Gender pay gap reporting: where are we and what lies ahead?

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With the latest round of gender pay gap reports published earlier this month, Amanda Steadman and Blair Wassman take a look at what the process entails, what the latest figures show and what the future holds for this area of law.

What is gender pay gap reporting?

Gender pay gap reporting laws were introduced in 2017 and require all private and voluntary sector employers with 250 or more employees to report a range of "gender pay information" each year. The goal behind the regime is to close Britain's gender pay gap within a generation. The hope is that greater transparency will encourage employers to manage their pay gaps in a proactive manner, for example by taking measures to support women to progress to the most senior and highly paid positions.

The rules apply to each separate legal entity within a group of companies which meets the 250-employee threshold. In this context, "employee" has a wider meaning than is usually the case and includes traditional employees, workers and potentially even some independent contractors. In some cases, those working overseas may also need to be counted if they have a sufficiently strong connection with Great Britain.

Employers who are in scope must gather and analyse their data and publicly report the results by no later than 4 April the following year. The figures must also be sent to a central Government website.   Importantly, the obligation is confined to reporting the figures only. There is no requirement to explain them or set out any remedial action plan, let alone implement one, although many larger employers choose to do so. The information must be published on the employer's website and kept there for three years.

What is the difference between the gender pay gap and unequal pay?

It is not uncommon for the gender pay gap and unequal pay to be conflated – including by the national media. However, they address different problems.

The gender pay gap reveals the gap between the mean and median rates of pay of all men and women across an organisation, regardless of their job roles. What it often shows is that women are underrepresented at the most senior and highly paid levels within the organisation and concentrated in lower-paid roles. It is not unlawful to have a gender pay gap.

By contrast, unequal pay refers to a disparity in pay between men and women who perform the same, similar or like work. Unequal pay will usually be unlawful, although there are defences available, such as there being a material factor which justifies the difference in pay.

Most employers will have some sort of gender pay gap. This does not necessarily mean that they are behaving unlawfully and paying men and women unequally.

What do employers need to do?

If the rules apply, an employer is obliged to report four separate types of information in relation to certain employees only, known as "relevant employees". A relevant employee is defined as someone who is employed by the employer on the snapshot date of 5 April each year. Partners and LLP members and anyone who does not identify as either gender are excluded from this definition. Independent contractors may also be excluded if it is not reasonably practicable to obtain the necessary data for those individuals.

The four types of information that must be reported are:

- The gender pay gap between the hourly rates of pay of male and female employees, calculated by reference to the specified pay period. This covers both mean and median hourly rates of pay.
- The gender bonus gap between the bonuses paid to male and female employees, calculated by reference to a specified 12-month period. This covers both mean and median bonus pay.
- The percentage of male and female employees who received a bonus in a specified 12-month period.
- The percentage of male and female employees who fell within four pay quartiles bands.

When it comes to calculating the gender pay gap, the employer must consider payments paid to the employee in the "relevant pay period", which will usually be a weekly or monthly pay interval. Most types of pay are taken into account, including basic pay, allowances, holiday pay and bonus pay (although a bonus relating to a longer pay period such as a year must be pro-rated to the relevant pay period).

When it comes to calculating the gender bonus gap, the employer must consider all bonus payments paid to the employee in the 12-month period ending on the snapshot date of 5 April. Any remuneration which relates to profit-sharing, productivity, performance, incentive, and commission is captured.

What do these year's figures tell us?

The figures from the first two years of reporting were published in April 2018 and 2019 respectively. The pandemic resulted in the cancellation of the third year's reports due in 2020, although some employers chose to report on a voluntary basis. Reporting resumed in 2021, although the deadline was deferred to October rather than the usual April. However, this year saw the return to the original reporting schedule in April 2022. Over 10,000 employers have reported their figures so far. A full analysis of the figures will be published by the Government Equalities Office in due course, but early analysis suggests progress is slow and results are mixed.

Early analysis by the CIPD shows that pay gap figures remain high across many sectors. The sector with the largest median gender pay gap was construction, where women were paid 76 pence for every pound earned by a man. Analysis of the financial services sector by Reuters revealed an average mean gender pay gap of just over 32%, which represents a 1% narrowing of the gap compared with the previous year. Although the figures are heading in the right direction, progress in this sector is painfully slow, and well behind the average figure for all UK employers which stood at 14.9% in April 2020.

