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Mind the (Gender Pay) Gap—At Home and Abroad

Pay Equity

For many HR professionals and in-house counsel, the topic of gender pay equality is being escalated from various sectors of organizations on an increasingly regular basis, attorneys with Baker McKenzie say in this *Bloomberg Law* Insights article. For the Board and C-suite, 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. Gender pay equality can be a challenging topic for organizations, but HR professionals and in-house legal can add real value by understanding the legal landscape, trends and getting ahead of the narrative, the Baker McKenzie attorneys say.

SUSAN EANDI, EMILY HARBISON, LOUISE BALSAN AND CAROLINE BURNETT

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All of those constituencies are clamoring before legal requirements are broached and champions of corporate social responsibility even weigh in. What is driving this

Susan Eandi is a Partner in Baker McKenzie's Palo Alto office, Emily Harbison is a Partner in the Houston office, Louise Balsan is an Associate in the Palo Alto office and Caroline Burnett is a Senior Professional Support Lawyer in the San Francisco office. They are all members of the Employment & Compensation practice, providing advice on a wide range of domestic and international employment-related matters.

heightened focus on gender pay equality? It's a confluence of several factors:

- Gender pay increasingly dominates news headlines on a regular, if not daily, basis. At the 2017 World Economic Forum in Davos, political and business leaders focused on strategies for enabling women and girls in the world economy.

- The U.S. and the U.K. are examples of countries that *already* have gender pay reporting regulations on the books, and just this month, German Parliament passed the "Act on Transparency of Pay," which is expected to come into force in July 2017. Plus, many more jurisdictions (e.g. Iceland and New Zealand) have proposed legislation directed at equalizing pay between male and female employees.

- 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.

■ Pay equity has been shown as a key driver of greater gender diversity in corporate leadership, 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.

So, given that, what do HR departments and in-house legal need to focus on with regard to gender pay equity and why? What are the global trends? And, how can companies be positioned to best address changing legal landscapes? The U.S. legal landscape is a good place to start to answer these questions.

Gender Pay in the U.S. and Mounting Pressure to Disclose Pay Equity

As a threshold issue, it is important to understand what gender pay equality is not. It is not the same as equal pay. While equal pay legislation is aimed at achieving an absence of reportable gaps based on any discriminatory characteristics, gender pay equality is specifically focused on identifying and addressing a discriminatory pay gap between men and women. The distinction is subtle but helpful to understand why gender pay and equal pay are, in some respects, terms of art and not used interchangeably.

There are two federal laws in the U.S. (the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964) that forbid 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 Paycheck Fairness Act is legislation that would add procedural protections to the EPA. Among other things, the legislation would shift the burden to employers to demonstrate that wage differentials are based on factors other than sex and would ban retaliation against workers who inquire about their employers’ wage practices or disclose their own wages. The bill (H.R.1869) has been reintroduced in Congress multiple times, most recently last month.

Uptick in Scrutiny of Federal Contractors

The U.S. Department of Labor has noticeably ramped up efforts in recent months to crack down on systemic discriminatory compensation disparities on the basis of gender, pursuing numerous investigations with requests for documents for compensation data.

Specifically, the DOL appears to be scrutinizing federal contractors and has gone so far as filing lawsuits against several high profile companies since the beginning of 2017. In one such lawsuit, the DOL asked the court to cancel the federal contractor’s contracts unless the company provides certain information, including private employee contact information.

Outside of the courts, in an effort to promote equal pay for equal work, the DOL’s Office of Federal Contract Compliance Programs (OFCCP) now requires federal contractors to post a Pay Transparency Nondiscrimination Provision and include it in employee handbooks. The Provision states that the employer will not discriminate against employees or applicants for inquiring about, discussing, or disclosing their pay or the pay of their co-workers (with limited exceptions).

