Gender Pay Gap Series
Assessing the global picture
Supporting gender pay and equity compliance

How we can help
What is the gender pay gap; what is pay equity?
The gender pay gap relates to the average difference in pay between men and women. Pay equity or equal pay relates to the question of whether men and women are paid equally for equal work. Many organizations have a gender pay gap; this is typically influenced by a variety of issues, but particularly the lack of women at senior levels of the organization. That in itself may be driven by a range of reasons, including lack of career progression, and occupational and career choices. It does not necessarily indicate that there is discrimination either in relation to pay or progression, but in some organizations, that may be a factor.

Why does it matter?
Narrowing the gender pay gap is not just about addressing inequality. Evidence shows that diverse organizations outperform their peers. It is also important from a talent perspective, as candidates may view it as an indicator of whether the employer has an inclusive culture that will provide a level playing field in terms of opportunity. The topic attracts significant investor interest, and regulation is also increasing, meaning this is both a brand and financial issue.

What is being done about it?
Most countries have legislation prohibiting discrimination in respect of employment decisions and requiring equal pay for equal work. But the gender pay gap has been slow to close, prompting a number of governments to introduce more stringent requirements. These range from requiring employers to report publicly on their gender pay gap, to more aggressive regulation such as requiring disclosure of compensation paid to peers and bans on asking job applicants about their previous salary. Investor groups, particularly in the US and UK, are also becoming more active in using voting powers to demand transparency and action.
REGULATORY & INVESTOR DEMANDS
Regulation is likely to increase but will not be globally consistent, while scrutiny from investors will likely intensify.

GLOBAL STORY
How to get the right message across to multiple stakeholders against the background of different ways of defining the gender pay gap?

CULTURE AND VALUES
How does the need to address the gender pay gap fit in with your culture and values?

EQUAL PAY LAWSUITS
Discrimination is not the only cause of the gap, but it can be one of the causes. What is the extent of that risk in your business?

HOW TO NARROW THE GAP
Are your diversity initiatives narrowing the gap quickly enough?
**Action Plan**

1. Identify regulatory and investor requirements and key potential risks

2. Identify who is responsible for gender pay compliance in each country and who are the key stakeholders

3. Assess extent of compliance with existing gender pay gap requirements and impact of existing and likely future requirements

4. Assess areas of key risk and exposure, including by carrying out a pay audit where appropriate

5. Design gender pay action plan and global communication policy

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**How we can help**

**COMPLIANCE**

We can advise you on gender pay and equal pay obligations by jurisdiction and on the likely developments globally. We can help you identify hotspot countries — those with the highest reputational, regulatory, financial and employee relations risks of non-compliance. We can advise you on the nuances in each jurisdiction where the company has employees, from the types and forms of “compensation” to include in audits, to how to properly aggregate and share data in light of applicable data privacy regulations.

**EQUAL PAY AUDITS AND RISK MANAGEMENT**

We can undertake pay audits (including our own in-house analysis of data) to identify potential exposure, and advise on strategies to reduce legal risk. We can also advise on pay policies and training materials. We know confidentiality is paramount and take great care to ensure and protect legal privilege whenever possible.

**LITIGATION**

Our experienced employment litigators regularly defend individual and class actions and challenges to pay practices. We partner with our clients to develop a strategic, cost-effective approach to proactively minimize risk in the pay equity arena as well as assisting clients in managing communications.
The international response to the gender pay gap
Assessing the regulatory approaches taken to address the issue
The international response to the gender pay gap

What is the gender pay gap?
The gender pay gap is the difference between what women in aggregate are paid, compared to men.

Global proliferation of regulation
The World Economic Forum’s most recent Global Gender Gap Report concludes that the gender gap in pay, participation and leadership is widening for the first time since 2006 after a decade of slow but steady progress. Paradoxically, this trend is occurring even while many governments are doubling their efforts to narrow the gender pay gap.

It has long been unlawful in the US, the EU and many other jurisdictions to discriminate in respect of employment decisions or to pay women less than men for doing the same job. But since these equality laws have failed to close the gap in earnings between men and women, governments and NGOs are looking at new ways to drive change.

There is no single approach to regulation in this area. The UK and Australian governments have recently focused their efforts on representation and the gender pay gap, requiring employers to publish data about the difference in average pay between men and women. In the UK, gender pay gap data is made available for public use, whereas in Australia the government publishes aggregated pay gap data from which individual companies cannot be identified.

Regulation in this area is expanding across North America, Europe and Latin America. While little regulation currently exists throughout APAC, Australia is a world leader in this area. In the last few months alone, Iceland (already ranked amongst the highest in the world for gender parity) has introduced new legislation requiring employers to certify that they pay employees equally for equal work, the French government has revealed plans to fine companies that do not close unjustified pay equity gaps within three years, Ontario has proposed new pay transparency legislation and Peru has introduced new equal pay legislation.

The topic is gaining momentum, and our expectation is that regulation will continue to increase. It is particularly worth watching out for the more stringent types of regulation being introduced in jurisdictions which are already leading the field, as governments look to build on existing legislation and step up efforts to move the needle. Regulation is unlikely to be globally consistent, even within the EU, leading to a complex patchwork of regulatory requirements with which multinational employers need to comply.
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 caretaking 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.

A number of other countries have focused efforts on pay equity and equal pay – again there is no common theme, but the key ones include:

- Pay equity/equal pay audits (e.g., parts of Canada)
- Works council right of access to pay data (widespread in Western Europe)
- Prohibiting employers from seeking information about applicants’ compensation history in the hiring process (states throughout the US)
- Individual right of access to pay data of comparable employees (Germany)

**Company and investor initiatives**

Beyond the need to comply with regulation and the desire to do the right thing, companies have other reasons to address their gender pay gap.

First, there is a recognized link between gender diversity and the bottom line. Several studies have demonstrated a correlation between a company’s performance and the gender diversity of its leadership teams (see McKinsey’s *Why Diversity Matters* and *Delivering Through Diversity* studies). Correlation does not mean causation (see Caroline Turner’s article for the Huffington Post which questions if diversity could be the result rather than the cause of better performance). Nevertheless it is broadly accepted that the connection holds true (see for example Boston Consulting Group’s study *How diverse leadership teams boost innovation*).

Second, there is a relationship between addressing the gender pay gap and winning the talent war. 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. Investors are also showing an active interest in gender diversity driven in part by a desire for fairness and equality and in part by the link between performance and diversity:

- Gender pay equity emerged as a key focus in the US in 2017, with nearly 30 high-profile companies facing shareholder proposals to disclose the extent of the gender pay gap in their organization and their plans to close it (EY’s proxy season review report).
- In the UK, 79 major investors are backing the Workforce Disclosure Initiative, which calls on UK FTSE 50 companies and 25 mega-cap multinationals to disclose details of their gender pay gap and their action plan to address it.

Scrutiny from shareholders and investors is likely to intensify regardless of legal developments. We expect calls for more transparency and active measures to address diversity and inclusion. For companies already under investor pressure, the next stage will be to demonstrate that they are narrowing the gap.

The World Economic Forum’s most recent Global Gender Gap Report concludes that the gender gap in pay, participation and leadership is widening for the first time since 2006 after a decade of slow but steady progress. Paradoxically, this trend is occurring even while many governments are doubling their efforts to narrow the gender pay gap.
Spotlight on Australia's gender pay gap

Equal pay for equal work was introduced as a principle in Australia in 1969
The principle of “equal pay for equal work” was introduced in Australia in 1969 and legislation prohibiting discrimination on the basis of sex first passed in 1984. Notwithstanding, women still earn less than men in Australia.

Current gender pay gap situation in Australia
A government statutory agency called the Workplace Gender and Equality Agency is tasked with promoting and improving gender equality in Australian workplaces.

The Agency defines the gender pay gap as “the difference between women’s and men’s average weekly full-time equivalent earnings, expressed as a percentage of men’s earnings. It is a measure of women’s overall position in the paid workforce and does not compare like roles.”

As of February 2018, the Agency reported that Australia’s full-time gender pay gap was 15.3%. This means that, currently, women earn on average AUD 253.70 per week less than men. The gender pay gap in Australia has hovered between 15% and 19% for the past two decades.

Reporting requirements — what data must be reported to the Agency?
- The gender composition of the workforce and the governing bodies
- Remuneration/pay between men and women
- Availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and working arrangements supporting employees with family or caring responsibilities
- Consultation with employees on issues concerning gender equality in the workplace
- Any other matters specified by the minister for the reporting period (e.g., sex-based harassment and discrimination).

Covered employers must acknowledge the report has been signed by the relevant CEO by adding her/his name and ticking the relevant box. Employers must also inform employees and shareholders it has lodged its report with the Agency and advise how the report may be accessed.

In addition, all non-public sector employers with over 500 employees must meet minimum standards set by the legislation. These standards require employers to have a formal policy or strategy in place in relation to one or more of the above.

