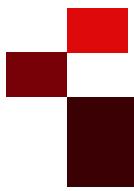


**Baker
McKenzie.**

International Horizon Scanner 2018

What's on the
horizon in 2018 for
US multinational
employers?



IN 2018, WE FORECAST THE FOLLOWING MAJOR TRENDS ACROSS THE GLOBE:

Multiplying statutory obligations aimed at closing the gender pay gap

A push to become data-privacy compliant before GDPR is effective May 25, 2018

Growing paid leave benefits for families

A renewed focus to protect company assets globally

Consistent deal growth with a particular bent towards "insourcing" arrangements

GENDER PAY

One of the hottest areas of employment law this year concerned the **global gender pay gap** and we expect the intensity of the focus on this issue to increase substantially in 2018. According to the [2017 report](#) from the World Economic Forum, the average progress on closing the gap stands at a depressing 68%.

In response, governments and labor authorities around the world, global NGOs, US shareholders and workers are demanding transparency and accountability when it comes to gender pay. One of the most significant difficulties facing multinationals today is complying with the patchwork of varying legal obligations. Even with the best of intentions, compliance is difficult.

Legal requirements vary greatly by jurisdiction. From requiring companies to externally publish the percentage difference in mean and median hourly pay between men and women across the company (e.g., the UK), to revealing salaries of comparable employees on request (e.g., Germany), to banning questions about previous salary history (e.g., California), the diversity in the methodologies for closing the gap is significant. As such, developing a global gender pay strategy requires a coordinated and comprehensive plan of attack involving multiple stakeholders (recruiting, HR, legal, the C-Suite, communications, etc.) best directed through a single point of legal counsel with a wide geographic footprint.



Source: Global Gender Gap Report 2017, World Economic Forum



GENDER PAY GAP

Regional Outlook and Key Updates



AMERICAS

US - In August 2017, the [US federal government "stayed"](#) the gender pay reporting requirements through a revised EEO-1 Form for the time being.

Individual states however are coming forward with their own measures aimed at combating the pay gap. [California](#), [Delaware](#), [Oregon](#), and [Massachusetts](#) have all prohibited employers from seeking salary history information about applicants for employment in an effort to prevent unequal pay from following women from job to job.



EMEA

UK - In 2018, [covered UK employers will have to report pay](#) data for the first time. Employers must upload their data to a government website that can be searched by the public. While there are no civil or criminal penalties for employers who fail to publish their reports, we expect the court of public opinion will weigh in. Employers are able to publish a narrative alongside the data on their website, for example to explain the causes of their gender pay gap and what they are doing about it. We expect this to be an important opportunity to tell the company's story in the most favorable light.

Iceland - New legislation requires that employers with over 25 employees certify every 3 years that they are paying their employees equally for equal work regardless of gender, ethnicity, sexuality, or nationality.

Germany - The new "[Transparency of Pay Act](#)" provides information rights for employees relevant to pay structures and implements specific review and reporting procedures pursuant to the German Commercial Code.

Ireland - New proposed draft legislation requiring gender pay reporting is pending.



Sweden - Employers must conduct salary reviews every year in order to identify gender pay gaps. All employers with 10 or more employees must create written action plans for achieving equal pay. A bill to compel employers with at least 25 employees to publicize the results of their audit is [pending](#).

APAC

As a region, APAC has been slow to address the gender pay gap. There are currently no reporting regulations in [China](#), [Singapore](#), [Hong Kong](#), the [Philippines](#) or in [India](#). However, [Australia](#) is a world leader in this area.

Australia - Since 2012, all non-public sector employers with over 100 employees must report on workplace gender equality, including remuneration between men and women, and the gender composition of the workforce and the governing bodies. The report is submitted to the Workplace Gender Equality Agency and is available for public use.

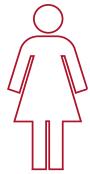


LATAM

Similar to APAC, LATAM has been slower than EMEA and the Americas to focus on the gender pay gap. Currently, there are no reporting obligations except in [Colombia](#) where employers must maintain an internal report that includes remuneration by gender. However, changes are on the horizon.

Brazil and Mexico - Our colleagues report that the gender pay gap is a "hot topic" in these countries. Legislation may be on the horizon in 2018.

