

More to Say on Equal Pay: 2018 Global Update

February 22, 2018

Christopher Wilkinson, Partner – US

Laura Becking, Partner – US

André Zimmermann, Partner – Germany

Mandy Perry, Partner – London

Chanani Sandler, Associate – US



United States

Christopher Wilkinson



State of Play at the Federal Level



- Administration Appointments Remain Stuck
 - Commissions and Boards remain in flux
 - EEOC close to Republican majority
 - Janet Dhillon and Daniel Gade are new nominees
 - Chai Feldblum re-nominated
 - DOL Status
 - Kate O’Scannlain, Solicitor of Labor (confirmed)
 - Ondray Harris, Director, OFCCP (in place)
 - Patrick Pizzella, Deputy Secretary (not confirmed)

State of Play at the Federal Level



- EEOC
 - EEO-1 Dead
 - Strategic Enforcement Plan-systemic case focus
- OFCCP (Obama lead agency on pay equity)
 - Signals based on Federal budget proceedings
 - Previous President's budget proposed merger into EEOC
 - Congressional pushback on merger and drastic funding cuts
 - FY 2019 continues push for regional centers focused on tech and financial services
 - Case filings down but 1,000 pre-scheduling letters

Employers Facing Individual and Class Claims



- Common addition to single plaintiff FEHA claims.
- Sole basis for class actions: *Ellis v. Google*
- Uncharted territory:
 - Statute of limitations
 - Class certification

Pay Equity Disclosures



- Affirmative Disclosure of Pay
 - Pressure exists from various sources
 - Obama-era Equal Pay Pledge (defunct)
 - Shareholder proposals
 - Progressive organizations tracking
 - For example, National Women’s Law Center March 2017 report (lists 19 companies’ reporting)
 - Internal advocacy groups

Pay Equity Disclosures



- Nature of disclosure
 - “99 percent pay equity”
 - “a very small percentage” pay gap
 - “achieved pay equity”
- Should you disclose?
 - Company culture dependent
 - Privilege considerations
 - If current or pending investigation or litigation, tread lightly
 - Otherwise, waiver question comes into play
 - Internal (company-wide) disclosure also poses risk

State and Local Laws Targeted at Pay Equity



- Various laws focused on pay equity under consideration and recently enacted throughout US.
- Laws preventing use of salary history gaining momentum as way to address wage gap.
- Regular updates on Orrick's Equal Pay Blog <https://blogs.orrick.com/equalpaypulse/>

Salary History Laws



- **Currently in effect**

- Puerto Rico (March 8, 2017)
- New York City (October 31, 2017)
- Oregon (October 31, 2017) (with private right of action on 1/1/24)
- Delaware (December 14, 2017)
- California (January 1, 2018)

- **Coming on line**

- Massachusetts (July 1, 2018)
- San Francisco (July 1, 2018)
- Philadelphia (stay pending challenge)

United Kingdom

Mandy Perry



UK – Mandatory Gender Pay Gap Reporting



- Final UK Regulations published 6 December 2016, requiring employers with 250 or more employees to produce statistics and information regarding the gender pay gap of their workforce on an annual basis
- Snapshot date—5 April 2017 with first publication by April 2018
- Snapshot date every 5 April annually thereafter
- Deadline for first publication 4 April 2018

Publication and Compliance



- Publish annually
 - the median and mean gender pay gap (%)
 - the median and mean gender bonus pay gap (%)
 - the proportion of men and women who received bonus pay
 - the proportion of males and females in four equal quartiles
- Order employees by pay and then divide into four equal groups
- Voluntary accompanying narrative
- Signed Statement
- Publication on employer's website and to government website
- Failure to comply — 'unlawful act' —current consultation on enforcement via EHRC

What are we seeing so far?



- Government website - <https://gender-pay-gap.service.gov.uk/Viewing/search-results>
- 1081 disclosures made on 20 February 2018—up from 704 on 29 January—growing fast
- Estimated 9000 in total to disclose so still a small proportion, given that the deadline is just under six weeks

How does it look?



