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Louisiana State Bar Association's Eleventh Annual Conclave on Diversity in the Legal Profession

Diversity and Inclusion: From Rhetoric to Reality Workplace Analytics

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Eric J. Felsberg

Jackson Lewis P.C. | Long Island

felsbere@jacksonlewis.com | 631-247-4640

About Our Data Analytics Group

From minimizing legal risk to improving planning and decision-making, it is crucial that employers recognize the value in leveraging data as a management tool. With decades of experience studying the interplay data analytics and the law, our multidisciplinary teams of lawyers, data scientists, and statisticians uses sophisticated analytics tools to advise clients in multiple practice areas. Our Data Analytics Group provides data-driven compliance assessments, litigation support, strategic labor relations assistance, and talent analytics for management and recruitment. In all matters, we combine our legal knowledge with powerful analytics insights to provide clients with critical information, while maximizing the protections afforded by the attorney-client privilege.

In short, if there is data involved, our Data Analytics Group can help. The Data Analytics Group has experience working with employer data in a variety of ways: from identifying the risk of litigation and providing data-driven early case assessments to helping employers mine analyzable data and constructing damage analyses. Below is a sampling of services the team can provide:

- **Predictive Analytics and Early Case Assessment:** Leveraging available employer and JL data, the team can perform analytics regarding charge filing likelihood, expected costs of litigation, litigation duration, and expected settlement value.

- **Data Mining and Management:** The team develops customized automated solutions to assist employers and JL lawyers with mining recordkeeping systems for analyzable data. We can convert native and non-native PDF documents to analyzable text formats. We also use optical character recognition technology to process hard copies of data.

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About Our Data Analytics Group

- **Analyses and Damage Assessments:** Whether you are handling an EEOC systemic discrimination claim, litigating an wage hour matter (e.g., misclassification, off-the-clock, tip credit, etc.), assessing damages, or are simply interested in performing a vulnerability audit (e.g., pay equity, hires, reductions-in-force, etc.), the Data Analytics Group is equipped to provide a full suite of analyses including, but not limited to, multiple, linear, non-linear, logistic, quantile, interval, and constrained regressions, disparate impact analyses using conditional and unconditional exact testing, and outlier detection analyses.

- **Data Visualization Tools:** Communicating the results of a complex statistical analysis using ordinary spreadsheet technology can be dry and difficult to digest. The team will help you "tell the story" behind the data so that employers can act on clear and obvious trends that are depicted by interactive data visualizations.

- **Advice and Counsel Related to Data Use:** We are equipped to provide advice and counsel to our clients regarding possible pitfalls associated with data-driven solutions including disparate treatment, impact, and validation, etc. We also partner with the Firm's other practice groups to provide advice and counsel regarding other issues associated with data-driven solutions including data security and privacy, disability management, and FCRA compliance, etc.

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About Our Speaker

Eric J. Felsberg is a Principal in the Long Island Office and the National Director of the Data Analytics Group at Jackson Lewis P.C. As the National Director of the Data Analytics Group, Mr. Felsberg leads a team of multi-disciplinary lawyers, statisticians, and analysts with decades of experience managing the interplay of data analytics and the law. Under Mr. Felsberg's leadership, the Data Analytics Group applies proprietary algorithms and state-of-the-art modeling techniques to help employers evaluate risk and drive legal strategy. In addition to other services, our group of lawyers and statisticians partners with employers to assess compliance with, and exposure under, wage-hour laws, conduct compensation equity studies, evaluate pre- and post-employment assessments, review reorganization plans and selection systems for evidence of impact, and leverage the use of analytics in defense of systemic discrimination claims. The group also provides analytics support to employers during labor relations negotiations, optimizes talent management and equity and policy practices through the use of machine learning techniques, and synthesizes data files into analyzable format. The Analytics Group designs its service delivery models to maximize the protections afforded by the attorney-client and other privileges.

