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HR Legal & Compliance Excellence

151 YEARS TO CLOSE THE GENDER GAP IN NORTH AMERICA?

Only 21.7% of corporate managing board members are women!

- Karen F. Cornwell

The State of Pay Equity 2020

State of the Industry Research

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EDITOR'S NOTE

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With a rising tide of high profile lawsuits targeting major employers, most notably in the U.S., entailing all the bad publicity and financial liability, with politicians and many notable celebs speaking out against the gender pay gap, discussing pay equity is the need of the hour.

This month's issue of HR Legal & Compliance Excellence is a themed edition on '**Pay Equity**', where we bring you several hand-picked articles on the topic.

A recent Global Gender Gap report indicates that achieving gender parity will require 151 years in North America.

According to the report, the global gender gap will close in just 99.5 years. This means North America is lagging way behind.

The question we should really be asking ourselves in the US is why are we allowing this to happen? Read this month's cover article ***151 Years To Close The Gender Gap In North America?*** by Karen F. Cornwell to know the answer and more.

As per a recent ruling, workers don't need to clear a heightened legal standard in order to pursue pay equity claims, setting the stage for a possible increase in the number of lawsuits seeking recovery for alleged unfair wages in 2020 and beyond. The analysis applied by the 2nd Circuit Court of Appeals' December 6 decision in *Lenzi v. Systemax, Inc.* could be applied by other courts across the country, creating a new outlet for workers to claim pay bias. What does this mean for employers? Catch up with Seth Kaufman's *article* ***Federal Appeals Court Lowers Bar To Advance Pay Equity Claims*** to know more.

Grooming policies are common in the workplace and employers assert they are necessary to maintain a professional working environment. Within the last decade, however, grooming policies, namely provisions banning certain hairstyles, have been highly scrutinized as a result of the disproportionate effect on black employees. To understand the pointers on the grooming policies, read Traci Jennings' article ***Hair Discrimination In The Workplace.***

In 2019, there were many developments in the employment law arena that will significantly impact the healthcare industry. Dawn M. Irizarry and Carolina A. Schwalbach's article ***Healthcare's Hurdles In 2020 Employment Law*** highlights key issues that healthcare facilities need to keep in mind in 2020.

Also included this month is an exclusive research from HR.com's HR Research Institute that will help you understand the degree to which organizations are embracing pay equity--particularly with respect to offering compensation that is competitive, measurable, ethical and defendable.

This is not all! This month's issue of ***HR Legal & Compliance Excellence*** is packed with top trending topics in the legal and compliance arena, and infused with information on new policies and laws to arm you and your employees to stay compliant and safe.

Have a say?
Write to the Editor.

Debbie Mcgrath
Publisher, HR.com

Raksha Sanjay Nag
Editor, HR Legal & Compliance Excellence

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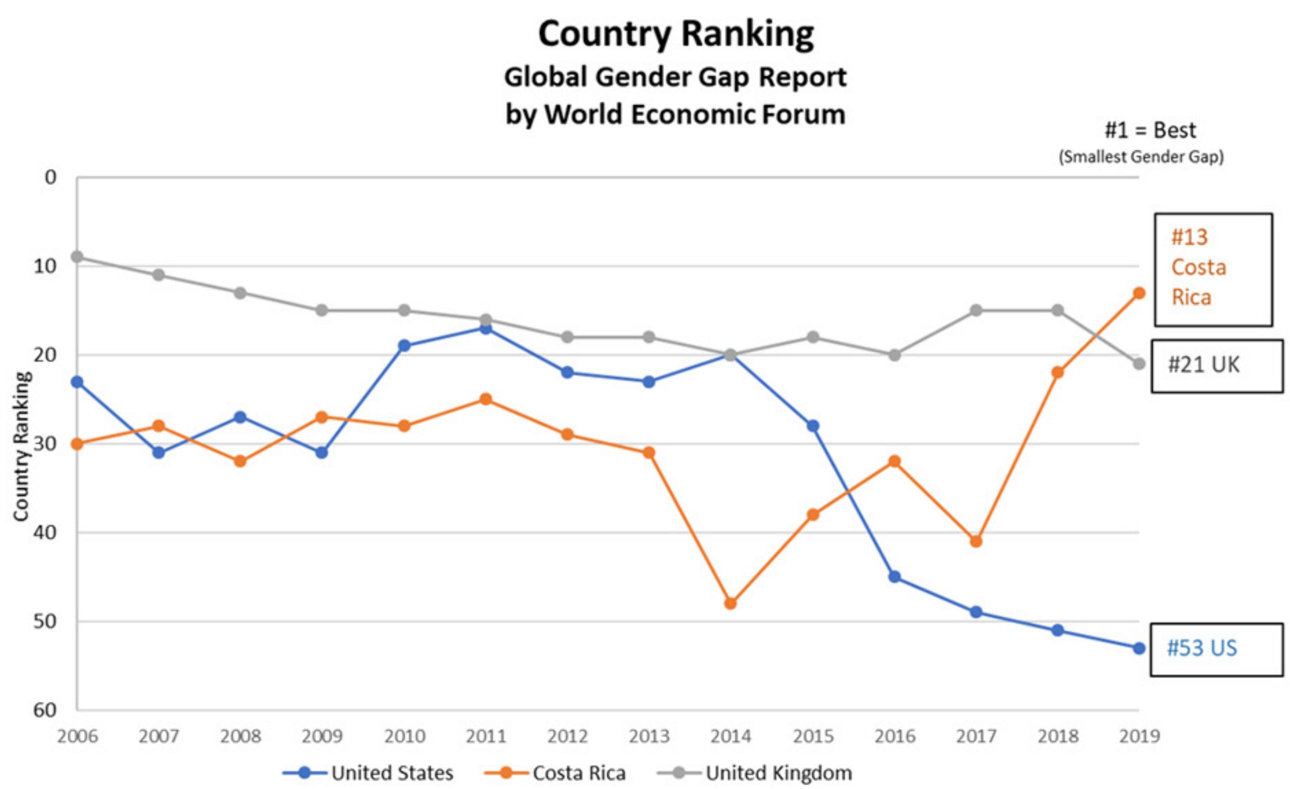
151 Years To Close The Gender Gap In North America?

Only 21.7% of corporate managing board members are women!

By Karen F. Cornwell

The latest Global Gender Gap report indicates that achieving gender parity will require 151 years in North America. 151 years? Yes, really, 151 years.

This report has been produced annually since 2006 by the World Economic Forum. If you factor in all the countries that have been tracked continuously in the report, the global gender gap will close in just 99.5 years. Guess what that means? North America is lagging way behind. Progress in North America has completely stalled! Just to let you know how others are doing Western Europe should be able to close their gap in just 54 years.



Global Gender Gap Reports from 2006-2020. World Economic Forum.

When I ask people where they think the US is in terms of the gender gap, most people say, "We must be up there, the top 10 for sure!" Try #53, we dropped two positions from last year. Let's look at a comparison of how just a few countries have changed over time. The US had been faring all right until 2011, when the decline started. Then, since 2014, we seem to have been in a free fall dropping from a rank of #20 all the way down to #53.

Contrast this with the performance of the United Kingdom (UK). They have only dropped from #9 to #21 over the past 14 years. If you want to see what can be done in terms of improvement, take a look at the performance of a country such as Costa Rica. They have gone from a ranking of #49 to a ranking of #13 over a short 5-year span.

Now, of course everyone wants to know the top 10 countries. Here they are.

Rank	Country
1	Iceland
2	Norway
3	Finland
4	Sweden
5	Nicaragua
6	New Zealand
7	Ireland
8	Spain
9	Rwanda
10	Germany

However, the question we should really be asking ourselves in the US is why are we allowing this to happen?

If you dig a bit into the data, a couple of things become evident. There are four sub-indices that are tracked, which compose the composite gender gap for each country:

- Health and Survival
- Educational Attainment
- Economic Participation and the Prosperity
- Political Empowerment

Two of these indices we need to worry about. The US and many other developed countries now have great scores on Health and Survival and Educational Attainment.

Where we come up lacking is in the Economic Participation and the Prosperity and Political Empowerment indices.

The truly sad part of this, is the US score on Economic Participation and Prosperity has been exactly the same since 2006. Reflecting absolutely no progress at all for the last 13 years! One of the biggest contributors to this gap is the lack of equality in wages and overall income gap.

"American women still struggle to enter the very top business positions: only 21.7% of corporate managing board members are women"

"In no country in the world is the amount of time spent by men on unpaid work (mainly domestic and volunteer work) equal to that of women; and in many countries, women still spend multiple-folds as much time than men on these activities. Even in countries where this ratio is lowest (i.e. Norway or the United States) women spend almost twice as much time as men on unpaid domestic work."

The Political Empowerment indices are low because women are under-represented in political leadership roles.

"In Canada and the United States, women representation in congress hovers around 25%, approximately 10% below Western Europe's average."

"Further, considering head of states over the past 50 years, in 85 of the 153 countries covered by this report there has never been a woman in charge. This accounts for 56% of the countries covered, and, notably, includes emerging and advanced economies such as Italy, Japan, Mexico, the Netherlands, Russian Federation, South Africa, Spain, Sweden and the United States."

