



HUMAN-CENTRED BUSINESS MODEL

A HOLISTIC APPROACH TO A SUSTAINABLE BUSINESS ECOSYSTEM



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EQUAL EMPLOYMENT OPPORTUNITY

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INTRODUCTION & PURPOSE

The concept of equal employment opportunity (EEO) emerged from the guarantee of equal treatment for minorities and women with respect to their white male counterparts; today, EEO is much broader, reaching a whole series of protected classes, and aiming to prevent employment or workplace

discrimination occurring on the basis of skin-colour, religion, race, gender, sexual orientation, age, disability, marital status, parental/pregnancy status and military/veteran status.

One of the core principles of the Human-Centric Business Model (HCBM), EEO is not only a legal and moral obligation, but also one that has important commercial and economic benefits at large, and which can have a potentially-dynamising effect on both the workforce and in the workplace. In order to implement EEO, we strongly suggest the inclusion of targets and adequate performance EEO indicators in the HCBM.

This Note begins by **(I)** exploring EEO in its different facets, considering what EEO is, and then **(II)** going on to examine the rationale for labour market interventions. Thereafter, it moves to the legal dimension, **(III)** considering the legal landscape for implementing EEO on each of the global, regional and national levels and **(IV)** discussing compliance issues with those standards and laws. Finally, it takes on a specific situation, **(V)** looking to the particular issue of gender equality in EEO.

I. UNDERSTANDING EQUAL EMPLOYMENT OPPORTUNITY

There is no single definition for EEO. The World Bank report on *Equity and Development* (2006) describes EEO as the idea that every individual should have the same chances in life to succeed economically, socially or politically, and that such opportunities should be independent of circumstances of life that are beyond their control, including, *inter alia*, gender, race, place of birth, family origins and social groups.¹ The report continues that “the outcome of a person’s life, in its many dimensions, should reflect mostly his or her efforts and talents, not his or her background.”²

The Bank’s report also refers to the idea of “levelling the playing field”, a term that has been widely employed by those working in EEO.³ In his social contract theory, John Rawls posited the thought exercise of a so-called “veil of ignorance” as a method for determining the morality of political issues and which construed: “behind” that veil, “contracting” souls would not have any particularities upon which to base their decisions—no talents, gender, assets, social placement or any other attribute that might affect their place within that social order—and, as such and, if nothing else, would, out of self-interest, make socio-political decisions that would result in relatively level societies.⁴

Rawls’ model has been criticised for failing to accurately “capture” intuitions.⁵ Ronald Dworkin has argued that levelling the playing field requires equalising resources across individuals, but doing so in such a manner that would allow for variances in the exercise of choice relating to differential individual

¹ World Bank (2006). *Equity and Development* [hereafter, “WB E&D Report”], at:

<http://documents.worldbank.org/curated/en/435331468127174418/pdf/322040World0Development0Report02006.pdf>.

² *Ibid.*, at 18.

³ *Ibid.*, at “Part III: Leveling the economic and political playing fields”.

⁴ John Rawls, *A Theory of Justice* (Boston: Belknap Press, 1971).

⁵ See, e.g., John E. Roemer, *Theories of Distributive Justice* (Cambridge, MA: Harvard University Press, 1996), Ch. 5.

preferences that would only emerge in final conditions.⁶ Such an approach would mean that, all individuals begin equally—on the same, “levelled”, “playing field”—, with the same opportunities set before them, therein obviating birth circumstances, but, due to individuality, not all individuals would necessarily succeed to the same degree or in the same fashion. Dworkin distinguished between, on the one hand, circumstances that should be neutralised to allow equal opportunities and, on the other one, preferences that differ for every individual and for which they should be held responsible. All predetermined circumstances—including race, skin colour, religion, gender or disability—are unchosen factors that ought not to fundamentally define a people’s access to opportunities.

Others have further developed the positions put forward by Rawls and Dworkin, notably John Roemer. Roemer has put forward the following understanding of Dworkin’s position as follows:

The general structure of Dworkin’s theory is that a person’s attributes (endowments, preferences, actions) can be partitioned into two sets—those for which we think it is morally correct to hold him accountable or responsible, and those for which we think it is not so. Call the first set responsible factors and the second, arbitrary factors.⁷

According to Roemer, “this conception of ‘responsible’ and ‘arbitrary’ factors [...] is key to the notion of equal opportunity.”⁸ However, adding further nuance, Roemer concludes that “the outcomes individuals sustain are the consequence of circumstances, effort, and policy”, with “policy [being] the instrument by which society [...] influences outcomes.”⁹

II. RATIONALE FOR LABOR MARKET INTERVENTIONS

Interventions and EEO laws and policies are particularly important in labour markets, as those markets are generally less competitive than commodities markets. Labour markets are frequently characterised by inequality of power in the employment relationship (between employer and employee), by imperfect mobility of employees, by insufficient or inaccessible information, or by discrimination. “[T]hese imperfections generate rents in the employment relationship, which both sides can try to capture.”¹⁰ Distortions in the market that lead to inefficient outcomes require external interventions that “guarantee more equal opportunities for workers, better working conditions, and less discrimination.”¹¹ By reducing labour market distortions, overall efficiency can be increased, “for example, by allowing full use of the labour of discriminated groups, by increasing labour mobility, or by better managing income risk.”¹²

⁶ John E. Roemer, “Equality of Opportunity: A Progress Report”, in: *Social Choice and Welfare* (2002), Vol. 19, pp. 455–71.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ WB E&D Report, *supra* note 1 at 186.

