



## **7 Strategies to Promote Workplace Gender Equality**

### **Skills and Professional Development**





## CHEAT SHEET

- **#MeToo.** The #MeToo movement sought to raise awareness about sexual harassment and sparked workplace activism demanding gender equality.
- **Unintended consequence.** Some men are avoiding interacting with their female colleagues in situations like mentoring, working one-on-one, or socializing together, out of fear of wrongful accusations of sexual misconduct.
- **Cycle of inequality.** When male colleagues avoid interacting with their female counterparts, they risk hindering the professional development and opportunities of women employees and expose the company to gender discrimination and pay equity claims.
- **Employer actions.** To support gender equality in the workplace, employers can provide sexual harassment and unconscious bias trainings; examine their pay practices; not require applicant salary history; and support flexible work policies.

A little over two years ago, the #MeToo movement went viral as women around the world took a stand against sexual harassment and assault in the workplace. Not only did the #MeToo movement rock the entertainment industry in the United States, it triggered unprecedented activism among female workers. [Time magazine's 2017 Person of the Year](#) was The Silence Breakers and, not long

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thereafter, the [Time's Up Movement](#) was started as an action-based organization to combat sexual harassment.

At the same time, women were demanding pay equality and states throughout the country were enacting laws mandating that men and women be paid equally. Corporate America was faced with an existential challenge that required immediate action and employers throughout the United States were forced to take meaningful steps to combat sexual harassment and promote gender equality in the workplace.

Employers responded to these demands in a variety of ways, including providing updated training on sexual harassment (in some cases mandated by state and local laws) and examining their pay practices to identify problematic areas. Despite these efforts, substantial disparities continue to exist in career opportunities and earning potential between men and women. High stakes lawsuits are filed daily and corporate executives are demanding immediate action plans to ensure compliance with new pay equality laws and avoid litigation.

Against this volatile backdrop, men in the workplace are concerned that they will be wrongfully accused of inappropriate conduct and some have retreated by avoiding interaction with women. Many of these challenges land directly on the desk of corporate counsel who are tasked with making effective changes in the workplace and insulating their organizations from liability. This article explores the basic legal tenets of sexual harassment, gender discrimination, and pay equity and offers practical solutions to make cultural and procedural changes that promote equality in both wages and opportunities for women and other minority groups in the workplace. While corporate America has made great strides, there is no doubt that 2020 will demand more in terms of promoting and ensuring gender and pay equality in the workplace.

## **Unintended consequences from the #MeToo movement**

The #MeToo movement sought to raise awareness of sexual harassment and misconduct that women experience, and it precipitated activism among women to prevent harassment and demand gender equality in the workplace. Unfortunately, one of the unintended consequences of #MeToo has been men avoiding one-on-one encounters with women in the workplace. This is the so-called "[Pence Rule](#)," coined after US Vice President Mike Pence stated that he does not dine or have drinks alone with any woman other than his wife to [avoid any appearance of impropriety](#). A recent study by the nonprofit organization [Lean In](#) reveals that 60 percent of the male managers surveyed reported they are uncomfortable participating in a common work activity with a woman, including mentoring, working one-on-one, or socializing together. Thirty-six percent of the men surveyed stated that they have avoided mentoring or socializing with a female employee because they were nervous about how it would look.

**The unfortunate net result of the #MeToo movement may be fewer opportunities for women in the workplace because male employees are concerned about optics and being accused of improper conduct.**

Some men who may have previously been inclined to mentor female employees are no longer providing them with the pivotal guidance and connections needed to advance their careers. The unfortunate net result of the #MeToo movement may be *fewer* opportunities for women in the workplace because male employees are concerned about optics and being accused of improper conduct.

