

MACFARLANES

GENDER PAY REPORTING

OVERVIEW

To prepare for the gender pay gap reporting regime, large employers will need to act now. This booklet summarises:

- ◆ The gender pay gap and the factors that can influence it.
- ◆ What you need to know to understand the data you will need to report.
- ◆ How to compile and calculate the data.
- ◆ How to publish and explain the data.
- ◆ The action businesses should be taking now to prepare for the regime.

The Government's new gender pay gap reporting regime requires employers with 250 or more employees to publish information on their gender pay gap from (in effect) 6 April 2017.

The gender pay gap shows the difference between men and women's earnings as a percentage of men's earnings. The figure is intended to provide a high level indicator of earning power and show inequalities in the market. In 2016, the gap for all full time employees was 9.4%. When part time employees are taken into account, this figure rises to 18.1%¹. These figures do not show the differences in rates of pay for comparable jobs and are affected by a number of factors looked at in more detail at page 2.

The figures produced by the gender pay gap reporting regime are intended to allow a comparison between different employers and to encourage employers to tackle the root causes of the gender pay gap.



¹ See Office for National Statistics: Annual Survey of Hours and Earnings: 2016 provisional results (26 October 2016)

FACTORS INFLUENCING THE GENDER PAY GAP

The Office for National Statistics (ONS) examined the reasons behind the gender pay gap and identified the following factors.

- ◆ **Part time workers:** More women work part time than men, leading to a larger overall pay gap when considering the workforce as a whole. 41% of women work part time compared with 11% of men and since part time workers, both men and women, earn less, on average, per hour than their full time counterparts, this widens the gap. Looking at part time workers separately, men who work part time are paid less on average, showing a gap of -6.5%, bucking the trend more generally.
- ◆ **Type of occupation:** The ONS found that women tend to work in occupations which offer lower salaries. For example, a higher proportion of women than men work in sectors such as administration and caring, which are typically lower paid.
- ◆ **Having and caring for children:** From age 40 upwards, the gender pay gap is much wider than for younger employees. The ONS considered this likely to be connected to women taking time out of work to have children. Having children may also change what women want or need from a job; women may be more likely to want the option to work flexible hours, for example.



THE GENDER PAY REGULATIONS

The final regulations (the Regulations) come into force on 6 April 2017. The Advisory, Conciliation and Arbitration Service (ACAS), together with the Government Equalities Office, has produced guidance on managing the Regulations' reporting requirements (the Guidance).

KEY DATES

5 April 2016	Bonuses paid from this date will fall within the reporting regime.
5 April 2017	"Snapshot" date in respect of 2017.
6 April 2017	Regulations come into force.
4 April 2018	Deadline for employers to publish first gender pay report in respect of 2017.

CONTENTS OF A GENDER PAY REPORT

Employers will be required to publish six key statistics:

1. the mean hourly pay gap between men and women;
2. the median hourly pay gap between men and women;
3. the mean bonus for men and women;
4. the median bonus for men and women;
5. the proportion of men and women receiving a bonus; and
6. the number of men and women in each “quartile pay band”.

Employers must also publish a written statement which confirms the accuracy of the calculations.

WILL OUR BUSINESS BE CAUGHT?

An employer will only be required to publish a gender pay report if it has more than 250 employees on the snapshot date, which is 5 April each year.

The gender pay report is triggered for each individual entity which has 250 or more employees. This means that group companies are not required to aggregate their employees across subsidiaries. Large groups may therefore find that: (i) they are outside the scope of the Regulations due to several group entities employing fewer than 250 employees; or conversely (ii) they need to produce numerous reports for different group entities. In groups where senior executives are employed by a different entity to the majority of the workforce and that employing entity has fewer than 250 employees, then there may be no reporting obligation in respect of the more senior cohort which, in turn, could skew a business’ gender pay gap.

Multinational organisations that have employees working in Great Britain may find that all or some of their employees will need to be counted for the Regulations. Similarly, an employer who sends employees abroad may find that all or some of their employees are also still counted for the Regulations (see page 5).

“RELEVANT EMPLOYEES” AND “FULL-PAY RELEVANT EMPLOYEES”

In addition to using the term “employees” for the purpose of the 250-employee threshold, the Regulations use two additional categories of employee: “relevant employees” and “full-pay relevant employees”.