The results at certain institutions were considerably worse than the average or heading in the wrong direction. For example, Goldman Sachs reported a 51.3% mean gender pay gap (representing a very slight narrowing on the previous year). Whereas Deutsche Bank and UBS both saw their pay gaps increase this year to 33.4% and 29% respectively.

What is next for gender pay gap reporting in light of the review that had to be completed by 1 April 2022?

In 2019 the Government published Gender Equality at every stage: a roadmap for change. The roadmap set out the Government's proposals to tackle eight key drivers of inequality, including the gender pay gap. The roadmap promised to review the gender pay gap reporting regime to assess how effective it had been at unveiling the causes of the pay gap and the impact of employers' policies to reduce it. The intention is to use the results of this review to decide whether to update the gender pay gap reporting rules.

The original plan was that this review would be completed in time for a public consultation to take place on any proposed changes in 2021. However, due to the pandemic this timeframe was delayed and was due to be completed by 1 April 2022. To date, it seems no progress has been made and therefore, if changes are proposed, any public consultation is unlikely to happen before the latter half of 2022.

One possible area of change is the introduction of further measures to increase transparency about the steps that employers are taking to support gender equality. The roadmap discussed whether, as part of the reporting exercise, employers should be required to provide details of their family-friendly policies and retention rates of employees returning from different forms of family leave.

How could the gender pay gap reporting regime be improved?

While we await the outcome of the review, we think there are three key changes that would improve the regime.

Clearer guidelines to help employers get it right

A survey of around 900 employers conducted between the first and second years of gender pay gap reporting revealed that the majority of employers (82%) felt that they had a good understanding of the theory of gender pay gap reporting. However, other Parliamentary research highlighted those businesses found the mechanics of reporting very difficult, with many needing to take external advice on how to complete the process. Ambiguities in the gender pay gap rules and guidance are partly to blame for this. Some common areas of uncertainty include:

- when to include overseas employees;
- understanding that bonus payments need to be counted for in both the gender pay gap and the gender bonus gap but may need to be treated in different ways; and
- identifying whether a particular payment is an “allowance” or a “bonus” or neither.

More detailed guidance, with worked examples of how to deal with tricky issues, would assist employers achieve more accurate reporting across the board and enable a fair comparison of pay gaps between employers.

Revise the treatment of bonuses to make it fairer to employers

At the moment, employers have to calculate the gender bonus gap by reference to the actual amount of bonus paid to the employee. Therefore, where a bonus is pro-rated for a part-time employee, that figure must be used in the calculations rather than the full-time equivalent of the amount paid. Given that women are more likely to work part-time this approach has the effect of inflating the gender bonus gap artificially. Changing the rules to require employers to use a full-time equivalent figure would enable a like for like comparison between men and women.

The Government has previously declined to make this change, telling employers to explain their results by way of a narrative if they needed to. However, not all employers choose to produce a narrative and so a change to the underlying rules would produce a fairer and more consistent outcome.

Require employers to publish a narrative, action plan and targets for closing the gap

There is currently no requirement for employers to explain their gender pay and bonus gap figures or to take any action to close them. Around 40% of employers choose to publish a narrative report explaining their figures. However, the quality of the reports is variable since there is no minimum standard to be met. Worse, only around 20% of employers publish an action plan on steps they will take to close the gap, and fewer still set targets for reducing the gap.

The Government has declined to require employers to publish narratives, actions plans or targets, preferring the light touch “what gets measured, gets managed” approach. However, as discussed above, progress on closing the gap has been slow and there is a case to say that a more proactive approach is needed. Consideration could also be given to introducing penalties for employers who fail to implement their action plans or make progress towards targets.

Conclusion

Whilst some degree of progress has been made in closing the gender pay gap, the impact of the pandemic and the lack of detail required in reporting means progress is slow. If guidance were improved, along with meaningful reporting which included a requirement to specify clear action points to close the gap, we believe we would see better results.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss gender pay gap reporting or any other issues relating to the content of this article, please contact Principal Knowledge Lawyer, Amanda Steadman (amandasteadman@bdbf.co.uk), Senior Associate, Blair Wassman (blairwassman@bdbf.co.uk) or your usual BDBF contact.

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