How Covid-19 has messed up gender pay gap statistics

Tom Heys, Legal Analyst at Lewis Silkin LLP, explains how Covid-19 has affected gender pay gap reporting obligations, highlighting the practical issues involved and how employers can tackle them

Gender pay gap reporting obligations came into force in the UK in 2017, requiring larger employers to publish their first report by April 2018. The power to make regulations to force employers to disclose gender pay gap information had been included in the Equality Act 2010, and then prime Minister David Cameron announced in 2014 that it would be used. Ahead of the regulations, the Government released an impact assessment (http://www.pdpjournals.com/docs/99021) estimating that it would take employers just a few hours each year to comply with their reporting obligations. The impact assessment assumed that it would be a short and straightforward task, requiring a quick look at payroll information and some basic maths done in a spreadsheet.

The reality has been quite different for many employers. Gender pay gap reporting is often a complex and lengthy process, requiring the input of a variety of stakeholders in an organisation.

Impact of gender pay gap reporting

Hard data about the true impact of gender pay gap reporting is hard to come by. Anecdotally, some reports claim it has increased the number of women being hired and female employees being promoted into more senior roles, while lowering overall wage bills by slowing the growth of male wages.

Shortly after the publication of both the first and second gender pay gap reports, in April 2018 and April 2019 respectively, Employment Tribunal statistics revealed big spikes in the number of equal pay cases being submitted. It is not clear whether there was a direct causative effect, but it is perhaps a little too coincidental to be chalked up to chance.

What are the current gender pay gap reporting requirements?

Employers in England, Wales and Scotland (but not Northern Ireland) with 250 employees or more must publish six statistics each year:

- the mean pay gap;
- the median pay gap;
- the mean bonus gap;
- the median bonus gap;
- the proportions of men and women receiving a bonus;
- the proportions of men and women within each of four pay quartiles.

The regulations set out the process to be followed when performing the calculations necessary to derive the statistics. The statistics must be based on a "snapshot date" of 5 April and be reported by 4 April of the following year. The definition of "employee" in the regulations includes workers and self-employed contractors.

Pay gaps involve a comparison of female hourly rates to male. These hourly rates are calculated by taking all elements of "pay" and a pro-rated amount of any "bonus" elements paid during the period including 5 April, then dividing by the number of hours the employee worked in that pay period.

Bonus gaps are calculated by comparing the mean and median total bonuses paid to women over the 12 months ending on 5 April against those paid to men.

The terms "pay" and "bonus" have specific definitions within the regulations. It is not always straightforward to determine whether an element of remuneration should fall within the definition of "pay" or "bonus" (or neither) – a payment that is called a "bonus" might not actually meet the definition.

Anyone who is on leave and being paid at a reduced rate (for example, those on non-enhanced maternity leave, sick leave, or an unpaid sabbatical) is excluded from the pay gap and quartile statistics.

How will Covid-19 affect gender pay gap reporting?

The current health crisis will affect gender pay gap reporting in a number of ways, both in relation to firm's 2020 obligations, and in respect of relevant calculations going forward.

Suspension of the obligation to report 2019 figures

On 24 March 2020, the Government Equalities Office (GEO) and the Equality and Human Rights Commission (EHRC) announced in a joint statement that the obligation to report gender pay gap figures relating to 5 April 2019 would be suspended.

The statement made clear that any employer could still voluntarily choose to report the 2019 figures but would not be legally required to do so. The next set of figures it would be mandatory to report would be those relating to 5 April 2020, which would have to be reported by 4 April 2021.

At the time of the announcement, over 3,000 employers had already published their 2019 figures and, as the announcement of the suspension came with just ten days to go before the 5 April 2019 snapshot date, many other employers had already done much of the work. After the suspension was announced, a further 1,527 employers went on to publish their gender pay gaps ahead of what would have been the deadline and more have gone on to report since then. Overall, there is about a 50% compliance rate, with around 5,000-6,000 employers failing to report.