So, what do we need to do?

- Men need to pick up their share of the unpaid domestic and volunteer work
- Companies must close the gender wage gap and promote women into leadership positions, especially at the top echelons
- We need to elect more women to office, especially at the higher levels.

"The [Global Gender Gap] report highlights the message to policy-makers that countries that want to remain competitive and inclusive will need to make gender equality a critical part of their nation's human capital development."

Assuming we want to make America as prosperous as possible, we better get on this NOW! We cannot wait 151 years to achieve gender parity in North America!

Data for this article was extracted from The Global Gender Gap Reports prepared by the World Economic Forum (link takes you to the latest 2020 report).

• • •

Karen F Cornwell is the Founder of AttunoVation. Karen has spent the majority of her career in high tech working in Engineering, Systems, Account Management, Business Development, Product Management, R&D, Sales Training, Product Development, and Marketing. Her lifelong quest to improve the acceptance and utilization of a diverse workforce continues with her current work to offer change management programs to high-tech companies that want to maximize their productivity and innovation by leveraging the differences between genders and making their workplaces inclusive with strong employee engagement.

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When Labor Shortage Is A Thing In The Past

Podcast with guest James Sinclair on Labor Shortage solutions

By Patty Fletcher and James Sinclair

Ever wonder how we can make labor shortages a thing of the past? Well, treating your employees as customers or advocates first would be the first step in the right direction. So, how do you retain the relationship with them?

I asked my good friend James Sinclair to sit down and share his thoughts about taking care of former employees to solve the problem with the labor shortage. He is an in-demand strategist and speaker within the HR innovation and change management fields and the co-founder and CEO of EnterpriseAlumni.

Here are some of the highlights of our conversation:

You're always talking about returnships, alumni and boomerangs -- what are you talking about?

People hear about alumni (i.e. Accenture alumni, McKinsey alumni), but don't really understand what it means. Some people think it's just essentially a little coffee shop online for people to high-five and reminisce about the good old days. The reality is that the leading organizations are recognizing they're spending a tremendous investment on recruiting. And that spending is even more than what they're investing in keeping those people (ie. employee experience, quality of life, training, learning). Then they leave and they're like, "well good luck then with the rest of your life," while the innovative companies are asking, "why wouldn't we maintain a relationship?" Best possible outcome is they leave, get new skills, go to a new company, make new friends, get a new perspective, get the diversity of opinion, and they're gonna bring that back to the company they once worked for and execute that.

I think that's what we're seeing - the market is suddenly realizing this.

When it comes to the money piece, what's HR's role in that and are they movers in this?

I think HR is taking a very financial-centric role of recognizing that. There are a lot of people who need that business case of "show me the money" of where the value is. So when someone chooses to come back, not only is their time to productivity better, their effectiveness is better because they've decided to, with everything they know about your company, come back and bring that in.

There are the advocates out there. There's the spreading of our message, just more people out there kind of preaching that we're a great company. We start to see that impact referrals. Instead of shipping them through the careers website, what about making that introduction?

We're starting to see HR really take an intelligent kind of perspective that we need to rethink everything from step one.

When I think about how it used to be, when someone leaves to go move somewhere else, it feels like a divorce; it's like all ties are broken. Consider that just part of another onboarding process where there are no hurt feelings, the relationship just might look different for a little time being.

How do we even get in touch with these alumni? How do we know if they're gonna take our call if we reach back out to them? What does that look like in this new world?

Your alumni is already self-congregating. Whether that is going for beers and playing golf or in large groups on LinkedIn. Your alumni wants this, and if you provide an easy path for them to come back or to gain a meaningful experience with your organization, they would want to.

It's about saying "Hey, there should be a relationship for life and maybe as part of that relationship you might come back and work for us?" Maybe part of that relationship is they refer someone; maybe part of that relationship is we can help you learn or extend the offer and we can provide you value.

I think that, as people move quicker through their cycles of employment, you have to maintain that investment for life.

You did talk about technology, can you talk a little bit about this whole concept. Is the employee experience part of the Alumni experience? Does that fall under? How do we use technology?

They've chosen to leave or we chose for them to leave. The reality is, you are going to find yourself in a competitively difficult situation going forward because modern companies who are reimagining the employee experience are saying "Actually, we have to look at every touchpoint and every value point we can have."

You may also be an employee, a past employee, a recruit, a vendor, a partner, or any of those things, but you are a customer/advocate before you are anything else. So I think that's a really interesting way of considering the conversation. Just because you're employed in the company, doesn't change your position to be able to drive business, do business, or refer business.

What we see from companies is like washing your hands after you go to the bathroom: you know the value, you know you should absolutely do it, but not everybody does it. Sometimes that is how alumni is viewed. There is a lot of concern about whether they're gonna say something bad about you, so better if they say it in your platform rather than publicly. There are also the issues of what moderation, controls, and software do.

I think a good system shouldn't be led by resources but should be led by technology. Essentially the resources can focus on strategy and execution and value versus administration and Excel spreadsheets.

When I think about the Alumni status quo, obviously what you're saying is we need to disrupt how we believe that alumni fit in what we do about it in keeping them under our umbrella. Can you talk a little bit more about what it means? This is something totally different. What are some companies doing things a little differently to still keep people in the family even when they've left the company?

You could have five generations of people in there - everyone from an intern to a retiree, and every one of those people is going to have a different experience or different view of what a meaningful experience means. So alumni 3.0 to us is creating contextual meaningful valuable relationships with the people and making sure each experience is slightly different.

You're starting to see companies that actually think that this is more than "Can I get more people to recruit?" - this is a broader conversation. So it does require HR to kind of get out of their own bubble a little bit and not think about their own performance, They can get trapped with questions like: “How many recruits am I going to get?”, “When am I going to get them?”, and “How quickly?”.

The platform delivers for many of our customers between 400 to 4,000 recruits a year, but there’s this wider conversation of actually thinking about “What is the value of delivering this meaningful experience?” and “What is the value of making sure?”.

You have to move beyond that and this is just right on! As we end this, I would love some kind of pragmatic steps for the folks watching and listening in, what’s a good call to action when it comes to having alumni be part of your whole talent strategy and practices?

First, this isn’t a drain on resources; this is part of the fight. You’ve already made investments into your HR infrastructure to your company-wide infrastructure. This is the last step of the employee experience, and the goodbye step is no longer the goodbye; it’s “See you later.”

So, the parting message to everyone is it’s not difficult, you just have to start somewhere, and I think the value can easily be qualified by whatever you think the value is. It’s not on the organization to say, “This is what’s important to you.”

Let success be the momentum of growth. Let success in the project be the driver of growth. Either the product does what it says on the tin and crushes it for you or it doesn’t. What matters is being a good partner to them, not just a good software solution.

One thing that James talked about that really hit me is that we’re starting to understand that we need to move away from a mindset of cradle to grave. The average CHRO is only in place for 18 to 36 months. People don’t stay in companies. Rare are people who are here forever and yet our practices don’t reflect that; we only have them for a short period of time. So the experience, unfortunately, reflects that and we need to change that view from a start and end to a continuous process that takes different forms. James just gave me 15,000 things to think about!

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Patty Fletcher
Chief Equity Advocate & HR Disrupter, HR.com

James Sinclair
Co-Founder/CEO, EnterpriseAlumni

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Equity Theory: Helping Your Employees Feel More Fairly Paid

Improving perceptions of equity

By Simon Kilpatrick

On the blog recently, I wrote about the importance of paying employees properly – properly meaning *accurately.* So this week, I thought we could explore the importance of paying employees properly – but this time, meaning *fairly.*

To help tackle this subject, I've been speaking again to business psychologist Simon Kilpatrick, founder of Intrinsic Links. And it turns out that there's actually a name for how fairly employees feel they're being paid.

It's called "Equity Theory".

What Is Equity Theory?

Equity theory (Adams, 1965) is all about whether or not employees feel they are being paid fairly.

"It's important to note that this is nothing to do with whether you are or are not paying them fairly" explains Simon. "It's about whether or not they *feel* they are being paid fairly. It's a matter of perception."

Simon tells me that the theory is drawn from the principle of social comparison, and is based on the perception of fair treatment or justice. It suggests that how hard a person is willing to work, is actually a function of comparisons with the efforts of others.

How People React to Perceived Pay Inequality

Simon says that while all people are different, equity theory outlines three distinct reactions to perceived pay equality/inequality:

1. **Pay equity.** Employee feels satisfied.
2. **Overpayment inequity.** Employee tends to feel lucky, guilty, or both.
3. **Underpayment inequity.** Employee feels angry and frustrated.

"Something you might notice" says Simon "is that many employees take action to 'balance the books'.

This isn't necessarily a conscious choice. However, somebody feeling guilty because they believe they are overpaid, may begin to turn up early, work late, and put more energy into projects. They feel like they must make up the difference, so that they feel their salary is justified."