¹¹ *Ibid.*

¹² *Ibid.*

III. THE LANDSCAPE FOR IMPLEMENTATING EQUALITY OF EMPLOYMENT OPPORTUNITY

In order to understand the EEO landscape, it is helpful to consider **(A)** the legal basis provided at the global level, which finds voice in the various instruments of the International Labour Organization (ILO), **(B)** activity at the regional level, notably that of the European Union, and **(C)** how those broader inputs have been implemented on a national level, such as in the United States of America.

A. GLOBAL LEGAL BASIS: THE INTERNATIONAL LABOUR ORGANIZATION

On the global level, the conventions and recommendations of the International Labour Organization (ILO) are the only internationally agreed upon instruments. A specialised agency of the United Nations, the ILO brings together governments, employers and workers of 187 Member States to set labour standards, develop policies and devise programmes promoting decent work for all women and men.¹³ In that overall aim, the Member States of the ILO have identified EEO as an important concern. Three conventions specifically aiming to define international standards of equality of opportunity and treatment in labour markets have been ratified, setting the basis for understanding the notion:

1. **Equal Remuneration Convention** (1951)¹⁴, which aims to guarantee equal remuneration for men and women for work of equal value;
2. **Discrimination Convention** (1958)¹⁵, which prevents discrimination in the work place; and
3. **Workers with Family Responsibilities Convention** (1981)¹⁶, which aims to create equality of opportunity and treatment for men and women, and to enable workers with family responsibilities to engage in employment without being subject to discrimination.

Of these three instruments, the **Discrimination Convention** provides the best concrete definition of EEO, construing it broadly as the absence of discrimination in the workplace and then, in its Article 1, discretely defining “discrimination” as follows:

- (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality opportunity or treatment in employment or occupation;
- (b) Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers’ and workers’ organizations, where such exist, and with other appropriate bodies.¹⁷

¹³ See, e.g., About the ILO, at <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

¹⁴ ILO, Equal Remuneration Convention, 1951 (No. 100), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100.

¹⁵ ILO, Discrimination (Employment and Occupation) Convention, 1958 (No. 111) [hereafter, “ILO Discrimination Convention”], at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

¹⁶ ILO, Workers with Family Responsibilities Convention, 1981 (No. 156), at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156.

¹⁷ ILO Discrimination Convention, *supra* note 13, at Art. 1.

While a carve-out is allowed for distinctions, exclusions or preferences that are based on the inherent requirements of a particular job¹⁸, employment and occupation are understood to “include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.”¹⁹

Collectively, the three ILO conventions set a basic, international legal framework for EEO. States Parties to these conventions are legally obliged to design their national policies to guarantee that the conventions are implemented domestically. It bears emphasising that, even in signatory nations, the conventions themselves do not apply directly—a principle that is known as “direct effect”—; rather, each convention must be implemented by each State Party in accordance with its own legal requirements, a process known as “domestication”.²⁰ This chain of action implies that, while the overall policies may be generally applicable, each State Party has freedom to interpret the conventions in their minutiae in developing the framework for application on a national basis. It also means that, while varying results are found to particular incidents and issues, the end result should largely be the same for all State Parties, insofar as clearly stipulated in the convention.

EEO laws should be applicable at any stage of the employment relationship, including for selection, promotion and compensation decisions, but also for any other decision that might affect an employee. In reaching such decisions, consideration should only be had for merit-based factors and objectively determinable or appraisable attributes. Circumstances and conditions that are not job-related must not be considered by employers in their decision making. Thus, for instance, EEO laws specifically forbid discrimination in the workplace on the basis of race, colour, gender, religion, political opinion, national extraction, sexual orientation, but also due to age, disability, marital status, parental/pregnancy status and military/veteran status.

B. REGIONAL INSTRUMENTS: THE EUROPEAN UNION

The European Union (EU) is a regional organisation that, while having its roots in economic cooperation, has grown to become a political union among twenty-eight European nations.²¹ Although, the objective to become a political union ceased to be the ultimate aim of the European construction process after the big enlargement of the EU in 2004. The central organs of the EU can oblige, in varying forms, EU Member States to implement certain laws, and to do so in ways that, though not necessarily identical, are harmonious with the goal or vision espoused by EU. Due to the political dimensions of the Union, the degree of harmonization, if not necessarily homogeneity, that comes from EU instruments is substantially greater than that which comes from broader international instruments, such as the afore-discussed ILO conventions.

With regard to EEO, the laws of the EU guarantee certain minimum rights to all employees, among which is protection against discrimination. Specifically, **Directive 2000/78/EC**—the so-called

¹⁸ *Ibid.*, at Art. 1.2.

¹⁹ *Ibid.*, at Art. 1.3.

²⁰ See, e.g., A.O. Adede, “Domestication of International Obligations”, CommonLII (15 Sep. 2001), at <http://www.commonlii.org/ke/other/KECKRC/2001/14.html>.

