

Group Briefing

April 2019

Government's Gender Pay Gap Information Bill 2019 published

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Europe Women in Business Law Awards

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The Government has published the much-anticipated Gender Pay Gap Information Bill 2019. The Bill has been presented to Dáil Éireann where it now awaits Second Stage.

The Bill, once enacted, will amend the Employment Equality Acts 1998 to 2015 to require the Minister for Justice and Equality to make regulations requiring certain employers to publish information relating to the gender pay gap in their organisations. Employers will also be required to publish the measures taken by them to eliminate or reduce the gender pay gap.

Minister for Justice and Equality, Charlie Flanagan TD, said that the aim of the Bill is to provide transparency on the gender pay gap in organisations. It is his belief that firms which can report a low or non-existent pay gap will be at an advantage in recruiting future employees and that mandatory reporting will incentivise employers to take measures to address the issue insofar as they can.

BACKGROUND

As the law currently stands, no gender pay gap reporting obligations exist for Irish employers. However, the principle of equal pay for equal work has been enshrined in law for a long time. It formed part of the original constitutional architecture of the EU at the time of the adoption of the Treaty of Rome in 1957

and an equivalent provision is now contained in Article 157 of the Treaty on the Functioning of the European Union. The principle of equal pay for men and women, originally in the Equal Pay Directive enacted in 1975, is now contained in the Recast Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

In Irish law, the relevant legal protections in this area are the equal pay provisions of the Employment Equality Acts 1998 to 2015. These Acts provide employees with a cause of action if they can show that there is a person of the opposite sex in the same employment working for the same (or an associated) employer doing 'like work' and being paid more.

Anecdotally, it seems that equal pay claims do not arise very frequently before the Workplace Relations Commission and Labour Court. One could speculate that this is due to several factors. However, the requirement that an employee in this scenario would be able to point to an actual real-life comparator of the opposite sex who is performing

'like work' for higher pay necessarily presents an obstacle for potential claimants. In addition, employers have a defence to an equal pay claim under the Employment Equality Acts if they can demonstrate that the grounds for unequal pay are not related to any of the protected characteristics under the Acts.

Despite these longstanding legal prohibitions on discrimination in relation to pay, evidence suggests that significant differences remain in the rates of pay of men and women doing the same work. A recent EU survey found that only 26% of Europeans were aware of the legal guarantee of equal pay for equal work in their country. Nonetheless, the survey indicated that a clear majority were aware of the gender pay gap, with 69% of Europeans thinking that women are paid less than men. According to figures collected by the Central Statistics Office, in 2008 Ireland's gender pay gap stood at 17%. In 2016, Ireland's gender pay gap had reduced to 13.9%. However, a gender pay gap of 13.9% remains high, by any objective measure.

It was against this backdrop that the Minister for Justice announced, on International Women's Day this year, that the Cabinet had agreed the text of the Gender Pay Gap Information Bill, as part of a range of measures aimed at reducing the gender pay gap and promoting wage transparency. In addition to the work on the Bill, the Minister outlined the important steps being taken to address gender imbalances on State Boards. The Government also noted a Progress Report on the first year of the implementation of the National Strategy for Women and Girls 2017-2020 and the ratification of the Istanbul Convention on preventing and combating violence against women and domestic violence.

GENDER PAY GAP INFORMATION BILL 2019 - MEASURES THAT MUST BE CONTAINED IN THE REGULATIONS

The Gender Pay Gap Information Bill 2019 would require the Minister, as soon as reasonably practicable after the commencement of the legislation, to

make regulations requiring employers to publish information relating to the pay of their employees for the purpose of showing whether there are differences in such pay referable to gender and, if so, the size of such differences.

The information which must be published by employers under the regulations includes the following:

1. the difference between both the mean and the median¹ hourly pay of male and female employees;
2. the difference between both the mean and the median bonus pay of male and female employees;
3. the difference between both the mean and the median hourly pay of part-time male and female employees;
4. the difference between both the mean and the median bonus pay of part-time male and female employees;
5. the percentage of male and female employees who received bonuses and benefits in kind.

In addition, employers will be required to publish, concurrently with the above gender pay gap information, the reasons for such differences and the measures (if any) taken or proposed to be taken by the employer to eliminate or reduce such differences.

