



GENDER PAY GAP REPORTING PLANNING FOR A GAP YEAR

Monica Kurnatowska and Paul Harrison of Baker McKenzie examine the impact for employers of the gender pay gap reporting regulations which come into force in April 2017.

From April 2017, employers with at least 250 employees will need to publish details of their gender pay gap on a publicly accessible website on an annual basis. The information that employers must report on will include differences in mean and median hourly pay and bonuses between men and women as well as the proportion of women in each pay quartile within the organisation.

The information will need to remain on the website, accessible to employees and the public, for at least three years and also be uploaded to a central government website to enable easy comparison with other employers. It is likely to be looked at by employees and their representatives, potential job applicants and, in some cases, by clients.

Employers will have until 4 April 2018 to publish their first set of data, but it must be based on a snapshot of pay data as at

5 April 2017. The requirements are set out in the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (*SI 2017/172*) (2017 Regulations). The details are complex and employers that have not already done so should start to plan now, to ensure that they are in a position to comply with the 2017 Regulations and to explain the gender pay gap, which most in-scope employers are likely to have to disclose.

This article explains:

- The metrics that are required to be reported under the 2017 Regulations and how they are to be calculated.
- Which employers and employees fall within the scope of the 2017 Regulations.
- The requirements of where the information is to be published and for how long.

The article also briefly considers the related diversity challenges, equal pay issues and the perspective of global employers.

THE CONTEXT

The gender pay gap in the UK economy as a whole currently stands at 18.1% according to the latest figures from the Office for National Statistics (ONS) from April 2016. This represents the difference between the median hourly rate of pay for women, compared to men, looking across the economy as a whole. Similar gender pay gaps exist at a micro level within organisations.

This does not necessarily mean that employers are discriminating against women by paying them less for equal work, although this can be one of the causes of a gender pay gap. A report published by the House of Commons Women and Equalities Committee

in March 2016 summarises the key causes of the gender pay gap (www.publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/584/584.pdf). They include the fact that women tend to be concentrated in lower grades within organisations and in lower paid occupational sectors. Women are also more likely to have taken career breaks and to work part time. The gender pay gap measures the gap in pay per hour and so strips out any difference in pay based purely on the number of hours worked. But, as discussed in the report, full-time working correlates to progression, which is to say that working part-time has a long-term curbing effect on women's incomes.

In 2011, the government introduced a scheme for employers to publish this information voluntarily, but very few employers did so. The government's view is that the gender pay gap is not reducing quickly enough, and that existing initiatives have not achieved sufficient progress. In July 2015, the government consulted on plans to introduce mandatory gender pay gap reporting (the consultation) (*see News brief "Gender pay reporting: disclosing and closing the gap"*, www.practicallaw.com/6-617-5298). It believes that requiring employers to publish details of their gender pay gap will accelerate progress by incentivising employers to analyse the drivers behind it, and take action aimed at reducing it.

METRICS AND CALCULATIONS

The 2017 Regulations set out in detail the information to be reported by organisations and how it is to be calculated. Acas and the Government Equalities Office (GEO) have published joint guidance for employers (the guidance) (www.acas.org.uk/media/pdf/1/6/Gender_Pay_Reporting_GUIDE.pdf).

The compulsory metrics

Employers must publish six compulsory metrics:

- The difference in mean hourly pay between male and female employees, expressed as a percentage.
- The difference in median hourly pay between male and female employees, expressed as a percentage.
- The difference in mean bonus pay between male and female employees over a period of 12 months, expressed as a percentage.

Meaning of ordinary pay

Ordinary pay is defined in regulation 3 of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (*SI 2017/172*) as:

- Basic pay.
- Allowances (including fire warden allowances, location allowances, car allowances and recruitment and retention allowances).
- Pay for piecework.
- Pay for leave.
- Shift premium pay.

However, ordinary pay does not include:

- Remuneration referable to overtime.
- Remuneration referable to redundancy or termination of employment.
- Remuneration in lieu of leave.
- Remuneration provided otherwise than in money; that is, benefits in kind.
- Reimbursement of expenses wholly and necessarily incurred by the employee in the course of employment.

Ordinary pay is to be calculated before deductions at source, that is, before deductions for tax or employee pension contributions or other deductions such as subscriptions.

