

Mandatory Gender Pay Gap Reporting



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The Equal Pay Act was enacted back in 1970; however the Gender Pay Gap in the UK economy remains significant.

Progress Update

The Equality Act 2010 (Gender Pay Information) Regulations 2017 have now been published, subject to parliamentary approval.

They provide clarity on the details of Gender Pay Gap ('GPG') reporting obligations for the *private and voluntary sector*.

The Government plans to extend the mandatory reporting regime to the *public sector*. We await final details of this.

Which employers are affected?

Initially, only employers with 250 or more 'relevant employees'. This threshold may be lowered in due course.

Regulations will not yet apply to the public sector but this is planned to follow.

How is a "relevant employee" defined?

The broad definition of "employment" (as set out in section 83 of the Equality Act 2010) has been used. This is a wider definition than previously expected and includes people who are employed under:

- A contract of employment
- A contract of apprenticeship; or
- A contract personally to do work

There is a specific exception for partners, including LLP members in a firm.

The definition includes casual workers, zero hours employees, and overseas employees with a strong connection with Great Britain. Also, many self-employed workers who are engaged directly as contractors and consultants. This will take more employers over the 250 'employee' threshold.

Agency workers will only be taken into account by the employer with whom they have the contract of employment, generally their agency.

This wider definition may make data reporting more onerous as it may not sit in one payroll database. There is however some better news on this. While such workers will 'count' for determining whether or not an employer is over the 250 employee threshold, an employer is not required to include pay data in the reporting if: a) a worker is engaged under a contract personally to do work, and b) the employer does not have, and "it is not reasonably practicable for the employer to obtain" that data.

How does this relate to groups?

For a group of companies, the Regulations are written such that each individual employer entity caught within the scope will have to produce an individual GPG report (as opposed to an aggregated group report).

What will we be required to publish in the GPG report?

The GPG report will need to contain a prescribed set of data (below) that, when presented together, gives a picture of the gender pay gap in the organisation:

a) Gender Pay Gaps:

1. The **difference** in **mean pay** between male and female employees – the difference must be expressed as a **percentage** of the mean pay of male employees e.g. if mean male gross pay is £10 per hour, and mean female gross pay is £8 per hour, the difference is £2, and is expressed in the report as **20%**.
2. The **difference** in **median pay** between male and female employees – again, the difference must be expressed as a **percentage**, of the median pay of male employees e.g. if median male pay is £10 per hour, and median female pay is £9 per hour, the difference is £1, and is expressed in the report as **10%**.

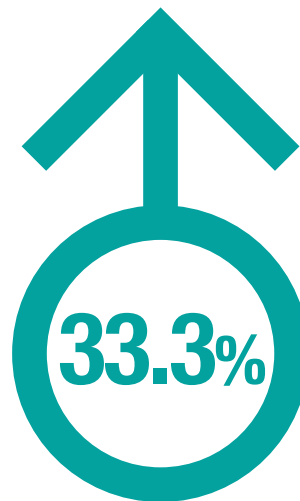
'Mean' means: the sum of all the values in a list divided by the number of values.

'Median' means: the middle value in a list where the values are listed in numerical order, from lowest to highest.

Employers are not obliged to break these figures down by variables such as job type or grade, employees' location, or by full-time and part-time employees (but of course such analysis may prove helpful to you to understand the fuller picture).

b) Gender Bonus Gaps:

1. The **difference** in both **mean and median bonus payments** between male and female employees, during the 12 months preceding the 'snapshot date'. (As the first snapshot date is 5 April 2017, we are already into the preceding 12 months so decisions on bonuses made now, will already be within scope of the first report). Only employees who receive bonuses should be included in these calculations. *The differences must be expressed as a **percentage** of the mean (and median) bonus pay of male employees e.g. if mean male bonus pay is £1000, and mean female bonus pay is £800, the difference is £200, and is expressed in the report as **20%**. The same percentage calculation applies for the median.*
2. The **proportion** of male employees who **receive a bonus**, and the proportion of female employees who receive a bonus (during the 12 months preceding the 'snapshot date'). *These must be expressed as percentages, of the total number of employees. To illustrate, if there are 300 male employees, of whom 100 receive a bonus; and there are 200 female employees, of whom 50 receive a bonus, the report will need to show:*
 - proportion of male employees who receive a bonus: 33.3%
 - proportion of female employees who receive a bonus: 25%



c) Salary Quartiles

The number of men and women in each **quartile** of the employer's pay distribution.

