

Gender pay gap reporting



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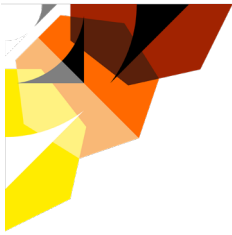
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The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (the “Regulations”) require employers to report on the gender pay gap in their organisation.

This inbrief provides an overview of the law as it applies to the private and voluntary sector.

Background

The Regulations apply to larger private and voluntary sector employers. Their stated aim is to help reduce the ongoing pay gap between men and women in the workplace. There are very similar rules for public sector employers (not covered in detail in this inbrief).

Employers must publish six figures: their mean and median hourly pay gap; their mean and median bonus pay gap; the proportions of men and women receiving bonuses; and the number of men and women in each of four pay quartiles. This is done by using the data for the pay period which includes the “snapshot date” of 5 April. The figures must be published on an annual basis by 4 April each year, based on the previous year’s snapshot date.

To assist employers in meeting their reporting obligations, Acas has published non-statutory guidance.

Who is covered?

Which employers?

The Regulations apply to “relevant employers”, meaning employers with 250 or more “employees” on the snapshot date of 5 April. The Regulations use the broad definition of “employment” and “employee” from the Equality Act 2010, namely employment under a contract of employment, a contract of apprenticeship, or a contract personally to do work”. This will cover many non-payrolled workers who are engaged directly by employers as consultants, independent contractors and casual workers.

The number of employees is to be calculated per individual employer, so there is no requirement to add together group companies or other related employers.

There is nothing in the Regulations expressly limiting the employees to be reported on to those who are based in the UK under a contract to which UK laws apply. The Acas guidance explains that an employee will be within scope if the employment relationship suggests a stronger connection to Great Britain and UK employment law than to any other country.

Which employees must be reported on?

The employees to be reported on are “relevant employees”, meaning those employed by the employer on the snapshot date of 5 April each year. Partners and LLP members are expressly excluded from the definition and so do not need to be reported on. Agency workers will form part of the headcount of the agency by which they are engaged rather than the headcount of the end user to which they are assigned. An employer subject to the reporting requirements is not required to include data relating to a “relevant employee” if they are employed under a contract personally to do work, the employer does not have the pay data for that person and it is not reasonably practicable for the employer to obtain the data. This exception may help to address difficulties in gathering pay data for workers such as selfemployed contractors and consultants who are not off-payroll and whose “pay” cannot easily be assessed, for example because they are not paid for time worked.



Definitions of pay

The following definitions are essential in producing the six reported figures.

Pay period

The pay period to be reported on for each employee is the period for which they are normally paid their basic pay and which includes the “snapshot date” of 5 April each year.

Full pay

Employers only need to report the pay gap for “full-pay” employees, namely those employees who receive their normal pay during the relevant pay period.

Employees are excluded if they receive a reduced or nil rate of pay in the pay period because they are on any form of leave. It seems likely that a casual or zero hours worker between assignments, and effectively on unpaid “leave”, should be excluded on the same basis.

Note that relevant employees who are not full pay employees still count in determining whether the employer has 250 or more employees, and in the calculations for the bonus gap.

Ordinary pay

The employer must identify what “ordinary pay” has been paid to each “full-pay” employee in the pay period.

“Ordinary pay” includes:

Basic pay

- ▶ Allowances - including allowances for particular duties ancillary to employment, location allowances, vehicle allowances, recruitment and retention allowance
- ▶ Shift premium pay
- ▶ Pay for leave - but only if the employee is receiving full pay throughout the pay period

It does not include:

- ▶ Overtime pay
- ▶ Payment to reimburse expenses
- ▶ Benefits in kind/remuneration provided otherwise than in money (such as benefits provided via salary sacrifice arrangements)
- ▶ Redundancy pay or other pay referable to termination of employment
- ▶ Pay in lieu of leave

Bonus pay

“Bonus pay” is any remuneration relating to profit sharing, productivity, performance, incentive or commission whether in the form of money, vouchers, securities, securities options or interests in securities. It excludes pay which counts as ordinary pay, overtime pay and redundancy pay or other termination payments.

Pay in the form of securities, securities options and interests in securities should be treated as being paid to the employee at the time it gives rise to taxable earnings or income, and in the same amount as that attracting the tax liability.

Reporting on hourly pay

Employers must publish separate figures for the **mean** and **median** gender pay gap in their organisation based on “full pay” hourly rates of pay.

How to calculate hourly pay

The Regulations contain detailed steps for calculating hourly pay rates, which include both “ordinary pay” and “bonus pay” paid within the relevant pay period, as follows:

Step 1 – identify all “ordinary pay” and “bonus pay” paid to each full-pay employee in the pay period.

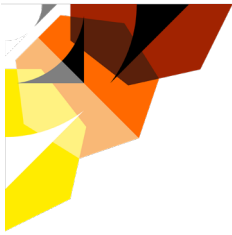
Step 2 – exclude any amount of “ordinary pay” which would normally fall to be paid in a different pay period.

Step 3 – if bonus pay has been paid for a period which is different from the length of the pay period, pro-rate the bonus payment. This is most likely to apply to annual (or other periodic) bonuses which happen to be paid in the April pay period, or to annual/quarterly or one-off commissions. The Regulations specify that for determining the number of days in the pay period or bonus period where those periods are a month or a year, a month is to be treated as having 30.44 days and a year is to be treated as having 365.25 days.

Step 4 – add together the (adjusted) amounts.

Step 5 – multiply by the “appropriate multiplier”, which is defined as seven divided by the number of days in the pay period. Multiplying the total pay for the pay period by this multiplier produces the amount of pay applicable to one week.