Underpayment Inequity Can Lead to Bad Behavior

Just like an employee who feels overpaid may put in extra work to balance the books, Simon tells me that an employee who feels underpaid may find creative ways to 'get their fair share'. This could take many forms, such as:

- Putting in less effort during working hours
- Cutting down working time by leaving early, arriving late & calling in sick
- Stealing items from work

Simon says that the stealing side of things is often as simple as pads of paper from the stationary cupboard. Yes, petty theft at work can often be the result of an employee who feels underpaid, subconsciously trying to balance the books!

Of course, feeling unfairly paid doesn't stand up as a defense for stealing from work. It is wrong, illegal, and could lead to dismissal and/or prosecution.

How Employees Calculate Their Perception of Payment Equity

How each employee determines whether or not their pay is fair, will vary from person to person. However, the equity theory suggests that judgements tend to be made, in some form or another, based on a comparison against others. This comparison could be made against colleagues in similar roles, or even industry averages.

"The public sector has fewer problems with this, because there are national guidelines and pay scales. Private sector is a little bit different, because it's less regulated. The law says you have to pay minimum wage, and there are guidelines set by industry averages, but beyond this, it's a free for all. So people tend to judge how fairly they are being paid by comparing themselves with their peers."

Of course, an employee's perception of what is fair, isn't always accurate. It is often subjective, imprecise, and at times, even based on rumors.

Advice to Management on Improving Perceptions of Equity

It starts with actually making sure you're paying employees fairly, of course. However, because their perceptions are based on other factors – not just what you consider fair – there are other things you can do.

"Good line management can be a good way to 'even the equity,'" explains Simon. "Make sure performance reviews are done in the right way, and show clearly how pay is being linked to performance. Also, if you pay a little more than industry average, then don't be afraid to point this out."

In summary, Simon gives the following advice to management:

- Employees need to feel they are fairly dealt with
- Feelings of inequity leads to resentment and tension
- Employees compare their pay with their peers
- This is not always reliable – it can be imprecise and subjective
- Management should circulate accurate information about rewards
- Management should link pay with performance

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Simon Kilpatrick is a Business Psychologist, and Founder of Intrinsic Links. He is also a lecturer of psychology at Leeds Beckett University. His company helps to teach positive psychology and management techniques that build great teams and top performers

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Healthcare's Hurdles In 2020 Employment Law

Tips to be better positioned to avoid potential costly litigation

By **Dawn M. Irizarry** and **Carolina A. Schwalbach**

In 2019, there were many developments in the employment law arena that will significantly impact the healthcare industry. Below is a summary of key issues that healthcare facilities need to keep in mind going into 2020.

- **Efforts to Curb Workplace Violence**. Healthcare workers continue to be at risk for incidents of workplace violence with 75% of the estimated annual 25,000 incidents of workplace assault occurring in the healthcare industry. Therefore, it is no surprise that several states have introduced bills to address workplace violence in healthcare settings. For instance, in April 2018, California became the first state to require that hospitals and other specified medical providers provide training to its employees regarding workplace violence prevention. Similarly, in 2019, a bill was enacted increasing the penalties for assaults committed inside healthcare facilities. Given the growing need for such programs, healthcare employers throughout the nation should be developing a comprehensive workplace violence prevention plan and/or reviewing and revising existing plans.

- **Mandatory Vaccinations/Religious Accommodations**. Healthcare employers continue to maneuver through the obligation to provide a safe environment for patient care (by mandating its staff to get the influenza ("flu") shot) and accommodating an employee's sincerely held religious beliefs under Title VII and similar state laws. In 2019, the EEOC settled a case against a Michigan hospital for $74,418, where an applicant's offer of employment was revoked after she refused to get the flu shot based on her Christian beliefs, but nevertheless offered to wear a face mask when performing her job duties. There, the hospital had a policy that allowed for the use of face masks where the employee suffered from a medical condition that prevented him/her from getting the flu shot. While fact specific, this case illustrates the need for healthcare employers to review these types of requests on a case by case basis and to engage in the interactive process in an effort to reasonably accommodate such requests when made.
- **Preventing Harassment.** In the wake of the #MeToo movement, California lawmakers continue to make sweeping changes to protect employees from harassment and discrimination in the workplace. For example, California employers with five or more employees have until January 2021 to provide one hour of sexual harassment training and education to all nonsupervisory employees (in addition to two hours of training to supervisory personnel). Healthcare providers, particularly those in high-stress environments such as the surgical field, are often faced with harassment charges by current or former employees. If your practice is not currently in compliance, 2020 is the year to make sure that you are.

  The California legislature has also extended an employee's deadline to file an administrative charge relating to alleged discrimination or harassment from one to three years. Similarly, starting in 2020, "no rehire" provisions will no longer be allowed in employment settlement agreements unless the affected employee has been found to have committed sexual harassment or assault.
- **Implicit Bias Training.** Several studies have shown that implicit bias (the subconscious associations made on the basis of irrelevant characteristics such as race or gender) has an impact on medical services. As a result, California law mandates that, by January 1, 2022, all continuing education courses for physician and surgeons must include lessons on implicit bias in medical treatment. Similar requirements are in place for nurses and physician assistants, who must comply by January 1, 2023. This law, while not employment related, may curb comments and other offensive behavior in the workplace that could form the basis of a discrimination/harassment claim under state and federal laws.
- **Independent Contractor Issues.** Independent contractor misclassification has been a "hot topic" in 2019 as employers try to understand the consequences of the California Supreme Court's decision in *Dynamex* (codified by AB 5). Under the *Dynamex* test, California employers (with limited exceptions) must meet the "ABC" test if they intend to classify someone as an independent contractor. Specifically, the person must be: (1) free from the control and direction of the hiring entity; (2) contracted to perform work that is outside the usual course of the hiring entity's business; and (3) customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. While AB 5 does exempt physicians, surgeons, dentists, podiatrists, and psychologists from the *Dynamex* test, it does ***not*** exempt nurse practitioners, nurses, medical assistants, medical technicians, pharmacists, occupational, respiratory, physical and speech therapists, and other workers typically employed in the healthcare industry. As these professionals are not exempt from the ABC test, healthcare employers should be reviewing the classification of these employees with knowledgeable counsel.
- **Arbitration Agreements**. Many healthcare organizations in California currently have mandatory arbitration agreements (containing class action waivers) with their employees; however, starting in 2020, such "mandatory" agreements as a condition of employment will no

longer be allowed unless the employer can show that it is engaged in interstate commerce, as those are enforceable under the Federal Arbitration Act ("FAA"). This new law does not invalidate agreements that are entered into "voluntarily" (*i.e.*, where it is not a condition of employment) and/or prior to January 1, 2020. On December 6, 2019, consumer groups filed a lawsuit challenging whether AB 51 is unconstitutional because it is preempted by the FAA. While the courts address this issue, healthcare employers should work with counsel to determine whether their agreements are covered by the FAA, and to provide employees with an opportunity to review, consider, and ask questions before signing.

For those cases in arbitration, California employers must ensure that arbitration fees are paid within 30 days or risk being in material breach of the arbitration agreement and the case being moved back to state court.

- **Lactation Accommodations.** The California legislature has expanded an employer's obligation to lactating mothers. In 2020, employers will be required to provide a private space for lactation (not a bathroom), one that has access to a sink and refrigerator, and that is close to the employee's workspace. Failure to provide an employee with an appropriate space and/or break will result in penalties (one hour of pay per violation). Surgical practice groups with under 50 employees may, under certain circumstances, seek an exemption, but all employers must make a reasonable effort to provide a private location for an employee to express milk.
- **Ethnic Hairstyles.** In 2020, California law will prohibit discrimination because of historical traits associated with race, including hair texture and protective hairstyles, such as locks and braids. While surgical practices may have specific policies pertaining to grooming requirements, they should ensure that those policies do not prohibit such hairstyles.

Healthcare facilities that keep these issues in mind as we head into 2020 will be better positioned to avoid potential costly litigation.

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Dawn M. Irizarry is a Partner of Carothers DiSante & Freudenberger LLP. Dawn has substantial experience representing management in all phases of civil litigation involving claims of sexual harassment, unlawful discrimination, hostile work environment, retaliation, wrongful discharge, defamation, failure to accommodate and other employment-related disputes before federal and state courts, the United States Equal Employment Opportunity Commission, and state civil rights enforcement agencies, as well as through private mediation and binding arbitration.

Carolina A. Schwalbach is a Partner of Carothers DiSante & Freudenberger LLP. She practices employment litigation, defending employers against a wide scope of claims before California state and federal courts and administrative agencies. She also advises clients on compliance with California and federal wage and hour laws, always keeping overarching business goals in mind and engaging a practical approach.

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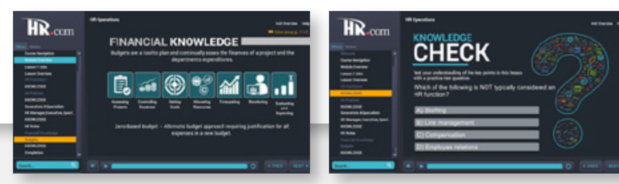

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The State of Pay Equity 2020

Advance your talent objectives by analysing and addressing pay equity issues

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RESEARCH REPORT SUMMARY

The State of Pay Equity 2020

Advance your talent objectives by analysing and addressing pay equity issues

Survey conducted by: hr.research INSTITUTE POWERED BY HR.COM

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The State of Pay Equity 2020

Advance your talent objectives by analysing and addressing pay equity issues

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Compensation can help organizations reach important goals such as employee engagement, higher productivity, healthier operations, and full legal and regulatory compliance.

