Bloomberg BNA

Global Efforts to Advance Gender Pay Equity

International HR Decision Support Network™

Bloomberg BNA's resources will change the way you do business.

Global Efforts to Advance Gender Pay Equity

By Robert P. Lewis, Susan Eandi, and Monica Kurnatowska

  

Mr. Lewis has been a Partner at Baker McKenzie's New York Office and a member of the Firm's Global Employment and Compensation Practice Group since 2000. Mr. Lewis focuses his practice in the area of international and domestic employment law, counseling and defending foreign, domestic and multinational employers on a global basis in connection with the full range of workplace and employment law issues arising under U.S. and foreign law.

Ms. Eandi is a partner in Baker McKenzie's Palo Alto, California, office and is lead of Baker McKenzie's global employment and labor law sub-practice group for North America.

Ms. Kurnatowska is a Partner in Baker McKenzie's London office.

Two recent events in the U.S. vividly illustrate the growing centrality of gender pay equity issues. On one side of the ledger, in early April 2018, the U.S. Court of Appeals for the Ninth Circuit, in *Rizo v. Fresno County Office of Education*, held that an employee's prior salary—either alone or in a combination of factors—cannot be used to justify paying women less than men in comparable jobs. On the other side of the ledger, the U.S. Department of Labor's Office of Federal Contract Compliance Programs, on April 20, 2018, announced that it is upending standards implemented during President Obama's administration designed to promote gender pay equity among federal contractors. Under this new policy, employers will be able to decide for themselves how their employees should be categorized and analyzed for purposes of fair pay investigations by the government.

These two U.S. events are merely the latest examples of increased activity around the globe with regard to the issue of pay equity. That should come as no surprise. The World Economic Forum's most recent Global Gender Report, issued in November 2017, found that the average progress on closing the global gender gap stands at 68 percent—meaning an average gap of 32 percent remains to be closed worldwide across the four Index dimensions to achieve universal gender parity, compared with an average gap of 31.7 percent in 2016. Based on current trends, it will take exactly 100 years to close the overall global gender gap across the 106 countries covered since the inception of the report.

This is more than just an academic exercise for multinational employers. For Boards and C-suites, it is a highly visible issue that shareholders are demanding be addressed. For business leaders and sales departments, it is a topic on which customers are asking their vendors to take a public position. For marketing departments, it is an avenue to distinguish the company from its competitors. All of those constituencies are clamoring before legal requirements are broached and champions of corporate social responsibility even weigh in.

In addition, workers (particularly millennials and generation Z) have made it clear they want to work for employers that are purpose-driven, value diversity and inclusion, and pay fairly. In the U.S., more than two-thirds of employees are not likely to apply for a job at a company where they believe a pay gap exists between men and women doing similar work, according to Glassdoor data.

It is now well accepted that gender diversity has business benefits, and numerous studies find that improved gender diversity in corporate leadership can lead to better long-term financial performance. Notably, companies in the top quartile for gender diversity are 15 percent more likely to have financial returns above their respective national industry medians.

This paper describes how have governments have responded to the issues of gender pay and pay equity, and how companies can be positioned to best address changing legal landscapes.

Pay Equity vs Gender Pay Gap

As a threshold issue, it is important to understand two basic concepts. While equal pay legislation is aimed at eliminating discrimination between those undertaking comparable roles, the gender pay gap relates to the average pay of men and women across all roles. Put another way, pay equity or equal pay is generally about eliminating discrimination and bias (whether intentional or not), whereas the gender pay gap reveals the wider picture of the types and seniority of roles occupied by women compared to men. The gender pay gap is mostly about representation and may be caused by any number of interrelated issues (e.g., education choices, lack of career progression, inadequate mentorship and sponsorship opportunities, starting salaries, motherhood and care-taking roles, cultural norms, etc.). However, any lack of pay equity will also contribute to the gender pay gap, and in practice the two concepts are easily blurred.

Many countries, including the U.S., have long-standing laws that prohibit discrimination in pay. In the U.S., for example, the Equal Pay Act of 1963 ("EPA") and Title VII of the Civil Rights Act of 1964 prohibit employers from discriminating in pay and benefits based on sex. The EPA requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be “substantially equal.” The EPA places a significant burden on plaintiffs to show that they are paid less because of their sex, and the law allows employers several affirmative defenses (that the difference is based on seniority, that it's based on merit, that it "measures earnings by quantity or quality of production," or that it's based on "any other factor other than sex."). The latter argument was the one used by the employer in justifying using a female employee's salary history to pay her less than a male in the aforementioned *Rizo v. Fresno County Office of Education* case.

Those laws, however, have not eliminated the gender pay gap that is generally driven by a range of factors including education and career choices, lack of career progression (glass ceiling), lack of mentorship/sponsorship, starting salaries, responsibility for child care, career breaks and part-time roles, and cultural norms. In response, there has been an uptick in legislation specifically targeting both the gender pay gap and equal pay in and outside the U.S. Several city, county, and state governments have enacted stricter laws aimed at combating pay discrimination. The laws range from lowering the bar for equal pay lawsuits by fundamentally altering how equal pay claims are analyzed in court to anti-pay secrecy requirements to banning questions about salary history.

