

TO: The New Jersey Women Lawyers Scholarship Committee

FROM: Dianna Schwartz

DATE: January 19, 2016

RE: Equal Pay Trends and Legislative Calls to Action

## INTRODUCTION

A gender “gap” has separated the privileges of men and women in nearly every civilization on record, save for the occasional exception (i.e. ancient Egyptian society).<sup>1</sup> Since the dawn of the common law, strides have been made towards the creation of parity between genders.<sup>2</sup> In 2016, overt discrimination is prohibited in the Western world, yet a decisive de facto rift remains. One of the most tangible of these de facto discriminatory weaknesses is the gender pay gap. Importantly, a great portion of the Western world has addressed this issue with direct (and recently updated) legislation. However, despite the passage of an Equal Pay Act in 1963, the United States has thus far declined to update the Act or provide any meaningful millennium campaigns aimed at the modern woman.

This lag on behalf of the United States is disappointingly noticeable when compared with the international community. In this memo is detailed a comparative analysis which periscopes from a global view using international human rights law, through the European Union standard on equal pay (with specific attention given to United Kingdom policy), before continuing to current U.S. standards. This memo’s proposed solution calls for action from three separate entities; females themselves, the companies which hire them, and the policymakers who control the power to help them.

## COMPARATIVE POLICY

On June 29 of 1951, Convention 100 of the International Labour Organisation adopted the Equal Remuneration Convention.<sup>3</sup> The Convention states, in relevant part, “...each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value”.<sup>4</sup> Today the Equal Remuneration Convention has been

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<sup>1</sup> Janet H. Johnson, Women's Legal Rights in Ancient Egypt; The University of Chicago Digital Collections. Available <http://fathom.lib.uchicago.edu/1/777777190170/>

<sup>2</sup> For the purposes of this memo, “Gender” will be referred generally to as Male/Female, although the advocacy voiced here should be given to the entire spectrum of gender identification.

<sup>3</sup> Revlon, Inc, 2002 WL 1058526, at \*24 (S.E.C. No - Action Letter Apr. 5, 2002).

<sup>4</sup> Revlon, Inc, 2002 WL 1058526, at \*24 (S.E.C. No - Action Letter Apr. 5, 2002).

ratified by 172 of the 186 ILO members; among the list of non-ratifying countries are included Qatar, Somalia, the Cook Islands, Oman, and Palau.<sup>5</sup> The most conspicuous name on the list of non-ratifying countries is the United States, the *only* United Nation Security Council power and arguable world leader to decline to agree to the core standards of “promotion” and “application” of equal pay across genders for its citizens.

In the EU, Equal Pay for Equal Work exists as one of key founding principles of the union. Similar to the phrasing of the Equal Remuneration Convention, Article 141 of the Treaty of Rome first held that, “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.”<sup>6</sup> This has since been updated by the Treaty on the Functioning of the European Union; equal pay is addressed therein under Article 157.<sup>7</sup> The EU has enacted several campaigns aimed at closing the gap between male and female salaries, including establishing an “Equal Pay Day” held each year to raise awareness of the issue; the day is set based on the day when men already earned what women will have earned at the end of the year.<sup>8</sup> Encouragingly, the date has moved from March 5 2011, to March 2 2012, and February 28 2013/2014.<sup>9</sup> To closely monitor this progress, the EU maintains gender pay gap figures on all its member states and aggregates its own average of disparity (16.4% as of 2012).<sup>10</sup> A relevant sampling is contained herein:<sup>11</sup>

<b>Belgium</b>	10%	<b>France</b>	14.8%
<b>Germany</b>	22.4%	<b>United Kingdom</b>	19.1%
<b>Ireland</b>	14.4%	<b>Sweden</b>	15.9%
<b>Greece</b>	15%	<b>Finland</b>	19.4%
<b>Spain</b>	17.8%	<b>Slovenia</b>	2.5%

Within the EU, it is worthwhile to examine the common practices of our greatest ally and counterpart, the United Kingdom. The UK first addressed the gender pay gap in the Equal Pay Act, passed in

<sup>5</sup> C100 - Equal Remuneration Convention, 1951 (No. 100); [http://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312245:NO](http://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312245:NO)

<sup>6</sup> European Court considers meaning of "same work", The Law Society of Scotland; 1 June 1999; <http://www.journalonline.co.uk/Magazine/44-6/1001101.aspx>

<sup>7</sup> Gender Pay Gap: What is the EU doing? The European Commission; [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/eu-action/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/eu-action/index_en.htm)

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id. .

<sup>11</sup> Gender Pay Gap: The Situation in the EU. The European Commission; [http://ec.europa.eu/justice/gender-equality/gender-pay-gap/situation-europe/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-pay-gap/situation-europe/index_en.htm). **Note:** The EU requests that this data be looked at in conjunction with other market conditions, i.e. a lower female employment rate, a reflection of a smaller proportion of low-skilled or unskilled women in the workplace, etc. A high pay gap is generally indicative of a highly segregated workplace where women are more concentrated in a small number of sectors.

1970.<sup>12</sup> Today the Act has now been mostly superseded by Part 5, chapter 3, of the Equality Act 2010.<sup>13</sup> The 2010 Act is aimed at simplifying and strengthening the earlier legislation in order to combat the continuing pay gap between genders.<sup>14</sup> Along with the Act has been issued guidance for employers to help instill a culture of fairness as well as textual guidance on the rights afforded to workers under which they may seek retribution.<sup>15</sup>

## **U.S. FEDERAL POLICY AND HESITANCY**

Like its worldwide counterparts, the United States established direct contact with the gender pay gap issue around the general time of women's liberation. President John F. Kennedy signed into law the Equal Pay Act (1963) as a means to addressing the widely disparate salaries between men and women.<sup>16</sup> The Bureau of Labor Statistics reports that at the time of the signing, women earned 62% of the salary of a male counterpart; by 2004, that figure was closer to 80%.<sup>17</sup> However, the U.S. culture diverges from its contemporaries in its current resistance to updating its stance on the gender pay gap issue. Despite the hard work of several policymakers in the last decade to update and expand U.S. legislation on the issue, such efforts have been futile. The Paycheck Fairness Act (PFA) was initially introduced in 2008 as a companion to the Lilly Ledbetter Fair Pay Act (widely recognized as President Obama's first successful piece of legislation).<sup>18</sup> However, despite the PFA passing in the House in January 2009, it was put on hold in the Senate in the interest of ensuring focus on and passage of the Ledbetter bill, and has been immobile ever since.<sup>19</sup>

The PFA was revived in June 2010 with numerous changes. Similar to both the U.K. and the EU, the newly proffered PFA would also create programs to proactively disseminate information to women and girls and provide funding for trainings such as equal-pay negotiating. Unfortunately for women throughout the country, the updated PFA continues to stall in Committee. The bill was reintroduced on March 25 2015 by

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<sup>12</sup> Equal Pay Act; Legislation.gov.uk.; 1970; <http://www.legislation.gov.uk/ukpga/1970/41>

<sup>13</sup> Equality Act 2010: Chapter 3: Equality of Terms, Legislation.gov.uk; <http://www.legislation.gov.uk/ukpga/2010/15/part/5/chapter/3>

<sup>14</sup> What is the Equality Act? Equality and Human Rights Commission.; Oct 8 2015; <http://www.equalityhumanrights.com/legal-and-policy/legislation/equality-act-2010/what-equality-act>

<sup>15</sup> Id.

<sup>16</sup> The Equal Pay Act of 1963; U.S. Equal Employment Opportunity Commission; <http://www.eeoc.gov/laws/statutes/epa.cfm>

<sup>17</sup> Women in the Labor Force: A Databook 1 Report 985; Bureau of Labor Statistics, U.S. Department of Labor; 2005.