By ensuring pay rates are equitable within their organizations, companies can often advance those corporate goals. However, attaining that state of equity can be a challenge given historical pay gaps among gender, ethnic and other groups that were traditionally viewed as “minorities.”

For the purpose of our report, we defined equitable pay/pay equity as follows:

It is comparable pay for work of equal or comparable value. It can also mean equal pay for employees who are similarly situated and have the same job function. The goal is to eliminate bias from the labor market, especially in the area of compensation and wages.

To better understand the degree to which organizations are embracing pay equity--particularly with respect to offering compensation that is competitive, measurable, ethical and defendable--HR.com's HR Research Institute conducted an extensive study and wrote a full report, ***The State of Pay Equity 2020***.

Key Findings

- Most participants rate pay equity at their organization as average or worse, and only a few cite pay equity as a top priority.
- Many companies are falling short when it comes to measuring and analyzing pay equity data.
- Most organizations are not getting pay equity correct from the start.
- Organizations are not involving all job levels into their plans and discussions for closing pay equity gaps.

Gender Pay Equity Today

On average, the World Economic Forum (WEF) found that women make just 63% of what men make for the same work and earn 50% less than men each year overall.

In fact, The 2020 Global Gender Gap Report,[1] released by the WEF, estimates that it will take 99.5 years for gender economic equality between men and women to be achieved around the world. At the current pace, for example, gender gaps can potentially be closed in 54 years in Western Europe, 59 years in Latin America and the Caribbean, 95 years in Sub-Saharan Africa, 107 years in Eastern Europe and Central Asia, 151 years in North America, and 163 years in East Asia and the Pacific.

Along with gender income disparity, U.S. women have remained vastly underrepresented in leadership positions in the country, according to the WEF. For example, the forum's report noted that, among U.S. companies, only 21.7% of corporate managing board members are women.

Several countries are putting laws into effect to make pay more transparent and equitable. Though some gaps are closing, there is still much work to be done across the globe. This HR Research Institute's report delves into the overall state of pay equity today and shares what organizations can do to improve equity.

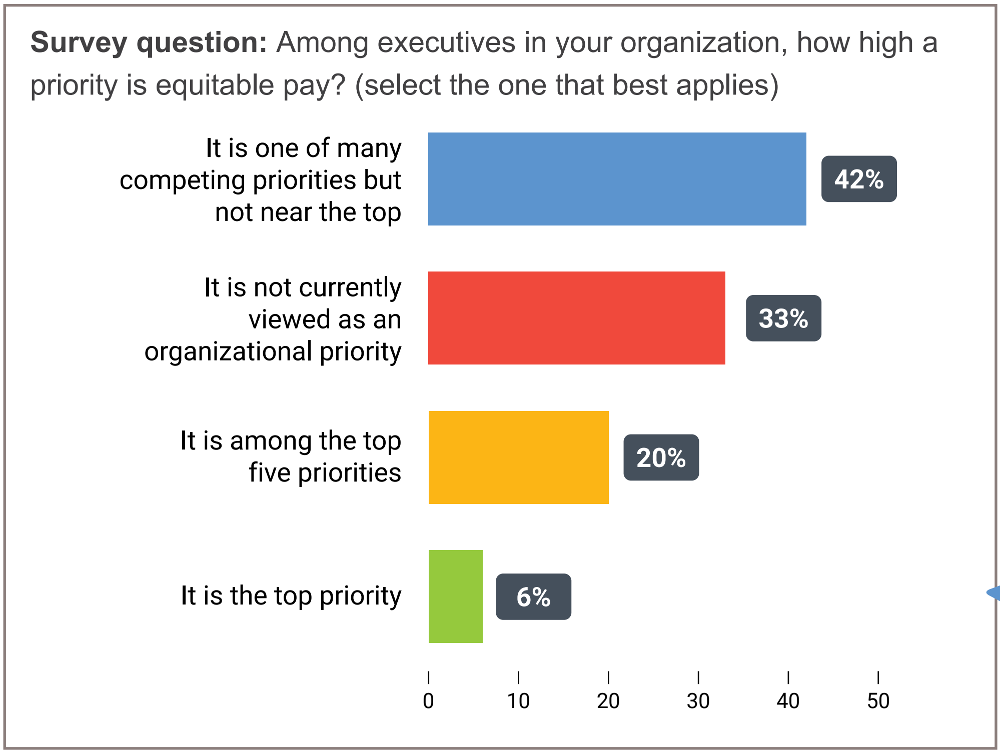
How Does HR Perceive Their Organization's Pay Equity Position?

Participants were asked to rate their organization in the area of pay equity based on their perceptions. Just 9% indicate pay equity is excellent and about another third (31%) say it is good, totaling 40% of participants.

Among organizations that do not already have equitable pay, about two thirds (64%) think pay will become more equitable over the next two years. Just 9% of participants, however, say pay will be *much* more equitable, while more than half (55%) think pay will be *somewhat* more equitable.

More than one-third (36%) report pay equity will not change because it is not a priority. This suggests that while many organizations think pay will change somewhat, most do not think pay will become much more equitable over the next two years.

When asked how high of a priority pay equity is to executives at their organization, just 6% says pay equity is a top priority, and only another one-fifth report it is among the top five priorities. The remaining three-quarters either say pay equity is one of the many competing priorities but not near the top (42%) or not an organizational priority at all (33%).



Few participants think pay equity is a top priority or among the top five

What Drives Pay Equity?

Three-fifths of HR professionals (59%) say their organizations focus on pay equity to *retain* the right talent and another half (53%) say they do so to *recruit* the right talent. A sense of fairness, reported by nearly half of participants (47%), probably matters to both retention and recruitment.

More than a third (38%) of HR professionals cite legal/regulatory considerations or requirements as one of the drivers of equitable pay. It's clear, therefore, compliance issues also help drive the need for equitable pay in many organizations.

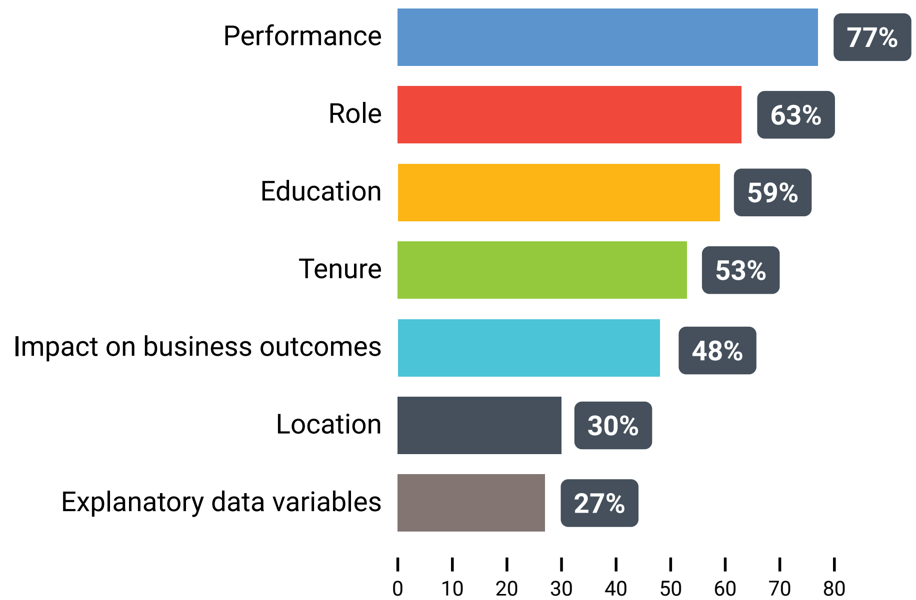
To What Extent Do Companies Use Data to Optimize Pay Equity?

Participants were asked to indicate the extent to which they agree that their organization analyzes and leverages data to increase pay equity and reduce pay gaps. Only two-fifths (42%) indicate that this is done to any extent, with 31% agreeing and another 11% strongly agreeing.

Among organizations that analyze and leverage data in an effort to increase pay equity, virtually all review at least one variable to help determine if there are pay gaps and what might be causing them. Among those that conduct such analyses, 77% include performance in their calculations. About two-thirds also look at the organizational roles. Many (59%) consider education and 53% consider tenure with the organization. Half consider business outcomes, maybe with an eye toward gaining more valid insights into performance.

Indeed, we believe that the notion that performance is usually correlated with pay may be an example of wishful thinking for some companies. After all, other HR.com studies show that many organizations are not measuring performance well. In fact, only about a third of HR professionals believe that the performance management system in their organizations "accurately portrays employee performance."[2] This represents a conundrum. If a few systems accurately portray performance, then how can most organizations make pay equitable?

Survey Question: What variables are included in your analysis of pay equity issues? (select all that apply)



Editor's Note: As possible responses, this question also contained the legally protected classifications of age, gender and race. Relatively few respondents chose those categories for this question (gender, 27%; age, 16%; race, 12%), but more chose them as "lenses" through which to look for the purpose of pay gap analyses as will be seen in the following finding.

