



December 2016

The Equality Act (Gender Pay Gap Information) Regulations 2017

Background

The final draft of the Equality Act (Gender Pay Gap Information) Regulations 2017 (the Regulations) and accompanying Explanatory Memorandum was published 6 December 2016. Subject to parliamentary approval, the Regulations will come into force 6 April 2017. The Regulations introduce a mandatory gender pay gap reporting requirement for non-public sector employers with at least 250 employees.

To whom do the Regulations apply?

The Regulations apply to any "relevant employer", namely private/voluntary sector employers with 250 or more employees on the "relevant snapshot date", which is 5 April in the relevant year. The reporting requirement applies to individual employers within a group, rather than a groupwide basis.

Relevant employers are only required to report in relation to "relevant employees", namely "a person who is employed by the employer on the relevant snapshot date". Notwithstanding the apparent reference to employment, this is widely defined, and covers workers, self-employed contractors under a contract personally to do work, and apprentices, but excludes partners (including LLP members). Consultants will also be excluded if the employer does not have the relevant data and it is not reasonably practicable for it to obtain that data. In practice, there is likely to be some debate over what this means, although the exclusion is thought to be intended to avoid difficulties where the consultant is not on the employer's normal payroll systems. Where a "relevant employee" is on leave receiving less than full pay (*e.g.*, while on maternity leave), they are excluded from the publication requirements to avoid skewing the hourly pay comparison.

Reporting Requirements

By 4 April 2018, relevant employers must publish on their website, in a manner accessible to their employees and the public:

- 1) *Mean and median gender pay gap figures, based on the hourly pay of "full pay relevant employees" during the relevant pay period.* Hourly pay includes a pro rata proportion of any bonuses paid during the relevant period.
- 2) *Mean and median overall gender bonus gap figures in the year ending with the snapshot date for all "relevant employees".* A "bonus" is widely defined as "any form of remuneration that is in the form of money, vouchers, securities, securities options, or interests in securities, and relates to profit sharing, productivity, performance, incentive or commission". Bonuses in the form of securities, options or interests in securities are deemed paid at the time and in the amount in respect of which they give rise to taxable earnings income.
- 3) *Percentage of men and percentage of women who received a bonus.*
- 4) *Number of men and number of women in each pay quartile for "full pay relevant employees".* Each quartile must include an equal number of employees, organised according to their hourly pay rate, from lowest to highest paid.

This information must be (1) retained on the website for at least three years and (2) accompanied by a written statement of accuracy, signed by a director, partner, or equivalent.

The information will also be published on a central website set up by the Government, including the name and job title of the person who signed the statement of accuracy. The Government has said it may use the information to create sector-by-sector league tables.

Potential Problem Areas

The publication of the Regulations has not been without criticism, and there are various potential problem areas which employers should consider addressing in their narratives. For example:

- > While employees not based in Great Britain are not subject to the reporting requirements, international employees are likely to fall within the scope of the Regulations if they have a "strong connection" with Great Britain. There is, therefore, a need for suitable protocols to identify such employees.
- > Bonuses paid during the snapshot pay period must be included when working out the overall mean and median pay gap figures and quartile pay band figures, which may skew the calculations and penalise employees who pay bonuses during the snapshot period rather than at any other time in the year. Deferred bonuses are also not dealt with comprehensively.

Hopefully, further clarity will be provided on these problem areas in due course.

Practical Steps

Employers should consider doing a "test run" pay gap analysis, using the methodology set out in the Regulations, to identify any significant pay gaps and decide how best to manage them. This could include explaining them in their report, or addressing any material issues before publication is due 4 April 2018. It is also important to keep senior management informed, including in particular the director or partner who will be required to sign the statement of accuracy.

Enforcement

While there are no specific enforcement provisions within the Regulations, the Explanatory Memorandum indicates that failure to comply with the Regulations will constitute an "unlawful act" within the meaning of Section 20 of the Equality Act 2006, which empowers the Equality and Human Rights Commission (EHRC) to take enforcement action. There is also the possibility that the Government will adopt a 'naming and shaming' approach toward those who do not comply.

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