

## **GUIDANCE NOTE**

### **Mandatory Gender Pay Gap Reporting: What You Need to Know**

**July 2016**

This note provides information on the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016. These Regulations are expected to be brought into force on 1<sup>st</sup> October 2016 and introduces obligations on large employers with over 250 employees. We will update this note when the final version of the Regulations are published later in the summer.

In summary the draft Regulations require:-

- Employers with 250 or more employees on 30<sup>th</sup> 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 by 29<sup>th</sup> 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 draft Regulations if they have 250 or more relevant employees on the relevant date. This relevant date will be 30<sup>th</sup> 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 reporting requirements for group companies may change, as the Government Equalities Office (GEO) has indicated that this issue has been raised during the consultation and is under review.

#### **Which Employees are Covered?**

For the purposes of the draft Regulations, a person is an employee if:-

1. They ordinarily work in Great Britain;
2. They are employed under a Contract of Employment; and
3. Their Contract of Employment is governed by UK legislation.

A careful analysis of who are classed as employees will need to be undertaken.

If an employee is from a foreign jurisdiction e.g. from the USA and is seconded to a UK company on an American Employment Contract they would not be included within the definition of employees. Ex-pat employees will likely fall outside these Regulations if they do not ordinarily work in Great Britain even if they are on UK Contracts. Agency workers will also fall outside the employee definition.

## 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. Percentage of men and women in bonus scheme within a 12 month period.
5. Distribution of men and women in salary quartiles.

It is expected that the bonus figures could be especially headline grabbing as only the mean gender bonus gap (and not the median) is to be published. Bonus may also be counted twice as it may be included within the mean and median gender pay gap figures as well as being published separately within the mean gender bonus gap.

The fifth category above introduces the new concept of “salary quartiles”. Employers will be required to report on the number of men and women in each of four pay bands. Employers will calculate their own “quartiles” based on the overall pay range. The ordered list of hourly rates is then divided into four quartiles, which are to be expressed as follows:-

- **Pay band A** is from the lowest pay to the first quartile.
- **Pay band B** is from the first quartile to the second quartile.
- **Pay band C** is from the second quartile to the third quartile.
- **Pay band D** is from the third quartile to the highest pay.

The Regulations require employers to report the number of male and female employees in each quartile.

### 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. This accords with the GEOs understanding of what is envisaged by draft Regulation 7. The pay bands are calculated by splitting the pay range into four equal segments.

<b>Pay band</b>	<b>Pay range (hourly rate)</b>	<b>Number of men</b>	<b>Number of women</b>	<b>Total</b>
<b>Pay band A</b>	£7.00 to £20.99	145	185	330
<b>Pay band B</b>	£21.00 to £34.99	22	18	40
<b>Pay Band C</b>	£35.00 to £48.99	11	9	20
<b>Pay band D</b>	£49.00 to £63.00	7	3	10

At present on the drafting of the Regulations it is not clear whether employers are required to publish the actual range of each pay band (for example £7.00 to £20.99) or whether they simply state “Pay band A”. If the current wording remains the same in the Regulations, it is likely that many employers will not provide any actual pay data when reporting on their salary quartiles.

## What is the Definition of “Pay”?

The first pay period is for the pay period including the 30<sup>th</sup> 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 30<sup>th</sup> April 2017 falls.

The draft Regulations define “pay” non-exhaustively. At present:-

<u>Included</u>	<u>Excluded</u>
<ul style="list-style-type: none"><li>• basic pay</li><li>• paid leave</li><li>• maternity pay (but not other family leave at present)</li><li>• sick pay</li><li>• bonus pay</li><li>• most allowances (car, shift, clothing, on call, standby, first aider, etc. allowances)</li></ul>	<ul style="list-style-type: none"><li>• overtime</li><li>• expenses</li><li>• benefits in kind</li><li>• arrears of pay</li><li>• tax credits</li><li>• value of salary sacrifice schemes</li><li>• redundancy pay</li><li>• pay for a different pay period</li></ul>

Employers have to calculate a “gross hourly rate of pay” determined using the weekly pay divided by weekly basic paid hours for each relevant employee.

Pay is calculated using gross figures before any deductions for PAYE, National Insurance contributions, pension contributions, student loan repayments and voluntary deductions (e.g. gym membership, season ticket loan, purchase of additional holiday or benefits etc.).

The inclusion of bonus pay in the definition of “pay” means bonuses which are paid in the pay period ending 30<sup>th</sup> April will be reported twice: in the employer’s headline gender pay gap figures and in their gender bonus gap figure.

## What is the Definition of “Bonus Pay”?

The “mean bonus pay” is based on the bonus pay received during the 12 months before the 30<sup>th</sup> April 2017.

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

- Payments received and earned in relation to profit sharing, productivity, performance and other bonus or incentive pay, piecework and commission.
- Long-term incentive plans or schemes (including those dependent on company and personal performance).
- The cash equivalent value of shares on the date of payment.

This definition of bonus has been widely criticised because it is ambiguous in several respects. It is quite likely that the final definition will change following the responses to the consultation on the draft Regulations not least in working out how long-term incentive plans and similar schemes should be valued i.e. whether it should be counted as at the date of the award or the vesting date or how the value should be assessed over the vesting period. Such valuation will present difficulties for private companies as opposed to listed companies, as the process for valuing shares in private companies is complex and costly. Likewise the meaning of a “received and earned” bonus which has not yet been paid and which pay year that should be reported in.

## **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. At the moment the draft Regulations do not set out how group companies should deal with publication if they do not have their own separate website to a parent company.

Employers must also upload the information to a government-sponsored website where employers are likely to be grouped into sectors with league tables.

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.

The draft Regulations allow employers a high degree of flexibility over when to analyse and publish their information. The first snapshot date in the draft Regulations is 30<sup>th</sup> April 2017. Employers will have until 29<sup>th</sup> April 2018 to publish their first gender pay gap information. Thereafter, they must produce and publish an annual report.

## **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 narrative on their own website where the report is published.

Under the draft 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.
- The number of employees on maternity leave, and the number of employees on adoption leave, shared parental leave or parental leave, with a gender breakdown.
- Discrepancies in pay across the organisation, for historic reasons or as a result of factors unrelated to gender (such as regional variations).
- 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, although this will be kept under review.

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 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 the risk 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 should consider to prepare for the new regime before the first snapshot date of 30<sup>th</sup> 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 30<sup>th</sup> 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 whether there are any overseas employees who are assigned to work in the UK, or employees who work under employment contracts governed by foreign law or ex-pat employees working overseas.
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. Calculate the gender pay gap information using the methodology of the draft Regulations (perhaps using 30<sup>th</sup> April 2016 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.
8. Review the draft gender pay gap report analysis with legal support to address any potential issues (and do so under the protection of legal privilege).

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