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# Shining a light on the British gender pay gap

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**CATEGORY:**
ARTICLE

Following the publication of regulations requiring employers with at least 250 employees to start reporting on their gender pay gaps from April 2018, the Government Equalities Office in conjunction with ACAS has now published its final guidance to help affected employers comply with the new law.

The guidance clarifies a number of issues arising from the regulations such as the treatment of part time staff, how pensions should be taken into consideration and how bonuses should be calculated. It also makes a series of suggestions for reducing the pay gap.

The Government has previously published two sets of regulations, the first covering private and third sector employers and the second covering the public sector. Employers in the private and voluntary sectors will need to start compiling pay information from April 2017, a year ahead of the information coming into the public eye.

Office for National Statistics figures, published in October 2016, show that the gender pay gap is currently 9.4% for full-time employees – this rises to 18.1% for all employees because a higher proportion of women work part-time (41% compared with only 12% of men). The figures are affected by the proportions of men and women in different roles, and vary across age groups. The Government believes the move will encourage pay parity – voluntary schemes attempted in the past have been ineffective.

KEY FACTS

- Employers with over 250 employees will have to publish information about pay and bonuses on their websites annually. There are specific rules on shares and other long term incentives.
- The regulations cover employees ordinarily working in Great Britain, but some people working outside the UK will need to be counted. The guidance suggests that those who are entitled to bring an Equality Act claim should be included in the headcount.
- The term 'employee' will be defined as anyone with a contract personally to do work – not only people with a contract of employment.
- 'Pay' is widely defined but excludes overtime and benefits.
- The report must cover differences in mean and median pay to men and women in four pay quartiles based on the overall pay range.
- It must also cover differences in mean and median bonuses paid to men and women.
- There is no requirement to break information down by age.
- Some larger organisations may be out of scope if employees are engaged by different entities and no one entity has more than 250 employees.
- Non-compliance may lead to enforcement action by the Equality and Human Rights Commission (' EHRC'). Failure to comply (or the existence of large pay gaps) may also affect organisations' ability to attract good candidates, or in their success in tender situations. Information about pay might also be used in support of equal pay or discrimination claims.

THE REGULATIONS EXPLAINED

Mandatory gender pay gap reporting has been under discussion in the UK for some years. The Equality Act 2010 includes a provision that enables the Government to require employers to publish information about differences in pay between men and women in their workforces. That provision was brought into force in August 2016.

After low take up of the opportunity to provide gender pay gap information voluntarily, the Government consulted on mandatory reporting between July and September 2015. After receiving over 700 responses the Government decided to proceed with a mandatory reporting regime. The final regulations followed a further period of consultation. 82% of respondents thought that the publication of gender pay gap information would encourage employers to act to close the gap.

The Government also believes that pay gap reporting will increase employee confidence in pay information and the remuneration process; help employers find ways to increase female participation rates; drive sector-based competition that encourages best practice; and provide a consistent measure which will generate a national benchmark of good practice.

TIMING

- The private and third sector regulations will come into force on 6 April 2017. They will require employers to collect a 'snapshot' of pay data on 5 April each year, starting on 5 April 2017. Employers will need to publish, within 12 months, a report based on that data showing the overall gender pay gap in their organisation. The first report will therefore be due by 4 April 2018 and the same process will be required annually thereafter.
- Affected employers should by now be considering the systems they will need to capture the required information and be ready to start implementing them from 5 April 2017.

WHO IS COVERED?

- Under the new regulations all employers in the private and voluntary sectors with at least 250 employees on the snapshot date (5 April) will be required to publish a report. Every employee who receives pay during the particular pay reference period that includes the snapshot date should be included in the headcount. A pay reference period will normally be a week or a month, depending on the employer's usual pay cycle.
- An 'employee' includes anyone working in Great Britain with a contract personally to do work (the definition used in the Equality Act 2010). It is therefore not limited to those with a contract of employment. This means that temporary and casual workers and potentially some staff working overseas should be included in the headcount, as should some self-employed people. Partners in firms (including members of LLPs) are expressly excluded.
- Under the regulations group companies will not be required to aggregate employees across different subsidiaries. It is therefore possible that a large employer could be outside the scope of these requirements if it does not have a single entity that employs 250 or more employees.

WHAT THE REPORT SHOULD COVER

- The annual gender pay gap report must include:
- the difference between the mean hourly rate of pay of relevant male 'full-pay' employees and that of relevant female 'full-pay' employees;
- the difference between the median hourly rate of pay of relevant male 'full-pay' employees and that of relevant female 'full-pay' employees;
- the difference between the mean bonus paid to relevant male employees and that paid to relevant female employees;
- the difference between the median bonus paid to relevant male employees and that paid to relevant female employees;
- the proportions of relevant male and female employees who were paid a bonus; and
- the proportions of relevant male and female full-pay employees in the lower, lower middle, upper middle and upper quartile pay bands.
- 'Relevant employees' are those employed on the snapshot date.
- 'Full-pay' employees are those who are not being paid at a reduced or nil rate as a result of being on leave. This means that the potentially distorting effects of periods spent on maternity and other types of leave will be removed from the statistics.
- 'Hourly pay' is calculated using a series of six steps set out in the regulations (see below).
- 'Working hours' are calculated either by reference to the individual's contract, or where hours vary, by using an average over a 12 week period.
- The regulations use the concept of 'ordinary pay' which means basic pay, pay for leave, allowances, shift premium pay and pay for piecework. It excludes pay referable to overtime, redundancy, termination of employment, pay in lieu of leave or remuneration provided otherwise than in money.
- Pay is calculated using gross figures, before any deductions made at source.
- 'Quartile bands' are arrived at by identifying the overall pay range by reference to hourly rates of pay and dividing the total number of employees as far as possible into four equal sized groups to produce the lower, lower middle, upper middle and upper quartile pay bands.