The definitions are explored below, but are important because some of the mandatory statistics use one definition, and some use the other:

STATISTIC	EMPLOYEE DEFINITION
Mean hourly pay gap between men and women	Full-pay relevant employees
Median hourly pay gap between men and women	Full-pay relevant employees
Mean bonus for men and women	Relevant employees
Median bonus for men and women	Relevant employees
Proportion of men and women receiving a bonus	Relevant employees
Number of men and women in each “quartile pay band”	Full-pay relevant employees

WHAT IS A “RELEVANT EMPLOYEE”?

“Relevant employees” means all employees employed by the employer on the snapshot date of 5 April each year. The term “relevant employees” is used for the three bonus pay gap calculations.

The Regulations go further than capturing just “employees” (in the narrow sense) and businesses will need to consider their wider workforce including those directly employed or engaged or required to work personally, including:

- ◆ apprentices;
- ◆ casual workers (including zero hours contractors) engaged directly by the employer (i.e. not via an agency); and
- ◆ self-employed contractors who are engaged directly by the employer (i.e. not via an agency or a personal service company) and who are required to carry out work personally (i.e. who would not in practice be permitted to send a substitute).

There is an exception from the reporting duty in relation to workers for whom the employer does not have, and it is not reasonably practicable for the employer to obtain, the relevant data. For example, where it would be difficult to obtain pay data for a self-employed contractor who works on an ad-hoc basis and is not paid through the payroll, data relating to that worker may not need to be included. There is clearly scope for argument as to precisely what “reasonably practicable” means in this context.

Certain categories are excluded altogether:

- ◆ partners and LLP members;
- ◆ agency workers (i.e. those who remain engaged by the agency and are only provided to the entity); and
- ◆ employees seconded in from other businesses.

As a general rule, an employee based overseas will be within the scope of the Regulations if they can bring a claim to an Employment Tribunal under the Equality Act 2010. The test for that depends, broadly, on whether the employment relationship suggests a stronger connection to Great Britain and British employment law than to the law of any other country. This is a notoriously tricky area and each case will be fact-specific.

WHAT IS A “FULL-PAY RELEVANT EMPLOYEE”?

“Full-pay relevant employees” are the group used for the hourly pay gap and “quartile pay band” calculations and are those “relevant employees” (see above) who were not, during the pay period, either paid nothing or paid at a reduced rate as a result of being absent due to:

- ◆ annual leave;
- ◆ maternity, paternity, adoption, parental or shared parental leave;
- ◆ sick leave; or
- ◆ “special leave” (a term which is undefined but which we suggest should be treated as a “catch all” provision covering, for example, sabbaticals or study leave).

In other words, to establish the “full-pay relevant employee” pool you take the “relevant employee pool” and then exclude those falling into the above categories. If an employee is paid less than usual for reasons other than leave as outlined above (for example, a part time employee or an employee on strike action), they will still count as a “full-pay relevant employee”.



WHAT IS PAY?

One of the most complicated factors in putting together a gender pay report will be to determine what “pay” is for each employee.

For the purposes of the Regulations, “pay” will include most remuneration paid through the payroll and should be calculated, using gross figures, before any deductions for PAYE, national insurance contributions or pension contributions, student loan repayments and voluntary deductions:

INCLUDED IN “PAY”	EXCLUDED FROM “PAY”
<ul style="list-style-type: none">◆ Basic pay◆ Allowances (including car allowances paid through the payroll, location allowances, recruitment and retention allowances, on-call and standby allowances, clothing, first aider or fire warden allowances)◆ Pay for piecework◆ Pay for leave◆ Shift premium pay	<ul style="list-style-type: none">◆ Pay for a different pay period◆ Overtime pay◆ Redundancy or termination pay◆ Pay in lieu of leave◆ Remuneration paid other than in money (such as benefits in kind or securities including share-based awards such as options)◆ Expenses wholly and necessarily incurred for business purposes, for example, repayment of a taxi fare◆ Salary sacrifice schemes◆ Interest free loans, for example, a season ticket loan

WHAT IS BONUS PAY?

Bonus pay is included in both the gender pay gap figure and must be reported separately in the gender bonus figure.

Bonus is defined as any remuneration that:

- ◆ is in the form of money, vouchers, securities, securities options or interests in securities; or
- ◆ relates to profit sharing, productivity, performance, incentive or commission.

Bonus pay does not include ordinary pay, overtime pay or remuneration referable to redundancy or termination of employment.

