
BLIND LEADING THE BLIND: A CASE FOR A LEGALLY CONSCIOUS,
ANONYMOUS EMPLOYMENT APP

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I. Introduction

Nearly every jurisdiction in the United States recognizes the at-will employment doctrine that signifies that employees may be terminated for any reason that does not violate statutory protections or public policy.¹ Some state legislatures have outlawed mandatory pay secrecy in order to broaden statutory protections for workers.² Massachusetts, California, Colorado, and Illinois are some of the jurisdictions that have explicitly codified protections for employees

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¹ See *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 184–85 (Pa. Sup. Ct. 1974) (emphasizing employers' long-standing right to terminate at-will employment if there is a plausible and legitimate reason to do so that does not violate a clear mandate of public policy); *Hedrick v. Jay Wolfe Imports I, LLC*, 404 S.W.3d 454, 459 (Mo. Ct. App. 2013) (affirming the termination of an at-will employee who failed to demonstrate a constitutional or statutory public policy exception to termination); *Debus v. Burlington N. & Santa Fe Ry. Co.*, 157 F.Supp.3d 1034, 1036 (D. Kan. 2016) (defining at-will employment doctrine to mean that, absent an express or implied contractual agreement, an employer is able to terminate an employee at any time for any reason, so long as it does not violate common law or statutory exceptions).

² See WOMEN'S BUREAU, U.S. DEP'T OF LAB., FACT SHEET: PAY SECRECY, 1 (2014) (contextualizing the status of pay secrecy laws in certain jurisdictions after the above-mentioned states passed salary transparency laws). Under the Obama Administration, the federal government also endorsed legislation and enacted executive orders that prohibit pay secrecy policies in the workplace. *Id.*

who discuss their salaries and benefits with colleagues and third parties.³

Although state legislatures have only recently recognized pay transparency laws, on a federal level, such protections, to some degree, have long been in force.⁴ Namely, the National Labor Relations Act of 1935 dictates that employers may not inhibit employees from engaging in concerted labor activities such as discussing salaries or wages with fellow employees.⁵ Still, many employers either discourage their employees from discussing their compensation or require them to sign non-disclosure agreements expressly prohibiting them from discussing their salary with other

³ See MASS. GEN. LAWS ANN. ch. 149, § 105A(b) (West 2018) (protecting unionized and non-unionized employees from retaliation and adverse employment actions if they discuss their wages, salary, benefits, etc. with other employees or third parties). The primary purpose of the statute is to help close the wage gap between female and male employees and protect workers from gender-based pay discrimination. *Id.* The statute creates protections for all employees who openly discuss their salaries and benefits with other employees. *Id.* at § 105A(c)(1). See also CAL. LAB. CODE § 232 (2003) (prohibiting any employer to “require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages; require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages; [or] discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.”). See also COLO. REV. STAT. § 24-34-402 (2017) (outlawing employers from discharging or disciplining employees for, or coercing employees from, discussing wages with co-workers). See also 820 ILL. COMP. STAT. ANN. 112/10(b) (2019) (stating “it is unlawful for any employer to discharge or in any other manner discriminate against any individual for inquiring about, disclosing, comparing, or otherwise discussing the employee’s wages or the wages of any other employee, or aiding or encouraging any person to exercise his or her rights”).

⁴ See National Labor Relations Act, 29 U.S.C. § 151–69 (1935) (establishing landmark federal protections for unionized and non-unionized employees who engage in activities with the purpose of collectively improving working conditions). Employees who discuss their salaries for the expressed purpose of mutual aid and benefit of fellow workers, particularly those who share a community of interest, would be covered under the Act. *Id.*; Brian P. O’Neill, *Pay Confidentiality: A Remaining Obstacle to Equal Pay After Ledbetter*, 40 SETON HALL L. REV. 1217, 1219 (2010) (underscoring that pay secrecy provisions widely are considered illegal pursuant to Section 8 of the NLRA).

⁵ See 29 U.S.C. § 157 (1935) (protecting employees covered under the Act who engage in concerted activity for mutual aid and benefit).

employees and third parties.⁶ Although it is robust, the Act does not and cannot address every instance of employer retaliation for discussing employee pay and benefits—leaving employees at risk of losing their jobs for mere inquiries into the compensation of their peers.⁷

Awkwardness in discussing salary, employer resistance to employees discussing their respective salary, and lack of absolute protection for all employees discussing their salaries regardless of whether the discussion is in furtherance of mutual aid or benefit remain obstacles to achieving pay transparency.⁸ Furthermore, since unionization efforts have declined, American workers have seen the largest pay disparity between employee and employer ever.⁹ Blind, a South Korea based app that assigns randomized, anonymous, encrypted identification numbers to participating employees, allows workers to discuss subjects such as salary, fairness in the workplace, and company policies, and can help remedy these issues.¹⁰ While Blind offers a way to protect workers from workplace retaliation, there is a noticeable lack of competition and vast amount of

⁶ See WOMEN'S BUREAU, *supra* note 2 (stating that despite protections from the NLRA, employees are still in danger in many states when they discuss matters such as salary and benefits with other employees).

⁷ See *id.* (implying that there are firings every year based off of employees discussing their salary with colleagues). See also Heather L. Devine, *NLRB Says At-Will-Employment Policies Are Lawful*, N.H. EMP. L. LETTER (July, 2013) [hereinafter "N.H. Employment Law Letter"] (demonstrating that employer's practice of unilaterally modifying at-will status is lawful). The NLRA protects non-unionized employees as well as unionized employees, but the NLRB will uphold "reasonable at-will-employment policies" that do not cause employees to reasonably believe that said policies violate § 7 of the NLRA. *Id.*

⁸ See Christina Le Beau, *How knowing your colleague's salary could hurt you*, QUARTZ AT WORK (May 2, 2019), *archived at* <https://perma.cc/S7KW-AYM8> (advocating salary transparency is actually harmful to employees because salary data is not inherently valuable, employees may not be happy with the results, and wages could be cut); Laurence Bradford, *Are Tech Companies Breaking The Law With Pay Secrecy Policies?*, FORBES (Sept. 2018), *archived at* <https://perma.cc/P94J-NHX8> (demonstrating that tech companies in particular are responsible for potential violations under the NLRA for discouraging, inhibiting, and sometimes punishing employees from engaging in pay transparency techniques).

⁹ See *infra* Part II.B (encapsulating the positive correlation between union membership and wage and pay equity).

¹⁰ See *infra* Part II.B (highlighting Blind as a potential means of circumventing nosey employers in the tech industry who engage in pay secrecy and other toxic employment practices).

speculation as to whether the app is truly anonymous and safe for employees to use.¹¹

This Note will examine how Blind synergizes with existing state and federal legislative infrastructure protecting pay transparency, concerted activity, and workers from discrimination. To achieve this end, this Note will contextualize unionization in America, the concept of at-will employment, and equal pay initiatives and interests to underscore the need for emerging tools and strategies to aid American workers in achieving an equitable workplace. Finally, this Note aims to evaluate Blind as a potential solution and intermediary for employee protections and advocate for either legally conscious renovations to Blind's platform or for another company to provide similar services that Blind does in a more legally responsible way.

II. History

A. *The National Labor Relations Act and the Union Model of Pay Transparency*

Historically, workers in the United States were not afforded labor protections until the passage of significant labor reform acts, especially the National Labor Relations Act of 1935 ("NLRA," "the Act").¹² Section three establishes the Act's enforcing body, the

¹¹ See *Blind – Anonymous Work Talk You May Also Like*, APPLE APP STORE (Oct. 17, 2019), archived at <https://perma.cc/MP63-BBCV> (demonstrating no English language apps related to Blind in the Apple App store); *App Store*, GOOGLE PLAY (Oct. 17, 2019), archived at <https://perma.cc/8G7S-Q2JR> (showing other employment apps assisting people with finding work or flexible jobs but not showing apps pertaining to anonymous employment tools). See also Shelby S. Skeabeck, *Another Anonymous Employee Posting App? Watch Out!*, LABOR & EMPLOYMENT REPORT (Feb. 15, 2018), archived at <https://perma.cc/86MM-BWRG> (opining that Blind is not as secure as advertised because it requires a work e-mail to sign up). Employer IT services can flag accounts their employees are creating with their work e-mails. *Id.*

¹² See *Lochner v. New York*, 198 U.S. 45, 45 (1905) (holding that the maximum hour statute for bakers in New York violated employees' right to contract under the Fourteenth Amendment of the Constitution); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 229 (1917) (granting injunctive relief for a mining company that terminated the employment of any employee known to the company as being in or attempting to organize a union). See also *infra* Part II.B; Richard B. Gregg, *The National War Labor Board*, 33 HARV. L. REV. 39, 39–40 (1919) (demonstrating that one of the first boards to resolve labor disputes was borne from

National Labor Relations Board (“NLRB,” “The Board”) which has five board members who preside over hearings at the highest level.¹³ Section seven of the Act establishes that employees have a right to engage in concerted activities.¹⁴ Section eight of the Act establishes several unfair labor practices which employers may not engage in.¹⁵ With limited exceptions, the NLRA does not protect government employees, but government employees enjoy pay transparency by the nature of their employment because local, state, and federal governments publish salaries so that they are searchable by the public.¹⁶

Expressly enabled by the NLRA, union pay scale transparency models establish compensation within the terms of a collective bargaining agreement and remain the most easily accessible and recognizable mode of pay transparency.¹⁷ Some

militaristic necessity and strictly watched over by agents of capital and the government). However, the National War Labor Board served as a precursor to the NLRA in a sense that it “educate[d] employers and employees and the public in regard to some fundamental aspects of industrial relationships.” *Id.* at 61; Norris-La Guardia Act, 29 U.S.C. § 103 (1932) (banning “yellow dog” contracts which require employees to not join a union as a condition of continued employment); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 388 (1935) (holding the National Industrial Recovery Act, a New Deal legislative action, despite making unionizing efforts significantly easier, was unconstitutional).

¹³ See 29 U.S.C. § 153(a) (establishing a board of five members appointed by the President with the advice and consent of the Senate). This board is known commonly as the National Labor Relations Board. *Id.*

¹⁴ See *Teamsters Loc. Union No. 117 v. State Dept. of Corr.*, 317 P.3d 511, 511 (Wash. Ct. App. 2014) (establishing concerted activities as activities undertaken by employees, jointly with one another, for the purpose of improving their working conditions).

¹⁵ See 29 U.S.C. § 158 (1935) (listing various unfair labor practices, including: interfering with employees’ right to unionize or concert, retaliating against employees for filing charges with the National Labor Relations Board, and refusing to bargain with the lawfully representing union).

¹⁶ See 44 C.F.R. § 208.12 (2005) (establishing the Maximum Pay Rate Table for Department of Homeland Security employees for various positions and localities). While government employees do not have the same NLRA protections as private employees, government employees have extensive access to public records detailing pay scales, salaries, benefits, etc. of their co-workers. *Id.* See also 5 U.S.C. § 5504 (2003) (outlining compensation scale and pay scales for federal administrative employees); MICH. COMP. LAWS SERV. ANN. § 32.513 (LexisNexis 2019) (creating compensation for active state employees including pay, allowances, and appropriations).

¹⁷ See 29 U.S.C. § 414 (1959) (stating that any employee whose rights are affected by the terms of a collective bargaining agreement has the right to request a copy of

private sector unions even publish their respective collective bargaining agreements—which contain salary and wage schedules—online with the United States Department of Labor.¹⁸ Public sector union employees, while not protected under the NLRA, are also able to simply search for their pay scales on the internet or request copies of their collective bargaining agreements.¹⁹

It is a common misconception that the NLRA only applies to unionized employees; the Act extends protections to at-will employees as well.²⁰ Thus, an employee of a large retail chain, a server at a restaurant, and an office assistant at a Fortune 500 company are all typically protected under the NLRA.²¹ In its essence, mandatory pay secrecy is considered an unfair labor practice under the Act.²² However, the Act is not always effective at preventing many employers from resisting pay transparency, punishing employees who partake in acts related to pay transparency, and keeping salary and benefit information secret from inquiring employees.²³

such agreement from their union or union steward). Unions publish pay scales in collective bargaining agreements and are legally required to distribute copies of collective bargaining agreements to employees. *Id.*

¹⁸ See Office of Labor-Management Standards (OLMS), *Collective Bargaining Agreements File: Online Listings of Private and Public Sector Agreements*, U.S. DEPARTMENT OF LABOR (Apr. 2, 2019), archived at <https://perma.cc/NKU3-RD38> (listing a searchable database of unions that publicly list the terms of their collective bargaining agreements).