- The difference in median bonus pay between male and female employees over a period of 12 months, expressed as a percentage.
- The proportion of male and female employees who received bonus pay during the 12-month period.
- The proportion of male and female employees in each quartile pay band (*regulation 2(1), 2017 Regulations*).

The mean is what is commonly described as the average, that is, it involves adding together the pay or bonus of the employees then dividing by the number of employees. The median is the mid-point, that is, the amount paid to the employee in the middle of the list if employees are listed in order of pay or bonus. The ONS has historically regarded the median as the best representation of the average pay gap, because it is less affected by numbers at the extreme end of the spectrum; for example, a very highly paid CEO. However, requiring employers to publish the mean in

addition to the median is intended to give greater depth to the analysis and to factor in the full range of earnings.

The bonus data is intended to require transparency around the distribution of bonuses and the extent to which the average pay packages of male employees are augmented by bonuses. There is around a 57% gender bonus gap in the UK economy as a whole according to the impact assessment accompanying the 2017 Regulations.

The quartile pay band calculation is intended to show the extent to which an organisation has successfully recruited or promoted women into jobs that attract higher pay and to highlight blockages to women progressing within an organisation (*see "Quartile pay band data" below*). The requirement to report relative proportions rather than the numbers of men and women in each quartile is a change from the earlier draft version of the 2017 Regulations, and will make it less likely that individual employees can be identified from the data.

In addition to these key metrics, there is the option to publish a narrative. Although not compulsory, the guidance strongly encourages it, to help explain the employer's view of the causes of the gap and what the employer is doing about it (*see below*).

Calculating ordinary pay

Ordinary pay is defined widely but does not include payments in respect of overtime, as the government considered that this might create a perverse incentive for employers to put pressure on women to work overtime (*see box "Meaning of ordinary pay"*).

The 2017 Regulations are silent on salary sacrifice schemes but the government response to the consultation and the guidance state clearly that employers that operate salary sacrifice schemes should base the calculation on the employee's post-sacrifice pay (*see News brief "Mandatory gender pay gap reporting: a further step towards pay transparency"*, www.practicallaw.com/1-623-5186). Benefits in kind are not included in the meaning of ordinary pay, even if they have been funded through a salary sacrifice scheme.

Many employers regard this approach to salary sacrifice as unfair, particularly in situations where they allow employees a free choice over whether to participate in the salary sacrifice scheme. There is also the potential for the exclusion of benefits purchased through salary sacrifice to skew an employer's figures if, for example, more women than men participate in the scheme. However, employers should not assume that more women than men will participate in a salary sacrifice scheme, and should analyse the practical impact of their particular scheme on their own gender pay gap figures. The government's response to the consultation on the initial draft regulations recommended that employers highlight in their narrative if their gaps have been distorted by salary sacrifice schemes.

For flexible benefit schemes that are not salary sacrifice schemes, it may be possible to legitimately position the cost of the benefit as a deduction from ordinary pay, rather than a variation in ordinary pay, and therefore use the pre-deduction or reference pay. For example, some of these schemes allow employees to buy extra holiday and the cost of this would typically be regarded as a deduction from pay, rather than a contractual variation in pay. Each scheme

Meaning of bonus pay

Bonus pay is defined in regulation 4 of the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (*SI 2017/172*) as meaning pay that:

- Is in the form of money, vouchers, shares, share options or restricted shares.
- Relates to profit sharing, productivity, performance, incentive or commission.

However, bonus pay does not include:

- Ordinary pay.
- Remuneration referable to overtime.
- Remuneration referable to redundancy or termination of employment.

will need to be considered according to its own characteristics and there will be some borderline situations where employers will need to take advice.

Allowances paid with respect to the recruitment and retention of an employee are explicitly included within the definition of ordinary pay. This seems to be directed at a particular type of regular supplement that is common in some public sector roles. However, on the face of it, this also captures sign on or retention bonuses that are paid in cash. If these bonuses are included within the definition of ordinary pay, they will be factored into the hourly pay gap calculation if paid in the relevant April pay period, but ignored if not paid in the relevant April pay period. It seems unlikely that this is what the government intended.

Although not dealt with explicitly in the 2017 Regulations, it seems clear that employer pension contributions are excluded. Employee pension contributions, on the other hand, operate as a deduction from ordinary pay, and so employers should base the calculation on pay before employee pension contributions.

