of the time they demand and the compensation for that time they provide, on top of the underlying instability that is inherent to each.²⁰² It will be

200. Compare U.S. SOCCER, FINANCIAL STATEMENTS YEARS ENDED MARCH 31, 2016 AND 2015 (2016), available at <https://www.ussoccer.com/about/federation-services/resource-center/financial-information> [<https://perma.cc/9DN9-Q5X3>] (follow "2016 Audited Financial Statements" hyperlink) (providing audited financial statements of Federation and listing "Total Assets" for 2016 at \$121,939,719, up from \$104,124,735 in 2015), and U.S. SOCCER, U.S. SOCCER 2016 ANNUAL GENERAL MEETING 57–58 (2016), available at <http://resources.ussoccer.com/images/160127-AGM-PDF-FINAL.pdf> [<https://perma.cc/NT5Q-C3HU>] (providing budget for Fiscal Year 2017 and projecting Total Revenue of \$17,588,500, and Surplus of \$5,187,838 for Women's National Team, but just \$9,049,500 in Total Revenue, and Deficit of \$963,523 for Men's National Team), with USA HOCKEY, INC., ET AL., FINANCIAL STATEMENTS AND SUPPLEMENTAL SCHEDULES FOR THE YEAR ENDED AUGUST 31, 2016 5 (2016), http://assets.ngin.com/attachments/document/0113/4775/USA_Hockey_Inc_Financial_Stmts_8-31-16_FINAL.pdf [<https://perma.cc/HED3-4BM8>] (providing financial statements for USA Hockey and listing Total Assets in 2016 as \$74,146,736, up from \$73,479,937 in previous year).

201. See Berkman, *supra* note 123 (reporting how after NWHL cut "player salaries by 40 to 50 percent six weeks into" its previous season, "the players released a statement demanding more transparency, directly addressing what many consider the N.W.H.L.'s biggest shortcoming"); Kevin McCauley, *NWSL Has Survived Longer Than Any Other Women's Soccer League. When Do Players Get Paid?*, SBINATION (Apr. 15, 2016, 7:59 AM), <https://www.sbnation.com/soccer/2016/4/15/11409908/nwsl-2016-season-wages-cap-salary-minimum> [<https://perma.cc/HSK4-CLV9>] (describing how while NWSL is longest running women's professional soccer league, quality of life for players is still lacking because of compensation, and that "[u]ltimately, the value proposition the NWSL offers non-allocated players is very low pay in exchange for platform to potentially make a national team"). For a discussion on the rigors of player schedules as part of USA Hockey and the challenge that presents while being considered "independent contractors," see *supra* notes 66–68 and accompanying text.

202. See Berkman, *supra* note 123 (quoting Megan Duggan on challenges for Rylan to develop NWHL and challenges that came with it after salary cuts, who said, "I don't envy the hurdles [Rylan has] to jump through and the tasks she has to complete, but we really wanted to know the future of the league, what we were investing all our time and energy into"); McCauley, *supra* note 201 (explaining tensions presented by NWSL being part-time work, which enables many to defend its practices of low compensation, but in which many players are not "encouraged to treat it like part time job and find other opportunities to make money in the offseason"). Kevin McCauley, in his article, also included a quote from Houston Dash midfielder, Rebecca Moros, who articulated the problem:

There are some coaches that don't want players other jobs [*sic*], but in the men's league if they paid that little, they'd be expected to get other

essential in coming years that non-player leaders stay committed to the provisions in the new contracts and work to implement new initiatives that will continue to grow the games not just at the highest and lowest levels, but also at the professional level which has gone largely overlooked until recently.²⁰³

Leaders at the highest level of each governing body must take active steps to continue growing the games across all levels, rather than the Federation or USA Hockey simply relying on international success to interest audiences and achieve growth passively that way.²⁰⁴ A recent partnership between the Metropolitan Riveters of the NWHL and the New Jersey Devils of the NHL is the premiere example of the type of initiative that parties should strive to take going forward.²⁰⁵ The deal is “the first of its kind” in hockey and will result in the Devils offering “the Riveters ice time along with back-end support in sales, marketing, and promotion.”²⁰⁶ The deal lasts three years, and not only gives the NWHL enough of a chance

jobs. In a women’s league, it’s not expected that they’re breadwinners They’re not trying to encourage players to have jobs outside of the game.