¹⁹ See 29 U.S.C. § 152(2) (1935) (stating that employers defined by and subsequent rights derived from the Act do not apply to the United States Government or wholly owned government bodies). See also 29 U.S.C. § 414 (reinforcing obligation for unions to provide copies of collective bargaining agreements to members).

²⁰ See 29 U.S.C. § 157 (1935) (protecting all employees covered under the act in making concerted efforts for the purpose of collective bargaining, mutual aid, or protection).

²¹ See *id.* at § 152(3) (prohibiting certain types of employees from deriving rights and protections from the act, including public or government employees, independent contractors, and railroad and airline industry workers covered under the Railway Labor Act). For example, a CEO would be unable to recover under the act because the Act bars all management workers from deriving benefits under the Act. *Id.*

²² See 29 U.S.C. § 158(a)(1) (dictating that restraining or otherwise preventing employees from engaging in mutual aid, such as discussing salary, is an unfair labor practice).

²³ See Bradford, *supra* note 8 (implying that tech companies are especially guilty of discouraging and prohibiting salary discussion, which violates the NLRA).

B. *The Rise and Fall of American Unions*

At one point in history, many Americans knew members of unions.²⁴ Large general unions such as the Industrial Workers of the World (IWW) and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) actively engendered support for worker protections throughout the entire twentieth-century.²⁵ After the passage of the Taft-Hartley Act of 1947, the federal government and state governments regained a considerable amount of power over unionized workers.²⁶ With the Taft-Hartley Act outlawing some of unions' most powerful strategies, external factors including economic downturns, anti-Communist sentiments, and political undertows, gravely affected union membership in the United

²⁴ See Quoc Trung Bui, *50 Years Of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015), archived at <https://perma.cc/ENT3-V6H5> (highlighting union membership rates across America from 1964-2014). At its height in 1964, nearly one in every three workers was unionized, with the state of Washington having the largest percentage of unionized workers at forty-four and a half percent. *Id.* By 2014, only one out of every ten workers were unionized. *Id.*

²⁵ See SHARON SMITH, *SUBTERRANEAN FIRE: A HISTORY OF WORKING-CLASS RADICALISM IN THE UNITED STATES*, 86–87 (Haymarket Publishers 2006) (stating that it is difficult to determine the IWW, especially during the 1910s and 1920s when unions were most politically active, but it is estimated that the IWW had approximately 120,000 dues-paying members in the 1910s). Many workers joined the IWW during periods of economic unrest, firings, wage slashes, labor uprisings, etc. because the union was able to achieve extraordinary gains in various localities, such as in the Lawrence Strike in Massachusetts in 1912. *Id.*

²⁶ See Colin Gordon, *The Legacy of Taft-Hartley*, JACOBIN (Dec. 19, 2017), archived at <https://perma.cc/EW5N-VCZ7> (dictating that the Taft-Hartley Act gravely diminished union power by making it more controllable by the government and agents of capital). The Taft-Hartley Act: outlaws wildcat strikes, general and solidarity strikes, and closed-shops; required anti-Communist affidavits from union officials—which was later ruled to be unconstitutional by the Supreme Court; and permitted right-to-work legislation. *Id.* The law ended up purging many radical voices from unions—who were fierce worker advocates—while also contributing to mass passing of right to work laws in the Deep South, which kept Black workers along “the color line.” *Id.*

States.²⁷ From the 1960s through the mid-2010s, union membership in America hit record lows annually.²⁸

The United States government has resorted to many different means to neuter unions and curtail working class movements from usurping ruling class hegemony, even if that meant resorting to using state mechanisms.²⁹ For example, there has been a growing sentiment from academics and politicians alike that unions who

²⁷ See Dwyer Gunn, *WHAT CAUSED THE DECLINE OF UNIONS IN AMERICA?*, PACIFIC STANDARD, Apr. 24, 2018 (citing free-market reforms, globalization, and anti-desegregation coalitions from Republicans and Southern Democrats as major factors of union decline). By the 1960s, unions were seeking to expand membership in Southern states which historically saw very low union membership. *Id.* The South's textile industry remained one of the largest non-unionized labor sectors in America. *Id.* Southern capitalists and employers saw unionization as a threat to their hegemony and hid behind the "boogeyman" of desegregation to increase anti-union sentiment amongst white workers in the Jim Crow South. *Id.* Globalization ushered in an era in which goods, especially manufactured goods, could be produced cheaper abroad, resulting in the decline of America's manufacturing sector. *Id.* Manufacturing workers were one of the most common unionized employees in America at the time. *Id.*

²⁸ See Bui, *supra* note 24 (showing that union membership has steadily declined since 1964 to the point where approximately ten percent of the American labor force is unionized).

²⁹ See ROBERT W. DUNN, *THE AMERICANIZATION OF LABOR: THE EMPLOYERS' OFFENSIVE AGAINST THE TRADE UNIONS*, 11 (1928) (stating that factories were dominated by ruling class interest). Factories and businessmen suggested that consumers patronize non-union shops. *Id.* at 18. States had associations of business owners and employers who lobbied against and actively resisted concerted labor activities. *Id.* at 44–45. The employing class also sought to capitalize off of militaristic anti-German and anti-Bolshevik sentiments to target union members and worker's compensation drives. *Id.* at 22. See also SMITH, *supra* note 25, at 80 (stating that IWW leader Bill Haywood was arrested by Pinkerton agents—agents of a security contractor the Pinkerton Company—on “trumped up charges” for assassinating an anti-union former governor of Idaho). Pinkerton agents constantly broke strikes for anti-unionists in the government and business sector alike as the agents of capital possessed the financial means of hiring the Pinkerton's services to do extra-legal activity. *Id.* at 52. See also Sandheep Vaheesan, *America's most insidious union-buster? Its own government*, THE GUARDIAN (June 29, 2018), archived at <https://perma.cc/Y537-6WBV> (opining that the United States government has historically went to considerable lengths to stymie working-class movements by suing unions and organization movements under antitrust laws). One such notable example is the use of the Sherman Act as a means of targeting workers classified as independent contractors. *Id.* See also Sam P. Burford Jr., *Antitrust and Labor – Union Liability under the Sherman Act*, 19 SMU L. REV. 613, 615 (1965) (discussing American antitrust legislation being utilized to break apart unions that represent large swaths of the American workforce).

expand rights enjoyed under collective bargaining agreements to as many workers as possible inherently violates the language of antitrust legislation.³⁰

C. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.: Every Minute Counts for Wronged Employees*

At-will and independently contracted employees constitute the majority of the workforce in the United States, enabling employers to terminate employees for any reason at all or for those outlined in a contract for employment.³¹ Generally, at-will employees especially have less awareness of their compensation in comparison to their unionized counterparts because employers tend to not provide compensation details making wage violations on the basis of discrimination more prevalent.³²

Title VII of the Civil Rights Act of 1964 was bolstered by the Lilly Ledbetter Fair Pay Act (“FPA”) which was passed in the wake of *Ledbetter v. Goodyear Rubber, Co. Inc.*³³ Lilly Ledbetter brought a claim against her employer under Title VII for pay discrimination which was ultimately denied by the Supreme Court.³⁴ In the wake of

³⁰ See Sylvester Petro, *Competition, Unions, and Anti-Trust*, FOUND. FOR ECON. EDUC. (July 1, 1964), archived at <https://perma.cc/U8DM-FVPZ> (opining that unions that seek to include as many workers as possible eliminate competition by way of “price-fixing” the terms of collective bargaining agreements within its relative labor market).

³¹ See Bui, *supra* note 24 (implying that if approximately ten percent of workers in 2014 were unionized, the remaining ninety percent of employees would be at-will or contracted employees).

³² See *McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st. Cir. 1998) (holding that the veterinarian organization engaged in discrimination when it knowingly payed female department head significantly less money than her male counterparts). *McMillan* was the head of the radiology department for a veterinarian practice. *Id.* When a new radiologist was hired at a starting salary of \$38,000, *McMillan* was concerned that she was being underpaid because she was making \$3,000 more as the department head. *Id.* She requested a raise and received a raise to \$51,000. *Id.* *McMillan* only learned that she was being underpaid by nearly \$15,000 compared to her male counterparts when a newspaper published all of their salaries. *Id.*

³³ See 42 U.S.C § 2000e–5(e)(3)(B) (amending Title VII to allow statute of limitations for discrimination claims to accrue and reset at each discriminatory action arising out of the same discriminatory behavior).

³⁴ See *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 550 U.S. 618 (2007) (holding that claimant could not consider each deducted paycheck due to discrimination as the first day of 180-day statute of limitations). *Ledbetter* worked at Goodyear for

this controversial ruling, employers were able to circumvent Title VII's narrow 180-day statute of limitations on pay discrimination claims, as the statute would start running at the first instance of pay discrimination.³⁵ In 2008, President Obama signed into law the FPA as a means of amending Title VII's 180-day statute of limitations by resetting the 180-day timer with each instance of pay discrimination as opposed to the first instance of pay discrimination.³⁶ However, the FPA does not reset the timer for every type of discrimination claim, even if the reasoning behind the discrimination is based on unfair employment practices.³⁷

D. Some State Legislators Expand Rights of At-Will Employees for Purposes of Pay Transparency and Paycheck Fairness Act

Especially in light of the #MeToo movement and the ever-growing scrutiny of the gender gap, there is a great impetus for the

decades. *Id.* at 621. Ledbetter was earning \$3,727 per month compared to the lowest paid male employee who was being paid \$4,286 per month and the highest paid employee who was being paid \$5,236 per month. *Id.* at 643. Ledbetter brought a claim with the Equal Employment Opportunity Commission (EEOC) regarding potential wage discrimination. *Id.* Her claim was statutorily barred by Title VII, as the EEOC has a 180-day statute of limitations from when the discrimination started. *Id.* at 618. The Supreme Court held that under Title VII, the first instance of discrimination, in this case the first pay check Ledbetter received that had a lower rate of pay than her male counterparts, began the actionable time period in which she could file a claim. *Id.* This period did not renew at each paycheck. *Ledbetter*, 550 U.S. Justice Ginsberg famously dissented, stating that the lack of pay transparency and the nature of pay discrimination cases inhibits employees who are being discriminated against from realizing the discrimination before it is far too late. *Id.* at 645. *See also* *McMillan v. Massachusetts Soc. For the Prevention of Cruelty to Animals*, 140 F.3d 288 (Mass. 1998) (supporting Ginsberg's dissent because it highlights how pay discrimination is a product of incremental instances of docking pay, passing over for raises, etc.).

³⁵ *See Ledbetter*, 550 U.S. at 644 (implying that employers will take advantage of the case's holding to further discriminate against women).

³⁶ *See* 42 U.S.C. § 2000 e-5(e)(3)(B) (allowing for aggrieved plaintiffs to recover back pay on claims arising under Title VII pay discrimination for up to two years preceding the filing of the charge). The unlawful employment practice(s) in question must be substantively similar or related to the unlawful employment practices with regard to discrimination in compensation that occurred outside the statute of limitations for the first instance of alleged discrimination. *Id.*

³⁷ *See* *Noel v. The Boeing Co.*, 622 F.3d 266, 266 (3d Cir. 2010) (holding that the Fair Pay Act did not apply to failure to promote claim).

legislature to codify expanded protections against pay secrecy.³⁸ Additionally, pay secrecy also affects nonwhite people's ability to figure out whether their wages are equivalent to their white counterparts.³⁹ Only seven states prohibit employers from requesting previous salary information for incoming applicants and many more cities and other municipal entities have passed ordinances prohibiting this conduct in an effort to combat the gender and race gap in the workplace.⁴⁰

Further yet, there is proposed legislation in Congress that would expand the same rights offered by the aforementioned state statutes to a federal level.⁴¹ However, the bill is not expected to

³⁸ See *Institute for Women's Policy Research*, QUICK FIGURES: PAY SECRECY AND WAGE DISCRIMINATION (Jan. 2014), archived at <https://perma.cc/E5G9-TEE3> (demonstrating that women make less than their male counterparts at every education level, and this issue is compounded further when race is also a factor). Pay secrecy is an illegal practice in which employers require nondisclosure of salary, benefits, wages, or terms of employment between employees. *Id.* See Lilly Ledbetter, *Lilly Ledbetter: Women can't wait any longer for paycheck fairness*, CNN (Jan. 30, 2019), archived at <https://perma.cc/7CL3-YWTH> (opining that the Fair Pay Act is necessary to combat rampant discrimination continuing to prevail in 2019).