Mr. Felsberg also provides training and daily counsel to employers in various industries on day-to-day employment issues and the range of federal, state, and local affirmative action compliance obligations. Mr. Felsberg works closely with employers to prepare affirmative action plans for submission to the Office of Federal Contract Compliance Programs (OFCCP) during which he analyzes and investigates personnel selection and compensation systems. Mr. Felsberg has successfully represented employers during OFCCP compliance reviews, OFCCP individual complaint investigations, and in matters involving OFCCP claims of class-based discrimination. He regularly evaluates and counsels employers regarding compensation systems both proactively as well as in response to complaints and enforcement actions. He is an accomplished and recognized speaker on issues of workplace analytics and affirmative action compliance. Mr. Felsberg graduated from Hofstra University School of Law where he served as the Editor-in-Chief of the Hofstra Labor & Employment Law Journal. He is admitted to the Bar of the State of the New York as well as the U.S. District Courts in the Eastern and Southern Districts of New York.

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INTRODUCTION

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Big Data and Analytics

"People in both fields operate with beliefs and biases. To the extent you can eliminate both and replace them with data, you gain a clear advantage."

Michael Lewis, Moneyball: The Art of Winning an Unfair Game.

_____

"Without big data, you are blind and deaf in the middle of a freeway."

Geoffrey Moore, author and consultant

25 Insightful and Thought-Provoking Quotes About Big Data

Amarenda Bhushan, CEO and Editorial Director of CEOWORLD magazine (May 2, 2014)

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"In God we trust. All others must bring data."

Predictive Analytics, Eric Siegel (quoting William Edwards Deming)

Have You Ever Encountered Analytics Use in Your Everyday Life?

- Have you ever applied for a loan? What about a credit card?

- Have you ever received a sales circular?

- Have you ever voted?

- Have you ever shopped?

- Surfed the net?

- Purchased health or car insurance?

- Purchased cold cuts at the deli counter?

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WORKPLACE ANALYTICS

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Workplace Analytics

Workplace Analytics is the practice of mining Big Data on applicants, employees, operations, customer interactions, and myriad other metrics and then using statistical analyses to identify correlations that can vastly improve decision making in areas such as:

(i) optimizing traditional HR functions, such as recruiting, hiring, employee engagement and retention (*See e.g.,* Sean Captain, *Can Using Artificial Intelligence Make Hiring Less Biased?,* FAST COMPANY (May 18, 2016 5:58 AM))

(ii) driving sales through improved customer experience by better positioning/training employees

(iii) improving profits by increased efficiencies obtained through better use of human capital

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Your Own Crystal Ball?

What do you think are some ways analytics may be used in the workplace?

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Your Own Crystal Ball?

What about talent acquisition?

