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Gender Pay Gap back on the Agenda: Mandatory Reporting Returns in April

Employers with 250 or more employees are required to report on the gender pay gap in their organisation by no later than 4 April each year. This is with the exception of the last two years, when the April 2020 reporting deadline was suspended due to the chaos employers were faced with at the start of the pandemic. Employers were then given six months' grace on the reporting deadline for the 2020/21 reporting period. Reporting deadlines have now returned to normal, with the private and voluntary sector reports due by midnight on 4 April 2022.

Data released by the Office for National Statistics (**ONS**) shows that the gender pay gap has widened during the pandemic, with an increase from 14.9% in April 2020 to 15.4% in April 2021. The ONS calculates its pay gap based on its own survey of hours and earnings, which is different to the calculations required in mandatory pay gap reporting. However, it may provide a preview of what employers are facing in their pay gap reports for the 2021/22 reporting year.

This month's alert considers the impact of the pandemic on gender pay reporting and includes guidance to help UK employers prepare their next gender pay gap report.

GENDER PAY GAP REPORTING – WHAT IS REQUIRED?

We assume that many of you will be familiar with gender pay gap reporting and will have prepared reports since the first reporting deadline in April 2018. For those who need a reminder or who have recently reached the headcount threshold, here is an overview of the UK's gender pay gap reporting laws in the private and voluntary sector under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (the "**Regulations**"). Specified public sector employers are subject to different regulations and timeframes.

- **Who has to report?** An employing entity in the private or voluntary sector that has more than 250 employees on the 'snapshot' date of 5 April of the relevant reporting year. The number of employees is



calculated per individual employer and does not include the headcount of group companies. The Regulations adopt a very wide definition of “employment” and captures anyone employed “*under a contract of employment, a contract of apprenticeship, or a contract personally to do work*”. This includes workers and consultants engaged through a personal service company.

- **Who do you have to report about?** The employees to be reported on are “relevant employees” who are employed on the snapshot date, excluding partners (although they are included in calculating the headcount). An employer is not required to include data relating to a “relevant employee” if the individual is under a contract personally to do work (i.e. a worker or consultant) and the employer does not have and cannot reasonably obtain the pay data for that person. This exception helps employers to exclude off-payroll contractors whose pay cannot be easily assessed, for example because they are not paid for actual time worked. Employers only need to report the pay gap for employees who received their “full-pay” on the relevant date. This includes part-time workers when they are in receipt of normal pay but excludes anyone who was on furlough in receipt of only 80% wages and anyone on family leave or long-term sick leave.
- **When do you have to report by?** The report must be published within one year of the snapshot date of 5 April, so by 4 April of the following year.
- **What do you have to report?** Employers must publish six figures:
 1. **Mean gender pay gap** – This is the average gender pay gap using hourly pay. This is calculated by adding the hourly pay rate for male/female employees (separately and excluding overtime) then dividing by the number of male/female employees. The difference must be shown as a percentage of the mean pay of men.
 2. **Median gender pay gap** – The middle hourly pay rate, when you arrange your pay rates in order from lowest to highest. The difference must be shown as a percentage of the median pay of the men.
 3. **Bonus proportions** - The percentage of male and female employees who received bonus pay in the 12 month period. Bonus pay includes any remuneration in the form of money, vouchers, shares or share options which relates to profit sharing, productivity, performance, incentive or commission.
 4. **Mean bonus gap** – The difference between the average bonus pay for each gender in the 12 months ending on 5 April each year.
 5. **Median bonus gap** – The difference in median bonus pay to relevant employees who are men and median bonus pay to relevant employees who are women.
 6. **Quartile pay bands** – The percentage of male and female employees within each hourly pay quartile.

Detailed government guidance on how to calculate the required figures can be found [here](#). Employers must also provide a written statement confirming the above information is accurate. Employers can also choose to publish a supporting narrative and/or an action plan to explain any gender pay gap and the actions they plan to take to address this.