Calculating bonus pay

The definition of bonus pay includes shares and share options as well as cash bonuses and other incentives (*see box "Meaning of bonus pay"*).

Bonuses are treated as paid at the time that taxable earnings or taxable specific income arises, in the amounts that give rise to taxable earnings or taxable specific income. With a cash bonus, the relevant time is when the bonus is paid. With share plans, it is when the

shares vest or, in the case of options, when the options are exercised.

It is worth noting that UK tax-advantaged plans are also included in the definition of bonus, but benefits received under those plans will only be included in the calculations if, and to the extent that, a taxable event occurs, which tends to occur only in exceptional cases, such as where a participant withdraws from a share incentive plan within five years of buying shares, other than for good leaver circumstances.

Calculating the hourly pay gap

The calculations involve looking at ordinary pay and bonus pay in the relevant pay period, that is, the pay week or month which includes 5 April. For employers that pay their employees monthly, in respect of each calendar month, the relevant pay period is the month of April.

The hourly pay gap calculation includes bonuses paid in the relevant pay period, which means that a bonus which is paid in the relevant pay period must be included in the hourly pay calculation as well as the bonus pay gap calculation. However, where the bonus relates to a longer period, the bonus should be pro-rated and only the portion relating to the pay period included. Employers that normally make annual cash bonus payments in the relevant April pay period will therefore need to include a month's worth of the annual cash bonus in the hourly pay gap calculation. If this skews their figures then one option is to change the timing of their bonus payments in the future. Income from share plans which is received in the relevant pay period must also be included in the hourly

pay gap calculation. As with cash bonuses, if the income relates to a longer period than the income can be pro-rated. It is sensible to use the period from grant to vesting as the relevant period, but each scheme needs to be considered on its own facts.

If the employee is paid monthly in respect of each calendar month, the hourly pay gap calculation involves:

- Identifying the ordinary pay paid for April, excluding any amount that would normally fall to be paid in a different month.
- Pro-rating any bonus pay which is paid in April but relates to a longer period of time, so that only a month's worth of bonus pay is included.
- Converting the total amount into a week's pay by applying an appropriate multiplier which, for monthly paid employees, is seven divided by 30.44 (the average number of days in a month).

This may seem overly complicated, but is presumably intended to introduce consistency into the search for a week's pay for employees who are paid monthly.

There are also detailed provisions for calculating an employee's weekly working hours (*regulation 7, 2017 Regulations*). Where the employee has normal working hours that do not differ from week to week or over a longer period, these are defined as the number of normal working hours in a week under the contract of employment. If the employee has no normal working hours or the number of normal working hours varies, employers should take a 12-week average ending with the last complete week of the relevant pay period, disregarding weeks of no work and bringing earlier weeks into account unless they are not reasonably able to do this, in which case they should take a fair representation. Working hours explicitly excludes hours in respect of which overtime is paid.

Organisations may have contracts of employment which state different numbers of normal working hours depending on the business area or the date they were issued. Many senior highly paid employees will have contracts of employment stating that their normal working hours are 37 or 40 hours per week, when in reality they will work

considerably in excess of this. The guidance does not address this situation: it focuses instead on whether the contract states there are normal working hours. A key decision will therefore be whether to rely on the stated contractual hours as "normal working hours", which is the more straightforward approach. However, it may produce an artificially high hourly rate for these employees and, in organisations where women are under-represented at this level, this may accentuate the pay gap.

Once the employer has calculated the hourly rate of pay for each in-scope employee, it must calculate the mean and median for men and women (*regulations 8 and 9, 2017 Regulations*). It must then publish the gap, expressed as a percentage of the male mean and median rates. For example, if the mean male hourly rate is £20, and the mean female hourly rate is £16, the mean hourly pay gap is 20% (£4 expressed as a percentage of £20).

Calculating the bonus pay gap

The bonus pay gap calculation involves identifying the total bonus paid to each employee in the 12 months ending with 5 April. The details of any cash bonuses, incentives or taxable events relating to share plans from 6 April 2016 to 5 April 2017 will therefore need to be included in the first gender pay report. It does not matter if the bonus relates to an earlier period of time or to multiple periods of time. Nor is there any provision allowing employers to upscale bonuses paid to part-time employees, or employees who have been absent. The bonus pay gap calculation may therefore be affected by factors outside of the employer's control and not necessarily a fair or useful measure of gender equity.

