



European Employment Law ALERT

Compulsory Equal Pay Audits to Reduce the Gender Pay Gap

By Peter Talibart and Tessa Cranfield

As of 1 October 2014, UK employers have been required to carry out an equal pay audit if they lose an equal pay or gender discrimination pay claim in the UK Employment Tribunal. Publishing pay information runs the risk of fuelling further litigation. It also carries wider reputational risk, as employers will be required to publish the audit results on their website.

When must an Employment Tribunal order an equal pay audit?

The Employment Tribunal must order an equal pay audit where an employer loses an equal pay or pay-related gender discrimination claim brought after 1 October 2014. This covers disputes over contractual terms on pay, bonuses, holiday pay, sick pay, overtime and pension benefits, as well as non-contractual terms such as discretionary bonuses.

Key Points

The content of the audit is for the individual Employment Tribunal to decide, but it must identify any differences in pay between men and women, the reasons for those differences and contain a plan to address any unjustified disparities.

The Tribunal has discretion to decide key audit parameters, such as which employees should be included (which can be a broader group than were included in the original claim), how long a period the audit should cover and how long the employer has to complete it (which must be at least three months).

Once complete, the Tribunal reviews the audit and can order it to be re-worked if it is not satisfied. Once completed, the employer must publish the audit on its website for not less than three years. The employer must also inform the employees covered by the audit, and let them know where they can obtain a copy. The scope for further litigation is clear.

Failure to carry out the audit can trigger a penalty of £5,000, but (more seriously) will be held against employers in any future gender pay litigation. However, the Tribunal does not have any power to check whether the employer's plan to address equal pay breaches has been put into effect or to penalise an employer for failing to do so.

Exemptions

Employers will be exempt from carrying out an equal pay audit if they fall into one of the following categories:

- A relevant audit has already been carried out, within the three years prior to the Employment Tribunal's judgment.
- It is already clear, without an audit, whether or not any action is needed to prevent breaches. This would include situations where jobs are clearly graded and this information is open to all employees.
- There has been a "one off" breach and there is no reason to think there will be others.
- Publication would breach other legal obligations. There may be some scope here to argue conflict with Data Protection compliance, but the Tribunal will take a narrow view.
- There are also exemptions for start-ups (operating for less than one year at the time the claim is made) and small businesses (employing fewer than 10 full-time employees or the equivalent).

Practical impact for employers

It is important to remember that an equal pay audit can only be ordered once an employer has lost an equal pay or sex discrimination case. In practice, most employers would look to settle strong claims. The new risk of an equal pay audit would be an extra reason to do so.

In anticipation, some employers are choosing to review their pay practices on a proactive basis. A review can range from an informal "sense check" by HR, to a full equal pay audit by one of the various UK external consultancies specialising in this field. Only a full audit, with an action plan to address pay disparities, would get "credit" in the Tribunal for purposes of and prevent a compulsory audit in the event of successful litigation. On the downside, the results of any audit would be available to litigants in any future litigation, unless prepared for the purposes of review by internal or external counsel, and subject to attorney/client privilege.

More changes on the horizon?

UK legislation allows the Government to bring in legislation requiring employers with 250 or more employees to publish information about the gender pay gap in their organisation, whether or not they are subject to litigation. There are no immediate signs that this legislation will be brought in, but gender pay remains a hot topic in the UK.

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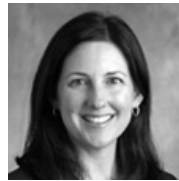
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