²¹ See, e.g., “The EU in brief”, Europa.eu, at https://europa.eu/european-union/about-eu/eu-in-brief_en.

“Employment Equality Directive”—is part of a series of measures aiming at combating discrimination in the workplace. It seeks to tackle workplace discrimination on basis of religion, age, disability or sexual orientation.²² The Directive lays down general minimum rules that each EU Member State is directed to implement, itself determining the minutia. In 2006, the “Directive 2006/54/EC-equal opportunities” comes into force with the aim to simplify, modernise and merge existing Community legislation in the area of equal treatment for men and women in employment and occupation. Specific provisions of the 2006 Directive prohibit explicitly any discrimination on grounds of sex with regards to pay, treatment in occupational social security schemes and access to employment, vocational training and promotion and working conditions. However, major pitfall of Directive 2006/54/EC lies in that it does not even define the principle of EO. The Directive uses the expression “principle of equal opportunities” in its title. However, none of its provisions addresses the contents and extent of this principle. Unlike, Regulations, which are binding legislative acts having legal force throughout every Member State and entering into force on a set date in all the Member States, Directives lay down certain results that must be achieved but leaving each Member State freedom to decide how to transpose those measures into their national laws.²³ As such, and quite similar to the case of national implementation of the aforementioned ILO conventions, the details of EEO laws and regulations vary from country to country, even as their overall outcome is largely the same.

The Directive covers various areas. It regulates the conditions for access to employment, including selection criteria and promotion, among which, for example, is the requirement to provide reasonable accommodations for persons with disabilities, when needed, so as to enable them to have access to enjoy professional success in terms of participation, advancement and training. The Directive also regulates employment and working conditions, including pay and dismissals, as well as membership and involvement in organisation of workers or employees.

The Directive obliges Member States to introduce mechanisms ensuring effective remedies in the event of discrimination. For example, Member States are supposed to introduce judicial or administrative procedures that are available to all persons considering themselves wronged by the failure to apply principles of equal treatment. Similarly, Member States are required to introduce systematic protection for employees in case of reprisals by the employer.

Two other, earlier Directives also apply to EEO. Through **Directive 76/207/EEC** of 1976, the principles of equal rights between men and women have been implemented and cover a range of areas, including parental leave, and the protection of pregnant employees and breastfeeding mothers.²⁴ **Directive**

²² Jan Tymowski, *The Employment Equality Directive European Implementation Assessment*, European Parliamentary Research Service (EPRS), PE 536.346 (Feb. 2016), at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536346/EPRS_STU%282016%29536346_EN.pdf. See also, European Equality Law Network, “Key EU directives in gender equality and non-discrimination”, at <http://www.equalitylaw.eu/legal-developments/16-law/76-key-eu-directives-in-gender-equality-and-non-discrimination>.

²³ See, e.g., “Regulations, Directives and other acts”, European Union, at https://europa.eu/european-union/eu-law/legal-acts_en.

²⁴ Directive 76/207/EEC (9 Feb. 1976), at <http://eur-lex.europa.eu/legal-content/DA/TXT/?uri=CELEX:31976L0207>.

2000/43/EC(6) of 2000 specifically establishes the principle of equal treatment for people of different racial or ethnic origin in the field of employment and occupation.²⁵

C. NATIONAL IMPLEMENTATION: THE UNITED STATES OF AMERICA

On a national level, developing an EEO framework typically requires a tiered approach, usually beginning with some sort of a national strategy (if not with a constitutional guarantee), followed by some form of EEO law(s), and then being implemented through executive regulations, which ought to be further shored-up by program manuals. An EEO framework should present appropriate policies guiding EEO in both the public and private sectors. Where nations have ascribed to global or regional instruments, national measures must take those directives into account. It bears noting that, as the United States is a federated nation, there are two levels of jurisdiction: the larger, unificatory, federal level of limited jurisdiction, with measures coming out of the national organs (principally seated in Washington, DC), and the foundational, “sovereign” basis of the fifty states. This note will treat federal law alone, which is directly applicable in every US jurisdiction, and which sets a minimum to which the states can add further guarantees, but not detract or undermine.

The basis for EEO is enshrined in the US Constitution—the Fourteenth Amendment’s Equal Protection Clause provides that no state shall deny to any person within its jurisdiction “the equal protection of the laws”.²⁶ US federal antidiscrimination law is subsequently divided into different sections targeting various categories. Employers must be mindful of these statutes when hiring and firing, offering promotions or benefits, and giving or failing to give pay raises. To date, six discrete areas are protected from discrimination under federal law, each of which is covered by an individual law:

1. NATIONAL ORIGIN, RACE, RELIGION AND SEX: The ***Civil Rights Act of 1964*** prohibits *inter alia* employer discrimination based on national origin, race, religious beliefs and sex. Its implementation is enforced by the Equal Employment Opportunity Commission (EEOC), created through the same act.²⁷ The EEOC is tasked with ensuring that all businesses follow EEO provisions for their employees, and that seeks to obviate pay inequality for equal work for male and female employees.²⁸ If an employee feels he or she has been treated unfairly, the individual can file a complaint with the EEOC, which will then investigate and determine whether a pattern of discrimination is evident.
2. AGE: The ***Age Discrimination in Employment Act*** (ADEA) states, in relevant part, that it is unlawful for an employer to fail or refuse to hire any individual over the age of 40 on the basis of that

²⁵ Directive 2000/43/EC (29 Jun. 2000), at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0043>.