Employers will need to calculate quartile data by dividing the workforce into four equal sized groups, starting from the lowest paid to the highest paid) (e.g. in a company of 1,000 employees, there will be four groups of 250 employees). This approach has been adopted in preference to calculating quartiles by dividing the overall pay distribution into four quartiles.

To show an illustrative example based on this calculation method, there are 500 employees in company X. There are 300 male employees, and 200 female employees. For each quartile, the report must show the proportion of both male and female employees in that quartile, expressed as a percentage.

The regulations address the scenario where a business has a large number of employees who receive the **same** hourly rate and will fall within more than one quartile. They state that the employer must (so far as possible) ensure that when 'ranking' the employees in pay order, and setting the quartile bands, those male and female employees should be assigned to the two quartiles in the same proportions. This prevents an employer moving men and women into separate quartiles in order to improve the look of its data.

| | Men | Women | Total |
|--|-----------------------------|----------------------------|------------|
| Quartile D (highest paid 125 employees) | 105 employees 84% | 20 employees 16% | 125 |
| Quartile C (next highest paid 125 employees) | 85 68% | 40 32% | 125 |
| Quartile B (next highest paid 125 employees) | 65 52% | 60 48% | 125 |
| Quartile A (lowest paid 125 employees) | 45 36% | 80 64% | 125 |
| | 300 | 200 | 500 |

How is 'Pay' defined for GPG reporting purposes?

The regulations use broadly the same definition of ordinary pay used by the Office of National Statistics (ONS) for the Annual Survey of Hours and Earnings. This *includes*:

- Basic pay
- paid leave - including annual leave, sick leave, maternity, paternity, adoption or parental leave. (However, the final regulations do address the potential issue of data being skewed by, for example, women on maternity leave at the snapshot date. Only "full-pay" relevant employees should now be included in calculating mean and median hourly pay data. For example, if a woman is on maternity leave on 5 April, her data should be excluded, unless she happens to be on full pay at that date. This same adjustment has not however been made for calculating bonus pay data, or the four pay quartiles).
- allowances (including recruitment and retention, area, car allowances paid through the payroll, on call and standby allowances, clothing, first aider or fire warden allowances).
- shift premium pay
- pay for piecework

The definition excludes:

- overtime pay
- expenses
- benefits in kind
- redundancy pay, or pay referable to termination of employment
- pay in lieu of leave

Calculating "Hourly Rate of Pay" and Employee's working hours in a week

To remove the effect of the number of hours worked, the data used must be based on a **gross "hourly pay rate"** for each employee.

The regulations set out six (rather complicated!) steps to assist with the "hourly pay rate" calculation, the first of which is to identify both the 'ordinary pay' (see above), 'bonus pay', and the period for which that bonus has been paid.

Again in very precise terms, the regulations tell us how to determine the number of working hours in a week for a relevant employee, in a variety of scenarios.

How is 'Bonus Pay' defined?

This includes any remuneration that:

- a) is in the form of money, vouchers, securities, securities options, or interests in securities*;
- b) relates to profit sharing, productivity, performance, incentive or commission;

*these are to be treated as paid to the employee at the time, and in the amounts in respect of which they give rise to taxable earnings or income.

Both pay definitions (ordinary pay, and bonus pay) are **gross**, before deductions for PAYE, NI, pensions, voluntary deductions or student loan repayments.

Timing

Employers must take a 'snapshot' of relevant pay data on 5 April annually. **The first 'snapshot date' is 5 April 2017**, which doesn't leave long to prepare administrative / data systems.

Employers will need to base their pay calculations, for GPG purposes, on the gross hourly pay rate of all relevant employees that are paid on the snapshot date of 5 April. The hourly rate will need to be calculated for each employee during the pay period that includes 5 April. The pay period that applies to that particular employee could be monthly, weekly, or fortnightly etc., depending on how you pay your employees.