Id.

203. See Berkman, *supra* note 123 (quoting star Women’s Hockey player Hilary Knight, who said, “[t]here are mentalities that need to be changed, because people aren’t changed enough,” and also explained that “[s]ome within women’s hockey believe more action is needed from the International Ice Hockey Federation, which holds influence over every participating nation’s governing body”); see also McCauley, *supra* note 201 (“Current Orlando Pride and former USWNT head coach Tom Sermanni advocates for more owner investment and a fully professional league.”).

204. McCauley, *supra* note 201 (“It’s everyone’s hope that someday NWSL stands on its own and club play is taken as seriously as international play; that winning club trophies will matter as much as winning international ones. But right now, NWSL and other leagues are very much secondary to the international game.”).

205. See Carol Schram, *NWHL Partnership with NHL’s New Jersey Devils Aims to Boost Profile of Women’s Hockey*, FORBES (Oct. 10, 2017, 8:30 AM), <https://www.forbes.com/sites/carolschram/2017/10/10/nwhl-partnership-with-nhls-new-jersey-devils-aims-to-boost-profile-of-womens-hockey/#80479d538a94> (summarizing three-year deal between NHL and NWHL team in New Jersey that is set to “help support the growth of the National Women’s Hockey League and increase visibility of girls’ and women’s hockey in New Jersey and across the metropolitan area”); see also Dan Rice, *Why the New Jersey Devils Deal is Massive for the NWHL and Women’s Hockey*, NWHL (Oct. 6, 2017, 12:00 PM), http://www.nwhl.zone/news_article/show/841383 [<https://perma.cc/Y9EL-HZ4Y>] (quoting NWHL Commissioner Dani Rylan on goal of partnership, “[f]or us to be able to leverage the Devils marketing engine to educate more people in the metropolitan area that there’s a professional women’s team as well, we believe that will continue to accelerate the girls grassroots growth of the game”).

206. Schram, *supra* note 205. The author further noted that “[t]he two organizations also plan to collaborate on events that will support local girls’ hockey programs.” *Id.* Hugh Weber, president of Harris Blitzer Sports and Entertainment, which is the parent company of the New Jersey Devils stated that “[t]he

for it to continue to get its feet off of the ground, but also for the potential of other NHL franchises to follow suit with the NWHL teams in their cities.²⁰⁷ In a similar vein for soccer, improvements made in the NWSL minimum salary, efforts by NWSL players to unionize, and the commitment by top players and the Federation to the NWSL through their CBA demonstrates incremental steps towards a more stable league that has ample room to grow.²⁰⁸

The partnership is only one of many more moves that must be made in coming years for other professional players to truly feel the benefits of the new deals achieved by the National Teams, but even then, it is helpful to keep in mind that even some of Title IX's benefits have taken as long as decades to be felt.²⁰⁹ With continued successes by the top players in each sport, and continued commitment

deal) aligns with so much of what we stand for on so many bases, in terms of growing the sport and using athletics to change people's lives." *Id.*

207. See Rice, *supra* note 205 (quoting Dani Rylan, who said, "[w]e really believe that this will be a great domino for the league, not only as a blueprint for the other NHL clubs in our (current) markets, but also expansion opportunities in other markets").

208. See Corey Roepken, *Source: NWSL Minimum Salary to More Than Double*, HOUS. CHRON. (Jan. 25, 2017, 4:54 PM), <http://www.chron.com/sports/dynamo/article/Source-NWSL-minimum-salary-to-more-than-double-10883469.php> [<https://perma.cc/8CQ9-JS6M>] (reporting on sources who shared minimum salary in NWSL would increase from \$7,200 in 2016 to about \$15,000, which was increase of over one-hundred percent); Das, *supra* note 136 ("The agreement also reinforces the national team players' commitment to the N.W.S.L. through their league salaries, while at the same time establishing a mechanism for them to pursue opportunities abroad."); *USWNT Makes \$16,000 Donation to Help Launch NWSL Union*, NBC SPORTS (Sept. 28, 2017, 3:50 PM), <http://soccer.nbcsports.com/2017/09/28/uswnt-makes-16000-donation-to-help-launch-nwsl-union/> [<https://perma.cc/2QWV-8QHC>] (detailing how one month after ratification of Women's National Team's CBA, non-allocated NWSL players approved new constitution and bylaws for their own players' association, and how U.S. Women's National Team Players Association recently donated \$16,000 raised by selling T-shirts as part of their "#equalpayforequalplay" campaign during their own labor disagreement, to help get NWSL union off ground).