Non-cash bonus awards, including awards of shares, share options and other interests in securities, are deemed paid at the time, and in the amount in respect of which, the employee becomes liable to income tax on them. This will mean that the extent to which any non-cash awards will count towards the employer's gender pay gap will depend on the type of security. Broadly speaking, this will generally be when the employee receives shares on vesting of an award or exercise of an option (although it can also catch other situations where income tax arises in respect of a share based award, for example where restrictions on forfeitable shares or restricted stock fall away). This will require careful record-keeping as the timing of exercise of an option, for example, is at the discretion of the employee and only

those employees who choose to exercise during the relevant period will be captured. The reported ratios could therefore be affected by employees' choices as to whether to defer exercise of vested options. Employers should consider whether an explanation of the impact of such deferral should be included with their disclosures or whether it might even be worth making amendments to their share plans.

PUBLISHING AND EXPLAINING

Employers must publish the specified gender pay gap information on their own website and must retain the information online for three years. Employers must also upload the information to a government-sponsored website. The information must be in English, and be presented in a manner that is accessible to all employees and the public.

A written statement confirming that the gender pay gap information is accurate must accompany the required information. This must be signed by a director (for companies), a designated member (for LLPs), a partner (for partnerships) or the most senior employee of the employer.

Employers may also choose to publish an accompanying narrative explaining, for example, any pay gaps and setting out what action it plans to take to close them. ACAS has suggested that businesses should always do this; this is guidance and does not itself have legal effect, and it is likely that market practice will establish itself over time.

ENFORCEMENT

Although the Regulations themselves do not expressly contain: (i) any enforcement mechanism; (ii) any sanctions for failure to comply; or (iii) any sanctions for publishing misleading or inaccurate reports, the Equality and Human Rights Commission (EHRC) has accepted the view that if an employer fails to comply with the requirement to publish gender pay gap figures, this will be an “unlawful act” under the Equality Act 2006.

Under the Equality Act, the EHRC can carry out investigations into “unlawful acts” and can issue unlawful act notices. This will be its primary enforcement mechanism. In addition, the Government intends to produce sector based tables of employers’ reported gender pay gaps; highlight and identify employers publishing full information; and name and shame those employers who have not complied.

HOW TO PREPARE NOW

Scoping

- ◆ Select a project team - input may be required from HR, Reward, Legal and Public Relations departments
- ◆ Consider whether steps can be taken to maintain legal privilege
- ◆ Determine which employing entities are caught by the 250+ employee threshold
- ◆ Determine which pools of relevant employees are caught (remember one pool is needed for “relevant employees” and another for “full-pay relevant employees”)
- ◆ Determine which payments are caught and how to measure them

Gathering

- ◆ Consider whether steps can be taken to maintain legal privilege
- ◆ Check and ensure your payroll or accounting systems can generate the required data
- ◆ Review annual pay round, bonus award and share plan timings and amend if necessary

Analysing

- ◆ Consider whether steps can be taken to maintain legal privilege
- ◆ Do a “dry run” analysing the required data
- ◆ Decide if additional data should be analysed and published
- ◆ Identify any issues, decide whether and how these issues can be rectified or explained in the report
- ◆ Decide whether to publish an accompanying narrative explaining the data and any issues identified

Publishing

- ◆ Decide where on your website the data will be published
- ◆ Decide when in the April-April year to publish your pay information
- ◆ Decide whether any additional data ought to be published
- ◆ Review any internal and external PR issues to be dealt with
- ◆ Review what steps are being taken to address whatever issues have been identified



HOW TO CALCULATE THE DATA

STAGE 1 - DATA GATHERING

STEP 1 Identify your “relevant employees” and “full-pay relevant employees”

- ◆ Create two lists identifying your relevant employees and your full-pay relevant employees on the snapshot date of 5 April, noting in each case whether the employee is male or female. See pages 4 and 5 for more information on who to include.

STEP 2 Identify the “relevant pay period” for “full-pay relevant employees”

- ◆ Identify the pay period (i.e. the period in which you pay the full-pay relevant employees basic pay i.e. weekly, fortnightly or monthly) in which 5 April falls. For monthly employees, data will be gathered by reference to the payroll data for the payroll month in which 5 April falls, i.e. the April monthly payroll.
- ◆ If an employee does not receive basic pay but does receive some other form of ordinary pay, then the pay period is the period which the relevant employer most frequently pays that form of ordinary pay.

