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New Pay Transparency Directive to Require EU-wide Gender Pay Gap Reporting and Remediation

The EU Pay Transparency Directive was recently adopted. The Directive seeks to close the gender pay gap among workers in the European Union. As noted in the Directive, the EU's gender pay gap stood at 13% in 2020, having decreased only minimally over the preceding 10 years. In this Alert, we provide an overview of the Directive's reporting and pay gap remediation requirements as well as selected other aspects of the Directive.

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The right to equal pay between women and men for equal work or work of equal value is enshrined in Article 157 of the Treaty on the Functioning of the European Union and in the EU's 2006 Equal Pay Directive. However, the execution and enforcement of this right in practice has proven to be challenging. In 2020, an evaluation of the Equal Pay Directive found that greater transparency in pay systems would empower both workers and employers to better protect the right to equal pay.

As used in the Directive:

- **“Work of equal value”** means work that is determined to be of equal value in accordance with non-discriminatory and objective gender-neutral criteria.
- **“Non-discriminatory and objective gender-neutral criteria”** includes skills, effort, responsibility, working conditions and any other factors that are relevant to the specific job or position.
- **“Gender pay gap”** means the difference in average pay levels between female and male workers of an employer expressed as a percentage of the average pay level of male workers.
- **“Pay level”** means the gross annual pay and the corresponding gross hourly pay.

Implementation of the Directive

The Directive itself does not create binding obligations on companies. Those will be created by the EU member states' laws to be adopted pursuant to the Directive (for brevity, in this Alert, we refer to the Directive rather than to those individual member state laws).

Member states have three years to transpose the Directive into national law (i.e., until June 7, 2026). Those national laws must be at least as favorable to workers as the provisions laid out in the Directive.

Scope of the Directive

The Directive applies broadly to private employers, but some of the reporting obligations apply only to employers that have a threshold number of employees, as discussed later in this Alert.

Also as discussed in this Alert, the Directive requires member states to put in place protections for workers who have an employment contract or employment relationship, which may include – depending on the laws of the applicable EU member state – part-time workers, contract workers, domestic workers, intermittent workers, on-demand workers, trainees and apprentices. The Directive also creates pay transparency rights for job applicants, as discussed below.

Pay Transparency Reporting

Subject Employers and Timing

Transparency reporting requirements will depend on the employer's number of workers.

- Employers with 250 or more workers must provide their first report by June 7, 2027 (relating to 2026 data). They will need to make subsequent reports annually thereafter.
- Employers with 150 to 249 workers must also provide their first report by June 7, 2027. However, they only need to make subsequent reports every three years thereafter.
- Employers with 100 to 149 workers will be required to provide their first report by June 7, 2031 (relating to 2030 data). They also will need to make subsequent reports every three years thereafter.
- Employers with fewer than 100 workers will not have a reporting requirement under the Directive, although they may voluntarily report. Member states may, however, elect to require employers with fewer than 100 workers to provide pay transparency information.

The long implementation period is intended to allow employers sufficient time to ensure that pay practices are not discriminatory when reporting begins.

Data to Be Reported

Under the Directive, employers will need to compile the following information:

- The gender pay gap;
- The gender pay gap in complementary or variable components;
- The median gender pay gap;
 - The “**median gender pay gap**” is defined as the difference between the median pay level of female and median pay level of male workers of an employer expressed as a percentage of the median pay level of male workers.
- The median gender pay gap in complementary or variable components;
- The proportion of female and male workers receiving complementary or variable components;
- The proportion of female and male workers in each quartile pay band; and
 - A “**quartile pay band**” is each of four equal groups of workers, bands into which workers are divided according to their pay level, from the lowest to the highest.
- The gender pay gap between workers by category, broken down by ordinary basic wage or salary and complementary or variable components.

The accuracy of the information must be confirmed by the employer's management after consulting workers' representatives. Workers' representatives also must have access to the methodologies applied by the employer.

Under the Directive, employers may choose to publish required information on their website or make it otherwise publicly available. Employers also will need to provide the information to the appropriate member state's monitoring authority for publication in a manner that allows for comparison between employers, sectors and regions of the member state. Data from the last four years will be required to be made publicly available by the member states' monitoring authorities.

The gender pay gap between workers by category broken down by ordinary basic wage or salary and complementary or variable components is not required to be published. That information instead must be provided to workers and workers' representatives. Upon request, employers also will need to provide this information, and similar data from the past four years, to the member state labor inspectorate and the equality body.

Workers, workers' representatives, labor inspectorates and equality bodies also will have the right to ask employers for clarifications and additional details regarding any of the reported data, including explanations concerning any gender pay difference. Employers will need to respond to those requests within a reasonable time period by providing a substantiated reply.