- Government website—figures are front and centre
- You can search alphabetically or by sector
- Search facility works
- Click through to the business's 'gender pay gap report' which is where the narrative is contained



- Lots of focus on the positive
- Case studies
- Graphics
- Animation
- Some 'burying' of figures in the narrative
- Dividing workforce into different groups and providing different figures
- Positive commitment to change and focus on the future

Germany

André Zimmermann





- **Pay Transparency Act** (*Entgelttransparenzgesetz – EntgTransG*) **entered into force on July 1, 2017** after having been adopted by the parliament (*Bundestag*)
- Since January 6, 2018, employees in Germany may bring a **claim to information** on their peers' salary
- In 2018, for the first time (voluntary) internal **review procedure** and (mandatory) **reporting obligations** for companies in scope apply

Information Rights



- **Individual right to information** for employees about the salary of co-workers in similar positions against the employer
 - Which companies are in scope?
 - Companies employing **200 or more employees** in Germany
 - Who can bring information claims?
 - All employees
 - What information can be requested?
 - Salary of co-workers in similar positions, criteria and procedure for determining own salary
 - Average monthly gross salary of at least six colleagues of the other gender who perform the same or the same type of work
 - Optional: up to two other remuneration components (e.g. bonus, company car)

Information Rights



- Form requirements?
 - Specify the (alleged) same or same type of work in the request
 - Textual form (email)
 - Every two years
- Requirements for the reply?
 - Details on the salary of the specified comparison group on the basis of the statistical median of the gross salaries and two other remuneration components, if requested
 - CBA: refer to the applicable salary groups
 - Within three months
 - textual form (email)

Information Rights



- Who will gather and issue the information?
 - Companies bound by **collective bargaining agreements**
 - Information to be gathered and issued by the **works council**, unless otherwise determined by the employer
 - Companies with an existing works council but not bound by collective bargaining agreements
 - Right to information may be exercised **either by the works council or the individual employee** according to employer's and works council's choice
- What happens if the company does not comply?
 - Reversal of burden of proof in case of litigation

Voluntary Internal Review Procedure



- Companies with regularly **more than 500 employees** are called upon to implement **internal review procedures** to ensure their compliance with equal pay principles
- No legal obligation to implement such internal review procedures
- Results to be published internally within the company
- If the review reveals gender discrimination with regard to pay, the relevant remuneration arrangements must be eliminated without delay
- Disclosing a negative review result may prepare the grounds for litigation

Mandatory Pay Equity Reporting



- Companies regularly employing **more than 500 employees** which are required to prepare a **management report** under the German Commercial Code (*Handelsgesetzbuch – HGB*) (e.g., stock corporations (AG), limited liability companies (GmbH)) will be obligated to include information about their measures to achieve pay equity in this report
- Report must cover the previous three years and will be made publicly available
- First report must to be prepared in 2018 for 2017