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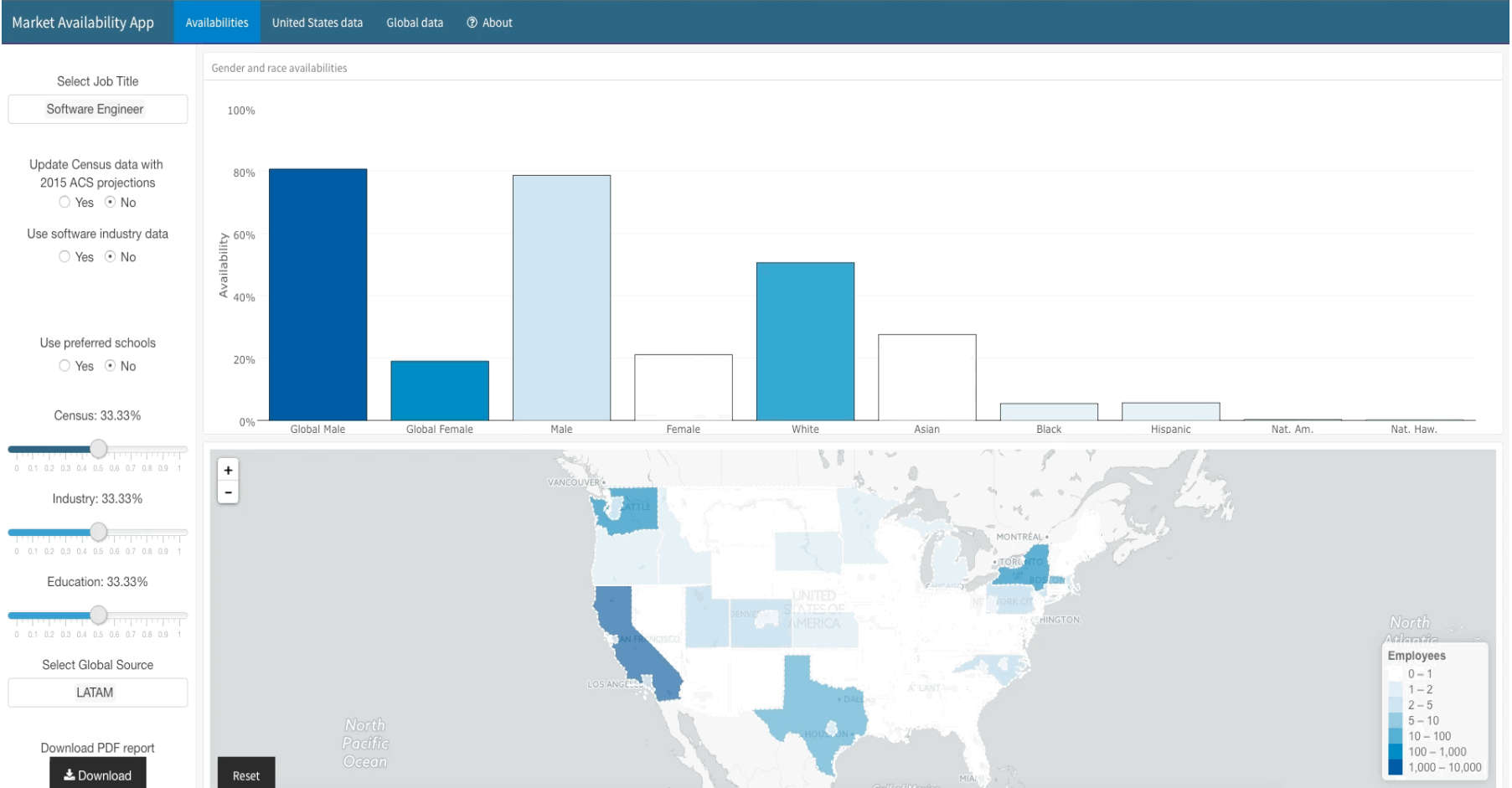**jackson lewis.**

What about talent acquisition?

(Yes! As an example, employers may link performance ratings and promotional movements with employee education and skillset at hire to assist in recruiting)

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Your Own Crystal Ball?

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Your Own Crystal Ball?

What About Personnel Issues Such As Training, Employee Engagement, etc.?

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Your Own Crystal Ball?

What About Personnel Issues Such As Training, Employee Engagement, etc.?

