



Equal Pay and Mandatory Gender Pay Gap Reporting

The biggest issue your business
will face in coming years?

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Introduction

The Small Business, Enterprise and Employment Act 2015 (**Act**) obliges the government to make regulations requiring employers with at least 250 employees to publish information about their gender pay gap within 12 months of the Act coming into force.

Draft regulations announced on 12 February 2016 require all private and voluntary sector employers, with over 250 employees, to publish pay information annually to show whether there are differences in the pay of male and female employees. There have also been debates in Parliament about the Equality and Human Rights Commission acting as a watchdog which could compare progress in different sectors, highlighting where the gender pay gap is unusually high or widening, but this has not made its way into the draft regulations. Whilst the regulations are not yet in final form, and the consultation on them is open for approximately four weeks, it is not anticipated there will be many, if any, changes. The Regulations will come into force in October 2016.

We feel that mandatory gender pay gap reporting is likely to have a number of potential consequences for large, private and voluntary sector employers. The consultation suggests that the focus is not about unlawful sex discrimination, commenting that we have had equal pay legislation for over 40 years, but the regulations will inevitably increase the awareness of equal pay generally and the likelihood that employees of private sector employers of all sizes will seek greater clarity on their pay. The scope for costly equal pay disputes, with potentially far reaching consequences, is therefore large. However, employers that are immediately affected by the regulations have a window of opportunity now to prepare for the new reporting regime.

Here we provide information on the legal position as it stands today and we will continue to update you as the legislation progresses towards implementation. If you have any queries regarding the effects of this change on your organisation then we will be happy to discuss any aspects with you.

Will this issue affect our business/organisation?

Yes, you will be directly affected if you are a private or voluntary sector employer with 250 “relevant employees” or more as at 30 April 2017 and as at every 30 April thereafter.

In the medium / long term, for the reasons set out in this note, equal pay considerations are likely to be substantial considerations for all employers regardless of size.

What is a relevant employee?

A “relevant employee” is an individual who ordinarily works in Great Britain for you under a contract of employment. Workers, self-employed contractors, partners and LLP members do not fall within the definition of a relevant employee. Under the draft regulations, the numbers of employees across group companies do not need to be aggregated to establish if the employer has 250 relevant employees or more; each company stands alone for these purposes.

Why is equal pay likely to be an issue?

The Office for National Statistics’ 2014 annual survey of hours and earnings shows that the gender pay gap in the private sector is 17.5%. Men working full time, on average, earn over £100 per week more than women working full time (£558 per week compared with £462 in April 2014). If your business follows this trend and you do not have in place (and pay your workforce according to) a valid job evaluation scheme, mandatory gender pay gap reporting could expose your business to potential equal pay and sex discrimination claims as well as reputational damage. It is perhaps telling that, under the coalition government’s voluntary gender pay gap disclosure initiative called Think, Act, Report, over 250 companies initially signed up to the initiative but only five companies have actually published their gender pay gap information.

What do I need to do in readiness for mandatory gender pay gap reporting?

1. Collate the data

Firstly, you will need to collate the gender pay data for the first time on 30 April 2017 and disclose by 30 April 2018. The draft regulations state that the following information will need to be published by employers:

- The percentage difference in mean pay between men and women;
- The percentage difference in the median pay between men and women;
- The difference in bonuses paid to men and women;
- The proportion of men and women who receive bonuses; and
- The gender pay breakdown split between quartile pay bands.

What should be included as pay?

Other than bonuses, (see below) where employers will need to reflect all bonuses paid in the previous calendar year from 1 May to 30 April, the information that will need to be published is based on a snapshot of each relevant employee's pay taken on 30 April 2017 and, provided the 250 threshold is still met, every subsequent 30 April. For these purposes, pay includes:

- basic salary;
- paid leave;
- maternity pay (NB. what they receive at that time and not the notional pay an employee would receive if she was not on maternity leave);
- sick pay;
- shift premiums; and
- allowances.

It does not include:

- the value of benefits in kind;
- expenses;
- the value of salary sacrifice schemes; or
- overtime.

Bonuses include:

- all performance-related bonuses;
- commission;
- sums paid under profit shares and long-term incentive plans; and
- the value of shares.

2. Analyse the data

Secondly, it is worth analysing the data as soon as possible to understand:

- if there is a gender pay gap; and, if so,
- whether there is a potential sex discrimination or equal pay issue; or
- whether, when the information is published, it is simply a case of putting the data in context to make it meaningful and explain any anomalies.

In particular, there is no obligation under the draft regulations to explain pay differentials or to say how any gender pay gaps are being addressed by the organisation. However it is likely to be helpful to have a communication plan in place, especially where gender pay gaps are identified, and to consider how the organisation will deal with any questions or challenges.

Whilst we appreciate that there is a nervousness about opening Pandora's box, given that highly sensitive data created could be disclosable in any future litigation (unless it benefits from legal privilege), we can help you to undertake a fully confidential and legally privileged equal pay audit and can advise on a strategy to address any issues arising from the audit in readiness for mandatory gender pay gap reporting.

