A&L Goodbody

EMPLOYMENT

New EU Directive: *Pay transparency under the spotlight*

The principle of equal pay for equal work has long been enshrined in the laws of EU member states. Despite this, its effective implementation and enforcement remains a challenge and lack of pay transparency has been identified by the European Commission as one of the key obstacles. Pay transparency facilitates workers to detect and prove possible gender discrimination. It also raises awareness and stimulates debate around the reasons for structural gender pay differences.

The gender pay gap in the EU is 13% in favour of men. The gender pay gap has long term impact on the quality of women's lives, their increased risk of exposure to poverty and on the gender pensions gap, which stands at around 30% in the EU.

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Directive 2023/970 (the **Pay Transparency Directive**) is part of a multi-pronged approach to address the root causes of the gender pay gap and economic empowerment of women, which includes the Work Life Balance Directive (read our briefing here), sectoral initiatives to fight stereotypes and improve gender balance and a Directive on improving gender balance on the Boards of large EU listed companies (read our briefing here).

The Pay Transparency Directive will come into force on 7 June 2023. Member states will then have three years to implement the new rules.

The Pay Transparency Directive sets out the minimum standards that will be required and member states may introduce and maintain laws that are more favourable to workers.

There is no doubt that the Pay Transparency Directive contains new far reaching requirements, such as gender pay gap reporting in all EU member states, a ban on pay secrecy agreements, information rights on the part of job candidates, employees and more.

In this briefing we take a look at what is in the Pay Transparency Directive and its implications for employers.

Gender pay gap reporting

Gender pay gap reporting is already in place in Ireland, with a requirement for employers with 250 or more employees to publish the details of their gender pay gap. The threshold will decrease to employers with 150 or more employees in 2024 and employers with 50 or more employees in 2025.

The Pay Transparency Directive will require employers with 250 or more employees to report on their gender pay gap on an annual basis and those with 150 or more employees to report every three years. Employers with 100 to 149 workers will also eventually have to report every three years.

The Irish gender pay gap reporting legislation is, therefore, well ahead of the Pay Transparency Directive in this regard.

While the information which will be required to be reported under the Pay Transparency Directive is similar to the Irish requirements, the Pay Transparency Directive also requires the gender pay gap by category of employees to be provided to employees and employee representatives.[1] Broadly, this means employees categorised as performing equal work or work of equal value. In addition, the accuracy of the information will need to be confirmed by the employer's management, after consulting employee representatives. This is not currently required under Irish law.

Employees, their representatives, the Workplace Relations Commission (**WRC**) and the Irish Human Rights and Equality Commission (**IHREC**) will have the right to ask the employer for clarifications and details regarding such information, including explanations concerning any gender pay differences. The employer will be required to respond to any such request within a reasonable time by providing a substantiated reply. Where gender pay differences are not justified by objective and gender neutral factors, the employer will be required to remedy the situation in close co-operation with employee representatives, the WRC and/or IHREC.

[1] *Employee representatives are usually a trade union with which it has been the practice of the employer to conduct collective bargaining negotiations, or employees chosen by means of election to represent their fellow employees.*

Joint pay assessment

Where the gender pay gap report indicates a gap which (i) is at least 5% in any category of workers, (ii) has not been justified by objective and gender neutral factors and (iii) has not been remedied within 6 months of the date of the gender pay gap report, the employer will have to carry out a pay assessment (i.e. an equal pay audit). This involves a detailed process and the results of the assessment must be made available to employees, their representatives and the monitoring body.

It is noteworthy in this regard that in 2022, IHREC published a code of practice on equal pay which contains guidance on conducting an equal pay audit (read our briefing here).

Work of equal value

Employers will need to have pay structures in place which ensure equal pay for equal work or work of equal value. "Work of equal value" means work that is determined to be of equal value in accordance with objective, gender neutral criteria, such as skills, effort, responsibility and working conditions.

Member states will be required to make tools or methodologies available and accessible to guide the assessment of "work of equal value." In the meantime in Ireland, guidance can be found in IHREC's code of practice on equal pay.

Pay transparency for jobseekers

Employers will be obliged to indicate the initial pay level or range to be paid for a specific position in a job vacancy notice, or otherwise prior to interview and, importantly, will not be permitted to ask prospective employees about their pay history.

The aim of this provision is to ensure workers have the necessary information to engage in balanced and fair negotiations regarding their salaries when they enter into an employment relationship and to ensure existing pay discrimination and bias is not perpetuated over time, especially when workers change jobs. It does not limit the employer's or the employee's bargaining power to negotiate a salary outside the indicated range.

Right to information

Employees will have a right to request information from their employer on their individual pay level and on average pay levels broken down by gender for employees doing the same work or work of equal value. To address possible reprisals or fear of reprisal on the part of an employee, they will be allowed to request the information through their representatives or through an equality body. The information must be supplied within two months of the request.

Employers will have to inform employees on an annual basis of their right to receive the information and how they may go about doing so.

Not only that, but employers with 50 or more employees will have to make information regarding the criteria (which must be objective and gender neutral) used to determine employees' pay, pay level and pay progression easily accessible.

Pay secrecy

Ireland, along with other member states, will be obliged to put measures in place to prohibit contractual terms that restrict employees from disclosing information about their pay (pay secrecy clauses).

Redress

Currently an employee needs to establish a prima facie (apparent) case of discrimination prior to the burden of proof shifting to the employer to defend the claim. Under the Pay Transparency Directive, where an employer is not compliant with the pay transparency obligations set out by the directive (e.g. by refusing to provide information requested or not reporting on the gender pay gap), this will automatically place the burden of proof on it.

