



The United States players stand on the field during player introductions with their tops turned inside out as part of the team's equal pay campaign before the SheBelieves Cup match against Japan at Toyota Stadium on March 11, 2020 in Frisco, Texas. In March 2019, 28 players of the USWNT filed a federal lawsuit alleging USSF violated two federal laws: the Equal Pay Act and Title VII of the Civil Rights Act of 1964. (Photo by Alika Jenner/Getty Images)

THE FIGHT OFF THE FIELD

Legal Issues Surrounding Compensation of Female Professional Athletes

By Mari Bryn Dowdy and Mailise Marks

"Let's not forget the fight off the field. It's time we pay our USWNT equally."

—VICE PRESIDENT KAMALA HARRIS ON TWITTER, JUNE 11, 2019

"To @USWNT: don't give up this fight. This is not over yet."

—PRESIDENT JOE BIDEN ON TWITTER, MAY 2, 2020

Every professional league and sports organization in the United States has its own structure of compensation and benefits. While the level of pay varies from sport to sport, a common reality has arguably existed since the advent of professional sports in society: female athletes consistently make less than men.

Generally, athletes sign a contract with a particular team consisting of a base salary and usually a signing bonus. The base salary is typically guaranteed money, even if the athlete is injured or later released from the team. Athletes may also receive performance bonuses based on their team's success, such as qualifying for tournaments or championships.¹ Athletes who are represented by labor unions (i.e. U.S. Women's National Soccer Team Players Association or Women's National Basketball Players Association) regularly engage in contract negotiations with their employers. Non-union athletes are typically represented by advocate organizations (i.e. National Women's Hockey League Players' Association or Commission for Equity in Women's Surfing). Unlike unions, these entities do not engage in collective bargaining.² Union athletes are able to use their collective bargaining agreements (CBA) to push for improvements in pay, benefits and working conditions. Athletes may also seek to challenge the league itself or even attempt to form new leagues when collective bargaining agreements result in gender inequality.

Gendered pay discrimination for professional athletes is not a novel issue and the fight for equality has continued to present day, even headlining some of the biggest labor disputes in recent sports history. From the basketball court, to the soccer pitch and even the hockey rink, women's fight for fair compensation in professional sports presents an amalgamation of legal issues. In recent years, female athletes have made great strides in bringing these issues to the public's attention. However, as illustrated below, these steps are just the beginning of making truly substantial changes toward equality for professional female athletes. These disputes, negotiations and agreements brought many of legal issues into the national spotlight.

USWNT: The Long Battle

In March 2016, five U.S. Women's National Team soccer players—Carli Lloyd, Alex Morgan, Megan Rapinoe, Rebecca Sauerbrunn and Hope Solo—filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC) alleging wage discrimination. This was a necessary procedural step before a federal discrimination lawsuit could be filed against their employer, the United States Soccer Federation.³ In April 2017, the two sides announced they had ratified a new five-year CBA, which included an increase to



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both base pay and bonuses. However, the new agreement still allegedly did not represent equal pay with the men's national team. Additionally, the agreement did not attempt to resolve the EEOC charge.

The EEOC officially ended its investigation in February 2019 and issued right to sue letters to the players, which established that the players had exhausted their obligation to seek resolution through the EEOC.⁴ In March 2019, 28 players of the USWNT filed a federal lawsuit in the U.S. District Court for the Central District of California alleging USSF violated two federal laws: the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The players alleged the USSF engaged in gender discrimination on the basis of pay and other conditions of employment, *e.g.* allegedly substandard training conditions and travel accommodations.

