

This draft Statutory Instrument supersedes the draft of the same title which was laid before Parliament and published on 19th June (ISBN 978-0-11-111675-3). It is being issued free of charge to all known recipients of that draft Statutory Instrument.

Draft Regulations laid before Parliament under section 208 of the Equality Act 2010, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2014 No.

EQUALITY

The Equality Act 2010 (Equal Pay Audits) Regulations 2014

Made - - - - *****
Coming into force - - *1st October 2014*

These Regulations are made in exercise of the powers conferred by sections 139A and 207(1) and (4) of the Equality Act 2010(a).

The Secretary of State has consulted the Minister for Employment Relations and Consumer Affairs and the Lord Chancellor in accordance with section 139A(12) of that Act.

In accordance with section 208(4), (5)(ea)(b) and (8) of that Act, a draft of these Regulations has been laid before and approved by resolution of each House of Parliament.

The Secretary of State makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Equality Act 2010 (Equal Pay Audits) Regulations 2014 and come into force on 1st October 2014.

(2) In these Regulations—

“the Act” means the Equality Act 2010;

“audit” means an equal pay audit;

“date of complaint” means the date on which a complaint in respect of an equal pay breach is presented to a tribunal;

“date of judgment” means the date on which a tribunal finds that there has been an equal pay breach;

“relevant gender pay information” means information relating to the pay of men and women (including the maternity-related pay of women to whom section 74 of the Act applies (maternity equality clause: pay))—

(a) 2010 c. 15; section 139A was inserted by section 98(2) of the Enterprise and Regulatory Reform Act 2013 (c. 24).

(b) Subsection (5)(ea) was inserted by section 98(4) of the Enterprise and Regulatory Reform Act 2013 (c. 24).

- (a) who are employed by the respondent;
- (b) who are appointed to a personal or public office by the respondent;
- (c) for whom the respondent is the relevant person in relation to the terms of appointment to a personal or public office;

“relevant person” has the same meaning as in section 52(6) of the Act;

“tribunal” means an employment tribunal.

Requirement for a tribunal to order an audit

2.—(1) This regulation applies to a complaint presented on or after 1st October 2014 where a tribunal finds that there has been an equal pay breach.

(2) Subject to regulations 3 and 4, the tribunal must order the respondent to carry out an audit.

Circumstances in which an audit must not be ordered

3.—(1) A tribunal must not order the respondent to carry out an audit where it considers that—

- (a) the information which would be required to be included in the audit under regulation 6 were the tribunal to make an order, is already available from an audit which has been completed by the respondent in the previous 3 years;
- (b) it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing;
- (c) the breach which the tribunal has found gives no reason to think that there may be other breaches; or
- (d) the disadvantages of an audit would outweigh its benefits.

(2) In paragraph (1), “previous 3 years” means the 3 years preceding the date on which the tribunal issues a judgment, orally or in writing, stating that there has been an equal pay breach.

Exemption for existing micro-businesses and new businesses

4.—(1) A tribunal must not, within the applicable exemption period, order a respondent to carry out an audit in relation to persons employed for the purposes of a business where the respondent is carrying on that business and the business is—

- (a) an existing micro-business, or
- (b) a new business.

(2) The Schedule defines “micro-business” and “new business” and the exemption period applicable for each.

Content of the tribunal’s order

5.—(1) An order made by a tribunal under regulation 2 must—

- (a) specify descriptions of persons in relation to whom relevant gender pay information must be included in the audit and the period of time to which the audit must relate; and
- (b) specify the date by which the audit must be received by the tribunal.

(2) The date specified for the purposes of paragraph (1)(b) must not be sooner than 3 months after the date on which the order is made.

Content of an audit

6. An audit must —

- (a) include the relevant gender pay information related to the descriptions of persons specified by the tribunal for the purposes of regulation 5(1)(a);

- (b) identify any differences in pay between the descriptions of men and women specified for the purposes of regulation 5(1)(a) and the reasons for those differences;
- (c) include the reasons for any potential equal pay breach identified by the audit; and
- (d) include the respondent's plan to avoid equal pay breaches occurring or continuing.

