

Equality and Human Rights Commission

Closing the gap:

Enforcing the gender pay gap regulations

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Introduction

The Equality and Human Rights Commission ('the Commission') is the equality regulator with responsibility for enforcing the Equality Act 2010 (EA 2010) in accordance with its statutory duties as set out in the Equality Act 2006 (EA 2006). We are also a National Human Rights Institution and our remit covers the whole of Great Britain (England, Wales and Scotland), though we share our human rights remit in Scotland with the Scottish Commission for Human Rights. Our duties include reducing inequality, eliminating discrimination, promoting and protecting human rights.

All private and voluntary sector employers with 250 or more employees in England, Wales and Scotland must now publish information on their gender pay gap under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

All listed public sector employers with 250 or more employees in England must publish the same information under the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017.

Both sets of regulations are collectively referred to in this policy as the GPGR.

Private and voluntary sector employers must report the required pay gap information by 4 April 2018. Public sector employers in England must publish the required information by 30 March 2018. All employers covered by the GPGR must then respectively report by 30 March and 4 April in following years.

This policy summarises our intended approach to enforcement in order to bring about compliance with the GPGR.

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) and the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 place different gender pay gap reporting duties on public sector employers in Scotland and Wales respectively. This policy does not apply to the enforcement of these specific duties.

As set out in our [Strategic Plan](#), we see our regulatory role as helping organisations achieve what they ought to do, not trying to catch them out if they fall short. We will continue to educate employers about the action they must take under the GPGR. Our overarching objective is to see compliance with the GPGR. In the first instance we will always seek an informal resolution where employers appear not to have complied.

What does this policy cover?

This policy covers the whole of Great Britain.

It applies to the use of the following statutory powers by the Commission under the EA 2006 and EA 2010 in order to enforce the GPGR:

- Investigations (s20 EA 2006)
- Unlawful Act Notices (s21 EA 2006)
- Action Plans (s22 EA 2006)
- Agreements (s23 EA 2006)
- Orders (s24 EA 2006)
- Public Sector Duty Assessments (s31 EA 2006)
- Public Sector Duty Compliance Notices (s32 EA 2006)

You can find a general explanation of our statutory powers on [our website](#).

All references to sections and schedules in this policy are to sections and schedules of the EA 2006.

What falls outside this policy?

This policy does not:

- apply to enforcement of the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended) or the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011
- apply to the use of the above powers in relation to enforcement action outside of the scope of the GPGR

- cover the enforcement powers available to us but which we will not use in the context of enforcing the GPGR. For details of our general approach to enforcement please see our [Compliance and Enforcement Policy](#)
- apply to the use of any of our litigation powers, such as legal proceedings in relation to judicial review, injunctions or interventions, or
- set out your reporting obligations under the GPGR. For a summary of the requirements under the GPGR and links to further sources of information, please see the [guidance on our website](#).

Principles underpinning this policy

We have a range of powers and tools at our disposal. We will always choose the ones that will best fulfil our duties and effect change in a particular circumstance. The nature of the GPGR and the system for reporting GPGR information are such that we can reasonably anticipate the forms that non-compliance will take and therefore outline the approach we will take to enforcement in certain scenarios.

We are a firm but fair regulator. We have developed our own regulatory principles to guide our work. We are also subject to the provisions of the Regulators' Compliance Code ('the Code') and the Legislative and Regulatory Reform Act 2006. Details of how these principles and provisions are exercised can be found in our [Compliance and Enforcement Policy](#).

