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Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek

Morgan Lewis



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GETTING THE
DEAL THROUGH 

Pay equity and workplace culture in the #MeToo era

Matthew Howse and Louise Skinner

Morgan, Lewis & Bockius LLP

More than ever before, workplace culture is the subject of intense scrutiny on a global scale. At a fundamental level, legislation such as the Modern Slavery Act in the United Kingdom, the Duty of Vigilance law in France, and the proposed Modern Slavery laws in Australia and Hong Kong has been implemented or proposed with a view toward eliminating human exploitation in the supply chain. The focus on wage parity and equality of opportunity is intensifying around the globe, with pay equity a hot topic on most board agendas. Possibly most prominent in recent months is the movement against harassment and unwanted conduct of a sexual nature in the workplace.

Regrettably, sexual harassment is nothing new. A survey of sexual harassment in the workplace conducted by the United Kingdom's Trade Union Congress in 2016 found that more than half of the 3,524 women polled had experienced some form of sexual harassment. The report also highlighted that four out of five women did not report this conduct to their employers. Similarly, the US Equal Employment Opportunity Commission (US EEOC) has estimated that 75 per cent of all workplace harassment incidents go unreported altogether. The US EEOC also reported that in a 2003 study, 75 per cent of employees who spoke out against workplace mistreatment faced some form of retaliation. In France, a survey carried out by polling institute Odoxa revealed that 53 per cent of women had experienced sexual harassment or assault at least once in their lives. With statistics like these, the emergence of sexual harassment campaigns such as #MeToo and #TimesUp should not be surprising. But it is reported that until recently many women were afraid to speak up for fear of repercussions, and that even those complaints that were reported were often swept under the carpet, the perpetrator receiving a rap on the knuckles and the victim usually being the one to leave the organisation, often sworn to secrecy.

The tables have very publicly turned as a result of high-profile complaints reported in the press and on social media – a tweet can go viral in minutes – and in recent months many employers have been caught unawares by complaints and allegations in relation to unwanted and inappropriate conduct taking place within their workplaces. Investigating sexual harassment complaints can be a lengthy and difficult process, and the reputational impact of allegations can be very damaging. What should employers be doing to mitigate the risk of sexual harassment in the workplace and the consequent legal and organisational risks to the organisation?

In the past, employers typically have been reactive, launching investigations where explicit complaints have been raised. But that is no longer enough. Employers need to take steps to understand their workplace culture now, before complaints arise. There are many factors that indicate a higher risk of sexual harassment occurring. Researchers have found that organisations that are male-dominated, hierarchical and forgiving of misconduct are particularly prone to incidences of sexual harassment, and this is echoed by studies carried out by the UK's Equal Employment Opportunity Commission. Employers cannot rest on their laurels: focus groups should be established, policies reviewed and updated, and comprehensive, meaningful training put into place.

Employers should ensure that channels for raising complaints are known to employees and that staff trust that concerns raised will be treated seriously and confidentially. Employers should also ensure that there is no 'cover-up' culture, and may even need to re-open previous harassment investigations to identify whether further steps can be or should have been taken. The UK government's Women &

Equalities Commission has recently launched an inquiry to examine what actions both the government and employers can take to change workplace culture, including confidence to report issues, the effectiveness of tribunals and other means of legal redress and the use of non-disclosure agreements (NDAs) pertaining to allegations of harassment. Recommendations have been published in the UK by the Equality and Human Rights Commission that encourage action in order to transform workplace cultures, promote transparency and strengthen legal protections. The recommendations include calls for the government to introduce a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace, the introduction of targeted sexual harassment training, the introduction of workplace sexual harassment champions, the implementation of better online reporting mechanisms, and a ban on NDAs that prevent disclosure of future acts of discrimination, harassment or victimisation.

In the United States, there has been commentary to the effect that misallocated effort is a reason for the lack of progress in improving demographics. It is claimed that instead of protecting women through specialised programmes, the focus should be on changing workplace cultures, and that little can be achieved without engaging male business leaders. Consequently, strategies for persuading men to take on issues of women's advancement have been proposed, including showing how diversity benefits everyone, letting men discuss the problem privately, and broadening the concept of what constitutes effective leadership.

In France, the president has chosen gender equality as a key element of his presidency. The French government recently announced a series of measures to address wage inequalities between men and women, as well as to combat sexual and gender-based violence at work. The proposals include payroll software to identify wage inequality, transparency obligations imposed on companies to reveal pay equity results, and detailed procedures to prevent and penalise gender-based violence at work. The #BalanceTonPorc campaign on social media, which is in effect the French equivalent of the #MeToo campaign, has also achieved visibility.