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Unfortunately, this phenomenon, where men avoid working with women, greatly diminishes opportunities for mentorship, professional development, and opportunities to cultivate business and client relationships. While avoiding professional interactions with women may reduce the risk of being accused of sexual misconduct, it greatly increases the risk of gender discrimination and pay equity claims. If women are not offered a seat at the table because they are not in the room (or on the business trip or at the hotel bar with clients), they will be unable to advance in their careers and likely will not earn as much as their male counterparts. Isolating women in the workplace and providing critical opportunities only to men prevents women from accelerating on their career path and, as a result, limits their earning capacity — contributing to the wage gap.

## **Gender discrimination and harassment**

Intentionally excluding women from certain opportunities at work solely because of their gender may lead to gender discrimination and hostile work environment claims under Title VII and similar state laws. To state a gender discrimination claim, a female employee must demonstrate that her employer treated her differently because of her sex. An employee need only show that sex “was a motivating factor for any employment practice, even though other factors also motivated the practice.”

To establish a *prima facie* case of a hostile work environment under Title VII, a female employee must demonstrate that her work environment was “permeated with discriminatory intimidation, ridicule, and insult” that was “sufficiently severe or pervasive to alter the conditions of [her] employment.”

Certain state and local laws set a lower bar to establish a claim of a hostile work environment. For example, under New York City law, a female employee would only need to establish that, by excluding her from certain opportunities, she was treated “less well” because of her gender. Additionally, the Massachusetts Supreme Court recently interpreted “adverse employment action” under the Massachusetts discrimination statute quite broadly, discussing that an adverse employment action is “substantial enough to have materially disadvantaged an employee.”

Where female employees are routinely excluded from opportunities that may advance their career — perhaps in part due to a concern by male employees of being accused of impropriety — they are arguably treated “less well” or materially disadvantaged because of their gender

## **Role of unconscious bias**

Not all gender discrimination is overt or intentional. In fact, several factors that contribute to this opportunity gap between men and women are rooted in unconscious bias. Also known as implicit bias, unconscious bias refers to the prejudicial mental shortcuts that are made based on outdated social norms and stereotypes. These biases range from those based on physical characteristics like gender to more subtle characteristics or attributes like parental status and personality type. Based on these unconscious biases, employers often make assumptions about what kind of work each gender is best suited for. The result is that women are often placed on a career path where the opportunities are limited to lower-level, lower-earning positions than men.

In order to work toward combating unconscious bias, proactive employers are offering (and sometimes requiring) formal training on unconscious bias to all employees, especially managers and human resource professionals who are involved in compensation and promotion decisions. Through training, employees can start identifying when they are making assumptions based on biases and

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stereotypes and remove these considerations from the opportunity and compensation equations. In the effort to maintain work environments that are free from discrimination, it is also important that employers establish clear, understandable, actionable, and transparent metrics around recruitment, retention, advancement, and pay so that these decisions are based upon merit and are not influenced by implicit bias.

Another area for employers to be cognizant about is the impact of leave on pay and advancement. Women often take more and longer leaves of absence from work than men, primarily to take care of children and family members. These leaves of absence have been shown to correlate to a loss of earning power: an absence of at least 12 months results in a 7.3 percent wage “penalty” upon return to work relative to other employees who did not take a leave of absence. In order to minimize this penalty and promote opportunities for women in the workforce who also have family obligations, employers should consider flexible work policies that support a work-life balance for caregivers and all employees throughout the ebbs and flows of their careers. Periodic analyses to determine whether pay and position correlate with contributions to the organization are recommended to avoid women being penalized for leave time.

## **Case study: Gender gaps in the legal profession**

Despite significant strides, the gender pay and opportunity gaps are prevalent in the legal profession. In its [2018 Report on Diversity](#), NALP reported that while women comprise almost half of associates in law firms (45.91 percent), less than a quarter of the partners (23.36 percent) are women. The level of female advancement in law firms reflects an opportunity gap and begs the question of whether male and female associates are provided with the same opportunities to engage with clients and business contacts, the same opportunities to engage in client development, and the same chance of inheriting a retiring partner’s book of business.

