

THE NEW REGULATIONS ON EQUALITY

On 14 October 2020 two Royal Decrees on equality were published in the Official State Gazette (BOE), Royal Decree 901/2020, of 13 October, which regulates equality plans and registration thereof and Royal Decree 902/2020, of 13 October, on equal pay for women and men.

Both Royal Decrees provide very specific details on the obligations companies have to comply with in terms of equality.

1. ROYAL DECREE ON EQUALITY PLANS AND RECORDS

1.1. Obligation to have an equality plan and deadlines

Royal Decree 901/2020, of 13 October, (the "**Equality Plans Regulation**") implements Organic Law 3/2007 of 22 March, in relation to the Equality Plans that the law established.

This law reiterates that all companies are obliged to respect equal treatment and opportunities at work. To that end, following negotiations, they will have to adopt the measures necessary to avoid any kind of labour discrimination, as well as promoting working conditions that prevent sex-based and sexual harassment, providing for specific prevention procedures that make it possible to process complaints made by anyone who has been the subject of the same.

On this basis, it is stipulated that companies with 50 or more employees, and those whose collective agreement so dictates, will have to prepare and apply an equality plan.

In the case of groups of companies, a common equality plan may be drawn up for all or part of the group companies. However, the group equality plan will have to take into account the activity of each of the companies that comprise it and the applicable collective agreements, and include information on the situational diagnoses of each of the companies.

The calculation to ascertain whether the staff threshold making an equality plan obligatory is reached must be carried out on the last day of the months of June and December each year, at least.

For the purposes of calculating the number of employees that determines whether the thresholds are reached, account will be taken of the total staff of the company, regardless of the category or type of contract, including those on part-time contracts as another staff member, as well as persons with supply contracts.

Key points

- Both the equality plan and the prior situational diagnosis will have to be negotiated with the employee legal representatives. In the absence of legal representation, it will be the unions who negotiate on behalf of the company personnel.
- A minimum content is established for the situational diagnosis and the equality plan.
- All equality plans must be recorded in a public register.
- All companies will keep pay records for their entire staff, including management personnel and senior executives.
- The legal representatives of the employees are entitled to access the full content of the pay records.
- Equality plans drawn up by companies will have to include a pay audit, following the negotiation that such equality plans require.

As for fixed-term contracts that, having been in force in the company for the previous 6 months, had expired when the calculation is performed, every 100 days worked or fraction thereof will count as another person.

Once the threshold making the equality plan mandatory is reached, the obligation to negotiate, draft and apply the equality plan is triggered. This obligation is maintained even when the number of employees falls below 50, once the negotiating committee has been formed and until the end of the term of validity of the plan, or for 4 years, as the case may be.

The negotiation process must start within a maximum term of 3 months as of the date on which the threshold making the equality plan mandatory is reached or as of when the collective agreement establishing the obligation is published. For companies obliged to draft an equality plan in 2020 for the first time, the starting point of the maximum term for setting up the negotiating committee will not be prior to the entry into force of the Equality Plans Regulation.

Moreover, the equality plan will have to be negotiated, approved and presented within a maximum term of 1 year as of the day after the end date of the term envisaged above for setting up the negotiating committee for the corresponding plan.

Not having an equality plan approved and in force when the company is obliged to do so, may prevent the company from entering into contracts with the public administration.

The plans in force at the moment of entry into force of the Equality Plans Regulation will have to adapt their content in line with the same within a maximum term of 12 months as of the entry into force of the Equality Plans Regulation, following a negotiating process.

2. Parties entitled to negotiate the equality plan

Both the equality plan and the prior situational diagnosis will have to be negotiated with the legal representatives of the employees and, in the absence of the same, the Equality Plans Regulation establishes that it will be the trade unions who negotiate on behalf of staff.

The following is established in relation to the parties entitled to negotiate the Equality Plans:

- In companies with employee legal representatives: It will be the works council and personnel delegates, or trade union sections when the latter so decide and represent a majority of the members of the council or personnel delegates.
- In companies with several work centres, the inter-centre committee may negotiate, where there is one and it has the necessary powers.
- In companies without employee representatives, the most representative trade unions and those most representative of the sector, entitled to form part of the negotiating committee of the collective agreement, will intervene on behalf of the employees. The maximum number of members will be 6 persons on each side and the committee can validly contain those trade unions who respond to the call by the company within a term of 10 days.