Pay is defined as an annualized base salary, as if the employee has worked full-time and for a year. Total remuneration is also reported, which includes base salary, superannuation and any other payments the employee has received. Employers must complete an online “workplace profile” before submitting the required report to the Agency.

The Workplace Gender Equality Act
The Act is the primary legislation that specifically addresses the gender pay gap in Australia, establishes gender pay reporting requirements (see below) and generally aims to promote equality for both men and women in the workplace.

Who is within the scope of the Act?
- All non-public sector employers with 100 or more employees for any six months between 1 April and 31 March the following year must file public reports on workplace gender equality. All employees (headcount, not full-time equivalent) count.
- For corporations that are part of a corporate group, the 100-or-more-employees threshold applies to the combined total of employees in Australia of the parent corporation plus the employees of any subsidiaries in Australia.
Where is the data reported?
The report is submitted to the Agency and is available for public use.

- The information is publicly available on the Agency’s website and is used by the Agency to report to the minister and is laid before parliament.
- There are no civil or criminal penalties for employers who fail to report. However, non-compliant employers may not be eligible to tender for contracts under some government frameworks and may not be eligible for some government grants or other financial assistance. There are also reputation issues to consider as the Agency publishes a list of non-compliant organizations.
- Once a report is filed, employers must notify employees and shareholders as soon as is practicable and make it available to them. It must also notify relevant employee organizations within seven days. Employees and relevant employee organizations must also be informed that they can provide comments on the report.
- The Agency’s annual report on gender pay statistics sets out the relevant pay gap across different occupations, industries and types of employment. The Agency does not name employers when making gender pay gap information public. However, the Agency has previously named employers which have not complied with the Act.

Proposed reforms to achieve gender pay equity in Australia
In 2017, the Senate Standing Committee on Finance and Public Administration conducted an inquiry into gender segregation in the workplace and its impact on women’s economic inequality. The Committee made nine recommendations:

1. Develop and implement a national policy framework to achieve gender pay equity in Australia.
2. Amend the Fair Work Act 2009 to improve its capacity to address equal remuneration.
3. The government should conduct a comprehensive consultation process with expert stakeholders to achieve these reforms.
4. The government should restore and protect the budget of the Pay Equity Unit that was previously established as part of the Fair Work Commission.
5. The Department of Education and Training should update the National Career Development Strategy and the Australian Blueprint for Career Development to address the need for gender-sensitive career guidance and counseling in all Australian schools and training institutions.
6. The Department of Education and Training should undertake a national evaluation of all programs and initiatives associated with the increasing number of girls in STEM education.
7. The government should conduct a review of recent gender pay reporting initiatives in the UK.
8. The government should conduct a review of labor force data with particular attention to job classifications used by the Australian Bureau of Statistics.
9. The Australian Bureau of Statistics “Time Use” study should recommence on a regular basis.

At the time of publication, there is no pending legislation implementing these recommendations. However, they are significant and may well be implemented in the future.

In addition, the Fair Work Amendment (Gender Pay Gap) Bill 2015 remains before parliament. The Bill amends the Fair Work Act 2009 to remove restrictions on employees’ rights to disclose the amount of, or information about, their pay and earnings. It also prohibits employers from taking adverse action against employees for disclosing this information.

This Bill was restored to parliament in August 2016 and a second reading debate on the Bill was held on 19 March 2018.
Spotlight on Latin America's gender pay gap

Laws regulating gender equality are underdeveloped in the region
Laws regulating gender equality in the workplace are underdeveloped in Latin America. However, foreign investment in Latin American subsidiaries is having a positive impact by making diversity and inclusion initiatives relevant in a way we have not seen previously. In fact, many Latin American companies are adopting HR policies that go beyond current legal standards.

A glance at the gender gap in Latin America
The Forum’s 2017 Global Gender Gap Report lists Latin American and Caribbean countries in the middle of the overall global gender gap, behind Western Europe, North America, Eastern Europe and Central Asian countries. Sadly, many countries in Latin America are particularly unbalanced in terms of women’s economic participation and opportunities for females. Brazil, Peru, Argentina, Chile and Mexico are all below average. Colombia and Venezuela are faring better by holding places 32 and 67 of 144 countries, respectively.

There is also a great disparity between women and men when it comes to equal pay for similar work. Colombia, Peru, Brazil, Chile, Mexico and Argentina are literally in the lowest rankings. The only exception is Venezuela, which is 48th. The percentage a woman earns compared to a man in Colombia, Peru, Venezuela, Brazil, Chile, Mexico and Argentina is between 68% and 49%. In other words, women in these countries earn from 49 to 68 cents for every dollar a man makes. Finally, very few women hold board or senior management roles in LATAM.

Legislation in Latin America addressing the gender gap
Governments in Latin America have not been indifferent to these statistics and most have made incipient efforts to address the gap in their countries. Argentina, Brazil, Chile, Colombia, Mexico and Venezuela require equal pay among men and women. Peru recently adhered to this initiative by enacting a new law prohibiting gender pay discrimination. Generally, these laws mandate equal pay for equal work and most countries embrace the International Labor Organization’s notion of “work of equal value.” In addition, gender discrimination is forbidden in these countries, providing different legal actions available to employees against employers that tolerate gender discrimination in the workplace. In Mexico, for example, employers tolerating workplace discrimination may be subject to penalties from the Labor Ministry. Employees can also file a constructive dismissal claim for payment of the mandatory severance, and a complaint before the National Commission to Prevent Discrimination to seek: (a) payment of damages; (b) a public warning; or (c) a public or private apology. Additionally, employees can also bring civil actions requesting payment of “moral damages” and criminal actions for discrimination.

The gender pay gap in Latin America remains wide—29.8% according to the World Economic Forum. However, with public attention growing in recent years, we do not expect it to stay this way forever.
**Reporting obligations in Latin America**

Although these laws are important and undoubtedly advance women’s rights, the truth is that the gender pay gap has been slow to close. This is especially the case in Latin America, where it is expected to take 64 years to close. The lack of effective regulation requiring companies to demonstrate compliance with gender pay-related legislation to government bodies or other authorities is a significant obstacle to closing the gap. Reporting requirements are only in place in Colombia and Peru.

- In 2011, Colombia enacted a law requiring companies to maintain a gender pay record for visits or audits by the Ministry of Labor. Although this is not a reporting requirement itself, it obliges employers to keep a record that includes the following information from a gender perspective: remuneration, job descriptions, conditions for admission to employment, employment conditions and more.
- In Peru, on December 28, 2017, Law No 30709 ("Law prohibiting pay discrimination between men and women") came into effect. In general terms, the law:
  a. bans wage discrimination between men and women
  b. obliges companies to prepare and keep wage scales
detailing employee categories and duties (within 180 days following the law enacting date)

c. requires companies to inform employees about salary and remuneration policies, performance evaluation criteria and any other factors impacting remuneration

The fulfillment of these new obligations will be subject to inspection by the Superintendency of Labor Inspection (SUNAFIL) and regional labor offices (Labor Authority) as of January 1, 2019. The law establishes that continued discrimination may be considered a “hostile act,” giving grounds to employees to initiate legal action against employers to claim constructive dismissal and the payment of the mandatory severance. In addition, companies may be subject to significant penalties, which will be determined based on the number of employees affected by the hostile act.

**Trickle down effect in Latin America**

Even though legislation is still slow to come on gender pay-related issues, many multinational companies are picking up the slack and demonstrating a strong proclivity to tackle the gender pay gap through corporate governance.

Multinational companies with headquarters in countries with more developed gender gap legislation (for example, in the UK) have created a trickle down of progressive policies. Empirical data confirms these companies outperform peers and have a significant advantage when attracting talent. Candidates and employees see these initiatives as an indicator of an inclusive culture that provides a level playing field in terms of opportunity.

Due to this trickle down effect, many multinationals in Latin America have voluntarily started implementing things like mentorship programs, home office and flextime schemes, and maternity and paternity leaves among other progressive policies in order to attract, retain and promote women. To assist companies in achieving their goals in this area, we collaborate with clients to conduct internal audits to diagnose any unintentional pay gaps and to develop action plans for addressing them in an ongoing and preventative manner.

In Mexico, for example, some multinationals have chosen to adopt the “Mexican Standard for Equality and Discrimination” issued in 2015 by the Labor Ministry and the National Commission to Prevent Discrimination. By adopting the standard, companies are awarded a certificate recognizing workplaces with anti-discrimination practices.
To be certified, companies must submit to an audit to verify the policies and practices that they have in place. The audit includes a review of the company’s:

- recruitment and hiring process
- training, promotion, equal pay and anti-harassment policies
- designation of a committee in charge of implementing policies on this topic
- gender quotas

**Latin America and the gender gap in the years to come**

The discouraging data on the gender pay gap in Latin America, as well as evidence of some multinational companies voluntarily addressing issues relating to female retention and equal remuneration, has prompted some governments to add gender pay to their legislative agenda and to start to introduce more stringent requirements on the matter. In our view, the gender pay gap is a hot topic in Latin America for employers and will only become more so in the years to come.