Determining compliance with an order to carry out an audit on the papers

7.—(1) Where an audit has been received by a tribunal by the date specified in relation to it for the purpose of regulation 5(1)(b), the tribunal must determine whether the audit complies with the requirements in regulation 6.

(2) Where the tribunal determines that the audit complies with the requirements in regulation 6, it must make an order to that effect and provide a copy of that order to the respondent.

(3) Where the tribunal is not satisfied that the audit complies with the requirements in regulation 6 or where the audit was not received by the tribunal by the date specified for the purposes of regulation 5(1)(b), the tribunal must—

- (a) fix a hearing;
- (b) notify the respondent of—
 - (i) the reasons why it is not satisfied that the audit complies with the requirements in regulation 6 (where an audit was received by the tribunal by the date specified for the purposes of regulation 5(1)(b)) and the powers available to the tribunal;
 - (ii) the date of the hearing; and
 - (iii) the right of the respondent to make representations at the hearing; and
- (c) where an audit has not been received by the date specified for the purposes of regulation 5(1)(b), make an order specifying the new date by which the audit must be received by the tribunal, which must be no later than the date specified in paragraph (b)(ii).

Determining compliance with an order to carry out an audit at a hearing

8.—(1) This regulation applies where a tribunal has held a hearing fixed under regulation 7(3) and considered any representations made by the respondent.

(2) Where an audit has been received by a tribunal by the date of the hearing, it must determine whether the audit complies with the requirements in regulation 6.

(3) Where the tribunal determines that the audit complies with the requirements in regulation 6, it must—

- (a) make an order to that effect and provide a copy of that order to the respondent; and
- (b) where the audit was not received by the tribunal by the date specified for the purposes of regulation 5(1)(b) or (as the case may be) regulation 7(3)(c), paragraph (4)(a) below or paragraph 5(a) below, consider whether to make an order under regulation 11.

(4) Where the tribunal determines that the audit does not comply with the requirements in regulation 6, it must—

- (a) make an order requiring the respondent to amend the audit so that it does so comply and specifying the date by which the tribunal must receive the amended audit;
- (b) notify the respondent of the reasons for its determination;
- (c) provide a copy of that order to the respondent; and
- (d) consider whether to make an order under regulation 11.

(5) Where the audit has not been received by the tribunal by the date of the hearing, the tribunal must—

- (a) make an order specifying a new date by which the tribunal must receive the audit;
- (b) provide a copy of that order to the respondent; and
- (c) consider whether to make an order under regulation 11.

(6) Where the respondent fails to comply with an order under paragraph (4) or (5), the tribunal must—

- (a) fix a further hearing; and
- (b) notify the respondent of—
 - (i) the date of the hearing; and
 - (ii) the right of the respondent to make representations.

(7) The preceding provisions of this regulation apply to a hearing fixed under paragraph (6) as they apply to a hearing fixed under regulation 7(3).

Publishing an audit

9.—(1) This regulation applies where a tribunal makes an order under regulation 7(2) or 8(3).

(2) Subject to paragraph (3), the respondent must, not later than 28 days after the date of the order, publish the audit—

- (a) if the respondent has a website, by placing it on the respondent's website for a period of at least 3 years starting with the date on which it is placed on the website; and
- (b) by informing all persons about whom relevant gender pay information was included in the audit where they can obtain a copy.

(3) Where the respondent considers that publication under paragraph (2) would result in a breach of a legal obligation, the respondent—

- (a) must, so far as possible, publish the audit in accordance with paragraph (2) with such revisions as it considers necessary to ensure compliance with that obligation while still ensuring compliance with regulation 6; or
- (b) where it is satisfied that it is not possible to comply with sub-paragraph (a), need not publish the audit.