The Equal Pay Act prohibits employers from wage discrimination on the basis of sex but does not automatically obligate employers to pay men and women employees the same wages as the comparison of "work" is not always straightforward. Rather, the analysis involves a careful comparison of relevant job descriptions, including assessing whether the jobs require equal skill, effort and responsibility and are performed under similar working conditions. Ultimately, the employer must show that the difference is due to a non-discriminatory reason(s). In other words, an employer must have lawful reasons for the pay disparity. The USSF denied the players' claims, arguing in a May 2019 court filing that the pay differential between the men and women players is "based on differences in aggregate revenue generated by the different teams and/or any other factor other than sex" and that the two teams are "physically and functionally separate organizations."

In May 2020, Judge Gary Klausner

granted USSF's motion for summary judgment on the players' wage discrimination claims but preserved the working conditions claims based on alleged discrimination in air travel, hotel accommodations and medical and training support. In the 32-page ruling, Judge Klausner includes an extensive history of the CBA negotiations between USSF and the USWNTPA over the past decade. He held that that members of the women's team knowingly and willingly sacrificed potential earning power in their CBA negotiations in exchange for the security of guaranteed annual salaries from USSF. In other words, the women rejected a pay-to-play structure similar to the one in the men's agreement and instead accepted greater base salaries and benefits. "Plaintiffs cannot now retroactively deem their CBA worse than the MNT CBA by reference to what they would have made had they been paid under the MNT's pay-to-play structure when they themselves rejected such a structure," Klausner stated.

USWNT have flatly rejected this ruling and confirmed their intent to appeal the decision to the Ninth Circuit Court of Appeals. "The argument that women gave up a right to equal pay by accepting the best collective bargaining agreement possible in response to the federation's refusal to put equal pay on the table is not legit reason for continuing to discriminate against them," said Molly Levinson, USWNT spokesperson.

In December 2020, the USWNT and U.S. Soccer agreed to settle their claims of unequal working conditions before trial was scheduled to begin in January 2021 (Hays, 2020).⁵ According to the proposed settlement, USSF agrees to provide an equal number of charter flights, as well as comparable hotel accommodations. USSF will also enact a new "Senior National Team Professional Support Policy" that seeks to ensure equality of staffing while allowing each national team flexibility for its specific

needs. Each team will have between 18 and 21 "professional positions" for staff. Additionally, under a venue selection policy included as part of the settlement, the federation will "seek to provide equally acceptable venues and field playing surfaces" for the national teams.

In settling the issues related to working conditions, the path is now cleared for the team to appeal Judge Klausner's May ruling that rejected their equal pay claims. Levinson confirmed in December, "we now intend to file our appeal to the Court's decision which does not account for the central fact in this case that women players have been paid at lesser rates than men who do the same job."⁶ While a ruling on the USWNT's remaining claims would become case precedent for future union-management disputes, the appeal process—between 15 to 32 months—could still complicate negotiations when the current CBA expires this year.⁷

WNBA: The Recent Victory

After 23 seasons of subpar playing conditions the WNBA secured a progressive new collective bargaining agreement in January 2020, which had a record 90% player vote.⁸ The new CBA raises the WNBA salary cap by 30% and boosts maximum annual salaries from \$117,500 to \$215,000. Players will also be able to earn up to \$250,000 apiece from a \$1.6 million pool the league is dedicating to marketing agreements and will gain free agency after five years (down from six). Teams will also provide housing with two bedrooms for athletes with children, individual hotel rooms on the road and flight upgrades. The groundbreaking provisions of the agreement though focus on players who are mothers or expecting parents. Under the old CBA, athletes who had children lost pay when they lost work time and had to cover their own childcare costs; now, players will receive their full salaries during leave and a \$5,000 stipend for child-



Nneke Ogwumike of the Los Angeles Sparks is the president of the WNBA Players Association. The WNBA players secured a progressive new collective bargaining agreement in January 2020. The new CBA raises the WNBA salary cap by 30% and boosts maximum annual salaries from \$117,500 to \$215,000. (Photo by Douglas P. DeFelice/Getty Images)

care costs. Additionally, veteran players (those who have played at least one season) will receive up to \$60,000 to cover costs related to adoption, surrogacy and IVF treatments. The new CBA even mandates players are given a private place for nursing.