CALCULATING HOURLY PAY – THE SIX STEPS

- **Step 1:** Identify all amounts of ordinary pay and bonus pay paid to the employee during the relevant pay period.
- **Step 2:** Exclude from ordinary pay any amount that would normally fall to be paid in a different pay period (eg reimbursement of an accidental underpayment from the previous month).
- **Step 3:** Adjust any bonus payment to a pro rata amount by dividing the amount by the length of the bonus period (in days) and multiplying it by the length of the relevant pay period (in days). The regulations treat months as having 30.44 days and years as

having 365.25 days.

- **Step 4:** Add together the amounts identified under Step 1 (as adjusted, where necessary, under Steps 2 and 3).
- **Step 5:** Multiply the amount found under Step 4 by the appropriate multiplier, which is 7 divided by the number of days in the relevant pay period (7 days for a week; 30.44 days for a month).
- **Step 6:** Divide the amount found under Step 5 by the number of working hours in a week for that employee.

###### BONUSES

- Bonus pay is defined as any remuneration that:
- is in the form of money, vouchers, securities, securities options, or interests in securities;
- relates to profit sharing, productivity, performance, incentive or commission.
- It does not include:
- ordinary pay;
- overtime pay; or
- redundancy pay or termination payments.
- Securities, securities options and interests in securities are to be treated as paid at the point at which they become taxable earnings.
- The regulations do not make clear whether the two-part definition of 'bonus pay' requires both, or only one, of the criteria to be met. Whilst this may give rise to uncertainty, we consider the likely intended definition requires both criteria to be satisfied. That view is reflected in the draft guidance.

###### WRITTEN STATEMENT

The gender pay report must be accompanied by a written statement that confirms that the information in the report is true and is signed by the appropriate person (eg a company director). The report will provide the employer with the opportunity to give context to the statistical information and provide explanations for unusually large gaps or anomalies.

###### SANCTIONS

- The Explanatory Notes to the regulations confirm that failure to publish a statement will be an unlawful act under the Equality Act 2010 and could lead to enforcement action by the EHRC, including issuing public notices that an employer has not complied with its duties.
- It will also be interesting to see how indirect sanctions operate in practice – eg in tendering and contracting exercises, in investment decision making, in recruitment etc.
- There will be a range of 'soft sanctions', ie the Government may:

- Run periodic checks for non-compliance.
- Produce tables by sector of employers' reported gender pay gaps.
- Draw attention to employers that publish full and informative explanatory information.
- Publicise the identity of employers known not to have complied.

- The EHRC will have a role in monitoring compliance in the public sector.
- Whilst, in our view, the publication of information showing a gender pay gap is unlikely to lead directly to a finding that there has been a breach of equal pay law, published data might be used in support of a claim, meaning that an accompanying narrative might have considerable importance. The failure to publish information, or the publication of misleading or incomplete information, might also be used in support of an individual or group equal pay claim.

## (#comment). COMMENT

###### WHAT IS THE CURRENT PAY GAP?

- The pay gap is an international phenomenon and attempts to address it can be found in many developed economies. According to figures published on 26 October 2016 by the UK Office for National Statistics, in April 2016 the gender pay gap (for median earnings) for full-time employees in the UK was 9.4%, down from 9.6% in 2015.
- The gap for all employees was 18.1% (down from 19.3% in 2015) because a higher proportion of women work part-time (41%, compared with only 12% of men), and part-time workers (both men and women) earn less per hour, on average, than their full-time counterparts.
- Part-time men are actually paid less on average than part-time women (the gap is -6.0%). This could be because women in higher-paid roles are more likely to seek part-time work while their male counterparts tend to work full-time.
- For high earners (the top decile), the gap for full-time employees has remained largely consistent, fluctuating around approximately 20% (18.8% in 2016).
- For low earners (the bottom decile) the gap has narrowed over the long term, to 4.9% in April 2016, the largest year-on-year decrease in the full-time gender pay gap for the bottom decile since records began in 1997. This is likely to be connected to the

introduction of the National Living Wage, as women tend to work in lower paid occupations.

- These figures do not take account of differences in rates of pay for comparable jobs, and are affected by, for example, the proportion of men and women in different occupations. The gap varies from 3.9% for sales and customer service, to 25.1% for skilled trades occupations.
- When looking at the differences in pay by age group for full-time employees, the gender pay gap is relatively small for full-time employees aged up to 39, with the exception of those aged 16 to 17. In fact, full-time women are paid slightly more than men between the ages of 22 and 29, on average. From 40 upwards, the gap is significantly wider.

SOME LIMITATIONS IN THE REGULATIONS

- The lack of a requirement to break down figures by age may mean that the increase in the pay gap in older sections of the working population will not be apparent.
- There is also no account taken of the effect on the figures of women deciding to give up work because the cost of childcare is too high, or because flexible working is not available.
- The'Think, Act, Report' framework, which encouraged voluntary reporting, suggests more detailed ways of measuring the pay gap that employers might consider adopting voluntarily in the interests of greater transparency. These include tracking:
- changes in the pay gap over time;
- reward at different levels;
- the representation of women and men by job role or occupational group; and
- patterns in the promotion of women and men.
- The exclusion of overtime means that the gender pay gap figures will not take account of the fact that in general men may be more able to work overtime than women who tend to take on a greater proportion of caring responsibilities. This will have more of an impact in some sectors than in others. The reason behind the decision to exclude overtime appears to be that the Government does not want to encourage employers to force women to work more overtime.

For more specific advice, please speak to your usual contact in the employment team.

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