³⁹ See Tim Herrera, *Why You Should Tell Your Co-Workers How Much Money You Make*, THE NEW YORK TIMES (Aug. 31, 2018), archived at <https://perma.cc/9HE3-HK9J> (citing expert who says that pay secrecy makes it difficult for racial minorities to figure out the existence of pay disparities).

⁴⁰ See *Asking for Salary History Perpetuates Pay Discrimination from Job to Job*, NAT'L WOMEN'S LAW CENTER (Dec. 10, 2018), archived at <https://perma.cc/FY35-24YZ> (demonstrating that Massachusetts, California, Delaware, Oregon, Puerto Rico, Connecticut, Hawaii, and Vermont, as well as Kansas City, MO, New York City, and Pittsburgh, among other localities, have passed legislation banning salary history requests). See also M.G.L. ch. 149 § 105A (outlawing the practice of employers asking for salary history in the state of Massachusetts); CAL. LAB. CODE § 432.3 (prohibiting the practice of employers asking for salary history in the state of California); DEL. CODE ANN. tit. 19 § 709B (banning the practice of employers asking for salary history in the state of Delaware); OR. REV. STAT. §§ 652.210, 652.220, 652.230, 659A.820, 659A.870, 659A.875, 659A.885 (preventing the practice of employers asking for salary history in the state of Oregon); P.R. LAWS ANN. tit. 29 § 251-259 (outlawing the practice of employers asking for salary history in Puerto Rico); CONN. GEN. STAT. ANN. § 31-40z (prohibiting the practice of employers asking for salary history in the state of Connecticut); Haw. S.B. No. 2351 (Jan. 1, 2019) (making illegal the practice of employers asking for salary history in the state of Hawaii); 21 V.S.A. § 495m (preventing employers from asking prospective employees for their salary history in the state of Vermont).

⁴¹ See Ella Nilsen, *The House just passed a bill to close the gender pay gap*, VOX (Mar. 27, 2019), archived at <https://perma.cc/3F54-GML8> (stating that while the House passed the Paycheck Fairness Act, the bill has an uphill battle in the Senate).

pass.⁴² But, vulnerable populations such as women and racial minorities may have recourse if their employers enforce a pay secrecy policy—an app called “Blind.”⁴³

E. Awkward Watercooler Talk: Do Employees Really Want to Talk About Their Pay Even in the Face of Inequality?

Despite the advantages that pay transparency provides to all, workers are not entirely on-board with the idea about discussing their salary, wages, or benefits with other people; in fact, discussing any of these things is still taboo and makes large portions of America’s workplace uncomfortable.⁴⁴ Perhaps employees fear that the workplace will become more tense if salaries serve as a point of social comparison.⁴⁵ However, tension could potentially be exacerbated if companies do not provide any context as to why some

Congress has a history of passing similar legislation only for it to fail in one chamber or the other. *Id.*

⁴² See *id.* (demonstrating that the Republican-controlled Senate will likely kill the House bill).

⁴³ See *infra* Part III Premise (discussing Blind as a potential tool to circumvent workplace discrimination). See also *Why Use Blind’s Salary Comparison Tool?*, BLIND (Mar. 29, 2020) [hereinafter “Salary Comparison”], archived at <https://perma.cc/6VJ2-WQJ3> (providing a centralized location for workers across Blind’s platform to anonymously share salary information).

⁴⁴ See Le Beau, *supra* note 8 (citing general unease with sharing salary information). See also Joe Pinsker, *The Extreme Discomfort of Sharing Salary Information*, THE ATLANTIC (Oct. 16, 2018), archived at <https://perma.cc/M3HZ-DERP> (underscoring that employees would go to great lengths to prevent other employees from finding out their salary information). Economic theorists attempted to quantify discomfort with sharing salary information and found that people were not willing to spend much of their wealth to find out others’ salary information, yet were willing to spend significantly higher in order to keep their salary information hidden despite highly valuing the need and desire to have a transparent workplace. *Id.*

⁴⁵ See Samantha Cooney, *Should You Share Your Salary With Co-Workers? Here’s What Experts Say*, TIME (Aug. 14, 2018), archived at <https://perma.cc/S48J-XRCA> (weighing the various pros and cons of sharing one’s salary information). While employees may be happier overall, wage gaps can close, companies may be able to control the narrative of controversy regarding wage gaps, employees may feel pitted against each other, companies may hire or retain fewer employees, and pay differences may be taken out of context. *Id.*

employees make more or less than other employees.⁴⁶ In all, despite the potential illegality of such practices, forty-one percent of employers discourage and twenty-five percent outright prohibit discussion of salary information.⁴⁷

Despite the potential for employee dissatisfaction arising out of pay transparency policies, seventeen percent of employers voluntarily release salary and benefit information.⁴⁸ Employee interest in salary transparency may be behind these disclosures.⁴⁹ Companies that switch to a transparent pay model may find that employees work harder, are more motivated, and are more diverse.⁵⁰

⁴⁶ See *id.* (suggesting that sharing salary information could pit employees against each other and that pay differences could be taken out of context).

⁴⁷ See JEFF HAYES, PRIVATE SECTOR WORKERS LACK PAY TRANSPARENCY: PAY SECRECY MAY REDUCE WOMEN'S BARGAINING POWER AND CONTRIBUTE TO GENDER WAGE GAP (Institute for Women's Policy Research 2017) (demonstrating figures and statistics of employers' policies regarding pay secrecy). In the public sector, where pay scales are defined and transparent, the wage disparity between men and women is much lower than in the private sector, where it is wholly not transparent about salary and benefits. *Id.*

⁴⁸ See Cooney, *supra* note 45 (stating that a minority of companies believe that it is healthier for company culture to be transparent about who is being paid what).

⁴⁹ See GLOBAL SALARY TRANSPARENCY SURVEY: EMPLOYEE PERCEPTIONS OF TALKING PAY 2 (Glassdoor 2016) (finding that seventy percent of employees across seven countries believe that salary transparency is good for employee satisfaction). When narrowed to employees surveyed in the United States, seventy-one percent of men surveyed wish that they had a better understanding of the fair market compensation for their position, while sixty-six percent of women answered the same. *Id.* at 6. Seventy-three percent of men and sixty-four percent of women surveyed believe that salary transparency would be good for employee satisfaction. *Id.* at 8. Furthermore, sixty-nine percent of men and sixty-one percent of women surveyed would be willing to disclose their salary information if they could do so anonymously. *Id.* at 9. Seventy-four percent of men and seventy-one percent of women surveyed believe that salary transparency would in fact be good for business at their respective company. *Id.* at 11. In all, the study concludes that employees want more salary transparency, are willing to disclose the necessary information to facilitate transparency if they can do so anonymously, and believe that transparency can help business. *Id.* at 12. See also Elena Belogolovsky et. al., *Looking for Assistance in the Dark: Pay Secrecy, Expertise Perceptions, and Efficacious Help Seeking Among Members of Newly Formed Virtual Work Groups*, 31 J. BUS. PSYCHOL. 459, 459 (2016) (stating that employees are more likely to trust and ask other employees for help if they know what they make); Cooney, *supra* note 45 (interviewing expert who says that employees who do not know whether they are underpaid or not will assume that they are and purposely or subconsciously decrease performance).

⁵⁰ See Kim Elsesser, *Pay Transparency Is The Solution To The Pay Gap: Here's One Company's Success Story*, FORBES (Sept. 5, 2018), archived at

Although, this employee interest in transparency may not be enough—the history of the labor movement in the United States shows owners of capital and the hegemonic powers in society will constantly and feverishly resist efforts that seek to redistribute power to those who produce value through labor.

III. Premise

A. *Blind: An App that Helps Workers Combat Today's Income Inequality*

2019 marked the largest-ever wealth gap between the wealthy and working classes.⁵¹ Unsurprisingly, the rise in at-will employment and subsequent decline in unionized employment mirrors the steadily increasing wealth gap over the past five decades.⁵² The wages of the highest earners—the top one percent of the income bracket—have consistently outpaced the wages of working-class and middle-class earners who have seen exponentially

<https://perma.cc/D3D6-8SVT> (opining that pay transparency will close the wage gap because it has proven at an evaluated company in order to decrease turnover rate of female employees and streamline the hiring process); Tim Herrera, *The Benefits of Sharing Your Salary*, THE NEW YORK TIMES (Nov. 18, 2018), archived at <https://perma.cc/6K3T-VTWT> (stating that sharing salary information minimizes disparate treatment under Title VII); Kristin Wong, *Want to Close the Pay Gap? Pay Transparency Will Help*, THE NEW YORK TIMES (Jan. 20, 2019), archived at <https://perma.cc/GMK6-3ZBK> (suggesting salary transparency in the workplace leads to a more productive workforce).

⁵¹ See Taylor Telford, *Income inequality in America is the highest it's been since Census Bureau started tracking it, data shows*, WASHINGTON POST (Sept. 26, 2019), archived at <https://perma.cc/8A2V-7HGN> (demonstrating that Census Bureau has recorded another record high year of income inequality across America). While some states have a more equal share of wealth than others, nine states saw drastic spikes in inequality in 2019. *Id.*

⁵² See Celine McNicholas et al., *Unprecedented: The Trump NLRB's attack on workers' rights*, ECONOMIC POLICY INSTITUTE (Oct. 16, 2019), archived at <https://perma.cc/826D-5Z3X> (opining that the decline of union membership has been directly correlated with income inequality since the 1960s). Up until the high-water mark of union membership in the 1960s, the share of income going to the top ten percent of Americans was almost equal to the rate of union membership at approximately thirty-five percent. *Id.* Compared to 2017, only approximately eleven percent of Americans were unionized and almost half of all income went to the top ten percent of earners. *Id.*

smaller growth rates.⁵³ While decades of data demonstrating that wage growth for working people is positively correlated with collective action, employees lack the necessary resources and information to effectively engage in protected, concerted activity such as collective bargaining or activities for mutual aid and benefit to fellow workers.⁵⁴

While the economic landscape may seem discouragingly unclear for working people in America, Blind is an app that may level the playing field for employees by offering users anonymous

⁵³ See *id.* (highlighting the share of wealth possessed by CEOs and the top one percent of earners in comparison to the remaining ninety percent of earners since 1978). CEO salaries have increased 940 percent compared to a twelve percent growth in employee salaries. *Id.* Wages of the top one percent as a whole have grown 150 percent, while the bottom ninety percent only saw their wages increase by twenty-one percent—roughly one seventh as fast. *Id.* See also Leigh Thomas, *Middle class shrinking as income stagnates, costs rise: OECD*, REUTERS (Apr. 10, 2019), archived at <https://perma.cc/FHU7-JYJG> (contrasting the rising wealth of the upper-class with the global middle class's struggle to maintain a middle-class lifestyle). Globally, the middle-class sectors in 36 countries studied are shrinking. *Id.* This phenomenon is especially apparent when adjusted for age and generation. *Id.* “The middle class has shrunk with each generation with sixty-eight percent of baby-boomers - those born between 1942 and 1964 - belonging to the middle class when they were in their twenties compared with sixty percent for millennials, born between 1983 and 2002.” *Id.* This, coupled with the rising costs of housing and education, inflation, and automation threatening one-in-six middle-class jobs, spells a dire forecast for the middle-class' ownership of total wealth. *Id.* See also Joe C. Davis & John H. Huston, *The Shrinking Middle-Income Class: A Multivariate Analysis*, 18 EASTERN ECON. J. 277, 284 (1992) (postulating the decline of middle-class citizens is due to a multitude of factors such as degree of education, dual incomes, unionization, race, and sex). Heads of households are working a few hours less than the historic average. *Id.* The increase of female heads of household has contributed to a one half of one percent decrease in members of the middle-class, which tacitly states that women are being paid less than their male counterparts to the detriment of the middle-class. *Id.* One of the largest contributors to the shrinking middle-class is the decline of unionization as jobs drift away from manufacturing and trend to high earning technology and low earning service jobs. *Id.*

⁵⁴ See McNicholas, *supra* note 52 (citing that many American workers would unionize if they could, but feel that the opportunity is not there for them to do so).

