

REWARD



Gender pay reporting - another consultation...but the obligations take shape

Caroline Harwood, director of incentives, and Annelise Tracy Phillips, senior employment lawyer, Burges Salmon LLP, review the draft Gender Pay Information Regulations

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Having completed the "Closing the Gap" consultation exercise in September 2015 the Government has finally published draft Gender Pay Information Regulations. These are subject to further consultation which ends on the 11 March 2016. Whilst some detail may change, we now know that employers with more than 250 employees will be obliged to publish:-

- mean difference in pay between men and women as a percentage;
- median difference in pay between men and women as a percentage;
- number of men and women in each quartile of their pay distribution;
- mean difference in bonus between men and women shown as a percentage;
- the proportion of male and female employees who receive a bonus as a percentage.

Publication will have to be on the employer's searchable website and will be uploaded to a Government sponsored website. The Government has indicated that it intends to publish sector league tables in 2018.

Key points

- The Regulations will come into force in October 2016 but the key date is 30 April 2017 – employers will have to report their pay gaps based on the pay period which includes this date.
- Employers have until 30 April 2018 to publish the data.
- The reporting obligation only applies to employees, not the self-employed or agency workers – though this may change.
- Reporting is by legal entity not group, so smaller companies within a large group may not have to report.

Pay

How pay is defined will impact on the pay gaps reported.

| Included | Excluded |
|----------------------------------|---------------------------------------|
| Basic pay | Pay from a different reference period |
| Paid leave | Overtime pay |
| Maternity pay | Expenses |
| Sick pay | Value of salary sacrifice schemes |
| Area allowances | Benefits in kind |
| Shift premium pay | Redundancy pay |
| Bonus pay | Pay arrears |
| Other pay (including allowances) | Tax credits |

Pay is to be calculated before deducting PAYE, NI, pension schemes, student loan repayments and voluntary deductions

The regulations use the same definition of pay as used by the Office of National Statistics. This provides consistency, but could result in a skewing of results. For example:

- o Allowances paid to first aiders/fire wardens are for additional voluntary responsibilities meaning individual choice can affect the data;
- o Benefits-in-kind, such as company cars, are excluded whereas car allowances are included, again a danger of failing to compare like with like;
- o Pay is assessed before pension contributions are deducted but salary sacrifice benefits appear to be excluded, even if they are used to make pension contributions;
- o Maternity pay, often much lower than ordinary pay, will be included - potentially exaggerating the pay gap.

Bonus

Bonus is to be published separately because research from the Equality and Human Rights Commission in the financial services sector indicates that differences between men and women's bonus pay constitutes a significant proportion of the gender pay gap in that sector.

Bonus will include:-

- 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 share schemes (including those dependent on performance); and
- Cash equivalent of share value on the date of payment.

What next?

Even though employers have until April 2018 to report, the relevant data will need to be gathered between 30 April 2016 and 30 April 2017 for bonus and as at 30 April 2017 for pay. That means that employers now have a relatively short window in which to act where there are concerns about existing pay systems.

Whilst there is no obligation on employers to provide a narrative to accompany the data, most organisations will want to explain it and explain what steps they are taking to address issues highlighted.

Employers should, therefore:-

- check whether they can gather the necessary data and if not, put the necessary systems in place and how to do so;
- review areas of concern, for example by taking snapshot reviews or conducting pay system audits, and take steps to address any issues.
- If women are under-represented in parts of the workforce consider what can be taken to address this; for example, participation in diversity networks, mentoring schemes, talent development programmes.

When conducting data gathering exercises employers should take care to avoid creating documents which might subsequently be used in litigation by disgruntled employees. Information gathered for the purposes of obtaining legal advice can be subject to legal advice privilege and cannot generally be used in subsequent litigation so employers should consider involving in-house lawyers or external legal advisers in audits or reviews.

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