

BLP: LOOKING AHEAD

Key changes in employment law explained

16 July 2014

BLP BERWIN
LEIGHTON
PAISNER

Equal Pay Audits

On 19 June 2014, the Government published its response to the consultation on Equal Pay Audits together with the draft Equality Act 2010 (Equal Pay Audits) Regulations 2014. For equal pay claims presented on or after 1 October 2014, Employment Tribunals will have the power to order an employer to carry out an equal pay audit (EPA) where a finding has been made that the employer is guilty of sex discrimination in relation to pay. This could be either an equal pay claim or a dispute over a non-contractual payment, such as a bonus.

Draft Regulations – Key points:

When must a Tribunal order an EPA to be carried out? Subject to the exceptions noted below, a Tribunal must order an employer to undertake an EPA where it has found that the employer has committed an “equal pay breach” i.e. a breach of an equality clause, or of legislation prohibiting sex discrimination in relation to pay.

What are the exceptions? Tribunals must not order an EPA where:

- the employer has already completed a suitable EPA within the last three years;
- it is clear, without an EPA, whether action is required to prevent equal pay breaches occurring or continuing;
- the breach found by the Tribunal gives no reason to suspect that there may be other equal pay breaches within the employer’s organisation;
- the Tribunal considers that the disadvantages of an EPA outweigh its benefits.

Content of an EPA order: An order must specify the employees to be covered by the audit; the period of time to which the audit must relate, and the date by which the employer must comply (being no less than 3 months from the date of the order).

Content of an employer’s EPA: Under the draft regulations, an equal pay audit must:

- include relevant gender pay information relating to those employees described by the Tribunal;
- identify any differences in pay between men and women and the reasons for those differences;
- include the reasons for any potential equal pay breach identified by the audit; and state the employer’s plans to avoid equal pay breaches occurring or continuing.

Will the EPA be published? If after review (either on the papers or at a hearing) the Tribunal is satisfied with the EPA, in most cases the employer will be required to publish it on its website for three years and to inform the employees covered by the audit of where the audit can be viewed. The EPA must be published within 28 days of the date of the EPA order confirming it has satisfied the Tribunal's requirements. The only exception to this is where publication would breach a legal obligation (such as data protection obligations). It is envisaged that this exemption from publication will rarely apply).

Penalties for non-compliance: The draft regulations provide that the Tribunal may order a fine of up to £5,000 to be payable by an employer who fails to comply with an EPA order without a reasonable excuse. The fine can be imposed repeatedly if the employer continues to fail to comply with an EPA order. Clearly, the ramifications for an employer of not complying with equal pay obligations are likely to be further reaching – particularly if a number of employees are affected.

BLP Comment

- The risk, and associated potential cost, of an EPA being ordered in gender pay discrimination cases is likely to become a key strategic consideration for employers facing such claims, particularly given that in most cases the results will have to be made public. It is not clear whether the data collated in order to produce the EPA will be potentially subject to disclosure in any future proceedings.
- It is still not clear at this stage how the Tribunal will assess whether the disadvantages of ordering an EPA outweigh the benefits. It remains to be seen whether this will be an issue on which respondents will need to make legal submissions in the course of the hearing, or whether they will need to deal with it at an earlier stage, for example, in their ET3.
- The Government is not proposing to issue any further guidance on EPAs, referring employers instead to the existing guidance provided by the Equality and Human Rights Commission.
- Prudent employers may wish to explore the pay profile within their organisations, in order to ascertain now whether any legal or business risks exist. Identifying and remedying any areas of risk should help to minimise the possibility of equal pay claims and a compulsory, public EPA being ordered, over which the employer has no control.

For further information, please contact



Lisa Mayhew
Partner

T: +44 (0)20 3400 4628
lisa.mayhew@blplaw.com



Kate Novak
Senior Associate

T: +44 (0)20 3400 4323
kate.novak@blplaw.com

Getting in touch

If you would like to talk through your project or discuss solutions to your legal needs, please get in touch.

Berwin Leighton Paisner

Adelaide House, London Bridge,
London EC4R 9HA England

Lisa Mayhew

Tel: +44 (0)20 3400 4628
lisa.mayhew@blplaw.com

About BLP

Today's world demands clear, pragmatic legal advice that is grounded in commercial objectives. Our clients benefit not just from our excellence in technical quality, but also from our close understanding of the business realities and imperatives that they face.

Our achievements for clients are made possible by brilliant people. Prized for their legal talent and commercial focus, BLP lawyers are renowned for being personally committed to clients' success. Our approach has seen us win five Law Firm of the Year awards and three FT Innovative Lawyer awards.

With experience in over 70 legal disciplines and 130 countries, you will get the expertise, business insight and value-added thinking you need, wherever you need it.

Expertise

- Commercial
- Competition, EU and Trade
- Construction
- Corporate Finance
- Dispute Resolution
- Employment, Pensions and Incentives
- Finance
- Funds and Financial Services
- Intellectual Property
- Private Client
- Projects
- Real Estate
- Regulatory and Compliance
- Restructuring and Insolvency
- Tax

Clients and work in 130 countries, delivered via offices in:

Abu Dhabi, Berlin, Brussels, Dubai, Frankfurt, Hong Kong, London, Moscow, Paris and Singapore

www.blplaw.com