Rest of World

Laura Becking & Chanani Sandler

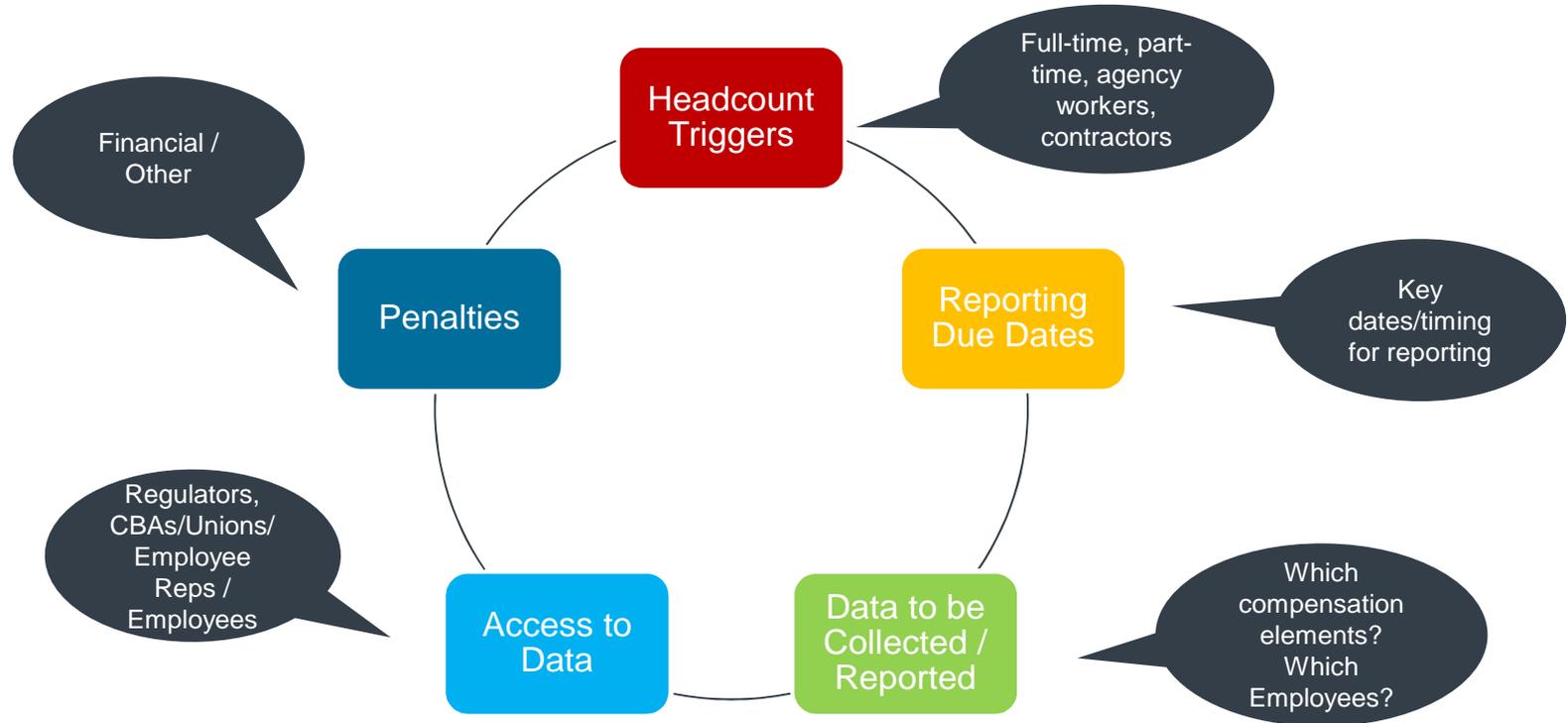


Pay Equity or Pay Ratio Collection and Reporting Rules – Considerations



- Many countries have some form of gender-based pay equity requirements.
- However, not all of those countries currently require companies to collect and/or report pay / compensation data by gender.
- For countries that require employers to collect and/or report such data, the thresholds, level of detail of data, etc. vary.

Pay Equity or Pay Ratio Collection and Reporting Rules – Considerations





- All non-public sector employers with **100 or more employees** have **annual** gender reporting obligation.
- Employers are also obligated to inform its employees and shareholders that it has lodged its report with the regulator, provide them with access to the report and allow them the opportunity to comment on the report to the employer and the regulator.
- Employers with **500 or more employees** must also comply with the legislated minimum standard of having a formal policy or formal strategy in place that specifically supports gender equality.



- Remuneration data in companies' social balance sheet (i.e. '*Bilan social*'), which is part of the **annual** account statement, must be broken out by gender.
 - Report is publicly available - irrespective of whether the company is a publicly traded company or whether it has unions or a Works Council.
- Companies with **more than 50 employees** must also draft an 'analysis report' (*rapport d'analyse*) on the wage structure of female and male employees.
 - **Every 2 years** (covering two accounting years).
 - If inequalities are detected through this analysis, the company is required to work out an action plan.
 - The analysis report is confidential and must be kept so by members of the Works council or the Union delegation.



- The *Pay Equity Act* (the “Act”) does not include an ongoing reporting or disclosure obligation. However, the Pay Equity Commission (the “Commission”) has the ability to audit employers for compliance and employees/unions can file complaints with the Commission alleging a violation of the Act.
- The Act requires the achievement of pay equity based on total compensation.
- The Commission has broad powers to monitor employer compliance and they do take a proactive approach.



- Employers **with an average of 10 and more employees** are obligated to:
 - implement a pay equity exercise and determine any pay adjustments that must be completed **within 4 years** of becoming subject to the *Pay Equity Act* (the “Act”);
 - proceed with a pay equity audit every **5 years** thereafter;
 - file an annual declaration with the CNESST with respect to compliance with the Act.



- Companies with **at least 35 employees** must draft gender pay statistics for the company **annually**, *provided* that there is a minimum of 10 persons of each gender with the same working function.
 - The definition of “pay” is the ordinary base or minimum pay and all other payments that employees receive as a result of the employment relation directly or indirectly in money or natural produce.
 - Annual gender-segregated wage statistics report for the previous calendar year due before September 1st of the following year.



- Companies with a works council in place (a works council must be set up in companies employing **50 employees and more**), have an obligation to collect and disclose pay information:
 - In the framework of the “*social and economic database*”, which is basically a support of the employer’s consultation obligations, the employer must fill in this database with some specific information, including information on equal pay between genders and remuneration of the employees and managers;
 - In the framework of the annual obligation to consult with the works council on some topics, amongst which the social policy of the company, the employment conditions and the employment.