209. See Greg Myre, *U.S. Women Will Rule in Rio (You Can Thank Title IX)*, NPR (Aug. 4, 2016, 9:19 AM), <http://www.npr.org/sections/thetorch/2016/08/04/487765827/u-s-women-will-rule-at-the-olympics-you-can-thank-title-ix> (analyzing how during 1972 Summer Olympics, which was same year Title IX was passed, U.S. women won twenty-three medals compared to seventy-one for men, but also how in 2012 Summer Olympics U.S. women won fifty-eight medals to men's forty-five, and were set to outnumber men 292 to 263 with respect to participation in 2016 Summer Olympics); see also McCauley, *supra* note 201 (outlining practical solutions for NWSL to continue growing, including, but not limited to picking players in "educated way" instead of "to trade them," so as to "[h]elp them become passionate about the club they pay [*sic*] for," and commitment by NWSL owners to keep players in one market and helping them find offseason jobs). NWHL's Commissioner, Dani Rylan, believes that in five years, "I see this league thriving. At that point we'll have two Olympic cycles under our belts In five years, bigger goals—hopefully we have a linear broadcast deal, a handful more teams in the league, and more NHL team partnerships." Rice, *supra* note 205.

by officials in each governing body to support the other professional athletes outside the highest level, the professional leagues currently in place can gain more stable footing and financial security.²¹⁰ Therefore, while each new deal resulted in “equitable pay” rather than truly “equal pay,” each team has effectively put itself, and its sport, in the best position to keep growing across all levels of the game; in the future, there is now the possibility that financially successful professional leagues will be firmly established, and also that true “equal pay” among players of all genders might be achieved.²¹¹

IV. CONCLUSION

After long, and at times tumultuous, negotiating processes that included litigation in federal court, threats to boycott, and an EEOC complaint, the Women’s National Soccer and Hockey Teams each finally came to agreements with their respective governing bodies, resulting in significant improvements on their previous situations.²¹² While they did not achieve truly “equal pay” to their male counterparts, in large part because of the different salary structure in Women’s Soccer, and the disparity between the male and female professional leagues in the example of hockey, they can, and should, be considered to have achieved a form of “equitable pay” that put each in much fairer positions relative to their male counterparts.²¹³ Before their new deals were made, the Women’s Soccer and Hockey Teams were not receiving equal treatment by their governing bodies as the corresponding Men’s Teams were.²¹⁴ For ex-

210. See McCauley, *supra* note 201 (“Year four is here. NWSL has survived. Now, the biggest question it has to answer is whether or not its capable of more than just surviving.”); see also Rice, *supra* note 205 (underscoring broad aspirations by players that reach beyond just American game, by quoting player who was part of negotiations, who said that “[s]tarting a culture change in U.S.A. Hockey, that’s ultimately at the end of the day what needs to happen to progress and move forward. Hopefully, other countries now will kind of follow suit. We’re a model to look at”).

211. For further discussion of the resolutions of each dispute, see *supra* notes 133–145 and accompanying text.

212. For further discussion of the resolution of the Women’s Soccer dispute, see *supra* notes 133–138 and accompanying text. For further discussion of the resolution of the Women’s Hockey dispute, see *supra* notes 139–145 and accompanying text.

213. For further discussion on why these disputes should be considered to have achieved “equitable pay,” see *supra* notes 146–179 and accompanying text.