Extreme inequality and wage stagnation for virtually all but the highest earners have left fewer . . . U.S. workers able to access the middle class. Increasingly, workers are demanding change. Nearly half (48%) of all nonunion workers say they would vote for a union if given the opportunity—a 50% higher share than when a similar survey was taken in 1995.

Id.

access to topics channels, lounges, and private company channels to employees with a work e-mail address at a place of employment with at least thirty employees.⁵⁵ While non-users can browse Blind's public forums, in order to access the anonymous services, users must verify their professional status with TeamBlind by providing a company e-mail address.⁵⁶ Upon joining, users are presented with one feed of public posts and one feed of private posts, and are free to participate in, expand, or filter topics based on matters such as compensation, housing, politics, relationships, layoffs, and terminations.⁵⁷

⁵⁵ See Sara Ashley O'Brien, *App lets workers talk about their companies anonymously*, CNN BUS. (Feb. 12, 2018), archived at <https://perma.cc/VE7Q-XAPX> (introducing the Blind app, which is an anonymous message board connecting tens of thousands of employees from companies such as Amazon, Uber, Apple, and Google). See also *FAQs*, BLIND (Mar. 2019), archived at <https://perma.cc/K5ZP-XJE6> (demonstrating the various services offered by Blind while ensuring users that they cannot be traced back to Blind by either employers or TeamBlind). Topic channels act as the broadest type of service provided by Blind, offering every Blind user access to general message boards across various industries and companies. *Id.* Lounges are more focused boards that allow employees with similar job functions and backgrounds across similar industries to interact. *Id.* The most focused type of services are the Private Company Channels which are unique to each company and are meant to provide companies with at least 30 employees with an individualized space for more "intimate discussions." *Id.*

⁵⁶ See *FAQs*, *supra* note 55 (explaining that Blind relies on being a community of verified professionals). In order to verify professional status, users must sign up for Blind using a work or a professional e-mail address. *Id.* Blind ensures that this is a safe process because of their encryption method. *Id.* TeamBlind has a patented encryption method that makes workplace e-mail addresses and passwords totally invisible to TeamBlind. *Id.*

⁵⁷ See Paige Leskin, *Tesla employees are complaining that the company is trying to block Blind, an anonymous app for talking about your company – here's how it works*, BUS. INSIDER (June 6, 2019), archived at <https://perma.cc/TTP3-NRLQ> (demonstrating that Blind's feeds range from discussing strategies for asking for a promotion, job referrals, and company morale). See also Rosa Trieu, *How Businesses Are Using Anonymous Blind App To Change Work Culture*, FORBES (July 2, 2016), archived at <https://perma.cc/JL2W-E9HE> (suggesting that even employers can stand to benefit from Blind as it offers a forum for "raw criticism" that can be implemented to enact positive changes to company culture or services). See also *AMA: Co-founding CTO at a Silicon Valley startup*, BLIND (Feb. 6, 2020), archived at <https://perma.cc/ZKN6-A7BT> (giving an example of what a Blind chatroom looks like). Because this post is viewable without a registered account, it is one of Blind's public forums. *Id.*

Blind is relatively unestablished in America, but the app has been supremely popular in South Korea ever since “Nut Rage,” an infamous incident in which the daughter of a South Korean business executive verbally berated a flight attendant of Korean Air after the attendant served her nuts in a bag instead of on a plate.⁵⁸ Korean Air employees took to Blind to discuss the incident without fear of recourse from their employer—known for forcing employees to kneel for executives, spitting on workers, and beating employees for things as trivial as forgetting to buy groceries.⁵⁹ Users and supporters of Blind praise the app for providing an open forum for employees to air grievances and challenge corporate decisions when they otherwise would not be able to.⁶⁰ While Blind may not be a popular tool for American workers, employees of large corporations such as Tesla, Microsoft, Apple, and Facebook use Blind to discuss workplace decisions, policies, and culture.⁶¹ Blind could serve as a litmus test

⁵⁸ See Trieu, *supra* note 57 (showing the increase in Blind’s popularity in South Korea following an incident in which a Korean Air heiress abused an employee, and how that surge opened the door for the app’s future success). See also Jake Kwon, *Culture of abuse and violence at the heart of some of South Korea’s biggest companies*, CNN (Feb. 21, 2019), archived at <https://perma.cc/43ZT-U38G> (demonstrating years of abuse from executives of Korean Air towards staff and employees as well as a greater cultural and societal precedent of abuse from company executives across the country). The “Nut Rage” incident is an encapsulation of a greater culture of abuse in South Korea from executives, which includes violent and abusive behavior from executives of Korea Future Technology and Marker Group. *Id.*

⁵⁹ See Kwon, *supra* note 58 (demonstrating that South Koreans employed by Korean Air flocked to Blind to collectively discuss their experiences as “voluntary slaves” for Korean Air).

⁶⁰ See *id.* (highlighting that the anonymous chatting on Blind ultimately led to public protests and demonstrations by employees against their employers). The employee-led dialogue dispelled the air of untouchability that the owners of Korean Air had. *Id.* See also Choe Sang-Hun, *Korean Air Heiresses, One Known for ‘Nut Rage,’ Lose Their Jobs*, N.Y. TIMES (Apr. 22, 2018), archived at <https://perma.cc/88NV-XV45> (demonstrating the aftermath of the public outcry against Korean Air, which resulted in a win for Korean Air employees). However, the hegemony of the chaebol, Korea’s business and corporate class, still endures because “they are crucial to [South Korea’s] economy.” *Id.*

⁶¹ See Hayley Peterson, *One-third of Amazon employees predict a website crash on Prime Day, a new survey says*, BUS. INSIDER (July 8, 2019), archived at <https://perma.cc/ZL9W-FLXD> (stating that one third of Amazon employees who completed a Blind survey on Amazon’s company page believed that Amazon’s app would crash on Amazon Prime Day). Over 4,000 users responded to the survey, and users could only vote once. *Id.* See Curie Kim, *OVER 74% OF APPLE EMPLOYEES BELIEVE THAT THE APP STORE IS NOT A MONOPOLY*, BLIND

for how a particular company's employees feel about job security, harassment in their workplace, discrimination, or pay inequity in both their particular workplaces as well as their companies or industries as a whole.⁶²

WORKPLACE INSIGHTS (May 21, 2019), *archived at* <https://perma.cc/AS9A-LS96> (highlighting the disparity between Apple workers who believe that the App Store is not a monopoly and Spotify workers who believe that it is). Seventy-four percent of Apple users believed that the prevalence of the App Store was fair, whereas eighty percent of Spotify users disagreed. *Id.* The survey had over 10,000 responses. *Id.* See Shona Ghosh, *Facebook employees are still loyal to Mark Zuckerberg and think he should remain CEO*, BUS. INSIDER (Jan. 21, 2019), *archived at* <https://perma.cc/L95Y-GZLE> (highlighting that 613 out of 735 Facebook employees on Blind believe that Mark Zuckerberg should still be CEO of Facebook). A follow up survey revealed that 817 out of 985 Facebook employees surveyed felt that scandals involving Zuckerberg did not devalue Facebook stock. *Id.* However, 7,000 other industry users on Blind firmly believe that scandals involving Zuckerberg did devalue stock. *Id.* But see *Three D, LLC d/b/a Triple Sports Bar and Grille v. N.L.R.B.*, 629 F.App'x. 33, 36 (2nd. Ct. App. 2015) (holding that Facebook posts, comments, and likes can qualify as protected concerted activity under the NLRA). While Blind is an employee focused app, other social media apps can also be used for employee organizing purposes and be protected. *Id.* at 37. See also Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 962–63 (2012) (stating that the NLRB first ruled that Facebook activity can qualify as concerted labor activity under the act as early as 2009). Even without an anonymity shield, currently existing and more popular social media platforms such as Facebook and Twitter are still powerful organizing tools albeit more public-facing. *Id.* at 1009.

⁶² See Isobel Asher Hamilton, *Tesla employees fear for their jobs more than workers at any other major tech firm*, BUS. INSIDER (Feb. 13, 2019) *archived at* <https://perma.cc/K8L9-9NNZ> (stating that Tesla employees fear the most about their job security compared to other large tech companies). An astonishing seventy-seven percent of Tesla employees surveyed on Blind reported fearing layoffs. *Id.* The average percentage of employees who feared layoffs across all of the companies whose employees were surveyed on Blind was approximately thirty-five percent. *Id.* Google employees were the least fearful, with just ten percent of employees believing that layoffs were imminent. *Id.* See Paige Leskin, *Almost 40% of LGBTQ tech employees that participated in a survey said they've witnessed homophobic discrimination and harassment at work*, BUS. INSIDER (June 26, 2019), *archived at* <https://perma.cc/QG2G-YEAH> (demonstrating that almost forty percent of LGBTQ+ employees surveyed believed that their respective Silicon Valley companies did not provide safe work environments for queer employees). The survey received over 7,000 responses. *Id.* Half of respondents from Facebook, Oracle, LinkedIn, and Netflix have witnessed harassment of queer employees, along with a quarter of respondents from Uber, Apple, Microsoft, and Amazon. *Id.* See Lauren, *The #METOO MOVEMENT'S IMPACT IN THE WORKPLACE*, BLIND WORKPLACE INSIGHTS (Oct. 9, 2019), *archived at*

B. *The NLRB, EEOC, and State-Equivalent Agencies: A Politically Fickle Source of Remedial Support*

While employees using Blind to crowdsource claims of unlawful labor practice may turn to the NLRB for relief, the Board can only provide remedial support in the form of job restoration, seniority restoration, or backpay with interest.⁶³ However, with the overall decline of the amount of unionized employees in America, the NLRB's power and ability to effectively curtail adverse management policies is becoming increasingly limited.⁶⁴ Furthermore, the political inclinations of the NLRB are notoriously

<https://perma.cc/2H3D-HZCS> (showing that seventy-two percent of professionals who responded to a site-wide survey on Blind believe that there have not been positive changes in workplace culture since the #MeToo Movement began). Blind posed the question on its #MeToo specific channel page, and of its 2.8 million users 8,500 responded, with results differing from employer to employer. *Id.* Ninety percent of women who worked at Oracle who responded said that they had not seen a positive change in workplace culture since the advent of the #MeToo movement. *Id.* Interestingly, more women than men at Salesforce said that positive changes have been implemented. *Id.* See Nick Kolakowski, *Retaliation Still a Huge Problem Among Tech Firms: Survey*, DICE (Mar. 15, 2019), archived at <https://perma.cc/XT2U-WJWN> (showing that retaliation is a major issue in the tech industry according to Blind users). Booking.com users reported the most instances of retaliation at sixty-four percent. *Id.* See Curie Kim, *EMPLOYEES ARE SEEING COST-CUTTING AT THEIR WORKPLACES*, BLIND WORKPLACE INSIGHTS (Aug. 19, 2019), archived at <https://perma.cc/3F2E-KU9W> (revealing that over ninety percent of workers at some companies have seen significant cost-cutting efforts at work). Many of the 2,601 respondents have witnessed cost-cutting actions such as hiring freezes. *Id.* However, many victims of layoffs crowdsource hiring opportunities, discuss pay and salary negotiation, and share the latest industry news. *Id.* See Julia Carpenter, *Whose side is HR really on?*, CNN BUS. (Nov. 16, 2019), archived at <https://perma.cc/FEN2-RDNR> (demonstrating general dislike of HR departments across multiple companies). Company spokesperson and blog author Curie Kim stated that “[Blind] wouldn’t exist if everyone trusted HR.” *Id.*

⁶³ See Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579, 1579 (2005) (discussing the limitations of the National Labor Relations Board’s remedial authority as well as its inability to assess punitive measures on violating employers).