Employers must publish both the median and mean bonus gap, expressed as a percentage of the male figures in the same way as the hourly pay gap (*regulations 10 and 11, 2017 Regulations*). Employers must also publish the proportion of male and female employees who received bonus pay in the 12 months ending with 5 April (*regulation 12, 2017 Regulations*).

Quartile pay band data

This calculation involves ranking employees according to their hourly rate of pay and then dividing them into four quartiles, which are equal in terms of number of employees, described as the lower, lower middle,

upper middle and upper quartile pay bands (*regulation 13, 2017 Regulations*). Employers must then calculate the proportion of men and women in each quartile (see box "Quartile pay band data").

The 2017 Regulations also contain guidance for dealing with the problem of where to draw the quarter line between employees whose hourly rate of pay is the same. This can be a material issue for employers in some sectors where large numbers of employees in the lower and lower-middle quartiles are paid at identical hourly rates. The 2017 Regulations make clear that employers do not have the freedom to put female employees above the quarter line and male employees below it. Instead, when ranking employees in order of their hourly pay, they must do so as far as possible so that the relative proportion of male and female employees receiving the same hourly rate is the same in each of the quartiles. In practical terms, this means that if an employer puts one woman for every four men into the lowest quartile it must (as far as possible) put one woman for every four men into the lower middle quartile.

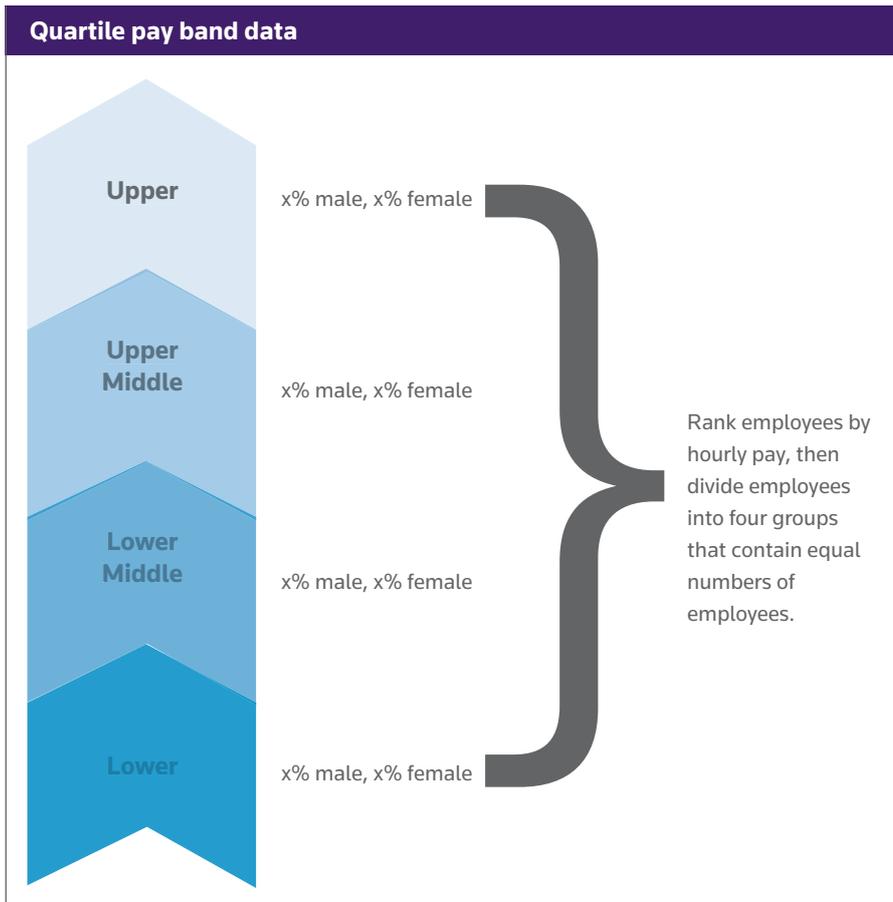
SCOPE OF THE 2017 REGULATIONS

Not all employers are required to report the gender pay gap data, and the data does not need to reflect all employees.