In this new paradigm of female empowerment, the heightened awareness of employee rights and growing confidence to speak up in relation to treatment perceived to be inappropriate or unfair, employers can expect to see more action being taken against them. In the UK, the abolition of tribunal fees, the introduction of gender pay gap laws and heightened media scrutiny of culture in the workplace mean that employers should prepare to deal with an influx of data subject access requests and effect processes to investigate allegations of sexual harassment and/or sex discrimination in a timely manner. In Australia, firms have started conducting gender pay gap analyses and reporting the results to the executives of the companies. An increasing number of organisations are feeling the pressure from the media and public, and implementing specific actions to try to address like-for-like pay inequities. Even in Saudi Arabia there have recently been calls for gender equality in order to drive forward economic change. Taking steps to minimise the risk to employees and ensure fair treatment is paramount, as is having a well-planned and comprehensive crisis management and investigation programme that can be instigated as soon as any concern is raised. This is a global issue, and all employers should ensure they are well prepared and understand their businesses and the people, culture and conduct within them.

The sharp focus on sexual harassment in the workplace comes at a time when gender pay disparity is the subject of close examination. 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 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 Nordic countries are clearly leading the way. In its 2017 global gender gap report, the World Economic Forum found that four of the top five countries in the global rankings were Nordic countries. By contrast, the bottom 10 countries included places such as Saudi Arabia, Syria, Yemen and Iran.

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 industry 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. UK businesses have witnessed this during the first year of obligatory gender pay reporting for employers of 250+ employees, as huge media focus has thrust the best- and worst-performing employers into the spotlight for all to see and scrutinise.

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, in 2017 the UK government introduced a requirement for employers with 250 or more employees to publish an annual report on pay disparities between men and women on their websites, 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 that have received a bonus; and
- the proportion of men and women who fall within each of four pay band quartiles of an employer's workforce (starting from the lowest- to the highest-paid employees).

UK employers must report on these pay disparities with reference to a snapshot of data taken as of 5 April each year. The first such report was due by 4 April 2018, and in excess of 10,000 employers published their gender pay data, more than had originally been estimated by the UK government. Approximately two-thirds of those employers reported a gender pay gap in favour of men, and in some sectors such as financial services and aviation the gender pay gap is particularly significant, with substantial bonus gaps giving further cause for concern. A multi-party group of UK members of parliament have launched a campaign entitled #PayMeToo aiming to raise the profile of this issue and pressurise employers to make changes with a view to promoting women and addressing the pay gap.

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 employers in that they do not need to include data if they do not have that data and it is not reasonably practicable for the employers to provide such data. However, it has become clear that the public scrutiny is such that employers will be called to account if their figures do not stand up, with several UK employers re-submitting figures multiple times in response to concerns raised about the accuracy of the data reported.

Such data-quality concerns should not be understated. 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 within staff in the organisations or that it will be difficult to show the 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 also to 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 to 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 are 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 are required to submit certain pay data to the US EEOC. Such data includes the earnings and hours worked by male and female employees. The US EEOC uses such data for the assessment of charges of unlawful discrimination involving a particular employer. The US EEOC performs statistical analyses of data to determine if there are pay disparities across pay bands in connection with gender and other protected characteristics.

The potential implications resulting from the submission of such data include, most obviously, enforcement action 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 has 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. 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 improving 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 that 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 equality 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. Such policies may disengage women from the workforce at the point when they decide to start a family.

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

Conclusion

The path to true equality is hugely complex, with gender being only one aspect of the diversity debate. Pay gaps and discrimination exist on the basis of ethnicity, age, disability and several other factors. It is to be hoped that once there is good traction on the progress of gender equality, the framework established will allow important steps to be taken in relation to other minority groups. There is a surfeit of data demonstrating that a more diverse, inclusive workplace will yield better financial results and performance. To achieve this, much work needs to be done to address and challenge stereotypes, ensure that there is equality and fairness of opportunity, and protect the vulnerable from the risk of harm or inappropriate treatment.

Morgan Lewis

Matthew Howse
Louise Skinner

matthew.howse@morganlewis.com
louise.skinner@morganlewis.com

Condor House
5-10 St Paul's Churchyard
London EC4M 8AL
United Kingdom

Tel: +44 20 3201 5000
Fax: +44 20 3201 5001
www.morganlewis.com

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