Beyond Contractors—Employers With 100 or More Employees Will Be Required to Report Pay Data by Gender

The Equal Employment Opportunity Commission (EEOC) recently revised its Employer Information Report (EEO-1 Form) for federal contractors and employers with 100 or more employees. The new form will require covered employers to report pay data, in addition to the information already required regarding the gender, race, and ethnicity of employees by job category. The EEOC states that the form will “assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces.” The 2017 reports, which are the first reports under the new rules, are due by March 31, 2018. (However, it is possible that the Trump administration will reverse course here as the new EEOC Acting Chair, Victoria Lipnic, previously voted against the revised EEO-1 Form and recently reiterated her opinion that the purported benefits of collecting the pay data do not outweigh the costs of doing so.)

Growing Patchwork of Equal Pay Laws in the U.S.

Perhaps in recognition of an area that is in need of improvement, a number of city, county, and state governments have taken it upon themselves to pass stricter laws aimed at combating gender 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. For example:

■ Massachusetts has one of the most expansive equal pay laws in the country. The law not only prevents employers from firing employees for discussing their compensation with coworkers, it also prohibits employers from asking applicants about their salary history to prevent individuals from being continually underpaid. The law also provides incentives for companies to conduct salary reviews to detect any disparities.

■ The California Fair Pay Act promotes pay transparency (as employers may not prohibit employees from disclosing or discussing their own wages or the wages of others), expands the comparison standard from employees performing “equal work” to “substantially similar work,” and increases coverage of the law to require comparing employees across the entire state, rather than at an employer’s single work location. Employers will be required to justify pay differentials and the new rules limit the factors that employers can use in their defense. In addition, there are two pending bills

in California, [AB 168](#) and [AB 1209](#), that would prohibit employers from seeking prior salary information from applicants and impose reporting obligations on employers with more than 250 employees.

- [Maryland's Equal Pay for Equal Work Act](#) is significant in that it reaches beyond just pay. In addition to promoting pay transparency, the new law prohibits employers from “providing less favorable employment opportunities” based on sex or gender identity (e.g. “mommy tracking”), and prohibits unequal pay for work of “comparable character.”

- The [New York Achieve Pay Equity Act](#) increases coverage to require comparing employees across the same “geographic region,” rather than at an employer’s single work location, promotes pay transparency, and increases damages that may be awarded.

- On April 5, 2017, New York City passed [legislation](#) barring employers from asking applicants about salary history.

- In 2016, [San Francisco](#) became the first jurisdiction in the nation to require its contractors to file pay equity reports that provide data on employee compensation, race, and gender.

Laws banning questions about an applicant’s salary history are intended to prevent the perpetuation of wage discrimination and to level the planning field. New York City, Philadelphia and Massachusetts have recently gone this route. Bucking the trend, however, a [panel decision from the Ninth Circuit](#) in April this year ruled that it may be legal to pay women less than men based on past salaries under the federal Equal Pay Act and remanded a lower court’s summary adjudication ruling for further consideration. The case may make its way to the U.S. Supreme Court as there is a circuit split on this issue—the Tenth, Fifth and Eleventh circuits have ruled that the EPA bars employers from using salary history as the sole justification for a pay disparity. It’s worth noting that plaintiff’s claim arose before amendments to California’s Fair Pay Act, therefore she did not sue under it. The result would likely be different if filed today under California state law since amended Cal. Labor Code Section 1197.5 states that “prior salary shall not, by itself justify any disparity in compensation.”

While some speculate that there won’t be any additional efforts to end pay disparity from the White House, an obligation to narrow the pay gap will not likely disappear for employers. Cities and states likely will continue to pass piecemeal legislation increasing pay data transparency and making it easier for individuals to file equal pay claims.

Gender Pay on the Global Stage—Multinational Employers Take Note

Intensifying scrutiny on equal pay and gender pay disparity is not unique to the U.S. Nearly every country has legal obligations to ensure equal pay that are embedded in anti-discrimination concepts. Taking this a step further, global organizations like the [UN](#), [World Economic Forum](#), [International Monetary Fund](#), and the [Organization for Economic Co-operation and Development](#)

have made closing the gender pay gap and increasing female labor force participation a top priority.

