



NHS Employers Briefing Note

Gender Pay Gap Reporting

Introduction

The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (the “Regulations”) set out a public authority’s gender pay gap reporting duties, which form part of its public sector equality duty under the Equality Act 2010. In this briefing note we look at the calculations which employers are required to carry out under the Regulations and consider what information an organisation may wish to include in any narrative accompanying the report.

Equal pay and the gender pay gap

It is important to appreciate that the gender pay gap and equal pay are two distinct concepts:

- Equal pay is concerned with men and women earning equal pay for the same, or similar, work.
- The gender pay gap is about the difference between men and women’s average pay within an organisation.

Generally, the average pay of women is lower than that of men and this tends to be because there are fewer women in senior high earning positions in organisations than men. Whilst a workforce may be predominantly female, if the most senior positions are taken up by men, the average pay of women in that organisation could well be lower. The Regulations have been brought in to highlight this imbalance, the aim being to enable employers to consider the reasons for any inequality within their organisation and to take steps to address it.

Which organisations need to report?

The Regulations apply to the public authorities listed in schedule 2 of the Regulations where 250 or more employees are employed by the public authority on the snapshot date of 31 March. Those employers with 250 or more employees should have received a letter from the Government Equalities Office which sets out the employer’s identification number to be used when uploading their report.

Where an employer has fewer than 250 employees on the snapshot date, it does not need to report on their gender pay gap (although they may volunteer to do so) nor do they need to provide a nil return. Where an employer with fewer than 250 employees has received a letter from the Government Equalities Office, as detailed above, but the employer is out of scope, they should complete [this online form](#).

Who is included in the headcount?

The Regulations state that an employee, for the purposes of the headcount, is a person who is employed by the relevant authority on the snapshot date.

Each part-time or job-share individual counts as one employee for headcount purposes. Those on leave should be included in the headcount, although note that these employees will not necessarily be included when calculating the pay gap figures (see below for further details).

Contractors who are not obliged to perform work under a contract personally (i.e. they can send a substitute to carry out the work) and those who work via a personal services company do not count towards the 250 threshold. Organisations will, therefore, need to consider the employment status of their contractors.

If an agency employs agency staff used by an organisation, the staff will already be included in the employing agency's headcount calculation and should not be taken into account when looking at the organisation's threshold. However, for temporary staff where there is a direct contract between the individual and the organisation (such as bank staff), these members of staff should be included if they are working on an assignment and employed on the snapshot date of 31 March. By default, ESR includes in the calculations bank staff who are working on an assignment at the organisation on 31 March.

In respect of non-binary staff, the ACAS guidance states that where an employee does not self-identify as either gender they can be omitted from the calculations.

Pay

It is important to understand what is meant by 'pay' in order to carry out the calculations set out in the Regulations. Pay will include:

- basic pay
- full paid leave including annual, sick, maternity, paternity, adoption or parental leave
- bonus pay received in the pay period in which the snapshot date falls (bonus pay should be pro-rated where it relates to a period longer than the pay period)
- area, on-call and other allowances such as recruitment and retention allowances
- shift premium pay
- pay for piecework.

Pay will not include:

- overtime pay
- expenses (payments made to reimburse expenditure wholly and necessarily incurred in the course of employment, for example mileage for use of vehicle)
- remuneration in lieu of leave
- benefits in kind (for example child care vouchers)
- redundancy pay and tax credits.

Organisations must calculate hourly pay rates for their employees based on the pay each employee has received in the pay period within which the snapshot date of 31 March falls. Pay periods vary between employers but tend to be weekly, fortnightly or monthly. For the purposes of the Regulations, a month is 30.44 days.

Our view is that payments to consultants for Additional Programmed Activities (APAs) form part of 'pay' for the purposes of the calculations. The APAs are agreed with consultants at the Job Plan and form part of their Programmed Activity for the year. They endure for one year and can only be terminated by either party with three months' notice. Therefore, our view is that the APAs are a temporary amendment to the working hours of the consultant and that APA payments are 'pay' and not akin to overtime.