STEP 3 Identify elements of “ordinary pay” received in the “relevant pay period” for “full-pay relevant employees”

- ◆ All figures should be based on gross figures before any deductions made at source (for example, for income tax or national insurance contributions). Ordinary pay only includes money

payments, so anything that is not money (such as benefits in kind or securities) should be excluded. See page 8 for more information on what to include.

STEP 4 Identify elements of “bonus pay” received in the twelve month period that ends on the snapshot date for “relevant employees” and for “full-pay relevant employees”

- ◆ Identify any bonuses including share plans that have actually been received within the 12 month period preceding the snapshot date. For these purposes, if a bonus is attributed to the period but not actually received, it is not relevant for the calculations. See page 9 for more information on what to include.

STEP 5 Identify elements of “bonus pay” received in the “relevant pay period” for “full-pay relevant employees” only

- ◆ If the period for which a bonus was received is the same as the relevant pay period, the full amount should be recorded. If the period for which a bonus was received differs from or exceeds the pay period, the bonus amount should be pro-rated i.e. divided by the number of days in the bonus period and then multiplied by the number of days in the pay period.
- ◆ For the purpose of the Regulations, where periods are calculated in months, a month is treated as having 30.44 days, and where periods are calculated as a year, a year is treated as having 365.25 days.

STEP 6**Identify each “full-pay relevant employee’s” working hours in a week**

- ◆ “Working hours” for these purposes includes hours when the employee is awake and “on call” at or near a place of work but excludes hours for which the employee is paid overtime pay.
- ◆ For employees whose normal working hours do not differ from week to week or over a longer period, use their defined working hours under their contract.
- ◆ For employees whose normal working hours do differ from week to week or over a longer period, use either:
 - their average working hours per week over the last 12 weeks in which hours were worked (so excluding any weeks in which no work was done but ensuring that 12 weeks in total are taken into consideration) ending with the last complete week of the April payroll month; or
 - if an employee has not been employed long enough or the employer is otherwise not reasonably able to carry out the above calculation, a number which fairly represents the number of working hours in a week having regard (as appropriate in the circumstances) to:
 - the employee’s normal working hours in a week under their contract; and
 - the average number of working hours of other employees engaged in comparable employment.

STAGE 2 - PREPARING THE DATA

STEP 7

Calculate the hourly rate of pay per “relevant employee”

The Regulations outline six steps for calculating an employee's hourly rate of pay:

- ◆ Step 1: Identify the amounts of ordinary pay and bonus pay paid to the employee in the relevant pay period.
- ◆ Step 2: Exclude from any ordinary pay identified under Step 1 amounts that would normally be paid in a pay period other than the relevant pay period.
- ◆ Step 3: To the extent that any bonus pay was identified under Step 1, divide the bonus pay by the length, in days, of the performance/bonus period in respect of which it was paid (with a month being treated as 30.44 days and a year as 365.25 days) and then multiply it by 30.44.
- ◆ Step 4: Add together the ordinary pay and any bonus pay identified under Step 1 (as adjusted, if applicable, by Steps 2 and 3).
- ◆ Step 5: Multiply the total calculated under Step 4 by the “multiplier”, being, in this case, 0.22996 (7 divided by 30.44).
- ◆ Step 6: Divide the sum calculated under Step 5 by the number of working hours in a week for the employee in question (see page 14).

STEP 8

Prepare for salary gender pay gap calculation

- ◆ List all full-pay relevant employees by hourly rate of pay ordered from lowest to highest in two lists: male and female. A simple example shows how this might look:

EMPLOYEE NUMBER	FEMALE	MALE
1	£7.20	
2	£7.20	
3		£7.20
4		£7.20
5		£7.20
6	£14	
7	£15	
8	£17	
9		£20
10		£20

STAGE 3 – PAY GAP CALCULATIONS

STEP 9

Calculate the median single pay gap figure

- ◆ To find the median: Find the mid-point in each list i.e. the numerical value which splits the top 50% of the population from the bottom 50%. If there is an odd number of results, the median is the central number. If there is an even number of results, the median will be the mean average between the two central numbers.

In the example above, the medians are £14 for full-pay female relevant employees (employee 6) and £7.20 for full-pay male relevant employees (employee 5).