Even female attorneys who have seized opportunities and risen to the ranks of general counsel are affected by the gender pay gap. From 2017-2018, [pay for male general counsel](#) increased from US\$2.52 million to US\$2.63 million, while pay for female general counsel *decreased* from US\$2.44 million to US\$2.21 million. In fact, the pay gap is *widening* for general counsel: In 2018, male general counsel earned 18.6 percent more than their female counterparts, versus 11.2 percent in prior years. In 2019, male general counsel reportedly received US\$540,000 more in bonus dollars than their female counterparts. The legal profession has set high goals in terms of diversity and inclusion, and there is plenty of room for improvement.

## **How the opportunity gap translates to dollars and cents**

Although the US Equal Pay Act (EPA) has been on the books for more than 55 years, studies show that the gender pay gap continues to exist. A [recent PayScale study](#) confirmed that in 2019, women earned 79 cents for every dollar earned by men. When factors such as experience, industry, and job level are accounted for, women earned 98 cents for every dollar earned by an equivalent man.

These statistics suggest that, while efforts to provide equal pay for equal work have led to positive changes, women continue to be at a disadvantage when it comes to having the *opportunity* to hold

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higher level, higher paying jobs and that men are generally on a more accelerated career path. This opportunity gap is significant, and must be addressed in order to rectify the pay gap.

## The federal Equal Pay Act

Since 1963, the EPA has required that men and women in the same workplace be given equal pay for equal work. Whether work is “equal” or “substantially equal” requires an analysis of the skill, effort, and responsibility associated with the position. The analysis goes beyond job titles or job descriptions — which may be misleading or outdated — and requires a case-by-case assessment of the actual job duties and work performed.

What constitutes pay for purposes of the EPA is viewed broadly. The regulations make clear that wages or compensation “generally includes all payments made to [or on behalf of] an employee as remuneration for employment.” Therefore, all forms of compensation, “whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name[,]” and fringe benefits must be equal — at least in the aggregate.

There are a limited number of exceptions where it is permissible to pay employees performing substantially similar work differently. Under the EPA, these exceptions include differences in pay is based upon: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.

The fourth exception, known as a “catch all,” was previously used to defeat most EPA claims in court. However, this exception has come under more scrutiny and courts have been narrowing the scope of the catch all exception. Significantly, state laws have further narrowed the catch all to require the differentiating factors be bona fide, job related, based on business necessity, and/or that there be no alternative that would serve the same business purpose without producing the wage differential.

**The issues around gender relations and equality in the workplace are complicated but cannot be ignored. Proactive employers committed to diversity and inclusion will be rewarded with tangible benefits to the organization.**

## US state laws aimed at closing the gender pay gap

Almost every state in the country has some form of pay equity law. These laws range from generally prohibiting discrimination in wages on the basis of sex to protections going well beyond the EPA by providing equal pay protections to minority groups other than women and/or limiting the exceptions to which employees performing substantially similar work may be paid differently. Massachusetts has eliminated the catch all exception in its entirety.

More recently enacted state laws specifically target some of the fundamental issues that have contributed to the gender wage gap. Several states have enacted equal pay laws that include pay transparency and anti-retaliation provisions. Under these laws, employees cannot be prohibited from inquiring about their compensation or the compensation of other employees, and employers are prohibited from retaliating against employees who make such inquiries or raise complaints about their wages. By allowing these types of conversations and inquiries in the workplace, employees are

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permitted to investigate how their pay compares to that of others performing substantially similar work and assert their rights — without the fear of retaliation or retribution for doing so.

## **Salary history bans seek to stop the cycle of pay discrimination**

Numerous states and local governments have also enacted laws prohibiting employers from asking job applicants about their salary history and using salary history in setting compensation. The rationale behind these laws is that pay discrimination can follow employees, and particularly women, from job to job throughout their careers, resulting in a systemic reduction in earning power. By eliminating an applicant's prior salary from the compensation equation, pay inequality that a female applicant may have experienced earlier in her career will not perpetuate.