(4) Where the respondent publishes the audit under paragraph (2), it must send to the tribunal evidence of this not later than 28 days after the date of publication of the audit.

(5) Where the respondent publishes the audit under paragraph (3)(a), it must send to the tribunal—

- (a) evidence that the audit has been published; and
- (b) adequate written reasons why it considers that publication under paragraph (2) would result in a breach of a legal obligation,

not later than 28 days after the date of publication of the audit.

(6) Where the respondent, in reliance on paragraph (3)(b), does not publish the audit, it must send to the tribunal, not later than 28 days after the date on which the tribunal makes an order under regulation 7(2) or 8(3), adequate reasons in writing explaining why it considers that publication would result in a breach of a legal obligation and why it is satisfied that it is not possible to comply with paragraph (3)(a).

Determining compliance with an order to publish an audit

10.—(1) This regulation applies where a tribunal makes an order under regulation 7(2) or 8(3).

(2) The tribunal must, no sooner than 56 days after the date of that order, consider whether the respondent has complied with the publication requirements.

(3) Where the tribunal determines that the respondent—

- (a) has complied with the publication requirements; or
- (b) is not required to do so by virtue of regulation 9(3)(b),

the tribunal must issue a decision in writing to the respondent stating that the respondent has so complied or that the respondent is not required to do so.

(4) Where the tribunal is not satisfied that the respondent has complied with the publication requirements and is required to do so, it must—

- (a) fix a hearing to determine whether the respondent has complied with the publication requirements; and
- (b) notify the respondent of—
 - (i) the reasons why it is not satisfied that the respondent has complied with the publication requirements;
 - (ii) the date of the hearing; and
 - (iii) the right of the respondent to make representations.

(5) Paragraphs (6) to (8) apply where the tribunal has held a hearing under paragraph (4) and considered any representations made by the respondent.

(6) Where the tribunal determines that the respondent—

- (a) has complied with the publication requirements; or
- (b) is not required to do so by virtue of regulation 9(3)(b),

it must issue a decision in writing stating that the respondent has so complied, or is not required to do so.

(7) Where the tribunal determines that the respondent has not complied with the publication requirements and is not exempt from doing so by virtue of regulation 9(3)(b), it must make an order specifying a new date by which the respondent must comply with the publication requirements, in so far as the respondent has not done so.

(8) Where the respondent fails to comply with an order under paragraph (7), the tribunal must—

- (a) fix a further hearing; and
- (b) notify the respondent of—
 - (i) the date of the hearing; and
 - (ii) the right of the respondent to make further representations.

(9) The preceding provisions of this regulation apply to a hearing fixed under paragraph (8) as they apply to a hearing fixed under paragraph (4).

(10) In this regulation, “publication requirements” means the requirement to—

- (a) publish the audit; and
- (b) provide evidence of publication to the tribunal,

in accordance with regulation 9.

Power to order a penalty

11.—(1) Where a tribunal—

- (a) determines that a respondent has failed to comply with an order made under regulation 2 or 8; and
- (b) is of the opinion that the respondent has no reasonable excuse for failing to comply with the order,

the tribunal may order the respondent to pay a penalty to the Secretary of State.

(2) Where the respondent fails to comply with an order made following a hearing fixed in accordance with regulation 8(6), the tribunal may order the respondent to pay—

- (a) an additional penalty or a further additional penalty, if the tribunal previously ordered the respondent to pay a penalty or an additional penalty; or
- (b) a penalty, if the tribunal previously decided not to order the respondent to pay a penalty, because the tribunal was then of the opinion that there was a reasonable excuse for not complying with an earlier order or otherwise.

(3) The tribunal must have regard to the respondent’s ability to pay—

- (a) in deciding whether to order the respondent to pay a penalty or an additional penalty under this regulation; and
 - (b) in deciding the amount of a penalty or an additional penalty.
- (4) The amount of each penalty or additional penalty ordered under this regulation must not exceed £5,000.

