

Pay Equity in the U.S. and Around the World

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Program Overview

- History of Pay Inequity
- New State & City Legislation to Address Pay Equity
- How to Avoid or Defend Pay Equity Claims; Key Questions and Take Aways
- Internal Audits: Crunching the Numbers
- International Developments



Federal Pay Protection



- **Title VII**

- Disparate treatment (proof of intent required)
- Disparate Impact (no proof of intent required)
- EEOC provides that "[a]ll forms of pay are covered [...], including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits."

- **Equal Pay Act of 1963**

- Prohibits:

- Sex-based differentials in wages;
- Within the same “establishment”;
- For “Equal work” (i.e., jobs that require substantially equal skill, effort and responsibility under similar working conditions); and
- No proof of intent is required.

- **Affirmative Defenses:** seniority, merit, quantity or quality of production, or any factor other than sex.

Federal Pay Protection

A sample of the EEO-1 Employer Information Report form, showing the title "EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1" and various sections for reporting.

- **Federal Contractors:**

- June 2006 - OFCCP issued guidelines regarding self-evaluation with respect to systemic compensation discrimination (Executive Order 11246)
- February 2013 - OFCCP Directive 307 - Provides additional details such as:
 - Will continue to investigate compensation discrimination by federal contractors
 - Will use Title VII's case-by-case approach to investigate and prosecute federal contractors
 - Lists various investigation techniques (e.g. comparisons of individual pay differences, statistical analyses of class compensation disparities, and interviews of employees, to “tailor the compensation investigation” to the facts of the particular case)

- **Private employers:**

- Proposed amendment to the Employer Information Report (or EEO-1)
 - Summary pay data from private employers (and including federal contracts and subcontractors) with 100 or more employees
 - Contains data on job category as well as by sex, ethnicity, and race
- Created under Obama Admin but cancelled by Trump Admin in Aug, 2017

Average Women's Income vs. Average Men's

- According to the Census Bureau, women now make 80.5¢ for every \$1 earned by their male counterparts.
- Up from 79.6¢ in 2016.
- Part of the gain has come as men lose grounds (men saw a 1.1% decline over the same period)



Pay Gap by Gender and Race

All Professions

	White	Black	Asian	Hispanics
Male	100%	71.4%	112.9%	64.4%
Female	79.0%	62.5%	86.8%	54.4%

Source: The Institute for Women's Policy Research, September 2017

Pay Gap in the Legal Profession

As a % of the median pay of men in the same category

	Full-Time Lawyers	All Law-Related Jobs	Paralegal	Judges, magistrates & other judicial workers	Legal support
Female	77.4%	51.6%	94.0%	71.8%	73.7%

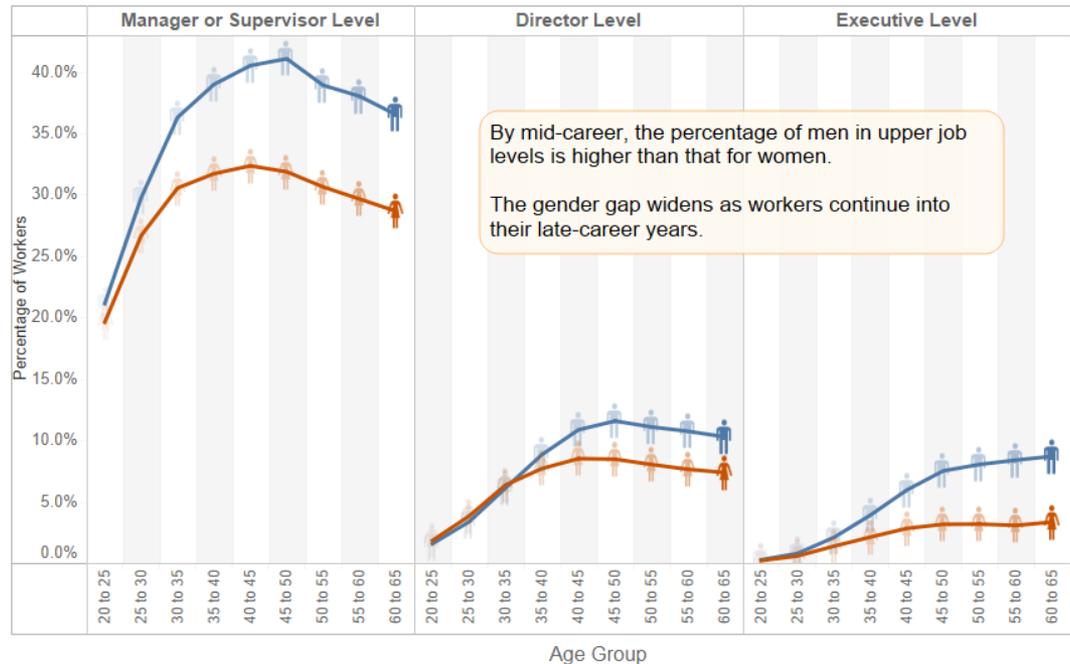
Source: ABA Journal, March 2016

CA Rules of Professional Conduct

- Rule 2-400 - Prohibited Discriminatory Conduct in a Law Practice
 - (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race , national origin, sex, sexual orientation, religion, age or disability in:
 - (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or
 - (2) accepting or terminating representation of any client.
- Proposed Rule 8.4.1 (Prohibited Discrimination, Harassment and Retaliation) would go even further if adopted and also apply to representation

The Opportunity Gap

- At the start of their careers, men and women tend to work at similar job level
- Over the course of their career, both genders move into manager or supervisor-level roles
- Men are 85% more likely than women to be VPs or C-Suite Execs by mid-career
- Men are 171% more likely to hold those positions late in their career

