

MARCH 13, 2017

## **New Mandatory Gender Pay Gap Disclosures Will Soon Take Effect for Large Employers in Great Britain**

BY TAHL TYSON AND LAVANGA V. WIJEKOON

Effective April 6, 2017, new Gender Pay Reporting regulations to address the gender pay gap<sup>1</sup> (the “Regulations”) come into force in Great Britain. The Regulations are intended to address the pay gap between men and women by requiring large employers to calculate and publish certain gender pay information annually.

### **What is a “relevant employer”?**

Any private sector employer in Great Britain (England, Scotland and Wales) with at least 250 “employees” on the “snapshot” date of April 5 of each year is a “relevant employer” under the Regulations and must comply.

### **Who are the “employees” that must be counted towards the 250?**

An “employee” for purposes of the Regulations includes not only workers who are on the company payroll as employees, but also those who have a contract with the company to personally perform work, such as some independent contractors.

The Regulations specifically limit their territorial scope to Great Britain. However, in defining a relevant employer, the final Regulations did not specifically exclude for purposes of the definition employees who work for the employing entity wholly or partly outside of Great Britain (in Northern Ireland, for example, and countries outside of the United Kingdom). As a general rule, these employees probably need to be included if they have a strong enough connection to Great Britain that, based on case law, would allow them to bring a claim to an Employment Tribunal under the Equality Act 2010. This will depend on whether the employment relationship

---

<sup>1</sup> The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, 2017 No. 172 (Feb. 6, 2017).

suggests a stronger connection to Great Britain and British employment law than to the law of any other country. Some indications that someone should be counted may include:

- having a contract subject to Great Britain legislation;
- continuing to have their home in Great Britain; and
- having United Kingdom tax legislation apply to their employment.

The threshold of 250 employees is determined on basis of the employing legal entity and is not aggregated group-wide.

## What needs to be done?

### Calculations

Covered employers must calculate and publish on their websites and on a government website, six metrics relating to the gender pay gap.<sup>2</sup> The metrics must be based on a “snapshot” of pay information taken on April 5 of each year, published within 12 months of that date, and kept there for three years from the date of publication.

The first snapshot date is April 5, 2017, so the first publication date is no later than April 4, 2018.

### A relevant employer must publish:

1. The gap between the mean hourly rate of pay of male full-pay<sup>3</sup> relevant employees<sup>4</sup> and that of female full-pay relevant employees.
2. The gap between the median hourly rate of pay of male full-pay relevant employees and that of female full-pay relevant employees.
3. The gap between the mean bonus pay paid to male relevant employees and that paid to female relevant employees.
4. The difference between the median bonus pay paid to male relevant employees and that paid to female relevant employees.
5. The proportions of male and female relevant employees who were paid bonus pay.
6. The proportions of male and female full-pay relevant employees in the lower, lower middle, upper middle and upper quartile pay bands.

### Statement

The published information must contain a statement that it is accurate and signed by a senior company representative, such as a chief executive.

### Optional Explanatory Narrative

Employers have the option to provide a narrative to give some context for the results of the calculations.

## Are there any penalties?

Failure to comply will be considered an “unlawful act” under the Equality Act 2010. Therefore, violations of these reporting requirements will fall within the existing enforcement powers of the Equality and Human

---

2 Although they will need to be considered for purposes of triggering the obligations, those “non-traditional” employees do not need to be included in the calculations if the employer does not have, and it is not reasonably practicable for the employer to obtain, the data for such individuals.

3 A “full-pay relevant employee” means a relevant employee who is not being paid at a reduced rate or is unpaid as a result of the employee being on leave.

4 A “relevant employee” means a person who is employed by the employer on the snapshot date.

Rights Commission (EHRC), which include applying to courts to order compliance. The results or steps taken to address violations could potentially be used by unions or by claimants making equal pay claims.

### **Practical Pointers**

Employers in Great Britain should consider taking the following steps:

- Identify the employees to be included in the count of 250 and determine whether the threshold is reached.
- Identify which employees will be included in the calculations.
- Conduct an initial audit and risk assessment under privilege. Consider how legal privilege will apply to in-house counsel and the team that will be involved with the risk assessment.
- Identify any problems (the EHRC considers a significant pay gap to be 5% or more), and consider ways to address them, or to provide context in the explanatory narrative.
- Identify a senior executive who will sign the certification of accuracy confirming that the information is accurate.