

GUIDANCE NOTE

Mandatory Gender Pay Gap Reporting: What You Need to Know **The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (“Regulations”)**

January 2017

As you may recall we issued a Guidance Note in July 2016 on this topic. In December 2016, the final version of the Regulations were published and this Guidance Note sets out the obligations on large employers with over 250 employees. These final Regulations are now expected to be brought into force on 6th April 2017, subject to parliamentary approval.

In summary the final draft Regulations require:-

- Employers with 250 or more employees on the 5th April 2017;
- Based in England, Wales and Scotland (not Northern Ireland);
- To analyse their gender pay gap profile; and
- Publically disclose details of their gender pay gap report by 4th April 2018.

This applies to both private and voluntary sector employers. In due course it will be extended to the public sector.

Which Employers are Affected?

A ‘relevant employer’ will only be in the scope of the final Draft Regulations if they have 250 or more ‘relevant employees’ on the relevant date. This relevant date will be 5th April in each year, the date on which a snapshot is taken of pay data for the preceding pay period.

The 250 employee criteria relates to individual entities, as opposed to being aggregate across group companies. It is therefore possible that a large group of companies may be outside the scope of these requirements if it does not have any single entity that employs 250 or more employees. The Government’s rationale for this is that single entity pay gap reporting is “more meaningful” especially where group subsidiaries operate across a wide range of sectors and it will encourage senior leaders at each subsidiary to take ownership of the issue and, if necessary, implement changes.

Which Employees are Covered?

The definition of employee has been changed since the previous Draft Regulations. An individual is now a ‘relevant employee’ if at the 5th April they are employed under a contract of service, a contract of apprenticeship or a contract personally to do work. This does not include partners in a firm (including LLP members).

A careful analysis of who are classed as a ‘relevant employee’ will need to be undertaken.

This now means that overseas employees of a UK employer will count as a ‘relevant employee’ and towards the 250 threshold to be considered in the pay gap report. Whereas if an employee is from a foreign jurisdiction e.g. from the USA on an American Employment Contract and is seconded to a UK company they should not be classed as a ‘relevant employee’.

What Should be Disclosed?

An affected employer is required to publish a gender pay gap report with the following contents:-

1. Mean (average) gender pay gap.
2. Median (middle) gender pay gap.
3. Mean gender bonus pay gap.
4. Median gender bonus pay gap.
5. Percentage of men and women in bonus scheme within a 12 month period.
6. Percentage of men and women in salary quartiles.

The Regulations now include that the median gender bonus pay gap is to be published as well as the mean gender bonus pay gap. This should give a fairer overview.

The bonus will be counted twice, if it is paid in the April payroll, as it will be included within both the mean and median gender pay gap figures as well as being published separately within the mean and median gender bonus gap. However if bonuses are paid in the April payroll then they are to be apportioned and only 1/12th considered for the gender pay gap figure.

Salary Quartiles

The sixth category above introduces the concept of “salary quartiles”. Employers will be required to report on the percentage of men and women in each of the four quartiles. Employers will calculate their own “quartiles” each containing an equal number of employees. Since the last draft there has been clarity on how this information shall be presented. The ratio of male and female employees in each quartile must be set out as a percentage and the pay bands are to be described as lower, lower middle, upper middle and upper rather than providing the monetary range.

Example: Quartile pay bands calculated by overall pay range

By way of example, there are 400 employees whose gross hourly pay ranges from £7.00 an hour to £63.00 per hour. An employer would have to put the various rates of pay in ascending order and divide the list into four equal bands each containing 100 employees to create the pay bands. These would then be split into the lower, lower middle, upper middle and upper but the monetary split, which does not need to be disclosed, but would be £7.00 to £7.99 per hour, £8.00 to £9.99 per hour, £10.00-£17.99 per hour and £18.00-£63.00 per hour (however these monetary values do not need to be included). The report would be set out as follows:

Quartile		Number of men	Number of women
Lower	0 – 25%	44%	56%
Lower middle	25 – 50%	42%	58%
Upper middle	50 – 75%	46%	54%
Upper	75 – 100%	53%	47%

Employers do not have to issue separate gender pay gap figures for full-time and part-time workers nor do they have to break down the figures by age, grade or job type. Therefore, workforce demographic information may be appropriate as part of the accompanying narrative to explain any disparities.

What is the Definition of “Pay”?