In contrast, waiting list initiative payments are agreed separately from a consultant's Programmed Activities. These additional duties can, therefore, be classified as overtime and should not be included as 'pay'.

Recruitment and retention payments, where they are paid regularly, are allowances which should be included in pay. Where a one-off recruitment payment is made at the start of employment, the ACAS guidance states that this is more akin to a bonus.

How do we deal with salary sacrifice?

Where an employee opts to sacrifice a proportion of their salary, for things like child care vouchers or lease car schemes, these deductions should be made from the employee's salary in the usual way. It is the gross salary which remains after these amounts have been deducted, this is then used to calculate the average hourly rate. Some trusts are finding that this impacts on their quartile figures and that female employees - who should form part of the top quartile if salary sacrifice amounts were to be included in the hourly rate calculation - are in fact dropping to lower quartiles because they are voluntarily sacrificing salary. This is a point which should be noted in the narrative, however, to be clear the reduced pay after salary sacrifice should still be used in the calculations.

Shift allowances and overtime

The gender pay gap calculations will include shift premium pay or shift allowances such as an on-call payment, as these payments are generally a component of an employee's regular pay used to compensate for them working undesirable or inconvenient hours.

Overtime payments are excluded as they are additional payments for extra hours worked on an ad hoc basis.

Employers need to think carefully about how payments are allocated in their particular organisation and either include or exclude payments according to whether they are classified as out of hours allowances or overtime payments.

Relocation payments

Whether a relocation payment should be included in pay or excluded, or whether it could form part of a bonus, will depend on the nature of the payment. The Regulations set out that expenses should be excluded from pay where the payment is to reimburse expenditure wholly and necessarily incurred by the employee in the course of his or her employment. Therefore, relocation payments which reimburse specific relocation expenses should be excluded from the pay calculations. Relocation allowances, however, as ongoing payments which are designed to compensate an employee for the hardship of relocating are more akin to an allowance and we suggest should be included as pay. Where a one-off relocation payment is made and does not relate to expenses, this should be included in the bonus pay calculations and will only need to be taken into account in the calculation of the hourly rate when it is paid in the relevant pay period.

How do we deal with employees on leave?

The Regulations provide that the hourly rate pay calculations should be for full-pay employees and not include those who are being paid at a reduced rate, or nil, as a result of being on leave during the pay period. This includes employees on maternity, paternity, adoption, parental or shared parental leave who are on reduced pay. Therefore, employees on sick leave, maternity leave, or other family leave, should be included only if they are in receipt of full pay during the pay period on which the employer's calculation is based. Note that employees on reduced pay are included in the calculations in respect of the gender bonus gap as opposed to the gender pay gap (see below).

In ESR, employees on full pay maternity leave cannot currently be included since the payroll does not include units worked when processing full maternity pay. Those on full pay sick leave are included in the calculations. The issue with those on maternity leave is something which is currently being looked into and has been logged with the system supplier.

Calculations

Hourly rates

Organisations need to calculate the gross hourly rate for each of their employees and use these figures to calculate the various figures required by the Regulations.

Bonus payments are included in the calculations for hourly rates when they are received in the pay period in which the snapshot date falls. However, it is important that they are pro-rated if the period to which they relate exceeds the pay period. For example, where the pay period is a month and a bonus has been paid during that pay period but the bonus relates to a six-month period, the bonus needs to be pro-rated.

Full pay and pro-rated bonuses should be added together and multiplied by the appropriate multiplier. The appropriate multiplier is 7/30.44 for a monthly pay period (or in the case of a fortnightly pay period 7/14). This sum should then be divided by the number of hours worked per week.

Mean and median

Calculating the mean gender pay gap involves adding the hourly rates for all male full pay employees and then for all female full pay employees in two groups and then dividing these totals by the number of male or female full pay employees in each list. The employer then needs to subtract the standard female hourly rate from the standard male hourly rate, divide the total by the standard male hourly rate, and multiply the figure by 100. This will give a percentage difference in pay. A positive percentage means women are paid a lower average hourly rate.