What Tools Do Organizations Use to Measure Pay Gaps and Inequity?

Among organizations that analyze and leverage data in an effort to increase pay equity, the majority (76%) look at pay among comparable jobs. Such data can potentially be gathered using external benchmarking data and internal data.

Three-fifths compare pay within pay bands (60%). Among organizations that analyze and leverage data in an effort to increase pay equity, the majority (76%) look at pay among comparable jobs. Such data can potentially be gathered using external benchmarking data and internal data. Three-fifths compare pay within pay bands (60%).

Is Pay Linked to Performance?

As discussed previously, the number one variable organizations look at to address pay equity issues (when they conduct any analysis at all) is performance (77%). Yet, two-fifths (42%) of HR practitioners say that in their organizations, there is no assumption that higher pay is given to better performers. One reason for this is that performance reviews can include too many subjective components that make raises and bonuses arbitrary in nature.

Participants were asked to indicate the job levels their organizations are investing in terms of detecting, preventing, and closing the pay equity gaps. Only 28% of participants say their organization invests in closing the gap at all job levels, which is somewhat surprising given the very public discrimination cases that exist across a variety of positions and levels.[3]

Organizations more commonly invest in establishing pay equity among roles that include management VP, director, and manager (35%) and senior executive/C-suite (31%).

Investing in closing pay equity gaps at the EVP or SVP levels occurs less than one-quarter of the time.

How Broadly Are Pay Equity Goals and Issues Communicated?

When asked to indicate the constituents at the organization who are involved in formal communication pertaining to action plans for predicting, preventing, and closing pay gaps, nearly two-thirds (63%) say formal action plans are communicated with C-level/senior executives. Only one-quarter communicate action plans to all managers (25%) and/or middle managers (22%). About 8% communicate pay equity action plans to individual contributors, and 15% do not communicate them with anyone or do not have action plans to begin with.

To What Extent Are Organizations Actively Investing To Determine If Pay Equity Gaps Exist?

For the purpose of this survey, we define “actively investing in the understanding of the pay equity gap” as expending resources on developing and implementing good metrics that are used to create or use initiatives that improve pay equity.

Only one-fifth of participants say their organizations are actively investing in closing pay equity gaps to a high (13%) or very high (7%) degree. Participants most commonly report that their organizations are actively investing at a moderate rate (43%). Together, these three groups comprise nearly two-thirds of participants.

To learn much more about the survey results and insights and for strategic takeaways, we invite you to read the complete report.

Notes

[1] World Economic Forum. (2019). Global Gender Gap Report 2020. Retrieved from http://www3.weforum.org/docs/WEF_GGGR_2020.pdf

[2] HR.com. (2019) The State of Performance Management 2019: Learn about the current state and future direction of performance management. Retrieved from https://www.hr.com/en/resources/free_research_white_papers/hrcom-performance-management-july-2019-research_jy7erds4.html

[3] Noguchi, Y. (2019, March 8). #MeToo Awareness Sharpens Focus On Pay Equity.npr Retrieved from https://www.npr.org/2019/03/08/701169339/-metoo-awareness-sharpens-focus-on-pay-equity

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Pay Equity

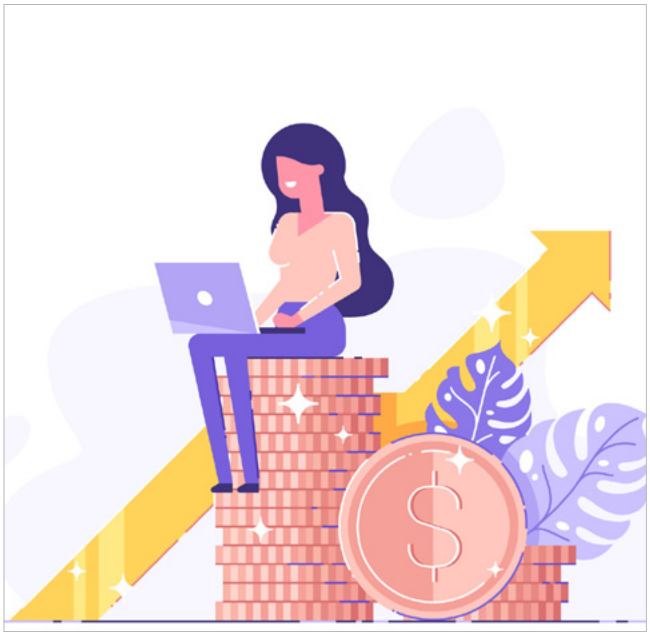
The key difference between Title VII And equal pay act wage discrimination claims

By **Matthew Gagnon** and **Alexandra Oxyer**

On December 6, 2019, the Second Circuit Court of Appeals vacated in part a summary judgment ruling that had dismissed a plaintiff's pay equity claims against her former employer. The plaintiff had alleged, in relevant part, violations of the Equal Pay Act ("EPA") and Title VII related to the setting of her compensation. The District Court for the Eastern District of New York dismissed her claims because she had failed to prove she performed equal work for unequal pay, as she was the only employee in her position at the company. After consideration, the Second Circuit vacated the District Court's order related to the Title VII claim, clarified the standard for Title VII discriminatory compensation claims, and remanded the case back to the District Court for further proceedings.

Case Background

Plaintiff filed her lawsuit in 2014 alleging violations of the EPA, Title VII, the Pregnancy Discrimination Act, the whistleblower protections of the Consumer Product Safety Improvement Act, and related provisions of New York state law. In sum, Plaintiff's complaint claimed that Defendant had paid her less



because of her gender, retaliated against her when she brought forward concerns about her disparate pay and potential Consumer Product Safety Act violations, and terminated her because she was pregnant. Defendant filed a motion for summary judgment on Plaintiff's claims in March 2017.

In March 2018, the District Court granted the motion for summary judgment. After analyzing Plaintiff's pay discrimination allegations, the District Court held that Plaintiff's Title VII claims, like claims brought under the EPA, required her to show "positions held by her purported male comparators [were] substantially equal to her position." *Lenzi v. Systemax, Inc.*, No. 18-979, 2019 WL 6646630, at *6 (2d Cir. Dec. 6, 2019) (internal citations omitted). Plaintiff could not make this showing because she was the only employee who held her job title and duties, so her Title VII claims were dismissed. The District Court further noted that Plaintiff had not presented evidence of discriminatory intent in the determination of her pay, as is also required for Title VII wage disparity claims.

Plaintiff subsequently appealed the District Court's order to the Second Circuit. Notably, in the briefing of the summary judgment motion to the District Court, both Plaintiff and Defendant had agreed that Title VII disparate pay claims shared the same standard as EPA claims but required an additional showing of discriminatory animus; however, on appeal, Plaintiff challenged the District Court's holding that Title VII discriminatory compensation claims, like EPA claims, required a showing of equal work for unequal pay.

The Court's Decision

In evaluating the dismissal of Plaintiff's Title VII claims, the Second Circuit first addressed Plaintiff's failure to challenge Defendant's argument at the summary judgment stage that a pay discrimination claim under Title VII required a showing that the Plaintiff's position was substantially equal to the positions held by her purported comparators (in fact, the Plaintiff adopted this standard in her own briefing on the issue). While the Second Circuit recognized that "[s]uch a concession ordinarily precludes a party from advancing a different argument on appeal," it ultimately decided that it would exercise its discretion to consider the Plaintiff's later argument that such standard was not appropriate. *Id.*

The Second Circuit then acknowledged that one of its opinions from 1995, which held that"[a] claim of unequal pay for equal work under Title VII . . . is generally analyzed under the same standards used in an EPA claim," is commonly used by district courts in their analyses of Title VII pay discrimination claims. *Id.* (quoting *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995)). The Court expressed a desire to "take this opportunity to clarify that a Title VII plaintiff alleging a discriminatory compensation practice ***need not*** establish that she performed equal work for unequal pay," as is required by the EPA. *Id.* at *7 (emphasis added). While affirming that a plaintiff could bring a claim for equal work for unequal pay under Title VII if they could show a discriminatory animus behind the pay determination, the Court emphasized that such a claim was not the *only* kind of Title VII claim available related to pay.

The Second Circuit gave examples of several variants of disparate pay claims that could be alleged under Title VII that would not require an equal work for unequal pay showing: "[f]or example, an employer might hire a woman for a unique position in the company, but then pay her less than it would had she been male . . . [s]imilarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination [if required to make such a showing].” *Id.* Ultimately, the Second Circuit rejected the notion that plaintiffs can only succeed on discriminatory pay claims under Title VII if there is an employee of the opposite sex in an equal position earning a higher rate of pay.

The Court concluded its holding by reiterating that “all Title VII requires a plaintiff to prove is that her employer ‘discriminate[d] against [her] with respect to [her] compensation . . . because of [her] . . . sex.” *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)). Discriminatory pay claims can be brought successfully under Title VII even if the plaintiff cannot show a purported comparator of the opposite sex earning a higher wage (provided that the challenged pay rate is not based on seniority, merit, quantity or quality of production, or any other factor besides sex). The Second Circuit then found that the Plaintiff had sufficiently shown discriminatory intent with respect to her pay and vacated the District Court’s order granting summary judgment on her Title VII claim.