The Forum’s 2017 Global Gender Gap Report lists Latin American and Caribbean countries in the middle of the overall global gender gap, behind Western Europe, North America, Eastern Europe and Central Asian countries.
Spotlight on Germany's gender pay gap
Examining the country's new legal framework
The new legal framework in Germany aims to promote pay equality by encouraging pay audits, requiring pay equity reports and providing a new right to information on comparative pay.

The Transparency of Pay Act
As discussed in previous articles in our series, the growing desire to have a non-discriminatory remuneration system is a global phenomenon. The external pressure for companies has also intensified, even in countries with existing laws demanding equal pay. The German Government responded to this development and passed the Transparency of Pay Act in 2017. It aims to promote gender equality in pay. To achieve this, the Act imposes various obligations on companies requiring them to disclose salary information and take other action. However, right from the beginning, the scope of these obligations and the consequences of non-compliance remained unclear, and are only expected to be further refined by case law.

The law has been in effect since July 2017 but has imposed obligations on employers to take action only as of January 2018. Here, we outline the key provisions of the Transparency of Pay Act and reflect on its success in promoting gender equality in pay to date.

The provisions of the Transparency of Pay Act at a glance
1. individual right to information about the remuneration paid to peers of the other gender and the criteria used to determine remuneration in the company — relevant for establishments with regularly more than 200 employees
2. (voluntary) pay audit — for companies with regularly more than 500 employees
3. (compulsory) gender equality/pay equity reports — for companies with regularly more than 500 employees, which have to file a status report according to sections 264 and 289 of the German Commercial Code

Individual right to information
Employees working in establishments with regularly more than 200 employees have a right to the following information in order to verify the gender equality of their remuneration:

- disclosure of the monthly average remuneration that employees of the other gender receive for comparable work
- breakdown of this information for up to two specified wage components (e.g., base salary, bonus payments)
- information on the relevant criteria for the determination of their own remuneration as well as the remuneration for the same/comparable work

The right to obtain this information has been available since 6 January 2018. Information requests can be lodged with the company or the works council, if any. However, the works council is only competent unless and until the company claims exclusive jurisdiction over information requests, which is recommended as only the company would have the relevant salary information to respond to the request. Once a request is lodged, the deadline to provide the requested information is three months.

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Pay audits
The law encourages companies with regularly more than 500 employees to conduct pay equity audits. While this was initially drafted as a legal obligation, companies can now decide whether they want to conduct an audit voluntarily. However, should companies decide to conduct a voluntary audit:

- employees must be informed about the results (section 20 (2) sentence 1 Transparency of Pay Act)
- the company audit has to be reported on during works council meetings (section 20 (2) sentence 2 Transparency of Pay Act and section 43 (2) Works Constitution Act)

These obligations exist regardless of when the audit was conducted and whether the company had any opportunity to resolve any potentially identified discrimination in pay. By disclosing a negative audit result, however, companies may prepare the ground for litigation for salary adjustment. This applies even for employees who do not exercise their right to information about comparative remuneration under the new law. To avoid this, companies have to evaluate whether at all and in which form a company audit should be conducted.

Reporting obligation
Companies with regularly more than 500 employees, which have to publish a status report according to sections 264 and 289 of the German Commercial Code, are further required to publish a report regarding gender equality and equal pay in the German Federal Gazette. This report extends to measures on promoting gender equality and their results as well as measures taken to achieve equal pay.

For companies that are bound by or apply collective bargaining agreements, these reports have to be prepared every five years. For all other companies, a period of three years applies (section 22 (1), (2) Transparency of Pay Act). In future, the report must cover the preceding five or three years respectively. However, as a transitional measure, the first report need only cover the preceding year (section 25 (2), (3) Transparency of Pay Act).

Consequences of possible pay discrimination
Entitlements to a salary adjustment, i.e., to adjust the salary to the relevant comparative remuneration, were already recognized by the courts before the Transparency of Pay Act was passed. These entitlements derive from the principle of equal treatment and the provisions of the Equal Treatment Act. Employees can claim a salary adjustment if comparable employees are compensated differently and this difference is based on gender. The claimant must prove this to be the case. However, as with other EU Member States, Germany operates the principle of a reverse burden of proof in situations where the claimant proves facts from which it may be presumed that discrimination has occurred. If the burden of proof has shifted, it will be up to the companies to prove that there is no difference in pay, that the difference is not based on gender or that the differential is objectively justified by valid reasons.

The Transparency of Pay Act does not codify this case law but does provide that the burden of proof will shift where the employer does not meet its obligations to provide the required information in response to an employee request according to the law (see under 1 above).

Practical implications of the “individual right to information”
The individual right to information has had a quiet start so far. Employees are exercising their rights, but the widely feared overrun with requests did not occur. Time will tell if German employees just need to get used to this new law or if the great desire for information on remuneration of colleagues is simply not there.
From an employer’s perspective, the biggest challenge should have already been overcome: the implementation of the bureaucratic structures inside the company that are necessary to respond to requests by employees. We are also recognizing a trend where works council members are using their information rights to verify that their employer is capable of handling its new responsibilities according to the Transparency of Pay Act. For those employers that have not yet taken any steps to prepare for information requests, we recommend doing so ASAP. While the current interest in information requests may be lower than initially expected, the deadlines for providing the information are tight — especially if one is unprepared and needs to start “from scratch” with identifying what information is needed and where to find it.

**Conducting pay audits in Germany**

Generally, the reporting obligation regarding gender equality and equal pay only exists for companies that meet certain requirements (see under 3 above). Nonetheless, globally active companies are increasingly conducting equal pay/pay equity audits for each country they are operating in — irrespective of whether they are obligated to do so. There are many benefits of doing so, as outlined in a previous article in our series.

However, it is imperative to note that the Transparency of Pay Act in Germany has strict legal requirements for a lawful audit — even if the audit is done completely voluntarily (see under 2 above). While the legal consequences of non-compliance remain unclear in many respects, non-compliance may open the door to conflict with the works council. As a result, global players are currently struggling to adapt to the new legal framework in Germany. On the one hand, leading employers are determined to eliminate unjustified pay differences, but on the other hand, they are concerned about creating unnecessary legal risks. We are regularly advising on balancing these considerations and, in our experience, it is important to weigh these issues up front to minimize risk.

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Equal pay audits

An important diagnostic tool to help close the gender pay gap
Introduction
For most organizations, the single biggest cause of the gender pay gap is the lack of women in senior roles, which is primarily driven by challenges in recruiting, retaining and promoting women.

While this is not an equal pay issue, employees (and the media) often conflate the two - and unequal pay will certainly contribute to a gender pay gap.

In our experience, some employers do have some pockets of the organization where there is an “unexplained” pay gap between employees carrying out the same or similar work. The current push for transparency — from governments, employees and other stakeholders — can also lead to difficult questions about the real causes of the gap and what is being done about it.

An equal pay audit is therefore a useful tool to help employers identify gaps, assess the organization’s risks and begin to address the issue. This can have the dual benefits of significantly reducing the risk of equal pay claims, and at the same time, helping to narrow the gender pay gap.

The benefits of an equal pay audit
There are many good reasons why an organization would choose to carry out an equal pay audit:

▪ A thorough audit will provide a detailed examination of how rewards work at your organization, both in theory and in practice. It results in a deeper understanding of the discernible factors driving pay, and often these are not always as initially predicted. For example, an organization may predict that length in role (tenure) is the biggest driver within particular job roles, but an audit may reveal that it has a lower impact than other factors.
▪ The examination of these factors (and the related data) will help you to understand whether any of your practices are adversely (and possibly inadvertently) impacting either gender in a discriminatory fashion.

Specific compensation drivers can be analyzed against the impact that they have had, which may bring to light some unexpected issues.
▪ If a risk is identified, an audit allows you take steps to remedy it before litigation arises. Remedial options are many and varied, and can include salary increases for those specific individuals who are affected, red circling of individuals and process improvements designed to reduce risks going forward.
▪ A further benefit of process improvement is the ability to identify and explain why people are paid at the level they are. When defending equal pay claims, one of the challenges is to prove the non-discriminatory reason why one individual is paid more than another. Often the records simply do not exist — either because the information needed to defend an equal pay claim was not recorded at the time, or because no information was recorded at all. Therefore, the ability to identify and explain the reasons for any differentials will materially reduce the risk.

How equal pay audits can be used to narrow the gender pay gap
Audits can also be used to drive cultural change within a business. In most cases, disparities in pay between genders are not due to direct discriminatory intent, but rather an unforeseen consequence of an otherwise legitimate pay practice. Audits can identify where this is happening, and allow an organization to take steps to ensure the right questions are being asked when compensation decisions are in progress.

An audit can also help an organization consider if its pay practices are consistent with its employer brand and values (particularly important in winning the talent war). Openness and transparency on issues of equal pay is helpful to attract and retain existing employees and candidates.