⁶⁴ See James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 221–22 (2005) (opining that the NLRB’s power as derived from the NLRA does not effectively protect against a large number of employees, such as graduate assistants and rehabilitating workers).

volatile and subject to presidential appointments, bringing into question its reliability in aiding workers.⁶⁵

The Trump administration ushered in a particularly dire turn for American workers; the Board under former President Trump was largely employer-friendly and quickly began rolling back Obama-era decisions and precedents.⁶⁶ Thus, the Board became significantly

⁶⁵ See *id.* at 223 (underscoring the NLRB has been consistently criticized over its political biases from as early as 1939). The NLRB practices non-acquiescence and maintains that its authority is defined by Congress and the President of the United States. *Id.* at 237. The NLRB disposes ninety-seven percent of its decisions and generally does not follow the precedent of federal appellate courts in making its decisions. *Id.* at 238. Different presidents followed different strategies of appointing members to the NLRB, such as Reagan appointing “union avoidance” advocates and Ford appointing established and experienced union attorneys. *Id.* at 248. See also Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board’s Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKLEY J. EMP. & LAB. L. 223, 234–35 (finding that the political ideologies of members of the NLRB greatly affects the likelihood of favorable biases for unions and employees versus management, companies, and corporations). With the addition of each Democrat to the Board, union-favorable decisions became more consistent. *Id.* at 235–36. With the addition of each Republican, management-favorable decisions became more consistent. *Id.* at 233. However, the bias of the NLRB remained mostly uninfluenced by the sitting president and members of Congress, leading one to believe that each Board member retained or utilized his or her ideology for guidance for the tenure of his or her appointment to the Board. *Id.* On the whole, there are “broad patterns of Board member voting being very closely aligned with the party of the appointing President.” *Id.* However, Republican presidents tend to appoint more conservative Board members and Democrat presidents tend to appoint more liberal Board members. *Id.* at 234. See also Frank Langfitt, *Unions Find Labor Relations Board Ineffective*, NPR (Nov. 21, 2007), archived at <https://perma.cc/DZ2S-9BBW> (citing Board decisions under the George W. Bush administration that chipped away workers’ ability to unionize and collect back pay). AFL-CIO labor organizers and counsel stated that these “egregious” pro-management decision made it easier for employers to violate the law. *Id.* But see Katie Johnston, *Under Trump, labor protections stripped away*, THE BOSTON GLOBE (Sept. 2, 2018), archived at <https://perma.cc/V2RP-CSUL> (interviewing a policy analyst who states that NLRB policy historically swings whenever a new party comes into power of the executive branch). See Bui, *supra* note 24 (highlighting the steady decline of unionization over the last few decades to show that a vast majority of American workers are at-will employees without union protection).

⁶⁶ See Johnston, *supra* note 65 (stating that the Trump administration has reversed dozens of Obama-era initiatives in many key policy areas). One such roll back in labor policy is how large companies will no longer have to report gender and race pay statistics to the Equal Employment Opportunity Commission, which they were required to do under a policy that attempted to help close the gender gap. *Id.* See

pro-management which discouraged unions from filing grievances out of fear that pro-labor precedents would be overturned.⁶⁷ One such rollback came from *Caesars Entertainment Corp d/b/a Rio All-Suites Hotel and Casino* which reversed the rule from *Purple Communications* holding that employers may not restrict the use of company e-mail addresses for purposes of union organizing.⁶⁸ The state of the NLRB under former-President Trump inspired much

also McNicholas et al., *supra* note 52 (demonstrating that the Trump NLRB established a “top-10 corporate wish list” of labor policy changes, all of which have since been acted on by the Board). Examples of items on this “top-10 list” are changes that allow management more power to unilaterally change the collective bargaining process, to keep employee and supporter discussions of views on workplace issues outside of employer property, and to allow employees to force arbitration and disallow class claims. *Id.* See also *Caesars Ent. d/b/a Rio All-Suites Hotel and Casino and Int’l Union of Painters and Allied Trades Local 159, AFL–CIO, Case 28–CA–060841* (overturning Obama-era NLRB decision and restoring rights and power to employers). The Obama administration’s NLRB held in *Purple Communications* (361 NLRB 1050 (2014)) that employees may use employer property in order to facilitate organization and engaging in protected concerted activity. *Id.* The Board in *Caesar’s Entertainment* overruled *Purple Communications* citing a longstanding precedent that employers have the right to restrict the use of its own company property, including e-mail addresses and I.T. services. *Id.*

⁶⁷ See Andrew Wallender & Hassan A. Kanu, *Trump’s Labor Board Has Unions Shelving Complaints*, BLOOMBERG L. (May 10, 2019) archived at <https://perma.cc/N3AQ-WZ7E> (highlighting that the number of grievances filed with the NLRB dropped by over eleven percent since Trump was elected). One famous example is the union settlement of a number of cases pertaining to the union’s use of inflatable rats during protests, intended to raise awareness and support for union picket lines since the 1990s. *Id.* See also Robert Channick, *Born in Chicago, Scabby the giant inflatable protest rat may be banned from picket lines by national labor board*, CHICAGO TRIB. (Aug. 8, 2019), archived at <https://perma.cc/A534-MFMX> (contextualizing the birth of Scabby the Rat, the mascot of a 1990 bricklayers union strike in Chicago); Max Green, *How A Rat Balloon From Suburban Chicago Became A Union Mascot*, WBEZ (Apr. 19, 2017), archived at <https://perma.cc/ES65-Z49Q> (describing the inflatable rats as ranging from six to twenty-five feet tall and serving as a worldwide symbol for union strikes).

⁶⁸ See *Caesars Ent. d/b/a Rio All-Suites Hotel and Casino and Int’l Union of Painters and Allied Trades Local 159, AFL–CIO, Case 28–CA– 060841* (holding that employers may restrict the use of company e-mail addresses from engaging in union organizing). The Board held in a 3-1 decision that employers have the right to control the use of their equipment, including their email and other I.T. systems, and they may lawfully exercise that right to restrict the uses to which those systems are put, provided that in doing so, they do not discriminate against the Section 7 rights of employees as defined under the NLRA. *Id.* This is particularly alarming since Blind users must verify their accounts with a company e-mail address. *Id.*

debate as to whether the hyper-conservative pendulum swing is typical or atypical for the NLRB.⁶⁹ However, President Biden has vowed to steer the proverbial pendulum back to the left in order to protect workers from the Trump administration's attacks on organized labor.⁷⁰

At-will employees who use Blind may find worthwhile remedies for violations by their employers when considering litigation or actions that could prevent working conditions from being changed unilaterally and adversely by management.⁷¹ However,

⁶⁹ See Johnston, *supra* note 65 (highlighting the debate between liberal and conservative commentators about whether Trump's NLRB is particularly employer friendly). While some would say that Trump is maliciously going after Obama era regulations, others believe that Trump is only being aggressive because Obama's regulations were too radical. *Id.*

⁷⁰ See Katie Johnston, *As labor secretary, Marty Walsh would face daunting challenges and high expectations*, THE BOSTON GLOBE (Jan. 18, 2021) archived at <https://perma.cc/6MGX-FKX4> (showing that President Biden's pick for Secretary of Labor, Martin Walsh, indicates the administration's intention to roll back the Trump administration's attack on worker's rights). The Biden administration has a mountain to climb after the Trump administration relaxed employment designations for companies that use subcontractors, loosened the definition of independent contractors which ultimately excludes more workers from the protections of the NLRA, and weakened federal workers unions. *Id.* The juxtaposition of the rampant rollbacks of worker's rights under Trump and the promise from Biden to be one of the most pro-labor presidents in American history perfectly exemplifies the proverbial pendulum swing of labor law jurisprudence. *Id.*

⁷¹ See 42 U.S.C. § 2000e-5(g)(1) (1964) (enforcing an employee's right to injunctive relief, back pay, interest on back pay, and whatever remedy a court may find equitable). Employees recently gained the ability to receive other damages such as punitive damages, damages for pain and suffering, and damages for loss of future earning power under an amendment to Title VII. *Id.* See 42 U.S.C. § 1981a (1991) (allowing employees to recover damages besides back pay and injunctive relief on intentional discrimination claims). This amendment caps the damages recoverable by plaintiffs depending on the size of their employers. *Id.* Some states, such as Massachusetts, expand the damages recoverable by employees. *Id.* See M.G.L. c. 151B, §5 (2002) (stating that the Massachusetts Commission Against Discrimination may award back pay plus interest as well as a \$50,000 penalty against employer). Plaintiffs may remove claims with the Commission to state or federal court where they may receive awards of punitive damages. *Id.* See Lukas I. Alpert, *Staff at Satire Site the Onion Announce Plans to Unionize*, WALL ST. J., (Mar. 29, 2018), archived at <https://perma.cc/488T-S8FS> (summarizing the Onion's plan of unionizing after reports that their holding company considered mass layoffs). In the face of hundreds of jobs disappearing nearly overnight, the writers of the satire site the Onion unionized rapidly to spurn management's decision. *Id.*

claims brought through the Equal Employment Opportunity Commission and their equivalent state agencies or through the court system are subject to widely varying statutes of limitations based on the nature of each respective claim.⁷² Blind users looking to sue employers would need to consider their jurisdictional laws, the nature of their claims, and the statutes of limitations of their claims which may be naturally dependent, to varying degrees, on the political vogue.⁷³

C. *Litigation as a Threat to Online Anonymity*

While users of any website may think that they are posting anonymously, there are steps that employers can take both internally and legally to threaten the anonymity of users who are not careful.⁷⁴

⁷² See *Timeliness*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 17, 2019), archived at <https://perma.cc/9N2L-Y53T> (demonstrating that citizens in some states have a 180-day statute of limitations for workplace discrimination claims whereas others have 300 days). See also 29 U.S.C. § 255 (1939) (stating that the statute of limitations for federal wage and hour claims against employers is two years but may be increased to three years if a plaintiff can prove willful misconduct from employer). But see MASS. GEN.LAWS. ch. 149 § 150 (2002) (stating that statute of limitations for all wage and hour claims are three years unless an employment-by-contract relationship exists in which case the statute of limitations increases to six years).

⁷³ See *Timeliness*, *supra* note 72 (demonstrating different states with varying statutes of limitations on certain employment claims). In theory, a legally conscious Blind user could inform someone posting on a company specific channel, such as Google, that statutory limitations differ in California—where Google is headquartered—than in Massachusetts where a hypothetical claim took place. See O'Brien, *supra* note 55 (outlining how company employees can communicate with employees across state or international borders). See also Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 599 (1991) (highlighting that Republicans between 1968 and 1992 had controlled the White House and thus federal judicial appointments for twenty of the twenty-four years). The conception that the federal court system would be better suited to protect individual liberties is not supported by the political convictions of the sizable population of conservative judges on the federal bench. *Id.* Considering that federal judges have lifetime tenure, this realization is even more profound. *Id.*

⁷⁴ See Shelby S. Skeabeck, *Another Anonymous Employee Posting App? Watch Out!*, SHAW ROSENTHAL LLP: LAB. & EMP. REP. (Feb. 15, 2018), archived at <https://perma.cc/8EA4-P7L7> (stating that company I.T. departments may be able to monitor which of their employees join Blind by flagging email addresses that receive account confirmation communications from Blind). Company e-mails, which Blind requires users to verify in order to use its most robust features, are typically viewed legally as company property. *Id.* Employers may be able to flag

However, Blind encrypts their user data in such a way that does not allow TeamBlind to view the information of account holders on the website at any time.⁷⁵ Unfortunately, Blind users would be mistaken to believe that TeamBlind would never turn in the user information it does have to employers or their counsel or that their personal data will never be compromised.⁷⁶

The current jurisprudence on whether Blind would have to comply with a subpoena to release protected or encrypted information to an employer in a lawsuit between employee and employer is lacking because of the complexity and relative novelty of this legal issue.⁷⁷ While a third party like Blind may be able to protect user information from a subpoena under the Stored Communications Act, employers may potentially have other methods

incoming verification e-mails from Blind and monitor which employees are using the site. *Id.* See also Savanna L. Shuntich & Kenneth A. Vogel, *Doe Hunting: A How-To Guide for Uncovering John Doe Defendants in Anonymous Online Defamation Suits*, 50 MD. B.J. 48, 51 (2017) [hereinafter *Doe Hunting*] (stating various ways in which counsel can obtain IP address information of anonymous posters online in suits, investigations, and proceedings).