Pay Equity Laws Outside of U.S.

U.K.

There has also been an increase in legislative efforts specifically targeting the gender pay gap outside the U.S. Like the U.S., the U.K. has longstanding legislation prohibiting pay discrimination, but progress in terms of women's earnings remains slow. To address this, the U.K. enacted gender pay gap reporting obligations in 2017 under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. Generally, employers with over 250 employees working in, or sufficiently connected to Great Britain had until April 4, 2018, to publish their first set of gender pay gap data based on a "snapshot" of pay data as of April 5, 2017. The information is publicly available and employers are required to publish six different metrics, including the percentage differences in average hourly pay and bonuses between men and women and the proportion of women in each pay quartile. Not surprisingly, the published data show that most organizations have significant gender pay gaps.

Sweden

In January, 2017, Sweden implemented stricter regulations aimed at combating gender-related pay discrimination. Employers are required to conduct salary reviews every year to identify any pay equity/equality issues (this was previously required every three years), and create a written action plan for achieving equal pay. This will apply to all employers with ten or more employees. Employers are also required to have a policy and established routines for combating harassment, sexual harassment, and reprisals.

Germany

The German Bundestag passed the Act on Transparency of Pay in 2017, the purpose of which is to ensure pay equality between women and men. The Act expressly states that it aims to promote and enforce the equal pay principle, meaning that equal pay must be granted for equal or comparable work and that direct or indirect wage discrimination based on gender is prohibited. The Act requires companies with at least 500 employees to report on a regular basis the status of equal treatment and equal pay (if the company is required to provide management reports pursuant to the German Commercial Code). The law also grants certain individual rights to information (for employees working in establishments with at least 200 employees) and encourages internal audits.

Iceland

From January 2018, companies in Iceland are required to demonstrate that they pay male and female employees fairly — without gender discrimination. Failing to do so can result in daily fines. The law enforces equal pay standards. It does not rely on an employee to prove she was discriminated against. Instead, the burden is on companies to prove that their pay practices are fair. Ironically, Iceland has one of the best track records on gender equality, but still had a gender pay gap just over 16 percent as of last year. Iceland's new law applies to companies with 25 employees or more. Every three years, companies are required to confirm that they are paying men and women equally for jobs of equal value.

Peru

Finally, Peru enacted a new law that came into force on Dec. 28, 2017 - Law No. 30709—"Law prohibiting pay discrimination between men and women." It prohibits wage discrimination between men and women in equivalent or identical categories or functions. Companies are required to keep tables detailing employee categories and functions and companies that do not already have tables must prepare them within 180 days of Dec. 28, 2017. Employers are also required to formulate employee pay in a manner that does not discriminate based on gender. Peru's National Superintendency of Labor Inspection (SUNAFIL) and regional labor offices (Labor Authority) are responsible for supervising compliance with the new law. The law sets forth the following sanctions for noncompliance:

- Continued discrimination may be considered a "hostile act" and employees can take legal action against the company to end the discrimination;
- An employee can consider the hostile act to be an unjustified dismissal and institute legal action to be indemnified for dismissal; and
- The Labor Authority can undertake an investigation, and if the company is found to have committed a hostile act by providing disparate remuneration on the grounds of gender can impose a fine of between five and 1,000 UIT, or between approximately US$6,375 and US$1,275,000[1], depending on the number of employees affected.

[1] Peru uses the "tax unit" (UIT), a figure set annually by tax authorities, to determine applicable rates and deductions, amongst other uses. The UIT for 2018 are PEN 4,150.

Proposed Pay Equity Laws

France

In March 2018, French Prime Minister Edouard Philippe presented a plan under which employers in France will have three years to erase their pay discrimination or face possible fines. This plan is based on data indicating that men are, on average, paid nine percent more than women in France, notwithstanding that French law has required equal pay for the same work for 45 years. Under the plan, companies with more than 50 employees will be required to install special software connected directly to their payroll systems to monitor unjustified pay gaps. The goal is to roll out the software in companies with more than 250 employees next year and in 2020 for companies with 50 to 249 workers. If a company fails to erase a pay gap detected by the software over three years, labor inspectors could impose a fine of up to one percent of the firm's wage bill. Companies will also have to be more transparent about their gender pay gaps. They will be required to publish them on their websites and internally unions will have access to data by job role and seniority.

Ontario, Canada

Also in March 2018, Kevin Flynn, Ontario's Minister of Labour, introduced legislation entitled, Bill 203, Pay Transparency Act, 2018. If enacted, Bill 203 would introduce several measures intended to increase the “pay transparency” of Ontario workplaces, including:

- requiring all publicly advertised job postings to include an expected salary rate or range;
- barring employers from asking about a job applicant’s compensation history;
- prohibiting reprisal against employees who disclose or make inquiries about compensation;
- requiring large employers (initially, those with more than 500 employees) to track and report compensation gaps based on gender and other prescribed diversity characteristics and to disclose the information to the province;
- allowing for compliance officers to conduct workplace audits; and
- imposing financial penalties on employers who contravene the Pay Equity Act.