²⁶ US Const., amend. XIV, §1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

²⁷ Civil Rights Act of 1964, Title VII, § 42.

²⁸ US Equal Employment Opportunity Commission (EEOC), at www.eeoc.gov.

individual's age. ADEA further forbids discrimination in cases of promotion, firing and laying-off, pay, training, and fringe benefits.

3. **DISABILITY:** The ***Americans with Disabilities Act*** (ADA) prohibits employers from discriminating against qualified people with disabilities during hiring, in cases of promotion, firing and laying-off, pay, training, and fringe benefits.
4. **GENETICS:** The ***Genetic Information Nondiscrimination Act*** (GINA) prohibits employers from discriminating on the basis of genetic information, including genetic-based diseases, disorders or conditions, as such information is not indicative of an employee's current ability to work.
5. **PREGNANCY:** The ***Pregnancy Discrimination Act*** of 1978 states that an employer cannot refuse to hire a pregnant woman because of her pregnancy, a pregnancy-related condition, or related prejudices of co-workers, clients or customers.
6. **SEXUAL ORIENTATION AND GENDER IDENTITY:** Presently, there is no federal US law prohibiting employer discrimination on the grounds of sexual orientation or gender identity; instead, each of the several US states has its own legislation governing the topic. However, the ***Employment Non-Discrimination Act*** (ENDA) is presently in committee in the US Congress in order to address these lacunae, with the matter having repeatedly been proposed since 1974.

The United States has traditionally promoted EEO through ***affirmative action*** programs. Affirmative action programs seek to remove structural inequalities persisting at the larger, societal level by actively facilitating the advancement of traditionally disadvantaged groups. In the workplace, such programs seek to reproduce the composition of the workforce in the relevant labour pools. As such, quantitative analyses are carried out to evaluate the place of traditionally disadvantaged groups in the workforce as compared to the composition of the analysed sample workforce.²⁹

US authorities have a panoply of powers to bring to bear in enforcing antidiscrimination laws. Most directly, authorities can issue fines and penalties, and bring companies to court for violations. While companies are guaranteed their day in court, those that are found to have violated antidiscrimination laws are obliged to pay the imposed fines and penalties, and may also be required to pay court costs.³⁰ Less tangibly, but no less impactful, businesses may also see a decrease in customer and employee loyalty, as well as curtailed business by other companies tending to avoid doing business with those intentionally discriminating against employees.³¹

V. ENSURING COMPLIANCE WITH EQUAL EMPLOYMENT OPPORTUNITY LAWS

²⁹ USC Title 41, § 60–2.1 *et seq.*, at <https://www.gpo.gov/fdsys/pkg/CFR-2005-title41-vol1/pdf/CFR-2005-title41-vol1-subtitleB-chap60.pdf>.

³⁰ See, e.g., EEOC, at <https://www.eeoc.gov/employees/remedies.cfm>.

³¹ See, e.g., Mayhew Ruth, "How Does an EEOC Complaint Hurt an Employer?", AzCentral, at <http://yourbusiness.azcentral.com/eeoc-complaint-hurt-employer-2544.html>.

While the legal basis discussed in the previous section is necessary to guaranteeing EEO, execution—necessary to ensure compliance with those laws—requires **(A)** phase-specific guidelines and **(B)** a focus on remuneration.

A. PHASE-SPECIFIC GUIDELINES FOR ENSURING EEO

Businesses striving to comply with EEO laws, and to promote an inclusive working environment that is inclusive, ethical and fair for all employees, have numerous resources at their disposal. What follows is **Recruitment** a general guide to doing so, broken-up by phases of the hiring process.³²

- **Phase.** In order to guarantee EEO, business must begin by ensuring compliance with any pertinent EEO laws, and must do so at each stage of the employment relationship and process. The process begins with guaranteeing EEO compliance in the recruitment process. When recruiting applicants for a position, it is important to advertise in a variety of sources and media (*e.g.*, web, newspaper, job boards, flyers). Doing so helps to ensure that a broader range of candidates are notified of opportunities and might apply. In the instance that a business relies upon a single method of advertising, it is more likely to miss out on reaching one or populations lacking access to the chosen communication channel.

- **Standardisation of the Selection Process.** When selecting qualified candidates from a large applicant pool, it is essential that the selection process be standardised. The more subjective the selection process, the more likely that a hiring manager will allow—intentionally or otherwise—biases to enter, thereby potentially affecting the outcome of the selection process and the ultimate decisions. Furthermore, objective and standardised processes help ensure screening accuracy, therein improving employee retention rates.

- **Sustained Objectivity in Employee Advancement and Development.** Even after the selection process has been completed, it is necessary to keep the employment relationship as objective as possible. For example, when faced with the question of promotion, formal steps need to be taken to ensure that all qualified candidates have equal opportunity obligations to be notified and made aware of the position, and to duly apply for that position, should they so desire. Mechanisms that help sustain objectivity for matters going beyond selection include posting the opened-up position for a specified period of time, placing the notice of vacancy in a highly-populated area and taking advantage of other, popular modes of communication, developing standardised screening tests and techniques to promote selection of the most qualified employee, and thoroughly debriefing candidates who were not selected as to the reasoning and rationale.

