



European Employment Law ALERT

Europe's Gender Pay Gap Rules Gather Momentum

By Peter Talibart, Laurence Harvey Wood, Tessa Cranfield, William Hampshire

Europe has long-standing legislation requiring that men and women should receive equal pay for equal work. Despite this, the gender pay gap in the EU still averages around 16%. An accelerating number of initiatives and proposals have been put forward to tackle this, ranging from voluntary measures to financial sanctions for employers. This alert covers the most recent developments across Europe with a particular focus on France.

France: New Rules on Eliminating Gender Pay Gaps

In September 2018, France adopted legislation creating a new obligation for employers to publish information each year on gender pay gaps and actions taken in order to address them. The obligation applies to companies with at least 50 employees. If the employer's equal pay rating (measured by reference to certain "indicators" to be defined by decree) is below a certain level, it must negotiate and adopt suitable corrective measures. If its equal pay rating is below the required level for three consecutive years, a financial penalty applies.

The French government has now issued a decree dated 8 January 2019 setting out detailed rules on how gender pay gaps will be measured for these purposes.

Methodology for Measuring Pay Gaps

The five "indicators" to be used - and their respective weighting - are as follows:

Indicator	Weighting
The pay gap (expressed as a percentage) between men and women, based on their respective average FTE remuneration within each group of equivalent jobs (split out into four age brackets)	40%
The difference between the respective proportions of men and women to have received an individual pay rise (other than as a result of a promotion)	20%
The difference between the respective proportions of men and women to have received a promotion	15%
Whether or not the employer has complied in all cases with the existing legal obligation to give a pay rise to employees when they return from maternity leave, if pay rises were granted during their maternity leave	15%
The proportion of men and women among the 10 most highly paid employees within the company	10%

For companies with no more than 250 employees, a simpler but broadly similar set of indicators applies.

The calculation and weighting methodology set out in the decree gives rise to an overall score out of 100 points. If the company scores below 75 points for three consecutive years, a financial penalty of up to 1% of the company's annual payroll bill can apply.

For purposes of calculating the gender pay gap (which is the most heavily weighted of the five indicators, carrying 40 of the 100 available points):

- The workforce must be divided into four age brackets: below 30, age 30-39, age 40-49 and at least 50. Within each age bracket, the employees must then be divided up into groups of "equivalent jobs". It is up to the employer to decide which classification system to use in order to divide the employees into groups, but it must consult the works council on the proposed system if it does not simply use the four statutory "socio-economic categories" (i.e. labourers, blue-collar employees, technicians/supervisors, engineers/executives). Further, it must use those four default categories if the alternative classification system proposed by the employer would make it impossible to calculate the gender pay gap in accordance with the requirements of the decree (see below).
- Almost all forms of remuneration must be taken into account (including variable pay and benefits in kind). Termination payments, overtime pay and statutory profit share are excluded.
- In smaller companies, it may be impossible to calculate the gender pay gap. For example, the decree requires that each group of employees performing equivalent jobs (within each age bracket) must contain at least three women and three men. If a group of employees does not meet that requirement, the group must be excluded from the calculations. And if the total number of employees included in the calculations is below 40% of the workforce, the decree states that the gender pay gap cannot be calculated.

Timing of the Publication and Information Obligations

Companies with at least 1,000 employees must publish their first gender pay score on 1 March 2019 at latest (in respect of calendar year 2018, or another 12-month period if the company so decides). Companies with fewer than 1,000 employees have until 1 September 2019 (or 1 March 2020 for companies with 50 to 250 employees).

The annual score must be published on the company's website. In parallel, the employer must provide a detailed breakdown and explanation of the results to its works council, and to the labour authorities.

Financial Penalty

The financial penalty would apply if the local labour inspector notices that the company has scored below 75 in three consecutive years and reports the matter to the regional employment authority (the "*Direccte*"). The *Direccte* then decides whether to impose a financial penalty or give the company an additional period of up to 12 months to comply. If a financial penalty is imposed, then in determining the amount, the *Direccte* must take into account the action taken by the company and any reasons for the breach cited by it (e.g. economic difficulties).

Developments Elsewhere in Europe

A number of similar gender pay gap reporting measures have been implemented or are currently being considered elsewhere in Europe. Three countries tackling the issue by way of mandatory reporting are the UK, Ireland and Portugal:

United Kingdom

Since last year, mandatory gender pay gap reporting applies in the UK. This requires employers with at least 250 employees to publish the average pay and bonus gap between their male and female employees. There are currently no prescribed targets for employers to meet and no direct penalties for non-compliance, although discussion is underway as to whether there should be tougher enforcement and penalties for employers. Amongst the options under consideration include publishing league tables showing employers' reported gender pay gaps, establishing a database of compliant employers, and potentially issuing fines.

There are new proposals to introduce a similar mandatory pay reporting obligation in respect to ethnicity and, under similar rules, listed companies with an average number of UK employees above 250 in their group, will need to publish information on the ratios between CEO and average staff pay.

Ireland

Mandatory reporting legislation is also being considered in Ireland. The proposal is similar to the UK in requiring companies to publish information on their differences in average hourly and bonus pay for men and women (including mean and median), the proportions of men and women receiving bonuses and the number of men and women in each of four pay bands.

However, the proposed legislation goes further than the UK, both in terms of the rules themselves and the numbers of employers it will apply to. The pay data will need to be broken down by reference to temporary employees and the proportions of male and female employees who received benefits in kind. There are also tougher enforcement measures envisaged, including potentially fines of €5000 or a right for the Irish Human Rights and Equality Commission, and individuals, to compel an employer to comply. Employers with at least 50 employees will be caught (potentially after a 3 year staging period, which is still under discussion - this would start with a threshold 250 employees initially, falling to 150 and then 50 employees over the next three years). The aim is for the legislation to come into force this year, but it is not clear whether this will be achieved.

Portugal

From February 2019 employers in Portugal with 250 or more employees must submit an annual assessment of the salaries of their male and female employees to a government agency. If wage inequalities are detected, the employer will need to justify salary differences or implement an action plan for eliminating any unjustified gaps during the coming year. Gender pay differences that are not corrected or justified will be presumed to be discriminatory and companies will face penalties for non-compliance.

Other recent initiatives and proposals in Europe include rules to make it easier for individuals to request information to assess how their salaries compare with employees of the opposite gender (in Netherlands and Germany) at one end of the range, compared with mandatory external audits to prove equal pay (for employers in Iceland).

Looking Ahead

Ensuring that men and women receive equal pay for equal work is just one aspect of addressing the gender imbalances that exist in the workplace, and there is recognition that women face other obstacles, such as workplace culture and family and caring responsibilities, making it more difficult to progress to the most senior positions.

There is acceptance at a European level that current legislation is not effective and mandatory gender pay reporting is a key development and sits alongside other proposals such as promoting the sharing of childcare responsibilities between men and women and requiring companies to increase the number of women on their boards. We will keep clients updated as we expect more significant developments to follow.

If you would like further information, please contact [Peter Talibart](mailto:ptalibart@seyfarth.com) at ptalibart@seyfarth.com, [Laurence Harvey Wood](mailto:lharveywood@seyfarth.com) at lharveywood@seyfarth.com, [Tessa Cranfield](mailto:tcranfield@seyfarth.com) at tcranfield@seyfarth.com, or [William Hampshire](mailto:whampshire@seyfarth.com) at whampshire@seyfarth.com.

www.seyfarth.com



Attorney Advertising. This European Employment Law Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP European Employment Law ALERT | January 18, 2019

©2019 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.