Once the peak of HR pressures arising from Covid-19 begins to flatten and business begins to return to something closer to normal, those employers that did not respond will need to revisit their decision. As time passes, questions may begin to be asked about the 2019 figures - staff have a greater expectation of transparency as a result of the first two years of reporting. Failing to report 2019's figures could also seriously undermine the strong statements many employers have made about their commitment to taking action on the gender pay gap,

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Furlough, sick leave, shielding, self-isolating

Gender pay gap calculations are made using payroll data from 5 April, but anyone on leave and being paid at a reduced rate on that date is not a "full pay relevant employee" and so is excluded from the pay gap and quartile calculations. Normally, there might be no more than 3-5% who would be excluded in this way. However, the impact of Covid-19 – on account of furlough and sick leave – will completely change the dataset used in the calculations because so many employees will be excluded.

The biggest impact might be furlough. Because the furlough scheme covers only 80% of ordinary pay, employees affected must be considered as reduced pay employees. Reports of uptake suggest that huge swathes of workforces are being furloughed, with up to 80-90% of workers furloughed in some sectors. This means that, in these "mothballed" industries, employers' gender pay gaps will instead be calculated from a much smaller pool of workers that is not reflective of the whole organisation. For example, a national restaurant chain which furloughed everyone apart from its head office might be calculating gaps from just a few hundred people, rather than tens of thousands.

Besides furlough, many people will have been sick or self-isolating on 5 April 2020. Under changes brought in by the Budget 2020, entitlement to Statutory Sick Pay was extended to those self-isolating without any symptoms. Unless such individuals are paid enhanced sick pay, they would be excluded from the pay gap calculations in the same way.

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To support that message in their report, employers could calculate additional figures showing what the gap might have been had staff not been off sick or furloughed. Depending upon the result of this "hypothetical" calculation, it could help to evidence reductions in a business's gender pay gap over time.

Reductions in pay and hours: impact on pay gaps and quartiles

Many businesses have had to impose reduced hours on employees. However, because gender pay gaps are produced from a calculation of hourly rates, this means there is no difference between those working full time and part time. A person getting paid £2,500 a month for a 40-hour week will have the same hourly rate as

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someone getting paid £1,250 a month for a 20-hour week.

In contrast, if reductions in pay are imposed without reductions in hours, this will affect the statistics. Where those pay reductions fall could affect the statistics in different ways. A report by the High Pay Centre suggested that 37% of employers have cut pay for senior executives because of Covid-19 (http://www.pdpjournals.com/docs/99022). If these cuts were imposed in April, they are likely to have a significant impact on the gender pay gap.

Many workplaces have an over-representation of men at senior levels, which can be a big factor be-hind pay gaps. A small, male-dominated group that is paid generously will drag up the mean figures as these are affected by outliers. Any pay reductions could therefore reduce the mean gender pay gap (although it may not have much impact on the median pay gap).

> *"Despite the various pressures caused by the pandemic, it is advisable for employers to start tackling their gender pay gap reporting obligations at an earlier stage this year. The legal and statistical issues caused by Covid-19 mean that it is likely to take more time and be more difficult than in previous years"*

Reductions in bonus: impact on bonus gap and proportions

When calculating the bonus gap, employers will have to look at bonuses paid in the 12 months ending on 5 April 2020 and calculate the mean and median bonus gaps from this data. This means that, because the impact of Covid-19 has only been felt relatively late in that 12-month period, the bonus data used in calculating the gap might not be radically changed by Covid-19.

The real impact on bonus gaps might be in the subsequent round of reporting. The economic impact of Covid-19 could mean that bonuses will be much smaller over the coming year - fewer will be paid out and in smaller amounts. In addition, as bonus gaps are calculated from the raw amounts paid (i.e. not adjusted for part-time working), any reductions in hours that have been imposed or agreed will lead to pro-rated bonus awards and so impact the gap.

