An introduction to UK Gender Pay Gap Reporting – A Brave New World

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Large employers in the UK (with 250 or more employees) are now under an obligation to publish an annual report containing data on their gender pay gap by April 2018 under section 78 of the Equality Act 2010.

This mandatory reporting requirement, a first for the UK, came into force on 6 April 2016.

The gender pay gap reporting deadline of 4 April 2018 (or 30 March 2018 for public sector employers) is looming, and with only weeks to go 9 out of 10 employers are yet to publish their report – as at 14 February 2018 only 953 out of an expected 9,000!

Many employers may be waiting to see their competitors' figures first, and may be waiting for much of the recent Weinstein-fuelled news in the media to die down.

We recommend companies also use the remaining time to ensure they have a clear narrative, to give context to the stark figures they are required to report and help pre-empt queries/criticism from staff, campaign groups, the media and consumers alike.

What is the gender pay gap?

The gender pay gap is the difference between average hourly earnings for men and women. It is always expressed as a percentage, and is calculated by working out the difference between the average pay of all male employees (A) and the average pay of all female employees (B), and dividing that number by the average pay of all male employees (A).

The gender pay gap has always been a topic of interest, but compulsory reporting is intended by the UK government to increase awareness and improve pay equality. For the UK as a whole, the gap has reduced in the last 10 years but remains significant, particularly so in certain sectors.

What are the requirements?

The gender pay gap reporting regulations require organisations with 250 or more employees to publish:

- the difference between the mean and median hourly pay for full-time male and female employees;
- the difference between the mean and median bonuses paid to men and women;
- the proportion of male and female employees who received a bonus; and
- the proportion of male and female full-time employees in the lower, lower middle, upper middle and upper quartile pay bands.

For the purposes of gender pay gap reporting, pay (which is broken down into "ordinary pay" and "bonus pay") includes basic pay, bonuses, allowances, pay for piecework, pay for leave (but only fully paid leave) and shift premiums, which is of particular importance for financial services and other sectors where bonuses are a significant part of overall remuneration. Overtime payments, expenses, benefits in kind and the value of salary sacrifice schemes will be excluded.

Who is an employee?

For the purposes of gender pay reporting, the definition of who counts as an employee is defined in the Equality Act 2010. This is known as an 'extended' definition which includes:

- employees (those with a contract of employment);
- workers and agency workers (those with a contract to do work or provide services personally); and
- some self-employed people (where they have to personally perform the work).

Where must employers publish the information?

Employers must publish their gender pay gap report on their website, and upload the information to GOV.UK. The information is then available to the public (and, indeed, staff) online at https://gender-pay-gap.service.gov.uk/Viewing/search-results

Employers have the option to provide a narrative with their calculations. This should generally explain the reasons for the results and give details about actions that are being taken to reduce or eliminate the gender pay gap. This narrative offers the employer an opportunity to explain what challenges they face to combat pay inequality, their successes and their plans for long-term results. The narrative may be particularly important for employers that offer benefits such as flexible working and childcare vouchers which, as mentioned above, are not taken into account for gender pay gap reporting.

We will be commenting further on how much (or indeed how little) information should be given by employers by way of context and narrative as this needs to be looked at on a case by case basis. It is also the case that many people will mistake a gender pay gap for inequality of pay which it is not.

Consequence of non-compliance

Companies can't be punished for a wide gender pay gap, but they might be punished for failing to publish their data or for publishing misleading or inaccurate figures.

In the 'Closing the Gender Pay Gap' consultation paper, the government sought views on whether a civil enforcement system would help ensure compliance with the gender pay gap regulations. Around two thirds of the respondents agreed that such a system would help ensure compliance, but the government has decided not to introduce any civil penalty.

However, the Equality and Human Rights Commission (EHRC) is responsible for ensuring employers publish their pay gap figures. The EHRC set out plans for its enforcement policy in December and says it will approach employers informally at first, but businesses could ultimately face "unlimited fines and convictions".