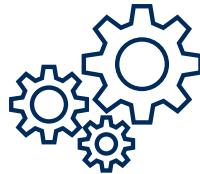
Peru - On December 27, 2017, Congress passed an Equal Pay Act. The aim of the new act is to prevent salary discrimination as well as to guarantee the right of employees to perceive the same salary for equivalent services, not only for identical ones. This new law creates a variety of new obligations for all employers.



GENDER PAY GAP

Recommended Actions

- 1 Understand applicable laws and nuances. Compare company footprint with the obligations in each jurisdiction.
- 2 Determine whether and how to conduct an internal confidential audit as a dry run to know where the company stands. This can help prevent against being blindsided by identifying potential pay disparities (and gives the opportunity to take remedial steps) before a plaintiff's attorney or government agency discovers them.
- 3 Consider that an audit conducted with the assistance of outside counsel is the best practice because it has the protection of the attorney-client privilege.
- 4 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 discrimination. And, there may also be questions about whether steps to promote female employees will fall foul of prohibitions against positive discrimination in certain jurisdictions.
- 5 Craft internal company communications accompanying the project. 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. Any narrative should be in sync with training materials for HR, managers and supervisors, as well as employment policies, recruiting and retention efforts globally.



DATA PRIVACY

What's Changing?

There are only **5** months left to get General Data Protection Regulation ("GDPR") compliant.

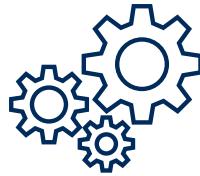
GDPR goes into effect on May 25, 2018. Some of the GDPR's key requirements relevant for HR data include:

■ **Accountability**, which necessitates implementation of measures such as:

- Inventorying and maintaining a comprehensive record of all local and group HR data processing activities;
- Implementing a privacy program which includes sufficient training for HR data handlers at all levels on all new protocols (relevant employees should be trained in data intake and governance, security measures and breach management, data subject access requests, DPIAs, etc.);
- Conducting a data privacy impact assessment ("DPIA") if HR data processing activities may result in "high risk to individual rights and freedoms." For example, a DPIA should be conducted with respect to whistleblower hotlines which are likely to process sensitive personal data (e.g., on criminal offenses), and systematic IT monitoring (which is subject to extensive legal limitations, some of which are country-specific).

■ **Transparency**. Employees (and others, such as candidates and contractors) must be provided with **specific** information on the use of their personal data. A privacy notice must specify, among other things: (1) contact details of the employer/Data Protection Officer ("DPO") or privacy contact (if no DPO); (2) purposes and legal bases for the data processing; (3) categories of recipients; (4) description of non EU transfers and safeguard mechanisms used; (5) retention periods; (6) data subject rights such as the right to complain to the DPA; (7) whether provision of data is required or optional and the consequences of failure to provide it; and (8) whether automated decision making will take place.

■ **Consequences**. Serious data privacy violations / breaches may carry fines of up to the higher of EUR 20 million or 4% of the company's worldwide turnover. Noncompliance may also result in inability to use certain employee data as intended (e.g., for investigatory or discipline purposes).



DATA PRIVACY

Recommended Actions

1

Determine where European HR data is processed locally in Europe and transferred elsewhere, and identify whether there is a legal justification for each type of processing (e.g., under contract, law, legitimate interests, etc.). **Generally, consent should not be used as a justification for processing European data for HR purposes.**



2

Develop and implement data processing (from intake to recordkeeping) protocols.



3

Determine which vendors and third parties with access to HR data require new, GDPR compliant contractual terms and implement same.



4

Create or update candidate, employee, and contractor data privacy notices to meet robust new information requirements. For employees, such notices include: **(a)** employee data protection notice; **(b)** IT monitoring / security/acceptable use policy; and **(c)** whistleblower hotline notice, among other notices and policies impacting individual privacy (for instance, BYOD policies, data security breach policies).



5

Implement the new data privacy notices (e.g., via employee distribution and acknowledgement, incorporation into work rules / internal regulations, and works council / employee representative consultation).



6

Update employment contracts to remove "consent" to privacy practices language.



