

The Agenda podcast by Lewis Silkin: Pay Attention

Pay Attention Episode 1: What is the EU's groundbreaking Pay Transparency Directive?

Tom Heys

Hello and welcome to the first episode of Pay Attention, a regular podcast coming to you from the Lewis Silkin offices in London and in Dublin. My name is Tom Heys [My name is Siobhra Rush] [and I'm David Lorimer], and we have gathered round the microphones today to talk about the Pay Transparency Directive. So David, how did we get here?

David Lorimer

Good question Tom – I think we all know that the right to equal pay for men and women has been built into EU Law since 1957, long long ago, but the truth is it's really been hard to challenge that and enforce it, particularly for employees and those who represent them. The PTD aims to make that much much easier; it's going to put some pressure on employers to be more transparent about their pay structures, and more proactive about fixing gender pay equalities which should in turn increase gender diversity within the workplace. So that's the background then but what does the pay transparency do Siobhra?

Siobhra Rush

The EU PTD is basically a directive that needs to be implemented by member states around the EU in 2026. It introduces requirements about gender pay gap reporting, I know we are already aware that a lot of EU countries already have gender pay gap reporting but some of them look quite different depending on the size of the employer and how they work; for instance countries like Austria, Belgium, France, Italy – they might have works councils and they may be quite far into gender pay gap requirements whereas Ireland have only had it for a year so I suppose it is trying to get that all in line with certain minimum requirements with gender pay reporting. There are also obligations around categorisation of work, so what we're going to see is better creation of rights around information that comes from gender pay gap reporting to potentially ground claims for equal pay. There are also individual rights created around the directive about not being asked your salary history and employers being required to publish pay ranges for jobs that they are advertising. We are seeing quite a range of rights and regulations for employers, it is to be implemented by 2026 by member states so we are all waiting with baited breath to see how each jurisdictions implement this because obviously we have clients who operate in a number of jurisdictions and we need to get them to try and have minimum reporting requirements in line so they can be compliant.

David Lorimer

And on that, we've got a podcast exclusive, we think that France is going to be the first to declare their intention to implement by January 2025 so some states might go early. Well that sounds like a really good jumping off point. Can we delve into some details on what's coming and the headline is that some organisations have got to report on pay gaps, Tom what exactly are they going to have to report on?

Tom Heys

Well the PTD starts from the same kind of point in which you might be familiar with in the UK and in Ireland but on steroids. It's like gender pay gap reporting but to the max so as well as having to report a series of statistics of its company and its workforce, every employer with at least 150 employees will have to calculate gender pay gaps within categories of employees doing work of equal value. What that means is that companies will have to identify where their employees do work that has similar levels of skill effort and decision making and calculate the difference between men and women within those groups and where those differences are more than 5% and those differences cannot be justified where there is good objected reasons for that, that will prompt a joint pay assessment. This is the biggest point I think of the PTD, it is

essentially an equal pay audit of the entire organisation and it will have to be done in conjunction with Worker Representatives and so what we're talking about here is employers opening up all the way about how they pay their workforce, all sorts of compensation, all sorts of benefits in kind across all employees across all of the EU and having workers representatives being able to see all of this. I think this means there is a year of maximum two for employers to get their house in order and working out where there are people doing work of equal value and in the same category, work out what the gaps are and take steps in how to reduce them, it will expose a lot of things that I think employers may not want to expose.

Siobhra Rush

Tom I just asked David if I could but in here but I know the pay gap audit is potentially your bag and your focus – I think that from an Irish perspective where we don't have a heavy representative union and employee reps are really only elected where there is TUPE, health and safety or collective redundancy matters, a lot of employers won't have an employee rep body per say. I don't know whether you have that experience in the UK as well but how do you think that is going to work for instance where countries where there are reps and trade unions, employers will be used to informing the reps about the information required to be given in the PTD but how do we think this will work if that's not the normal way of working?

David Lorimer

It's a really good question and it looks to me in the wording of the directive that some of this might fall to existing representative bodies for example works councils in France or Germany, but where those don't exist, there will be a new freestanding requirement to facilitate an election or appointment of those reps and that's going to give rise to difficulties to circumstances where it is perfectly possible in place like Ireland to train employee reps on what the TUPE consultation process looks like, but it's going to be quite difficult to train reps on interpreting statistical data and understanding what that means and whether that represents unequal and unfair gender bias.

Tom Heys

I think you've hit the nail on the head, I think that there is going to be a lot of people selected into these worker representatives roles who don't really understand what their job will be, what data they have to make sense of and for an employer to try and consult with someone who is not up to speed who doesn't get it, it's going to be a massive problem.

David Lorimer

Yeah and I think that's not necessarily unique to territories like the Republic of Ireland, we have surveyed our friends across Europe and many of them right about what the worker reps look like and even those who are used to bargaining structures are worried about them being informed and trained enough to deal with those complex scenarios. What about then, Tom you have covered a lot of ground in what needs to be reported and one that sticks out to me is that this requirement to do 2 things. One to categorise our workforce to equal value – equal pay alert – and two, to report on the gaps between those categories – second equal pay alert – on categorisation, how are we going to do that?

