

Revised Gender Pay Reporting Regulations Published in the UK

December 12, 2016

International Employment

On 6 December 2016, the UK Government published the revised draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (the “Regulations”), which, subject to prior parliamentary approval, are expected to come into force on 6 April 2017. The new law will require private employers in the UK to collect and publish information showing differences in pay between male and female employees. The Regulations clarify a number of problem provisions in the original version (published in February), highlighted by the results of a Government consultation.

Employers caught by the Regulations are required to publish the following information:

- difference in mean and median gross hourly pay of male and female employees;
- difference in mean and median bonus pay awarded to male and female employees;
- proportions of male and female employees who were awarded bonuses in the previous year; and
- proportions of male and female employees falling within each quartile pay band of the workforce.

Changes to the Regulations

Who is in scope?

The Regulations apply to employers with 250 or more UK-based employees. Although, ‘employees’ are not defined, the explanatory notes state that the definition of ‘employment’ contained in section 83 of the Equality Act 2010 will apply, with the result that both employees and workers will be caught by the Regulations. The distinction between employee and worker—and worker and contractor—is often difficult to draw in practice.

Partners in an LLP are specifically excluded, as are workers with respect to whom it is not reasonably practicable for the employer to obtain relevant data (e.g., because they are not included in the employer’s normal payroll systems).

When must employers report by?

Employers are required to publish gender pay gap data within 12 months of the prescribed ‘snapshot date’, which has been brought forward to 5 April 2017. Therefore, employers must

publish their first gender pay gap reports by 4 April 2018. These reports will be in respect of data recorded for the relevant pay period in which the 'snapshot date' falls. The relevant pay period will depend on how the employer usually pays employees (e.g. weekly, monthly, etc.). The report must be published on the employer's website and remain online for three years.

How is 'gross hourly pay' calculated?

As mentioned above, employers will have to calculate their employees' gross hourly pay and publish a report setting out the difference in the mean and median pay of male and female employees. Gross hourly pay is calculated by: (i) adding together all ordinary pay and any bonus pay (see below) paid to the employee in the relevant pay period; (ii) multiplying that number by seven; and (iii) dividing that number by the number of days in the relevant pay period.

The Regulations clarify that where employees do not have set weekly basic paid hours, a 12-week reference period ending on the last complete week of the pay period including the 'snapshot date' should be used for the purposes of calculating their gross hourly pay.

'Pay' and 'Bonus'

For the purposes of calculating an employee's gross hourly pay, 'pay' includes basic pay, allowances, pay for piecework, pay for leave, shift premium pay, and bonus pay.

Pay does not include overtime pay, redundancy or other termination pay, expenses, benefits in kind, or payment in lieu of leave.

'Bonus pay' means any remuneration in the form of money, vouchers, securities and securities options, relating to profit sharing, productivity, performance, incentive or commission. The Government has inserted a new provision into the Regulations, clarifying that only the portion of any bonus payment that is proportionate to the relevant pay period should be taken into account when calculating an employee's gross hourly pay. In addition, where bonuses are awarded in the form of securities, then they are to be treated as paid only when they give rise to taxable earnings under section 10 of the Income Tax (Earnings and Pensions) Act 2003.

Another significant change is that employers will now only be required to take into account 'full-pay relevant employees' when calculating their mean and median gender pay. This means that employers may exclude employees being paid at a reduced rate (or nil) as a result of being on leave as at the 'snapshot date'. This will include those individuals who are on annual leave, maternity, paternity, adoption or shared parental leave, sick leave, and special leave. This change is intended to prevent distortions in an employer's gender pay gap calculation where, for example, a significant number of its female employees are on maternity leave and receiving statutory maternity pay (rather than their normal pay) as at the 'snapshot date'.

How are the quartile bands calculated?

The Regulations have now clarified the way in which quartile pay bands are calculated for the purposes of reporting the proportion of male and female employees within those bands.

Employers should rank their 'full-pay relevant employees' in order of gross hourly pay from lowest to highest. This list should then be divided into four, with each quartile containing an equal number of employees (to the extent possible). Notably, where employers have several employees with the same hourly pay that could legitimately be allocated to either of two

adjacent quartiles, they are required to assign relative proportions of male and female employees to each quartile in order to prevent any manipulation of the figures.

What are the sanctions for non-compliance?

Although the Regulations do not contain any express sanctions for non-compliance, the explanatory notes to the Regulations state that failure to comply will constitute an ‘unlawful act’ within the meaning of section 34 of the Equality Act 2006. Accordingly, the Human Rights Commission will have authority to take enforcement action against any employers in breach of the Regulations—and Tribunals may draw adverse inferences against employers when deciding cases alleging discriminatory pay or other practices. Whether such enforcement action will be taken in practice remains to be seen.

Contextual Information

Although there is no mandatory requirement to do so, the Government recommends that Companies provide an explanation for why pay discrepancies exist, as well as propose on-going or future remedial action.

A handful of companies have already published their first reports based on the Regulations, and generally those reports have sought to identify non-discriminatory reasons and/or mitigating factors where non-favourable results have been shown.

No doubt data analysis techniques will become more sophisticated in the UK, as they have in the U.S., enabling employers more effectively to interpret data and to identify root causes for any statistically significant discrepancies. It seems likely that employers will also wish to benchmark their position against competitors in the same industry sector, and establish diversity and pay strategies aimed at improving the data going forwards.

Next Steps

Employers now have a short window of time within which to:

- gather pay roll data that may be used to make the calculations required by the Regulations;
- analyse the group structure to determine which entities are in scope;
- determine internal and external protocols for investigating pay (including potential use of internal or external legal advisors to ensure privilege);
- review remuneration policies and practices;
- review recruitment policies and practices; and
- conduct a ‘dry-run’ of the report to establish: (i) where logistical challenges exist; (ii) factors that might generate a pay gap or skew the figures; and (iii) what if any factors may be creating any identified gender pay gap.

International Employment

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

Christopher Walter

+44 20 7067 2061

cwalter@cov.com

Chris Bracebridge

+44 20 7067 2063

cbracebridge@cov.com

Helena Milner-Smith

+44 20 7067 2070

hmilner-smith@cov.com

Hannah Bradshaw

+44 20 7067 2019

hbradshaw@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts.