

# Global HR Hot Topic

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## Global Pay and Benefits Discrimination Compliance



**Challenge:**

Multinationals increasingly launch global compensation strategies and benefits offerings without accounting for compliance with local pay discrimination laws.

A consultant at Norfolk Mobility Benefits, David Bryan, says that as “[t]oday’s multinational employer [evolves] into the transnational of tomorrow...[t]here appears to be more centralization of core corporate functions,” such as “benefits professionals implementing global benefits strategies.” Indeed, globalizing the human resources function often begins with aligning certain aspects of compensation/benefits across borders, such as by implementing global executive reward initiatives, regional sales incentive programs, broad-based global incentives/bonuses, and global stock option/equity awards. In addition, certain one-time events, like a merger, spawn special global offerings like retention bonus plans and severance pay plans.

In the push to launch cross-border rewards, multinationals can too easily overlook pay-related discrimination laws in each affected country. In this context, “discrimination” is a broad concept—pay discrimination laws can encompass not only US-style “protected group” discrimination but also a distinct type of “job category” discrimination unknown in the US. We examine both.

### “Protected Group” Pay Discrimination

Most jurisdictions impose general employment discrimination laws that protect specified traits or groups, such as gender/race/religion, in hiring, firing, and terms of employment. Examples include: Brazil constitution art. 7 items XXX-XXXI; EU Equal Treatment Directives 76/207/EC and 200/78/EC; South Africa Employment Equity Act 55/1998; Spain labor code arts. 4.2 (c), 17.1; and US Title VII/ADEA/ADA. Because rewards like pay, benefits, and equity grants are vital terms of employment, discrimination in rewarding employees can violate these protected-group employment discrimination laws. Many countries include as illegal discrimination a concept of “adverse impact” (called in Europe “indirect discrimination”), by which a facially-neutral compensation system may be held illegal if it disadvantages employees in some protected group.

**Pointer:**

Account for both “protected group” and “job category” discrimination principles in every country affected by any global compensation or benefits initiative.

Each monthly issue of Global HR Hot Topic focuses on a specific challenge to globalizing HR, and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case’s International Labor and Employment Law Practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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**Gender:** In addition, many countries impose separate *gender* discrimination laws specific to the pay/benefits/equity context. Examples include: EU treaty article 141 and EU equal pay directive 75/117; the Ontario Pay Equity Act; the UK Equal Pay Act of 1970; and the US Equal Pay Act of 1963. (Plus there are gender discrimination laws like Korea's Gender Equality Employment Act that reach—but are not specific to—compensation.) Some gender pay discrimination laws impose what in the US used to be called “comparable worth” analysis and what in the UK is called “work of equal value.” These laws require equalizing pay across job categories traditionally worked by one gender or the other (for example, an employer's janitors might argue they contribute the same “comparable worth/equal value” as its secretaries, and therefore deserve the same pay). Gender-pay-discrimination laws can impose real burdens on compensation systems; Ontario's Pay Equity Act requires employers affirmatively to run comparable worth/equal value analyses, and Ontario's increasingly-proactive Pay Equity Commission launches unannounced enforcement audits.

**Local citizenship:** Beyond gender, another specific group subject to special protection under some countries' pay-specific discrimination laws is local citizenship. Some developing countries prohibit compensating aliens more generously (the policy here is to keep multinationals from rewarding their expatriates more than comparable locals). For example, Bahrain labor law art. 44 mandates that “wages and remuneration” of “foreign workers” not exceed pay for local “citizens” with “equal skills” and “qualifications” unless necessary for “recruitment,” and Brazil labor code art. 358 requires that “salary” of a local citizen not be “smaller” than pay of a “foreign employee perform[ing] an analogous function.” Watch for these laws in structuring expatriate packages.

## “Job Category” Pay Discrimination

Beyond these protected-group discrimination laws, many countries outside the US impose separate “job category” pay discrimination laws by which every employee enjoys a legal right to be rewarded equally to co-workers in equivalent jobs—even if everyone concerned is in the same protected-group. As applied to a single job, these laws are conceptually simple: Two people doing the same work have a right to the same pay, even if both are white Christian men or even if both are black Muslim women. Where job-category discrimination laws get tricky is where they enter the realm of “comparable worth/equal value”—equating different jobs that purportedly contribute equal value to an organization.

For example, France's job-category pay discrimination law allows for comparable worth/equal value theories, subject to employer defenses based on different length of service, performance, responsibilities, and affirmative action/“positive discrimination” for nationality. See *15 Employees v. Renault, Cour de Cassation chamber social* (France) [CCCs] case # 92-42.291 (10/29/96). In one French case a lawyer won a daily lunch subsidy that his firm had granted only to non-lawyer staff, on the theory that the employer could not favor employees by professional category. *Meier v. Alain*

*Bensoussan, CCcs case # 05-45.601 (2/20/08); principle affirmed in Pain v. DHL, CCcs case # 07-42.675 (7/1/09); principle expanded in Cour d'appel de Montpellier chamber social case # 09/01816* (equalizing benefits between *cadres* [executive] and *non-cadre* employees). These cases, of course, turn on their facts; one French court ruled that a human resources job is not functionally comparable to—and therefore does not merit the same pay as—positions of project manager and “commercial manager.” *Fornasier v. Sermo Montaignu, CCcs case # 06-46.204 (6/26/08).*

Other countries that impose job category discrimination rules include:

- **Brazil:** Brazil labor code article 461 mandates equal pay among employees who perform “identical” work of the “same value.” Article 461 appears to link this mandate to protected group status—“sex, nationality, or age”—but Brazilian courts decouple the equal pay mandate from protected group status. A 2007 case explains that “what is relevant for the purpose of [Brazilian] equal pay [analysis] is whether the identical tasks were performed by the claimant and comparable colleagues with the same quality and productivity,” regardless of sex, nationality, or age. *Fisch v. Unibanco, 2d App. Trib. #00530-2007-201-02-00-4.*
- **China:** China's recent Employment Contract Law, at articles 11 and 18, mandates that “the principle of equal pay for equal work shall be observed” (absent a union agreement to the contrary), and does not link “equal pay” to gender or other protected group status. Implementing regulations are silent on equal pay; Chinese law on this point remains undeveloped.
- **Finland:** In a June 2009 decision under the Finnish Employment Contracts Act 2001, Finland's Supreme Court mandated equalizing employee benefits across two very-different job categories. See Finland Sup. Ct. case # *KKO:2009:52*. A construction company had enrolled its clerical workers in a generous health-care plan, but excluded its construction workers. The construction workers sued for the health benefit under a job-category (not gender-linked) comparable worth/equal value theory. The employer argued, but failed to prove, that each clerical worker contributed greater value. The court ordered extending the health plan to the construction workers.

A special type of job-category discrimination law addresses irregular—temporary/part-time/contingent—status. European Union member states expressly prohibit pay discrimination on irregular status, meaning that (contrary to a practice widespread across the United States) European employers cannot deny temporary/part-time/contingent workers benefits under insurance and retirement plans. See EU directive 97/81/EC. These same laws can also require European employers to credit part-time service as full-time for years-of-service requirements. Cf. *Lapouge v. Assoc. ADAPEI, CCcs case # 07-40.289 (5/7/08)* (France).

\* \* \*

Check that international pay, benefits, and equity awards comply with each affected jurisdiction's prohibitions against both “protected group” and “job category” pay discrimination.