Tom Heys

Well there is a big pause there because there is a lot of unknown there – in some countries like France and Italy, there is lots of collective bargaining. There is already a good idea of what sort of jobs are similar to other sorts of jobs so in those places, categorisation may not be so difficult as they can rely on what is already there. In places like Ireland where that doesn't exist, it's going to rely on employers really understanding what different roles there are in terms of the scale and the effort and decision making in each of the roles and how they compare to each other.

Siobhra Rush

Yeah I think the whole thing around job architecture and light work is going to be quite problematic and I think even though we are telling clients this is coming in in 2026, and I think its worth saying it needs to be implemented by 2026 by member states, however for instance in Ireland where we did have our gender pay gap act passed in 2021, it wasn't actually commenced until 2022 that's when the gender pay gap reporting came in and so there may be some differences in timing in member states which will cause difficulty for multinational employers who are trying to comply with various local regulations but coming back to the job architecture that the categorisation – part of the reason we are flagging this now is that this could be a massive project for stakeholders and some stakeholders might now even know that they are a stakeholder right now. HR and employee relations and comp and ben really need to get the company on board with this and get people around the table to discuss how this is going to be done even though it is sort of in a vacuum now and you don't have local regulations but you understand what needs to be done so on a high level it is in peoples minds and actions are being taken so when local regulations do come in and are being implemented, that you are ready to go and you're not scrambling.

David Lorimer

Ok so it seems like we've gone from a long way off – 2026 being the deadline for implementation – to suddenly thinking well hang on a minute, we potentially have to categorise our workforce for the first time, we then have to think about the gaps in each category by running dry run analytics, we've got to work out if they are 5% or more and then try and find a justification or face the very real threat when it comes to publication of protracting and costly equal pay litigation. Have we seen examples of that recently?

Tom Heys

Well we sure have if you have kept your eyes on the news at all in the past few months you would have seen Birmingham City Council has declared itself bankrupt and the main reason is because equal pay debt – it lost a series of claims against it on equal value litigation – it was female dominated roles being compared with female dominated roles – the male dominated roles were getting bonuses that female dominated roles were not getting so it was a pretty slam dunk case and the lost. They are a massive employer so even if we are just talking about a small difference, times that by a lot of people, times that by six years back pay it adds up to a lot of money. For Birmingham City Council they were in the billions I think. Asda are also facing equal pay litigation and potential debt if they lose is £2 billion. I think what the PTD does is it removes the barrier that has stopped people bringing equal pay claims before – the problem is that you have got to be able to identify someone getting paid more than you but you don't know that unless you go around asking everyone what they get paid and no one will tell you that but with the PTD – as an individual employee – you have the right to that information and the employer has to publish that information anyway so it really makes it very easy for the employee to bring a claim and with the extra involvement of worker representatives I can foresee across Europe a lot more of this big litigation being brought and employers having to face the consequences.

Siobhra Rush

I think an additional factor is the armoury for employees to bring these claims and on the base that knowledge is power, it is part of the individual rights so not alone can employees look for information on the employer about people who they think are doing work in the same category but there is no ability on the employer to ban the employees from talking about their pay where it is for the purposes of a potential equal pay claim so I think we might see much less secrecy in the employee population where it is in relation to an equal pay claim. And it is interesting actually I was wondering how far back those claims can go because it's the same in Ireland you can go back 6 years so it's obviously very costly where there is a large group of people bringing those claims. We see fewer class claims here but I feel this might become more common as this whole area moves on.

David Lorimer

Absolutely and it's something to keep an eye on and just to draw on one of the points and to segway onto the individual rights stuff, there is this basically this replication of right of subject access but in PTD terms there is this right for employees and their representatives to ask organisations to tell them how they are paid in comparison to the rest of their category and as far as we can see, that applies regardless of headcount. So even those who aren't required because of headcount thresholds to report publicly on this stuff, are going to have to report for the purposes of employee information and transparency.

Some of the other individual elements which are quite interesting and we will probably return to at some future points include a ban on pay secrecy clause so a ban on asking candidates on their pay history that is a requirement to publish salaries or salary ranges when publishing a job for the first time and that replicates some of the companies in the US and a ban as Siobhra says on stopping employees disclosing their pay to others so this could make a cultural change as well as a legislative one.

Siobhra Rush

I'm very keen to see how this affects the small and medium enterprises you know the creation of this is obviously great for employees and very progressive and it does help to bring on the aim of the EU to close the gender pay gap but the more regulation we've seen come in, the more difficult it has been for smaller employers to comply so it will be interesting to see whether if a small company doesn't comply with the requirements, what the potential ramifications will be in the Irish perspective because at the moment, if an employer hasn't published their gender pay gap report, an employee can bring a claim to the employee workplace representation but they can't be awarded commission, the only order that can be made is that the employer comply and publish their statistics so I wonder if that will be taken into consideration once our implementation stage comes in.

David Lorimer

Very interesting and one of the things that is TBC in local legislation is specific penalties for non compliance so we will be keeping an eye on that. Now we are not just going to have a lovely conversation on lots of big red flags and scary things to look out for on the PTD don't worry, we've got you covered and with that in mind Tom do you want to give us an overview of what you intend to cover in future episodes?

Tom Heys

We will have a number of episodes covering specific topics in the PTD, we'll be looking at individual rights, a deeper dive into the Joint Pay Assessments, we'll be getting views from around Europe and specialist input around the role of worker representatives and what you need to know about that.