Gender Pay Matters

1. Introduction

Shortly prior to Christmas 2016 we had the publication of the final version of the Gender Pay Gap Reporting Regulations. We now also have the ACAS guidance on managing gender pay in the private and voluntary sectors which was published at the end of January. This note offers an overall assessment of what employers need to know about the Regulations, and also why they matter, and what employers should be doing in preparation for the Regulations coming into force.

2. Why the Gender Pay Gap Reporting Regulations matter?

As employers will be aware there are regular surveys and academic studies on the extent of the gender pay gap in the United Kingdom. The most commonly quoted figure is probably that of the Office for National Statistics which asserts that the gender pay gap is in the order of 18.1% for all employees (i.e. including full-time and part-time employees). It was into this environment that the Gender Pay Gap Reporting Regulations have arrived. The Regulations will require employers with more than 250 staff to publish data about the gender pay gap within their own workforce. This is likely to leave a number of employers very uncomfortable and it seems a safe bet that the phrase "lies, damn lies and statistics" will be dusted down by a number of employers to explain apparent significant disparities within the workforce. The Regulations themselves do not specify the precise sanction for failing to publish all of the required data. The Explanatory Notes published with the Regulations do make it clear that, in the Government's opinion, the Equality and Human Rights Commission is entitled to take enforcement action against an employer that fails to comply with the Regulations. Although there are clever legal arguments as to whether or not this is in fact the case, it would be a mistake to focus on the legal impact only. Our view is that employers are going to be questioned by recruits, employees, clients and, where the employer is in the service industry, its client may well wish to know such information about any apparent disparities. It would be an extremely bold decision by an employer to bank on the lack of sanctions in the Regulations and simply decline to publish statistics.

There is, of course, a further link. Equal pay and gender pay reporting are not the same thing. The Gender Pay Gap Regulations, for example, will highlight disparity in pay between men and women across the entire workforce (with certain exceptions). Equal pay is about equality of pay between men and women doing comparable jobs. Take an extreme example, imagine a company where factory workers, doing manual labour, are all women, and the management are all men. Under the Gender Pay Gap Regulations, there will undoubtedly be disparities in pay identified, in rates of pay. However, it would seem unlikely that an equal pay claim would exist because the men and women are doing completely different jobs. Of course the situation could be reversed and an apparently neutral or minimal gap between the pay to men and women under the Gender Pay Gap Regulations masks equal pay problems. Having said all that however, our view is that claimant advisers will look at the gender pay gap data to see whether it is feasible to mount a class action (in the spirit of the current Asda equal pay litigation) relying on the existence of a gender pay gap as something that calls for explanation. Similarly, perhaps on a more frequent basis, individuals who are contemplating litigating against their employer (for example, they are facing redundancy) will undoubtedly check out the gender pay gap data to see if there is material which would allow an equal pay claim to be a creditable threat.

3. What pay data has to be calculated by the employer?

The Gender Pay Gap Regulations apply to employers with 250 or more employees. There is some uncertainty as to whether or not it includes all employees who are employed outside the UK by the employer or whether there needs to be a strong link with the UK for the employee in question. It would not usually make any significant difference to whether or not employers have to comply with the legislation. Each company is separate for identifying whether or not they meet the threshold number of employees. Accordingly, three companies in a group, each with 200 employees, will not have to file any report under the Regulations.

An employee for these purposes includes anyone who is an employee or apprentice, or who is under contract personally to do the work in question. These means that a number of contractors are going to count towards the threshold. Of course, if the individual consultant is employed by a service company, rather than the employer, then the consultant will not count at all since he will not be an employee of the employer. The Regulations create a snapshot date, which is 5 April each year. Employees (as defined) who are in employment on that date are covered by the Regulations. Employees who are absent from work (e.g. on maternity leave) may in some cases be excluded from the pay calculations, but not the bonus calculation.

Partners in firms (such as an LLP) count as headcount towards the threshold, but are not covered by the obligation to disclose data.

The employer is obliged to publish a calculation, in a preset form, for:

- the mean hourly rate of pay of male to female employees;
- the median hourly rate of pay for male to female employees;
- the difference between the mean bonus pay paid to male and female employees;
- the difference between the median bonus pay paid to male and female employees;
- the proportions of male and female employees who are paid bonus pay; and
- the proportions of male and female employees in each of the four quartiles.

The quartiles are simply the total workforce divided into four equal categories: lower, lower middle, upper middle and upper quartile.

The Regulations provide a lot of detail as to how one calculates ordinary pay and bonus pay. However, the detail consists of filling in what is probably apparent from the term “ordinary pay” and “bonus pay”.

One of the key aspects, however, is that to work out an hourly rate of pay (to enable a fair comparison to be made which covers both part-time employees and full-time employees) it is necessary to factor into the calculation the number of working hours in a week for each employee. If an employee has normal working hours that do not differ from week to week, then those are the number of working hours. However, if the employee has no normal working hours or it differs from week to week then the employer is entitled to take a 12 week average or alternatively, a number which fairly represents the number of working hours in a week. This is likely to be of critical importance when trying to evaluate the hourly rate of pay for senior executives, many of whom may have contracts which are a variant on the normal “you will work 35 hours per week together with such hours as are necessary for the proper performance of your duties” type clause. It almost goes without saying that there will be a temptation for employers to be quite generous in assessing the number of hours worked by senior executives because this will push down the hourly rate for the most senior (and probably predominately male) quartile.