Ultimately, pay audits are a diagnostic tool, not an intervention, so they will not of themselves remedy the gender pay gap and they are unlikely to deliver insight into the issue of gender imbalance in senior management roles or the talent pipeline.

How do I do one?
The specific audit methodology which best suits your organization will depend on a number of factors. However, there are a number of key steps which should be followed in all cases, in order to ensure your audit is most effective.

Scoping
The key threshold determination is what are you going to look at, which populations and which elements of pay (e.g., salary, bonus, benefits, equity, etc.).

Largely this will be driven by the quality of data your organization is able to rely upon. However, you will also want to consider local guidance and legal requirements where applicable (for example, in Germany there is a new statutory framework for carrying out a gender equality audit). In jurisdictions where equal pay laws require analysis between roles, which are different but are of equal value, you will also need to consider how easily you can identify which roles are genuinely comparable.

For example, an existing corporate title and global grading framework is an important tool in deciding which roles to compare, but in most organizations this does not give the full picture, as there are likely to be inconsistencies in approach in different areas of the business and differences between jurisdictions with regards to which analysis should be run. The best audits capture as many employees of your organization as possible, so the broader the better in the initial stage. The wider net can be drawn in at the stages which follow.
Data capture and analysis
Once you have identified your comparison pools, the next step is to analyze the data to identify where pay differentials exist. It will not be feasible to look in detail at every role within your organization, so at this stage you are looking for statistically significant gender pay gaps within the populations you have identified as comparable when scoping the audit.

For example, you may choose to look at roles where there is a 5% pay gap or more, or at elements of pay, such as bonus, where men are earning more than comparable women.

The UK Equality and Human Rights Commission suggests that, as a general rule, differences of 5% or more, or recurring differences of 3% or more, merit further investigation. There is no equivalent official guidance in the US but we typically recommend a similar approach.

A deeper dive and action planning
Having identified your statistically significant populations, the next stage is to delve into the detail and identify what is causing any unexplained differentials.

Again, the precise scope of this phase will depend on the results of the data analysis. However, it typically involves exploring the link between identified factors (e.g., length in role) and pay by testing sample cases to establish the likely root causes of disparity and identifying potential non-compliance with local equal pay legislation.

These results then inform your action plan going forward, as you implement your report’s findings across the business.

Managing legal privilege and disclosure obligations
Before conducting any pay audit, you should consider the question of sharing the results with your employees or their representatives. This involves an understanding of the local legal requirements and context.

For example, in Germany, a new legal framework requires employers to inform employees and works councils of the results of voluntary pay audits.

In contrast, in jurisdictions such as the US and UK, employers may (although do not always) prefer to carry out an audit under legal privilege as far as possible since pay audits (even where voluntary and confidential) may otherwise be disclosable to would-be claimants in equal pay litigation. If the audit is to be carried out under privilege, it is particularly important to ensure that privilege is not inadvertently waived by, for example, the way in which the audit is carried out and how it is messaged to employees, and it is critical to have a privilege strategy in place from the start.
Spotlight on Canada's gender pay gap
Ontario leading among global regulators intent on addressing the gap
Gender pay is currently top of mind in Canada. Despite the longstanding nature of equal pay and pay equity legislation in Canada, on average, women still earn less than men.

A report by Statistics Canada shows that women earn approximately CAD 0.88 for every dollar earned by men (as measured by the wage ratio method, i.e., comparing hourly wage rates of full-time workers). The Ontario Government and the Federal Government recently took steps aimed at improving women’s equality in the workforce and addressing the gender pay gap in these jurisdictions.

Ontario leading among global regulators intent on addressing the gap

Ontario is Canada’s most populous province and accounts for approximately 39% of the country’s labor force. Ontario’s newly introduced Pay Transparency Act, 2018 is set to come into force on 1 January 2019. The Act imposes requirements on employers to promote equality of compensation between men and women, and to increase the transparency of information regarding compensation and workforce composition. Ontario looked to other jurisdictions in developing the legislation, including the UK, Australia and Germany, and the Act puts the province ahead of other governments who are stepping up efforts to close the gap. Key requirements are as follows:

- A salary rate or range must be stated in all publicly advertised job postings.
- Job candidates may not be asked about their past compensation.
- No reprisals may be made against employees who discuss or disclose compensation.
- Employers with 100 or more employees and prescribed employers (i.e., prescribed by forthcoming regulations to the Act) must track and annually report compensation gaps based on gender and other prescribed characteristics (in “pay transparency reports”).
- Such employers will need to post their pay transparency report online, or in at least one conspicuous place, in every workplace of the employer.
- The province will also publish pay transparency reports, which may be done online.
- The initial reporting dates are staggered:
  - Employers with 250 or more employees must submit their first report by 15 May 2020.
  - Employers with 100 to 249 employees must submit their first report by 15 May 2021.

“Compensation” is defined as “all payments and benefits paid or provided to or for the benefit of a person who performs functions that entitle the person to be paid a fixed or ascertainable amount.” However, other details of what information is to be tracked and reported on are reserved for the regulations, which have not yet been released. Also reserved for the regulations is information as to:

- which employers, in addition to those with 100 or more employees, will be subject to the tracking and reporting requirements
- the characteristics, other than gender, to be tracked and reported on

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the amount of the penalties that compliance officers will be permitted to impose upon employers who are found to contravene pay transparency requirements.

At present, we do not know whether employers will need to report on the overall gap within their organization (as in the UK) or gaps between employees at the same level or in the same job role. The granularity of gap reporting can identify different issues - the UK single figure approach can reveal a representation gap, whereas the in-grade approach can reveal potential discrimination.

Equal pay and pay equity legislation in Canada

All jurisdictions in Canada have equal pay legislation and certain jurisdictions also have pay equity legislation.

Equal pay laws require equal pay for equal or similar work. Employers are required to pay men and women the same for work that is performed in the same establishment, requiring substantially the same skill, effort and responsibility and performed under similar working conditions.

Pay equity laws require equal pay for work of equal value, regardless of whether or not it is similar, assessed by reviewing the skill, effort, responsibility and working conditions of the jobs. Employers are required to pay female and male employees the same if they perform work of equal value in the same establishment, even if they do entirely different jobs. In Ontario and Quebec, pay equity legislation applies to all employers except private sector employers with fewer than 10 employees. As mentioned above, the federal pay equity system is currently a complaints-based model administered by the Canadian Human Rights Commission.

Equal pay and pay equity legislation have been in force for a relatively long time. For example, pay equity legislation has been in place as follows:

- Ontario - since 1988
- Quebec - since 1997, amended in 2009
- Federal - since 1977

Preparing for pay transparency

The fate of the Act will likely depend on the outcome of Ontario’s provincial election on 7 June 2018. However, making pay distinctions based on gender is already prohibited by employment standards legislation in Ontario (and in all other jurisdictions in Canada). In addition, most employers in Ontario (private sector employers with fewer than 10 employees are excepted) are already subject to pay equity legislation. Ontario’s pay equity legislation imposes an obligation on the employer to take specific steps to ensure that pay equity exists in the workplace and to prepare a Pay Equity Plan describing the steps taken, the outcome and any pay equity adjustments to be made. While there is no reporting requirement per se, the Pay Equity Office has a monitoring program pursuant to which it audits individual workplaces to ensure compliance. Under pay equity legislation, an employer must value every male and female job class in its establishment using a gender-neutral
comparison system and compare the wage rates of all equally valued male and female job classes to ensure that there are no pay inequities. Effectively, this requires a pay audit of all job classes.

The new legislation adds more rigor to the government’s monitoring capabilities. It also adds a risk of reputational damage stemming from the public and the media having access to published gaps. This has been the case in the UK. The ban on salary history questions and the need to state salary ranges in job advertisements will also be a significant adjustment for many employers. It is a common practice for employers to base compensation offers, at least in part, on previous salary history. Typically, employers will seek to offer enough of a salary increase to attract a candidate based on the candidate’s disclosure as to his or her current salary.

Employers should prepare for the new legislation by taking steps to ensure that pay policies and practices are free from unconscious gender bias and considering what adjustments might need to be made to their recruitment processes in order to comply with tougher rules about salary history questions and requirements to publish salary rates. Employers should also review their obligations under pay equity legislation and ensure that they are in compliance.

The gender pay gap in Canada
Despite the longstanding nature of Canada’s equal pay and pay equity legislation, on average, women still do not earn as much as men. According to a Statistics Canada report, the gender pay gap in Canada has changed as follows over the last three decades:

- earnings ratio increased from CAD 0.65 in 1984 to CAD 0.74 in 2014.
- wage ratio increased from CAD 0.74 in 1984 to CAD 0.88 in 2016.
- According to the above-referenced report, the gender pay gap is attributable to the following factors, which are common in countries across the globe at a similar level of economic development:
  - Canadian women are still more likely to work in lower paid traditionally “female” fields like teaching, nursing, social work, sales, service or administration.
  - Women are more likely to work part time than men and to experience interruptions in their careers, in many cases because they take on child-care and elder-care responsibilities.
  - Among less educated workers, heavily female-represented job types (such as cashiers and daycare workers) tend to be lower paid than many heavily male-represented job types (such as truck drivers or construction workers).
  - Discrimination, or unconscious bias, persists, e.g., men and women hold the same job/profession but women are valued lower.