- **Training and Advancement.** In order to promote EEO, it is important for businesses to establish a proactive organisational approach where employees are equally given the chance to improve and to be rewarded once they acquire new skills. Guaranteeing access to adequate training provides a mechanism for employees to improve and achieve better-paid and more interesting jobs.

³² N. Plowman, “What is equal employment and how can small businesses ensure compliance?”, Bright Hub Project (18 May 2011), at <http://www.brighthubpm.com/change-management/61586-how-can-small-businesses-ensure-compliance-with-equal-employment/>.

- **Career Advancement and Professional Fulfilment.** Promotion opportunities are important to push employees improving their skills and adding value to their work performance and training are essential to increase organisations' competitive edge and create well-trained, multi-skilled workforce. Opportunities for career advancement must meet EEO by guaranteeing the same access to information and networks for understanding systems of promotion.

- **Robust Grievance Mechanisms.** Businesses should establish robust and transparent grievance procedures and mechanisms. The complaints system should show employees that there is an active consideration and redressing of any problems regarding discrimination in workplace environments. Anonymity and confidentiality are essential to the proper functioning of any grievance system. As such, when implementing a formal grievance process, strict confidentiality clauses must be incorporated; those clauses must apply as much to the complainant as to those hearing the complaint. More generally, as employees can be intimidated by the thought of retaliation (notably those belonging to protected classes), the business must work hard to create a larger culture of trust, especially one that respects and guarantees anonymity. Mediation can play an important role in the grievance and dispute resolution process. In order to maintain the objectivity and integrity of the grievance process as a whole, businesses may decide to use third-party mediators to increase the likelihood of positive and fair dispute outcomes. A business should identify standards of behaviour and performance expectations that can be used as parameters for a correct behaviour against any form of discrimination.

- **Fair Remuneration.** The other important aspect of an employment relationship is remuneration. When making compensation decisions, a company must ensure that its compensation strategy is fair and well-documented. No group or individual should be remunerated on a biased basis. Biases, be they conscious or subconscious, are particularly prevalent and manifest in differences in pay between men and women. It is essential for the business to be able to show ample evidence showing that it is abiding by its written policy. Furthermore, the business should provide employees with a written copy of the strategy in order to enable all employees to make the most of opportunities that will yield higher compensation.

- **GRI Standards.** A business can also refer to the Global Reporting Initiative (GRI) standards to report its impact related to specific economic, social and/or environmental topics on the social system within which it operates, such as monitoring equal employment opportunity through GRI 401 and GRI 405. By reporting the number of new employees divided by categories of age, gender and region, the business's "efforts to implement inclusive recruitment practices based on age and gender, and the optimal use of available labour and talent in different regions" can be understood.³³ Also, by reporting the percentage of individuals within the business's governance bodies (*e.g.*, board of directors, management committees) as divided by categories of gender, age and other diversity indicators such as minorities or persons with disabilities, the level of diversity in the business can be more easily gauged by stakeholders.³⁴

B. FOCUSING ON REMUNERATION

³³ GRI Standards, "Consolidated set of GRI Sustainability Reporting Standards 2016", GRI, at www.globalreporting.pdf.

³⁴ *Ibid.*

Research carried out in Australia has indicated a second set of steps that might be used to achieve EEO, especially with regard to gender.³⁵ That research highlights that equality of remuneration plays a key role in achieving EEO. It bears emphasising that such does not only include access to both equal and equitable pay, but that the same standard must also be achieved with regard to bonuses and pay increases. Promotion or incremental advancement for employees who attain and improve their skillsets and experience should serve as means for equal application to both genders. By contrast, negotiated or discretionary wage increases tend to result in wage gaps that hurt underrepresented categories.

A business should also consider the possibility of guaranteeing permanent part-time work to employees struggling to balance work and family responsibilities and who might benefit from able to secure more flexible working arrangements when required. Permanent part-time work is an important mechanism to provide adaptable working times. Although particularly important for women with family responsibilities, such measures should be implemented and applied equally and objectively. Indeed, if more men were to avail of such arrangements, a company's gender dynamics might dramatically diverge from present social norms.

Flexible working hours can be an important asset not just for women but also for numerous other under-represented categories striving to achieve EEO. For example, persons with disabilities might also thrive under part-time working hours, if needed or desired. It is important that part-time jobs guarantee, at least partially, the benefits that are provided to them under full time jobs, such as healthcare, retirement schemes and parental or family leave.

VI. ACHIEVING GENDER EQUALITY

Guaranteeing gender equality is essential to achieving EEO. To do so, it is necessary to **(A)** understand the global nature of the pervasive problem of gender inequality and that **(B)** achieving gender equality is an international legal obligation. In order to tackle the problem, it is important to **(C)** highlight the general recommendations for ameliorating gender inequality, and **(D)** show specific, straightforward actions that can be undertaken to promote gender equality in the private sector.