- **Where do you publish your gender pay gap information?** Online, using the Government’s [Gender pay gap service](#). Employers must also publish their gender pay gap information on their website in a manner that is accessible to all its employees and to the public. The information must remain on the website for at least three years from the date of publication.
- **What happens if you do not report?** The Regulations do not provide for sanctions against employers who fail to comply with their duty to report. Failure to comply would be an “unlawful act” under the UK’s Equality Act 2010, which could potentially be investigated and enforced by the Equality and Human Rights Commission (**EHRC**) and lead to



finances. The EHRC also names and shames organisations who fail to submit reports and this has been the subject of much media attention.

The Regulations contain an obligation on the government to conduct a review of the Regulations before 22 April 2022. It is likely that the review will consider the introduction of sanctions as well as whether the scope should be extended to smaller employers. There have also been calls to introduce a requirement for publication of an action plan to close any identified gap. We will keep you posted as to any developments in this space.

HOW MIGHT THE PANDEMIC AFFECT THIS YEAR'S REPORTS?

COVID-19 has had a profound impact across all workplaces and sectors. Several global studies have shown that women have been disproportionately impacted by the pandemic as they are more likely to work in the “shutdown sectors” and/or perform roles more susceptible to furlough or redundancy (for example, roles which cannot be performed at home).

In an analysis of gender pay gap reports submitted by 5 October 2021 (for the 2020/21 reporting period, with the snapshot date of 5 April 2020), PwC has reported a decline in the average pay gap from 14.2% in 2017/18 to 13.1% in 2020/21. Further, 56% of the companies who had submitted reports in October 2021 had witnessed a reduction in their mean pay gap, while 53% saw a decrease in the mean bonus gap. This only reflects the position at the very start of the pandemic.

However, ONS data (which uses its own survey results) indicates a widening in the gender pay gap from 14.9% in April 2020 to 15.4% in April 2021. In both cases, these figures are likely to have been skewed by furlough and the disruption to wages and hours over the pandemic.

Gender pay gap reports are compiled using only the data of employees who are in receipt of “full pay” during the period in which the snapshot date falls. This is defined as an employee who is not receiving reduced or no pay on the snapshot date as a result of being on leave. Government guidance published in December 2020 confirmed that furloughed employees, whose pay was not being topped up by employers to their usual full pay should be excluded from gender pay reports. It has been widely reported that, since the start of the pandemic, more women than men were being furloughed, with women about one third more likely to work in a sector that was shut down by the pandemic. This means that low paid women are more likely to be excluded from pay reports which could distort disparities and translate into an artificial increase in the average hourly rate of pay for women.

In the hospitality and retail sectors, furlough of the majority of the workforce will mean that some employers will submit reports based on a fraction of their total workforce.

As reported in our [May 2021 alert](#), studies and surveys suggest that a higher proportion of working mothers had to reduce their hours/pay or take unpaid leave due to a lack of childcare support in during the pandemic. Those absent on the snapshot date would not be included in the calculations.

The upshot is that the calculation method means those hardest hit by the pandemic are unlikely to even feature in the statistics. Gaps to be reported for 2021/2022 could be radically different from previous years and fail to give a meaningful or accurate picture of an employer's actual pay practices.

TOP TIPS FOR PREPARING YOUR GENDER PAY REPORTS

- Breakdown your statistics. Break your data down further to analyse where your problem areas are – for example, look at differences between locations, departments and part-time vs full-time staff. By doing this you can identify your key improvement areas as well as see your success stories.



