

# Mind the Gap: UK Gender Pay Reporting

29 June 2017

Since the coming into force of new [regulations](#), large private and voluntary sector employers of employees in England, Scotland and Wales have until 4 April 2018 to publish on a [government website](#) and their own, the results of seven different calculations relating to the differences between the hourly and bonus pay of their male and female employees on 5 April 2017, using data attributable to the 12 month period ending on 5 April 2017 and to the company's periodic pay period in which 5 April 2017 falls. This will be the first of an annual reporting obligation.

The so called "gender pay gap" is the difference between the average pay of men and women in a given period, ignoring the differences in the roles performed. ACAS describes it in general terms as being an indicator of the roles that women have in a business in relation to men. It is usually expressed as a percentage of men's earnings.

The reasons for a gender pay gap in a particular profession or company are varied and wide-ranging but may reflect the fact that women are more likely to work part-time and may experience a slower career progression associated with motherhood, and the fact that certain professions, such as science, technology and manufacturing, were traditionally male-dominated and still feature senior positions overwhelmingly held by men.

The regulations form part of a series of measures<sup>1</sup> intended by the government to tackle the drivers of the gender pay gap and, in a generation, to eliminate it. The potential [reported](#) economic benefits of doing so include an increase in the United Kingdom's annual GDP of £150 billion by 2025. The aim of the regulations in this respect, is to raise awareness of the gender pay gap and to incentivize employers to consider the extent to which their employment policies and practices have contributed to any reported gap, then to do something about it.

The gender pay gap should not be confused with the principle of equal pay, which seeks to ensure that men and women are paid the same for performing the same or broadly similar work, work considered as equivalent in terms of the demands made on the worker, or work of equal value in terms of the level of effort, skill and decision-making required. The United Kingdom's equality legislation make it unlawful to pay men and women differently in these circumstances.

This memorandum will discuss the scope of the regulations and consider the implications for affected employers.

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<sup>1</sup> Alongside the introduction of shared parental leave, the extension of gender pay gap reporting to public sector employers, the extension of the right of any employee with 26 weeks' continuous service (not just those who are parents or carers) to request flexible working and the introduction of 30 hours of free childcare for three and four year olds of certain working parents.



## I. Relevant Employers

The regulations do not apply to all private and voluntary sector employers; only those having 250 or more employees on 5 April of the relevant year (the “snapshot date”) who are based in England, Scotland or Wales (and regardless of the jurisdiction of the employer). An [estimated](#) 8,000 employers currently satisfy this test.

For the purpose of this threshold question “employee” is defined very widely to include anyone who has agreed personally to do work, whether on a full- or part-time basis and irrespective of length of service or contract term. When considering whether they fall within the scope of the regulations, companies will need to take into account temporary, casual and bank workers, including those on zero hours contracts, and to evaluate independent contractors on a case by case basis. Agency workers are regarded as employees of the agency that supplies them and secondees with an enduring employment relationship should be excluded from the host’s calculations.

Although the regulations confirm that neither genuine partners nor LLP members need to be taken into account when calculating the relevant gaps, there remains some ambiguity around their relevance to this threshold question that has not been completely resolved by the [government’s response to the consultation](#) or [the joint ACAS and Government Equalities Office guidance](#). On balance, the preferred view is that partners and LLP members *should* be included in the 250 “employee” count when considering whether an organisation is caught by the regulations.

Employee numbers are calculated based on headcount, not on full-time equivalence. So, each part-time worker and each employee within a job-share, counts as one employee.

Each entity within in a corporate group is considered as separate for the purposes of determining whether they are a relevant employer.

The regulations do not apply to public sector organizations, but separate regulations for public bodies came into force slightly before those applicable to the private and voluntary sector.

### Key practical points:

- Organizations should begin the process of determining whether the regulations apply to them.
- Groups of companies may wish to disclose gender pay gap information on a group-wide basis, alongside the mandatory publication for each group entity meeting the statutory threshold.
- Companies whose workforce hovers around the statutory threshold should consider voluntarily disclosing their gender pay gap calculations in years where their workforce drops slightly below the threshold.

## II. Relevant Employees

Only data relating to “relevant employees” is taken into account in the gender pay gap calculations mandated by the regulations. A relevant employee is one who is employed on the snapshot date. “Employee” here has the same expanded definition as when used in the threshold question but, as mentioned, partners and LLP members are expressly excluded from the calculations. Employees who do not self-identify as either male or female may be omitted from the calculations, as can workers where it is not reasonably practicable for the company to obtain the relevant data.