## **Pay equity audit checklist**

- Establish goals.
- Get buy-in from senior management.
- Put the right team in place.
- Gather relevant data.
- Identify comparable jobs.
- Calculate whether members of a protected class are paid equally in comparison to those outside of the protected class.
- Assess whether differences in pay are justified under applicable law.
- Remediate any unjustified pay differentials.
- Adjust pay practices, including identifying the reason(s) for unjustified disparities and remedying practices and policies causing unjustified disparities.

## **Strategies to close the pay gaps**

The issues around gender relations and equality in the workplace are complicated but cannot be ignored. Proactive employers committed to diversity and inclusion will be rewarded with tangible benefits to the organization. This is an opportune time for corporate counsel to take steps to reduce, and eventually eliminate, sexual harassment, the gender pay gap, and the opportunity gap. The following seven suggestions can be incorporated into any organization's culture.

### **1. Have a fair and equitable process for reporting, investigating, and addressing sexual harassment**

It must be clear that bad behavior is unacceptable within your organization. This includes “walking the walk”: Company leaders must set the tone by publicly stating that sexual harassment will not be tolerated and, crucially, they must themselves model appropriate behavior. Discipline, including termination, for inappropriate behavior must be consistently applied across all levels of the organization. No one can be above the law.

Employee handbooks and company policies should include a comprehensive anti-harassment and anti-discrimination policy that clearly states the company's commitment to providing a working



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environment free of harassment and discrimination. Some states, like [New York](#), require that employers include certain language in their policies. The policy should inform employees how they can report concerns or complaints of harassment and discrimination, including more than one option to whom employees can report concerns.

Additionally, the policy should inform employees of the type of investigation that will take place in response to complaints. It is critical that all investigations are fair, and that the same procedure is followed regardless of the source or type of complaint received. The investigation must be an equitable process. Once the investigation is completed, both the employee reporting the concern and employee about whom the concern was raised should be informed that the investigation has concluded. If it is determined that there was a violation of the anti-harassment and anti-discrimination policy, discipline should be issued commensurate with the circumstances, up to and including termination. Even if there was no policy violation found, if there is an apparent conflict between two employees or an employee does not feel comfortable working with someone, the company should consider whether any steps can be taken to separate the two employees — whether it is physically in the office or reassigning teams. However, caution must be taken to avoid a change adversely impacting the employee who raised the concern or the employee about whom the concern was raised.

It is also imperative that your policy make clear that employees will not be subject to retaliation for making a complaint or reporting any concerns about harassment or discrimination with respect to themselves or others.

**Building a culture of diversity and inclusion needs to start from the top, with a clear statement of the leadership's commitment to a culture of inclusion and recognition that a diverse and inclusive workplace benefits employee individually and the organization as a whole.**

## **2. Conduct training on harassment, unconscious bias, and promoting an inclusive workplace**

Human resources teams should be provided with detailed training, including tools to address unconscious bias, and ensure that they know how to fully and fairly investigate claims — even if the claims involve senior leaders. This is essential because proper investigations are key to building trust within the organization.

All employees must be trained on how to create and maintain a positive, respectful work environment and ensure that everyone in the organization knows what to do if they see or hear something that is troubling. Several states, including New York and California, have made such training mandatory.

The [Equal Employment Opportunity Commission \(EEOC\)](#) has published guidance on effective harassment training, which provides that harassment training may be most effective if it is: championed by senior leaders; repeated and reinforced regularly; provided to employees at every level and location of the organization; provided in a clear, easy to understand style and format; provided in all languages commonly used by employees; tailored to the specific workplace and workforce; conducted by qualified, live, interactive trainers, or, if live training is not feasible, designed to include active engagement by participants; and is routinely evaluated by participants and revised as necessary.