Addressing Gender Pay Differences

If gender pay differences are not justified on the basis of objective gender-neutral criteria, employers will be required to remedy the situation with a reasonable period of time in close cooperation with workers' representatives, the labor inspectorate and/or the equality body.

Although employers have time before reporting begins, they should consider assessing whether there are gender pay gaps that will need to be remediated so that appropriate remedial steps can be taken.

Joint Pay Assessment

If an employer's pay reporting demonstrates a gender pay gap, it may be required to conduct a joint pay assessment. Joint pay assessments are meant to identify, remedy and prevent differences in pay that exist between female and male workers. A joint pay assessment will be required if each of the following conditions are met:

- Pay reporting demonstrates a difference in the average pay level between female and male workers of at least 5% in any category of workers;
 - **“Category of workers”** means workers performing the same work or work of equal value grouped in a non-arbitrary manner based on non-discriminatory and objective gender-neutral criteria by the workers' employer and, where applicable, in cooperation with the workers' representatives in accordance with national law and/or practice.
- The employer has not justified the difference in the average pay level on the basis of objective gender-neutral criteria; and
- The employer has not remedied the unjustified difference in average pay level within six months of the date of submission of its pay reporting.

A joint pay assessment must include:

- An analysis of the proportion of female and male workers in each category of workers;
- Information on average female and male workers' pay levels and complementary or variable components for each category of workers;
- Any differences in the average pay levels between female and male workers in each category of workers;
- The reasons for the differences in average pay levels, on the basis of objective gender-neutral criteria, if any, as established jointly by the workers' representatives and the employer;
- The proportion of female and male workers who benefited from an improvement in pay following their return from maternity or paternity leave, parental leave or career leave, if the improvement occurred in the relevant category of workers during the period in which the leave was taken;
- Measures to address differences in pay if they are not justified on the basis of objective gender-neutral criteria; and
- An evaluation of the effectiveness of measures from previous joint pay assessments.

Employers will need to make the joint pay assessment available to workers and workers' representatives as well as to the appropriate member state's monitoring authority. Upon request, employers also must make the joint pay assessment available to the member state labor inspectorate and equality body.

Employers will be required to remedy unjustified differences in pay in cooperation with the workers' representatives and potentially the member state's labor inspectorate or equality body. Remediation efforts will be required to include an analysis of the existing job evaluation and classification systems – or the establishment of those systems if they do not already exist – to ensure that they do not allow for direct or indirect pay discrimination due to sex.

Worker and Job Applicant Transparency Rights and Protections

The Directive provides current and potential employees with various pay transparency rights and other protections.

Pay Information Prior to Employment

Job applicants will have the right to pay information from a prospective employer during the application process. Employers must provide information about the initial pay or its range (which must be based on objective gender-neutral criteria). If applicable, employers also must provide the relevant provisions of the collective agreement applicable to the position. This information must be provided in a manner that allows for an informed negotiation on pay, such as inclusion in the job posting prior to an interview.

Pay History Inquiries

Employers will be prohibited from asking applicants about their pay history during the application process.

Gender-Neutral Job Vacancy Notices and Recruitment Processes

Employers will be required to ensure that job vacancy notices and job titles are gender-neutral and that recruitment processes are led in a non-discriminatory manner.

Pay Criteria Information

Employers will be required to make available the criteria that are used to determine workers' pay, pay levels and pay progression. The criteria used must be objective and gender neutral.

Member states may exempt employers with fewer than 50 workers from providing pay progression information.

Pay Level Information

Through their workers' representatives and potentially the equality body, workers will have the right to request information on their individual pay level and the average pay levels, broken down by sex, for categories of workers performing the same work or work of equal value. Employers will need to communicate to workers this right, and how to assert it, on an annual basis.

Employers will be required to provide the requested information within a reasonable amount of time; namely, within two months of the request. If the information received is inaccurate or incomplete, workers will have the right to request, personally or through their workers' representatives, additional and reasonable clarifications and details regarding the data provided and to receive a substantiated reply.

Pay Disclosure by Workers

Workers cannot be prevented from disclosing their pay for the purpose of enforcing the equal pay principle. Member states will be required to put in place measures that prohibit contractual restrictions on pay disclosure by workers.

Remedies and Enforcement

The Directive contemplates remedies when a worker's right to equal pay has been infringed. These include the right to compensation or reparation and injunctive relief.

A significant change to many member states' national laws will be a shift in the burden of proof in equal pay claims. Under the Directive, member state legislation generally will be required to provide that, if a worker makes a claim that their right to equal pay has been infringed, the burden of proof will fall on the employer to prove that no direct or indirect pay discrimination has occurred.

Member states also will be required to put in place effective, proportionate and dissuasive penalties for employers that violate rights and obligations relating to the principle of equal pay. The penalties must impose a legitimate deterrent for employers, including fines. Penalties also must take into account any relevant aggravating or mitigating factors, such as intersectional discrimination.

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