In the context of the GPGR, we have adopted the following principles:

- We will seek to ensure high levels of compliance by raising awareness of the GPGR. Before the end of the first GPGR reporting year, in association with the Government Equalities Office (GEO), we will promote awareness, consulting with stakeholders on this policy and signposting employers to sources of information so that they develop an understanding of what is required under the GPGR and the benefits of compliance.
- We will act consistently and aim to require compliance by all employers that the GPGR apply to.
- We are committed to openness and transparency, and aim in this policy to provide a detailed outline of the action that may be taken if employers do not comply with the GPGR.
- We will use our enforcement powers firmly, promptly and effectively in the enforcement of the GPGR. In doing so we will act proportionately by engaging informally in the first instance. We have adopted timeframes within which we expect non-compliance to be resolved and which we believe all employers should be able to comply with.
- If we decide to take enforcement action, we will inform employers why we are doing so, why we have chosen any particular course of action and what the next

steps in the process will be. We will only use the more serious of our enforcement powers where employers fail to engage with us during and following the informal stage of enforcement.

- We will maintain consistency in our approach to enforcement of the GPGR by requiring all staff members who make decisions about regulatory action to follow this policy.
- We will publish details of enforcement action that we take where we are obliged to do so under the EA 2006, and otherwise where it is lawful and appropriate to do so.

How will we achieve compliance?

‘Compliance’ in this context is defined as compliance with the provisions of the GPGR. We aim to promote compliance without the need for formal enforcement action. However, we will take action in accordance with our powers set out in the EA 2006 where employers do not comply, despite our encouragement to do so.

Range of activities to encourage compliance

We will encourage compliance through a range of activities including:

Promoting awareness: This will be achieved through a communications campaign targeted at employers, input into correspondence from the GEO to employers, and promotion of our consultation on this policy.

Education: This will be achieved by providing [information on our website](#) on what is required under the GPGR, signposting to other sources of information and advice, and providing guidance to employers during the informal stage prior to taking enforcement action. We will educate employers on the benefits of compliance by publicising work we have done with those employers who have found gaps in gender pay through complying with the GPGR, and as a result have taken steps to reduce the disparities in pay.

Monitoring compliance: Working with the GEO, we will monitor which employers have published the information required under the GPGR and the accuracy of such information, with a view to holding non-compliant employers to account.

Publicising compliance rates: Prior to taking any action in relation to individual employers we will take further steps to encourage overall compliance, such as posting the number of compliant and non-compliant employers on social media before and just after the compliance date. We will also publish compliance statistics throughout the year to demonstrate the effectiveness of our enforcement work and create momentum to comply with the GPGR.

Promotion of enforcement work: We will promote the results of our enforcement work in order to encourage other employers to comply with the GPGR.

Purpose of taking enforcement action

We define 'enforcement action' in the context of the GPGR as any use of our range of statutory powers listed above. Informal action and cooperation are our preferred option but we will take formal enforcement action where employers do not comply.

The purpose of the GPGR was to introduce greater transparency on gender pay differences in order to help employers and others to tackle the drivers of the gender pay gap. Enforcement action will help the GPGR to fulfil this purpose by:

- encouraging non-compliant employers to publish the information required by the GPGR and promoting sustained compliance with the GPGR in future reporting years, and
- ensuring that employers who breach the GPGR are held to account in order to deter non-compliance by other employers.

Means of enforcement

In the first instance, we will aim to resolve non-compliance through informal resolution. Where formal enforcement action is required, we will use the most appropriate action from our range of powers as set out below.

In 2018/19, we intend to focus our enforcement work on employers who do not publish the information required by the GPGR. If we have the capacity to do so, we may also take action against employers for publication of inaccurate data, if we consider that it is necessary, proportionate and feasible to do so.

Following the reporting dates, we will assess the scale of non-compliance and decide whether it is necessary to take a staged approach to enforcement. If we do need to take a staged approach, we will divide non-compliant employers by industry and contact a tranche of randomly selected non-compliant employers within each industry. We will determine the number of employers selected for each tranche based on the number of non-compliant employers overall and the scale of non-compliance in each industry. If the numbers of non-compliant employers are high, this approach will enable us to stage our enforcement work while guaranteeing fairness and consistency towards employers.

We have set out indicative timescales below, within which we will aim to take certain actions once we commence enforcement action. These timescales are provided as a guide and may be shortened or lengthened dependent on factors such as the overall numbers of employers who do not comply.