<sup>18</sup> Pitney Hardin LLP, With Health Care Reform passed, is the Paycheck Fairness Act Next? 18 No. 8 N.J. Emp. L. Letter

<sup>19</sup> Id.

Barbara Mikulski, Maryland (D).<sup>20</sup> According to Govtrack.us, its prognosis is bleak; it stands a 2% chance of getting past committee, and a 1% chance of being enacted.

## CONCLUDING ADVOCACY

It was reported in early January that Angela Ahrends, former CEO of Burberry and current SVP of retail and online stores at Apple, currently earns more (\$25.8mil in 2015) than her male counterparts, including CEO Tim Cook (\$10mil in 2015).<sup>21</sup> This is compelling yet unsurprising; Ahrends consistently ranks as the highest paid women in the U.S. on the Bloomberg Pay Index (a daily ranking of the top-paid U.S. executives).<sup>22</sup> But Ahrends is the exception to the rule, even at her employer; Apple, like most tech companies, employs a heavily male workforce wherein less than 31% of the global workforce is female.<sup>23</sup> Recruiters will argue that top-tier and tech-ready women simply aren't available in droves the way males are, and they're correct— a message consistent with the EU's request that all employment data be measured against the backdrop of market conditions and contributing factors.<sup>24</sup>

What remains needed is a multifaceted approach to progress. Importantly, the rhetoric imparted to females from an early age needs to change, and quickly. Women must adapt to the changing needs of business, and making both leadership and technological training more available to women is a wise idea. A number of nonprofit organizations currently do this work; for example, this paper's author is a member of Girl Develop It Philadelphia, a nonprofit organization that exists to provide affordable and accessible programs to women who want to learn to code and build web and mobile applications so as to improve their careers.

Further, companies can and should enact HR policies which set more stringent gender pay equality guidelines, and recruit for female leadership. Apple is making strides towards this, having increased its female hiring 65% from 2014 to 2015.<sup>25</sup>

Lastly, the importance of updated gender pay equality legislation cannot be understated. The hesitancy is understandable; the United States prides itself on free market conditions and a hands-off approach to big business. This paper's author shares those ideals. However, it has been proven that

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<sup>20</sup> S. 862: Paycheck Fairness Act; Govtrack.us.; <https://www.govtrack.us/congress/bills/114/s862>

<sup>21</sup> Valentina Zarya, Apple's Top Woman Makes More Than CEO Tim Cook; Fortune JANUARY 7, 2016; <http://fortune.com/2016/01/07/apple-angela-ahrends-pay/?iid=sr-link4>

<sup>22</sup> Id.

<sup>23</sup> Id.

<sup>24</sup> See footnote 11

<sup>25</sup> Valentina Zarya, Apple's Top Woman Makes More Than CEO Tim Cook; Fortune JANUARY 7, 2016; <http://fortune.com/2016/01/07/apple-angela-ahrends-pay/?iid=sr-link4>

companies only stand to benefit when they invest in the labor potential of women, especially in a context of demographic changes and skill shortages.<sup>26</sup> The United States, far behind the times, need wait no longer to take the Paycheck Fairness Act from the table and pass it into law as a means to “catch up” to her international colleagues. Lest it be forgotten that within that Act are contained subsidies for training women to be better negotiators and more informed leaders, which feeds directly back into the first approach to progress; empowering and training women to make better decisions themselves.

With all three approaches working together, Angela Ahrends may no longer be the exception to the rule, and Jennifer Lawrence may no longer have regret towards her own willingness to accept the belief that she is only worth a percentage of what her male counterparts are worth.

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<sup>26</sup> Equality Pays Off: A Europe 2020 Initiative; The European Union Programme for Employment and Social Solidarity; [http://ec.europa.eu/justice/gender-equality/files/epo\\_campaign/epo\\_leaflet\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/epo_campaign/epo_leaflet_en.pdf)