A. GENDER INEQUALITY: A GLOBAL, PERVASIVE PROBLEM

Gender inequality is one of the most primitive and oldest forms of inequality.³⁶ Workplace gender equality is achieved when people are able to access and enjoy the same rewards, resources and opportunities, regardless of gender.³⁷ According to the 2016 Global Gender Gap Report (**GGG Report**), the difference between men and women in the access to resources and opportunities, especially in the labour market remains wide: the gap in economic participation and political empowerment between men and

³⁵ David Peetz, Margaret Gardner, Kerry Brown and Sandra Berns, "Workplace Effects of Equal Employment Opportunity Legislation: The Australian Experience", *Policy Studies* (2008), Vol. 29, No. 4, pp. 405–19.

³⁶ OECD, "Why quotas work for gender equality", at <http://www.oecd.org/social/quotas-gender-equality.htm>.

³⁷ Workplace Gender Equality Agency, Australian Government, "The business case for gender equality" (Sep. 2016) [hereafter, "Australia's GE Business Case"], at <https://www.wgea.gov.au/sites/default/files/wgea-business-case-for-gender-equality.pdf>.

women in labour force participation is broad, with women only earning 59 percent of what men earn for the same work. The World Bank has recognised that, “across the world, women experience significantly lower labour market participation rates than do men and there also remains a significant gender gap in earnings” and that “working women are often employed in lower paying jobs.”³⁸

The gender divide exists in both developing and developed countries. The divide is particularly true with regard to remuneration, with men being paid substantially more than their female counterparts: 13.4 percent in Germany, 17.5 percent in the United States, 26.6 percent in Japan and 36.7 percent in Korea.³⁹

The gender divide is also present in terms of workplace governance and political empowerment. Presently, female representation on the boards of private companies is still very low, with representation in the United Kingdom and Germany at the high end with 25 and 26 percent, respectively, but with other developed countries lagging even farther behind: in Japan where only 3 percent of board members are female, and in the United States, only 5 percent of CEOs of Fortune 500 companies are female. More troubling still, the GGG Report also highlights that progress towards more gender equality is slowing down in developed countries, mainly North America and Western Europe.

It bears noting that gender discrimination can be exacerbated by social and religious norms, many of which, though informal, can have significant influence on social and legal norms⁴⁰, typically by negatively impacting women’s access to education and employment.⁴¹ A larger, social perspective of gender discrimination needs to take into account the lack of institutional and regulatory systems that might augment women’s participation in the labour market and increase their earnings, for instance by addressing child support, easier mobility and options for part-time work.⁴²

B. GENDER EQUALITY: AN INTERNATIONAL LEGAL OBLIGATION

The Universal Declaration of Human Rights guarantees the equality of all human beings, specifically preventing any discrimination made on the base of sex.⁴³ That guarantee has been reaffirmed multiple

³⁸ The World Bank (2011). “Getting to Equal: Promoting Gender Equality through Human Development”. *The International Bank for Reconstruction and Development*.

³⁹ “International Gender Equality Statistics”, Workplace Gender Equality Agency, Australian Government, at https://www.wgea.gov.au/sites/default/files/20160428_International_gender_equality_statistics_factsheet.pdf.

⁴⁰ The OECD has observed that “women have less personal autonomy, fewer resources at their disposal, and limited influence over the decision-making processes that shape their societies and their own lives.” Johanna Schalkwyk, “Culture, Gender Equality and Development Cooperation”, (Paris: OECD Publishing, 2000), at <http://www.oecd.org/social/gender-development/1896320.pdf>.

⁴¹ *Getting to Equal: Promoting Gender Equality through Human Development* (Washington, DC: World Bank, 2011) [hereafter, “WB Gender Equality Report”, at http://siteresources.worldbank.org/EDUCATION/Resources/278200-1099079877269/547664-1099080014368/Getting_to_equal.pdf.

⁴² *Ibid.*

⁴³ Art. 1 & 2, UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III) (10 Dec. 1948), at <http://www.refworld.org/docid/3ae6b3712c.html>.

times⁴⁴, most notably as part of the Sustainable Development Goals (SDGs).⁴⁵ That moral obligation has been developed into legal obligations of the state, notably in the ***Convention on the Elimination of All forms of Discrimination*** (CEDAW), as follows:

1. To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
2. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
3. To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; and
4. To provide special protection to women during pregnancy in types of work proved to be harmful to them.

In terms of EEO, gender equality can be best understood as having **six related incumbent rights**:

1. The right ***to work***;
2. The right ***to the same employment opportunities*** (application and selection process);
3. The right ***to free choice of profession and employment***, and, relatedly, upon having chosen to enter that profession and employment, the right ***to promotion, job security, training and retraining*** (including apprenticeships, advanced vocational training and recurrent training);
4. The right ***to equal remuneration*** (including benefits, equal treatment in respect of work of equal value, equality in the evaluation of the quality of work);
5. The right ***to social security*** (retirement, unemployment, sickness, invalidity, paid leave); and
6. The right ***to protection of health***, which include the right to safety in working conditions, including the safeguarding of the function of reproduction.⁴⁶

In order to achieve the above six incumbent rights of workplace gender equality, the four elements must be implemented by employers and in the workplace:

1. ***Equal pay*** for work of equal or comparable value;
2. ***Removal of barriers*** to the full and equal participation of women in the workforce;
3. ***Access to all occupations and industries***, including leadership roles, regardless of gender; and

⁴⁴ Art. 11, *Convention on the Elimination of All forms of Discrimination against Women*, A/RES/34/180 (18 Dec. 1979) [hereafter, "CEDAW"], at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

⁴⁵ SDG Goal 5, at <https://sustainabledevelopment.un.org/sdg5>.