214. For further discussion of disparities in compensation that existed between the U.S. Women’s and Men’s National Soccer Teams, see *supra* notes 103–120 and accompanying text. For a discussion on the unfair position that the Women’s Hockey Team was in compared to their male counterparts, see *supra* notes 121–132 and accompanying text.

ample, while the Women's Soccer compensation structure was salary-based as opposed to the Men's Team's "bonus-centric" model, there were still glaring disparities related to the compensation and benefits they received from the Federation.²¹⁵

The disparities present between compensation for the Women's and Men's National Hockey Teams took on a different form because of the contractor-independent contractor relationship the Hockey Team had with USA Hockey compared to the employee-employer relationship in the case of the Soccer Team.²¹⁶ USA Hockey compensated Men's and Women's National players equally, but there was a glaring disparity in the *fairness* of how they were compensated because of the lack of a stable professional league to fall back on, among other disparities in treatment by USA Hockey.²¹⁷ Each Team threatened to boycott major events as leverage during their negotiations, but in the end only the Hockey Team was able to establish a true threat of boycott.²¹⁸

The players found themselves, and their sports, in much improved situations after each team agreed to their new deals.²¹⁹ On top of agreeing to more equitable compensation, each deal included provisions for the governing bodies to further assist in the growing of each game.²²⁰ Along with continued proactivity by decision-makers in each league, such provisions will allow each game to grow domestically, creating further opportunity for players across a breadth of levels to play professionally and make money doing so,

215. For further discussion of the different compensation models that the Women's and Men's Soccer Teams had with the Federation, see *supra* notes 103–120 and accompanying text.

216. For further discussion of the legal distinction between the independent contractor relationship and the employer-employee relationship, see *supra* notes 42–48 and accompanying text. For further discussion of why the Hockey Team was considered an "independent contractor" during its dispute, see *supra* notes 65–68 and accompanying text.

217. For further discussion on the instability of the NWHL compared to the NHL, see *supra* notes 122–124 and accompanying text.

218. For further discussion of why the Hockey Team was able to boycott where the Soccer Team could not, see *supra* notes 85–87 and accompanying text.

219. For further discussion of the resolution of the Women's Soccer dispute, see *supra* notes 148–167 and accompanying text. For further discussion of the improved compensation for the Women's Hockey Team following the resolution of their dispute, see *supra* notes 168–179 and accompanying text.

220. For further discussion of how the Women's Soccer deal stands to help with the growth of NWSL, see *supra* notes 184–188 and accompanying text. For further discussion of how the Women's Hockey deal will help to continue growing their game domestically, see *supra* notes 189–191 and accompanying text.

while assuring the National Teams will continue their traditions of excellence by being composed of the sports' greatest talents.²²¹

Continued successes and revenues therefrom should put each of the teams in an even better bargaining position for their next deals, and bring each sport closer to true "equal pay" in coming years.²²² Achieving this success has not been easy up to this point, nor will it start to become any easier over the next several years, but with increased willingness by new parties like the New Jersey Devils in the case of the NWHL, and with further gains such as those made by increasing the minimum salary in the NWSL, change is possible.²²³ In any event, there should at least be no more question over "equal work" being performed in the case of the Women's Soccer Team, as the Men's National Team recently failed to qualify for their World Cup for the first time since 1986, while the Women are odds on favorites to repeat as champions of their World Cup in 2019.²²⁴

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221. For further discussion on the idea of a positive feedback loop being established to help foster growth in each game, see *supra* notes 194–196 and accompanying text.

222. For further discussion on improved bargaining positions for each team in the future, see *supra* notes 192–196 and accompanying text.

223. For further discussion on the steps that have been taken so far to improve conditions of professional leagues in each sport, see *supra* notes 204–208 and accompanying text.

224. See Ronald Blum, *U.S. Men Fail to Qualify for World Cup for First Time Since 1986*, CHI. TRIB. (Oct. 10, 2017, 11:41 PM), <http://www.chicagotribune.com/sports/soccer/ct-us-fails-to-qualify-for-world-cup-20171010-story.html> (describing how Men's National Team's loss to ninety-ninth ranked Trinidad and Tobago ended streak of making seven straight World Cups when team only needed tie to qualify); *World Cup Future Odds*, VEGASINSIDER (May 10, 2017), <http://www.vegasinsider.com/soccer/story.cfm/story/1795157> [<https://perma.cc/4HNU-S2UK>] (listing odds to win 2018 FIFA Men's World Cup and 2019 FIFA Women's World Cup, and listing USA Women's Team as two-to-one favorites to win outright in 2019).

* J.D. & M.B.A. Candidate Class of 2019, Villanova University Charles Widger School of Law; B.A. in International Studies, Boston College, 2016.