

Addleshaw Goddard LLP

Response to Mandatory Gender Pay Gap Consultation

What, if any, modifications should be made to these draft regulations? To inform our consideration of any proposed modification(s), please explain your response and provide supporting evidence where appropriate.

This response represents the combined feedback we have received from a selection of our clients on the draft regulations. These clients wished to submit their views on an anonymous basis. The response does not represent the views of Addleshaw Goddard LLP qua employer.

1. **Regulation 1:** the definition of "gross hourly rate of pay" is defined as the weekly basic paid hours for each relevant employee. Clarification is needed as to the meaning of basic paid hours for salaried workers. Is the intention that the relevant hours figure is: (i) that contained in the contract of employment; or (ii) the actual number of hours worked?
2. **Regulation 1:** the definition of "relevant employee" refers to persons who ordinarily work in Great Britain and whose contract of employment is governed by UK legislation. Clarification is required on two points. First, what is the test for determining whether an employee is "ordinarily working in Great Britain"? Second, are the regulations intended to cover employees in the narrow sense only or does the wider definition of employment as per section 83 of the Equality Act 2010 apply? The latter would bring workers and some self-employed contractors into scope. We have been told by the GEO that the intention is that the wider s.83 Equality Act 2010 definition will apply. This is not clear on the face of the regulations and, indeed, there has been confusion on this point in some of the commentary we have read. Our clients' preference would be for the narrower definition to apply (i.e. genuine employees) only. There are concerns that gathering the appropriate data for self-employed contractors will be a particularly difficult task.
3. **Regulation 1:** the definition of "relevant employer" means a person who has 250 or more employees on the relevant date. This suggests that where a group of companies has different legal entities with 250 or more employees engaged in each, they are required to conduct separate pay gap analyses and produce multiple pay gap figures. Our clients would prefer group companies to be given the option of either reporting: (i) individual figures per entity; or (ii) globally for the whole group. Our clients consider that a global figure would be a more useful figure in many cases for the purposes of comparison between different employers within the same sector.
4. **Regulation 2:** on the definition of "pay" we have the following comments:
 - The inclusion of statutory maternity pay and statutory sick pay will negatively distort pay gap figures and we consider that notional salary should be used instead.
 - It is not clear why the value of salary sacrifice arrangements has been excluded. The recent EAT decision in *Peninsula Business Services v Donaldson UKEAT/0249/15/DM* has confirmed that salary sacrifice arrangements should be treated as remuneration (for the purposes of maternity leave) and that, properly analysed, a salary sacrifice scheme is a diversion of salary from the pay-packet to the voucher provider.
 - Redundancy payments are said to be excluded. What about other types of severance payments? The general consensus is that they should be excluded.
5. **Regulation 2:** on the definition of "bonus pay" we have the following comments:

- The definition refers to payments "received and earned". Does this include amounts that have been awarded and not yet paid and/or amounts that have been deferred?
 - How are long term incentive plans to be valued? There are various ways this can be done, none of which are straightforward. At Appendix 1 we attach a summary of the different alternatives and the problems with each. Clarity is required on what employers are expected to do.
6. **Regulation 6:** it is questionable how useful the statement of what proportion of male and female employees have received bonus payments will be. For example, if an employer pays an annual Christmas bonus to all employees of £100, then the figures would be 100%. This does not offer the insight which the regulations are seeking to provide. A better approach might be to ask for reporting on the proportion of men and women who received a bonus over a certain amount.
7. **Regulation 7:** the drafting in respect of the pay quartile information is unclear. Our view is that, as drafted, the regulations require an employer to identify their overall gross hourly pay range, divide this into equal quartiles, and then populate with numbers of male and female employees falling into each. However, we have seen other legal commentators describe the obligation as being one which requires the employer to divide their employee population into 4 equal quartiles, ranked according to pay. The revised regulations and guidance must clarify the intended approach.
8. **Regulation 8:** the requirement for a director (or equivalent) to state that the gender pay information is accurate will be challenging for large businesses where the statutory directors have many competing demands on their time. In order to be close enough to the information to be able to provide this statement, the director would need a detailed and time-consuming briefing. A more sensible way forward would be to allow the director the option to delegate this responsibility to another suitably senior person within the business (who may not be a statutory director).
9. **Regulation 9:** if the employer does not have a website in the United Kingdom how are they to report their gender pay information?

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Appendix 1

Gender Pay Reporting – Valuing awards under a Long-Term Incentive Plan (LTIP)

There is no perfect way to value an LTIP award. The table below sets out the potential ways in which this can be done.

Valuation method	Explanation of method	Main problems with method	Points to note
Face value	<p>Valuation at grant.</p> <p>Multiply the number of share subject to the award by the share price on the date of grant.</p>	<p>Doesn't take into account any option price payable on exercise.</p> <p>Assumes that the award will vest in full, whereas in reality vesting will be subject to performance conditions and continued employment.</p> <p>Doesn't take into account the fact that the award may be subject to malus pre-vesting and clawback post-vesting.</p> <p>The share price at the date of vesting may be considerable more (or less) than the share price at the date of grant.</p>	<p>This is the method used to value awards for the purposes of disclosing scheme interests awarded to directors of listed companies during a financial year. However, there is an opportunity in the notes to the "scheme interest awarded" table to address some of the issues outlined in the previous column.</p> <p>This may be the method used to value awards for the purposes of the "bonus cap" for those financial services firms subject to the Remuneration Code.</p>
Fair value	<p>Valuation at grant.</p> <p>An attempt to calculate the real or actual value of a share option at the time it is granted.</p> <p>Includes an assessment of market-based performance conditions being met and any option price payable is taken into account.</p> <p>As a very rough "rule of thumb" the fair value of an award is likely to be about 25% of its face value.</p>	<p>Assessing the fair value of a share award is complicated. Companies must usually use an option pricing model to assess fair value.</p> <p>The most commonly used option pricing models are the "Binomial Method" (a financial option pricing model to estimate the expected value of share-based payments using the variables of dividend yield, exercise period, exercise price, market price, risk free rate of return and share price volatility) and the "Monte Carlo Simulation" (a statistical simulation technique which can be used</p>	<p>This method is used to account for share awards. Accounting standards require that the fair value of a share award is taken as an expense in a company's profit and loss account.</p> <p>This may be the method used to value awards for the purposes of the "bonus cap" for those financial services firms subject to the Remuneration Code.</p>

		as a method of determining the value of share options or awards under an employee share incentive arrangement. It is most commonly used to value awards with a market-based performance condition such as total shareholder return).	
Market value	<p>Valuation at vesting.</p> <p>Multiply the number of shares that vest by the share price on the date of vesting less any option price payable.</p>	<p>The share price at the date of vesting may be more (or less) than the share price at the date of exercise if these events are not simultaneous.</p> <p>Doesn't take into account the fact that the award may be subject to clawback post-vesting.</p>	<p>Valuing the award at the date of vesting is the method used to value awards for the purposes of disclosing the value of share awards in the "single total figure" pay table for directors of listed companies during a financial year.</p> <p>A variation to this method would be to value the award at exercise (rather than at vesting). Taking into account only awards that have been exercised and that therefore have "real" (as opposed to only potential) value for the employee, would best reflect what an individual has actually been received as "pay" during the financial year.</p> <p>This is only an issue where awards are structured as options as opposed to conditional awards as conditional awards vest automatically and so there is no exercise date.</p>