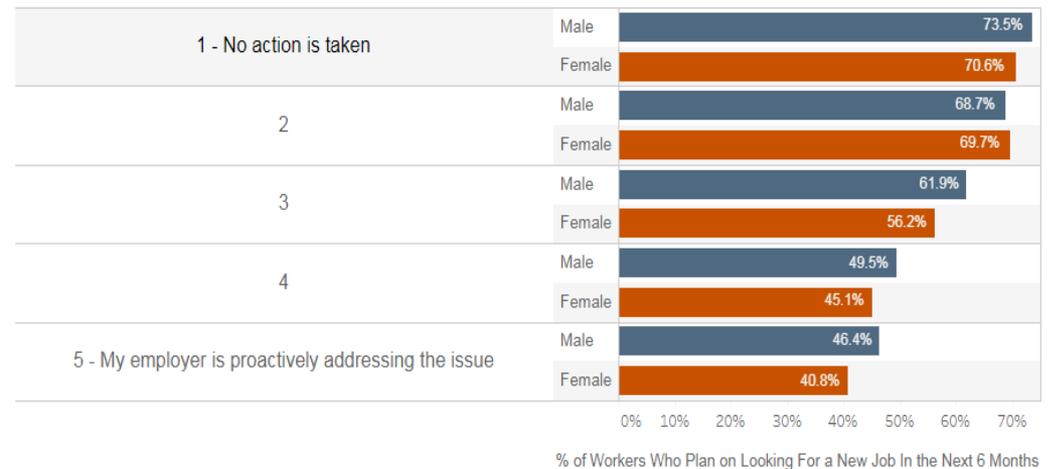


Source: www.payscale.com

Gender Pay Gap and Employee Retention

- 17% of men believe there is an issue and their employer is proactively addressing it, while 10% of women feel the same
- the more educated a woman, the more likely she is to give her employer a low rating on addressing workplace gender inequality
- If employees believe their employer is taking no action to address gender inequity, 71% of women and 74% of men plan to find a new job within six months

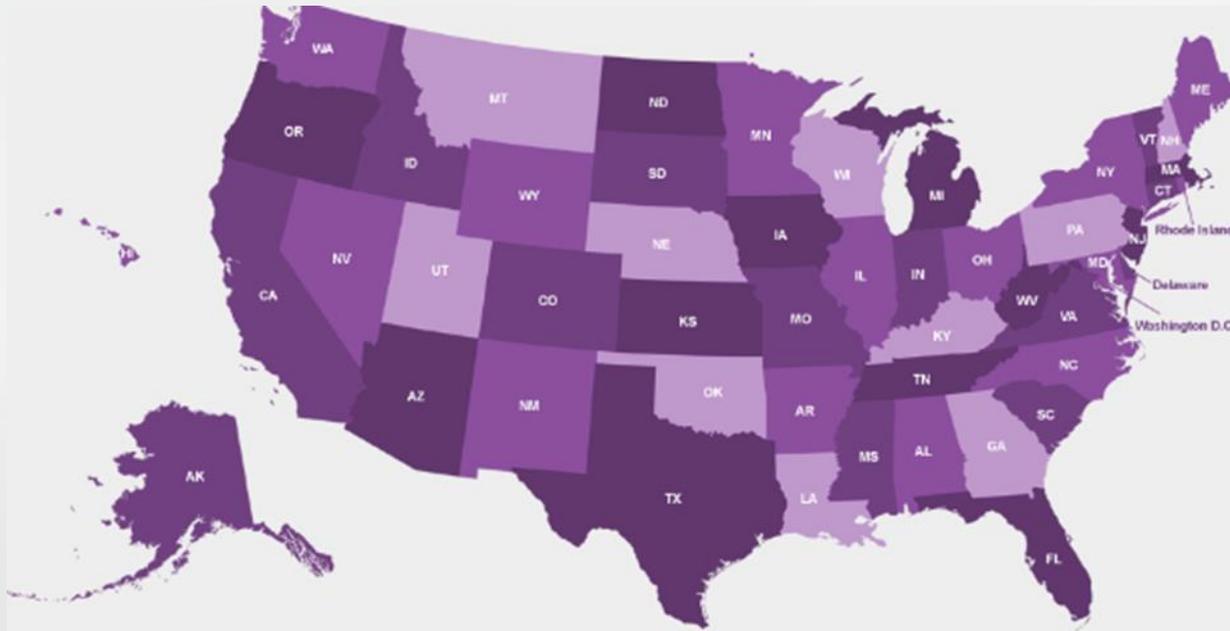
On a scale from 1-5, rate your employer's activity in addressing workplace gender inequity.



Workers were asked to rate their employer's activity in addressing workplace gender inequity on a scale from 1-5. We asked these same workers if they planned on actively seeking new jobs outside of their current company in the next 6 months. The graphs above show the share of respondents who stated that they do plan on looking for new jobs soon, corresponding with how they rated their employer.

Source: www.payscale.com

State Developments





- **California Fair Pay Act (2016 - amended in 2017 and 2018) (Cal. Lab. Code 1197.5 and Cal. Lab. Code 432.3)**
 - **Key provisions and content:**
 - Sex, race and ethnicity.
 - No same “*establishment*” requirement.
 - “*Substantially similar work*” replaces “*equal work*”, and is defined as a composite of:
 - Skill;
 - Effort;
 - Responsibility; and
 - Performed under “similar working conditions.”
 - Job titles NOT controlling.
 - Employer cannot prohibit an employee from disclosing the employee’s own wages, discussing the wages of others, or inquiring about another employee’s wages.
 - Not limited to applicants. Applicable to all employees throughout employment.
 - **Effective Jan. 1, 2018:**
 - Employer cannot seek salary history information about an applicant.
 - Upon request, employer must provide to the applicant the pay scale for the position.