(Sure! Employers may identify areas of high attrition rates, charge filing, or customer feedback to focus training and development)
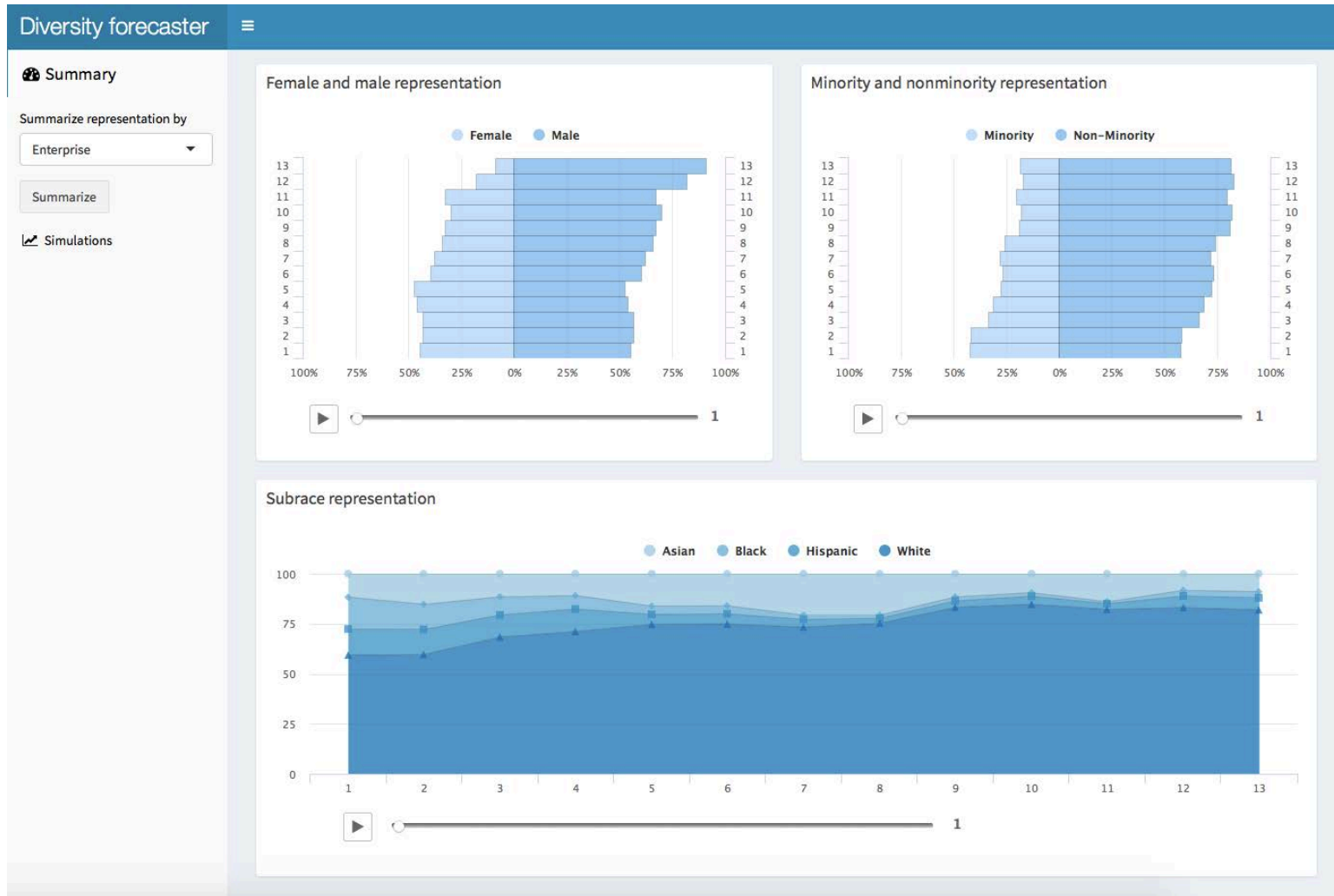
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Your Own Crystal Ball?

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Your Own Crystal Ball?

So, can we figure out who is more likely to leave the organization, or worse, file a charge?

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Your Own Crystal Ball?

So, can we figure out who is more likely to leave the organization, or worse, file a charge?

(Using predictive analytics methodologies, employers may use past attrition and charge filing characteristics, for example, to predict likelihood of new events)

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Your Own Crystal Ball?

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Your Own Crystal Ball?

Can we figure out what our remote employees are up to?

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Your Own Crystal Ball?

Can we figure out what our remote employees are up to?

