

# Revealing the race pay gap

25/10/2018

**Employment analysis:** The government has launched a consultation proposing to introduce mandatory ethnicity pay reporting by employers to promote transparency and equality in the workplace. James Davies, divisional managing partner at Lewis Silkin specialising in employment law, discusses the implications of introducing this scheme on employers and legal practitioners.

## Original news:

Government unveils measures to tackle ethnic workplace disparities, LNB News 11/10/2018 60

*Prime Minister, Theresa May has introduced the Race at Work Charter, which involves a series of measures that aim to address ethnic disparities in the workplace. The Race at Work Charter looks to commit businesses to a set of principles and actions that foster a step-change in the recruitment and progression of ethnic minority employees. Alongside the Race at Work Charter, the government has also launched a consultation seeking views from employers on a mandatory approach to ethnicity pay reporting, due to a small number of organisations publishing information on pay gap for employees from different ethnic backgrounds and there being considerable disparities in pay and progression compared to white counterparts. The consultation closes on 11 January 2019.*

## What is the background to the government's decision to consult on introducing ethnicity pay reporting?

The UK is steadily becoming more diverse, with the proportion of the working age population increasingly coming from a black, Asian or minority ethnic (BAME) background. Although a lot of businesses recognise the benefits of having a more inclusive workforce, many ethnic minorities tend to be concentrated in lower paying jobs. As with women and the gender pay gap, BAME employees may be paid the same as white employees for doing the same work, but are under-represented in higher-paying senior jobs.

An independent review by Baroness McGregor-Smith from 2017, '[Race in the Workplace](#)', set out a range of recommendations for both employers and the government to take to help address the issues affecting BAME workers. According to the review, the UK's economy could benefit from an increase of £24bn per year if BAME workers were given the same opportunities as their white counterparts.

In this context, and following on from gender pay gap reporting coming into force, there has been a push for employers to publish pay breakdowns of their workforce by ethnicity.

## How effective are the current systems/obligations in place for employers reporting on ethnicity pay gaps?

There are currently no reporting obligations in place for employers in relation to collecting data or reporting on ethnicity pay. One of Baroness McGregor-Smith's key recommendations was that organisations must gather and monitor ethnicity pay data and that this should be underpinned by the government legislating on mandatory reporting.

Although some organisations have published such information voluntarily, including the 'big four' accountancy firms and the Civil Service, this is a small minority of employers. A [one-year-on review](#) of 'Race in the Workplace', which was published in October 2018, found that just 11% of employees reported that their organisations collect data on ethnicity pay.

Another problem with voluntary reporting is that there is no centralised system, meaning that businesses have been reporting using different methodologies. This limits how useful the data is when looked at comparatively.

## What are the benefits/challenges of making ethnicity pay reporting mandatory?

One of the key benefits of making ethnicity pay reporting mandatory is that it should highlight any problems and encourage employers to take steps to understand, and address, any gap in their organisation. Legislation on how reporting is done means that a consistent approach can be enforced—enabling employers to more accurately compare any pay gap with that of other employers and measure their progress.

How it will work in practice is the main challenge. The consultation asks for views on how helpful it would be to mirror parts of the gender pay gap methodology. However, doing so too closely could greatly affect the accuracy of the data collected. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172 require comparison of the average woman to the average man—but, if there are only a small number of female employees, it can be hard to produce meaningful data. This problem will be magnified if the same approach is used for BAME employees, who are likely to make up a small minority of staff in most organisations. These small numbers mean that the statistics can be changed dramatically by the arrival or departure of just one highly paid BAME employee.

Another challenge is that, unlike gender, many employers do not hold ethnicity data on all of their staff. This is 'special category' personal data, so employees may not wish to provide the information, its processing is subject to special rules, and employers will rightly be cautious about how they collect, store and use it.

### **What ethnicity pay information should be reported?**

The consultation suggests some options as to how the information could be reported.

*One pay gap figure comparing average hourly earnings of ethnic minority employees as a percentage of white employees*

This has the benefit of avoiding too much complexity and creating more reliable statistics as the sample sizes will be bigger (although potentially still too small to be meaningful). However, the issues faced by one minority group are unlikely to be identical to those faced by another. For example, ONS data shows an overrepresentation of Asian workers in financial services, but an underrepresentation of black workers.

*Several pay gap figures for different ethnic groups, using standardised ethnicity classifications*

This would create more complexity and mean that any data collected is based on a smaller pool of people, making it harder for meaningful data to be produced. The consultation proposes a comparison between different ethnic minority groups and white workers. However, if the legislation went further and required comparison between ethnicities (for example, a black vs Asian pay gap), employers would be required to calculate and report no fewer than 171 different pay gaps if all 18 suggested categories were used.

*Ethnicity pay information by pay band or quartile, showing the proportion of employees from different ethnic groups by £20,000 pay bands or by pay quartiles*

This would help to identify the number of employees from ethnic minority groups in each pay band/quartile and highlight to employers if there is any concentration in terms of a particular ethnicity. It still, however, raises the same issue of how to group different BAME groups—and may also breach pay confidentiality if there are so few individuals that they can be personally identified.

### **How would the mandatory reporting be enforced? Has the government made any solid commitments to putting this in place (eg the suggestion of 'mirroring elements of the gender pay gap regulations')?**

There is no indication in the consultation paper about plans to enforce mandatory reporting. If the gender pay gap model is followed, there would not be a direct penalty for failure to report. The Equality and Human Rights Commission has been active in enforcing gender pay reporting, particularly against employers who have failed to report at all, so it could potentially be given powers to investigate and enforce any ethnicity pay reporting obligations.

### **What are the next steps?**

The consultation period ends on 11 January 2019, so we can expect concrete proposals and draft legislation after this date. This will include confirmation of the size of employer affected—the current proposal being for employers with 250 or more employees. It is difficult to take much action before the new rules are finalised, but employers could start looking at their current methods for collecting ethnicity data to assess whether reporting is likely to be possible and/or accurate.

The government has already stated that it recognises that some businesses will have not collected this type of data before, and will need a lot of support in order to be able to comply. It has suggested support similar to that provided for gender pay gap reporting, for example guidance developed by the Government Equalities Office and Acas. The government is also considering whether a trial or phased approach should be taken, in which they would work with 'early adopters' before the introduction of mandatory reporting. This would hopefully have the effect of ironing out any issues with compliance before the full regime comes into effect.

*Interviewed by Samantha Gilbert.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

FREE TRIAL

RELX (UK) Limited, trading as LexisNexis®. Registered office 1-3 Strand London WC2N 5JR. Registered in England number 2746621. VAT Registered No. GB 730 8595 20. LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. © 2017 LexisNexis SA-0617-25. The information in this document is current as of June 2017 and is subject to change without notice.

---

The Future of Law. Since 1818.