California



- An employer can defeat a Fair Pay Act claim by proving that the difference in pay for substantially similar work is due to:
 - Seniority;
 - Merit;
 - A system that measures earnings by quantity or quality of production; and/or
 - A “**bona fide factor**” other than sex, race, or ethnicity, “*such as education, training, or experience*”:
 - Must not be derived from a sex, race or ethnic-based differential.
 - Must be job-related and consistent with “*business necessity*” – i.e., an “*overriding legitimate business purpose*”.
 - “[A]n employer must show that it applies the factor(s) reasonably and that the factor(s) accounts for the entire difference in wages”.
 - Double damages for violation.

Delaware



- **Delaware Wage Payment and Collection Act (Del. Code Title 19 Sec. 1107A) (Currently effective)**
 - Prohibits pay differential based on gender only;
 - Same establishment requirement;
 - "*equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions*";
 - Wages defined under Del. Code Title 19 Section 1101 as "*compensation for labor or services rendered by an employee, whether the amount is fixed or determined on a time, task, piece, commission or other basis of calculation.*"
 - Can justify differential on seniority of merit systems, a system which measures earnings by quantity or quality of production, or any other factor other than sex;
 - Employers "*shall not [...] reduce the wage rate of any employee*" in order to comply.

Delaware



- **Compensation History (Effective December 14, 2017)**

- Prohibits employers or their agents from seeking "*the compensation history of an applicant from the applicant or a current or former employer*";
 - Nothing prohibits seeking applicant's compensation history "*after an offer of employment with terms of compensation has been extended to the applicant and accepted, for the sole purpose of confirming the applicant's compensation history*";
 - Nothing prohibits discussing "compensation expectations" provided that the employer or employer's agent does not request or require the applicant's compensation history;
- Defines compensation as "*monetary wages as well as benefits and other forms of compensation*";
- Fines between \$1,000 and \$10,000 per violation depending upon subsequent violations.

Massachusetts



- **Massachusetts Act to Establish Pay Equity (effective July 1, 2018)**
 - Prohibits gender differentials in pay throughout employment.
 - "Comparable work" similar to "substantially similar" standard.
 - Wages include "*all forms of remuneration*".
 - Differential is permitted if based upon:
 - Seniority, provided that time spent on leave due to a pregnancy-related condition or protected parental, family or medical leave, does not reduce seniority;
 - Merit system;
 - Quantity or quality of production, sales or revenue;
 - Geographic location in which a job is performed;
 - Education, training or experience; and
 - Travel, if required.
 - Employers may not reduce wages of others to comply with the Act.

Massachusetts



- Employers may not "*seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer or require that a prospective employee's prior wage or salary history meet certain criteria*".
- Unlawful to ask prospective employees or current or former employers about applicant's wage or salary history, until after an offer of employment agreement has been negotiated and made.
- Affirmative defense: If within 3 years prior to the commencement of the action the employer has conducted "self-evaluation" and "*can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender for comparable work*".
- "*It shall be an unlawful practice for an employer to [...] require [...] that an employee refrain from inquiring about, discussing or disclosing information about either the employee's own wages, or about any other employee's wages.*" (HR exception)
- Double damages.

New York



- **New York's Equal Pay Act (effective January 19, 2016)**

- Prohibits gender differentials in pay throughout employment for "*equal skill, effort and responsibility [...] performed under similar working conditions.*"
- Employees are considered to work at the “same establishment” if they work for the same employer at workplaces located in the same geographical region, no larger than a county.
- Pay differentials may be based on:
 - seniority system;
 - merit system;
 - system which measures earnings by quantity or quality of production; or
 - bona fide factor other than sex, such as education, training, or experience." (cannot be based on, or derived from, a sex-based differential in compensation, and must "be job-related with respect to the position in question", and "be consistent with business necessity.")
- "*No employer shall prohibit an employee from enquiring about, discussing, or disclosing the wages of such employee or another employee.*"
- Triple damages.



• Oregon Equal Pay Act of 2017

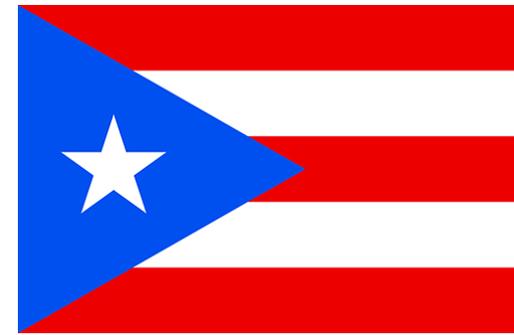
- Prohibits pay discrimination throughout employment on the basis of "protected class", defined as "*race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age*".
- Compensation "*includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation*".
- Prohibits employers from paying any employee at a rate greater than that at which the employer pays wages or other compensation to employees of a protected class for work of "comparable character" (substantially similar knowledge, skill, effort, responsibility and working conditions regardless of job title).
- Pay differentials are permitted if the employer can establish that one or more of the enumerated factors accounts for the entire compensation differential.
 - Seniority, merit, quantity or quality of production, workplace location, travel, education, training, experience, or any combination thereof.

Oregon



- Employers may not reduce the compensation of an employee to comply with the Act.
- Prohibits employer from "screening job applicants" based on current or past compensation or from "seeking" the salary history of an applicant or employee. However, after the employer makes an offer that includes the amount of compensation, the employer may request written authorization from the applicant to confirm prior salary.
- Mitigation: "*[T]he employer may file a motion to disallow an award of compensatory and punitive damages [...] if the employer demonstrates [...] that [it] [c]ompleted, within three years [...], an equal-pay analysis of the employer's pay practices in good faith [...], [e]liminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff.*"
- Various effective dates ranging from January 2019 to January 2024.

Puerto Rico



- **Puerto Rico Equal Pay Act of March 2017**
 - General prohibition of pay discrimination based on sex.
 - Exceptions are generally similar to pre-existing laws in California.
 - Prohibits prospective employer from asking salary history UNLESS:
 - The prospective employee volunteers the information; OR
 - The salary was already negotiated and set forth in an offer letter.
 - Employers cannot prohibit employees from discussing salaries amongst one another or with HR personnel.
 - Back-pay penalty may be waived if employer can demonstrate that good faith mitigating measures have been commenced since previous self-evaluation.