Employers that must report

Employers with 250 or more employees on 5 April in any year must report their gender pay gap data for that year. This includes companies, partnerships and other legal entities. The Equality Act 2010 (2010 Act) defines employees as including apprentices and anyone employed under a contract personally to do work, which includes workers and some contractors. In practice, therefore, employers must consider their wider workforce, not just their core employees, to assess whether they are large enough to be in scope of the 2017 Regulations. However, agency workers and individuals providing work through personal service companies are excluded. In addition, the data can be based on a narrower group of employees in some circumstances (see "Employees that must be included" below).

In a group of companies, the obligation to report applies to each company separately, based on the number of employees in the company rather than the group as a whole. Each company with 250 or more employees



must therefore produce its own report and upload its data to the government website, even if the group voluntarily produces a consolidated version. Equally, companies with fewer than 250 employees do not have to produce a report, even if they are part of a wider group with more than 250 employees. This means that a business's gender pay gap figures may be significantly affected by its group structure and, for example, how it chooses to employ its board and senior executives.

Employees that must be included

Although employers must consider their wider workforce, not just their core employees, to assess if they are large enough to be in scope of the 2017 Regulations, it may be possible to disregard certain employees when it comes to calculating some or all of the metrics.

Workers and contractors can be disregarded for the purposes of calculating any of the compulsory metrics if the employer does not have the data for them and it is not reasonably practicable to obtain those data. This means that, for example, an employer can ignore contractors when calculating the hourly pay gap where it cannot reasonably collect the necessary details of their working hours. This leaves an open question as to how much

effort an employer is expected to make. The guidance implies, for example, that the employer could include in its terms of engagement with the contractor a contractual obligation to provide the information.

Partners, including limited liability partnership members, are disregarded for the purposes of calculating all six of the compulsory metrics. The position of non-executive directors will generally need to be assessed individually.

Employees who are being paid at a reduced rate or nil during the relevant pay period as a result of being on leave are included for the bonus pay gap calculation but must be disregarded for the purposes of the hourly pay and quartile pay band calculations. This addresses a concern in the consultation that a gender pay gap could appear greater as a result of reduced pay to women on maternity leave. However, employees who are absent and on reduced pay will still be included for the bonus pay gap calculation, and this may have a distorting effect.

"Leave" is defined as including (but not being limited to) all types of family leave, annual, sick and special leave. This would cover compassionate leave, time off to attend

medical appointments or for dependants, any kind of holiday (including public holidays) and any other kind of leave. Note that any amount of leave is potentially enough to exclude the employee from the hourly pay calculation as long as they are on reduced or nil pay. So, for example, an employee on maternity leave but on full pay must be included in all the calculations, whereas an employee who takes an unpaid afternoon off to help a dependant during the relevant pay period must be excluded from the hourly pay calculation but not the bonus calculation.

"Reduced rate" is not defined in the 2017 Regulations, so questions may arise as to when an employee on leave should be taken as being paid a reduced rate.

The guidance deals with the situation of employees who do not self-identify as either gender. The 2017 Regulations do not say anything about this issue, but the guidance suggests that these employees are simply omitted from the calculations, which is clearly a sensible approach.

Employees on international assignments

The 2017 Regulations are part of the law of Great Britain, that is, England, Wales and Scotland, but not Northern Ireland. This raises some interesting questions around which employees are covered and what happens to employees on international assignment. The 2017 Regulations say nothing about their application to employees on international assignment.

It seems most likely that the test for deciding if an employee is covered by the 2017 Regulations will be the test in *Lawson v Serco* for deciding if the employee has unfair dismissal rights ([2006] UKHL 3, www.practicallaw.com/5-202-0452). In *R (Hottak and another) v The Secretary of State for Foreign and Commonwealth Affairs and another*, the Court of Appeal held that the *Lawson v Serco* test should extend to claims under the 2010 Act ([2016] EWCA Civ 438, www.practicallaw.com/6-630-2625). This view is supported by the guidance.

On this basis, some employees who are employed by an in-scope employer but who are working outside Great Britain are likely to be included. They will be covered by the 2017 Regulations if there is a sufficient connection between their employment relationship and Great Britain, looking at factors such as where the employee lives and works, how

they are managed in practice, which law governs the contract and where tax is paid. The inclusion of employees on overseas assignment may accentuate an employer's hourly pay gap where those assignments are highly paid and are more likely to be accepted by men. These employees are likely to receive special allowances or per diems, and these payments will need to be included in their hourly pay calculation where they go beyond the reimbursement of necessary expenses.