(You guessed it - Determining employee engagement and hours worked for remote workforces may be accomplished by looking at digital footprint data, for example)

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Your Own Crystal Ball?
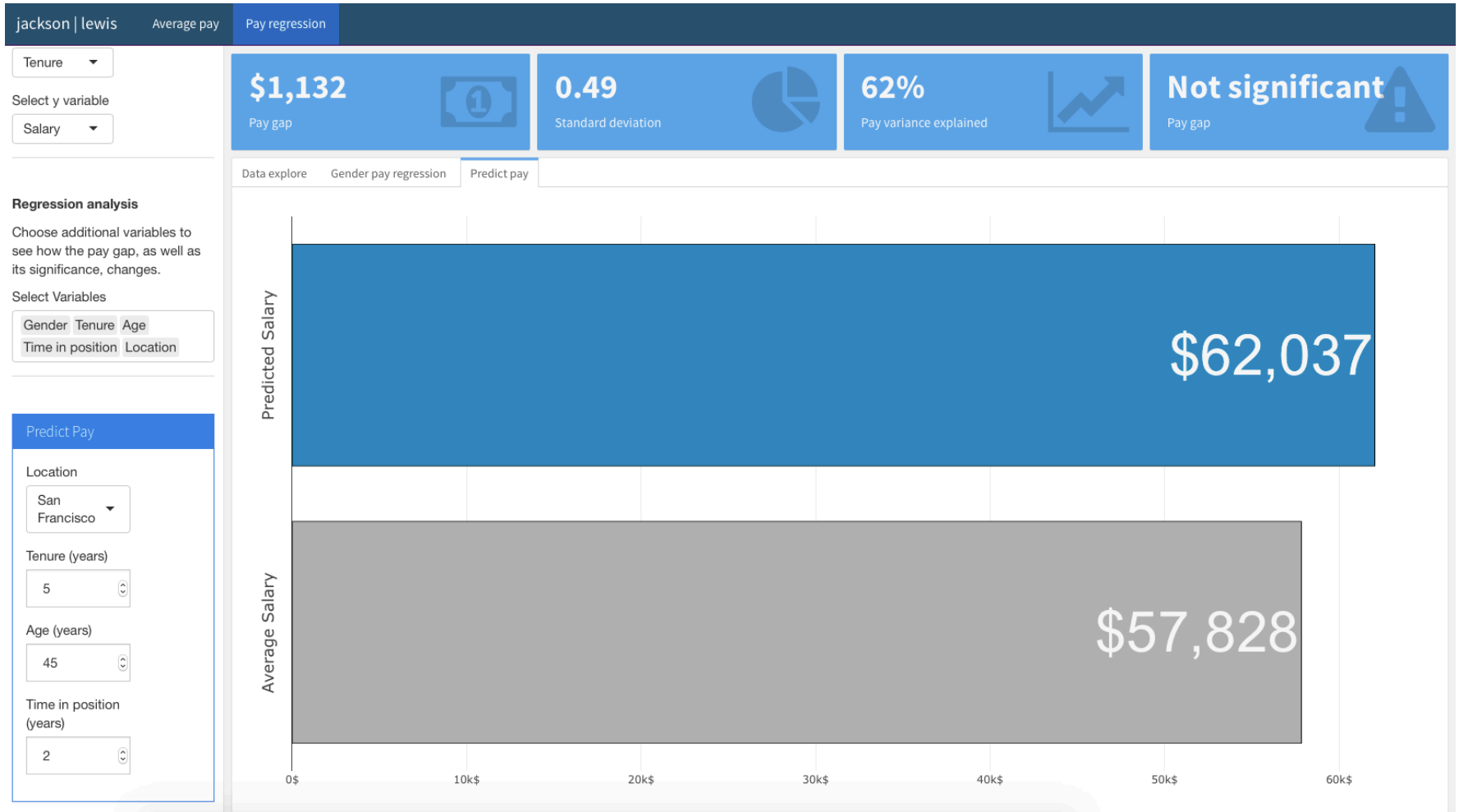
What about pay?

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Your Own Crystal Ball?

What about pay?

(Employers may analyze and assign values to each variable impacting compensation (e.g., tenure, performance, experience, etc.) to set appropriate employee pay)

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Setting Compensation

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BUT BE CAREFUL . . .

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But Be Careful . . .