The regulations will only apply to employers with 250 or more employees in the first two years after introduction. In the third year, the requirements will also apply to employers with 150 or more employees. Thereafter, the requirements will apply to employers with 50 or more employees. The regulations will not apply to employers with fewer than 50 employees.

It is likely that a central website onto

¹ The mean, commonly known as the average, is calculated when you add up the wages of all employees and divide the figure by the number of employees. The median is the figure that falls at the midpoint of a range when all employees' wages are considered from smallest to largest. The median is a typically considered to be a more representative figure as the mean can be skewed by a handful of highly paid employees.

which employers will be required to upload their information will be established.

GENDER PAY GAP INFORMATION BILL 2019 - MEASURES THAT MAY BE CONTAINED IN THE REGULATIONS

In addition to the above requirements that must be contained in the regulations, the Bill provides that the regulations may, but are not required to, prescribe the following:

1. the class of employer, employee and pay to which the regulations apply;
2. how the number of employees that an employer has and pay is to be calculated; and
3. the form, manner in which information is to be published, along with the frequency of publication (which will not be required more than once per year).

The regulations may require the publication of the difference between both the mean and the median hourly pay of temporary male and female employees, the percentage of employees in each of the four (lower, lower middle, middle and upper) quartile pay bands who are male and female or the publication of information by reference to job classifications.

The regulations may also provide that, where the employer does not have access to the information it is required to publish but another person does have access to that information, the other person must give the information, or access thereto, to the employer to allow it to comply with its obligations under the regulations.

The regulations may require that employers ensure that personal data undergoes pseudonymisation on or before publication.

ENFORCEMENT OF GENDER PAY GAP REPORTING MEASURES

The Bill provides that the Minister may appoint designated officers to ensure that the gender pay gap information published by employers is accurate. It is envisaged that the designated officers

will have the power to investigate and prepare reports on matters specified by the Minister to ensure that employers are publishing accurate information. In carrying out an investigation under the regulations, the designated officers will have the power to enter premises, obtain information, require persons to provide information and produce records, and inspect and copy those records. If an employer fails to comply with a requirement of a designated officer in the course of an investigation, the designated officer may apply to the Circuit Court for an order requiring the employer to comply with the requirement. An employer, which fails to comply with a Circuit Court order, will be in contempt of that Court.

An employee who claims that his/her employer has failed to comply with the requirement to publish gender pay gap information may make a complaint to the Workplace Relations Commission. The Workplace Relations Commission will investigate the complaint if it is satisfied that there is a *prime facie* case warranting investigation. If the Workplace Relations Commission upholds the complaint, it may order the employer to take a specified course of action to comply with its gender pay gap reporting obligations. This is the only remedy that may be ordered.

There is no provision for the payment of compensation to the employee or for a fine to be imposed.

The Bill also provides that where the Irish Human Rights and Equality Commission is satisfied that it has reasonable grounds for believing that an employer has failed to comply with the requirement to publish gender pay gap information, as provided for in the regulations, it may apply to the Circuit Court for an order requiring the employer to comply. Finally, the Irish Human Rights and Equality Commission may itself carry out, or invite a particular undertaking, group of undertakings or the undertakings making up a particular industry or sector, to carry out an equality review or prepare and implement an equality action plan. It will be for the Irish Human Rights and Equality Commission to decide whether to exercise these powers following a request by the Minister.

CONCLUSION

While the publication of the Bill is welcome, coming a number of months after the publication of the General Scheme of the Bill just before the Dáil Éireann summer break last year, the requirement that the Minister makes

regulations to provide for gender pay gap reporting means that the detail of the proposals is not yet known. It will be for the regulations to set out the form which publication of gender pay gap information must take and the manner in which compliance with the obligations contained in the Bill will be achieved.

The Government has indicated that this legislation may come into effect later this year and apply to employers (at least those with 250 or more employees) from 2020 or 2021 onwards. Given this relatively short lead in time, we recommend that employers take steps now to establish whether gender pay gaps exist in their organisations and consider the steps that they can take to reduce/eliminate a gender pay gap ahead of time.

If you require further information or assistance in relation to the gender pay gap reporting obligations contained in the Bill, please contact any member of the Employment Law Group or your usual Arthur Cox contact who will be able to assist.

We will keep you up to date with developments as the Gender Pay Gap Information Bill 2019 moves through the Houses of the Oireachtas.

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