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Gender Pay Data: Impact Of European Laws In The US

By **Lynne Bernabei and Kristen Sinisi** (May 11, 2018, 11:40 AM EDT)

Globally, there has been an uptick of legislation aimed at bridging the gender pay gap. Although American and European laws often develop on parallel tracks, the U.S. has not kept pace with the EU in the pay transparency context. The United States does not mandate pay transparency on a national level, while a growing number of European countries require employers to publish or provide their employees access to gender pay data. Nonetheless, new European transparency laws may have the unintended consequence of pushing multinationals with U.S. employees to publish pay data to keep up with their European counterparts.



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Background

Although Congress enacted the Equal Pay Act in 1963, more than a half-century ago, its promise of equal pay for equal work remains distant. As the Ninth Circuit recently stated in *Rizo v. Yovino*,^[1] "[s]alaries speak louder than words" and "the financial exploitation of working women embodied by the gender pay gap continues to be an embarrassing reality of our economy."



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In that case, the Ninth Circuit overturned its 1982 decision and held that employers could no longer justify pay inequity by pointing to an employee's or applicant's salary history. The Ninth Circuit reasoned that prior salary is not a job-related factor, "and it perpetuates the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end." For the same reason, several U.S. states restrict employers' ability to ask applicants about their salary histories. While such laws limit the disparate treatment of employees based on salary history, they do little to curb employers' discrimination based on other gender-related factors.

In recent years, U.S. females earned an average of approximately 18 percent less than their male counterparts. The Pew Research Center^[2] reported that in 2017, women earned 82 percent of what men earned, and the Organization for Economic Cooperation and Development,^[3] or OECD, similarly put that number at 81.9 percent in 2016. In terms of troubling statistics, however, the U.S. is not alone. The countries with the most prevalent gaps included Korea (36.67 percent), Estonia (28.34 percent), Japan (25.73 percent), Latvia (21.12 percent), and Chile (21.05 percent). Canada and the United States ranked in the bottom quartile with gaps of 18.22 percent and 18.14 percent, respectively, while the U.K. did slightly better with a gap of 16.84 percent. According to the OECD, the gender pay gap is the

least pronounced in Costa Rica, Luxembourg, Greece, Belgium and Slovenia, where it is 5 percent or less.

European Approach

European countries have implemented a series of laws which seek not only to prevent pay inequity, but to hold employers accountable for gender pay gaps. In 2014, the European Commission recommended that its member states implement the following core measures to combat pay disparity:

- An employee's right to request information on gender pay levels for the same work or work of equal value;
- An employer's duty to report on average gender pay levels by category of employee or position;
- An employer's duty to conduct an audit on pay and pay differentials on grounds of gender; and
- Measures to ensure that the issue of equal pay, including pay audits, is discussed at the appropriate collective bargaining level.

Pursuant to the U.K.'s 2017 gender pay gap regulations, each year, private and public entities with more than 250 employees must publish information about the difference between the average hourly rate of pay for male and female employees, the difference between the average bonus paid to male and female employees, the proportions of male and of female employees who receive bonuses, and the relative proportions of male and female employees in each quartile pay band of the workforce. The inaugural reports released last month revealed that more than 75 percent of the reporting companies pay men more than women on average, with an average medium pay gap above 9 percent.

The regulation also applies to U.S. companies with U.K. employees. Time Magazine[4] stated that Goldman Sachs and Citigroup reported pay disparities among their U.K.-based employees of 55.5 percent and 48.4 percent, respectively. The Washington Post[5] reported that this gap is even wider in the context of discretionary year-end bonuses: "women at Goldman receive average bonuses that are 72 percent lower than male employees."

At least some companies used the 2018 report to analyze their gender pay strategy on a global basis. For instance, in Citigroup's report, it stated that to facilitate improvement of its gender pay gap, it implemented a "global diversity strategy" in 2017, through which it "plac[ed] ownership and accountability for the achievement of diversity results with business leaders."

Although Belgian employees largely are covered by collective bargaining agreements, Belgian companies must report information about the gap in their annual audits, which are submitted to the national bank and made publicly available. If the reports reveal that women earn less than men, employers must submit an action plan to address the pay gap. Every two years, companies with more than 50 employees must create a gender gap pay report, and they must analyze all job classification systems for gender neutrality.