7

Review data privacy consent in equity agreements, decide whether consent will continue to be relied upon, and, if so, align consent language with GDPR.



8

Provide training to relevant personnel on all new processes and protocols (including data security and data breach protocols, DPIAs, consent issues, record retention, etc.).





GROWING PAID LEAVE BENEFITS FOR FAMILIES

What's Changing?

Many countries outside the US already have statutory paid parental leave frameworks that are more generous than the US. And, many multinational employers are even going beyond the statutory requirements and upping their existing partner leave to exceed their obligations.

This year, certain jurisdictions have taken parental leave entitlements to the next level and made changes designed to increase incentives for more women to work or to remain in the workforce, as well as to address an aging workforce. In particular, paid parental leave has expanded in scope with the introduction of paternity leave laws in some traditionally patriarchal societies, as well as legislation to extend parental leave laws to working grandparents.

As a result, employers are face challenges navigating statutory parental leave law requirements that offer varying entitlements based on differing circumstances. Further, employers also need to balance the drive to remain competitive in certain industries in a way that makes sense globally and complies locally.

Maternity, paternity and parental leave—or any other type of additional shared leave—are closely associated with women's economic participation in many parts of the world, and are thus an important element of policies aimed at more efficient use of the country's human capital pool. Parental benefits enabling mothers, fathers or both to take paid or unpaid time off to care for a child following birth can increase women's participation in the workforce and foster a more equitable division of childrearing.

Source: Global Gender Gap Report 2016, World Economic Forum



GROWING PAID LEAVE BENEFITS FOR FAMILIES

Key Updates



■ Increasing parental / paternity leave, and related benefits

- In **Singapore**, as of January 1, 2017, in line with the government's objective to promote a family friendly workplace and boost Singapore's birth rate, employees who have been employed for at least 3 months are now entitled to 2 weeks' Government-Paid Paternity Leave ("GPPL") and may be entitled to an additional 4 weeks' of shared parental leave if their spouse qualifies for maternity leave under the Child Development Co-savings Act. GPPL is paid by the employer but is fully reimbursable by the government up to S\$2,500 per week. Additionally, for children born on or after July 1, 2017, employees are entitled to take up to 4 weeks of shared parental leave, capped at S\$2,500 per week.
- A new law in **Spain** increased paternity leave from 13 calendar days to 4 weeks. Leave is provided at 100% of covered pay, provided by social security. Leave can be taken either full- or part-time, at a minimum rate of 50% of regular working time.
- In **South Africa**, on November 28, 2017, Parliament passed a bill providing unpaid paternity leave (at least 10 days), adoption leave and surrogacy leave for all employees who do not qualify for maternity leave. The bill also provides for an increase in maternity leave benefits and now provides for payment of parental benefits and surrogate parental benefits from the Unemployment Insurance Fund. Last, the bill is of great significance in terms of recognizing the rights of the LGBT community as it is gender neutral.
- Earlier this year, the **European Commission** announced that it wants to introduce paternity leave of at least 10 paid days. Stay tuned.

■ Increasing maternity leave and related benefits

- As of July 2017, every 6 months, **Colombian** employers will need to facilitate, promote and offer 1 day employees can share with their families. That said, employers can offer this day off any day of the week, even on the employee's mandatory rest day. If the employer does not offer this day off within the 6 month period, the employee can request a paid day off during the work week to spend time with their family and attend to family duties. Also in **Colombia**, maternity leave has been increased to 18 weeks. With these changes, the government aims to encourage the proper attention and appropriate early childhood care.
- In **India**, as of earlier this year, establishments with 50 or more employees must provide childcare facilities within a certain distance from the workplace. Female employees may visit their children at the facilities up to 4 times per day, inclusive of rest time. Further guidance on the exact requirements this places on employers is expected in 2018.

■ Leave for working grandparents

- **Germany** and the **UK** have introduced paid leave legislation for working grandparents. Under the UK proposal, shared parental leave would extend to working grandparents, and families would also be allowed to split statutory shared parental pay.
- **New Zealand** has a generous 26-week paid parental leave policy that can apply to eligible grandparents with full-time care (though there is no separate leave benefit for working grandparents).