To calculate the median, the hourly rates need to be ranked from lowest to highest in two groups: one male and one female. The median is the midpoint in each ranked list. Again, a percentage calculation is to be carried out. The employer needs to subtract the median female hourly rate from the median male hourly rate, divide by the median male rate and multiply by 100.

The median figure can be seen as the most representative of the average male and female employee but pay distribution and increases amongst staff are rarely even and so the median figure does not account for a concentration of high earners. The mean can be seen as more accurately reflecting the gender pay gap where there are more men in high paying senior positions.

Bonuses

Bonus pay is defined as any remuneration that is in the form of money, vouchers, securities or options and relates to profit sharing, productivity, performance, incentive or commission. For each employee who receives a bonus, organisations need to add together all bonus pay received by employees in the 12-month period ending on the snapshot date of 31 March.

Organisations then need to calculate the mean and median gender bonus gap as with the gender pay gap. They must also go on to calculate the percentage of male employees who are paid a bonus from the total number of male employees (note not male full pay employees, so therefore including those on leave who are receiving reduced or nil pay) and the percentage of female employees who receive a bonus from the female employees.

Employers may find that bonus figures are misleading because no pro-rating is permitted for the bonus calculation figures (as compared to bonuses in the hourly rate calculation). This can be explained in the narrative.

Clinical Excellence Awards

Clinical Excellence Awards (CEAs) are awarded based on the performance of a consultant. The national CEAs are subject to a renewal process every five years based on a consultant making an application for renewal. If the consultant is no longer providing an excellent service, the CEA should be withdrawn. To the extent that local CEA schemes mirror this, we consider that they are paid to reward performance and, as such, should be treated as a bonus.

Each part of an employee's pay is called an 'element' in ESR and there is a specific element for CEAs which payroll should use when entering data. By default, CEAs are included in the gender bonus gap and ordinary pay reports produced by the ESR reporting tool. An organisation would need to uncheck the CEA box if it did not want to include CEAs in the bonus pay calculations. If payroll have entered the CEAs under a different element name, for whatever reason, then the organisation will need to ensure that it includes that other element when running the bonus report.

Where local CEAs, once awarded, are enduring and not subject to a review process at which they could be withdrawn, an organisation may consider the payment as ordinary pay and not include it in the gender bonus gap calculations. This issue should be addressed in the narrative.

Other long service awards and recruitment payments

Under the Regulations, only payments which relate to profit sharing, productivity, performance, incentive or commission should be included in the bonus calculations.

There was debate about whether long service awards should be included, but the most recent ACAS guidance states that such awards with a monetary value should be included as a bonus. However, non-monetary long service awards, such as additional annual leave, should not be included as they are a benefit which are excluded from the calculations.

Some employers are finding that where they pay nominal long service awards and these are paid predominantly to women, the impact of including these awards on their gender bonus gap is significant. This is a point to refer to in the narrative, and we recommend that organisations also include details of what the gender bonus gap would be without the inclusion of nominal long service awards.

The ACAS guidance also states that one-off payments which are made to individuals to encourage recruitment at the start of employment, should be treated as bonus pay. Our view is that where a recruitment payment is paid monthly over a number of years it is more akin to an allowance and should be deemed 'pay' for the hourly rate calculations.

Bonuses which are paid as vouchers should be included in the calculations.

Quartiles

Organisations must also publish details of the positioning of male and female employees according to quartile pay bands.

Once the hourly pay rate for each employee has been established, the organisation should rank all the employees (male and female together) from lowest to highest paid. These employees should then be divided into four pay bands. These bands should be equal, but only as far as possible. If you have 426 employees an equal split would give you 106 employees in each quartile with two employees left over. The organisation could add the two employees to the mid quartiles so they would have 107 employees each.

Organisations then have to calculate the gender split in each quartile as a percentage.

