

KIRKLAND ALERT

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New UK Regulations in Force on 6 April: Behavioural Change Tool or Compliance Burden?

Two new 'ethical compliance' reporting obligations are due to come into force in the UK next month. This represents the next phase in the UK government's so-called 'behavioural change' agenda and follows the introduction of a modern slavery and human trafficking reporting obligation last year.

The new reporting requirements reflect a clear direction of travel; the UK government is currently consulting on a number of corporate governance reform proposals, which include plans to strengthen the wider stakeholder voice at boardroom level and to raise corporate governance standards for large companies through enhanced narrative reporting.

Whilst this is likely to be of most direct application to large UK companies, financial sponsors will have an obvious interest in their portfolio groups' compliance with these new ethical reporting obligations.

UK gender pay gap reporting

Summary

New regulations will require UK employers with more than 250 employees to collect gender pay gap metrics as at the 'snapshot' date of 5 April each year (beginning as at 5 April 2017). The data must then be published annually (by 4 April 2018, for the first reporting cycle).

Background

The gender pay gap is a measurement of the difference between men and women's average earnings. According to the UK Office for National Statistics, male employees are currently paid around 18% more, overall, than female employees in the UK.

Although some practitioners have expressed doubts that they will bring about meaningful change, the new regulations are designed to narrow this gap by requiring relevant organisations to engage — at least notionally — with gender pay differences.

Which entities are within the scope of the new obligations?

UK employers with more than 250 employees on 5 April 2017 will be subject to the new reporting obligations, wherever those employees are based and whether or not they are working under a UK law-governed contract. There is no requirement to aggregate employees across corporate groups for qualification purposes — for example, if two group companies each have 249 employees, neither will be subject to the reporting obligation.

UK employers with more than 250 employees on 5 April 2017 will need to publish gender pay gap metrics by 4 April 2018.

What information needs to be published?

For the 2016–2017 reporting cycle, the following information must be published on the employer’s website and also uploaded to a web-based government portal, at any time after 6 April 2017 and by 4 April 2018 at the latest:

- The mean and median hourly ordinary pay gap as between male and female employees as at 5 April 2017.
- The number of male and female employees who were paid a bonus in the period between 6 April 2016 and 5 April 2017.
- The annual mean and median bonus gap as between male and female employees for the period from 6 April 2016 to 5 April 2017.
- The number of male and female employees in each quartile of the workforce as at 5 April 2017. Broadly, this involves dividing the workforce into four pay bands ranked according to their hourly rate of ordinary pay, and is intended to show the gender pay gap at different levels of seniority.

Employers can also opt to publish an accompanying narrative in order to explain, or provide more context for, their published data.

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What should relevant entities be doing *now*?

Although the first long stop reporting deadline is over a year away, the data reported on will be historic. Employers should therefore be working towards assessing the number of employees they will have as at the 5 April 2017 ‘snapshot date’ (for determining qualification into the 2016–2017 reporting cycle) and also considering whether they have appropriate payroll and accounting systems in place to pull the required data by reference to *gender*.

There are a number of drafting nuances in the regulations, but broadly:

- employees (including some self-employed consultants and independent contractors) are within scope, and partners and members of limited liability partnerships are not;
- ordinary pay includes basic pay, allowances (including cash benefits, such as car allowances) and paid leave, but excludes overtime, statutory maternity or sick pay and termination payments; and
- bonus pay includes remuneration in the form of securities, options, profit share and commission.

There is still time for in-scope employers to carry out a pre-5 April 2017 audit, in conjunction with external legal counsel (which would provide the protection of legal privilege). This could provide the impetus for addressing any identified risks proactively or at least set in train a dialogue around how best to frame the accompanying narrative.

What are the consequences of disclosing gender pay discrepancies?

While the legislation is relatively toothless in strict legal enforcement terms, there

are obvious reputational implications — and increased discrimination litigation risks — where gender pay differences are publicly disclosed. Although there is a risk that publicising a significant gender pay gap could invite unwelcome attention, as mentioned above, the reported data can be contextualised — and mitigated — with an explanatory narrative.

Reporting on payment practices

Summary

Proposed new regulations will require large UK companies and limited liability partnerships to publicly disclose their invoice payment practices, for financial years beginning on or after 6 April 2017. The objective is to subject relevant businesses to increased public scrutiny and help small businesses make better informed decisions about their contract counterparties.

Which entities are within the scope of the new obligation?

UK-incorporated and registered companies and limited liability partnerships will be subject to the new reporting obligation if, on their last **two** consecutive annual balance sheet dates (or, last balance sheet date, if they are only in their second financial year), they satisfied at least two of the three qualifying criteria below:

- annual turnover of £36 million or more;
- balance sheet total of £18 million or more;
- 250 or more employees.

The obligations will not apply to any entity in its first financial year.

What information needs to be published?

The reporting obligation will apply in relation to business-to-business contracts (with the exception of contracts for financial services) involving goods, services or intangible goods. Broadly speaking, entities will only need to report in relation to contracts with a 'significant connection with the UK'.

The report must set out the prescribed information for each reporting period — including a description of the entity's standard payment terms, maximum payment period, the average number of days taken to pay an invoice, the percentage (by invoices paid, not value) of payments made within 30 and 31-60 days of invoice and the percentage of invoices not paid by their due date.

When and where does the information need to be published?

Reports will need to be published via a web-based (publicly accessible) government portal every six months. The first report will be due 30 days after the end of the first six months of the financial year, and the second will be due 30 days after the financial year-end. In rare cases where a relevant entity's financial year is significantly shorter or longer than 12 months, it will be required to report (respectively) once or three times during that financial year.

Large UK businesses will need to publicly disclose their invoice payment practices, for financial years beginning on or after 6 April 2017.

How will the obligations apply in a group context?

Reporting will be at an individual entity level, i.e., each UK entity in scope will be required to publish a report on its own individual payment practices, rather than reporting consolidated group information.

To avoid duplication, parent undertakings of 'large' groups will only have to report if they also meet at least two of the qualifying criteria on a standalone basis.

In-scope businesses should review their invoice payment practices and consider whether their existing processes are fit for purpose.

What should relevant entities be doing *now*?

In-scope businesses should review their invoice payment practices and consider whether their existing processes are fit for purpose — for example, to capture the date on which invoices are *received*.

What are the consequences of breach?

Failure to report and reporting materially false information will both be criminal offences.

Conclusion

Financial sponsors will be well aware of the reputational implications surrounding ethical compliance and reporting, and may wish to forward this briefing to their relevant portfolio group companies.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland author or your regular Kirkland contact.

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