Furthermore, bonus gaps are calculated only from those who received a bonus, which means that reducing a bonus from £50 to zero will take someone out of the analysis completely. An employer with a large number of women receiving small bonuses could therefore end up with a much lower bonus gap by removing the bonus and awarding nothing instead. Employers who see such a fall should be careful not to describe it as a "good news" story - it will be obvious to an outsider from the proportions of men and women receiving a bonus if this is what has occurred.

How is gender pay gap reporting enforced?

Gender pay gap reporting is enforced by the EHRC, which has taken a relatively light-touch approach but seems to be stepping up its efforts.

After the deadline of 4 April 2018 for the first round of reports had passed, the EHRC wrote to 1,456 employers that it believed should have reported but did not. All employers that were required to submit data subsequently filed gender pay gap information.

In 2019, the EHRC wrote to 328 employers that reported late the previous year in order to remind them to publish. When 50 of those employers still failed to report any figures at all, it wrote again. It subsequently started formal investigations against six employers. All six of these employers then either published statistics or were able to show that they were out of scope of the regulations, leading the EHRC to announce "100% compliance". (http://www.pdpjournals.com/docs/99023)

Besides late reporting, the EHRC also began looking into "suspicious" data. It contacted 100 employers to ask them to explain their figures and, in December 2019, started a formal investigation into a company that published "perfect" figures showing 0% gaps and a 50:50 gender split in the quartiles.

Notwithstanding the approach taken to date, there are doubts over whether the EHRC has the legal powers to take any effective enforcement action against those employers that fail to report, or inaccurately report, gender pay gap data.

The Equality Act 2010 gives the EHRC powers to take enforcement action in relation to "unlawful acts", namely something that is a contravention of the Act. Although the regulations were made under the Equality Act, they are not part of it. There is nothing in the Equality Act itself requiring employers to report, so failing to do that cannot be a breach and is therefore arguably not an "unlawful act". This legal grey area has been raised by the Business Energy and Industrial Strategy Committee which, in a series of proposals, has recommended clarification.

Future of pay gap reporting

Having an eye to how employers' obligations are likely to develop in this area is useful in formulating appropriate compliance systems. Below are a number of important factors to consider when looking to the future.

Will the regulations change any time soon?

In 2018, the Business, Energy and Industrial Strategy Committee published recommendations to improve the gender pay gap reporting. These included: increasing and clarifying the powers of the EHRC; converting the requirement to report quartiles into a requirement to report deciles (i.e. tenths of a workforce rather than quarters); amending the bonus gap calculations to take part-time working into account; and radically expanding the scope of the regulations so that employers with 50 or more employees would have to report rather than the current 250.

The Government disagreed with many of these proposals and said that, in any event, it was too soon to amend the regulations. They would only be reviewed after five years (as required by the regulations themselves). We can therefore expect a review, and details of any possible changes, no later than April 2022.

What is happening with ethnicity pay gap reporting?

A consultation about legislating on ethnicity pay gap reporting closed in January 2019. It had asked for views on whether the existing gender pay gap regime could be applied to ethnicity and, if not, what an alternative regime might look like.

Despite many organisations giving their views, the Government has not provided any response to this consultation. The Conservative manifesto in November 2019 contained no mention of any plans to legislate on this issue. Mandatory ethnicity pay gap reporting therefore appears to have been shelved (at least for now).

What employers need to be thinking about now

Despite the various pressures caused by the pandemic, it is advisable for employers to start tackling their gender pay gap reporting obligations at an earlier stage this year. The legal and statistical issues caused by Covid-19 mean that it is likely to take more time and be more difficult than in previous years.

As well as the mandatory figures, employers should consider calculating comparable figures showing what the gender pay gap might be if the issues caused by Covid-19 did not exist. This would involve eliminating the effect of furloughs, sickness and pay-cuts, then calculating adjusted gaps. The results would help in understanding whether any real change has taken place.
The employer would then be able to choose whether to include any of these adjusted figures in its public report. If they illustrate an improvement from previous years, the figures might help support a message of long-term reduction in the gender pay gap.

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