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Legislative Void Leaves Firms Guessing On Ethnic Pay Gaps

By **Adele Redmond**

Law360, London (October 12, 2022, 5:39 PM BST) -- After explosive protests in 2020, ethnicity pay gap reporting has become a linchpin of diversity and inclusion policies for a growing number of employers. But, without formal reporting requirements from the government, lawyers say organizations that make the leap are in uncharted waters.

Most white British workers earn more than employees from other ethnic groups, with pay gaps ranging from 2% to 16%. More employers are preparing reports — 19%, according to a report by the parliamentary Women and Equalities Committee in February — for staff and shareholders, who increasingly expect hard data and action plans.

Richard Yeomans, an employment partner at Addleshaw Goddard LLP, said employers that publicly report the gender pay differences within their workforces have provided the blueprint. Annual reports provided to the government's gender pay gap service allow people to compare pay and bonus gaps at more than 13,000 organizations, although employers often publish explanations on their websites too.

"What we're seeing is a trend — an increasing trend — to do some kind of ethnicity pay gap reporting, particularly among larger employers," Yeomans said. "If you're a big employer, you will already be doing gender pay gap reporting. You already have systems that dovetail with that."

But collecting data on ethnicity is significantly more complicated. Unlike gender, where only two or three categories suffice, more than 18 categories can apply. Collection can be further complicated by data protection law, as well as reluctance among employees to disclose their ethnicity.

And there is no definitive approach. The government, having declined to make it mandatory to report the difference in earnings according to ethnicity after carrying out consultation in 2018, said it would issue guidance for employers in the summer. But that guidance is yet to arrive.

"Employers sometimes struggle with how they would address ethnicity pay gap reporting because there are no prescribed rules," Anvita Sharma, senior associate at Hogan Lovells said. "The first step of any strategy will be to understand the workforce."

Encourage disclosure

Any attempt at ethnicity pay gap reporting requires employees to self-identify. But encouraging disclosure can arouse suspicion.

"We're very sensitive about talking about pay in the U.K., so when you combine race and pay there's real sensitivity," Keystone Law partner Audrey Williams said.

Ethnicity data is treated as a special category of information under the General Data Protection Regulation, so employees must explicitly consent to it being collected, and extra safeguards apply. Data protection regimes are stricter in the European Union too, adding more complexity for transnational outfits.

"There's a slight difference between what the data privacy processes say you should do and what's most effective," Simon Kerr-Davis, counsel at Linklaters LLP, said. "How are you going to use the data? As long as you are clear about that, then I think you can get around the GDPR."

It's important to get ethnic majority employees involved too, Kerr-Davis said — research suggests

that white people are the least likely to respond to ethnicity surveys, potentially skewing the results.

"For a lot of businesses, they see it as an issue where they need to appeal to the minority groups to provide the data, rather than saying to the majority, 'This is the purpose, and it's useless if we don't all do it,'" Kerr-Davis added.

Numbers alone don't reveal much, and lawyers recommended reporting the issues that emerge from the data. Tom Heys, a legal analyst at Lewis Silkin LLP, said that employers might even simulate data sets — calculating how the pay gap might shift by inflating levels of non-white representation in senior roles in line with projected recruitment, for example.

Quality data is essential if employers want to carry out worthwhile analysis, Heys said. "A 70% response rate is what you should be going for. Until you reach that level, focus your efforts on trying to build up that data set."

Williams suggested that looking at levels of participation and promotion rates among employees could be a better starting point than pay gap reporting for some organizations.

"If you can get individuals comfortable with what you're monitoring, why you're monitoring and that you are focussing on the non-pay issues, then it's easier to move on to pay," he said.

Choose your categories

Simply distinguishing between white and non-white employees is unlikely to capture the barriers different ethnic groups face at work, lawyers said. Many employers, aware that BAME — black and minority ethnic — is an anachronistic identifier, use the 18 ethnic categories in England's census to get a detailed picture of their pay gaps.