In addition, women are under-represented in private sector leadership roles in Canada. Only 2.6% of women were in charge of incorporated businesses in 2014, compared to 6.5% of men, according to a RBC Economics report.

Ontario’s new legislation demonstrates the global trend toward expanding regulation in this field. Other Canadian provinces will likely be keeping a watchful eye on these developments. It is also foreseeable that Quebec could build on the reporting requirements under their pay equity legislation.

Federal initiative
Federally regulated employers are currently subject to pay equity requirements under the Canadian Human Rights Act. The existing pay equity system is a complaints-based model administered by the Canadian Human Rights Commission without a progress reporting requirement. The Federal Government plans to introduce a new proactive pay equity regime in federally regulated sectors, affecting approximately 1.2 million employees. According to the
Federal Government’s budget plan, titled Equity + Growth: A Strong Middle Class, released earlier this year, the new legislation will:

- apply to federal employers with 10 or more employees
- build pay equity requirements into existing federal compliance regimes where possible
- establish a streamlined pay equity process for employers with fewer than 100 employees
- set out specific timelines for implementation and compulsory maintenance reviews
- include job types such as seasonal, temporary, part-time and full-time positions
- provide independent oversight
- ensure that both wages and other benefits are evaluated in a gender-neutral way
- apply to the Federal Contractors Program on contracts equal to or greater than CAD 1 million
- repeal previous legislation which is inconsistent with the goal of pay equity

In addition, to inform Canadians about the pay practices of federally regulated employers, the Federal Government plans to publish existing pay information filed by employers under the Employment Equity Act. The pay information will be made available in a user-friendly online format that identifies wage gaps. According to the budget plan, this approach will help draw attention to employers who lead in equitable pay practices, while holding employers accountable for wage gaps that affect women, Indigenous Peoples, persons with disabilities and visible minorities.


2 Ibid.

Spotlight on the US' gender pay gap

Pay equity is currently a hot button issue for the nation's employers
In the US, pay equity is a hot button issue for employers for a number of reasons: reputational concerns are triggered with increasing shareholder demands for transparency; activist investor groups are pushing companies, particularly in the financial services and technology industries, to disclose gender pay data; and, in the wake of pay equity dominating the news cycle, employees are asking more questions about the issue.

Adding to the pressure is the fact that the gender pay gap can also affect talent acquisition. A recent Glassdoor survey found that 67% of US employees say they would not apply for jobs at employers where they believe a gender pay gap exists. Moreover, the impact is magnified when looking at millennials. About 80% of millennials say they would not even apply for a job if they believed the company had a gender pay gap, driving home the message that focusing on equality is essential for a positive employer brand in the US market.

Federal updates

Federal agencies
In August 2017, the federal Office of Management and Budget (OMB) halted the planned EEO-1 compensation data reporting requirement pending further review. Under the Obama Administration, the EEOC had passed a rule requiring employers with 100 or more employees (and federal contractors with 50 or more employees) to include compensation data in their annual EEO-1 reports. EEO-1 reports are mandatory forms for covered employers that track race/ethnicity, gender and job category employment data. It is unknown at this time whether the federal government will reinstate the EEOC’s wage data collection, but it is looking less likely.

Despite the pause in federal gender pay reporting, government enforcement efforts to crack down on systemic discriminatory compensation disparities on the basis of gender are ramping up across different federal agencies. Both the US Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing equal pay obligations under the federal Equal Pay Act and Title VII of the Civil Rights Act, and the Department of Labor are aggressively pursuing numerous investigations and lawsuits that are accompanied by expansive and burdensome requests for compensation data.

Federal courts
In recent months, several class actions against high-profile companies claiming that female employees are routinely paid less, assigned to lower positions and promoted less often than similarly qualified male staff have been given the green light to move forward in federal courts.

And, in a landmark decision by the Ninth Circuit Court of Appeals on 11 April 2018, a unanimous panel of judges ruled that wage differences between male and female employees based on “prior salary alone or in combination with other factors” violates the federal Equal Pay Act. The Equal Pay Act requires employers to pay equal wages to men and women who perform jobs that require “substantially equal” skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. To bring a successful claim, the Act places the burden on plaintiffs to show that they are paid less because of their sex, but plaintiffs need not prove any discriminatory intent. The law allows employers to pay men and women differently if the disparity is due to one of four exceptions...
enumerated in the statute. Employers can permissibly pay workers at different rates if they do so based on seniority, merit, the quantity or quality of the employee’s work, or “any other factor other than sex.” In Rizo v. Yovino, the Court concluded that an employee’s prior salary is not a legitimate “factor other than sex,” stating that it is “inconceivable that Congress, in an act the primary purpose of which was to eliminate long-existing ‘endemic’ sex-based wage disparities, would create an exception for basing new hires’ salaries on those very disparities.”

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. In its decision, the Court cited cases from the Second Circuit (covering federal claims arising in New York, Connecticut and Vermont), Sixth Circuit (Ohio, Kentucky, Tennessee and Michigan), 10th Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming) and 11th Circuit (Florida, Georgia and Alabama) all as interpreting the “factor-other-than-sex” exception in a similar manner. Thus, in those jurisdictions, Rizo v. Yovino makes it more difficult for employers to justify pay differentials and defend pay equity claims. It also underscores the importance of reviewing how (and whether) past salary should be used in organizations to negotiate or determine salaries.

State updates

Salary history bans
The Ninth Circuit decision follows a wave of new state and local regulations banning the use of prior salary or salary history in setting pay. California, San Francisco, New York City, Philadelphia, Delaware, Massachusetts and Oregon have all recently passed legislation making it unlawful to inquire about prospective employees’ salary history. There are also a number of pending bills in other states. Each new law has its own twist, for instance, California’s ban applies to employers and their “agents.” California’s law also requires employers to provide the pay scale for a position to an applicant upon reasonable request.

Amendments to state equal pay laws
Alongside the efforts to remove individual salary history from salary negotiations, several states have amended their equal pay laws to supplement and exceed the federal Equal Pay Act. California, New York, Massachusetts, Oregon, Washington and New Jersey have led the way in passing more onerous pay equity legislation. At a high level, the changes effectively lower the bar for an equal pay lawsuit. As a result, the potential for class action litigation is increasing as more and more states pass robust equal pay laws (and as the national focus on gender inequality in the workplace, whether it’s sexual harassment or pay disparity, continues to grow).

In “no ask” jurisdictions, it is recommended that employers:
- remove all salary questions from hiring forms (including job applications, candidate questionnaires and background check forms)
- update interviewing and negotiating policies and procedures
- train recruiting, hiring managers and interviewers regarding the importance of ensuring that candidates are not pressured (even indirectly) to disclose salary history

In the US, in response to investor and employee pressure, new laws and regulations, and agency actions, employers are taking proactive measures to evaluate their pay practices and ensure they maintain a competitive advantage by providing fair and equal pay.
The bottom line

In the US, in response to investor and employee pressure, new laws and regulations, and agency actions, employers are taking proactive measures to evaluate their pay practices and ensure they maintain a competitive advantage by providing fair and equal pay.

Further, employers are well-advised to work with counsel to conduct periodic internal pay audits to proactively address any unexplained wage disparities. When conducting an audit, partnering with legal counsel is recommended to maximize confidentiality by establishing and maintaining an attorney-client privilege protocol.
Spotlight on the UK's gender pay gap

Recent UK legislation required employers to publish gender pay gap details by 4 April 2018
Outcomes of the first year of gender pay gap reporting

Recent UK legislation required employers to publish details of their gender pay gap by 4 April 2018 (see the summary of the UK gender pay gap reporting requirements for an overview of the legal requirements). More than 10,400 employers have now uploaded their data to a central government website, where it is available for public use. In this article, we look at what lessons we can learn from the first year of gender pay gap reporting in the UK.

Slow start to reporting, with most employers publishing at the end of the reporting year

Employers were required to publish their first year’s data (relating to April 2017) between 5 April 2017 and 4 April 2018. Most employers waited until the end of the reporting year before publishing their data, with half of all employers publishing in the final week (as confirmed by the BBC). Reluctance to publish earlier in the reporting year was due, in part if not mostly, to the intense media scrutiny of the earliest reports (see below).

Developments in Northern Ireland

The gender pay gap reporting requirements described in this article do not extend to Northern Ireland, where regulation on discrimination is devolved to the local Northern Irish government. Northern Ireland is unusual in having a reversed gender pay gap (i.e., women are on average paid more than men), yet it is still proposing its own legislation to require gender pay reporting, which is currently on hold. The draft legislation would require employers to report on their ethnicity pay gap as well as their gender pay gap. In 2017, Theresa May indicated that the Conservative Party would introduce an ethnicity pay gap reporting for large employers throughout Great Britain although these plans have not been pursued.