Date Secretary of State
Department for Culture, Media and Sport

SCHEDULE

Regulation 4

Exemption for existing micro-businesses and new businesses

Micro-businesses

12. A micro-business is a business that has fewer than 10 employees.

Existing micro-businesses

13. An existing micro-business is a business that was a micro-business immediately before the date of judgment.

New businesses

14.—(1) A new business is a business which a person, or a number of persons, (“P”) begins to carry on during the period of 12 months ending with the date of complaint.

(2) But a business is not a new business if—

- (a) P has, at any time during the period of 6 months ending immediately before the date on which P begins to carry on the business, carried on another business consisting of the activities of which the business consists (or most of them); or
- (b) P carries on the business as a result of a transfer (within the meaning of sub-paragraph (4)).

(3) Sub-paragraph (2)(a) does not apply if the other business referred to in that paragraph was a new business (within the meaning of this Schedule).

(4) P carries on a business as a result of a transfer if P begins to carry on the business on another person ceasing to carry on the activities of which it consists (or most of them) in consequence of arrangements involving P and the other person.

(5) For this purpose, P is to be taken to begin to carry on a business on another person ceasing to carry on such activities if—

- (a) the business begins to be carried on by P otherwise than in partnership on such activities ceasing to be carried on by persons in partnership; or
- (b) P is a number of persons in partnership who begin to carry on the business on such activities ceasing to be carried on—
 - (i) by a person, or a number of persons, otherwise than in partnership;
 - (ii) by persons in partnership who do not consist only of all the persons who constitute P; or
 - (iii) partly as mentioned in paragraph (i) and partly as mentioned in paragraph (ii).

(6) Sub-paragraph (2)(b) does not apply if the activities referred to in sub-paragraph (4) were, when carried on by the person who is not P referred to in that paragraph, activities of a new business (within the meaning of this Schedule).

(7) P is not to be regarded as beginning to carry on a business for the purposes of sub-paragraph (1) if—

- (a) before P begins to carry on the business, P is a party to arrangements under which P may (at any time during the period of 5 years beginning with the commencement date) carry on, as part of the business, activities carried on by any other person; and
- (b) the business would have been prevented by sub-paragraph (2)(b) from being a new business if—
 - (i) P had begun to carry on the activities when beginning to carry on the business; and
 - (ii) the other person had at that time ceased to carry them on.

(8) “Arrangements” includes an agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

The exemption period: existing micro-businesses

15.—(1) The exemption period, in relation to an existing micro-business, is the period beginning with the commencement date and ending when the business is treated as ceasing to be a micro-business for the purpose of this paragraph or (if sooner) the day 10 years after the commencement date.

(2) A business is treated as ceasing to be a micro-business for the purpose of this paragraph on the day after the assessment period if, during an assessment period, the number of days when the business is not a micro-business is greater than the number of days when the business is a micro-business.

(3) An “assessment period”, in relation to an existing micro-business, is a period of 6 months beginning with—

- (a) the first day after the commencement date on which the business ceases to be a micro-business; or
- (b) where, during an earlier assessment period, the number of days when the business is not a micro-business is less than or equal to the number of days when the business is a micro-business—
 - (i) the day after the end of the earlier assessment period, if on that day the business is not a micro-business; or
 - (ii) the first day after the end of the earlier assessment period on which the business ceases to be a micro-business, in any other case.

The exemption period: new businesses

16.—(1) The exemption period, in relation to a new business, is the period beginning with the commencement date and ending with the date on which P ceases to carry on the business or (if sooner) the day 10 years after the commencement date.

(2) If P is a number of persons in partnership, P is not to be taken for this purpose to cease to carry on the business if—

- (a) the members of the partnership change, or the partnership is dissolved; and
- (b) after the change or dissolution, the business is carried on by at least one of the persons who constituted P.

Number of employees of a business

17.—(1) For the purposes of this Schedule, the number of employees of a business is taken to be the number of its full-time equivalent employees.