The first pay period is for the pay period including the **5th April 2017**. A “pay period” means the period in which the employer usually pays the ‘relevant employee’, whether weekly, fortnightly, monthly or otherwise and in which the 5th April falls. For the majority of employers you would therefore look at the April monthly payroll or the weekly payroll that the 5th April falls in.

In the legislation the term “Pay” has been redrafted and splits the “Pay” into three categories. These are “ordinary pay”, “bonus pay” and “hourly rate of pay” and are defined in detail below. This note breaks down each category:-

What is the Definition of “Ordinary Pay”?

The Draft Regulations define “ordinary pay”, as follows:-

<u>Included</u>	<u>Excluded</u>
<ul style="list-style-type: none">• basic pay• paid leave (full pay only) including enhanced maternity pay and sick pay• pay for piece work• shift premium pay• most allowances (car, clothing, location, on call, standby, first aider, etc. allowances)• bonus pro-rata’d to 1/12th if paid in April	<ul style="list-style-type: none">• overtime• expenses incurred in course of employment• benefits in kind• arrears of pay• tax credits• value of salary sacrifice schemes• redundancy/termination pay• pay for a different pay period• pay in lieu of leave i.e.<ul style="list-style-type: none">➤ maternity, paternity, adoption pay if less than full pay; or➤ statutory sick pay

If bonuses are paid in the pay period including the 5th April they will be accounted for twice in the gender pay gap figures and gender bonus gap figures. Therefore the government has decided if this is the case the bonus should be apportioned. For example, if an employee receives an annual bonus paid in their April pay then only 1/12th of the bonus would be considered when calculating the hourly rate. This may have a distorting effect, especially if only senior employees receive their bonuses in April and others receive their bonuses at a different point in the year. Therefore employers may decide to include an explanation in the voluntary narrative when the figures are published, and/or change the month the bonus is paid.

What is the Definition of “Bonus Pay”?

The “bonus pay” is based on the bonus pay received during the 12 months before the 5th April. This means for the first gender pay gap report employers will need to consider bonuses paid between 6th April 2016 and 5th April 2017.

The bonus pay to be included within the pay calculation is defined as:-

- Remuneration in the form of money, vouchers, securities, securities options or interests in securities
- Which relates to profit sharing, productivity, performance, incentive or commission.

Bonus pay does not include ordinary pay, overtime pay or redundancy/termination pay. Bonus pay does include non-cash bonus awards such as remuneration from shares, share options and interests in securities. The Government has now clarified that these bonus awards relating to shares and share options and interests (security options) are only classed as ‘bonus pay’ at the time, and in the amount in respect of which, they give rise to taxable earnings income under section 10 of the Income Tax (Earnings and Pensions) Act 2003. This means only when the employee receives any income from the shares (i.e. when they are sold) are the shares included in the bonus calculation.

What is the Definition of “Hourly Rate Pay”?

Employers have to calculate an hourly rate of pay for each ‘relevant employee’ who is included within the gender pay report obligations. Draft Regulation 6 sets out a six step process to determine hourly pay using the ordinary pay as defined above. The calculation, although lengthy, is clearly set out in the legislation.

In calculating the hourly rate of pay the employer needs to know the employees weekly working hours and this can be difficult depending on how each employee works e.g. contractual hours, no normal working hours, or paid on a piecework basis.

Normal working hours

For an employee with normal working hours, that do not vary from week to week, the weekly working hours are the contractual working hours as detailed in the contract of employment in force on the 5th April.

Varied working hours

If the employee has ‘no normal working hours’ then the number of hours is based on an ‘average basis’ using a 12 week period, ending with the last complete week of the relevant period i.e. up to the 5th April 2017 in the first report. If this cannot be done the employer must use a fair figure which represents the working hours based on what an employee could expect under their contract and what employees engaged in comparable employment with the employer work.

It remains unclear whether an employee who works longer hours than their contractual hours to meet business needs but has a fixed salary could be deemed to have ‘no normal working hours’ or because their contractual hours do not change they have ‘normal working hours’. Further guidance is needed as it could have an effect on the gender pay gap results.

Where to Publish Gender Pay Information?

Employers must publish their gender pay gap information on their own website and must retain the information online for 3 years. The information must be in English and be presented in a manner which is accessible to all employees and the public. If employers do not have their own website (as they are part of a group) they may want to create a separate webpage for their information, or publish the information on a website hosted by its parent company. There is no requirement to publish the figures on a UK website.