Media focus on the gender pay gap

The gender pay gap became a headline story in the UK. Media focus tended to be on the size of the published pay gaps, but the Financial Times in particular also reported on the implausibility of some of the data. In most organizations, the gender pay gap is driven by a complex mix of factors, in particular the under-representation of women in senior or technical roles. That in itself may be driven by a range of reasons, including lack of career progression and career choices. The gender pay gap is not the same as a breach of equal pay laws, although a breach of equal pay law will certainly contribute to a gender pay gap.

Despite various explainers of these differences, we saw multiple examples of the two issues being confused. It was common, for example, to see reports that women at a particular organization are paid less than men, and an (incorrect) implication that this applied to women and men in comparable jobs.

Extent of the gender pay gap

According to analysis by the Financial Times, 78% of employers publishing reports have a pay gap in favor of men, and the median gap in median hourly pay is 9.7%.
This is lower than the gap between men and women in the UK economy as a whole (which is currently 18.4% according to the UK Office for National Statistics), but the figures are not truly comparable since, without access to the underlying individual pay data, any averaging of the pay gap data published by each employer cannot take account of whether that data represents, for example, 250 or 20,000 employees.

Pay gaps are largest in the construction, finance and insurance sectors, and lowest in the health, accommodation and food sectors. However, meaningful comparisons between individual organizations are hard to draw, since differences in group structures and workforces mean that peer comparisons are not necessarily like for like.

Although the spotlight has mainly been on the published gender pay gaps in hourly pay and bonus pay, in fact the pay quartile data has proven to be just as, if not more, revealing. This shows the distribution of women within an organization’s pay scales and so tends to get closer to the crux of the challenge. As other governments around the globe look to step up efforts to address the gender pay gap, it will be interesting to see if any of them adopt a methodology similar to the pay quartile approach.

**Action against non-compliant employers**

There are no civil or criminal penalties for employers who fail to publish their gender pay gap reports. The UK Equality and Human Rights Commission (EHRC) has reported that it wrote to around 1,500 organizations it believed to be within the scope of the reporting requirements but which missed the deadline for reporting, giving them 28 days to reply or face further action. Many have since filed their reports.

The EHRC has confirmed that it intends to invoke its enforcement powers against non-compliant employers. It has stated that it has the means to identify employers who submit statistically improbable data and that it will consider taking action against them, although in reality the EHRC has limited resources and it has accepted that, at least initially, it will target its enforcement action against organizations who do not file any reports.

**Company gender pay gap reports - what did they say?**

Typically, organizations invested significant time in putting together the gender pay reports they published on their own websites, and used them to explain the key drivers of their gap and set it into context. Almost invariably, organizations reported how the single biggest cause of their gap was the lack of women in senior roles. Some employers pointed to the challenges of recruiting women into certain occupations, in particular those involving STEM (science, technology, engineering, mathematics) qualifications. A number commented on how their data was skewed by the
calculation approach required by the regulations, especially the requirement to include unadjusted bonus figures for part-time workers (i.e., without adjusting them to full-time equivalent figures) and other factors such as the treatment of salary sacrifice schemes.

A common discussion point for companies before they published their reports was whether to calculate and publish additional or adjusted data showing the gap between employees at the same grade or within the same pay quartiles. This is typically a much smaller gap or occasionally a reversed gap. Carrying out this deeper analysis requires considerable investment beyond mere compliance. However, the attraction of publishing this analysis is that it backs up any statement that the organization’s aggregate gender pay gap is down to gender imbalance at senior levels rather than discrimination. Organizations that have chosen to publish in-quartile or in-grade gaps are typically disclosing very small gaps. There is a risk, though, that publishing any statistically significant gaps in favor of either gender raises questions needing explanation.

A number of companies made other voluntary disclosures, such as consolidated data for all companies within their group, or data relating to out-of-scope colleagues or companies (e.g., partners, employees in Northern Ireland, group companies with fewer than 250 employees).

**Future of gender pay gap reporting**

Reviewing the gender pay gap reports published by major companies shows how many of them are already committed to a range of initiatives aimed at getting more women through to senior management. However, our clients typically say they expect slow progress in narrowing their gap over the next five years. Yet governments, investors and employees are making it clear that they expect employers to address the issue. Ahead of publishing their year 2 data, organizations are beginning to focus more intensively on what will narrow their gender pay gap and allow them to keep pace with, or outstrip their peers. We are seeing an uptick in clients asking about equal pay audits (which are the subject of a later article in our series).

A parliamentary committee is currently reviewing compliance with the gender pay gap reporting regulations (along with controls on excessive executive pay) and another parliamentary committee recently called for radical reform of the UK’s parental leave system to encourage more fathers to take time off, pointing out how parental leave and the gender pay gap are closely linked. However, further regulation is unlikely in the near future as the new gender pay gap reporting requirements bed in.
Summary of UK gender pay gap reporting requirements

Which employers are within the scope of the requirement?
Gender pay gap reporting is mandatory for all companies, firms and other legal entities with at least 250 employees working in, or sufficiently connected to, Great Britain. In a group of companies, each company of the group with at least 250 in-scope employees must produce a separate report. A business, which is incorporated outside the UK, will be in scope of the reporting requirement if it has at least 250 employees working in, or sufficiently connected to, Great Britain.

What pay data must be reported?
Employers must publish six different metrics:

- the percentage difference in the mean and median hourly pay of women compared to the mean and median hourly pay of men. Employers must base the calculation on hourly pay rates over the employer’s pay period (e.g., pay week or month) which includes 5 April each year.
- the percentage difference in the mean and median bonus paid to women compared to men, based on all bonuses paid in the 12 months up to 5 April each year.
- the percentage of men and women who received bonus.
- the percentage of women and men in each pay quartile. Employers must rank employees in order of hourly pay, then split them into four equal groups and report on the percentage of women compared to men at each of the four pay quartiles.

Hourly pay is widely defined to include all pay and allowances, and even a pro-rated portion of any bonus which is paid in the relevant pay period. However, it does not include overtime or the value of benefits in kind. Bonus includes income from shares as well as cash bonuses and commission. The published data must include consultants with personal work contracts where the employer has, or can reasonably obtain the data for them, but does not include members of a legal partnership. Despite lengthy government guidance on the calculation approach, there are many grey areas such as the treatment of inbound and outbound expats, certain bonus plans and flexible benefit schemes. Since there is no scope for civil action, these issues will not be resolved by case law and employers need to make judgment calls.

Publication and sign-off requirements
Employers must upload the data to a government website, where the public can search for data relating to individual companies and to companies within identified sectors. Employers must also publish the data on their own website, typically in a more detailed report, which includes a narrative explaining their figures and setting them into context. The data must be signed off as accurate by a director, or equivalent in organizations that are not companies.

Key features of the UK approach
The key distinguishing features of the UK approach are that:

- The hourly pay and bonus comparison is between all men and women organization-wide — not just those doing the same or similar work. An organization’s gender pay gap will generally be caused by under-representation of women in senior or technical, more highly paid, positions rather than unequal pay or pay equity issues.
- The six published metrics are made fully available for public use.
Fair Pay or Hell to Pay?

What happens when corporate pay gaps are made public?
Both the US and the UK have experienced an increasing trend towards pay transparency, and with it a need to prepare for compliance with regulatory or shareholder demands and defense in the court of public opinion. Our experience of the first year of reporting under the UK gender pay and US CEO pay ratio regimes offers a number of (sometimes painful) lessons which may be of interest to any company preparing for future pay reporting on a voluntary or mandatory basis. In this article, we focus on the following four:

- Company ratios may not be rationally comparable; the media will compare them nonetheless.
- Pay reporting will reveal workforce demographics, which may need to be explained and may become a political issue.
- Shareholders and employees require immediate action on gender pay; CEO pay ratio issues may evolve over time.
- Regulators may tie punitive sanctions to pay reporting regimes.
United States

Pay Ratio. After years of anticipation and much speculation over the fate of the rule, in 2018 we have finally seen US listed companies’ first public disclosures of the ratio of their CEO’s annual total compensation to the median annual total compensation of all employees. The disclosures reflect compliance with Securities and Exchange Commission (SEC) rules adopted in 2015 to implement Section 953(b) of the Dodd Frank Act, enacted in 2010. The disclosures are typically the product of a major, months-long effort, which involved collecting and analyzing employee data and compensation information from multiple jurisdictions worldwide.