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## United Kingdom’s “naming and shaming” approach reveals opportunity gap among large employers

In the United Kingdom, companies with 250 or more employees are now required to submit reports providing statistics on their gender pay gap. The information that is reported includes mean gender pay gap, median gender pay gap, mean bonus gender pay gap, median bonus gender pay gap, proportion of males and females receiving a bonus payment, and proportion of males and females in each pay quartile. Employers are required to list all employees in order from highest to lowest paid, and divide this list into an upper, upper middle, lower middle, and lower quartile. The information released from the initial year of reporting revealed an opportunity gap across companies — where the upper two quarterlies, consisting of the highest paid employees, were skewed to include more men than women.

### 3. Build diversity and inclusion into your culture

Building a culture of diversity and inclusion needs to start from the top, with a clear statement of the leadership’s commitment to a culture of inclusion and recognition that a diverse and inclusive workplace benefits employees individually and the organization as a whole. Corporate counsel can assist in cultivating an inclusive environment by promoting the creation of multicultural and women-focused employee resource groups that include men to foster increased engagement and networking opportunities. Additionally, compensation for key leaders can be linked to meeting certain diversity and inclusion goals.

To achieve the goal of a more inclusive and diverse workplace, many corporate leaders have signed pledges to commit themselves personally to advance diversity and inclusion in their workplaces. For example, more than 800 chief executive officers have signed the [CEO Action for Diversity & Inclusion](#) pledge to: (1) continue to make their workplaces trusting places to have complex, and sometimes difficult, conversations about diversity and inclusion; (2) implement and expand unconscious bias education; and (3) share the best — and unsuccessful — practices.

Similarly, [Paradigm for Parity](#) was established to create a coalition of business leaders dedicated to helping companies achieve gender parity and increase the presence of women in leadership roles. More than 100 chief executive officers have joined this coalition.

### 4. Establish clear, understandable, actionable metrics

Creating transparent and objective metrics around recruitment, performance, advancement, and compensation can help ensure consistency and equality in decision-making across the organization. Regular and honest communication with employees about the metrics and their progress is key to building trust within the organization. However, establishing these metrics is only the first step, and audits must be done to ensure that decisions are made in accordance with pre-determined criteria and are not impacted by actual or implicit biases. Corporate counsel can play an important role in ensuring compliance and overseeing audits.

### 5. Be flexible

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To address the wage “penalty” often experienced by women who find themselves in caregiver roles, companies should consider policies that allow for flexibility. These policies may include allowing employees to work from home or have reduced hours at different stages of an employee’s life and career. One way employers can foster flexibility is to measure career progress by business results and performance, not physical presence in the workplace. Male and female employees in leadership positions should be encouraged to take advantage of these flexible work policies as a way of assuring employees across the organization that the company supports those policies.

## **6. Ensure compliance with changing pay equity laws**

Corporate counsel should take steps to review company policies and handbooks to make sure they are consistent with applicable state laws and local ordinances. Any policies and statements that prohibit employees from discussing compensation should be removed as most states now require transparency. Many states and localities also now prohibit employers from seeking salary history from job applicants and/or using salary history to make compensation decisions. Therefore, applications and other hiring documents should be updated to remove requests for salary history, and those conducting interviews should be instructed not to ask questions about salary history during the interview process.

**If any inequities are identified, the employer must determine whether the differences in pay are justified under the applicable law and, if not, remediate the unjustified pay differentials.**

## **7. Conduct a pay equity audit**

Employers should also consider conducting a privileged pay equity audit to identify any potentially unlawful pay disparities and remedy them before a claim is brought forward. Through an audit, the company gathers relevant pay data, identifies comparable jobs, and calculates whether women are paid equally in comparison to men who perform substantially similar work. If any inequities are identified, the employer must determine whether the differences in pay are justified under the applicable law and, if not, remediate the unjustified pay differentials. After an audit is completed, the employer can adjust pay practices going forward. To do so, the employer must proactively analyze the reasons why there was an unjustified pay disparity (such as unconscious bias) and take steps to remedy practices and policies that were the root cause in order to eliminate systemic pay disparities.