ADA

Disparate Treatment

Data Breach and Security Claims

Fair Credit Reporting Act

Disparate Impact

Labor Relations

Privacy and Confidentiality

Compensation

Application of Privilege to Analyses

Pre-employment Inquiries

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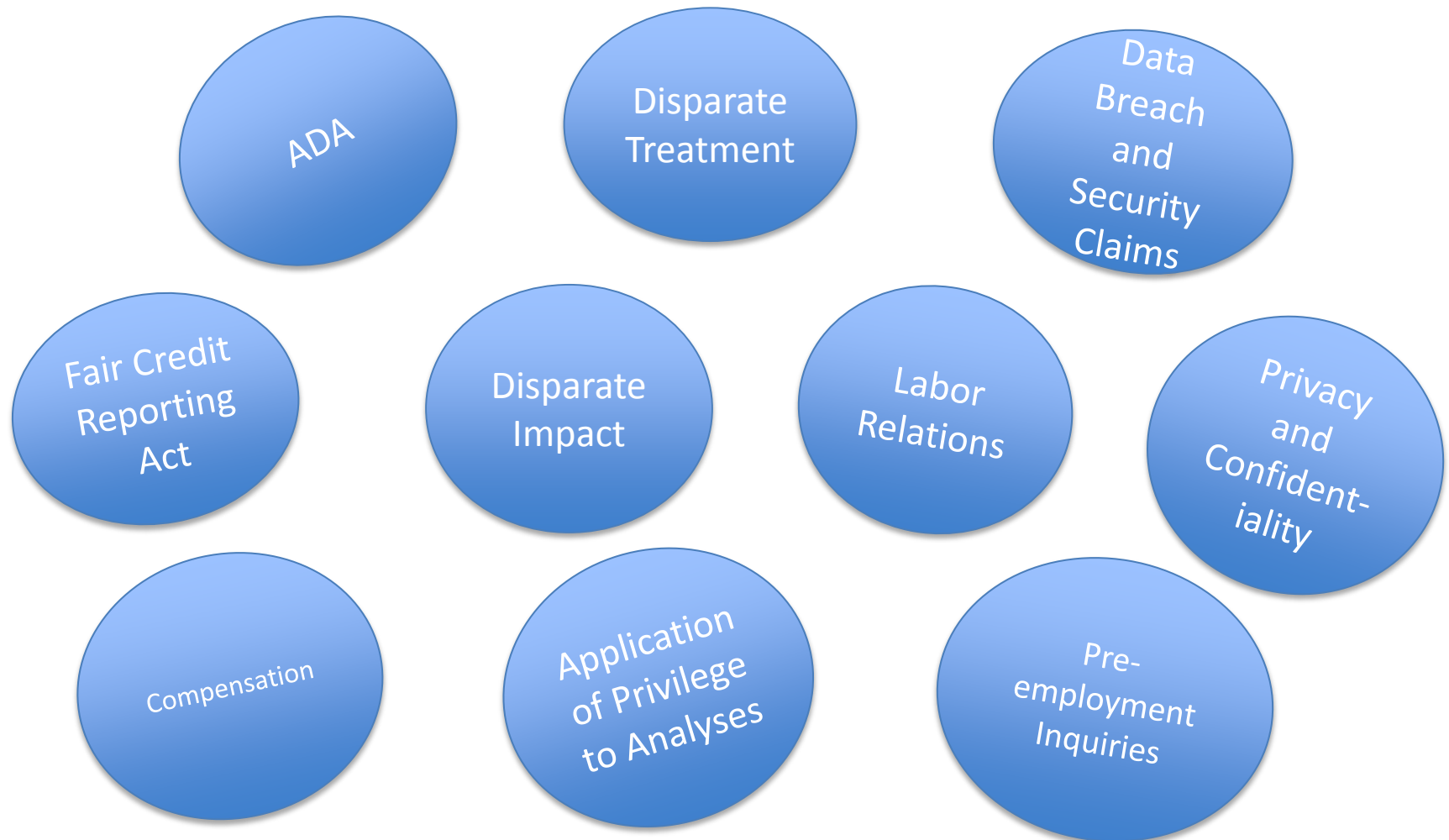
But Be Careful . . .