Reporting

The figures produced should be published by the public authority on its own website in a way which is accessible to both employees and the public. The results must remain on the organisation's website for three years. The same information must also be uploaded onto the [government viewing website](#).

Organisations must register with the government viewing website before they can upload their reports. The Regulations do not require a CEO or other officer of a public authority to make an accompanying statement to support the data (as is required in the private sector regulations) although a narrative is a very useful means by which to explain the organisation's results.

Public authorities will be aware that they are likely to be under a great deal of media scrutiny regarding their gender pay gap and comparisons are likely to be made between public organisations. Where the gender pay gap is distorted, the narrative provides a means by which to offer an explanation to the public. Current staff and potential employees will no doubt be looking at the data, so organisations can use the narrative to explain the positive steps which are being taken to ensure that any gender pay gap is reduced.

Some of the best narratives currently online include a more in-depth analysis of pay and bonus than is required by the Regulations. For example, narratives contain information on the gender split amongst different pay grades, and how the pay gaps vary between these pay grades. This information helps an organisation to show which group of employees are having the greatest impact on the average figures, which is a useful tool in identifying where efforts to address inequality need to be focussed.

Many NHS organisations are finding that the gender pay gap is minimal when medical staff are removed from the calculations. It is the inclusion of consultants which seems to have a significant impact on the figures. For those NHS Trusts where senior consultants are predominately male, this could be set out in the narrative together with steps which are being taken to improve diversity.

Positive steps to address imbalance

The narrative should be seen by organisations as a chance to set out the positive steps they are taking to tackle their gender pay gap. Some of the key steps may include:

- Training for staff – unconscious bias may still play a part in the gender pay gap. Organisations should be taking all steps necessary to ensure that staff understand their responsibilities under the Equality Act 2010 and that fair and non-discriminatory practices are followed. Organisations may wish to review the diversity training which they offer and take the introduction of the Regulations as an opportunity to roll out training amongst staff.

- Flexible working – many organisations see flexible working for all staff, not only women, as the key to equality and closing the gender pay gap. Organisations should look carefully at their approach to flexible working for all staff, including senior staff and medics, in order to establish whether more can be done to improve flexible working.
- Encouraging more women to apply for bonuses – the CEAs are proving to be a significant factor in the gender bonus gap between men and women. As applications for CEAs are open to all, organisations should be looking at why more men than women are successful in being awarded a CEA. Where there is a lack of applications from female consultants, awareness should be raised amongst the workforce to encourage applications. In one narrative, an NHS Trust has said that it has taken the step of writing to all female doctors highlighting the CEAs and offering support in making applications.
- Establishing working groups to discuss why there are higher proportions of women in the lower quartiles and lower proportions in the higher quartiles. Organisations should provide support for women’s network groups, which should be open to all staff. Networks help to hold leadership teams to account on gender equality issues. Working groups can also help to encourage career development for women by offering training and encouragement through a support network.

Enforcement

When the Regulations were first introduced, enforcement was to be via a system of ‘naming and shaming’ by the Equality and Human Rights Commission (EHRC). In December 2017, the EHRC published an enforcement guidance document which sets out that they will initially focus their efforts on those employers where no information has been published but if they have capacity, the EHRC will look at those with inaccurate data.

The EHRC will carry out an assessment, which may involve requiring documents and requesting oral evidence from the organisation. An assessment could lead to the issue of a notice to comply. Where an organisation fails to comply with a notice, the EHRC may apply to a court for an order to comply, and failure to do so could lead to an unlimited fine.

Summary

Public authorities must publish their reports on their own website and on the government viewing platform by 30 March 2018.

We recommend that organisations spend time developing a narrative to accompany their reports. The figures published by themselves could lead to negative inferences being drawn. Through the narrative, an organisation can offer both an explanation for any gender pay gap but also list the positive steps it is taking to demonstrate that gender pay is a matter which is taken seriously and which the organisation is committed to addressing.