This 'snapshot' approach avoids the need to capture data for all employees over a 12 month period, including those who may leave the organisation or get promoted.

The regulations then require employers to analyse and publish a GPG report at any time within 12 months of the snapshot date. So **the first GPG report must be published by no later than 4 April 2018**, and annually thereafter.

... there are no proposed civil or criminal sanctions for failure to comply with the regulations.

Where will the report need to be published and stored?

In English, on the employer's (searchable) website, that is accessible to all employees and the public. Access must be free of charge.

Each published report must then remain online for three years (which will enable interested parties to track trends and progress made).

Does the report need to be provided to Government?

Yes, employers will also be required to tell Government when the GPG report has been published. This will be done via publishing to a Government-sponsored website.

It is now unclear whether Government will use uploaded data to publish league tables (by sector) of employers' reported pay gaps, but this is a possibility.

Who publishes the GPG report?

There is a requirement that the report data needs to be signed off as accurate by a Director, or equivalent.

Is supporting commentary required?

Aside from the data and the 'signed-off' statement, there is no requirement to publish a commentary or supporting narrative, but the Government is encouraging employers to do so. Guidance is expected to provide suggestions on the type of commentary.

We would strongly advise employers to consider adding commentary. Depending on what the raw data looks like, it will be important to positively communicate what action is already being taken to address equal pay in the organisation, and to mitigate the risk of reputational damage from publication of a significant pay gap.

Are there sanctions for non-compliance?

No, there are no proposed civil or criminal sanctions for failure to comply with the regulations.

However, the Government have stated their intent to monitor compliance closely. It is anticipated that a 'name and shame' approach (with the associated reputational damage) will be taken.

Employers should bear in mind that pay information can already be used as evidence to support equal pay claims. To date, these claims have mostly been in the public sector. However, with GPG reporting about to introduce greater transparency to the private sector, this could be about to change and private sector employers may find they have significant liabilities if no action is taken. Employers may be aware of the Asda case for example, where an employment tribunal recently found that retail store employees are entitled to compare themselves with distribution depot employees for the purposes of an equal pay claim.

What should we be doing now?

We advise employers to start preparing now for the impact of the regulations. In particular, check whether (given the wider definition of 'employee') your organisation will be within scope of these regulations.

Specifically in preparation for the GPG reporting regime, including the administrative burden:

- Review the objectivity of decision-making within your bonus schemes. Decisions on bonuses made now (in the 12 months preceding April 2017) will be within scope of the first mandatory report.
- Check your processes in time to capture the required data efficiently and on a timely basis. The availability of the raw data (in particular the hourly 'pay' for each employee) will be crucial, as will having a tested process to create quartiles. This is relatively complex.
- Undertake an audit / 'dummy run' based on an earlier snapshot date than April 2017. We can help with this.
 - Does this highlight any system issues that need to be ironed out?
 - And once you have gathered and analysed an accurate dummy data set, what gender pay gaps does it show?
 - Consider what commentary would you put to that dummy data, if you had to publish it now?
- Agree who will need to sign off the GPG report.
- Agree where on your website the report will be published.
- Set a target date for publication (4 April 2018 being the latest date), considering when may be the best / most convenient time to present it.
- Based on a 'dummy run' agree what approach you want to take for compiling a commentary to go with your first 'live' report.

More widely, thinking about addressing potential litigation risks, and addressing potential reputational damage (and damage to employee relations):

- What does the current data tell you about the GPG in your workforce?
- Take legal advice on the potential consequences / risks of your findings – benefitting from legal privilege to protect the confidentiality of the information at this stage, prior to mandatory publishing. We can help with this.
- Does this highlight any issues that should be rectified before having to formally capture the data in April 2017?
- In particular, review Pay & Grading and/or Job Evaluation methods under which pay rates are determined in your organisation. Do the methods used comply with existing Equal Pay legislation? Is this supported by your GPG data, or does that suggest a problem? We can help with this.
- What positive actions are already being taken (or planned) to address the GPG?

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