Implications For Employers

The Second Circuit’s opinion is, in effect, a reaffirmation of the U.S. Supreme Court’s 1981 holding in *Washington County v. Gunther*. 452 U.S. 161 (1981) (“[C]laims for sex-based wage discrimination can also be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job.”). However, this case serves as a good reminder that employers should not expect to rely exclusively on the fact that there is no comparator in an equal position as a defense to a pay discrimination claim. Plaintiffs in such positions have options as to how to structure their theory of the case. And the oft-repeated mantra that Title VII is to be interpreted in line with the EPA clouds important, substantive differences between those two statutory schemes. When performing pay equity audits or setting employee compensation, employers should be mindful of those differences, particularly employers with more specialized positions or smaller operations that may have only one or two employees in senior leadership roles or performing the same kind of work. Such employers may also want to check market analyses and reporting when setting compensation. This case shows how pay equity claims can be brought even where there are no purported comparators, perhaps especially when it comes to high-level or specialized positions that are unique within a company.

This article originally appeared here.

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Matthew Gagnon is a Partner of Labor & Employment at Seyfarth Shaw LLP. Matt has the rare combination of knowledge, experience, and judgment to lead employers through the complexity of large, high-stakes class action litigation to successful, goal-oriented outcomes.

Alex S. Oxyer is an Associate of Labor & Employment at Seyfarth Shaw LLP. Alex’s practice focuses primarily on defending employers in a broad range of employment litigation matters, including class and collective actions, wage and hour actions, and single-plaintiff claims. Alex also counsels employers through difficult employment situations, including situations involving the FLSA, FMLA, Title VII, ADA, ADEA, USERRA, and state civil rights and wage and hour laws.

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Hair Discrimination In The Workplace

Key pointers on the grooming policies

By Traci Jennings

Grooming policies are common in the workplace and employers assert they are necessary to maintain a professional working environment. Within the last decade, however, grooming policies, namely provisions banning certain hairstyles, have been highly scrutinized as a result of the disproportionate effect on black employees. Men and women who choose to style their hair in braids, locks, twists, or in its natural afro texture experience resistance and sometimes repercussions at work for violating grooming policies. Although there are federal and state laws against discrimination on the basis of race and ethnicity in the workplace, those laws do not include language that protects employees from hair discrimination.

Historically, traditional black hairstyles have been considered by many employers to be unkempt and inappropriate for work. Such a biased perception derives out of innocent ignorance, or, as some argue, it is rooted in white supremacy. Regardless of where hair discrimination stems from, it is becoming a growing trend that black hair is considered professional, and black employees should be protected from adverse treatment based on their hairstyles. As of January 2020, only three states (California, New York, and New Jersey) have passed laws banning discrimination based on hair; but other states and cities are proposing similar legislation.

In June 2019, California became the first state to pass an anti-hair discrimination law. The law recognizes that hair has historically been a determining factor of a person's race, therefore hair discrimination is actually racial discrimination at its core. The California Legislature admits that enforcing a "Eurocentric image of professionalism" through grooming policies that "disparately impact black" people is inequitable. New York adopted the ban on hair discrimination by amending the New York City Human Rights Law to protect the rights of New Yorkers to "maintain natural hair and hairstyles closely associated with their racial, ethnic or cultural identities" in the workplace.

In conjunction with passing the law, the New York City Commission on Human Rights published guidance on hair discrimination, which includes an informative section on natural hair and hairstyles associated with black people. The Commission's efforts to educate the public will help to diminish widespread perceptions that black hair is unprofessional. New Jersey recently passed the Crown Act, also known as "Create a Respectful and Open Workplace for Natural Hair Act" in December 2019. The New Jersey Crown Act makes it unlawful to discriminate against people at work based on hair texture, hair type, and hairstyles such as braids, locks or twists. Cincinnati, Ohio and Montgomery County, Maryland have also passed the Crown Act.

Illinois and Wisconsin have each proposed legislation to adopt the Crown Act and ban hair discrimination in the respective states. The Illinois bill defines "race" to include traits historically associated with races, such as hair texture and hairstyles. The Illinois bill amends the Illinois Human Rights Act to ban discrimination based on hair. In Wisconsin, Representative LaKeisha Myers introduced the Crown Act in 2019 as a means to ensure "equitable hiring and employment practices in the state of Wisconsin." Representative Myers made a public statement acknowledging that natural hair textures and styles have often been criticized and used as a "tool of rejection" for black people in the workplace. Ten additional states, (Michigan, Tennessee, Kentucky, Pennsylvania, Massachusetts, Maryland, Georgia, Florida, South Carolina and Virginia) are considering adopting the Crown Act and have formally stated an intent to introduce anti-hair discrimination laws in their states.

It is important for employers to pay attention to the growing trend of municipalities and states enacting anti-hair discrimination laws as societal views shift. As versions of the Crown Act and other related legislation are adopted to ban hair discrimination, employers will need to amend grooming policies. Braids, locks, twists, afros and other natural hairstyles will have to be considered professional and clean, rather than unkempt and inappropriate in the workplace.

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Traci Jennings is a Law Clerk at MWH Law Group in Milwaukee, Wisconsin.

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When You Google Pay Discrimination–And Google Shows Up In Your Search....

Pay equity has been a big concern among many employers, including the search engine giant

By Janette Levey Frisch

Google has been in the news a lot. I'm sure that statement doesn't come as a big surprise. Not all the news is positive. That might not be a surprise either. Pay equity has been a big concern among many employers. This too shouldn't come as a surprise. At least a few employers looking to address this issue will start with a Google search of the terms "pay equity" and "pay discrimination." If you've read some of my other posts you may know that I can't resist pointing out irony. So how about this one: If you Google "pay discrimination" or even "pay equity," guess what? Yep. You might find Google in your search results–and not just once. Here are two examples:

In 2017, 3 women filed a class action lawsuit, on behalf of themselves and others similarly situated at Google, claiming they were paid less than their male counterparts. The California Superior Court dismissed the case, finding the claim too "vague" and overbroad, but ruled that the women could re-file and provide sufficient specifics. They did so in January 2018, and last year the class action lawsuit was revived.

The lawsuit actually arises out of pay data submitted by Google to the federal government. The class of plaintiffs allege that Google violated the California Equal Pay Act by tying starting salaries to job candidates' prior compensation and placing women in lower-paying job classes (more on this in a moment). The case is ***Ellis v Google*** and you can read the complaint here, if you are interested.

Last week, another female engineer sued Google, claiming she she is being paid less than her male peers and that she was demoted in retaliation for complaining about it. Although she was allegedly instrumental in Google Cloud's financial services offering and has received "exceeds expectations" on all of her performance reviews, Google allegedly hired her at a lower level than similarly situated men, paid her less than her male counterparts and refused to promote her to a role for which she was the most-qualified candidate.

After complaining to HR, she claims that Google moved her to a position offering limited development opportunities, and then offered her 3 other options, all of which were "undesirable". She further claims that Google's investigation of her complaint was "cursory" and "ignored plain facts." That case is ***Rowe v Google, LLC***. You can find that complaint here.

Now, I know that both of these cases are pending. It's too early for any factual findings. I also know that Google is not the only one alleged to have discriminatory pay practices. With that said however, and assuming for the moment that the allegations are true, what can all other employers learn from these cases? In other words, how can you ensure that you won't follow in Google's footsteps and find yourselves at the receiving end of the same type of lawsuits?

I can offer you the following thoughts: In the class action lawsuit, the main (or at least one main) allegation is that Google based pay on salary history. Some states, including California, have expressly prohibited such practices and may even ban asking about salary history during the application process. If any of your employees work in any such states, then basing pay on salary history will be an express violation of state law. What if your employees work in states that don't currently have such laws, however? There's still federal law, specifically the Equal Pay Act, which prohibits paying women less than men for (or men less than women for that matter) performing the same or substantially equal jobs.

To the extent that women have historically been paid less than men for the same or substantially the same work, basing current pay on past pay would perpetuate the pay gap, for reasons having nothing to do with job functions or qualifications. In other words, if you base pay on entirely or even primarily on salary history you are probably setting yourself up for a pay discrimination claim.

The more recent case, in addition to alleging pay discrimination, involves a retaliation claim. Even if this employee cannot prove she was subjected to discriminatory pay practices, she might succeed on the retaliation claim, which could actually yield more in money damages than her pay discrimination claim. The timing of the demotion, which apparently happened shortly after her complaint is certainly suspicious, especially given her previous performance reviews where she received ratings of "exceeds expectations".

That's not all though. While Google did investigate, if the allegations are true, it was a slipshod investigation that ignored significant facts (presumably any that would not have supported the conclusion Google wanted), which brings me to my next point: *A half-baked investigation is about as bad as doing none at all. In fact sometimes it's even worse.* It suggests that the employer didn't really care about the truth, wanted to create the appearance of doing what it was supposed to, but essentially swept the allegations under the carpet. That does not play well with a jury.

OK, let's boil it down to these takeaways:

- Base your pay practices on job functions and job qualifications (and make sure you have current, written accurate job descriptions to back up your practices);
- Do NOT base your pay practices on an employee or applicant's salary history, and whenever possible, avoid asking about it at all;
- If you do decide to pay an employee less than his/her similarly-situated peers, make sure you have a solid justification that has nothing to do with gender (or any other protected class) and document it;
- If any employee complains of *any* type of discrimination (whether or not it's pay discrimination), DON'T take any adverse employment action against him/her, unless you have solid evidence of a non-retaliatory motive–in which case, document it;
- Take all complaints seriously and do prompt and thorough investigation, and consider ALL relevant information, even if it does not support the conclusion you want.

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Janette Levey Frisch is an Employment/HR Attorney and the Founder of The EmpLAWyerologist Firm.

Would you like to comment?

New York Pay Card Regulations: How Employers Must Pay Employees

DOL's pay card regulations

By **Glenn S. Grindlinger**

A recent New York appellate ruling validates the New York Department of Labor's (DOL) regulations limiting the use of pay cards to pay employees their wages. Unless this decision is appealed to the New York Court of Appeals, the state's highest court, the appellate ruling upholds the DOL's rules and settles key ambiguities surrounding how employers may pay employees via pay cards.

Many employers nationwide elect to pay their employees via pay cards. Following concerns that employers and financial institutions may take advantage of employees who are paid this way, the DOL issued regulations in 2015 limiting the use of pay cards within the state. Various administrative bodies enjoined the DOL's rules on pay cards and thus introduced certain inconsistencies in the manner that employees could pay New York employees, which the aforementioned appellate decision seeks to clarify.

Employers who choose to compensate employees with pay cards should prepare to closely comply with the DOL's pay card regulations, and expect heightened scrutiny from the DOL.

Background on NY Pay Card Regulations

The DOL issued proposed regulations on May 27, 2015, setting forth specific requirements that employers must follow if they pay their employee by check, through direct deposit or the use of payroll debit cards (also known as pay cards). In September 2016, these rules were finalized and became effective. However, almost immediately, Global Cash Card, Inc. (GCC), a pay card provider, appealed the rules to the New York State Industrial Appeals Board arguing that the rules exceeded the DOL's statutory authority.

During this initial appeal, the rules were suspended pending a decision by the Industrial Appeals Board.

The Industrial Appeals Board agreed with GCC finding that the DOL exceeded its statutory authority when it implemented the regulations as they pertained to pay cards. As a result, the pay card rules were invalidated. The DOL then sought review of the decision of the Industrial Appeals Board in Supreme Court, Albany County, which overturned the Industrial Appeals Board's decision finding that the rules were valid.

GCC then appealed to the New York Supreme Court, Appellate Division, Third Department, which agreed with the trial court. The Appellate Court found that the pay card rules were within the DOL's authority to issue and as such are considered valid. Accordingly, unless the Court of Appeals agrees to hear the matter, the Third Department's ruling should settle the ambiguity over how employers in New York may pay their employees via pay card.

Pay Card Rules

- If an employer wants to pay its employees through pay cards, the employer must:
- Obtain the employee's advanced, written consent (and the union's consent, if applicable), which means that employers cannot require their employees to accept wages through payroll debit cards, and in fact, the proposed regulations specifically forbid an employer from requiring employees to use payroll debit cards as a condition of employment.
- At least seven (7) before even seeking such consent, the employer must provide the employee in writing, in at least 12-point font, and in the employee's primary language or in a language that the employee understands:

1. A plain language description of all the employee's options for receiving wages;
2. A statement that the employer may not require the employee to accept wages through a payroll debit card or by direct deposit;
3. A statement that the employee may not be charged any fees for services that are necessary for the employee to access his or her wages in full; and
4. A list of locations "within a reasonable proximity to their place of residence and place of work" where employees can access and withdraw wages at no charge to the employees.

- At least 30 days before any change in the terms and conditions of a pay card takes effect, the employer must provide written notice in plain language, in the employee's primary language or in a language the employee understands, and in at least 12-point font of any change to the terms or conditions of the pay card account including any changes in the itemized list of fees. If the pay card issuer notifies the employee of payment changes for a set date and charges the employee any new or increased fee before 30 days of that date, the employer must reimburse the employee for the amount of that fee.

The employer is also required to retain this documentation throughout the duration of the employee's employment and for six years after the employment relationship ends. Further, the DOL regulations also state that in order to pay employees via pay card, there must be at minimum:

- One network of automated teller machines that offers withdrawals at no cost to the employee.
- One method to withdraw up to the total amount of wages for each pay period or balance remaining on the pay card without the employee incurring a fee.
- The following statements must be provided either electronically or on paper upon the employee's written or oral request:

1. A periodic statement not less frequently than monthly; or if there is a balance but no activity with respect to the pay card, not less frequently than every three months;
2. A transaction history covering at least 12 months preceding the request, which shall include all transactions, including deposits, withdrawals, fees charged or other transactions by any entity from or to the employee's pay card account; and
3. Electronic balance notifications on a per-day or per-transaction basis.

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- The employee must be able to obtain an annual electronic or paper notice of the right to obtain a transaction history, annual statement or periodic statement on request.
- An employer or its agent cannot deliver payment of wages by pay card that is linked to any form of credit, including a loan against future pay or a cash advance on future pay.
- The employer cannot receive any kickback or other financial remuneration from the issuer, card sponsor or any third party for delivering wages by pay card.
- An agreement between the employer and issuer must exist explicitly stating that:

1. Any wage payments issued on a pay card cannot expire. However, the agreement may provide that the account may be closed for inactivity provided that the issuer gives reasonable notice to the employee and that the remaining funds are refunded within seven days; and
2. If an employee reports the pay card as lost or stolen or reports fraudulent activity on the pay card, the issuer must stop all card activity, conduct a reasonable investigation within 10 days and re-credit or reimburse any fraudulent or unauthorized transactions within one business day of the conclusion of the investigation.

- Employees cannot incur any costs in order to access their wages and the employer or their agent (presumably the company that issues the pay card) cannot assess any fee for:

1. Application, initiation, loading, participation or other action necessary to receive wages or to hold the pay card;
2. Point of sale transactions, declined transactions and other transactions;
3. Overdraft, shortage or low balance status;
4. Account inactivity;
5. Maintenance;
6. Telephone or online customer service;
7. Accessing balance or other account information online, by Interactive Voice Response through any other automated system offered in conjunction with the payroll debit card, or at any ATM in network made available to the employee;
8. Providing the employee with written statements, transaction histories or the issuer's policies;
9. Replacing the pay card at reasonable intervals;
10. Closing an account or issuing payment of the remaining balance by check or other means; or
11. Any fee not explicitly identified by type and by dollar amount in the contract between the employer and the issuer or in the terms and conditions of the payroll debit card provided to the employee.

Employers who elect to pay their employees through pay cards should expect that their practices will be carefully scrutinized by the DOL. Thus, employers should be cautious and follow these regulations rigidly. Employers will have to work with their payroll companies and the issuers of pay cards, if applicable, to ensure that these regulations are faithfully followed; if there are mistakes, it will be the employers who will bear the risks, not the financial institutions and pay card issuers. Prudent employers should also reexamine all of their new hire paperwork and confirm that pay card enrollment forms comply with New York law.

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Glenn S. Grindlinger is a Partner of Fox Rothschild LLP. Glenn represents management in the full spectrum of labor and employment law matters. He regularly defends clients in single plaintiff cases and class actions involving claims of Fair Labor Standards Act (FLSA) and state wage and hour law violations. He also routinely represents clients in federal and state courts and arbitration fora and before government agencies in cases alleging breach of contract and breach of restrictive covenant as well as age, race, national origin, gender, disability, sexual orientation and religious discrimination, harassment and retaliation. Additionally, he defends employers in a variety of labor disputes before the National Labor Relations Board (NLRB).

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The Fluctuating Workweek Method Of Calculating Overtime Pay

Wage and hour rule update

By Robert Meyer

On November 5, 2019, the Wage and Hour Division of the U.S. Department of Labor (DOL) proposed a new rule, which would allow employers to offer bonuses and other incentive-based payments to salaried nonexempt employees whose work hours fluctuate each week. This rule clarifies the DOL's position that such payments in addition to fixed salary are compatible with the fluctuating workweek method of computing overtime compensation under the Fair Labor Standards Act (FLSA).

This rule, if adopted, would revise the DOL's fluctuating workweek regulation[1].

The DOL has long recognized the fluctuating workweek method for compensating the overtime hours of a nonexempt employee who works varying hours from week-to-week. Under this arrangement as stated in section

778.114, and pursuant to the employee's understanding with the employer, a "fixed salary" may be paid to such employee as straight time compensation (apart from overtime premiums) for whatever hours the employee works in a workweek, whether few or many.

The employer may then satisfy the overtime pay requirements of the FLSA if it compensates the employee at a rate of at-least one-half of the regular rate of pay for the hours worked each workweek in excess of 40. The regular rate must be determined separately each week by dividing the fixed salary by the number of hours actually worked in that week. The fluctuating workweek method also requires that the amount of the fixed salary does not result in an hourly wage of less than the minimum wage required by the FLSA.