The EHRC has recently asked for just £300,000 in additional funding to enforce gender pay reporting in the UK during the next financial year, raising questions over its ability to ensure that companies accurately report their data.

ACAS guidance, available here http://m.acas.org.uk/media/pdf/m/4/Managing_gender_pay_reporting_04_12_17.pdf, confirms that the EHRC has the power to enforce any failure to comply with the reporting requirements, and can carry out investigations into "unlawful acts" and can issue unlawful act notices.

The UK government says it will also publish sector-specific league tables, highlighting companies failing to address pay differences between men and women.

Reputational damage

Most commentators agree that, to varying degrees, the introduction of gender pay gap reporting is having a positive effect on the quality of public discourse and in forcing business and government to act on the more persistent issues that underpin pay inequality – even if the measures used for reporting are imperfect, reflecting inequality in progression and opportunity rather than salary in most cases.

Some employers that have already published their report have faced unwelcome scrutiny in the press and social media. The resignation of BBC international editor Carrie Gracie earlier this year has focused national attention on the broader discussion. Up to 200 women at various levels of the BBC have made complaints about pay, according to #BBCWomen, a campaign group of around 150 broadcasters and producers.

The EHRC has said it will write to the BBC to investigate Gracie's allegations and will consider whether further action is required based on the BBC's response. If, following an investigation, the EHRC concludes that an employer has committed an unlawful act (for example, discrimination or breach of equal pay) as mentioned previously it can serve a notice, requiring the BBC to prepare an action plan to avoid any repetition, or continuance, of the unlawful act – and can enforce the plan by way of court proceedings.

However, as with Modern Slavery, the reputational risk often far outweighs the strict legal consequences, despite the fact that, in discrimination and equal pay cases, compensation is potentially uncapped.

While BBC employees are likely to have a bigger platform than most, the reputational risk associated with equal pay and other discrimination claims affects all employers. Employers should be aware that, in publishing their gender pay gap reports, pay disparity may come to the fore, and companies should consider what steps they can take to pro-actively manage potential risks. We will be writing more about this, so watch this space!

More recently, Supermarket giant Tesco has made the headlines and is facing what could be the largest equal pay challenge in UK history. If successful, lawyers estimate it could cost Tesco as much as £4bn to compensate workers. This follows on from similar cases with Tesco's rival Asda and Sainsbury's.

As at today's date none of the UK major supermarkets have reported their gender pay gap information.

Overseas staff

Unfortunately, the ACAS guidance provides little clarity about whether overseas staff (employed by a UK company but working overseas) should be included in employee number calculations. It states that an employee based overseas should be included if they would be able to bring a claim in the Employment Tribunal under the Equality Act 2010. As the guidance states, this is not a straightforward question and involves looking at multiple factors.

On this basis, employers should consider this issue carefully and if necessary should seek legal advice (this will also ensure that communications about this point are subject to legal privilege.) Conceding expressly in any internal documentation that an overseas employee would be able to bring claims in the Employment Tribunals could potentially undermine the employer's ability to dispute jurisdiction if that employee did later bring such a claim.

Issues may arise for multi-national companies where an international assignee works in the UK but is employed by an overseas entity. Potentially, these people may fall within the gender pay gap regime. We advise that analysis should be carried out on a case by case basis to assess the extent of the individual's connection to the UK. Relevant factors will include the length of the assignment, the terms of assignment, what contractual documentation is in place and whether such documentation states that they are working for the UK based company while on assignment and which company is bearing the employment costs of the assignee. If the assignee is on an extended assignment, for example, of a year or more, it may be safest to treat them as an 'employee' of the company based in UK for gender pay gap reporting purposes.

Conclusion

Gender pay gap reporting is intended to shine a light on disparity of pay and position in the workplace (though it is not in itself a measure of equal pay.) We will be commenting further over the coming weeks on key points employers should consider when making a report and managing their narrative and context, as the devil is likely in the detail.

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