GROWING PAID LEAVE BENEFITS FOR FAMILIES

Recommended Actions

Understand your obligations

Employers will want to take into account, among others, the following key considerations:

1

- Whether the parental leave is paid or unpaid and what are the eligibility criteria.
- If the parental leave is paid, what portion of the leave, if any, is covered by the employer and the local authorities / social security institutions.
- If the local authorities / social security institutions cover some but not all of an employee's salary during the leave, whether the local employer wishes to "top up" salaries to make the employee "whole" during the leave period. And whether, such "top up" needs to include commissions, bonuses, etc.
- Whether the employee benefits from job protection during his/her leave. If so, how long must the position be held for the employee on leave? Can the employer benefit from a government stipend to hire a temp during the leave?



2

Update policies and handbooks

Once an employer understands the parental leave law and requirements in jurisdictions where it has employees, it should ensure its policies, employee handbooks, employment agreements, and other employment-related documentation are in line with the new developments.



3

Roll out appropriate training

The rubber meets the road once HR and management are adequately trained and "up to date" on these new requirements and any updates to policies. At the end of the day, these teams will be the "first responders" to these new developments and need to be cautious while communicating with employees about leave entitlements.

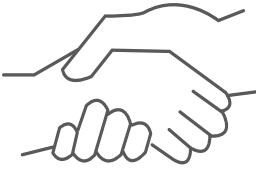


4

Hiring Practices

Companies should be mindful in their overall hiring practices not to discriminate against groups of individuals who may be most likely to benefit from new paid parental leave entitlements. The HR team should be reminded of the "dos and don'ts" of the interview process (for example, a simple question about a candidate's family could be viewed as discriminatory!).





RENEWED FOCUS TO PROTECT COMPANY ASSETS GLOBALLY

What's Changing?

There are 2 key tools in your arsenal to protect company assets: (1) Restrictive Covenants and (2) Proprietary Information and Inventions Agreements (PIIAs) (in addition to related policies and practices relating to protecting the company's confidential information, intellectual property and trade secrets).

The laws relating to post-termination restrictions differ significantly around the world. The increasing trend for key employees is to have international responsibilities and be globally mobile—for post-termination restrictions to apply across many different jurisdictions compounds the challenge. And as the war for talent increases, employers, especially in service-based and information industries, understandably wish to protect themselves against the risk that their employee talent will, after building valuable relationships with customers and having access to the employer's confidential information and intellectual property, go to work for a competitor. Working with counsel and putting in the time upfront to develop an effective strategy to protect these precious resources from walking out the door is well worth the investment.

Other than people, the most valuable assets in many companies are the trade secrets they possess. A trade secret can be any information that is of value to the business whether technical, such as a certain process, or commercial, such as client lists and business strategies. There are now new opportunities to protect trade secrets in Europe with the adoption of the **EU Trade Secrets Directive**. Prior to the Directive, the patchwork of different regimes across Europe made it difficult for companies to protect their trade secrets in an effective way.

The Directive is meant to standardize national laws in EU countries against the unlawful acquisition, disclosure, and use of trade secrets. EU countries have to pass laws to comply with the directives by June 2018. The Directive defines misappropriation, and clarifies that reverse engineering and parallel innovation are permitted. It also provides for injunctive relief, the removal of goods which violate trade secrets for the market, and provides compensation for damages for unlawful use or disclosure.



RENEWED FOCUS TO PROTECT COMPANY ASSETS GLOBALLY

Recommended Actions

With restrictive covenants

1

- In our experience, lots of non-compete covenants are broadly drafted and include catchall phrases like "concerned or interested in" and often do not include an express carve-out for shareholdings. As such, following the July 2017 UK court decision of *Tillman v Egon Zehnder Limited*, we suggest a quick review of your non-compete covenants in the UK (and other Commonwealth jurisdictions such as Hong Kong, Singapore and Canada) to determine if they are at risk of being deemed invalid. Seeking to enforce an invalid restriction could have costly consequences. Accordingly, take this step now to mitigate the risk of voiding a restriction, even with existing employees.
- By way of reminder, when preparing post-termination non-competes, don't forget to go through your checklist:
 - Is the contracting entity the local entity or parent company? What will provide for optimal results in the particular situation?
 - Is consideration required? If so, what is sufficient? Have we considered any timing requirements?
 - Are we using the appropriate form? (in the employment agreement? in a PIA agreement? or in a standalone agreement?)
 - Have we considered the choice of law provision?
 - Have we reviewed for a narrowly tailored scope tied to legitimate business interests (time, geography, activity)?
 - Do we understand the blue pencil rules in the particular jurisdiction?