Although the new WNBA calendar will make it harder to play overseas and stateside in the same year, the higher salaries will hopefully relieve the pressure athletes feel to travel overseas in the off-season to supplement their income. Additionally, the league agreed to prepare and promote players for coaching and others jobs in the off-season. As innovative as these new changes are, their total cost is about \$1 million per WNBA team per year, which means the proportion of league revenues paid to players will rise only from approximately 20% to 30%, in contrast to most major sports which are at around 50%.⁹ This may appear as WNBA players leaving considerable cash on the negotiating

table but may also represent just how much further women must go before achieving equal compensation.

NWHL and PWHPA: The New Fight

In 2017, the U.S. Women's National Hockey Team boycotted the world championships of the International Ice Hockey Federation after contract negotiations had broken down. Thirteen days after the boycott was announced, the team was able to secure a new deal that improved the team's annual compensation to roughly \$70,000 per player, plus performance bonuses, and included travel and insurance provisions commensurate with what the men's national team received. USA Hockey also agreed to other player requests, such as establishing a committee to look into how the federation could improve its marketing, scheduling, public relations efforts and promotion of the women's game, plus fundraising and other efforts for girls' developmental teams.¹⁰ However,

unequal pay and working conditions continued to plague women's professional leagues and when the Canadian Women's Hockey League folded in 2019, North America players were left with only one women's hockey league in which to play: the National Women's Hockey League.

During the NWHL's inaugural season in 2015, player salaries ranged between \$10,000 and \$26,000. Players were stunned when the league announced in 2016 that it was cutting salaries in order to keep the league afloat.¹¹ However, without a CBA, players did not have much recourse unless they were willing to walk out. Ultimately, over 200 players decided they would not play in any professional North American leagues in 2019 unless working conditions improved, and they formed the Professional Women's Hockey Players' Association.¹² The PWHPA then led a six-stop barnstorming Dream Gap Tour across the U.S. and Canada. The hope was that the Dream Gap Tour would fill a short, one-season void without professional women's hockey, but when no new, "sustainable" league was formed by the time the PWHPA finished its tour in March 2020, PWHPA was unsure of its future. The COVID-19 pandemic intensified that uncertainty.

Then, in October 2020, Secret announced its pledge of \$1 million to the PWHPA, the largest financial commitment ever made to professional women's hockey in North America.¹³ This contribution not only helped players return to the ice but also ensured the Dream Gap Tour would continue. PWHPA head and Hockey Hall of Famer Jayna Hefford confirmed the \$1 million from Secret will be divided between operational costs, cash prizes for players on the 2021 Dream Gap Tour and lastly, media and marketing to ensure the PWHPA remains visible.¹⁴

Meanwhile, the NWHL has made improvements since 2016. In 2019, the

salary cap for each team increased from \$100,000 to \$150,000, and players started receiving 50% of revenue from league-level sponsorship and media deals, which included agreements with Dunkin Donuts and Twitch, a video streaming service used for game broadcasts.¹⁵ In December 2020, NBCSN and the NWHL reached a deal to televise league playoff games for the COVID-abbreviated 2021 season.¹⁶ Given that these developments still do not result in NWHL players earning a livable wage, the PWHPA continues to hold out for a league that can provide one. Ultimately, the future success of women's professional sports organizations in a post-pandemic era will rely not only on equitable compensation for its players but also large investments in the organizations themselves.

Since the creation of the Equal Pay Act and Title IX, female athletes in the United States have been fighting to compete on the same footing as men. Today, female professional athletes are building public support, organizations and partnerships in order to create a market that supports their skills and pays them what they are truly worth. Once sports reemerge from the freeze of the COVID pandemic, women's leagues and federations will no doubt continue to face evolving expectations and novel issues as they answer the fundamental question of how to fairly compensate their athletes in 2021. ♪

Endnotes

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