Solely for purposes of the hourly pay calculations, relevant employees earning less than full pay on the relevant snapshot date due to sick leave, family-related leave or a sabbatical are to be excluded, out of a concern that such absences on reduced or nil pay may skew the figures.

The regulations do not specifically exclude employees who work outside of the United Kingdom and ACAS has indicated that overseas employees will be within scope if they have standing to bring a claim under the Equality Act 2010. This depends on the extent to which the employment relationship is connected with Great Britain and relevant factors include having an employment contract governed by English law, continuing to have a home in Great Britain and remuneration being subject to tax in the

United Kingdom. Where an overseas employee is included, any necessary foreign exchange calculations should be undertaken using the exchange rate that applied on the date of payment.

#### Key practical points:

- HR departments should begin the process of determining which employees are “relevant employees” for the purposes of the regulations.
- ACAS has highlighted the importance of being sensitive to employees’ gender self-identification. A template announcement inviting staff to check and update their recorded gender in existing HR and payroll records is available [here](#) (see “gender pay reporting notification template”).

### III. The seven calculations

#### (1) *The difference in mean hourly pay*

This is calculated by taking the mean *hourly rate of pay* (see below) of all male full-pay relevant employees (“A”), minus the mean *hourly rate of pay* of all female full-pay relevant employees, dividing the result by A and expressing the final result as a percentage of A. For example, if the mean *hourly rate of pay* for men is £13 and for women it is £11, the gender pay gap is 15.4% (rounded to one decimal place) as shown below:

$$\frac{\pounds 13 - \pounds 11}{\pounds 13} \times 100 = 15.4\%$$

#### (2) *The difference in median hourly pay*

This is calculated in the same way but using median *hourly rates of pay*.

#### (3) *The difference in mean bonus pay*

This is calculated by taking the mean *bonus pay* (see below) paid to male relevant employees (who received *bonus pay*) in the 12 month period ending with the snapshot date (the “relevant period”) (“B”), minus the mean *bonus pay* paid to female relevant employees (who received *bonus pay*) in the relevant period, dividing the result by B and expressing the final

result as a percentage of B. For example, if mean *bonus pay* for men is £10,000 and for women it is £9,500, the gender pay gap is 5% as shown below:

$$\frac{\pounds 10,000 - \pounds 9,500}{\pounds 10,000} \times 100 = 5\%$$

#### (4) *The difference in median bonus pay*

This is calculated in the same way but using median *bonus pay*.

#### (5) *The proportion of male employees who received bonus pay*

This is calculated by taking the number of male relevant employees who were paid *bonus pay* during the relevant period, dividing it by the total number of male relevant employees (“C”) and expressing the result as a percentage of C.

#### (6) *The proportion of female employees who received bonus pay*

The equivalent calculation then needs to be performed for females.

#### (7) *The proportion of male and female employees according to quartile pay bands*

Arguably the most complex of the seven calculations, this requires employers to (i) rank all (full pay) relevant employees according to their *hourly rate of pay* from lowest to highest paid; (ii) divide the list into four quartiles, with an equal number of employees in each quartile; and then (iii) calculate the proportion of male and female employees within each quartile, with the result expressed as a percentage of all (full pay) relevant employees within that band.

#### Key practical points:

- The process of collecting the information necessary for the calculations, in particular for those with variable hours, will be time consuming; companies should begin as soon as possible, as this will be easier while the data is fresh.
- The requirement to take mean *bonus pay* amounts paid in the relevant period may pose particular difficulties for companies that

receive employees by way of a TUPE transfer during that period. Ultimately, the question of whether to include such employees' pre-transfer bonuses in the transferee's calculations may come down to the simple matter of whether the relevant information is available to the transferee.

- The Conservative Party [manifesto](#) published ahead of the 2017 general election envisaged, without going into detail, that in future more data will need to be published, so a watching brief is required.

#### IV. Key definitions

As shown above, the statutory calculations use the concepts of "hourly rate of pay" and "bonus pay", which are defined below. All pay data should be taken on a gross basis, after any reduction for salary sacrifice arrangements.

- The *hourly rate of pay* for a relevant employee is calculated by:
  - taking the amounts of *ordinary pay*<sup>2</sup> and pro-rated *bonus pay* paid to an employee during the pay period within which the snapshot date falls;
  - for the majority of employers, with a monthly pay cycle, multiplying the result by 7/30.44; and
  - dividing the result by the number of *working hours in a week*<sup>3</sup> for that employee.
- *Bonus pay*:

<sup>2</sup> *Ordinary pay* (i) includes basic pay, allowances (including car and clothing allowances and location living allowances), pay for piecework and shift premium pay; (ii) excludes overtime pay, redundancy pay, pay that relates to the termination of employment, pay in lieu of holiday, remuneration provided other than in money (such as in the form of securities, as insured benefits and company cars) and the reimbursement of expenses; and (iii) season ticket loans and employer pension contributions would also be excluded.

