Labour & Employment

Contributing editors

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2017

GETTING THE DEAL THROUGH

Global gender pay equity – an achievable aim?

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The first country to give women the vote was New Zealand in 1893. The first country to elect a woman as its head of government was Sri Lanka in 1960. The first country to establish gender pay equity is still to be decided. Ensuring pay equity between men and women is undoubtedly a laudable objective in a genuinely meritocratic society. Moreover, as Kofi Annan once remarked, 'gender equality is more than a goal in itself'. People and their talents are among the core drivers of sustainable long-term economic growth. If half of those talents are underdeveloped or underutilised, growth and sustainability will be compromised. It is perhaps for these reasons that many countries and organisations are redoubling their efforts to eradicate pay inequality.

A challenge in drawing overall comparisons between countries is the difficulty in finding good and reliable data sets. A useful starting point is the global gender gap report produced on an annual basis by the World Economic Forum. A number of factors are looked at when assessing pay equity, including the participation gap between men and women in the workforce, the gap between the advancement of men and women in their careers, and the remuneration gap. The last indicator is measured by looking at the ratio of estimated female-to-male income.

Although no country has eliminated pay inequity to date, the Scandinavian countries are clearly leading the way. In its 2015 global gender gap report, the World Economic Forum found that three of the top five countries in the global rankings are in Scandinavia. By contrast, the bottom five countries are all in the Middle East.

For large multinational employers, such regional differences are important to appreciate when trying to formulate a global pay equity strategy. While many organisations would prefer to adopt the same strategy across all countries in which they operate, there is a whole host of complex social, political, and cultural factors that cannot be discounted. A 'one size fits all' approach is rarely the answer, but neither is the sacrifice of an organisation's core values. Instead, many organisations adopt a principled but pragmatic approach to pay equity issues, taking into account regional differences, their industries, and other wider risk factors.

Some employers choose to voluntarily publish gender pay disparities even where there is no legal obligation to do so, except perhaps in more litigious countries such as the United States. This can be good for business by allowing them to recruit the best and the brightest or to align themselves more closely with the values of their customers.

What follows is a broad summary of the key issues globally.

Europe

The law of most European countries prohibits unlawful sex discrimination and establishes the principle of equal pay for equal work between men and women. Some countries go further and require employers to produce internal or external reports on gender pay disparities.

For example, earlier this year the UK government introduced a requirement for employers with 250 or more employees to publish on their websites an annual report on pay disparities between men and women focusing on:

- the mean and median pay gaps between men and women (focusing on the hourly rate of pay);
- the mean and median bonus pay gaps between men and women;
- the proportion of male and female employees who have received a bonus; and
- the proportion of men and women who fall within each of the four pay band quartiles of an employer's workforce (starting from the lowest-paid, up to the highest-paid employees).

UK employers must report on these pay disparities with reference to a snapshot of data taken as at 5 April each year. The first such report is due by no later than 4 April 2018. As there is no requirement to submit the data to a regulator or independent third party for verification, employers may suspect that their competitors have taken a less robust approach to the collection and reporting of data if it is convenient to do so. There is some flexibility for an employer in that they do not need to include data if they do not have that data and it is not reasonably practicable for the employer to provide such data.

Such data quality concerns should not be overstated. As employers are required to produce updates on their gender pay disparities on a year-on-year basis, the manipulation of such data may not serve their long-term interests. This is because of the risk that their data will create a credibility gap among staff within the organisation or that it will be difficult to show progress made.

With that said, some European countries have sidestepped such concerns. For example, Denmark imposes certain information gathering obligations on employers with 35 or more employees and at least 10 employees of each gender with the same work function. Such employers are required to provide information regarding pay to a central government body. Statistics are then compiled and published showing the differences in pay between men and women for each employer.

In other European countries, employers are not only required to publish gender pay reports but to also engage with employee representatives in closing such gaps. For example, in France the obligation to report on gender pay differences applies to employers with at least 50 employees. There is an obligation for an employer to produce an annual report on pay disparities between men and women and inform and consult with the works council on closing gender pay gaps.

Belgium requires employers to implement a detailed action plan where such gender pay gaps exist, setting out defined objectives and timescales for addressing the issues. A failure to implement a plan can in and of itself amount to unlawful sex discrimination and result in litigation from the affected employees. In theory, employers may also be subject to fines and even criminal liabilities.

The main sanction for failing to comply with gender pay reporting requirements is administrative fines, but in Austria a works council may issue legal proceedings against the employer in question. In countries such as the UK, however, the only sanction is reputational risk and the government has suggested that league tables may be produced listing non-compliant employers and providing comparative rankings in certain industry sectors.

Some European countries, including the Netherlands, Poland and Romania, do not presently have any legal requirement for gender pay gap reporting.

United States

In the United States, there is no requirement for employers to publish internal or external reports on pay disparity between men and women.

However, the laws of many states such as California, New York and Massachusetts require employees to be given equal pay for equal work.

In addition, many state and local laws now prohibit employers from asking questions about a job candidate's prior pay during the recruitment process.

At a federal level, employers with more than 100 employees must submit certain pay data to the Equal Employment Opportunity Commission (the EEOC). Such data includes statistics regarding the earnings and hours worked by male and female employees. The EEOC uses such data for assessment of charges of unlawful discrimination involving a particular employer. The EEOC performs statistical analysis of data to determine if there are pay disparities across pay bands in connection with gender and other protected characteristics.

The potential implications resulting out of the submission of such data are most obviously enforcement actions against a particular employer. There is also the risk that affected employees might bring expensive class actions based on unlawful sex discrimination.