Employers must also upload the information to a government-sponsored website where employers are likely to be grouped into sectors with league tables. Details of this have not been released yet. The information to be uploaded must include all gender pay gap and bonus pay gap information required by Draft Regulation 2 of Gender Pay Gap Information Regulations 2017, as set out above.

These reporting requirements are entirely separate from other corporate reporting requirements. There is no requirement to publish gender pay gap information in a Company’s annual report.

A written statement confirming that the gender pay gap information is accurate must accompany the required information when published on the website and be signed by a senior individual.

The Regulations allow employers a high degree of flexibility over when to analyse and publish their information. The first snapshot date in the Regulations is 5th April 2017. Employers will have until 4th April 2018 to publish their first gender pay gap information. Thereafter, they must produce and publish an annual report but not necessarily at the same time each year.

Voluntary Accompanying Narrative

On the government website the employer will have no control over how their data is published, therefore it is envisaged that employers will include a voluntary narrative on their own website where the report is published.

Under the Regulations there is no requirement to explain what an employer will do to address any issues raised by the gender pay gap information. However an employer should consider the various audiences who will read this report:-

- Current employees.
- Potential recruits.
- Suppliers/customers.

Thus it is worth taking steps now in order to address any issues that may arise and contextualise any gaps. For example a narrative could explain:-

- The extent to which overtime is routinely worked, and the proportion of men and women regularly working overtime.
- Details of the employer's various bonus schemes, and in particular, any bonus schemes which pay out in April, and which are taken into account in both the headline gender pay gap figures and the gender bonus gap figures.
- Discrepancies in pay across the organisation, for historic reasons or as a result of factors unrelated to gender (such as regional variations, TUPE).
- How complex bonus schemes have been analysed and valued for the purposes of calculating the gender pay gap.
- The existence of possible skills shortages for particular roles, which means there are salary premiums for anyone who can perform those roles.
- What action is being taken by the employer to narrow the gender pay gap, if any exists.

Risks

There are currently no civil penalties for non-compliance and the government has indicated it will run periodic checks to check for non-compliance.

There are other risks to be considered:-

1. Reputation.
2. Negative publicity.
3. Impact on employee attraction, engagement and retention.
4. Employee claims for equal pay.
5. Adverse impact on procurement process.

Thus undertaking an early review of what an employer's report will look like prior to the 5th April 2017 in order to consider how to address any issues and minimise the above risks and/or consider what to put in the accompanying narrative would be a useful exercise so that there can be an understanding of any risks in advance.

Preparing for the New Regime

As mentioned above although the first gender pay gap reports do not have to be published until April 2018, there are several steps that employers may consider to prepare for the new regime before the first snapshot date of 5th April 2017:-

1. Identify whether the employer is a 'relevant employer'. This will involve considering who is a 'relevant employee', and whether there are likely to be 250 or more employees as at 5th April 2017.
2. For corporate groups, consider which employing entities will be relevant employers for the purposes of the Regulations and identify how many separate gender pay gap reports will need to be produced.
3. Identify any areas of uncertainty over who is in scope. For example, where there is a large pool of casual workers, how they will be treated? In particular, ensure that their pay data is readily available and can be collated together with the pay data for permanent staff.
4. Consider the status of any employees working overseas who are employed by a UK based company, and/or who may fall within the definition of employment for the purpose of the gender pay gap reporting obligations.
5. Consider the remuneration package offered, all benefits, and any flexible benefits scheme, and analyse which elements would be reportable under the Regulations. Consider whether to implement a salary sacrifice scheme, or if any existing benefits could be provided by means of salary sacrifice, so that their value would not need to be reported under the Regulations.
6. Carry out an audit of bonus schemes offered by the employer and identify which would need to be reported as "bonus pay" under the Regulations.
7. Consider moving bonus payments in a month other than April so they are not double counted.
8. Calculate the gender pay gap information using the methodology of the Regulations (using another example month as the relevant date) to assess how big the gap (if any) is likely to be when the first report is published, and to identify any issues which may be harmful to the employer's reputation when published.
9. Review the draft gender pay gap report analysis with legal support to address any potential issues and under the cloak of legal professional privilege.

If you wish to access the Regulations they can be found here:
<http://www.legislation.gov.uk/ukdsi/2017/9780111152010>

The comments in this Guidance Note are of a general nature only. Full advice should be sought on any specific problems or issues.

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