Employees assigned to Great Britain from overseas are also potentially in scope. However, in practice, those employees are unlikely to be employed by their host in Great Britain. The host in Great Britain can disregard anyone it does not employ. Their home country employer may not have 250 employees who are covered by the 2017 Regulations and so may not be required to report at all.

PUBLICATION REQUIREMENT

Employers must publish their data within 12 months of 5 April on a publicly accessible website. This means that the first reports will be due by 4 April 2018. Organisations therefore have a degree of flexibility over the timing of publication, and many are starting to consider when and how they want to present their data. The guidance encourages early publication, which it says will enable employers to be seen as leaders and exemplars in their sector. However, some employers will be concerned that early publishing could attract more media attention and, given that most in-scope employers will be publishing a gender pay gap, that the publicity will be negative. Employers will need to take the time to analyse the causes of their pay gaps and consider their narrative. Employers will also need to manage multiple stakeholders and may want to ensure that their employees, senior management teams and relevant employee groups are briefed in advance of publication.

The data should be uploaded to the website so that it is accessible to employees and the public, and retained for three years to enable trends to be identified (*regulation 15, 2017 Regulations*). The website does not have to be in the UK, which may be helpful for multinational employers with a single website. The data must be signed off as accurate by a director, or the equivalent in organisations that are not companies.

Employers must also upload their data to a government-sponsored website, details of which have not been announced at the time of writing. In its consultation response, the government stated that it wanted to produce tables by sector of employers' reported pay gaps. It is unclear how detailed these league tables would be, but there is an expectation that some form of league tables may also be compiled by the media or recruitment websites.

One concern for employers is that their gender pay gap data may put off candidates from applying for jobs. A survey conducted by the Young Women's Trust and cited in the government's consultation response in February 2016 revealed that 84% of the surveyed women (aged 16-30) would consider an employer's gender pay gap when applying for a job (www.youngwomenstrust.org/assets/0000/2198/GenderPay_survey_results_summary.pdf). There is also the prospect of competition between companies over the size of their gender pay gaps, and the potential for the data to be analysed by clients or the media.

Employers may choose to publish a narrative, for example, to explain their analysis of the gap, any measures they are taking to target the gap and to put their data in context alongside their diversity and inclusion initiatives. This will help to give context to any pay gap. Employers will need to strike a balance between being seen to be taking steps to address the gap and being realistic about what can be achieved and when. Employees and their representatives will look to hold employers to their commitments.

Employers will want to analyse the impact of including or excluding particular payments, benefit schemes and individuals in their gender pay gap calculations. If employers consider that their figures are skewed, for example, by the exclusion of benefits funded by salary sacrifice or by the inclusion of particular income from share plans, then they may want to explain this in their narrative and even consider publishing adjusted metrics.

Employers may also want to consider publishing additional or more detailed metrics. For example, the average hourly pay gap between employees at the same grade or job band may show a much smaller pay gap, but a pay gap at this level may be more indicative of equal pay risks, so employers will need to consider this carefully.

While most organisations seem to be considering a narrative, and the guidance takes the view that it is best practice, some are concerned about placing too much reliance on a narrative, or additional or adjusted metrics, which may not be included in any league tables.

Sanctions for non-compliance

There are no civil or criminal penalties for employers that do not publish their gender pay gap data. The intention seems to be that employees, unions, the media, customers and shareholders will apply sufficient pressure to non-compliant organisations. The government has stated that it may publicise the identity of employers known not to have complied.

The Equality and Human Rights Commission (EHRC) has confirmed that non-compliance with the 2017 Regulations would be an "unlawful act" for the purposes of the 2010 Act, which means that it has the power to take enforcement action. However, it seems unlikely that the EHRC will invoke this power to challenge the calculation approach adopted by employers. This means that employers that make judgment calls as to some of the more difficult issues are unlikely to face a formal adverse finding. However, a director will need to sign to say that the information is accurate, and the organisation may also face questions from employees and employee groups about its approach to the calculations.