Gender Pay. Gender pay reporting in the US is on hold following the federal government’s suspension of an Obama-era rule, requiring private employers with more than 100 employees to report how much they pay employees by race, ethnicity and gender on their required annual EEO-1 reports. However, shareholder activism is increasingly important on the US gender pay front. Over the past two to three years, many US public companies have received shareholder proposals seeking reporting on their gender pay gap, and several well-known companies in both the IT and financial services sectors have committed to provide such disclosures (including six major US banks in 2018). In the Institutional Shareholder Services (ISS) 2017-2018 Global Policy Survey, 60% of investor respondents stated that companies should be disclosing gender pay gap information. If this trend continues, voluntary gender pay reporting may become market practice in the US, notwithstanding the lack of mandatory reporting requirements.
United Kingdom

**Pay Ratio.** New regulations will require listed UK PLCs\(^1\) with more than 250 UK\(^4\) employees to report the ratio of their CEO’s total annual compensation to the median annual compensation of their UK employees, and to that of the UK employee at the 25th and 75th percentile. The first reports complying with the new legislation are due to be published from 1 January 2020, but certain listed UK PLCs have already included some disclosure on their CEO pay ratio in their 2017 annual reports and more may do so in their 2018 annual reports to test market reaction. Interestingly, the CEO pay ratio reporting regulations give companies the option of leveraging their gender pay gap data to calculate their CEO pay ratios.

**Gender Pay.** Gender pay gap reporting has been mandatory for employers with at least 250 employees in Great Britain\(^4\) since 2017. Gender pay gap reports for the first year of reporting were due by 4 April 2018 and covered businesses are now into the second year of reporting.

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\(^1\) CPA Practice Advisor

\(^2\) ISS Governance

\(^3\) By “listed UK PLCs” we mean UK incorporated public companies (or PLCs) with equity shares listed on the Financial Conduct Authority’s Official List, or on NASDAQ, the NYSE, or a recognised stock exchange in the EEA. This does not include AIM-listed companies.

\(^4\) The term “UK” includes England, Wales, Scotland and Northern Ireland, and is distinct from the term “Great Britain,” which includes England, Scotland and Wales and their associated islands, but excludes Northern Ireland.
Four lessons learned from US CEO pay ratio and UK gender pay gap reporting

Company ratios may not be rationally comparable; the media will compare them nonetheless
In adopting the US CEO pay ratio rule, the SEC stated that the primary benefit of the disclosure is to provide shareholders with a company-specific metric that they can use to evaluate the CEO’s compensation within the context of their company, not to facilitate comparisons across companies. The design of the rule reflects this, as it does not mandate any particular methodology for identifying the median employee and permits companies to use reasonable estimates in doing so, and in calculating annual total compensation. The substantial flexibility in the rule has indeed contributed to disclosed ratios that are not readily comparable between companies, even for otherwise comparable companies within the same industry sector.

In the UK, it has also been difficult to draw rational comparisons between the gender pay gap reports published by employers within the same industry sector. However, this was not due to flexibility within the rules, or the underlying policy objective. The UK gender pay gap reporting regulations set out an inflexible methodology for calculating gender pay gaps and the UK government explicitly stated that it expected to see competition within sectors. However, differences in corporate structure, location of head office and outsourcing or offshoring of manufacturing or support services tends to drive differences in gender pay gaps even within the same industry sector. As a result, despite the lack of flexibility in the rules and the initial expectation of comparability, intra-sector comparisons are often a case of comparing apples and oranges.

However, the fact that pay reporting rules may not reveal rational norms or benchmarks has not stemmed the tide of media comparisons. For example, in the US, Bloomberg has launched an online tracker of CEO pay ratios, in which it keeps a log of the median average pay and the highest and the lowest CEO pay ratios. In the UK, in the first year of reporting, the media continually drew comparisons between the gender pay gaps reported by companies in the same industry and there was extensive (mostly negative) media coverage throughout that first year. A similar approach will likely be taken with the first UK CEO pay ratio reports. As a precursor, Manifest has already published a table setting out the CEO pay ratio of many listed UK PLCs, based on publicly available information on the mean average pay of each company’s employees.

Employers preparing for pay reporting requirements in other jurisdictions should be prepared for similarly extensive media coverage, which may not always be balanced or well-informed. A proactive media message is essential to avoid common misunderstandings as to what can, and cannot, be discerned from the bare data.
Pay reporting will reveal workforce demographics, which may need to be explained (and may become a political issue)

UK gender pay gap reporting revealed the widespread underrepresentation of women in senior and higher paid jobs. Media criticism was directed at employers for blaming demographics or accepting them as an adequate explanation of the gender pay gap with the result that, as the second year of UK reporting gets underway, companies are preparing to focus on the underlying female representation gap and on describing what they are doing to narrow it.

In contrast, most companies complying with the US CEO pay ratio rule in 2018 chose not to provide supplemental disclosure to rationalize their ratio, or explain the underlying workforce demographics. However, many companies provided context on the job title and location of the median employee, pointing out that the median employee was, for example, a part-time factory worker in a non-US jurisdiction. The income of an overseas workforce may be less of a political issue than that of the domestic workforce. It will be interesting to see how UK listed PLCs choose to contextualize their numbers with explanatory disclosure, since the UK requirements focus only on UK employees, and may therefore reveal more sensitive UK workforce demographics such as areas of low pay within the UK workforce.

Shareholders and employees require immediate action on gender pay; CEO pay ratio issues may evolve over time

Shareholder activism on gender and diversity has already driven US companies to report on their gender pay gap despite the absence of governmental requirements. Similarly, the gender pay gap is emerging as an investor issue in the UK, where 79 major investors are backing the Workforce Disclosure Initiative, calling on UK FTSE 50 companies and 25 mega cap multinationals to address their gender pay gap. There was also a strong employee reaction to gender pay gap reporting in the UK, with statistical analysis becoming the watercooler conversation for what may be the very first time, and evidence that not addressing a gender pay gap could have a negative impact on attracting talent.

In contrast, in its first year, US CEO pay ratio disclosure has had a limited impact on shareholder “say on pay” voting on executive officer compensation. Employee reaction to the CEO pay ratio disclosure was similarly anticlimactic. As the 2018 proxy season got underway, companies in the US increasingly stated that their main concern regarding the CEO pay ratio disclosure was a decrease in morale of the half of the workforce who discover they are paid less than the company’s median annual employee compensation (not the gap between CEO pay and worker pay). Many companies prepared employee FAQs and trained managers to answer questions on the pay ratio disclosure and median employee pay number. After reporting, companies generally tell us that they received few (if any) questions from employees about their ratio. This was true despite the regular presentation of pay ratio-related headlines in the media.

However, 63% of investor respondents to ISS’s 2017-2018 ISS Global Policy Survey stated that they plan to compare the ratios across companies/industry sectors and/or assess year-on-year changes in the ratio in individual companies. The ISS has stated that it will review how a company’s ratio changes from year to year. CEO pay ratio issues may therefore receive greater scrutiny from investors and institutional shareholders in future years. This, in turn, will drive more media coverage, potentially resulting in a heightened employee reaction in years to come.

This difference in reaction may reflect the profound difference between the two reporting regimes. While there is broad consensus that the long-term goal for companies is
a gender-balanced workforce with a gender pay gap near to zero, it is less clear what a “good” CEO pay ratio should look like. Although a large CEO pay ratio cannot be ignored over the long term, it is easier to explain and companies may be given more time to address problematic results.

**Regulators may tie punitive sanctions to pay reporting regimes**

Perhaps the most tangible practical impact of the US CEO pay ratio disclosure (so far) is that it has inspired a number of state and local governments to propose new taxes, generally if the ratio between CEO pay and median employee pay exceeds a certain amount. At present, the only such proposal to take effect is in Portland, which applies a 10% surcharge on a company’s business license liability if its pay ratio exceeds 100:1 and a 25% surcharge if the ratio exceeds 250:1. It is not expected that the other proposals will pass (the California proposal is on its third iteration), so they are mostly symbolic. However, should the US introduce gender pay reporting, it is entirely predictable that similar taxes may be introduced based on the size of a company’s gender pay gap.

Outside of the US and UK, it is predictable that regulators may be even more inclined to tie punitive sanctions to undesirable pay gaps. What began as a set of transparency measures may, therefore, eventually lead to punitive sanctions.

The UK government is currently relying on pressure from the public, media, employees, potential recruits and other stakeholders to drive employer efforts to narrow the gender pay gap, as well as applying direct pressure on some organizations. However, the Scottish government has recently announced plans to make a company’s action on the gender pay gap a consideration when granting access to public sector contracts and grants, suggesting that access to public sector contracts could be denied to a company with an unjustified pay gap.

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Is it time to review your ethnicity pay gap?

This article looks at the case for reviewing the ethnicity pay gap.
Aside from the obvious point that disadvantaged ethnic groups vary by region, ethnicity is harder to define than gender (which is generally treated as binary).

There are multiple ethnic groups but no universally adopted classification system. Individuals may not identify as belonging to a particular group or may identify as belonging to several groups. In contrast to gender, ethnic or racial origin is much more likely to be a private or confidential matter. In many jurisdictions, collecting this information is restricted by law, including in the EU where ethnic or racial origin is a special category of data protected by the General Data Protection Regulation (GDPR). In many countries, there is a strong cultural attitude that surveying this information about employees is too intrusive, and in a number of countries it is clearly prohibited. Unlike gender, therefore, employers do not necessarily already have the data and may be restricted or regulated in trying to collect it.
The ethnicity pay gap: different causes?
Discrimination and bias is likely to be one of the causes of the ethnicity pay gap, as it is with the gender pay gap. However, in certain countries with a relatively high level of migration, some of the ethnicity pay gap may be accounted for by a lack of language ability or recognized qualifications among recent arrivals, which is not a relevant factor when considering the gender pay gap.