City Developments



Philadelphia



- **Philadelphia "Wage Equity Bill" (May 23, 2017 implementation suspended until pending lawsuit over)**
 - Unlawful for employer, employment agency, employee or agent thereof to:
 - "[I]nquire about a prospective employee's wage history, require disclosure of wage history, or condition employment or consideration for an interview or employment on disclosure of wage history, or retaliate against a prospective employee for failing to comply with any wage history inquiry."
 - "[R]ely on the wage history of a prospective employee from any current or former employer of the individual in determining the wages for such individual at any stage in the employment process [...], unless such applicant knowingly and willingly disclosed his or her wage history [...]"
 - "Wages" mean all earnings of an employee (hourly, "task, piece, commission or other method of calculation and including fringe benefits, wage supplements, or other compensation whether payable by the employer from employer funds or from amounts withheld from the employee's pay by the employer.").
 - Focus on gender, but also indicates that prohibitions apply to all employees.



- **San Francisco Parity in Pay Ordinance (Operative January 1, 2018)**
 - Prohibits employers from inquiring about applicant salary history (or "considering" it if volunteered).
 - Prohibits employers from disclosing employees' salary history without employees' authorization.
 - Nothing prohibits an applicant from voluntarily disclosing salary history following an employer's initial salary offer in order to negotiate a different salary or prohibits an employer from considering applicant's salary history in determining a counteroffer.
 - Fines paid to the City.



- **New York City Wage Equity Act (effective October 31, 2017)**

- Prohibits employers, employment agencies, and employers' agents from inquiring about salary history of a job applicant for employment.
- Salary history includes prior wages, benefits and other compensations, but not objective measure of productivity such as revenue, sales and other production reports.
- Permissible to discuss the applicant's "*expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer*".
- Does not restrict:
 - Salary inquiries for internal transfers or promotions of current employees.
 - If applicant voluntarily and without prompting discloses salary history and employer verifies thereafter.
 - Employment verification or background checks as long as not relied upon in determining salary, benefits or other compensation during the hiring process, including negotiation of a contract.

New Orleans



- **New Orleans Executive Order MJL 17-01 (Effective Jan. 25, 2017)**
 - High level and rather short executive order.
 - Prohibits questions about a candidate's salary history throughout the application and interview phases.
 - More details likely to be provided following various city agencies' studies.

Key Differences

- Beyond gender?
- Beyond base pay?
- Prior salary inquiry permitted or just dangerous?
- Salary inquiry permitted after offer?
- Affirmative defense or mitigation based on self-assessment?



Key Questions

- How do you treat years of seniority?
 - With current employees
 - In same field
 - Other years of service
 - Prior employment
 - Often difficult to compare
- Total compensation
 - Base pay
 - Performance bonuses
 - Overtime opportunities
 - Equity
 - Sign on bonus
 - Relocation bonus
- Performance evaluations (tainted by unconscious bias?)



Fixing the Problem

- Internal attorney-client privileged audits (may need to be waived for affirmative defense or mitigation)
- Base pay increases: prohibited decreased adjustments under some laws
- Other "wage" adjustments
- Identifying mislabeled individuals to align with actual functions
- Review of initial and subsequent comp (e.g., base, bonus & equity grants) and performance evaluation
- Unconscious bias training
- Does asking for "salary expectations" perpetuate discrimination?
- Separating compensation from hiring decisions?



Crunching the Numbers



Statistical Significance

- **Statistical Significance?**

- Results with more than 2.0 SDs (or 1.96 SDs) are generally considered statistically significant.
- Statistical significance depends on size of sample and outcome/effect