<sup>3</sup> *Working hours in a week* means: (i) for an employee with working hours that do not vary, the normal weekly working hours specified in their contract; (ii) for an employee with variable working hours, the average number of hours worked over the preceding 12-week period (replacing any weeks where no hours were worked with hours from an earlier week) or, in certain circumstances, a number that fairly represents their average weekly working hours; (iii) for an employee who is paid for piecework, the number of hours of output work in a week during the pay period. For this purpose, working hours includes awake and on call hours unless the employee is at home, and excludes hours where the employee is entitled to overtime pay.

- includes any remuneration relating to profit sharing, productivity, performance, incentive or commission, paid in the form of money, vouchers, securities, securities options or interests in securities;
- excludes overtime pay, redundancy pay and pay relating to the termination of employment;
- securities, securities options and interests in securities are treated as paid when they give rise to taxable income or earnings.

#### Key practical points:

- Advice should be taken on how the pro rating of *bonus pay* should be undertaken, as this may not always be obvious and will depend on the nature of the pay in question.

#### V. Publication

Employers must publish the required information within 12 months of the snapshot date. i.e. by 4 April of the following year. As the first snapshot date is 5 April 2017 the first reports must be published by 4 April 2018.

The information must be published:

- on the employer's own website in a manner accessible to all employees and the public. It must remain there for at least three years; and
- uploaded to a [government website](#).

Where an entity within a corporate group does not have its own website, it may publish its calculations on a website hosted by its parent company. There is no requirement for a link to be placed on the home page.

The seven calculations must be accompanied by a statement confirming their accuracy, which is signed by a specified senior individual (for example, a director in the case of a company and a designated member in the case of a limited liability partnership). The name and job title of the signatory must be included in the publication on the government website.

Companies may choose, but are not required, to provide contextual information alongside their calculations to explain particular anomalies which may have led to a higher pay gap. For many companies this will be a useful exercise.

**Key practical point:**

- Affected companies should begin preparing a section of their website for the publication of gender pay gap information.

## **VI. Enforcement**

The Labour Party [manifesto](#) published ahead of the 2017 general election included a proposal to introduce a civil enforcement system to ensure compliance with the regulations. This was considered by the current government at the consultation stage and rejected; the regulations do not contain any specific civil or criminal penalties.

Instead, the explanatory memorandum accompanying the regulations provides that a failure to comply will be an “unlawful act” under the Equality Act 2006 and so will fall within the existing enforcement powers of the Equality and Human Rights Commission (the “**EHRC**”). An unlawful act entitles the EHRC, following an investigation, to serve a notice on the relevant person, requiring them to prepare an action plan to avoid the repetition or continuation of the unlawful act. The action plan must be approved by the EHRC and the notice can be enforced by court order. Curiously, their standing was queried by the EHRC itself during the consultation process. Concerns about resources have also been raised.

The government intends to monitor levels of compliance so that alternative enforcement mechanisms can be considered if necessary.

## **VII. Conclusions**

There may be reputational benefits to being the first to report in a sector and organizations should consider whether they have the capability to publish the required information soon. On the date of writing, there remains many opportunities to collect this accolade in light of the total of only sixteen publications having been made to date.

If businesses are already aware of gender pay gaps within their organisation, it would be wise to start considering the reasons for such gaps and whether an explanatory contextual narrative should be prepared and presented alongside the calculations. Enhanced gender monitoring, as recommended by ACAS and the Government Equality Office, may help to provide a fuller picture of the situation. This would include collecting data showing the recruitment proportions of women and men, the number of women and men in each job or pay band, the proportion of women and men who return to work after maternity, paternity, adoption or shared parental leave to their original jobs, and the proportion of women and men still in a post one year after their return from such leave.

Ultimately, it is the government’s hope that the “burning injustices of the gender pay gap” will be eradicated and that companies reporting a gap will put in place remedial measures, but this remains to be seen in the short-term. Such measures may include updating talent management and people development policies, providing equality law training to managers, actively encouraging the take-up of family-friendly rights by employees (including the take-up of shared parental leave, which the government itself has pledged to do), reviewing maternity, paternity, adoption and shared parental pay policies to give them comparable financial effect, and taking other measures aimed at supporting parents returning to work.

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