Step 6 – divide by the number of working hours in a week for each employee. Where employees have normal hours which don’t differ from week to week, the number of normal working hours under the contract should be used. Where an employee does not have normal working hours, or hours vary from week to week or over a longer period, hours should be averaged over the last 12 worked weeks. For piecework employees, hours are to be calculated on the same basis as under the National Minimum Wage Act.



Calculating the mean and median gaps

The mean is the basic average figure. The difference must be shown as a percentage of the mean pay of the men.

The median is the middle pay point. Again, the difference must then be shown as a percentage of the median pay of the men.

In each case, the percentage is obtained as follows: (1) subtract the mean/median hourly rate for women from the mean/median hourly rate for men; (2) divide this figure by the mean/median hourly rate for men; (3) multiply by 100.

The basic pay gap may produce statistics which are quite misleading. There is no requirement to produce a narrative to explain any pay gaps, but many employers may want to do this to explain the figures. The Acas guidance positively encourages this, recognising that a gender pay gap does not mean an employer has acted inappropriately or in a discriminatory way.

Quartile pay bands

Employers must also publish the proportion of male and female employees falling within each of four quartile pay bands, again during the pay period which includes 5 April. This should show the proportion of male and female employees in the lower, lower middle, upper middle and upper bands. The calculation method is as follows:

Step 1 – determine hourly rate and then rank employees from lowest paid to highest paid.

Step 2 – divide the ranked employees into four groups of equal numbers of employees (as far as possible). Where employees are “left over” after dividing

into equally sized groups, the employer can allocate an extra employee to one or more of the quartiles to distribute the numbers as evenly as possible. If a particular group of employees on the same hourly rate stretch across a quartile boundary, the employer should try to ensure that the relative proportion of male and female employees on that rate of pay is the same in each of those quartiles.

Step 3 – calculate the proportion of male employees in each quartile. The proportion needs to be expressed as a percentage. To obtain this: divide the number of male employees in the quartile by the total number of employees in the quartile, then multiply by 100.

Step 4 – calculate the proportion of female employees in each quartile. Divide the number of female employees in the quartile by the total number of employees in the quartile, then multiply by 100.

Reporting on bonus pay

Employers must publish the difference between men’s and women’s mean and median bonus pay in the 12 months ending on 5 April each year, together with the proportion of male and female employees who received bonus pay in that period.

The reporting only applies to bonuses paid to “relevant employees”, i.e. those employed on the snapshot date of 5 April. Unlike with calculating the hourly pay gaps, it is not limited to “full pay” employees. It applies regardless of whether they are also “full pay employees”.

The bonuses are those “paid” to relevant employees in that 12 month period:

- ▶ Cash bonuses are counted on the date they are paid, even if eligibility has been triggered (much) earlier as may be the case under deferred schemes. For non-cash bonuses, tax treatment will effectively determine when the bonus should be treated as “paid”.
- ▶ Unlike the pro-rating of bonus payments for the relevant pay period in the general pay calculation, there is no adjustment of bonus payments for part-time employees or new joiners part way through the bonus year, which tends to distort the figures.
- ▶ For listed companies, it should be relatively easy to identify the timing of payment and taxable value and the rules should also be simple to operate for private companies where shares are easily convertible and the value can be ascertained. It may be less straightforward for other private companies where the market value of shares cannot readily be identified.

Publishing the data

The report must be accompanied by a written statement confirming that it is accurate, signed by a specified senior person – a director, LLP member, partner or member of the governing body. Organisations will need to think about who is the best person to do this, and when and how to ensure they have appropriate information to enable them to sign it off.

The data must be published on the employer’s public website in a manner that is “accessible” to all employees and the public, meaning it must be relatively easy to find from the home page. The information must remain on the website for at least three years from the time of publication.



The information must also be published on a Government designated website, including all the required pay data and the name and job title of the person who signed the accompanying statement.

The report must be published within one year of the snapshot date of 5 April, so by 4 April the following year. There are various things to consider in terms of both timing and content:

- ▶ Is it beneficial to include any accompanying narrative with the data? The bare statistics can look misleading.
- ▶ Waiting to publish until near the reporting deadline will mean the data is quite old by the time it is published, and may not reflect the current state of the organisation.
- ▶ There may be an advantage to publishing early anyway in the interests of openness, especially if the statistics look relatively good or there is a good story to be told about gender equality initiatives. The Acas guidance encourages early publication where possible.
- ▶ Employers will also need to consider communicating the result of the report with staff. Acas has produced a template employee communication, and suggests that employers may wish to inform staff in advance of the impending report and offer them the chance to query the employer's approach to tackling the gender pay gap and update their HR and payroll records ahead of the snapshot date.

Enforcement

There is no specific enforcement mechanism or sanction for a failure to comply in the Regulations themselves, although the public relations fallout could be considerable and gender pay statistics are likely to be cited regularly by employees in discrimination and equal pay claims.

The Government and the Equality and Human Rights Commission ("EHRC") take the position that failure to comply is an "unlawful act" under the Equality Act 2010, which can be investigated and enforced by the EHRC. This position is echoed in the Acas guidance.

It is actually questionable whether a failure to comply is technically an unlawful act. Nevertheless, the EHRC have published an enforcement strategy, and have written to employers who have failed to publish any statistics. Ongoing failures to comply can lead to a formal EHRC investigation and unlawful act notices, and even a court order if an action plan from the EHRC is ignored.

Not reporting at all is most likely to lead to action by the EHRC. In any event, reputationally it is unlikely to be advantageous to decide not to report at all, even if the statistics do not look favourable.

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