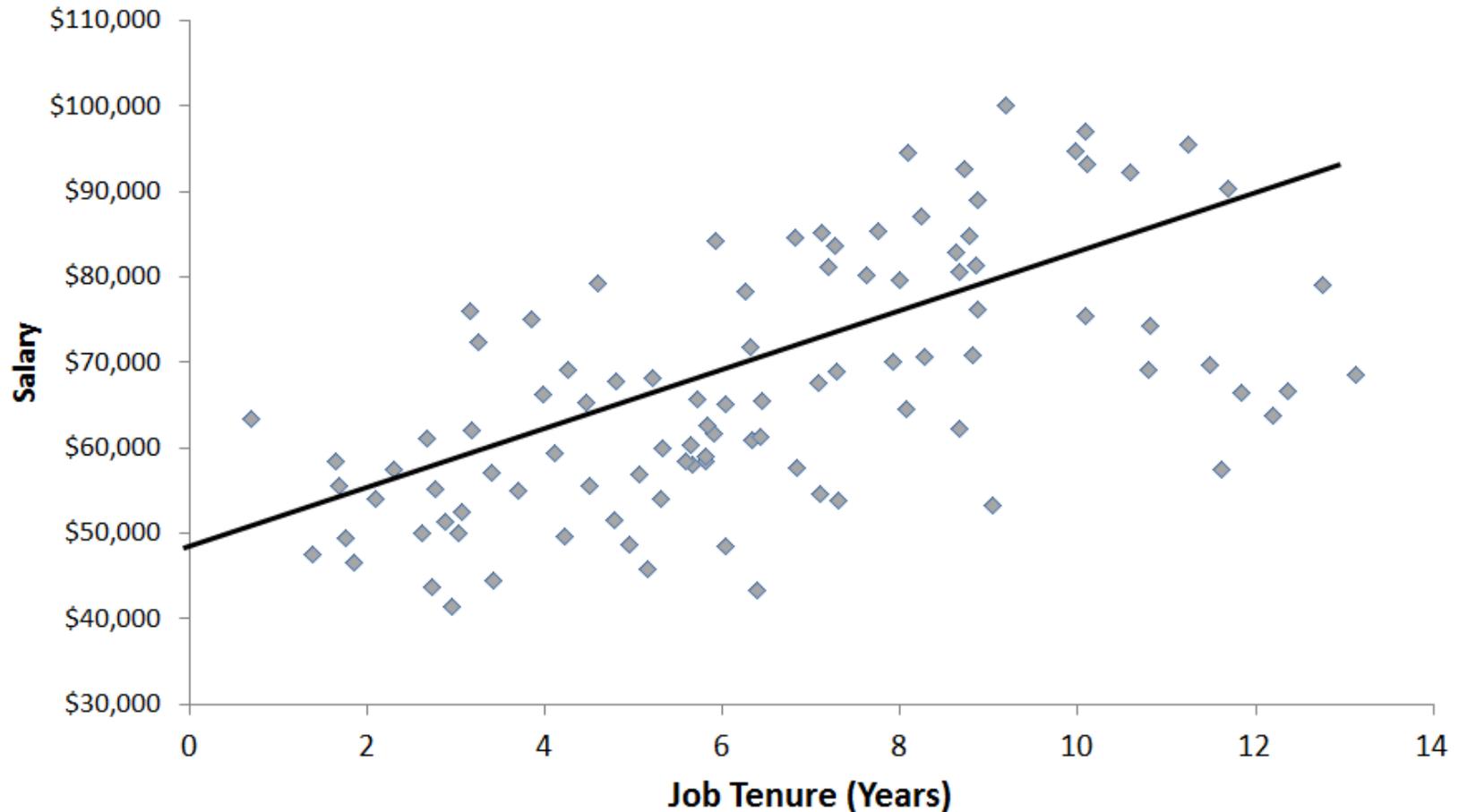
Statistical vs. Practical Significance

- **Statistical Significance vs. Practical Significance**
 - Women paid 30% less than men but not statistically significant
 - Numerically large dollars and practically significant
 - Should we worry?

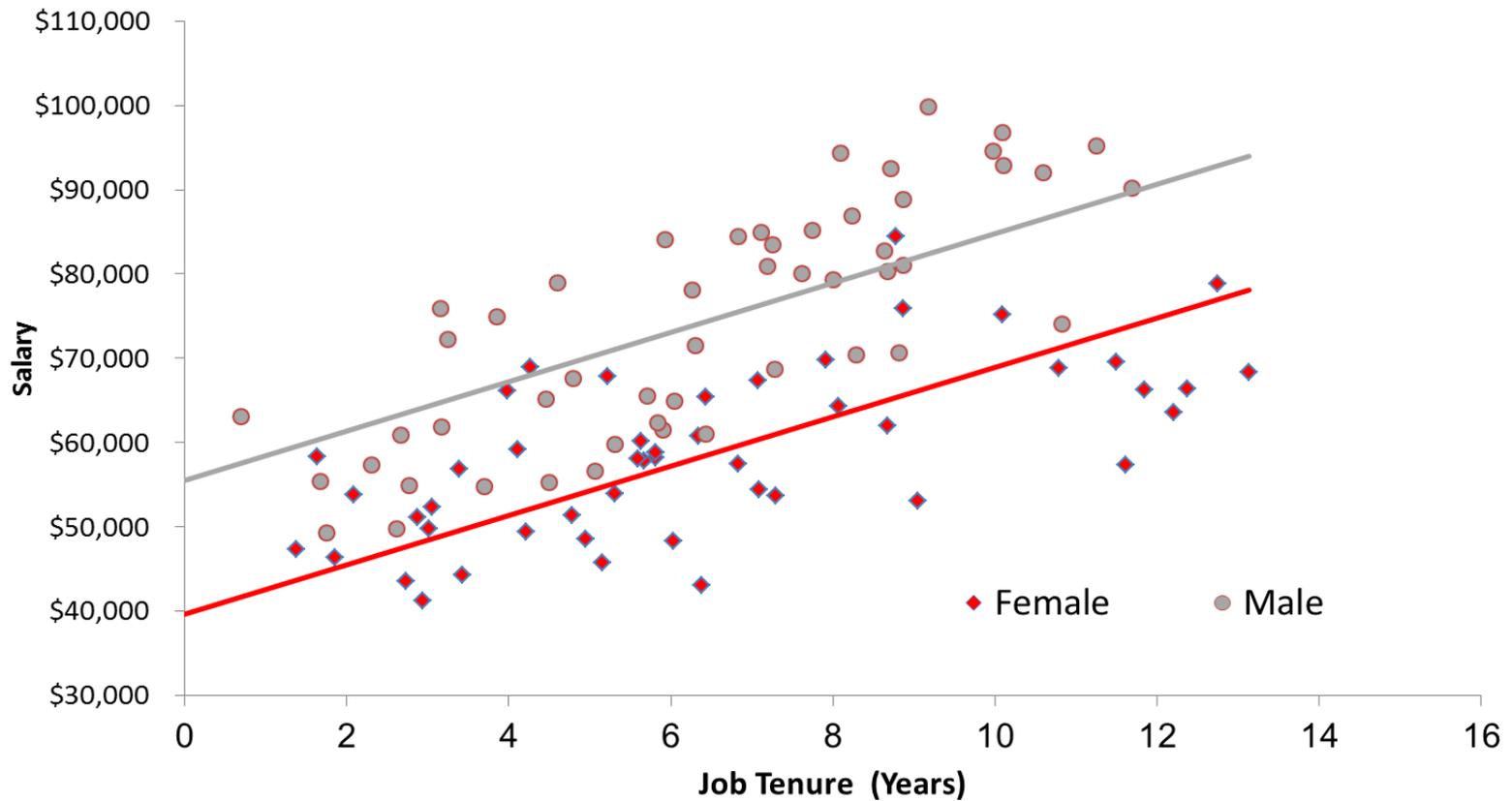
- **Women paid 0.1% less than men and statistically significant**
 - Do we have a real problem in a practical sense?
 - Do we have to see 0% difference?