Austria

In Austria, employers with more than 150 employees are required to prepare a report showing gender pay differences. The report has to be produced every two years and must contain the following information: number of male and female employees and their positions in salary schemes according to collective bargaining agreements or internal salary schemes and their seniority (“Verwendungsgruppe” and “Verwendungsgruppenjahre”) and average male vs. female salary; and total remuneration including benefits, payments in kind, special payments (Christmas and vacation pay) and other forms of payment. The report must be provided to the works council. If there is no works council, the employees must be made aware of the report. The information must be provided on an anonymous basis.

Belgium

In Belgium, employers with at least 50 are required to draft an analysis report on the salary structures of employees every two years. The report has to be communicated and discussed with the works council, or in absence of a works council, with the trade union delegation. Once the analytical report has been drafted and communicated to the works council, it is up to the works council to decide whether or not it is appropriate to draft an action plan for ensuring a remuneration structure independent of gender.

Denmark and Finland

In Denmark, employers with at least 35 employees and at least 10 employees of each gender with the same work function are required to send in information regarding pay to Statistics Denmark, who then provides employers with gender segregated pay statistics. By agreement with employees/employee representatives, employers can choose to make a statement on equal pay instead of the equal pay statistics. The statement must contain:

- a description of factors that have an influence on the remuneration of men and women at the company;
- a plan for how the company intends to prevent or reduce the pay gap between men and women; and
- a follow-up procedure.

Employees are entitled to receive information regarding the pay statistics and/or statement under the general rules on employee information and consultation.

In Finland, companies with at least 30 employees must prepare an equality action plan every other year.

Australia

In Australia, employers with more than 100 employees must report to the Workplace Gender Equality Agency and reports are available for public use. Unlike the new U.K. law, in Australia the government publishes aggregated pay gap data from which individual companies cannot be identified. Other APAC countries have been slower to address this issue, but some are now gradually implementing paid maternity and paternity laws, which experience around the world suggests have been historic precursors to new gender pay laws.

Steps for Managing Multinational Pay Equity Laws

With all of these different obligations, there are major challenges for multinationals. There are three important steps for multinational employers to manage the many different gender pay and pay equity laws around the world:

- **Step 1:** The first step is to understand any reporting requirements in relation to gender pay and pay equity in countries where the company has employees. Key questions to consider are:
    - Who does the law cover? Which companies? Which employees and workers?
    - How is ''pay'' defined? Does it include bonus and equity compensation?
    - How should the comparisons be conducted?
    - What must be reported and what can be said to explain pay differences?
- **Step 2:** The second step is a review of the processes for recruitment, promotion, and pay determination to eliminate any bias. In relation to pay, employers may decide to conduct an internal confidential audit, which can help prevent a company from being blindsided by identifying key areas of risk and potential pay disparities (and taking steps to correct them). Key considerations are:
    - An audit conducted with the assistance of outside counsel is typically best practice because it has the protection of the attorney-client privilege (where applicable).
    - Multinational employers also need to decide whether to target specific higher risk countries, or whether the focus could, or should, be a global one.
    - Consideration of broader issues including data protection requirements and whether collecting data for diversity monitoring purposes is culturally accepted.
- **Step 3:** The third step is to build an action plan that will address any pay equity issues, as well as the broader issues of gender representation across all levels of the organization. Counsel can advise not only on the content of the plan and policy changes, but also on training and on communication and internal and external stakeholder management.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of Baker McKenzie, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

About Baker McKenzie

Baker McKenzie helps clients overcome the challenges of competing in the global economy. We solve complex legal problems across borders and practice areas. Our unique culture, developed over 65 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients. (www.bakermckenzie.com)

Baker McKenzie's Global Employment & Compensation group is one of the world's largest and most recognized employment practices, with more than 700 lawyers globally and more than 130 attorneys in North America focused on employment law. A recent BTI Consulting survey of corporate counsel named Baker McKenzie a "standout" law firm for complex employment litigation. In addition, Chambers Global has recognized the Firm's employment practice with a Band 1 ranking for eight consecutive years.

Bloomberg Law®

International Human Resources Decision Support Network

Your compass to navigate your global HR needs.

Get the right answers to pressing international employment law questions and stay compliant.

Whether it's through your 12 custom research questions, searching the **Country Primers** and **International HR Guide**, reviewing our worldwide data on housing costs, comparing your organization's salary and benefits with our developing country salary data, or reviewing our collection of strategic white papers, *Bloomberg Law®* is your source for answers in every area of HR administration.

Train and advise with best-practice insights from around the globe.

Our services are designed to give you and your staff the support you need. Use our webinar and OnDemand programs for training and earn HRCI and SHRM credits, research best practices in international HR and global mobility, and see what your peers are asking as part of custom research.

Stay current with the latest global HR developments that affect your organization.

Get regular email updates on legislative developments, court decisions, and industry trends in the countries where your business operates. Easily access topic-specific legal and regulatory content for each of the countries you operate in with our **Chart Builder** and compare legal requirements across countries.

To learn more about our solutions for human resources professionals, please contact us at 800.372.1033 or visit www.bna.com/internationalhrdsn

 1217–JO24779