⁷⁵ See *FAQs*, *supra* note 55 (highlighting Blind's process to keep user data safe and invisible to users and Team Blind members alike).

⁷⁶ See *Privacy Policy*, BLIND (Sept. 18, 2014), *archived at* <https://perma.cc/U4AJ-HDCS> (disclosing that Blind reserves the right to turn over basic user data to comply with laws, subpoenas, and investigations). However, none of the basic user data is inherently identifiable. *Id.* But see Zack Whittaker, *At Blind, a security lapse revealed private complaints from Silicon Valley employees*, TECH CRUNCH (Dec. 20, 2018), *archived at* <https://perma.cc/65X2-BJWG> (stating that a server at Blind was exposed, revealing the information of thousands of users). Blind had exposed web-based data such as message content from its American and Korean websites. *Id.* This mistake was discovered by an independent researcher who promptly informed TeamBlind about the issue. *Id.* The mistake only exposed data from users who logged on for the span of about a month and a half. *Id.* While the mistake did not lead to misuse or misappropriation, it demonstrates that user data is not always totally safe. *Id.*

⁷⁷ See Alina Selyukh, *A Year After San Bernardino And Apple-FBI, Where Are We On Encryption?*, NPR (Dec. 3, 2016), *archived at* <https://perma.cc/L2EK-BTBH> (contextualizing the debate between officials as to whether it is legally responsible to encrypt devices and apps to render them "warrant-proof"). See also Orin Kerr, *Microsoft Challenged the Wrong Law. Now What?*, LAWFARE BLOG (Nov. 27, 2017), *archived at* <https://perma.cc/K5RH-UNSE> (highlighting recent legal battle between the United States and Microsoft when Microsoft refused to overturn secure user data stored in Ireland). The author argues that Microsoft suggested a dangerous legal precedent regardless of how the Supreme Court may have ruled on the case because a favorable ruling for Microsoft would have made all foreign stored information immune to court orders and warrants. *Id.*

of obtaining employee information.⁷⁸ Particularly diligent—and of course, deep-pocketed—employers willing to invest significant time, money, and resources into identifying Blind users may pose a danger to employees, particularly in employer-friendly jurisdictions.

IV. Analysis

A. *Pay Transparency Protections May Already Exist Within Existing State and Federal Legislative Infrastructures*

Blind truly is one of a kind as it is the only employment conscious app and web service that has the explicit goal of encouraging transparency from workers in various companies and industries while also catering to the sensitivity of sharing private information.⁷⁹ Because Blind is anonymous, workers who are too embarrassed or uncomfortable with discussing their salaries or benefits may finally be able to participate in the collective conversation surrounding pay transparency.⁸⁰ Pay transparency has already directly aided in closing the pay gap between male and female employees in major tech companies.⁸¹ By encouraging open

⁷⁸ See FED. R. CIV. P. 45(d)–(e) (stating that individuals served with a subpoena must turn over relevant information to complete the service of the subpoena unless they can prove that the information is privileged).

⁷⁹ See *Blind – Anonymous Work Talk You May Also Like*, *supra* note 11 (showing that there is no other app like Blind in the Apple App Store). See also *App Store*, *supra* note 11 (corroborating that no app like Blind exists for users in America). Neither Android nor iPhone app stores have anything like Blind. *Id.*

⁸⁰ See Pinsker, *supra* note 44 (highlighting discomfort with sharing salary information with fellow employees due to its longstanding taboo status in the workplace).

Some of that reluctance comes from having a lot of money in a society that is known to be unequal. “It’s convenient, right? That we have this taboo,” Sherman said, in the sense that not talking about money might allow people who have the most of it in a given society to ignore that fact.

Id.

⁸¹ See Wong, *supra* note 50 (demonstrating systemic and subtle obstacles impeding women in the workplace and how pay transparency could remedy these phenomena). Women are seen as less likable when they negotiate and typically do not receive the same pay that men do when men negotiate salaries and raises. *Id.* While this problem is common in every industry, even progressive industries like the tech industry are guilty of rather egregious pay discrimination practices. *Id.* The regional director of the Department of Labor for California stated that

collaboration between employees and fostering a culture of openness, companies across the country could see tangible improvements to morale and job satisfaction.⁸² Notwithstanding these clear benefits, the disproportionate corporate ownership of wealth underscores the immediate need for widespread pay transparency as a means of leveling the scales more equitably.⁸³ Given that the social spotlight is shining on pay equity issues in the United States and that states are beginning to pass legislation protecting pay transparency, employees may have the most support they have had in decades.⁸⁴ Most states lack transparency laws, but those organizing to implement widespread transparency in their workplaces might have recourse under state and federal law if employers terminate them.⁸⁵

Even if Blind is not necessarily legally conscious—in other words, despite its lack of legal resources or information for users that is site sponsored or verified—it is the only app that is widely available and specifically designed for workers attempting to advance their

“discrimination against women in Google ... is quite extreme.” *Id.* See also Elsesser, *supra* note 50 (highlighting Verve, a UK-based tech company, which granted employees access to all employee salaries). Verve demonstrates that setting objective criteria for salary increases that are tangible and accessible by everyone is an effective method of rewarding good performance while also remaining loyal to the transparency principal. *Id.*

⁸² See Elsesser, *supra* note 50 (underscoring that employees at Verve reported greater job satisfaction and overall happiness with company performance after switching to a transparency based corporate model).

⁸³ See Telford, *supra* note 51 (citing that income inequality has never been worse in America than it is now). America is plagued by “systemic inequality” that originates with CEOs of companies resisting relinquishing their capital and ability to derive higher returns from said capital. *Id.*

⁸⁴ See HAYES, *supra* note 47 (underscoring that it is the first survey of its kind to track pay transparency policies and their evolution in America). The Institute for Women’s Policy Research also publishes reports on pay parity for women and women of color. *Id.*

⁸⁵ See 29 U.S.C. § 157 (1935) (protecting every American worker not exempt under the NLRA from adverse employment actions such as termination or discipline for engaging in concerted labor activity). Concerted labor activity is partially defined as actions taken in or out of the workplace that are done for the “mutual aid” or “protection” of other employees. *Id.* This implies that employees organizing for the purposes of creating an open work culture *for the purpose of mutual aid* (emphasis added) would receive protection under the NLRA. *Id.* Terminating these employees, whether they are unionized or not, despite lacking a transparency law in that respective jurisdiction, could constitute an unfair labor practice under the Act. *Id.* See also WOMEN’S BUREAU, *supra* note 2 (stating that despite protections from the NLRA, employees are still in danger in many states when they discuss matters such as salary and benefits with other employees).

rights in a collaborative and anonymous manner.⁸⁶ It is not difficult to imagine scenarios in which employees using the app could gather evidence or information regarding pay scales or benefits and potential gaps between workers.⁸⁷ Thus information direct from Blind chatrooms, polls, or messages may bolster or initiate pay equity and other discrimination claims under Title VII.⁸⁸ The app's lack of any meaningful competition and its relative obscurity may allow workers to slip under their employers' radars for the time being—making it crucial for workers to begin to implement pro-employee infrastructures on their own accords immediately.⁸⁹

B. Three Hypothetical Situations in which Blind Users Could Prove Concerted Activity, Highlight Pay Inequity, and even Form a Union

1. Food Service Worker Staves Off Termination by Proving Concerted Activity

Courts and the NLRB itself have specifically ruled that social media posting can be considered protected concerted activity under

⁸⁶ See *Blind – Anonymous Work Talk You May Also Like*, *supra* note 11 (demonstrating that there are no other employment-related apps that provide similar services as Blind). See also *App Store*, *supra* note 11 (showing that no viable alternatives to Blind with similar features exist on Apple's App Store).

⁸⁷ See Leskin, *supra* note 57 (highlighting how workers in the tech industry utilize the Blind app to discuss work related issues). Public feeds contain posts from various companies and industries, which could allow users to monitor cross-industry trends. *Id.* Private feeds are related to specific companies or workspaces that could allow workers to monitor activity within their own place of work. *Id.* Users can filter their feeds by topics or keywords such as layoffs, human resources, and women in the workforce. *Id.* Feeds or posts that solicit career advice, job referrals raising capital, and, most relevantly, opinions on company morale and salary comparisons across companies garner plenty of user traffic. *Id.* Secondary internal company feeds allow workers to even further narrow their focuses to specific office locations or specific workplaces, which would lead to the most accurate and relevant salary or discrimination information. *Id.*

⁸⁸ See Leskin, *supra* note 57 (suggesting different methods of communicating with workers within and outside of particular industries on matters pertaining to workplace claims and potential litigation).

⁸⁹ See *App Store*, *supra* note 11 (highlighting that Blind is the only app of its kind and only had approximately four thousand reviews on the Apple App store as of the writing of this Note). See also Skeabeck, *supra* note 11 (demonstrating management-side consulting firm that recently became aware of Blind's existence and potential utility for workers).

the NLRA in certain circumstances; through the act of posting online as a means of legitimately exploring mutual aid and benefit, there is a strong inference that Blind users may be engaging in concerted activity for purposes of NLRA protections.⁹⁰ The following hypothetical should ease the minds of skeptics of using Blind chatrooms to discuss workplace issues because the NLRB already has ruled that online activity can be concerted activity.⁹¹

Barry Bartender, a food service worker and Blind user, is fed up with his employer, Sports Bar USA; Sports Bar USA made serious errors in his tax withholding documentation which resulted in Barry owing money to the IRS for the current tax year.⁹² After co-workers told Barry that there might be others affected by Sports Bar's error, Barry posts the following on Blind's general message board: "Sports Bar USA employees, listen up: they screwed up on all of the tax forms and now I owe the government money this year! Check your documents, guys. This company sucks."⁹³ Upon inquiry, the boss finds out that an employee is telling others that Sports Bar USA is not withholding taxes properly, creating potential tax liability

⁹⁰ See Sprague, *supra* note 61, at 993 (stating that the NLRA began ruling that Facebook activity can qualify as concerted labor activity for statutory employees as early as 2009). The NLRB applies the facts in each charge of unfair labor practices related to social media postings to its original definitions of unfair labor practices. *Id.* at 980. Ultimately, social media comments and postings are evaluated for their damage to branding or company image in addition to other factors traditionally considered by the NLRB such as whether the activity qualifies as mutual aid or protection. *Id.* See also *infra* IV C. Time-Tested Strategies to Undermine Employee Organizing (discussing potential litigation issues arising out of social network platforms such as Blind).

⁹¹ See Sprague, *supra* note 61, at 962 (demonstrating that the NLRB has ruled that social media posts can be considered protected concerted activity under the NLRA).

⁹² See *Three D, L.L.C. v. N.L.R.B.*, 629 Fed.Appx. 33, 36–37 (2nd. Ct. App. 2015) (detailing a case in which employees of a sports bar and restaurant complained about issues pertaining to tax information and tax withholdings on Facebook). The above hypothetical is a parallel example of this case. See *supra*, IV. B. Facts have been altered slightly in order to demonstrate the potential utility of Blind and its potential application in an employment or labor scenario. *Id.*

⁹³ See *Three D, L.L.C.*, 629 Fed. Appx. at 35–36 (setting forth the employee's Facebook statements which ultimately led to his termination for insubordinate behavior). *Id.* The employee "liked" a Facebook status made by a coworker that said "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money ... Wtf!!!!" *Id.* at 36. He then commented on their coworker's status stating: "I owe too. Such an asshole." *Id.*

for the business.⁹⁴ Because the boss was aware that Barry's tax information was erroneously generated, the boss deduces that Barry is the employee posting about Sports Bar USA's tax issues.⁹⁵ The boss fires Barry and the other employee because they are defaming the image and reputation of Sports Bar USA.⁹⁶ If Barry and his fellow employee were to bring an unfair labor practice charge against Sports Bar USA under the NLRA, they would likely prevail.⁹⁷

2. At-Will Employee Misses Statute of Limitations on Her Pay Discrimination Claim

Managers do not have any recourse under the NLRA but they can file discrimination claims with the Equal Employment Opportunity Commission ("EEOC").⁹⁸ Somewhat complicating the situation is that the statute of limitations for charges filed with the EEOC or state equivalent agencies for discrimination tends to be extremely short.⁹⁹ If a particular manager concerned with a discrimination suit was a Blind user, that manager would have access to view polls, pages, posts, and forums from every employee on the app discussing pay disparity, perhaps inspiring the manager to reach

⁹⁴ *See id.* (highlighting the NLRB conclusion that the employee bringing the charge had at maximum endorsed the co-worker's claim on their status that the bar had erred in their tax withholding).