- **<u>Disparate Treatment</u>** – In general terms, employers may not take into consideration an individual's protected characteristics when making a selection decision

- Suppose an employer develops an algorithm that predicts which of several hundred or thousand applicants are more likely to be successful employees

- Next, suppose the employer utilizes data that contains protected characteristics such as race, ethnicity, gender, age, familial status, religion, etc. If these characteristics inform the algorithm's prediction and the employer relies on the prediction when making a selection, *disparate treatment* may result

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But Be Careful . . .

◆ Now, is it a good practice to ask candidates if they are pregnant or have a certain medical condition?

◆ However, some of this information may be secured through data mining of employee data or third party sources. Use of these data points in an algorithm that are later relied upon is tantamount to inquiring into protected information and may violate **prohibitions about certain pre-employment inquiries**

◆ **The Fair Credit Reporting Act** also may be implicated if third party mined data is incorporated into an algorithm and later relied upon when making a selection decision

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But Be Careful . . .

◆ Depending on the data used, a host of **<u>privacy-related claims</u>** may be raised. Employers must remain vigilant about collecting sensitive data about employees and applicants to avoid running afoul of laws such as GINA, HIPAA, and the ADA. International prohibitions may be implicated as well

◆ Other workplace-related laws may also be triggered depending on the nature and scope of the what is being collected, analyzed, and what is or what is not being predicted

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But Be Careful . . .

- **<u>Disparate Impact</u>** claims result from the application of a facially neutral practice that disproportionately impacts a protected group. Disparate impact claims do not require a showing of any sort of employer intent to discriminate

- Use of pre-employment testing is ripe for disparate impact claims. And predictive analytics may be as well. But how?

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But Be Careful . . .

- For that answer, we have to look back to 1978 and read the Uniform Guidelines on Employee Selection Procedures or UGESP

- "These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision."

- "The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been **validated** . . . " (emphasis added)

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But Be Careful . . .

◆ So, what is validation within the meaning of the UGESP?

  • **Criterion-related**: "[E]mpirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance."

  • **Content**: "[D]ata showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated."

  • **Construct**: "[D]ata showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated."

◆ Competing selection procedures, impact, and transferability

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The Government Weighs In

- White House Report – "Big Data: Seizing Opportunities, Preserving Values" Issued in May 2014

- The FTC's January 2016 Report on "Big Data: A Tool for Inclusion or Exclusion?"

- White House Report - "Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights," May 2016

- The Federal Big Data Research Development Strategic Plan, May 2016

- EEOC's "Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law"

- A Word About Bias . . .

Attorney Client Privilege

◆ Attorney-Client Privilege applies:

- To **communications** (not underlying facts or data)

- Between **attorney and client** (or in house legal counsel and company employees)

- Concerning **legal advice**

◆ But what about the resulting analyses?

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Why Does This Matter?

- Because statistical evidence of discrimination is a hot topic, especially in the time leading up to litigation

- Plaintiffs/enforcement agencies are asking for copies of data analyses and evaluations in lawsuits/investigations

- Shareholders and "activist investors" want to publicize diversity & inclusion statistics

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Why Does This Matter?

◆ HR databases make finding "hidden" issues easy – "deep dive" analyses of thousands of employee files with a few keystrokes

◆ Incredible source of information to help predict success, reduce attrition, optimize operations, save money, *etc.*

◆ *…*but left unchecked, could be the "smoking gun" in a discrimination lawsuit, *even if no one intended to discriminate*

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Is A Balanced Approach Best?

◆ Algorithms could be tainted by bias-intentional or not

◆ But even without the use of analytics, unintentional biases often creep into our decision-making process

◆ Effective human resources analytics programs provide guidance

◆ Without safeguards, overreliance on algorithms and analytics to drive decisions could raise a host of issues

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If You Want to Talk . . .

Eric J. Felsberg
National Director of Data Analytics
Jackson Lewis P.C.

felsbere@jacksonlewis.com
631-247-4640

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THANK YOU

With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis provides the resources to address every aspect of the employer/employee relationship.