2

To protect trade secrets

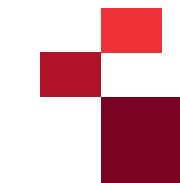
- Identify and maintain a register of trade secrets, where such secrets are defined with sufficient particularity.
- Verify (the paper trail of) ownership of those trade secrets.
- Regulate, control, monitor and log any physical and logical access to the trade secrets and the areas where they are stored.
- Review applicable technical and security arrangements and the company's ability to evidence them.
- Audit, update and refine the company's trade secret protocol where these are inadequate.
- Make sure that appropriate legal arrangements are made for all persons and parties that information is or might be shared with, from staff, contractors, freelancers and affiliates to suppliers, business partners and licensees.
- Track legislation relating to trade secrets in the EU countries in which you do business.





TRANSACTION FORECAST

What's Changing?



With consistent deal growth expected to continue into 2018, US multinationals contemplating transactions should plan ahead with respect to employment and HR issues.

Deal volume in 2017 is up 12% from 2016. Notably, US multinationals have swapped high value deals for more modestly valued deals, valued at \$500 million to \$2 billion. Megadeals, those valuing at least \$5 billion, have not experienced the upward trajectory initially predicted, with only thirteen such deals thus far.

This year also saw similar industries driving the M&A market. Technology related deals continue to predominate, followed closely by consumer goods. Together these industries encompass roughly one-third of aggregate activity, while industrial products and financial services comprise approximately one-fourth of deal activity.

Finally, 2017 has seen major transactions of all types. Divestures are up 9% from the comparable period in 2016, with practically no change in value, IPO activity has nearly doubled, and capital markets have enjoyed healthy activity, maintaining slow but steady growth. Only private equity-driven deal activity declined this year, suffering a 14% drop in value.

Outsourcing has been a consistent trend of the Fortune 500 for a while now, we're seeing a noticeable uptick in "**insourcing projects**." In traditional outsourcing arrangements, multinationals engage a third-party service provider to supply a particular business service such as finance, accounting, payroll or procurement. **Insourcing** is the provision of those services by an in-house team.

Lately, we see large multinationals bringing some of these activities back in-house and consolidating the services in a few (or just one) primary jurisdiction(s). The benefits of insourcing include avoiding the cost of third-party margins and increasing accountability and opportunities for greater control.



TRANSACTION FORECAST

Recommended Actions

While there are few “new” employment laws to consider in the transactions context, employers should keep the following evergreen issues at top of mind:

Plan (far) ahead when it comes to consultation

1 In many countries, especially in EMEA, works councils, unions, and employee representative bodies must be notified and/or consulted with prior to a change in corporate structure. Failing to abide by relevant consultation obligations could delay the closing date, frustrate your workforce, and even lead to fines from local government authorities.



Consider the risk of using transitional service agreements (TSAs) or outsourcing

2 Upon the sale or divestiture of a business, parties will frequently consider entering into TSAs so that the seller can provide temporary support services to the buyer following the closing date. In some jurisdictions, however, using a TSA could violate employee leasing or outsourcing laws, or even trigger unwanted “deemed integration” if the buyer and seller are sharing personnel, resources, or workspaces.



Outsourcing may be more cost-efficient than a TSA in certain cases, however, it raises a host of complicated employment-related issues for companies—and may be unlawful or highly restricted in certain jurisdictions (e.g., **Brazil, Venezuela**).

2

Weigh the cost / benefit of insourcing versus outsourcing

3 In determining whether to outsource or insource, consider the following questions: (1) is this a core function of your business or is it peripheral; (2) is your business need based around increased control; (3) what is the outsourcing risk landscape in the jurisdictions you operate; (4) what are the risks involved if a third-party entity hires your current employees; and (5) have you evaluated the cost of transferring employees?



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