⁴⁶ See CEDAW, *supra* note 34. The Convention specifically refers to discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work. *Ibid.*

4. **Elimination of discrimination on the basis of gender**, particularly in relation to family and caring responsibilities.⁴⁷

Regional instruments, such as **Directive 2006/54/EC**⁴⁸ of the European Union, can have important effects in creating subsequent and more specific legal obligations, as well as for implementing gender equality. The Directive speaks specifically to inequality in relation to (1) access to employment, including promotion, and vocational training; (2) working conditions, including pay; and (3) occupational social security schemes. It also seeks to make implementation more effective by the establishment of appropriate procedures.⁴⁹

C. ADDRESSING GENDER EQUALITY IN THE PUBLIC SECTOR

The 2015 OECD recommendations seek to frame and understand an approach for promoting a government-wide strategy for gender equality reform.⁵⁰ Although these measures focus on the public sector, they are ones that could be adapted to their analogues in the private sector; that said, this Note specifically addresses the measures for facilitating the development of gender equality further on.

1. **Mainstreaming Gender Equality in Public Policies and Budgets.** The first step to guaranteeing gender equality is the mainstreaming of gender equality in the design, development, implementation and evaluation of relevant public policies and budgets. In order to create a widespread culture that is accepting and supportive of gender equality, it is necessary that appropriate and determined leadership be shown at the highest political level, and actively engagement with relevant governmental and non-governmental stakeholders be undertaken. Equality gaps can be narrowed through both gender mainstreaming and specific, targeted actions to promote gender equality. In order to have effective, sustained and coordinated implementation, states must have an institutional framework that (i) clearly established roles and responsibilities, (ii) bolsters capacities and musters resources, (iii) ensures capacity and resources management and (iv) strengthens vertical and horizontal coordination mechanisms and assures coherence. The process can be facilitated by early integration of evidence-based assessments of gender impacts into various dimensions of public governance, as well as by transparently and affirmatively integrating the gender perspective into all phases of the budget cycle. While states are increasingly introducing gender budgeting and mainstreaming measures for gender equality in governance and public life, policy progress remains variable, and on-the-ground implementation and changes remains slow.⁵¹

2. **Strengthening Accountability and Oversight Mechanisms.** Policy preparation and rollout alone are insufficient for effective and thorough implementation; methods of accountability and oversight must

⁴⁷ Australia's GE Business Case, *supra* note 30.

⁴⁸ Directive 2006/54/EC (5 Jul. 2006), at <https://osha.europa.eu/en/legislation/directives/council-directive-2006-54-ec>.

⁴⁹ *Ibid.*

⁵⁰ OECD, *2015 OECD Recommendation of the Council on Gender Equality in Public Life* (Paris: OECD Publishing, 2016), at <http://dx.doi.org/10.1787/9789264252820-en>.

⁵¹ OECD, *Report on the Implementation of the OECD Gender Recommendations – Some Progress on Gender Equality but Much Left to Do* (Paris: OECD Publishing, 2017), at <http://www.oecd.org/mcm/documents/C-MIN-2017-7-EN.pdf>.

be developed in parallel. Such is no less the case for achieving gender equality. The implementation of oversight mechanisms, complete with a robust, anonymised complaints system, is essential to achieving gender equality. While, in 2017, twenty-three of the thirty-five OECD nations had established gender equality committees, such a measure is not itself sufficient to deliver more gender-sensitive policies.⁵² Strengthening accountability and oversight mechanisms requires, among other things, bolstering the place and role of independent institutions and advisory bodies, on the national and agency (or even project) level, is a key element. “To be effective, such oversight should be undertaken in a balanced manner and avoid prescriptive approaches to foster continuous improvement while enabling to track progress in gender equality.”⁵³ Oversight should be objective, thus requiring the strengthening of systematic, evidence-based assessments. Such might be accomplished through (i) uniform evaluation, measurement and accountability frameworks prepared *ex ante*; (ii) active promoting of data dissemination and affordable, effective and timely access to performance information; and (iii) increasing coordination and cooperation among data-collecting and data-producing bodies.

3. Increasing Gender-balanced Representation in Decision-making Positions. Beyond policy-setting and the implementation of accountability and oversight, it is important that gender-balanced representation be seen to be occurring in decision-making positions in public life. Effective leadership in this regard might be facilitated by embedding the political commitment to promote gender equality at the highest levels. Concretely, that might require (i) the setting of comprehensive (transitional or correctional) regulatory or voluntary measures to promote gender diversity, possibly with penalties for noncompliance; (ii) introducing measures enabling equal access to senior public sector appointments (disclosure requirements; clear recruitment standards and target setting or quotas; merit-based appointments); (iii) top-level mainstreaming work-life balance and family-friendly work practices; and (iv) facilitating capacity and leadership development (mentoring; networking; training programmes).