The question has arisen, however, as to whether the payment of bonuses and other supplements to employees, in addition to a fixed salary, is permissible under section 778.114. In 2008, the DOL issued a proposed rule that such payments are compatible with the fluctuating workweek method and must be included when calculatin g overtime compensation. Howev-er, the DOL subsequently reversed course and stated a contrary position in 2011.

Federal courts have also expressed divergent interpreta-tions of section 778.114, some holding that the payment of bonuses (especially when based on working extra hours) is inconsistent with the concept of a "fixed salary" for varying work hours and therefore impermissible under the flu-ctuating workweek method of compensation. In its 2019 proposed rule, the DOL discusses the confusion and uncertainty created by these holdings, and the need for clarity in the fluc t-uating workweek regulation. The DOL also observes that the existing confusion in the law has deterred employers from paying bonuses to fluctuating workwe-ek employees, or caused some employers to avoid using the fluctuating workweek method of compensation altogether.

Under the 2019 proposed rule, the DOL essentially restates its earlier position from 2008 that any bonuses, premium payments or other additional pay of any kind are compatible with the fluctuating workweek method of compensation. Accordingly, the DOL would revise the fluctuatin g workweek regulation to require that such payments be included in the calculation of the regular-rate unless they are excludable under FLSA sections 7(e)(1)-(8). The proposed rule also includes:

Examples to illustrate how the fluctuating workweek metho d will apply to certain types of bonuses and payments;

Revisions to the regulation to make it easier to read and understand; and

A proposed change to the title of the regulation, from "fixed salary for fluctuating hours" to "Fluctuating Workweek Method of Computing Overtime."

Pursuant to the DOL's rulemaking process, the public may now offer comments to the proposed rule until December 5, 2019. Employers should monitor this process and watch for the issuance of a final rule adopting some or all aspects of the proposal in the near future. Employers should also note that the DOL's fluctua -ting workweek regulation only applies to overtime compensation under the FLSA. Some states have enacted specific laws, which do not permit the fluctuating workwe-ek method.

Note

[1] 29 C.F.R section 778.114

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Robert Meyer is a Partner at Poyner Spruill LLP. He represents employers in all aspects of labor and employment, including litigation of cases before federal courts and administrative agencies, and day-to-day advice and counsel.

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FEATURE

Pay Equity Claims: 'No Need To Clear A Heightened Legal Standard'

What does this mean for employers?

By Seth Kaufman

A federal appeals court recently ruled that workers don't need to clear a heightened legal standard in order to pursue pay equity claims, setting the stage for a possible increase in the number of lawsuits seeking recovery for alleged unfair wages in 2020 and beyond. The analysis applied by the 2nd Circuit Court of Appeals' December 6 decision in *Lenzi v. Systemax, Inc.* could be applied by other courts across the country, creating a new outlet for workers to claim pay bias.

The relevant facts of the case are fairly straightforward.

Danielle Lenzi worked as a Risk Management executive at Systemax for several years, but soon had concerns that her salary was not where it should be. Despite receiving several pay raises, she was still paid significantly less than other department heads who were men. For example, her salary in 2013 as Vice President of Risk Management was $191,000 even though three other male executives in V.P. roles were paid between $262,000 and $308,000.

Each of the three male executives earned between $13,000 and $40,000 more than the "benchmark" salary for their positions (a figure established by examining salary data for Systemax employees in those departments), while Lenzi earned $27,200 less than her benchmark. She frequently complained about her pay levels, she says, but her pay was never raised to an equivalent level with her male peers.

Systemax terminated her employment after it scrutinized an expense report she submitted and believed she violated corporate policies, and Lenzi brought a federal lawsuit against the company. The case included allegations of pregnancy discrimination, whistleblower retaliation, and related state claims, but for the purposes of this discussion, the relevant claim was a gender discrimination claim brought under Title VII.

Her Title VII claim was founded upon an allegation that she was paid less than her male peers because of her gender. The lower court dismissed this claim because it determined that she failed to produce sufficient evidence that the three male executives paid more then her were in positions that were "substantially equal" to her position, which the court said was a necessary element for her to succeed. But on appeal, the 2nd Circuit Court of Appeals set aside this principle as erroneous. "A Title VII plaintiff alleging a discriminatory compensation practice need not establish that she performed equal work for unequal pay," it said. "By its plain terms, Title VII makes actionable *any* form of sex-based compensation discrimination."

While a woman could certainly make a Title VII claim by showing she was paid less than male peers, the appeals court said that wasn't necessary. "All Title VII requires a plaintiff to prove," it said, "is that her employer discriminated against her with respect to her compensation because of her sex."

Thus, in the 2nd Circuit – an area including federal courts of New York, Connecticut, and Vermont – a claim for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or any other factor other than sex. With this ruling, Lenzi will now be able to proceed with her case towards a trial.

What does this mean for employers? Expect to see more plaintiffs latching onto this theory and bringing pay equity claims in the form of Title VII claims. In states where pay equity laws have not yet caught up with the modern movement of expanding the types of claims that workers can bring, Title VII claims might still serve as the best mechanism for advancing their concerns.

This article originally appeared [here](#).

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Seth Kaufman is a Partner at Fisher & Phillips LLP, representing employers – both large corporations and small start-ups – in a range of industries, including healthcare, hospitality, media, and real estate, among others. Seth has successfully defended employers as lead counsel in a wide variety of employment litigation, including complex class and collective wage and hour cases in state and federal court, single-plaintiff employment discrimination and retaliation claims, and labor arbitrations and matters before the National Labor Relations Board (NLRB).

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California's Controversial New Independent Contractor Test

What happened to Uber and Postmates' request for preliminary injunction

By Vanessa Manolatou

As we recently wrote here, Uber and Postmates (and two of their drivers) to file an eleventh-hour lawsuit seeking to enjoin the enforcement of California's controversial new independent contractor law – known as AB 5 – against them.

In a significant blow to the challenge to the companies' challenge to the new law, the court has denied Uber and Postmates' request for a preliminary injunction to block the enforcement of AB 5 against them.

In denying the request for a preliminary injunction, the court concluded that Uber and Postmates were not likely to succeed on the merits of their various constitutional challenges to the statute, and that they

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had failed to demonstrate that they would suffer irreparable harm.

The court found that the companies had offered no evidence showing that the Legislature could not have reasonably conceived that AB 5 would further the state's interest in reducing the misclassification of workers as independent contractors such that they were likely to succeed on their equal protection clause challenge. And the court rejected the argument that there is no rational basis for AB 5's exemptions, under which an individual who directly sells products is exempted from the scope of AB 5, while an individual who earns income by offering driving services is not. In considering the rationale for AB 5's exemptions, the court found that exempted workers, such as direct salespersons, exert independence and control in performing their jobs.

The court also rejected the companies' argument that AB 5 deprives gig economy workers of the right to pursue their chosen occupation.

The ruling does not signal the end of the case, or of Uber, Postmates and other companies' challenges to AB 5. Should they not succeed in the trial court, an appeal is likely. However, perhaps more importantly, ride-share and delivery companies have reportedly earmarked more than $110 million to a campaign to have California voters exclude them from application of AB 5 in a referendum to take place later this year.

This article originally appeared here.

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Vanessa K. Manolatou is an Associate in the Employment, Labor & Workforce Management practice at Epstein Becker Green. She has extensive experience providing representation to employers of all sizes—from local companies to national corporations—in many industries, including retail, hospitality, real estate, health care, technology, insurance, education, construction, labor organization, nonprofit organizations, and various others.

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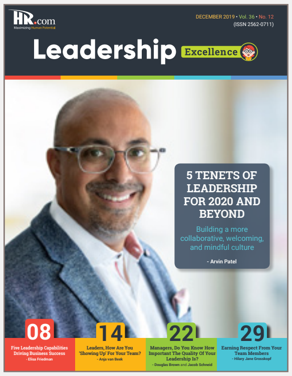

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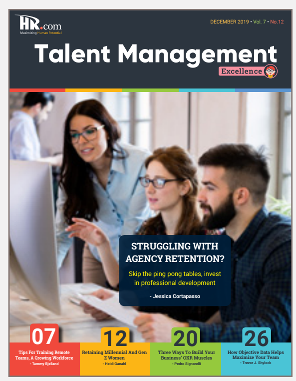

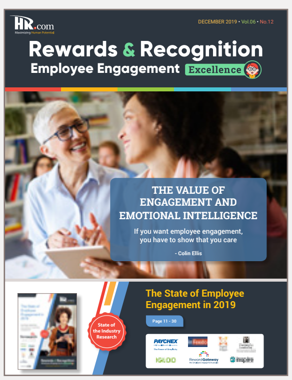

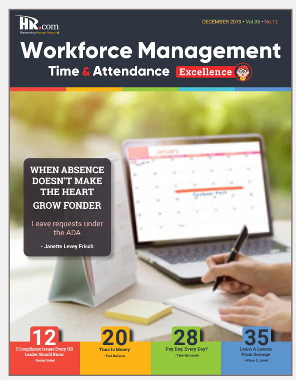

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