Informal resolution

When an employer (whether they are in the public, private or voluntary sector) has not complied with the GPGR, we will seek an informal resolution with them in the first instance.

Where an employer does not comply with the GPGR by the relevant reporting date, we will write to them after that reporting date:

- drawing their attention to their obligations under the GPGR
- requiring them to acknowledge our letter within 14 days
- requiring them to confirm within their acknowledgment letter that:
 - they will comply with the GPGR retrospectively for the past reporting year within 42 days of our letter, and
 - they will comply with the GPGR on or before the relevant reporting date in the current reporting year.

Where we receive the necessary assurances we will monitor for compliance within the agreed timescales for both reporting years. Where the employer complies with those timescales, no further enforcement action will be taken in respect of those reporting years.

Section 20 Investigations

If a private or voluntary sector employer does not comply at the informal resolution stage, we will carry out an investigation into whether they have committed the suspected unlawful act (breach of the GPGR) in accordance with our power under section 20. The steps required in a section 20 investigation are set out in Schedule 2. We will:

- provide the employer with draft terms of reference for the investigation and allow the employer or their nominated legal representative 14 days to make written representations on draft terms
- consider any representations on the draft terms and aim to publish the final terms of reference within a further 14 days
- gather and analyse any relevant evidence
- aim to provide the employer with a draft report within 28 days of receipt of any evidence requested under a paragraph 9 Schedule 2 notice and allow them 28 days to make representations on it, and
- consider those representations and aim to publish the final report within a further 14 days.

In seeking to gather evidence, we may give the employer a notice under paragraph 9 Schedule 2, requiring them to provide information and documents in their possession or to provide oral evidence. An employer may apply to the county or sheriff court under paragraph 11 Schedule 2 to have the notice set aside on the grounds that it is unnecessary or unreasonable.

We may apply to the court for an order requiring the employer to take the steps necessary to comply with the notice. An employer will commit an offence if it fails to comply with a notice or court order, falsifies anything provided in accordance with a notice or court order, or gives false oral evidence in response to a notice or court order and does not have a reasonable excuse for doing so. An employer who is convicted of such an offence will be liable to a 'level 5' fine which means that there is no maximum limit on the amount that they may be fined.

Section 23 Agreements

During the course of a section 20 investigation, we will offer the employer the opportunity to enter into a written agreement to comply with the GPGR in accordance with our power under section 23, as an alternative to continuing with the investigation.

A section 23 agreement will require the employer to:

- comply with the GPGR retrospectively for the past reporting year within an agreed period, and
- comply with the GPGR for the present reporting year on time.

We will make the offer of a section 23 agreement in writing when we provide the employer with the draft terms of reference. This offer may be accepted at any point during the 14-day period the employer has in which to make representations on the terms. We will make a second offer in writing upon providing the draft investigation report, which may be accepted at any point during the 28-day period the employer has in which to make representations on the draft report.

If an employer enters into a section 23 agreement, we will monitor for compliance within the agreed timescales for both reporting years. Where the employer complies with the agreed timescales, no further enforcement action will be taken in respect of those reporting years.

Section 24 Orders

If a private or voluntary sector employer enters a section 23 agreement, but does not comply with it, we will apply to the county court in England and Wales or the sheriff court in Scotland for an order under section 24. We will seek a court order requiring the employer to comply with the undertakings given in the section 23 agreement.

We may decide not to seek an order if there are exceptional circumstances requiring a variation to the agreement. In the majority of circumstances, we will expect employers to anticipate their non-compliance with a section 23 agreement and to seek a variation with us in advance.

Section 21 Unlawful Act Notices and Section 22 Action Plans

If the private or voluntary sector employer does not accept the offer of a section 23 agreement and the conclusion in our investigation report is that the employer has breached the GPGR, we will issue an unlawful act notice in accordance with our power under section 21.

An unlawful act notice will require the employer to prepare a draft action plan under section 22 within a specified time, setting out how they will remedy their continuing breach of the GPGR and prevent future breaches.