4. Equilibrate Remuneration and Recruitment. Among the adequate measures to improve gender equality, it is necessary to include merit-based promotion to offer equal opportunities to women and men, in a system guaranteeing equality of pay. To do as much, comprehensive and cause-specific measures are needed, including (i) enacting pay equality and equity laws and regulations, tools and regular pay assessments, (ii) performing regular and objective desk audits, targeting low-paid and/or female-dominated sectors to ensure pay equality and equity, and using feedback mechanisms to implement results-based policy recommendations, and (iii) ensuring effective channels of recourse. Additionally, it is necessary to promote merit-based recruitment and remove impediments, while also having positive policies and practices ensuring balanced gender representation; to establish clear institutional roles and responsibilities for promoting gender balance in the public sector, and to engage in gender equality awareness-raising activities for managers.

D. PROMOTING GENDER EQUALITY IN THE PRIVATE SECTOR

Gender equality is not only a matter of human rights but also of economic development. As such, while the international and regional instruments speak to government responsibilities, the World Bank

⁵² *Ibid.*

⁵³ *Ibid.*, at II.1.

has recently developed a social protection and labour strategy that aims to responsabilise the private sector as a sort of “gap-filler” when the public sector is unable to meet certain standards.⁵⁴ The full participation of women in economic life across all sectors and throughout all levels of economic activity is essential to (i) build strong economies; (ii) establish more stable and just societies; (iii) achieve internationally-agreed goals for development, sustainability and human rights; (iv) improve quality of life for women, men, families and communities; and (v) propel businesses’ operations and goals.⁵⁵

Specifically, workplace gender equality economic performance has been associated with the following benefits: (i) increased economic growth resulting from the unlocking of the “hidden” female labor pool; (ii) improved organisational, financial and market performance; (iii) better risk management; (iv) heightened corporate social responsibility and culture; (v) improved development and nurturing of leadership, team performance and motivation; and (vi) the better utilisation of human resources.⁵⁶ Similarly, the IMF has shown that eliminating barriers that discriminate women working in certain sectors or occupations could increase labour productivity by as much as 25 percent.⁵⁷ Moreover, and as noted with EEO in general, guaranteeing gender equality would very likely enhance an organisation’s ability to attract top-tier talent by increasing its reputation on this basis.

Concrete steps that organisations can take to address gender imbalances include the following:

1. Providing **equal pay** for work of equal for equal work;
2. Implementing an **equal and fair selection process** that is transparent and merit-based, and which removes barriers to the full and equal participation of women in the workforce (e.g., removing references to one gender alone);
3. Seeking to guarantee an **equal composition of the workforce**;
4. **Increasing access to leadership roles for women**, especially among high rank personal and among management;
5. **Eliminating discrimination on the basis of family commitments**, such as by allowing part-time jobs, offering child support, paid family leave (for men and for women) and mobile work options;
6. Developing **anonymous, confidential complaints mechanisms** for dealing with gender-related complaints; and
7. **Ensuring education, training and professional development options** for all on an equal basis, for both men and women.

⁵⁴ WB Gender Equality Report, *supra* note 41.

⁵⁵ UN Global Compact, “Women’s Empowerment Principles”, at <http://www.weprinciples.org/Site>.

⁵⁶ Robert Wood, *Building a Business Case for Gender Diversity* (Melbourne: Centre for Ethical Leadership, Ormond College, University of Melbourne, 2014), at <https://cel.edu.au/our-research/building-a-business-case-for-gender-diversity>.

⁵⁷ Christian Gonzales, Sonali Jain-Chandra, Kalpana Kochhar and Monique Newiak, *Fair Play: More Equal Laws Boost Female Labor Force Participation* (Washington, DC: IMF, 2015).

CONCLUSION

Guaranteeing EEO is an essential element in levelling-the-socio-economic playing-field. Efforts striving to do as much can be measured by comparing the professional and academic skills and capabilities of EEO beneficiaries relative to the skills and capabilities that they otherwise would have been expected to develop, as well as relative to the skills and capabilities of those who are benefit from structural inequalities.

Beyond EEO being a legal and moral obligation, there are manifold economic and commercial benefits to both employers and employees in implementing EEO. Through the implementation of EEO requirements, a business can establish a baseline for acceptable behaviour, favouring an inclusive working environment that takes into consideration the vast array of lifestyles, values and attitudes individuals have.⁵⁸ By building on the on above steps and guidelines, businesses can establish an inclusive and varied workforce that not only appropriately represents a diverse cross-section of workers, but which is built upon a cohesive, responsive and dynamic workforce. By guaranteeing EEO, businesses are better positioned to build a varied and diversified workforce, which has important, positive implications for teams, departments and overall organisational productivity, especially with regard to creativity.⁵⁹ Additionally, such measures result in increased levels of commitment, satisfaction and loyalty, therein increasing profits and profitability.⁶⁰ Moreover, a business complying with EEO will benefit from an increase in its positive reputation, therein positioning itself in a stronger place to attract qualified and dedicated employees over and against competitor businesses.⁶¹

⁵⁸ Plowman, *supra* note 27.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*