Critically, a pay audit also provides the company an opportunity to identify and correct weaknesses in the organization’s systems to protect against claims of disparity going forward. For this reason, employers should commit to conducting an audit every few years. Not only is this a best practice, but certain states, including Massachusetts and Oregon, provide a safe harbor where employers who have conducted pay audits and taken steps to eliminate gender-based compensation differentials have an affirmative defense to an equal pay claim. Corporate counsel can play an essential role in the pay equity audit by ensuring that the audit is conducted on a privileged basis, including retaining experienced outside counsel. ACC

## **References**

42 U.S.C. § 2000e-2(a).

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42 U.S.C. § 2000e-2(a)(1) and (m).

*Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

*Makinen v. City of N.Y.*, 167 F. Supp. 3d 472, 483 (S.D.N.Y. 2016), *rev'd in part on other grounds*, 722 F. App'x 50 (2d Cir. 2018). See also *Williams v. N.Y.C. Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009).

*Yee v. Massachusetts State Police*, 481 Mass. 290 (2019).

29 U.S.C. § 206(d)(1).

29 U.S.C. § 206(d)(1).

See *Odomes v. Nucare, Inc.*, 653 (F.2d 246, 250 (6th Cir. 1981) (whether a job is “substantially equal” is determined on a case-by-case basis, and “resolved by an overall comparison of the work, not its individual segments”); *Gunther v. Wash. Cty.*, 623 F.2d 1303, 1309 (9th Cir. 1979) (“It is the overall job, not its individual segments, that must form the basis of comparison.”).

29 C.F.R. § 1620.10.

29 C.F.R. §§ 16020.10, 1620.11.

29 U.S.C. § 206(d)(1).

See *Rizo v. Yovino*, 887 F.3d 453, 460 (9th Cir. 2018) (catch-all “limited to legitimate, job-related factors such as a prospective employee’s experience, educational background, or prior job performance”); see also *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310 (2d Cir. 1995).

See, e.g., Cal. Lab. § 1197.5(a)(1)(D) (California); N.J. Stat. Ann. § 10:5-12(t) (New Jersey); N.Y. Lab. Law § 194(1)(d) (New York).

Mass Gen. Laws ch. 149, § 105A.

See, e.g., 820 ILCS 112/10(b) (“It is unlawful for any employer to discharge or in any other manner discriminate against any individual for inquiring about, disclosing, comparing, or otherwise discussing the employee’s wages or the wages of any other employee, or aiding or encouraging any person to exercise his or her rights under this Act. It is unlawful for an employer to require an employee to sign a contract or waiver that would prohibit the employee from disclosing or discussing information about the employee’s wages, salary, benefits, or other compensation.”) (Illinois).

E.g., Cal. Lab. § 432.3 (California); Conn. Gen. Stat. § 31-40z (Connecticut); M.G.L. c. 149 § 105A(c) (Massachusetts); ORS 652.220 § 2(c) & (d) (Oregon). See also [Fisher Phillips’ Pay Equity Interactive Map](#), review each state’s specific pay equity laws, it identifies with a star icon the states and localities which prohibit salary history inquiries.

Mass Gen. Laws ch. 149, § 105A(d) (Massachusetts); ORS 652.235 (Oregon).

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## ACC EXTRAS ON... Gender equality

### *ACC Docket*

[Mind the Gap: Practical Solutions to Minimize Pay Equity Claims](#) (Dec. 2019).

[5 Strategies for In-House Counsel to Enhance Their Organization's Workplace Culture in the #MeToo Era](#) (July 2019).

[Pay Equity Laws: What's the Risk of Non-Compliance?](#) (July 2019).

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