When do I need to start collating data for the purposes of mandatory gender pay gap reporting?

The regulations are expected to come into force in October 2016. The draft regulations provide that data will need to be collated for the first time on 30 April 2017 and that the gender pay reporting information will need to be published by 30 April 2018. However, in our view, you should start considering your approach as soon as possible so you have time to analyse the data and, if there is a gender pay gap, to give you time to seek to rectify it or to mitigate the risks.

Where will the information need to be published?

The draft regulations state that the gender pay reporting information will need to:

- be published on the employer's website, which must be accessible to employees and the general public (so just publishing this on an intranet would not suffice);
- be signed off by an authorised signatory of the employer, most likely a director in relation to companies;
- remain on the website for at least three years.

There will also be a mandatory obligation to upload the information to a government website. The government is then likely to report against this with potentially sector specific and "worst" / "best" lists. The lists are also likely to be used by journalists and / or pressure groups to try and force change.

When we advertise a vacancy, our business simply pays the going rate for the role. Therefore, even if there is a gender pay gap, how could we be at risk of equal pay and sex discrimination claims?

A gender pay gap can arise for many reasons. For example, an employer may have a valid job evaluation scheme in place and may be lawfully paying its employees and it is simply the case that lower graded (and therefore lower paid) roles attract more female employees. Alternatively, an employer may be unlawfully paying women less than men for equal work (see further details below) because, for example, work which is traditionally viewed as "men's work" is paid at a higher rate due to a historic sex discrimination taint.

What is classed as "equal work"?

In simple terms, men and women are doing equal work when their jobs:

- are the same or broadly similar;
- have been rated as equivalent under a valid job evaluation scheme; or
- are of equal value in terms of the demands their jobs place on them.

For example a woman doing a different job to a man should still be paid equally if the demands of the job, when viewed as a whole, even themselves out and are therefore equal.

What do I do if I find differences in men's and women's rates of pay?

If you have found differences between the pay of men and women doing equal work, you need to be able to demonstrate that those differences are not related to the sex of the jobholders and that you can justify the higher rate of pay. Some pay differences, such as shift premiums for working anti-social hours, may be justified by the requirements of the job. However, you will need evidence as to why you are paying men more than women or vice versa.

For example, if you are paying male electricians a higher hourly rate than female HR officers, you will need to explain the differential in pay. This could be because, under a valid job evaluation scheme, it has been established that the electricians' work is of more value than the HR officer role. Alternatively, it may be that the roles are considered to be of equal value but the business was unable to recruit electricians at a particular rate of pay because there was a shortage of qualified electricians in the market. However, if challenged, you would need to evidence this by disclosing documents such as job adverts, competitor rates in the local area and evidence that you have had difficulty recruiting electricians at that rate. Evidence to support the reasons for the pay differential will be key in the event of a claim.

If employees were to bring claims as a result of the published pay information, what could it cost the business?

It is unlikely that any claim can be based solely on the published information. However, it is likely to highlight employers with potential issues and make them more susceptible to an equal pay challenge. If an equal pay claim is brought, the worst case scenario is that employees claim back pay (and interest) for up to six years. A judgment in the employees' favour (or indeed reaching settlement with existing employees) could also present a future problem for the organisation, as the employees would be entitled to the same level of pay as their male comparator(s) going forward.

What are the consequences of not complying with the requirement to publish gender pay gap information?

It was anticipated that a failure to comply with the regulations would either be a criminal offence or attract civil enforcement measures. However, surprisingly the draft regulations do not contain any enforcement measures. Nevertheless, it is anticipated that league tables of the "best" and "worst" employers will be published by the government, potentially by sector. The government is also likely to consider naming and shaming employers who fail to publish the gender pay reporting information. There is also likely to be reputational damage and a risk of being targeted by pressure groups, trade unions or claimant friendly organisations with dedicated equal pay units.

Will these changes help to close the gender pay gap?

They are likely in our view to be only one piece of the jigsaw. They will increase (and have already increased) awareness of the equal pay legislation. However, our concern is that they are merely a snapshot of an organisation, will fluctuate and are not entirely representative of an employer's approach to gender pay e.g. the rates will be affected by the number of employees on maternity leave in any April. If you take a business with 280 staff, six of whom are on maternity leave and not earning their normal rate of pay in a given April, the reporting of their SMP / or nil pay will show a gender pay gap (even if the employer in fact has no equal pay issues). The exclusion of overtime (which anecdotally men work more than women) and benefits of a kind (which usually increase with seniority) also means that the extent of any inequality is also likely to be under reported in many employers. It may be that these things even themselves out but how credibly the figures produced are treated is only likely to be known once the reporting phase starts and it is seen how far employers seek to explain the figures that they are forced to submit.

We will regularly review and update this note, adding additional questions and answers as they arise.

Any queries in the meantime can be raised via Chris Maddock or Lisa Kelly using the below details:



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