⁹⁵ *See id.* (implying that a manager or boss had seen the status and the employee's so-called endorsement of the claim made in the status and took adverse action against the employee filing the charge).

⁹⁶ *See* Three D, L.L.C., 629 Fed. Appx. at 36 (underscoring employer's argument that the vulgar nature of the post and its potential to be seen by past, current, and future customers prevented it from qualifying as protected activity). The employer stated that the post's public nature threatened the reputability and image of the company's brand and thus the speech lost NLRA protection. *Id.*

⁹⁷ *See id.* at 37–38 (finding the termination of the employee unlawful under the NLRA). The court held that, because the Facebook activity of the employees did not lose the protection of the Act, the employer's challenge to the other violations of Section 8(a)(1) must necessarily fail. *Id.* at 38.

⁹⁸ *See* 29 U.S.C. §157 (prohibiting certain types of employees, including anyone who labors in a management capacity, from deriving rights and protections from the act).

⁹⁹ *See* 42 U.S.C. § 2000e–5 (1967) (demonstrating the statute of limitations for employment discrimination claims, including pay discrimination claims, is 180 days unless an equivalent state agency to the EEOC grants a 300-day statute of limitations).

out to other employees before it is too late; however, the following scenario is all too common with employees across the country.¹⁰⁰

Patricia Plaintiff is employed as a shift manager by Tires, Inc., a multinational corporation that provides tires to automobile manufacturers all over the globe.¹⁰¹ Patricia has been a faithful employee for decades, but her pay fails to reflect this.¹⁰² Patricia chats with a male co-worker who began working at Tires, Inc. years after Patricia, and discovers that her co-worker had been earning a higher salary despite being less experienced and having similar performance reviews.¹⁰³ Confused and angered, Patricia finds a local employment attorney to explore bringing a claim against Tires, Inc. for pay disparity under Title VII of the Civil Rights Act; unfortunately for Patricia, the statute of limitations on her pay disparity had fully run, leaving her with no recourse.¹⁰⁴

3. Popular Satire Website Gauges Union Interest

Blind's central tenant of anonymity lends itself to engaging in concerted activity because fear of retaliation from employers for unionization efforts still threatens employees; however, Blind's features offer employees a way to engage in concerted activity

¹⁰⁰ See Leskin, *supra* note 57 (underscoring that users may search posts by topic and can potentially search the app and crowdsource ideas on who was being paid what within a company).

¹⁰¹ See Ledbetter 550 U.S. at 618 (holding claimant could not consider each deducted paycheck due to discrimination as the first day of 180-day statute of limitations).

¹⁰² See *id.* at 621 (demonstrating that Ledbetter worked at Goodyear for decades). Ledbetter was earning \$3,727 per month compared to the lowest paid male employee who was being paid \$4,286 per month. *Id.* at 643.

¹⁰³ See *id.* (showing the highest paid employee who was being paid \$5,236 per month, almost \$2,000 more than Ledbetter).

¹⁰⁴ See *id.* at 618 (holding Ledbetter's claim was barred by the statute of limitations under Title VII). Ledbetter brought a claim with the EEOC regarding potential wage discrimination. *Id.* Her claim was statutorily barred by Title VII, as the EEOC has a 180-day statute of limitations from when the discrimination started. Ledbetter 550 U.S. at 618. The Supreme Court held that under Title VII, the first instance of discrimination, in this case the first paycheck Ledbetter received that had a lower rate of pay than her male counterparts, began the actionable time period in which she could file a claim. *Id.* This period did not renew at each paycheck. *Id.*

devoid of any traditional uneasiness, visibility, and inconvenience.¹⁰⁵ Furthermore, union elections must be anonymous and are generally deferred to the union and workplace on how they will be conducted.¹⁰⁶

Wendy Writer is a Blind user who works for a popular satire magazine that publishes daily articles that poke fun of political leaders, sporting events, general current affairs, and pop culture.¹⁰⁷ Wendy and her co-workers are not unionized but have been considering forming a union recently.¹⁰⁸ The company that owns Wendy's magazine, Holding Co., is deep in debt and is considering salvaging its ventures by enacting budget cuts and lay-offs.¹⁰⁹ Knowing that some of her co-workers were considering unionizing before the news of possible lay-offs, Wendy takes to Blind and posts: "Who would be interested in accelerating talks of unionizing?" in her workplace's chatroom.¹¹⁰ After the writers post messages of support, Wendy coordinates in-person meetings with union organizers to hold elections that results in both the writers at the magazine officially becoming members of the Writer's Guild of America and holding

¹⁰⁵ See Pinsker, *supra* note 44 (highlighting that employees generally are extremely uncomfortable sharing salary information despite it being protected activity under certain circumstances).

¹⁰⁶ See 29 U.S.C. § 481 (1959) (requiring union elections to be held by *secret ballot* and union bylaws to govern the remainder of the election in conformance with the act). Inferring from the language of this act, while a union would have to explicitly state in its bylaws that a Blind election is a valid election, the polling feature can be a valid and legally binding means of holding union elections if overseen by an organizer. *Id.*

¹⁰⁷ See Alpert, *supra* note 71 (summarizing the Onion's plan of unionizing after reports that their holding company considered mass layoffs). The above hypothetical is analogous to the unionization efforts of The Onion. See *supra*, IV. B. Facts have been altered slightly in order to demonstrate the potential utility of Blind and its potential application to gauge union interest at a workplace that is online or not centralized. See *supra*, IV. B.

¹⁰⁸ See Alpert, *supra* note 71 (demonstrating that approximately 100 Onion writers planned on joining the Writer's Guild of North America).

¹⁰⁹ See *id.* (citing that unionization efforts began "in earnest" when The Onion's owner, Univision, considered massive layoffs and budget cuts).

¹¹⁰ See Leskin, *supra* note 57 (highlighting that Blind users can create company specific chat rooms or message boards and discuss any topic). In this hypothetical application, a message on a company specific board can put out a feeler to gauge interest in potentially unionizing. *Id.*

union position elections using the poll features in their Blind chatrooms.¹¹¹

C. *Time-Tested Strategies to Undermine Employee Organizing on Blind*

A popular strategy that employers utilized to break strikes in the early twentieth century could leave Blind users vulnerable to campaigns of misinformation spread by their bosses: infiltration.¹¹² While labor infiltration and spying is illegal, because Blind authenticates users through company e-mail addresses only, there are no mechanisms that flag users as being managers disguising themselves as ordinary employees.¹¹³ Even if employees are able to identify infiltrators, management can still monitor which of its employees are using their work e-mail addresses for verification purposes by simply setting up a flag in their IT systems.¹¹⁴ A

¹¹¹ See Leskin, *supra* note 57 (demonstrating poll functions within the app). The poll function is also entirely anonymous which lends itself well to holding union elections, which are required to be anonymous under the NLRA. *Id.*

¹¹² See SMITH, *supra* note 25, at 80 (highlighting the common employer practice of hiring private security forces typically hired by management to engage in extralegal activities—to pose as union activists and strikers in order to dissolve organization efforts). Furthermore, employers actively spread misinformation and actively try to make striking workers disorganized from within the ranks of the striking workforce. *Id.*

¹¹³ See FAQs, *supra* note 55 (stating that Blind limits access to private lounges and chatrooms to the public by making employees confirm their work e-mail addresses with the company to verify employment). There would be nothing stopping a manager, HR representative, or supervisor from making their own account verifying their employment status as a member of a certain company or workplace and in essence spying on other employees who are using the app. See Skeabeck, *supra* note 11 (demonstrating that employers can keep tabs on employees using Blind by creating their own accounts). In addition, employers are able to monitor the public forums without accounts. *Id.* Even if the employer cannot react outright to what they find on Blind, they are at least able to monitor what is being said about them and respond accordingly. *Id.*

¹¹⁴ See Skeabeck, *supra* note 11 (opining that Blind is not as secure as advertised because Blind requires a work e-mail to use the app opening door to employer's IT services for flagging accounts that sign up for employment apps). Ironically, employees using Blind may not have as much anonymity as they think because company e-mails are not private. *Id.* "Most employers have IT policies that make it clear that company email is the property of the company...and that it is not private." *Id.* Furthermore, employers can flag e-mails from Blind and make a list of which employers are using Blind. *Id.* This gives employers "a tremendous leg

particularly well-coordinated effort from a tenacious employer could render large amounts of Blind users unable to use their company e-mail addresses to verify their identity, rendering the remaining features—private chats and workplace-specific channels—totally unusable.¹¹⁵

D. An Intricate Maze of Potential Litigation

Since claims brought against employers for discrimination, harassment, wage and hour violations, and unfair labor practices are controlled by a litany of state and federal statutes, are inherently fact-reliant, and may have greater judicial, administrative, or legislative support in some jurisdictions than others, a communication platform aiming to provide workers with the social space to assert themselves against employer misdeeds ought to also provide some sort of legally conscious guidance—which Blind does not do—to mitigate the damage caused by those misdeeds as well.¹¹⁶

up in any internal investigation” especially in trade secret and restrictive covenant cases. *Id.*

¹¹⁵ See *id.* (highlighting strategies for employers to block or circumvent employees from using Blind’s key anonymity features through basic IT practices).

¹¹⁶ See 29 U.S.C. § 152(3) (1935) (defining “employee” for purposes of the act). Under the NLRA, employees who are supervisors or managers are not covered under the act. *Id.* Agricultural employees, railway workers, airline workers, federal and state employees, private workers working in a municipal capacity, independent contracted workers, or people employed in domestic services are not covered under the act. *Id.* See also 45 U.S.C. § 153(f) (1926) (stating that railway workers are specifically governed under this act for purposes of resolving labor disputes). While the NLRA is less interventionist in terms of how labor disputes are resolved, workers governed by the Railway Labor Act must exhaust certain methods of dispute resolution before being allowed to strike. *Id.* Even then, strikes are reserved for “major disputes.” *Id.* See also *Powell v. Union Pacific R. Co.*, 864 F. Supp. 2d 949, 957 (E.D. Cal. 2012) (distinguishing major disputes seek to create contractual rights while minor disputes seek to enforce contractual rights already in existence). See also 45 U.S.C. §§ 181–88 (1946) (amending original Railway Labor Act to extend to airline workers and carriers). The inclusion of air workers in the Railway Labor Act has garnered criticism for being ambiguous and unclear as to who is governed under the act and who is not. *Id.* See also Malcolm A. MacIntyre, *The Railway Labor Act - A Misfit for the Airlines*, 19 J. AIR L. AND COM. 274, 276–77 (1952) (arguing that there is no “clear-cut administrative manner in which ‘management’ or ‘employer’ may be separated from ‘labor’ or ‘employees’ for purposes of labor-management relations”). See also 42 U.S.C. § 2000e–2 (1964) (providing federal protections for all American workers from discrimination on the basis of various protected classes). Nearly every state has its own codified version of the NLRA and Title VII which gives employees additional

Given Blind’s collaborative nature and premise, even non-unionized workers using Blind may be deemed to garner the protection of the NLRA.¹¹⁷ Blind’s employment focus—which tailors site content to relate to individual workplaces and facilitates employees to knowingly or unknowingly engage in mutual aid—inherently carries significant legal implications because many users could fall under the protection of the NLRA or become aware of potential Title VII or Fair Labor Standards Act implications from work activity through seemingly innocuous participation in Blind chatrooms.¹¹⁸ Despite Blind’s enormous potential to make

means of recourse for unfair labor charges and employment discrimination. *Id.* See e.g. MASS. GEN. LAWS. ch. 150E § 10 (1973) (providing unionized workers in Massachusetts a means of recourse within Massachusetts for labor disputes). See also WOMEN’S BUREAU, *supra* note 2 (underscoring the handful of states with pay transparency laws). The fact sheet implies that over thirty states do not have any form of salary transparency protection codified into state law. *Id.* See also CAL. LAB. CODE ch. 1 § 232 (2003) (prohibiting any employer from requiring “as a condition of employment, that an employee refrain from disclosing the amount of his or her wages; require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages; [or] discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages.” See also COLO. REV. STAT. § 24-34-402 (2017) (outlawing employers from: discharging or disciplining employees for, coercing employees from, and mandating employees to sign waivers affirming to refrain from discussing wages with co-workers.). See also 820 ILL. COMP. STAT. 112/10(b) (2019) (stating that “it is unlawful for any employer to discharge or in any other manner discriminate against any individual for inquiring about, disclosing, comparing, or otherwise discussing the employee’s wages or the wages of any other employee, or aiding or encouraging any person to exercise his or her rights”).