- Employers with **25 or more** employees are obligated to prove that men and women are paid equally for the same jobs using the *Equal Pay Standard*.
 - Employers are required to analyze their salary structures and renew their equal pay certification every three years.
- Employers with **250 or more employees** need to have implemented the equal pay standard by 31 December 2018; employers with smaller headcounts have extended deadlines
 - E.g., the deadline for employers with **25-89 employees** is 31 December 2021.
- Employers who fail to undergo certification are faced with daily fines.



- There are currently no specific disclosure rules regarding equal pay between men and women *per se*.
- However, some of the *Shops and Establishments* acts (which vary by state) require employers to submit certain returns (mostly on an *annual* basis) which may include details of the number of employees employed in the establishment (which include identifying male and female employees), total amount of salary paid, etc.
- In accordance with the Ease of Compliance to Maintain Registers under various Labour Laws Rules, 2017 (“2017 Register Rules”), employers are required to maintain registers such as an ‘Employee Register’ and ‘Wages Register’ which contain details (including gender) of employees engaged in the establishment and wages paid to all employees in the establishment.



- There are currently no specific disclosure rules regarding equal pay between men and women.
- However, a Private Member's Bill (the "Gender Pay Gap Bill") was published in May 2017, which if passed as drafted, would require large employers to publish information relating to employee pay, for the purpose of showing whether there are differences in the pay of male and female workers and, if so, the nature and scale of such differences.



- Charities, public sector organizations and *companies listed on the Israeli stock exchange* are required to publicize or report on the remuneration paid to certain of its employees, and to provide such information with reference to gender.
- The Regional Commissioner at the Equal Opportunities Commission may require an employer to provide details of its compliance with obligations under legislation regarding equality at work. This is a broad requirement and not specifically on pay ratio but it could include pay ratio.
- Note that there are no headcount triggers in this context.



- Employers with **more than 100 employees** are required to provide a report to the “regional equal opportunity councillor” and to the “staff trade unions representative” **every two years**.
 - The report reflects personnel employed (in terms of men and women employees), as well as their training, career opportunities, use of redundancy instruments, level of salaries, etc.
- The report must be submitted by April 30th of the year following the expiration of each biennium.



- There are currently no specific disclosure rules regarding equal pay between men and women.
- However, there is a *proposed legislation* aiming at improving equal pay by introducing three measures:
 - To make any company policy on equal pay subject to approval of the works council;
 - To require companies to provide information to their works council on the status of their remuneration scheme (i.e. disparities in pay between men and women) at least once a year;
 - To have companies publish numbers on the remuneration scheme in their annual report.



- All private limited companies have a general duty to include information about the current gender equality status in the annual report, and be completed together with the company's financial statements.
- From January 1, 2018, ***small*** private limited companies will no longer be accountable (i.e., the obligation to report on gender equality would not apply).
- "Small companies" are companies that are below two out of three of the following thresholds:
 - 50 employees;
 - with annual sales of less than MNOK 70; and/or
 - a balance sheet amount of MNOK 35.



- There are currently no specific disclosure rules regarding equal pay between men and women.
- However, there is a draft bill that, if passed into law, would prohibit an employer from including gender identity and sexual orientation in determining the compensation of an employee.



- “Designated employers” are required to submit a statement to the Employment Conditions Commission on the remuneration and benefits received in each occupational level of that employer’s workforce.
 - “Designated employers” are employers who employ 50 or more employees, or who employs fewer than 50 employees, but who has a total turnover in excess of the prescribed turnover (i.e., revenue) of R30 million.
 - Where disproportionate income differentials are reflected in the income differential statement, the designated employer must take measures to progressively reduce these differentials.



- There are currently no specific disclosure rules regarding equal pay between men and women.
- However, there are regulations with regard to equal pay, such as the Equality Act, which require companies employing more than **250 employees** to conduct an analysis and prepare an Equality Plan.
 - The Equity Plan is intended to assess whether there are discrimination risks associated with conditions of employment within the company and to reflect measures that the company is/will be taking to mitigate those risks.



- Employers with **at least 10 employees**, must conduct an **annual** “Equal Pay Review” of the salaries of men and women in the workplace.
 - If differences in pay are identified in the Equal Pay Review, the employer must develop an action plan to address those differences “as soon as possible” (including a timeline and a cost estimate).
 - The Equal Pay Review must be conducted in collaboration with the employees’ representatives (the trade union, if applicable, otherwise other representatives for them).
- There is no formal submission requirement of the plan to the Swedish Discrimination Ombudsman (SDO). However, the SDO may conduct inspections and order an employer to fulfil the requirements under the Swedish Anti-Discrimination Act.



orrick