Along with these movements, there has been an uptick in legislation specifically targeting gender pay outside the U.S. For example, the [U.K.](#) is by far ahead of the curve here with gender pay gap reporting obligations that came into force this year. Broadly speaking, employers with over 250 employees working in, or sufficiently connected to Great Britain have until April 4, 2018, to publish their first set of data, but it must be based on a “snapshot” of pay data as of April 5, 2017. The information will be publicly available and employers must publish six different metrics, including the percentage differences in hourly pay and bonuses between men and women and the proportion of women in each pay quartile. Accordingly, this new law will impact any global business with sufficient headcount in Great Britain.

In January, [Sweden](#) implemented stricter regulations aimed at combating gender discrimination. Employers must conduct salary reviews every year in order to identify gender pay gaps (previously required every three years). The requirement to create a written action plan for achieving equal pay will apply to all employers with 10 or more employees. Employers are also required to have a policy and established routines for combating harassment, sexual harassment, and reprisals.

Further, [Germany's](#) new law, effective later this year, [Act on Transparency of Pay](#), requires companies with at least 500 employees to report on a regular basis about the status of equal treatment and equal pay (if the company is required to provide management reports pursuant to the German Commercial Code). It also grants certain individual rights to information (for employees working in establishments with at least 200 employees) and encourages internal audits.

Finally, gender pay laws may be on the horizon soon in APAC countries that are gradually implementing paid maternity and paternity laws, which have been historic precursors to gender pay laws.

Despite the varying legal requirements, there is a natural tendency to try to implement a “one-size-fits-all” approach when it comes to analyzing gender pay data. Before rushing to undertake studies and publish numbers, employers must understand what is meant by pay gaps in each country.

For example, while some countries may look at the gap between men and women in similar roles, others may look across the company at all roles. This means that a company may publish 0.1 percent numbers in one country but may need to report 20 percent in another, which can create communication challenges and make it difficult for multinational employers to publish global numbers. Thus, multinationals will need to consider not just the message in any narrative they publish alongside their data, but whether this is, or needs to be, consistent with what they are saying elsewhere.

Recommendations—3 Important Steps for U.S. and Multinational Employers

1. **Understand Applicable Laws and Nuances.** The first step is to understand applicable law where the company has employees and its obligations in each jurisdiction. Key questions to consider:

- Who does the law cover? Does it even apply to the company?

- Does the law apply to just base pay? How is “pay” defined?
- Who is compared under these laws?
- What are the permitted justifications to explain pay differences?

2. Conduct an Internal Audit Taking into Account U.S. and Outside the U.S. Requirements. The second step is to determine whether and how to conduct an internal confidential audit, which can help prevent a company from being blindsided by identifying potential pay disparities (and taking steps to correct them) before a plaintiff’s attorney or government agency discovers them. Key considerations are:

- An audit conducted with the assistance of outside counsel is the best practice because it has the protection of the attorney-client privilege (where applicable).
- Multinational employers also need to decide whether any action plan could, or should, be a global one. For example, collecting data for diversity monitoring purposes is still an emerging concept and its introduction can even raise suspicions of discrimina-

tion. There may also be questions about whether steps to promote female employees will fall foul of prohibitions against positive discrimination in certain jurisdictions.

- Planning ahead to develop a big picture approach taking into consideration local laws and data privacy considerations is important.

3. Build a Narrative and Close the Gap.

- Counsel can advise on drafting a narrative to accompany the data, which defines company strategy in relation to timing the publication of data and broader stakeholder management. Counsel can also advise on potential action plans and policies that can be taken to target any gender pay gap.

- Any narrative should be in sync with training materials for HR, managers and supervisors, as well as employment policies, recruiting and retention efforts globally.

Gender pay equality can be a challenging topic for organizations, but HR professionals and in-house legal can add real value by understanding the legal landscape and trends, and getting ahead of the narrative.