¹¹⁷ See 29 U.S.C. § 157 (1935) (protecting every American worker not exempt under the NLRA from adverse employment actions such as termination or discipline for engaging in concerted labor activity). Concerted labor activity includes actions taken in or out of the workplace that are done for the “mutual aid” or “protection” of other employees. *Id.* This implies that employees organizing for the purposes of creating an open work culture *for the purpose of mutual aid* would receive protection under the NLRA. *Id.* See also Sprague, *supra* note 61, at 961–79 (highlighting a lengthy list of cases, decisions, and rulings defining scope of employee rights to engage in protected concerted activity under the NLRA online and on social media platforms). As a testament to labor and employment related cases being extremely fact-specific, if those same workers are discussing wages on Blind while *at work*, they may lose protection of the Act. *Id.* at 965.

¹¹⁸ See 29 U.S.C. § 158 (1935) (creating protections for workers regardless of their union status for activities that promote mutual aid and protection). Even non-unionized employees using Blind to discuss, say, banding together to resist a corporate policy on Blind would inherently fall under protection of the Act. See 42

employees aware of their rights, there is no legally conscious guidance within Blind to actualize this possibility.¹¹⁹

When unions that are retaining highly experienced and specialized labor counsel start abandoning charges so as not to upset the precarious balance of NLRB precedents, it would be legally irresponsible to blanketly advise workers to mine litigation scenarios out of Blind without legally conscious guidance.¹²⁰ In addition to the fact-specific nature of labor and employment claims and charges, the political fickleness of the NLRB may make it difficult to predict with a reliable degree of consistency how it will treat disputes arising out of Blind chatrooms and message boards.¹²¹ If Blind, or a potential

U.S.C. § 2000e-2 (1964) (establishing unlawful employment practices as they correlate with protected class statues based on gender, race, and national origin). Blind lends itself to fostering greater protections under Title VII despite that the rights created under the Act are negative rights. *Id.* See also MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2018) (serving as a model for pay transparency with anti-discrimination animus). See also 29 U.S.C. § 157 (1935) (protecting all employees covered under the act in making concerted efforts for the purpose of collective bargaining, mutual aid, or protection).

¹¹⁹ See *Salary Comparison*, *supra* note 43 (providing real-time salary information for workers in different companies and similar fields). Blind possesses the capability of engaging with its community to provide salary information that can lead to litigation actions, but the information is community sourced as opposed to being compiled by Blind itself. *Id.* This site feature perfectly encapsulates the overarching principle that Blind serves to be a centralized location for employees to source information for mutual aid with Blind merely providing the means to facilitate this communication. *Id.*

¹²⁰ See Johnston, *supra* note 65 (showing that unions are hesitant to bring claims to the NLRB out of fear of having reliable precedents favoring unions and workers being overturned by the employer-friendly Board).

Some unions are avoiding the NLRB altogether, knowing that if their case goes before the Trump-appointed board it could overturn worker-friendly precedents. Unions seeking to organize graduate students at private universities, for instance, who were granted the right to do so in a 2016 NLRB ruling, have been trying to pressure universities to voluntarily recognize bargaining units without going through an NLRB-sanctioned election.

Id.

¹²¹ See Johnston, *supra* note 65 (demonstrating that the Trump's administration actively rolled back Obama-era NLRB rulings). Many of the protections for Facebook and social media activity came after 2008 when President Obama was elected. *Id.* See also Sprague, *supra* note 61, at 957 (showing the NLRB received hundreds of charges from unions pertaining to social media activity from 2008–2011 when Obama was in office). For another example, the NLRB has ruled that employees' online actions are sometimes protected under the NLRA whether they are unionized or not, but that their rights must be balanced with an employer's

competitor, had a company-managed account, page, or chatroom that posted general information on how to bring about claims, how certain employer misdeeds implicate landmark labor laws versus landmark employment laws, and how the jurisprudence of the field of law treats workers and unions, important legal information could be centralized in one easily accessible location.¹²²

E. Invisible? Not So Fast

TeamBlind does reserve the right to turn over what user data it has to comply with a court order, but the data it keeps on record is limited.¹²³ Because the secrecy of users' identities is a core tenant of its business model, TeamBlind explicitly states that it will not respond to subpoenas that disclose personal information for the purpose of employment or labor litigation.¹²⁴ TeamBlind also states

interest in protecting themselves against disparagement of their reputability, brand, and image. *Id.* at 1001. *See also* Three D, LLC v. N.L.R.B., 629 Fed.Appx. 33, 36 (stating that had employee unjustly compromised the image or brand of their employer that their speech would lose protection under the NLRA). *See also* Johnston, *supra* note 65 (demonstrating that the Trump Administration's NLRB was particularly hostile to employee rights) While changes in nearly every federal administration has resulted in the NLRB issuing a non-acquiescence for many past rulings, the Trump Administration in particular overturned the Obama Administration NLRB precedents with urgency. Unions are hesitant to bring claims forward because it risks precedent being overturned. *Id.*

¹²² *See Salary Comparison, supra* note 43 (demonstrating a page managed and verified by TeamBlind that serves as a resource center for wage and compensation information across the website). A centralized location with filters by jurisdiction and tabs with major labor and employment laws could follow a similar pattern as the Blind page. *Id.*

¹²³ *See Privacy Policy, supra* note 76 (reserving the right to disclose whatever data is in TeamBlind's possession to courts).

¹²⁴ *See Privacy Policy, supra* note 76 (disclosing TeamBlind will turn over what limited data it has if they have a "good faith belief" that the law requires them to do so). TeamBlind collects information provided for verification and registration purposes such as a username, password, and company e-mail address. *Id.* Other information that TeamBlind collects includes content posted such as polls, images, and messages, cookies, data on pages visited, messages sent, polls voted in, comments, likes and reactions, and aggregate user location. *Id.* TeamBlind immediately encrypts usernames, passwords, and company e-mail addresses and user data is stored on physical servers located in South Korea, Japan, and the United States. *Id.* Users in the European Union have expanded rights allowing them to request data reports of their personal information being stored on Blind, but this is not available to users in the United States or anywhere else. *Id.* TeamBlind does not have any means of linking e-mail addresses with specific user activity, so

in their privacy policy that they will only disclose information necessary to protect “legal rights, property or safety of [its] users, the public, and/or TeamBlind.”¹²⁵

While there is not an example of reported litigation arising out of Blind users filing claims or charges, TeamBlind will likely respond to a subpoena or discovery request for user identities by saying that the expense of decrypting their data coupled with the importance of privacy to their business model would be too burdensome of a request.¹²⁶ Employers have an edge over employees regarding discovery via Blind because they are able to request information from the individuals who are involved in litigation or employees that are using Blind instead of going through TeamBlind itself.¹²⁷

Blind’s reliance on using company e-mails for verifying its users is straightforward and accurate, but employees would be mistaken to believe that their anonymity and their rights will be fully preserved; employers are able to flag Blind’s verification e-mails coming in and out of company IT servers, giving employers the power to both expose employees who are using Blind and even restrict employees’ ability to use their company e-mails to register for Blind.¹²⁸ Furthermore, millions of low-wage workers without

they could not give anyone that information even if they wanted to. *Id.* See also *FAQs*, *supra* note 55 (confirming that TeamBlind retains data on users but goes through extraordinary lengths to preserve user privacy). Given their willingness to fight tooth and nail to protect user privacy, Blind is likely to follow Apple’s trend of resisting court orders or the government. *Id.* See also Selyukh, *supra* note 77 (pointing out how Apple resisted court orders to decrypt services that are business secrets or core tenants to business even in the face of extreme circumstances).

¹²⁵ See *Privacy Policy*, *supra* note 76 (assuring that TeamBlind will only disclose information to courts if absolutely necessary to uphold user safety and company values).

¹²⁶ See Fed. R. Civ. P. 45(d)–(e) (stating that individuals served with a subpoena must turn over relevant information to complete the service of the subpoena unless they can prove that the information is privileged).

¹²⁷ See Fed. R. Civ. P. 45(e)(2)(A)(i–ii) (setting forth the requirements for individuals withholding subpoenaed information under a claim that the information is privileged).

¹²⁸ See Skeabeck, *supra* note 11 (underscoring that companies can simply flag all verification e-mails coming into a server). If Blind becomes more popular, employers will know to look for the verification e-mail sent by Blind in order to complete the verification process and thus revealing which of its employees are using the service. *Id.* See also *Caesars Ent. d/b/a Rio All-Suites Hotel and Casino and Int’l Union of Painters and Allied Trades, Local 159, AFL–CIO*, Case 28–CA–060841 (holding employers may restrict the use of company property, including

company e-mail addresses are relegated to using the app's public features and would have to resort to other less private forums that do not have a base layer of identity protection.¹²⁹ Perhaps confirming employment status with a pay stub or W-2 information could both circumvent proactive employers and their IT departments and help include those without company e-mail addresses, but this would be asking employees to divulge sensitive information that they may not be comfortable with sharing.¹³⁰ While anonymity is certainly a useful tool, employees should shed their anonymity and provide messages, posts, and all content related to their litigation to the courts and all relevant parties in the litigation in order to establish prima facie cases for claims and charges under major employment and labor legislation, especially because there is nothing stopping employees from registering for Blind for a second time and creating a new account in order to preserve anonymity moving forward.¹³¹

V. Conclusion

It is clear that America's workers need reinforcements in their struggle for fairer wages, equal pay, and a greater share of wealth. Collective action, mutual aid, and salary transparency are effective in achieving these ends. While Blind has its shortcomings, its existence

work e-mail addresses, even if it interferes with organizing or protected activity under the NLRA). This decision marks one of many examples of the Trump Administration's NLRB overturning an Obama-era precedent and allows employers to tacitly stymie the rights of workers to organize under the NLRA. *Id.*¹²⁹ See FAQs, *supra* note 55 (demonstrating Blind's reliance on professional e-mail address verification in order to foster an online community built on trust and veracity). "A core part of our service is to build and maintain a community of verified professionals. Work emails are the best way for us to gauge the professional status of potential users." *Id.*

¹³⁰ See Le Beau, *supra* note 8 (highlighting general awkwardness and potential negative consequences surrounding salary transparency). Given that employees are hesitant to share information regarding how much they earn annually, they may be even more resistant to share information from their W-2 which includes a fully accurate representation of income earned. *Id.*

¹³¹ See FAQs, *supra* note 5555 (requiring a company e-mail address to create a username and password with full platform access). There is no limit on how many accounts one can create. *Id.* TeamBlind can only safeguard against potential abuse by banning users who infringe on the community's values and policies, which requires an active Blind community to identify moles and infiltrators from management and flag them on the app in order to kick them from chatrooms, lounges, or channels. *Id.*

and unique purpose is exciting, fresh, and innovative. The potential implications on the labor and employment movement make Blind worthy of consideration by attorneys and union organizers looking to advise their clients on ways to gauge union interest, investigate inclinations that clients are not being paid sufficiently, and engage in mutual aid. Legally conscious guidance would compound Blind's best features and ultimately help workers navigate complex laws and the nuances of labor and employment jurisprudence.

The power dynamic between worker and employer has always been an unfair and uneasy one. Whether or not Blind chooses to foster a more just and equitable labor identity in those unaware of their legal rights and obligations remains to be seen. Notwithstanding, workers should not be at the mercy of political appointments and their employers when it comes to standing up for themselves. Blind gives workers the potential to access some of the most powerful tools of all: anonymity, consciousness, and unity.