If we do not receive a draft action plan, we will apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring the employer to provide an action plan under section 22(6)(a) within a specified timeframe.

Within six weeks of receipt of a draft plan, we will either approve it or issue a further notice stating that the action plan is inadequate. Such a notice will require a further draft to be provided, and we will require receipt of the revised draft within 21 days of the notice.

An employer can make an appeal to the county court in England and Wales or the sheriff court in Scotland against the unlawful act notice within six weeks of the notice being issued, either on the basis that they deny they have committed an unlawful act or that they contend the requirement to prepare an action plan is unreasonable. On appeal, the court may affirm, annul or vary a notice or a requirement in the notice and make an order for costs or expenses.

The action plan will come into force after six weeks from our receipt of the draft if we do not ask for a revised draft and we have not applied to court for an order to require the employer to provide a further draft.

If an employer does not comply with an action plan, we will apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring the employer to comply with it under section 22(6)(c), unless in the circumstances it would not be appropriate to do so.

An employer will commit an offence if it fails to comply with an order made against it under section 22(6) and does not have a reasonable excuse for doing so. An employer who is convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that they may be fined.

Section 31 Public Sector Duty Assessment and 32 Public Sector Duty Compliance Notice

Where public sector employers in England have not published the information required by the GPGR, we will carry out an assessment of whether they have complied with a specific public sector duty in accordance with section 31. In this context, the specific public sector duty is to publish the information required by the GPGR.

The section 31 assessment will take the same format as section 20 investigation, as set out above. This may include giving the employer a notice under paragraph 9 Schedule 2 EA 2006, requiring them to provide information and documents in their possession or to give oral evidence. An employer may apply to the county court in England and Wales or sheriff court in Scotland under paragraph 11 Schedule 2 to have the notice set aside on the grounds that it is unnecessary or unreasonable.

We may apply to the court for an order requiring the employer to take the necessary steps to comply with the notice. An employer will commit an offence if it fails to comply with a notice or court order, falsifies anything provided in accordance with a notice or court order, or gives false oral evidence in response to a notice or court order, and does not have a reasonable excuse for doing so. An employer who is convicted of such an offence will be liable to a 'level 5' fine, which means that there is no maximum limit on the amount that they may be fined.

If the conclusion reached following the assessment is that the employer has complied with the public sector duty, we will take no further action.

If the conclusion reached following assessment is that the employer has failed to comply, we will issue a notice under section 32. The notice will require the employer to comply with the duty to publish and to provide us, within 28 days of the notice, with written information of steps taken or proposed for the purpose of complying with the duty.

Where we think that an employer has failed to comply with a notice given under section 32, we will apply to the county court in England and Wales or the sheriff court in Scotland for an order requiring the employer to comply under section 32(8).

Public sector employers will be offered the same opportunity as private and voluntary sector employers to enter into a section 23 agreement as an alternative to proceeding to issue a section 32 compliance notice, as set out above.

Further information

Further information on our compliance and enforcement work can be found on [our website](#).

Requesting a review of one of our regulatory decisions

When deciding to take enforcement action in respect of the GPGR, we will make every effort to comply with this policy and with the Regulators' Code.

If your organisation is directly affected by one of our decisions relating to the use of our enforcement powers and you think that we have got it wrong, you can ask us to carry out a review. The review procedure can be found on [our website](#).

Complaints about operation of policy

We will strive to ensure that this policy is applied fairly and consistently. Please read our [complaint policy and procedure](#) if you wish to make a complaint about the operation of this policy.

This policy will be reviewed regularly.

Contacts

This publication and related equality and human rights resources are available from the Commission's website: www.equalityhumanrights.com.

Questions and comments regarding this publication may be addressed to: correspondence@equalityhumanrights.com. The Commission welcomes your feedback.

Alternative formats

This publication is also available as a Microsoft Word file from www.equalityhumanrights.com. For information on accessing a Commission publication in an alternative format, please contact: correspondence@equalityhumanrights.com.

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