Similarly, much of the gender pay gap is driven by motherhood (and its knock-on consequences in terms of career interruption, choice of role and employer), which would not explain the ethnicity pay gap, at least not the ethnicity pay gap between men. In many countries, the position of ethnic minorities will be closely tied to issues of social or educational disadvantage.

Despite the complexity, there is a clear business case for action
Although we are unlikely to see a proliferation of regulation globally on this issue at least in the short term, there is a clear business case for improving ethnic diversity within the workplace. Aside from the moral case for equality of opportunity, research suggests a strong link between ethnic/cultural diversity and better business performance.¹

Employers with a diverse management team and an inclusive employment brand that appeals to future generations will also be a step ahead in the modern war for talent.²

The recent spotlight on the gender pay gap has exposed the extent to which women are underrepresented in senior and highly paid roles, but there is similar cause for concern in many parts of the globe in relation to underrepresentation of certain ethnic groups. There is a case, therefore, for turning the spotlight to the ethnicity pay gap.

¹ McKinstry - Delivering Through Diversity.
² Deloitte - 2018 Millennial Survey
Millennials across the globecorrelate diversity with a forward-thinking mindset and want to stay longer in companies with a senior management team they see as diverse.
When considering the need to transform the workplace, casting an eye over the typical South African business underscores the dire need for drastic action.

After decades of racial segregation, job reservation and disparate treatment based on race or ethnicity, South Africa finally transformed into a constitutional democracy in 1994. However, 24 years later, the average South African business far from reflects the demographics of the economically active population. By the dawn of democracy, years of massively unequal allocation of resources and state-enforced discrimination resulted in a society with disproportionate levels of skills and education residing in the white ethnic group.
While the statistics show a gradual improvement, the ripple effects of apartheid still leave many black job-seekers unemployed. As at the final quarter of 2017, 27.1% of black African people between the ages of 15 and 24 were not in education, employment or training. Although this is an improvement for the same group compared to the Q4 2016 figures, the position in respect of white youth in the same age group improved even more (down from 12% in 2016 to 8.2% in 2017). If you were to remove education and training from the data, a staggering 51.1% of youth are unemployed in South Africa. This is doubly sobering when you consider that there are over 37 million people of economically active age in the country. Absorption into the labor market remains a huge challenge, especially for the black population. The unemployment statistics show that black women are the most vulnerable group (34.2% unemployed), with only 6.7% of white South Africans unemployed. The white ethnic group constitutes 8.86% of the population while black South Africans represent 79.2%.

The significant disparity remains despite a constitutional right to equality, progressive employment legislation providing for affirmative action in the workplace, and business laws creating a localization framework in respect of ownership and empowerment of previously disadvantaged groups. The true ethnicity pay gap issue in South Africa is one where black people continue to struggle to find meaningful employment. The Employment Equity Act obliges employers (with more than 50 staff or with a predetermined financial turnover) to annually provide a detailed report to the Department of Labor on various indicators. These indicators include salary differentials between ethnic groups and across different genders.

Despite the fact that the act has been in place for over two decades, progress has been slow and disparities remain stark. Reports in 2015 showed significant differences in average salaries between professionals based on gender and ethnicity. White males showed average monthly earnings of ZAR 21,700, white females earned ZAR 17,700, black females ZAR 11,500 and black males ZAR 9,244. White males also showed higher rates of promotion and developmental opportunities than other groups, although they also featured most prominently in termination statistics. While employers are obliged to submit details of salary differentials to the Department of Labor, that aspect of the report remains confidential and is not accessible to the public.

However, there are clear signs that employers will face increased pressure to eliminate pay disparity. Some employers have had to face the ignominy of equal pay claims at the Employment Tribunal and, anecdotally, disputes about equal pay seem to be on the rise. Those employers who failed to submit their employment equity reports (in time or at all) have in many cases felt the wrath of the Department of Labor. There remains much work to do, but the South African Government hopes that the data on pay differentials will assist in creating a better understanding of the scope of the problem and drive home the reality. Progressive employers have taken these results and the guidance contained in the Employment Equity Act to heart and have conducted audits of their employment policies and practices. A particular focus has been on practices that, directly or indirectly, have resulted in unfair discrimination in the workplace and on affirmative action measures to promote the advancement of previously disadvantaged employees (and job applicants). As this topic becomes more of a focus globally, employers still using 1980s-style workplace practices will face greater commercial, legal and societal pressure to mend their ways. As with the outcry globally over gender pay, it is likely to be stakeholder pressure, more than governmental decrees, that will play a meaningful role in changing workplace behavior in relation to hiring, promotion and other workplace practices affecting ethnic pay gaps.
Discrimination on the grounds of race (including ethnic origin) has been unlawful in the UK since the 1970s, but disparities still exist.

Black and ethnic minority individuals comprise 14% of the UK working age population but make up only 10% of the UK workforce and hold only 6% of top management positions.³ Ethnic minorities are paid less overall than white British employees.

The UK plans to introduce mandatory ethnicity pay gap reporting
Until recently, the focus in the UK has been on increasing the ethnic diversity on boards of company directors. In 2016, the Parker Review recommended that every FTSE100 company should have at least one ethnic minority director by 2021. Most recently, however, the government has announced its intention to introduce a pay transparency requirement in respect of ethnicity, similar to the gender pay reporting requirement that was introduced in 2017. The government has opened a public consultation on the key issues surrounding this extension.  

Key questions for debate include:

- Should employers report on the position of multiple ethnic groups or roll all classifications of ethnic minority groups into one? In that regard, it is notable that the ethnicity pay gap varies significantly between different ethnic groups, with some ethnic groups experiencing significant pay disadvantage while others apparently have a pay advantage.
- Should employers supply contextual data, for example, about their location (given that the population of London and other major cities is more diverse than in other areas)?
- How should we define and classify different ethnic groups? There is a variety of standard approaches to this in the UK. The 2011 census adopted the approach of five broad groups, with 18 more specific categories.
- How can we encourage employees to disclose their ethnicity? There is no legal obligation on employees to do so in the UK and many employees will refuse to disclose their ethnicity if asked. How should we reflect non-disclosure rates in the information reported?
- What size of employer should be required to report? The current proposal is that only employers with 250 or more employees would be in scope, which is the same as the threshold for triggering the gender pay gap reporting requirement.

The government has not yet set a date for the introduction of ethnicity pay gap reporting and we do not expect it to be imminent given the complexity of the issue. However, regulators in other jurisdictions will no doubt be watching with interest. In the meantime, some large UK employers have started to report their ethnicity gap on a voluntary basis, alongside their gender pay gap reports. Given the increasing focus on this issue, UK employers should consider getting ahead by ensuring that they have a focus on measures to address the ethnicity gap:

- The first step is to ask employees to voluntarily disclose their ethnicity. Experience from employers who have done this is that response rates may initially be low as it takes some years to build the necessary trust among the workforce to report this data.
- Many of the interventions that employers are focusing on reflect the link with social/educational disadvantage and are aimed at outreach to schools and colleges in disadvantaged areas.
- The 2017 McGregor-Smith Review into Race in the Workplace made a number of recommendations for measures that employers can take in the workplace. These include conducting mandatory unconscious bias training, rejecting non-diverse candidate lists, challenging school and university selection bias, changing job specifications, having diverse interview panels, stopping unpaid internships and conducting reverse mentoring (where senior leaders are mentored by junior individuals from different backgrounds).

References:
3 Race in the workplace - The McGregor-Smith Review
4 A Report into the UK the Ethnic Diversity of UK Boards
5 Ethnicity Pay Reporting
6 The Ethnicity Pay Gap
Key Contacts

View our Gender Pay Gap contacts and additional reading
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Additional Reading

>> Gender Pay Gap Reporting – Reflections on a Gap Year
Monica Kurnatowska and Paul Harrison look back at the first year of gender pay gap reporting in the UK.

>> Global Efforts to Advance Gender Pay Equity
Robert P. Lewis, Susan Eandi and Monica Kurnatowska take a closer look at the efforts to close the global gender gap.

>> Gender Pay Legislation in South Africa and Around the World
Lauren Salt analyzes the situation in South Africa, where there are currently no formal requirements to publish gender pay information.

>> An Introduction to Pay Equity
Writing in Bloomberg BNA, Emily Harbison, Caroline Burnett and Robert P. Lewis provide an overview of the issue.

>> Equal Pay for Men and Women: The New Form of Corporate Social Responsibility?
Aegon recently signed a collective labor agreement stipulating men and women must be equally rewarded for equal work.
Thank you for reading

Gender Pay Gap