Regression Fits the "Best" Line to the Data Pay and Job Tenure for a Single Job

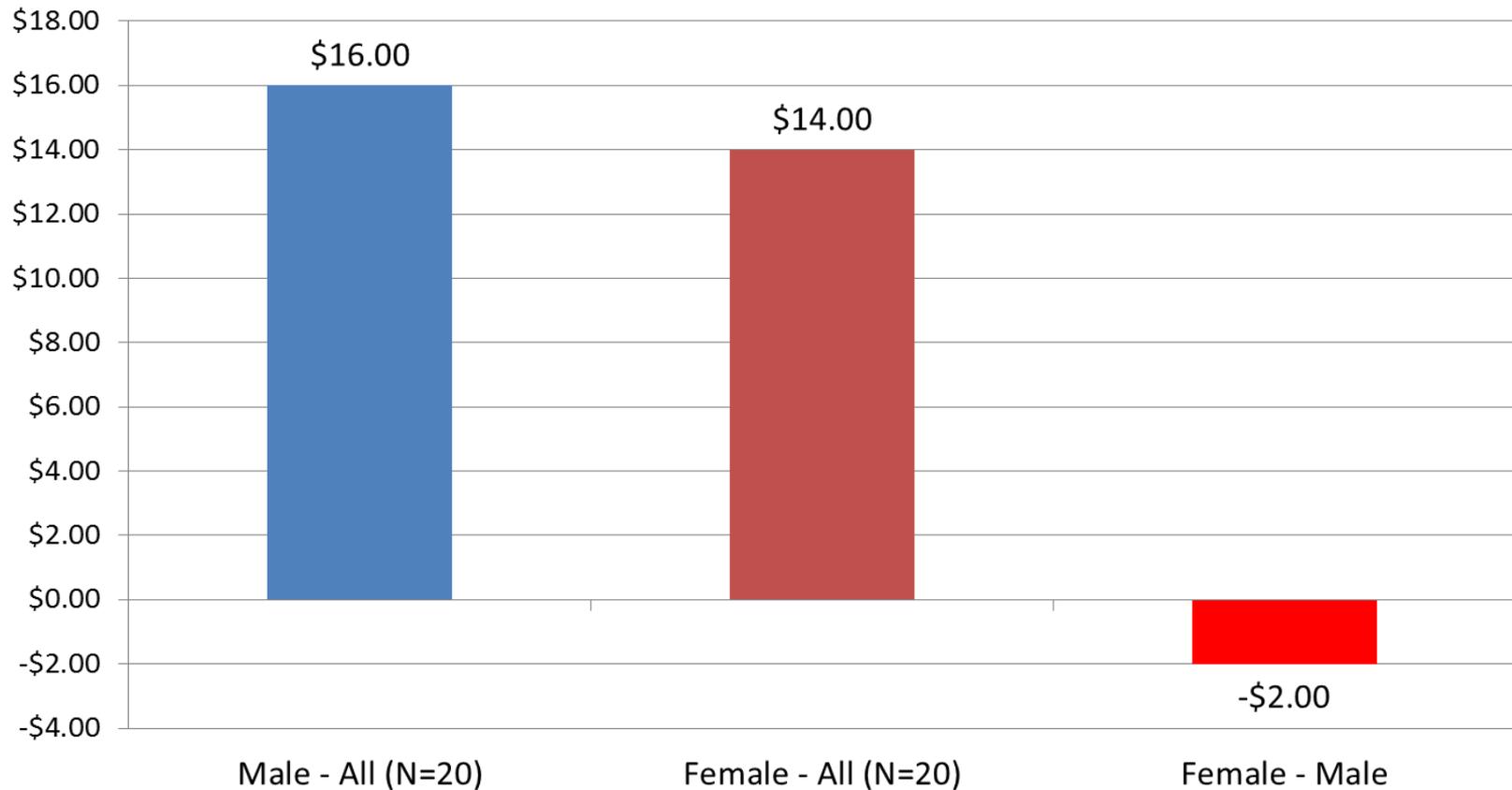


Regression: Gender Salary Gap



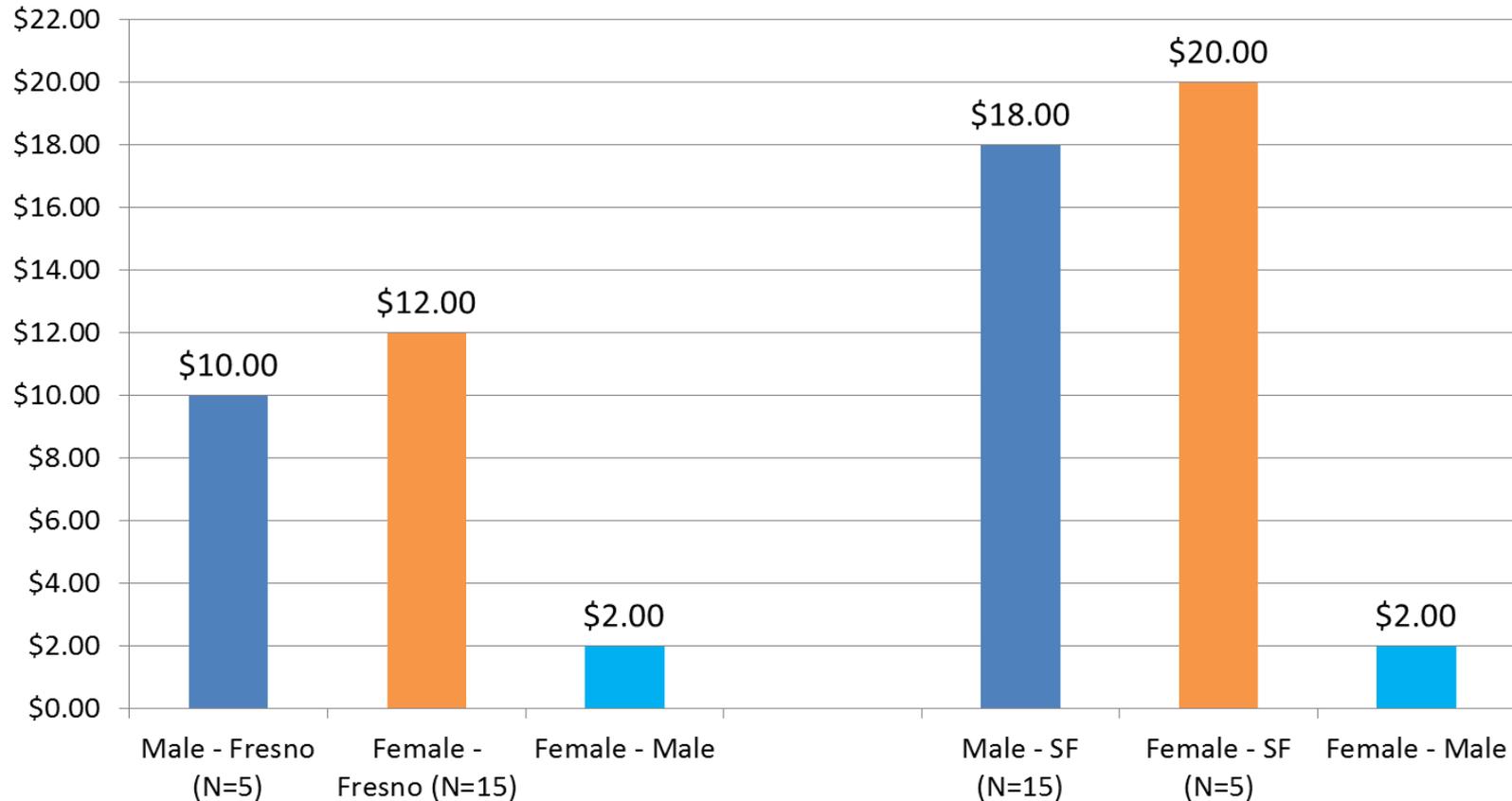
A Firm with Two Locations - Unfair?

Pay Rate for All Employees - San Francisco and Fresno Combined



A Firm with Two Locations - Fair?

Pay Rate for All Employees - San Francisco and Fresno Separately



Example of Pay Audit Summary

Analysis of Annual Salary

As of Snapshot Date

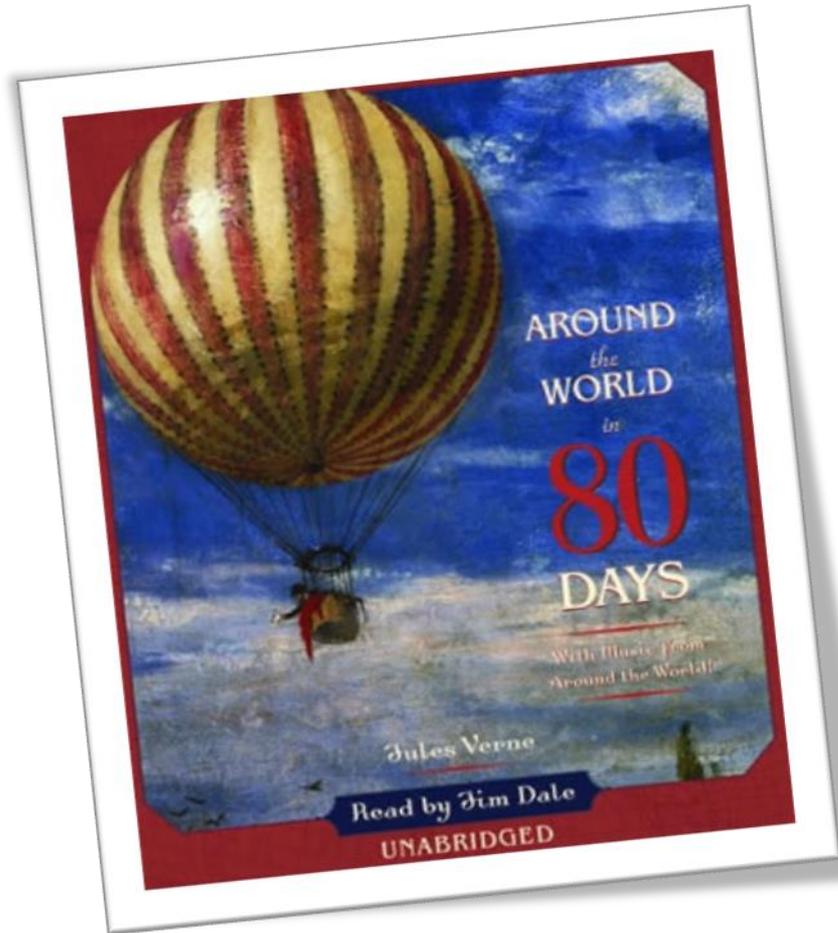
Job Group	Total	Females	Males	% Female	<i>Model 1: Raw Difference</i>		<i>Model 2: Add Experience to Model 1</i>		<i>Model 3: Add Job Title to Model 2</i>	
					Coeff	SD	Coeff	SD	Coeff	SD
A	1	1		100.0%						
B	199	81	118	40.7%	-13.1%	-3.10	-8.2%	-2.20	-5.6%	-1.56
C	50	29	21	58.0%	-6.4%	-0.93	-0.4%	-0.05	-4.1%	-0.51
D	1	1		100.0%						
Overall	251	112	139	44.6%	-11.7%	-3.22	-6.9%	-2.11	-5.2%	-1.61

International Developments



Other Countries with Pay Equity Laws

- Austria
- Denmark
- Finland
- France
- Italy
- Norway
- Portugal
- Sweden
- UK
- Australia
- Canada



UK Equality Act of 2010 (amended 2017)



- Employers with 250 + UK employees must publish by April 4th 2018 and each year thereafter on the employer's and a government website:
 - Mean/median gender pay gap in hourly pay
 - Mean/median bonus gender pay gap
 - Percentage of males and females receiving a bonus payment
 - Percentage of males and females in pay quartile

Pay means (non-exhaustive definition): basic pay, paid leave, area allowances, shift premium pay, bonus pay and other pay (including other types of allowances).