These calculations will need to be run each year, so one of the things to be considered of course is the direction of travel. A company that sees its statistics worsening, after two or three years, may find itself with a lot more attention than one where the original gap is significant, but where there are signs of the gap lessening in subsequent years.

The information must be reported, in a preset format, and posted on the employer's website for at least three years. It has to be fully accessible to employees and third parties. Similarly the same information has to be submitted to a Government website (as yet to be set up) where it will be available for analysis etc. The information has to be signed off by a senior person within the employer. Thus, for a company, it has to be signed off by a director and the director must confirm that the information included is accurate. For an LLP the report needs to be signed off by a designated member.

4. What steps should employers be taking now?

We would suggest that ahead of the obligation to do the data run and publish the results, employers need to be thinking through what this will mean for them. In practice, this probably means that it is prudent to do a trial run of the data. This would serve a number of useful purposes. Are there any difficult issues where employers need to know whether they are caught by the legislation, or whether particular employees are in or out of pool. Does the employer have access to all the necessary information? For example, employers will need to think about which employees they are going to view as having unmeasured working hours, and which work on a normal basis. Additionally, a trial run of the data may also help with what, in our opinion, may be the most important part of the process, namely the extent to which the employer is going to voluntarily disclose, on its own website, additional information which may place the statutory gender pay data into context. For example, some recent analysis has indicated that the gender pay gap generally is far smaller for employees aged below 30, but that the advent of childcare responsibilities continues to have a disproportionate impact on women. Whilst this may be no surprise, it may mean that the gender pay gap statistics (which are age neutral) will benefit from some form of explanation as to break down the employee statistics as well by reference to age bands.

It is also important to run the trial data sooner rather than later because pay decisions taken now will start to come through in the statistics for 5 April 2017 that need to be published no later than 5 April 2018. An employer with an April bonus round may want to think very carefully about whether it wishes to do any gender analysis before finalising bonuses. The same would apply to any pay rises that are being awarded from now on.

We also think employers should be considering carefully any communication plan, e.g. for staff when the data is published. It would seem very unwise to assume that employees will not be interested in knowing what the gender pay gap is for their particular employer. Equally, if the employer believes that there is an explanation or, relative to the particular sector in which individuals work, the employer's data is better than that for competitors, it is important to consider how this information will be conveyed to a workforce.

Finally, if there is a significant gender pay gap then it may be worth considering whether to run an equal pay audit. If it is correct that claimants and claimant lawyers will look to make a linkage between the gender pay gap for a particular employer and alleged inequality discrimination, etc., then it may be important for the employer to do a trial equal pay audit (perhaps for a particular team or department) to see whether on a snapshot basis there does seem to be any cause for concern. If an employer is aware that there is potential for an equal pay challenge, but it feels it is unable to take any immediate action to address the issue, then it will know that it is in effect accepted that it will have to settle any equal pay claims which are threatened. Alternatively, it may be possible to start the process of improving the equal pay risk, albeit gradually, and in a way that does not attract attention to the problem amongst the workforce.

5. ACAS Guidance

The ACAS guidance materials, and in particular the guide "Managing gender pay reporting in the private and voluntary sectors" offers useful assistance, coupled with more aspirational views on gender pay reporting, its benefits and what good employers should be doing. Interestingly it is clear that, in the view ACAS at least, the gender wage gap is linked closely to the impact of caring responsibilities on careers, and the extent to which this affects hourly wages.

The guidance note does repay reading but amongst other points it makes:

In a job share arrangement each employee counts individually. In other words there is no concept of aggregating a job share duo into one full-time equivalent employee.

ACAS believes that overseas employees, will be covered by the Regulations, and so have to have their data incorporated into the calculations, if they would be able to bring a claim for statutory employment rights in a British Employment Tribunal.

The guide acknowledges that the Regulations do not define the terms "male" and "female" and in some cases it is up to an individual how they choose to self-identify.

Salary sacrifice schemes would have the effect, for the purpose of the Regulations, of reducing the employee's gross pay without including the corresponding non-cash benefit generated in response.

Finally the ACAS guide provides several pages on how to reduce the gender pay gap once it has been messaged. Clearly these are valuable thoughts, and some employers will no doubt find this particularly informative on where to go once they have done the analysis.

6. Conclusion

Employers should bear in mind that any steps they take to prepare for the Gender Pay Gap Regulations may result in discloseable correspondence, if the employer finds itself in litigation involving allegations of sex discrimination or failing to provide equal pay. This may mean it is appropriate to be clear before putting down any conclusions, particularly if the initial data looks like it might be cause for concern. Similarly, involving internal or external lawyers in the process may ensure that some of the correspondence can be cloaked with legal privilege, particularly if it is looking at areas where the company feels it might be weak.

For more information on this update please contact:

Nicholas Robertson
Partner
T: +44 20 3130 3919
E: nrobertson@mayerbrown.com