- ◆ To find the median single figure pay gap expressed as a percentage: Divide the full-pay relevant female median hourly pay by the full-pay relevant male median hourly pay and multiply the answer by 100. Subtract this answer from 100%. Alternatively, subtract median hourly full-pay relevant female pay from median hourly full-pay relevant male pay to find the difference. To work this difference out as a percentage, divide it by median hourly full-pay relevant male pay and multiply by 100.

In the example, the median pay gap is – 94.4%. This is a negative result as the median full-pay relevant male pay is lower than the median full-pay relevant female pay. It is also a large difference given the difference between the two rates of pay. We would expect to provide an accompanying narrative to explain this seemingly odd result.

STEP 10

Calculate the mean single pay gap figure

- ◆ To find the mean: Add all full-pay relevant female employees' rate of pay together and divide by the total number of full-pay relevant female employees. Carry out the same exercise for the full-pay relevant male employees.

In our example, the means are £12.08 for full-pay relevant female employees and £12.32 for full-pay relevant male employees.

- ◆ To find the mean single figure pay gap expressed as a percentage: Divide the full-pay relevant female hourly pay by the full-pay relevant male hourly pay and multiply the answer by 100. Subtract this answer from 100%. Alternatively, subtract hourly full-pay relevant female pay from hourly full-pay relevant male pay to find the difference. To work this difference out as a percentage, divide it by hourly male pay and multiply by 100.

Using the example, the mean pay gap is 1.95%.

STEP 11

Breakdown by quartiles

- ◆ Place all full-pay relevant employees in one list in ascending order ranking them from the lowest hourly rate to the highest. Create a separate column next to this list separating the employees by gender. Divide the list into four equal segments by number of full-pay relevant employees. Your pay range will then be the lowest and the highest hourly rate in each segment of employees. This is how your final table might look:

PAY BAND	PAY RANGE (HOURLY RATE)	NUMBER OF MEN	NUMBER OF WOMEN	TOTAL
Pay band A	£7.20 to £7.99	15	59	83
Pay band B	£8.00 to £10.99	25	84	83
Pay band C	£11.00 to £28.99	36	30	83
Pay band D	£29.00 to £63.00	70	13	83
		146	186	332

STEP 12 Prepare for bonus gender pay gap calculation by identifying bonus pay period and bonus pay

- ◆ Identify how to treat the various types of bonus pay which have been received within the 12 month period preceding the snapshot date for all relevant employees (see page 9).
- ◆ List all relevant employees' bonuses ordered from lowest to highest in two lists: male and female.

STEP 13 Calculate the median bonus pay figure

- ◆ To find the median: Find the mid-point in each list i.e. the numerical value which splits the top 50% of the population from the bottom 50%. If there is an odd number of results, the median is the central number. If there is an even number of results, the median will be the mean average between the two central numbers.
- ◆ To find the median single figure pay gap expressed as a percentage: Divide the relevant female bonus pay by the relevant male bonus pay and multiply the answer by 100. Subtract this answer from 100%. Alternatively, subtract hourly relevant female bonus from hourly relevant male

bonus to find the difference. To work this difference out as a percentage, divide it by hourly male pay and multiply by 100.

STEP 14 Calculate the mean bonus pay figure

- ◆ To find the mean: Add all relevant female employees' bonuses together and divide by the total number of relevant female employees. Carry out the same exercise for the relevant male employees.
- ◆ To find the mean single figure pay gap expressed as a percentage: Divide the relevant female bonus pay by the relevant male bonus pay and multiply the answer by 100. Subtract this answer from 100%. Alternatively, subtract hourly relevant female bonus from hourly relevant male bonus to find the difference. To work this difference out as a percentage, divide it by hourly male pay and multiply by 100.

STEP 15 Calculate the proportion of men and women receiving a bonus

Consider the proportion of relevant male and relevant female employees who received bonus pay during the bonus pay period. This must be expressed as a percentage of the total number of relevant male and relevant female employees respectively.

STAGE 4 - PUBLICATION

STEP 16 Publishing

- ◆ Prepare a written statement that will be published alongside the calculations. At a minimum, this statement must confirm that the published information is accurate and be signed by an appropriate person (see page 9).
- ◆ Employers should also consider using the statement to include a supporting narrative to help anyone reading the statement to understand the calculations and, potentially, what the organisation intends to do following the results.
- ◆ The information must be published on the employer's website in a place where the information can be reasonably expected to be found, as well as on a designated government website (details of which have not yet been provided).

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