Currently in Ireland, where a claim is successful, the WRC may award up to three years' arrears of pay, make an order for equal pay from the date of referral and/or direct a specified course of action. Where a claim in respect of equal pay is successful in the Circuit Court, it may award up to six years' arrears of pay, make an order for equal pay from the date of referral and/or direct a specified course of action.

Under the Pay Transparency Directive members states will be obliged to ensure the compensation includes full recovery of back pay.

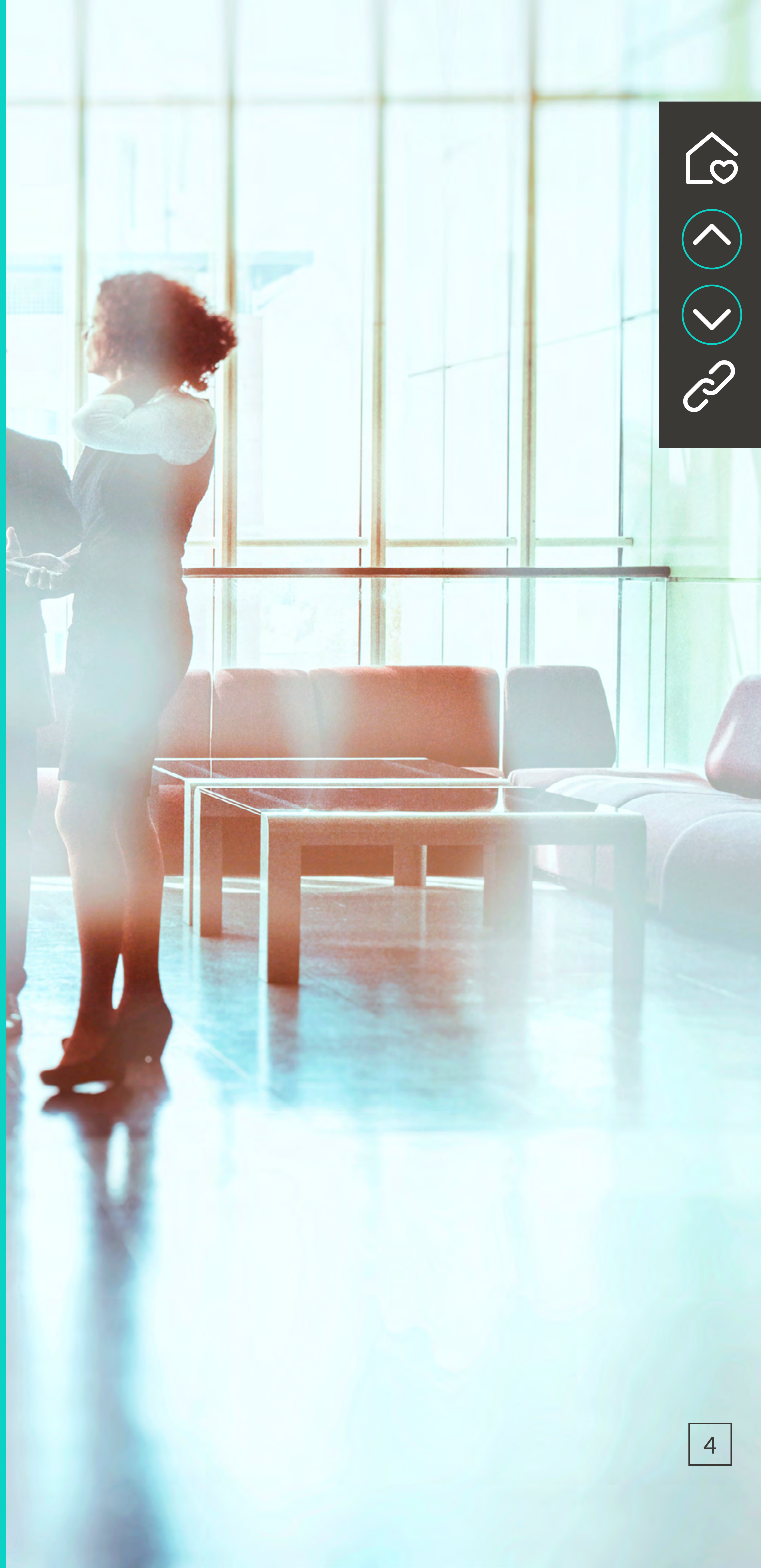
Next steps

Notwithstanding that Ireland already has legislation on gender pay gap reporting, the Pay Transparency Directive contains significant extra measures and new laws will be required to align Irish law with its requirements.

While Member States have up to three years to implement the Pay Transparency Directive, it is by no means too soon for employers to begin considering their compliance strategy. The Pay Transparency Directive's consequences are significant. It will undoubtedly lead to an increase in employee and representative involvement in addressing pay equity and it contains potentially arduous requirements to conduct equal pay audits and assessments of work of equal value. It will increase the profile of equal pay and pay transparency across EU member states and likely lead to a rise in equal pay claims. Employers should examine their existing pay practices and take steps to address any issues identified at an early stage. Employers should consider how the Pay Transparency Directive will impact their recruitment, pay and gender pay gap reporting practices and plan their compliance strategy accordingly.

Employers should bear in mind that pay transparency is an area that straddles both the social and governance aspects of ESG and ESG conscious employers will no doubt wish to get ahead of the game to support their ESG framework.

For further information in relation to this topic please contact Duncan Inverarity, Partner, Triona Sugrue, Knowledge Consultant, or any member of the ALG Employment team.



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Resources

- Directive 2023/970 — READ MORE
- Work-Life Balance: New law is wide-ranging — READ MORE
- Gender balance on boards – signposting a sea change — READ MORE
- New Codes of Practice on Equal Pay and Workplace Harassment published — READ MORE