What we can learn from the UK transparency laws

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 came into force on 6 April 2017, with the first reporting required on or before 4 April 2018.

More than 10,500 employers fall within the ambit of the Regulations. We have now had two years of gender pay gap reporting.

Background to the reporting requirements

- **What is the UK law on equal pay?** The original Equal Pay Act dates from 1970, and is a key pillar of EU law. It is now regulated in the UK by the Equality Act 2010. This gives a right to equal pay between men and women for like work, work rated as equivalent, and work of equal value.

- **What is the current pay gap?** Across all sectors, the Office of National Statistics figures for 2018 are – 8.6% for full-time employees, 17.9% across all employees, and close to zero for those aged 18-39.

- **How is equal pay enforced?** Legal enforcement is through the Equality Act 2010. The system primarily relies on individuals enforcing their rights through the Employment Tribunal system. After nearly 50 years, equal pay law has failed to remove the ongoing pay gap – claims are complex and lengthy (and so expensive), especially where equal value is claimed, and it can be difficult for employees to find out what others are paid in the same organisation.

The Regulations and their limitations

- **Who do the Regulations apply to?** Large employers in the private and voluntary sector – meaning those with 250 or more employees (which included 109 law firms in the initial reporting round). Partners and LLP members are expressly excluded from the reporting requirements.

- **What do employers have to report?** The figures to be reported are as follows:

    - two “headline” gender pay gap figures - the difference between men’s and women’s **mean** pay and **median** pay, based on an hourly pay rate, for the pay period including 5 April each year

    - the proportions of male and female employees falling within each of four quartile pay bands in that period

    - the difference between men’s and women’s **mean** and **median** bonus pay in the 12 months to April each year. “Bonus” is defined widely and includes commission, securities, securities options, interests in securities and vouchers

    - the proportion of male and female employees who received bonus pay in the pay period.

- **How does the data need to be published?** The report must be published annually within 12 months of each 5 April snapshot date. The data must be published on the employer’s public website, and kept there for at least three years. The data also needs to reported to a Government website, which publishes the figures with company names. This allows year-on-year comparisons to be made. Many employers have opted to publish an explanatory statement alongside the figures.

- **How is compliance enforced?** There is no explicit enforcement mechanism in the Regulations. But, the Equality and Human Rights Commission ("EHRC") have taken an active role in ensuring that employers comply with the requirement to publish.
- **Does this give us useful information?** The statistical analysis required is a blunt instrument, because it averages the pay of all workers across an organisation. The approach is to aggregate all the women in the organisation at all levels and compare their average pay against the average pay of all the men. There is no comparison required between workers in the same or similar job role or occupation, which would give a more accurate picture of whether men and women are paid the same for doing the same job. In addition, although the pay gap calculation is adjusted for part-time working, the bonus gap calculation is not – which can skew the bonus figures because women are more likely than men to work part time.

Application in the legal sector

There are some particular issues which apply to law firms in the UK.

- **Gender imbalance between roles**. Law firms (as with many other professional services organisations) tend to have a gender imbalance between different job roles. In particular, secretarial and support staff in lower-paid roles tend to be predominantly female, as compared to legal staff where gender is more balanced. The highest-paid roles also tend to be dominated by men. This creates a pay gap because the statistics are prodiuced by averaging pay across the whole organisation - even where men and women are actually paid the same for doing the same role.
- **Law firm results in first 2 years.** In the first year of reporting, 78% of law firms reported that men were paid more than women. The mean pay gap for the 25 biggest firms was 20%, and median pay gaps and bonus pay gaps tended to be higher than this. Results did not improve significantly in the following year of reporting, with the median pay gap increasing slightly for the top 10 firms.
- **Ways to deal with this.** Most firms have chosen to publish an explanatatory statement on their website alongside the figures, which seeks to explain the reasons for any pay gaps and sets out what the firm is doing to address the situation. Often these statements also break down the statistics by job role to show that there is not a significant pay gap between men and women doing equal work.
- **Inclusion of partner data.** Partners are excluded from the reporting requirements. The legal sector was criticised in the first year of reporting for choosing not to publish partner data voluntarily, when other similar professional employers (e.g. Big 4 accountancy firms) were doing so. Exculsion of partner data does arguably give a misleading impression of pay equity across a law firm, because high-earning partnerships still tend to be dominated by men.
- **The Law Society's position.** The Law Society (the professional body for solicitors across England and Wales) has produced best best practice guidance on gender pay gap reporting, which includes a recommendation that partner data is included. The stated aim is to give members and the wider public a useful benchmark and increased confidence in pay reporting, and to enable an evidence-based action plan to tackle inequalities. They have also recommended that law firms with fewer than 250 employees should report voluntarily.

- **Reporting on partner pay.** Many firms went on to report voluntarily on partner gender pay gaps in 2019. This can be difficult because partner pay is generally assessed in a different way from employee pay. The Law Society recommends publishing 3 figures – all workforce (employees and partners), employees only, and partners only. The inclusion of partner pay in all-workforce figures almost inevitably leads to an increased pay gap, due to men dominating senior partnership across most firms.

The problem of enforcement

Any new legal requirement is only as effective as its enforcement mechanisms. Although these are limited, it does appear that most employers are attempting to comply with the reporting requirements.

- **Penalties for failure to report**. One criticism of the Regulations is that there is no specific penalty for failure to report. However, the EHRC is taking an active role in ensuring that employers comply with their obligations. They have powers to formally investigate employers for breaching equality law, and ultimately can issue notices requiring specific action and/or bring legal proceedings. This year they wrote warning letters to 328 employers who failed to report their pay gap information on time, and sent a threat of formal investigation to 46 employers who did not then comply. In August 2019 they reported that there was 100% compliance.

- **Inaccurate figures**. The Regulations give considerable detail on how the data is to be calculated, and it can be a complex process to get this right. However, there is no real way to check whether firms have reported accurately. The EHRC is now focussing its enforcement action on “implausible data” – e.g. reports of an exact 50/50 split of male and female employees and claims of a zero pay gap from the lowest-paid to the highest-paid roles. It is writing to 100 employers who have published suspicious looking data asking them to explain the rationale for their figures and requesting their payroll data.

- **Reputation**. For law firms competing to attract the best graduates the reputational risk of failing to report – or reporting disappointing figures – is also a major incentive for firms to take this seriously. In particular, many firms have been at pains to explain pay gaps and set out what they are doing to address the issue.

The future

- **Review of the reporting requirements.** The (previous) government had committed to a review of the reporting requirements by 2022.

- **Equal pay action plans.** The EHRC has called for publication of equal pay action plans to be mandatory. In particular, they want action plans that are time-bound and include specific and measurable targets. As already noted, many law firms are doing this already in order to help with attracting the best talent.

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