Germany's Wage Transparency Act allows employees of companies with more than 200 employees to request information about their colleagues' salaries, for purposes

of ensuring pay transparency. Any employee may request information about the salaries paid to members of the opposite sex, but salary information will not be provided for individual employees. Rather, employers need only provide information about the average remuneration based on six or more colleagues of the opposite sex who perform a comparable job.

Every two years, Austrian companies with more than 150 employees must submit confidential equal pay reports containing information about the number of women and men per pay level and the median income of women and men in each pay group. Further, in job advertisements, Austrian employers must include information about the minimum and maximum pay for each vacant position.

A Labour Party bill pending in Ireland would require employers with 50 or more employees to publish information about the gender pay gap.

U.S. Approach

In the United States, pay transparency regulations were set to take effect this year, but the Trump administration has delayed them. Since 1966, the U.S. Equal Employment Opportunity Commission has required U.S. employers with 100 or more employees and government contractors with at least 50 employees to submit information about the gender and racial composition of their workforces. This requirement evolved over the years, and under the Obama administration, the Office of Management and Budget approved the EEOC's proposal to collect summary pay data from employers, effective March 2018. Specifically, that rule required private employers with 100 or more employees to provide aggregate pay data about their workforce, which would allow the EEOC to compare overall compensation based on race and sex, and allow it to identify the bands in which most minority employees were concentrated.

However, in August 2017, the new administration reversed course and stayed the rule purportedly because it imposed an undue burden on employers, created privacy and confidentiality concerns, and was ineffective. Since then, the National Women's Law Center and the Labor Council for Latin American Advancement have challenged[6] the stay in the U.S. District Court for the District of Columbia, where a motion to dismiss remains pending.

Although U.S. employees do not have a means of reviewing employer pay data, there is no reason to believe that U.S. arms of multinational companies provide better pay equity than their European counterparts, based on the Organization for Economic Cooperation and Development's statistics.

At the local level, U.S. states have begun to follow the European approach. In 1984, the Minnesota Legislature enacted a requirement[7] that all local governments evaluate their pay structures (but not individual differences in pay) for evidence of pay disparity among each class of employees and report this information to the State. New Mexico Executive Order No. 2009-049[8] mandates that each executive agency identify its pay gap on an annual basis, in a report which is ultimately submitted to the governor's office for review. New York Executive Order No. 162[9] requires state contractors and subcontractors to submit quarterly workforce utilization reports detailing the job title and salary of each employee performing the state contract. Currently, California Senate Bill 1284[10] is pending, which, if passed, would require private employers with 100 or more employees to submit annual pay-data reports to the Department of Industrial Relations.

Conclusion

In the United States, employers have objected to reporting gender pay data, primarily on the grounds of burden and confidentiality. However, pursuant to European law, thousands of employers have uploaded, or otherwise granted access to, summary pay data. The ability of employers to provide this information in other countries cuts against the feasibility and confidentiality arguments they have raised in opposition to U.S. laws and regulations on this issue. Those disclosures have led to vigorous debates about the need to pay women more.

The U.K.'s 2017 regulation will provide an insightful test case for U.S. lawmakers and U.S. branches of multinationals, alike. Through the analysis of their European pay data reports, multinational companies will possess the requisite information to develop strategic plans for improving diversity and reducing the gender pay gap. They should take the opportunity to devise comprehensive plans of global application, which will allow them to address pay disparity in an efficient, uniform manner, including in the United States.

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[1] <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/04/09/16-15372.pdf>

[2] <https://data.oecd.org/earnwage/gender-wage-gap.htm>

[3] <https://data.oecd.org/earnwage/gender-wage-gap.htm>

[4] <http://time.com/5229228/%20gender-wage-gap-uk/>

[5] https://www.washingtonpost.com/business/what-weve-learned-so-far-about-uks-gender-pay-gap-quicktake/2018/04/05/2b5c3c68-38ed-11e8-af3c-2123715f78df_story.html?utm_term=.661d9929777e

[6] <http://democracyforward.org/wp-content/uploads/2017/11/1-Complaint-1.pdf>

[7] <https://www.revisor.mn.gov/statutes/?id=471.994>

[8] <http://www.generalservices.state.nm.us/uploads/FileLinks/864df4748b2440569b3af8a95ce155d8/eo2009-049.pdf>

[9] https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_162.pdf

[10] http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1284