But nationality is often inseparable from ethnic identity. So crossover categories — Black British as opposed to African or Caribbean, for example — can complicate data sets. Employees of a particularly small ethnic minority within an organization will be identifiable, meaning that data about them cannot be published. The more finely detailed the picture an organization creates, the more likely that is to happen.

And pay gaps are averages. So, the smaller the group under scrutiny, the greater the likelihood of big swings in the data year to year, Heys said. "It's very difficult then to establish trends," he added.

Lawyers said that employers might want to consult staff before reporting, to help them shape the options they use. Broader categories are often better for small businesses or those with regional or international offices, where staff demographics can vary significantly.

The Solicitors Regulation Authority, for example, allows staff to choose from a "comprehensive" list of identities but reports on just seven categories — Black, white, Asian, mixed ethnicity, other, "not specified" and "declined to say."

Attorneys also cautioned against text boxes that force employers to interpret how workers describe their ethnicity. "Tick boxes is better — but for it to work effectively you need more boxes," Yeomans of Addleshaw Goddard said.

Sharma advised employers to consult employees about their ethnic identity regularly, not just when they're recruited. The census categories are "probably the most standardized, but that's not to say they're perfect," she said.

It is also worth them analyzing ethnicity pay gap data for intersectional effects, lawyers said. Gender and ethnicity can combine to double the disadvantage.

Pakistani and Bangladeshi women are bottom of the pay tables in most sectors, for example, suggesting bespoke interventions might be needed. But education and social mobility might be at issue in cases where workforces are ethnically homogeneous, Kerr-Davis noted.

Set targets

Lawyers said organizations can identify their pay gaps internally without committing to public

reporting — but warned this is unlikely to satisfy employees and stakeholders for long.

They urged ambition, but said it's ultimately for employers to decide what they report and by how much they aim to reduce earnings gaps. However, the government's 2018 consultation encouraged employers to provide a "narrative" for their results and an action plan, which can include mentoring and recruitment strategies.

Government research shows that setting targets can improve gender pay gaps even if those goals aren't met. Women earned 18.4% less than men before gender pay gap reporting was mandated in the U.K. Five years later, the gap has shrunk to 15.4%.

"I don't see why that wouldn't work for ethnicity," Heys said.

But employers are often shy to do so, partly because pay gaps are slow to shift and can widen before they narrow. Targets can help bring about change, but they have to be paired with analysis of what is creating the gap, Yeomans said.

"Don't have a target if you don't have a plan," he added.

And a compelling narrative can be more important than the data itself, according to Williams of Keystone. Targets can be set further down the road, perhaps in the third year of reporting, she said. "There's a recognition then that this is a long-term commitment," Williams added.

Be prepared

Without knowing exactly when the government will issue new guidance, employers that have already begun reporting might later find their approach clashes with best practice.

But that shouldn't necessarily deter companies from getting started in the meantime.

Employers in this position could consider a "parallel track" — one report might follow the guidance and another be issued in their usual style — to allow comparisons in the first year, Kerr-Davis suggested.

Yeomans, meanwhile, said companies should stay the course to avoid confusion in their narratives. "It's only guidance," he observed.

Compulsory reporting on the ethnicity pay gap probably remains some way away, attorneys said. But they pointed to the government's interest in creating a comparable standard and growing pressure to level the playing field for undervalued workers.

"I suspect the call to bring in some form of mandated arrangement is not likely to disappear," Williams said.

Employers should be prepared for other workforce reporting obligations, particularly in regulated sectors, lawyers added.

"My guess is, in the next couple of years, we will see more calls for [reporting on] class pay gaps, LGBT pay gaps," Heys said.

And, with public conversations growing in volume, many employees now expect to see not just gender pay gap reporting, but ethnicity information being made available as well, Heys added.

"If you want to attract the best talent, you need the lowest gap," he added.

--Editing by Ed Harris.