- Understand the results. A problem cannot be solved without being truly understood. Identify the differences in pay that are resulting and seek to understand the reason for any gaps. There can be many reasons for a difference in average pay. There are many non-discriminatory reasons for differences in pay for example, market factors, individual performance, the fact that women are more likely to work part-time or if your company employs more women in administrative roles.
- Ask challenging questions. Do your female staff reach a certain level of seniority and then stop? Look at your promotion timescales and pay, consider how long it takes male and female employees to reach promotion and why any lags might be happening.
- Compare your organisation's figures to your previous reports. Has there been any improvement in any area since 5 April 2020? If your figures show little or no improvement, consider how to best address this moving forward. If your gender pay gap has widened over the pandemic, it will be important to understand why in order to add context to reports and to improve the data moving forward.
- Consider what remedial steps can be taken to address any identified issues and set your objectives. The EHRC has produced a report on [Closing the gender pay gap](#) which analyses 440 gender pay gap reports across various sectors and provides helpful advice and examples. Create an action plan or consider whether you need to reassess or revise any existing action plan.
- Manage your message. Consider whether it may be beneficial to provide an accompanying narrative or action plan. A carefully drafted narrative can explain why the gender pay gap is present. Share your success areas in the narrative and recognize where the company has improved. A published action plan can send a strong message about the company's commitment to gender equality.
- Consider internal communications to staff. Internal communications should be circulated in advance of the public report to ensure that your staff understand the results, the proposed strategy and future targets.
- Ensure gender pay forms a key part of the organisation's DEI agenda year-round. Consult and engage with senior leadership and your staff.

ETHNICITY PAY GAP REPORTING

There have been increasing calls to introduce a similar ethnicity pay gap reporting regime. Unlike the gender pay gap, there is currently no legal requirement for companies to publish their ethnicity pay gap. The Government ran a consultation on ethnicity pay reporting from October 2018 to January 2019 and has not yet published a response. However, a [report](#) published by the Commission for Race and Ethnic Disparities in March 2021 recommended that the publication of ethnicity pay gaps should remain voluntary and that the government should provide guidance for employers who did want to voluntarily report.

The report noted that the current regime for reporting on the gender pay gap could not simply be applied to ethnicity due to "*significant statistical and data issues*" that would arise as a result of changing a binary characteristic (male or female), with one that has multiple categories, such as ethnicity. A white vs non-white would be unreliable and would make it impossible to look at the workforce using the 18 ethnic classifications used by the ONS.

A petition calling for ethnicity pay reporting signed by 130,576 people triggered a debate in the House of Commons on 20 September 2021 and the House of Lords on 25 October 2021. The debates highlighted the benefits of introducing ethnicity pay reporting with regard to identifying barriers to equality and tackling those barriers. The debates discussed the practical challenges of ethnicity reporting, including:



- Data collection issues. A study of more than 100 organisations by PwC in August 2020 found that almost 35% did not collect any ethnicity data, with half identifying legal and GDPR requirements as barriers to collecting the data.
- Data protection issues and the need for any reporting system never to inadvertently reveal the identity of the person it reports on. For example, an employer in a predominantly white community could inadvertently reveal personal pay levels of a handful of ethnic-minority employees.
- What categories or descriptions should be used, and how to reflect how employees prefer to be identified. It is estimated that something between 5% and 40% of employees do not disclose their ethnicity.
- Uneven geographical distribution of ethnic groups across the UK. For example, in Wales only 0.7% of the working-age population is black, which makes producing reliable and actionable statistics difficult. There are further concerns that 437 of 650 constituencies in the UK are over 90% white, so employers in these areas would not be able to record a valid sample.

The debates gave no indication as to what the government's position might be, nor when we can expect to see a response to the consultation. It remains unknown whether or not the practical challenges outlined above will stand in the way of mandatory reporting.

GOVERNMENT LAUNCHES CONSULTATION ON DISABILITY WORKFORCE REPORTING

Lastly, on 16 December 2021, the UK Government launched a consultation on disability workforce reporting as part of a wider government plan to improve employment opportunities for disabled people. The consultation explores the topic of introducing workforce reporting on disability status for large employers (with 250 employees and above). The consultation seeks views on:

- current reporting practices work, and what works well;
- the case for and against making reporting mandatory;
- how a mandatory approach to reporting might be implemented; and
- any alternative approaches to enhance transparency and increase inclusive practices.

The consultation does not refer to reporting on the disability pay gap. The consultation closes 25 March 2022, with a government response due by 17 June 2022.

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