(2) The number of full-time equivalent employees of a business is calculated as follows—

TH / 37.5

where *TH* is the total number of hours per week for which all the employees of the business are contracted to work.

Employees of a business

18. For the purposes of this Schedule, the employees of a business are all persons who are employed for the purposes of the business.

Employees

19.—(1) In this Schedule, “employee” means an individual who has entered into or works under a contract of employment.

(2) In sub-paragraph (1) “contract of employment” means a contract of service, whether express or implied, and (if it is express) whether oral or in writing.

The commencement date

20. For the purposes of this Schedule, “commencement date” means the date on which these Regulations come into force.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made under section 139A and 207(1) and (4) of the Equality Act 2010 (c.15) (“the Act”). They require an employment tribunal (“tribunal”) to order a respondent to carry out an equal pay audit (“audit”) after a finding that there has been an equal pay breach. An equal pay breach is defined in section 139A of the Act as a breach of an equality clause or a contravention of sections 39(2), 49(6) or 50(6) of the Act so far as they relate to sex discrimination in relation to pay.

Regulation 2 requires a tribunal to order the respondent to carry out an audit unless one of the exceptions in regulation 3 or 4 applies. An audit is defined in section 139A(3) of the Act as an audit designed to identify action to be taken to avoid equal pay breaches occurring or continuing.

Regulations 3 and 4 set out the circumstances in which a tribunal must not order an audit. Regulation 3 sets out four exceptions to the requirement to order the respondent to carry out an audit. Regulation 4 exempts new businesses and micro-businesses from the requirement to carry out an audit during the exemption period. The Schedule defines those kinds of businesses and the exemption period (a period of ten years from the commencement date of the Regulations).

Regulation 5 makes provision in relation to the content of the tribunal’s order under regulation 2 and requires the order to specify the persons about whom information should be included in the audit, the period of time to which the audit must relate and the time by which an audit must be received by the tribunal.

Regulation 6 sets out the information which an audit must include. It requires an audit to include information relating to the pay of men and women in respect of whom the respondent could be liable for an equal pay breach under the Act (“relevant gender pay information”). The audit must also explain the content of the audit. Finally, an audit must set out an action plan for avoiding equal pay breaches occurring or continuing.

Regulation 7 sets out the powers of the tribunal to determine, on the papers, whether an audit received by the tribunal by the date set out in its order complies with that part of its order relating to the content of the audit. Where a tribunal is satisfied that the audit is compliant, it must provide a copy of the order to the respondent.

Regulation 8 sets out the procedure applicable where the tribunal is not satisfied that an audit complies with that part of its order relating to the content of the audit, or where no audit has been received.

Regulation 9 sets out the manner in and time by which the respondent must publish the audit and send evidence of publication to the tribunal. Regulation 9(3) provides that where publication would result in a breach of a legal obligation, the respondent must publish the audit with any revisions to avoid it having that effect or, where it would not be possible to do so, not publish the audit. The respondent must send to the tribunal written reasons why publication would be likely to result in a breach of a legal obligation and the tribunal must consider whether the reasons are adequate.

Regulation 10 sets out the procedure applicable to the tribunal when determining whether the respondent has complied with its order in so far as it relates to the requirement to publish the order.

Regulation 11 provides that a tribunal may order the respondent to pay a penalty to the Secretary of State where the respondent fails to comply with an order made under regulation 2 or 8. A penalty may be imposed on more than one occasion where the failure to comply with such an order continues. The amount of any individual penalty may not exceed £5,000.

The instrument has effects on the costs of business, charities or voluntary bodies. A full impact assessment of the effect that this instrument will have on the costs of business, charities and voluntary bodies is available at <https://www.gov.uk/government/consultations/equal-pay-audits-a-further-consultation?4544> and is published along with the Explanatory Memorandum at <http://www.legislation.gov.uk/ukdsi/2014/978011116753/memorandum/contents>.

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