Bonus means payments received and earned in relation to profit sharing, productivity, performance and other bonus or incentive pay, piecework and commission, long term incentive plans or schemes.

Pay and bonus must be measured on April 5th of the previous year.

UK Gender Pay Gap

- Published on website in English, easily accessible by employees and public, remain for at least three years (to aid comparison).
- Gender pay gap information must be accompanied by a written statement confirming information is accurate.
- Voluntary accompanying narrative - opportunity to explain discrepancies and what remedial action is being taken.
- Gender pay gap is not the same as unequal pay...However, gender pay gap statistics are likely to be disclosable for the purposes of equal pay claims.
- More about social pressure than enforcement - compliance notices, no financial penalties.



UK Monitoring

- Government proposing to:
 - Run periodic checks to assess for non-compliance;
 - Produce tables by sector of employers' reported gender pay gaps;
- Highlight and identify employers publishing full explanatory information;
- Possibly publicise the identity of employers known not to have complied.

Pay Gap based on 5 April snapshot

The UK-wide pay gap is 5.6% at the mean and 3.3% at the median, which are significantly narrower than the gender pay gap cited by the Office of National Statistics (ONS) of 18.1%.



**Mean: a comparison of the average pay for a woman and the average pay for a man.*

***Median: a comparison of the 'middle' pay for a woman if all pay amounts were sorted from low to high and the 'middle' pay for a man. The median is less impacted by outlier numbers (very high or very low) than the mean.*

The quartile analysis below shows that females, who represent 25% of our total UK population, are under-represented at National Grid and in our industry more generally and both we and our industry need to continue our work to recruit more women.

Proportion of male and female employees by quartile pay

	Male	Female
Upper quartile	79.3%	20.7%
Upper middle quartile	73.2%	26.8%
Lower middle quartile	75.9%	24.1%
Lower quartile	72.1%	27.9%
Overall	75.1%	24.9%

Other European Countries



Other European Countries

- Differences in average gross hourly wage between men and women across the economy. The average in the EU is 16.7 %.

Country	Gender Pay Gap 2016
Italy	6.1%
Sweden	13.8%
Portugal	14.9%
France	15.5%
Denmark	16%
Finland	18.4%
UK	20.9%
Austria	22.2%

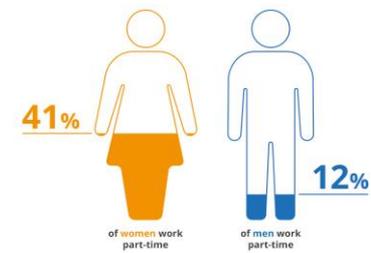


Other European Countries



- **Austria** is one of the EU member states with the highest gender pay gap. The National Action Plan for Gender Equality in the Labour Market includes a compulsory requirement for companies to publish detailed equal pay reports for companies with more than 150 employees.
- **Denmark, Norway, Sweden** The gender pay gap has diminished in all Nordic countries in recent years and is now among the lowest levels in Europe. In Sweden, the Discrimination Act 2009 requires employers to carry out a pay survey every three years in order to detect, remedy, and prevent unjustified differences between women's and men's pay, terms and conditions of employment, and draw up an equal pay action plan (if employing 25 or more workers).
- **Italy, France, Portugal**: In Italy, the female employment rate is low which is reflected in its lower than average pay gap. In France, the 2006 Act on Equal Pay between Women and Men makes provision for compulsory collective bargaining on gender equality and requires companies to report on salaries and plans to close the gender pay gap. In Portugal studies indicate that the gender pay gap decrease over the last two decades is very slow.

Other European Countries



Some of the factors that contribute to the gender pay gap in Europe

- Management and supervisory positions are overwhelmingly held by men. Within each sector men are more often promoted than women, and paid better as a consequence. This trend culminates at the very top, where amongst CEOs less than 4 % are women.
- Women take charge of important unpaid tasks, such as household work and caring for children or relatives on a far larger scale than men do. Career interruptions not only influence hourly pay, but also impact future earnings and pensions.
- Segregation in education and in the labour market; the "Pink" Ghetto.
- Pay discrimination, while illegal, continues to contribute to the gender pay gap.

Canada and Australia



Canada

- Pay equity is a human right found in section 11 of the *Canadian Human Rights Act*. It is discriminatory for an employer to "establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."
- Canada has moved down the World Economic Forum's global gender gap rankings, to 35th place, from 19th place two years earlier. It is behind other countries in requiring gender pay gap disclosure. Steering committees are lobbying for transparency.



Australia

- Workplace Gender Equality Act 2012 requires non-public sector employers with 100 or more staff (relevant employers) to submit a report to the Workplace Gender Equality Agency between 1 April and 31 May each year for the preceding 12 month period (1 April – 31 March reporting period).

Want to learn more?

Read my recent article:

Addressing Pay Equity In The US And Around The World
October 19, 2017
Law360

Even though the U.S. Equal Pay Act is over 50 years old, the U.S. census released in September 2017 still finds that women make 80.5 cents to the dollar that men make. States and cities are increasingly adopting pay equity laws in an effort to close pay gaps not just for women, but also in some cases for racial minorities and other historically marginalized people.

Read the full article at: www.dentons.com/cynthia-jackson

Questions and Answers

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