CHALLENGES AND ACTION PLANS

Many organisations are starting to look beyond the immediate concern of compliance with the 2017 Regulations (*see box "Ten-point action plan"*). Some want to analyse their data to better understand the causes of the gender pay gap in their organisation and consider what measures they could take to narrow it. These organisations are likely to want to look at alternative or adjusted metrics in order to track their progress, whether or not they also publish those metrics. Any deep analysis of the gender pay gap or production of alternative or adjusted metrics may take considerable resources when compared to simple compliance, and measures to target the gap will also require investment.

Targeting the gap

Which measures are effective will depend on what explains the gender pay gap in each particular organisation.

Ten-point action plan

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| 1 | Identify the legal entities in scope, being those with at least 250 employees on 5 April, including in-scope workers and contractors. |
| 2 | Assign responsibility for work streams and tasks; that is, calculating data, building narrative, uploading to the website, obtaining director-level sign off. |
| 3 | Identify in-scope employees: agree protocols for deciding which workers, contractors and expats are in scope. |
| 4 | Find out what data the business holds about pay and normal working hours, and identify any gaps. Decide the approach to any difficult issues, such as absence, flexible benefit schemes and contractor data. |
| 5 | Collate details of all bonus schemes, including cash bonuses, share options and long term incentive plans. Decide approach to any difficult bonus issues; for example, what is in and out of scope, and whether the systems can capture the necessary data. |
| 6 | If bonuses are normally paid in April, consider any impact on the business's hourly pay gap. |
| 7 | Carry out a dry-run of the six compulsory metrics and consider running further calculations to explore the potential for publishing alternative or adjusted metrics. Note that information gathered as part of this process may be disclosable. Take advice on how best to structure the approach to claim legal advice privilege. |
| 8 | Consider carrying out further analysis into the cause of the pay gap metrics (under legal advice privilege as far as possible) and whether to conduct an equal pay audit. |
| 9 | Start work on building a communications plan and future action plan and consider the following: <ul style="list-style-type: none"> • Will the business publish a narrative alongside the data and what will the content be? • What measures is the business already taking which may help narrow the gap? • Are there other measures the business will take to help narrow the gap? • When will the business publish the data on its website? • How will the business present the data and what internal communications (both in the UK and more broadly) will it publish alongside, or before it publishes, the data? • Are the data consistent with any other existing published data? |
| 10 | Do the final calculations and ensure that the data are signed off as accurate by a director, uploaded to the business's website and uploaded to the government website. |

Where the gap is caused by lack of female representation at senior levels, there are a range of measures in the November 2016 Hampton-Alexander review to consider (www.practicallaw.com/5-638-0440). The review suggested that the most important action is to target initiatives at the pipeline of female talent, ideally the whole pipeline, from entry upwards.

Pay is inevitably linked with promotion and progression, and lack of promotion can be one cause of a gender pay gap. Research by Catalyst suggests that men tend to be promoted on potential, whereas women tend to be promoted on performance (www.catalyst.org/system/files/The_Myth_of_the_Ideal_Worker_Does_Doing_All_the_Right_Things_Really_Get_Women_Ahead.pdf). This suggests that companies should pay close attention to promotion data.

Unconscious discrimination and gender bias may be present to some degree, even if only resulting from historic discrimination which has led to lingering pay differences. One way of trying to identify if historic discrimination still plays a role is to carry out an equal pay audit and to investigate any significant pay discrepancies (see feature article "*Compulsory equal pay audits: bridging the gender pay gap*", www.practicallaw.com/0-579-8026). Some companies are also looking at placing controls on managerial discretion over pay awards and bonuses, monitoring decisions for possible gender bias, and making sure that any performance-related decisions genuinely reflect performance differences. It is also advisable to provide unconscious bias training to managers, particularly those with responsibility for remuneration.

Some companies are considering setting stricter controls on entry pay rates, including standard pay ranges, to target the gender pay gap at the recruitment stage. In the private sector, it is common for an employee's starting salary to be based on, or influenced by, his salary in his previous role. However, although the employer may be able to defend this under the equal pay legislation, it can perpetuate gender pay differences. It is also common for employees to negotiate their starting salaries and it is often claimed that men may do so more successfully than women, although of course this may not be the case in all organisations.

Many organisations take a number of measures aimed at reducing attrition caused by maternity leave. Those measures tend to focus on encouraging women to return to the

same organisation immediately following maternity leave; for example, by making maternity pay conditional on return. It is not yet common for private sector organisations to focus on encouraging women who have taken a significant career break to return to working, for example in a new career. However, some organisations might consider targeting these women as part of their diversity and inclusion strategy.