To mitigate such risks, many US employers are conducting their own detailed pay equity analyses (ideally with a labour economist or statistician) on a legally privileged basis to assess whether similar employees receive comparable pay. It can be helpful for an employer to replicate what the data would show if it was subject to a full regulatory audit. Other steps that US employers may wish to take include reviewing existing pay policies to determine whether revisions are needed (such as starting pay or merit increases) as well as auditing pay decisions and making real-time adjustments when possible.

Asia Pacific

As a region, Asia has been relatively slow to address the gender pay gap between men and women and this is estimated to have cost the region approximately $50 billion a year in lost economic opportunities.

There are laws prohibiting unlawful sex discrimination and establishing the principle of equal pay for equal work in countries such as India, Pakistan and Singapore, but not China or Hong Kong. None of the Asian countries have implemented gender pay reporting requirements.

By contrast, Australia has been a world leader in taking steps to tackle gender pay equity issues. All non-public-sector employers with more than 100 employees must submit an annual report to a government agency against a set of standardised gender equality indicators.

Latin America

Generally, Latin American countries have not implemented specific measures aimed at establishing gender pay equity between men and women. In particular, there are no requirements for employers to publish gender pay reports in any Latin American countries.

Most Latin American countries have sought to address gender pay equity issues by focusing on enhancing educational levels and increasing minimum hourly pay rates as a way of improving pay equity between men and women.

Brazilian law prohibits unlawful sex discrimination and mandates equal pay between men and women. While an employer is not required to report on gender pay differences, it can avoid equal pay claims by implementing a formal career plan. Such a career plan is a document which sets out an organisational structure of the roles, duties and salaries of employees within an organisation, usually with details of different levels of seniority and milestones to be achieved by employees during their careers.

Middle East and North Africa

Despite the fact that the Middle East continues to be the worst-performing region for addressing gender pay inequalities, significant progress has been made by some Middle Eastern countries in closing the gender pay gap over recent years.

Algeria has gone further than most countries in the region by enshrining the requirement for men and women to be provided with equal pay for equal work. The United Arab Emirates also has a requirement that where a woman is performing the same work as a male counterpart she should receive the same remuneration. This has reportedly led to a significant narrowing of the gender pay gap.

By contrast, there has apparently been a significant deterioration in gender pay inequality in countries such as Turkey, Iran and Saudi Arabia.

In many Middle Eastern countries there are legal restrictions on women participating in the workplace. For example, certain jobs are designated as hazardous and morally damaging for women. There is a concern that such laws are hindering women from competing with men for highly paid job roles.

Other problems said to affect pay equity between men and women include the low levels of statutory maternity leave available to women. For example, in Tunisia there is a concern that maternity leave of 30 days is woefully inadequate and below international standards. There is a concern that such policies disengage women from the workforce at the point when they decide to start a family.

Obviously, there are no gender pay gap reporting requirements in the Middle East and North Africa region.

Conclusion

The solution to achieving gender pay equality appears fiendishly complex. This goes beyond conscious or unconscious bias in pay practices in the workplace. Rather, the underlying root cause lies with gender and cultural stereotypes for men and women.

While some governments have introduced laws requiring employers to report on gender pay gap differences, this is unlikely to eliminate the gender pay gap on its own. For example, there is a recognition that men and women often gravitate towards different career paths: statistically, a smaller proportion of women accept university places in engineering, mathematics and computer science compared to men. This may be due to certain stereotypes formed about 'men's work' and 'women's work' from a child's earliest days in school.

A connected issue relates to the fact that family-caring responsibilities tend to fall disproportionately more heavily on women compared to men. Some countries have taken steps to counterbalance such cultural bias. For instance, in Sweden the relatively low gender pay disparity is attributed to the generous 'use it or lose it' form of shared parental leave system. Both the mother and the father are required to take three months' shared parental leave.

It is not necessarily the case that gender pay differences will slowly but surely be eradicated over time. For example, with the rise of machine learning and artificial intelligence, many traditional process-driven jobs and industries will be destroyed or radically transformed through the creation of the gig economy. As many of these types of jobs have generally been dominated by women, there is a concern that such changes may widen rather than narrow pay disparities between men and women.

Against this backdrop, some employers are self-regulating their approaches to gender pay issues regardless of the laws in the countries in which they operate. They are for example publishing reports on gender pay disparities and devising and implementing action plans to try to address such differences.

Depending on the type of industry, other employers are only publishing gender pay differences where this is required by law. Where such an obligation exists, an employer must also consider whether it should provide any commentary to give context to such data, and, if so, how much detail should be given.

In all circumstances, great care must be taken by employers when reporting on gender pay disparities. Most employers adopt this type of approach as part of their overall equality and diversity strategies. Employers should ensure that internal and external communications are consistent and carefully managed through HR and public relations teams. Furthermore, managers need to receive appropriate training and understand that gender pay disparity does not automatically equate to evidence of unlawful sex discrimination.

Equally, where problems are identified, an employer will need a plan for resolving them. Is it better to address unexplained pay disparities as part of an employer's normal pay review cycle or to make on-the-spot pay adjustments? How can this be done in a way that minimises the risk of employment claims? If the pay disparities can be traced back to the initial recruiting decision, does the employer need to provide additional training for its recruiting managers to ensure that men do not receive higher pay than women simply because they are statistically better at negotiating starting salaries? These and many questions like them need to be addressed by employers seeking to eliminate gender pay disparities.

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Labour & Employment
ISSN 1750-9920

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