The Women and Equality Committee argue that one solution to the part-time penalty is to move away from regarding part-time working as a concession for women, and instead towards a situation where flexibility is used by both men and women. In other words, the answer may lie not in persuading women returning from maternity leave to work full-time, but in allowing men to work part-time. There is evidence that male millennials are looking for this type of flexibility in any event, and are content to take the reduction in pay associated with it. According to a recent survey published by Working Families, 47% of fathers want to downshift to a less stressful job, 38% would be willing to take a pay cut to achieve a better work-life balance and 69% would consider their childcare arrangements before they took a new job or promotion (www.workingfamilies.org.uk/wp-content/uploads/2017/01/Modern-Families-Index-Full-Report.pdf).

Whatever measures an organisation takes, it is important to be realistic and acknowledge what cannot be changed, at least in the short-term, as well as what can. There is a risk of an employer announcing a package of measures aimed at narrowing the gap and then finding that the gap remains the same in subsequent years. As explained above, employers need to display three years' worth of data on their websites. Some measures may pay off in the long term but make the gender pay gap worse in the short term. Organisations should not just be thinking about a package of measures to announce in the first year of gender pay gap reporting; they need to be looking ahead to the longer term, and monitoring the impact of measures.

Equal pay risk

There has been an increase in the number of organisations that are seriously assessing the extent of equal pay risk in their business including by conducting equal pay audits under the cloak of legal privilege. There is a concern that the much-publicised ongoing equal pay litigation against Asda could mark

Related information

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Practice notes

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the beginning of a new trend in equal pay claims in the private sector (see *News brief "Private sector equal pay: another hurdle cleared"*, www.practicallaw.com/8-634-8905 and feature article *"Private sector equal pay claims: the next big thing?"*, www.practicallaw.com/1-522-1307). There is also a concern that gender pay gap reporting could set off an increase in equal pay claims, either because employees simply misinterpret the data or because it exposes areas of potential pay discrimination.

Assessing the legal risk is not straightforward. UK equal pay law has been shaped by the wave of equal pay claims in the public sector, particularly in local government. As a result, the case law tends to relate to issues pertinent to the public sector such as the justification of productivity bonuses or pay protection schemes. There is not a wealth of case law on the relevant issues in the private sector, such as the extent to which employers can justify pay differentials resulting from salary in previous roles. It may also be less easy for private sector employers to identify the cause of any pay differentials, particularly when the cause is historic, and they may have more anomalies. There is also an ongoing evidential challenge if decisions have not been documented and managers have left.

THE GLOBAL EMPLOYER

The gender pay gap is a global issue, and other countries are taking a closer look at what can be done to improve it. In the US, the Equal Employment Opportunity Commission intends to start collecting pay data from US employers with 100 or more employees from March 2018. California and New York have both recently strengthened their state equal pay laws.

In many other jurisdictions in the EMEA region, employers are required to conduct gender pay gap surveys, although the requirement is typically to share the survey with works councils or similar rather than make it publicly available as required by the 2017 Regulations.

There are also growing signs that some other countries may take further action on the gender pay gap. For example, the German government is tabling legislation which will give works councils or employees at sites with more than 200 employees the right to ask about the average compensation of employees in comparable positions. Under the proposals, companies with more than 500 employees will also have to install mechanisms in order to monitor and promote equal pay, and report to public authorities.

Multinational employers will therefore be thinking about compliance in a global context. They will need to consider not just about the message in any narrative they publish alongside their data, but whether this is, or needs to be, consistent with what they are saying elsewhere. For example, some US employers have announced that they have achieved 100% gender equity on pay, but were referring to the gap between men and women in similar roles. Companies that have sent out similar messages on pay equity

will need to think about whether this affects the narrative they publish with their data. Employers that publish details of their pay gap in the UK may find requests for similar data from employees in other countries.

Global employers also need to decide whether any action plan could, or should, be a global one. This presents a challenge for a number of reasons. For example, it is common to collect data for diversity monitoring purposes in only very few jurisdictions around the globe. In

many countries, it is an emerging concept and its introduction can even raise suspicions of discrimination. This makes it challenging to monitor progress on a global scale. There may also be questions about whether steps to promote female employees will fall foul of prohibitions against positive discrimination in certain jurisdictions.

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