- If there are centres with and without representation, the labour side will be comprised of (i) the legal representatives of the employees in centres with representation and (ii) the union committee set up pursuant to the foregoing paragraph in representation of the centres that do not have representatives. In this case, the negotiating committee will be comprised of a maximum of 13 members on each side.

The negotiating committee will be comprised of equal numbers of company and employee representatives, and should contain a fair balance of men and women.

The negotiating committee will be entitled to participate in (i) the negotiation and preparation of the diagnosis, as well as the negotiation of the measures that will make up the equality plan; (ii) the drafting of the report with the results of the diagnosis; (iii) the identification of the priority measures, in light of the diagnosis; (iv) promoting the implementation of the equality plan in the company; (v) the definition of the measurement indicators and instruments for gathering information necessary for carrying out the monitoring and assessment of the degree of compliance with the measures of the equality plan implemented and (vi) any other functions that may be attributed to it by the regulations and applicable collective agreement, or agreed by the committee itself.

3. Negotiation

In drafting the equality plan, the parties will negotiate in good faith, with a view to reaching an agreement. In the event of disagreement, the negotiating committee may take recourse to the autonomous dispute resolution procedures and bodies, if so decided, after the intervention of the joint committee of the collective agreement, if so envisaged therein for such cases.

4. Situational diagnosis

The situational diagnosis is carried out prior to the equality plan and must refer to the following issues, at least: (i) recruitment and hiring process; (ii) professional classification; (iii) training; (iv) professional promotion; (v) working conditions, including the pay audit for men and women; (vi) co-responsible exercise of the rights to personal, family and working life; (vii) female underrepresentation; (viii) pay; and (ix) prevention of sex-based and sexual harassment.

The diagnosis will have to cover all the positions and work centres of the company and will be designed to estimate the magnitude of potential inequalities or difficulties in achieving effective equality in the company, gathering information to establish assessable measures in this regard. If the outcome of the diagnosis shows underrepresentation of persons of a particular sex in certain positions or hierarchical levels, the equality plans will include corrective measures, also potentially establishing affirmative action measures to eliminate the "*occupational segregation of women*".

A summary of this diagnosis and its main conclusions and proposals will be included in a report that will form part of the equality plan.

5. Equality Plan

The equality plans will have the following minimum content: (i) identification of the parties establishing it; (ii) personal, territorial and temporal scope; (iii) situational diagnostics report on the company, or on each of the group companies, (iv) the results of the pay audit; (v) validity and frequency of the pay audit; (vi) definition of qualitative and quantitative objectives; (vii)

description of specific measures, deadline for execution and prioritisation of the same, as well as the design of indicators that make it possible to determine the evolution of each measure; (viii) identification of the means and resources necessary for the implementation, monitoring and evaluation of each of the measures; (ix) schedule of actions for implementation, monitoring and evaluation of the measures; (x) system of periodic monitoring, evaluation and review; (xi) composition and operation of the joint committee responsible for the periodic monitoring, assessment and review of the equality plans; (xii) modification procedure and dispute resolution procedure.

6. Validity

The parties will establish the term of validity of the plan, which will not exceed 4 years. Moreover, the plan will have to be revised in the following circumstances: (a) when it must be done as a result of the outcome of the monitoring and evaluation; (b) when it is shown to be inadequate or insufficient as a result of the actions of the Labour Inspectorate or a judicial decision; (c) in cases of merger, absorption, transmission or modification of the legal status of the company; (d) when incidents arise that substantively modify the staff, working methods, organisation or systems of remuneration, including non-application of collective agreements and substantive modifications of working conditions; and (e) if a judicial decision finds the company guilty of direct or indirect sex-based discrimination or orders a review of the equality plan.

All equality plans have to be recorded in a public register.

2. ROYAL DECREE ON EQUAL PAY FOR WOMEN AND MEN

The object of Royal Decree 902/2020, of 13 October, on equal pay for women and men (the "**Royal Decree on Equal Pay**") is to establish specific measures in order to ensure the right to equal treatment and non-discrimination between women and men is upheld in relation to remuneration. The Royal Decree on Equal Pay will enter into force six months after its publication in the BOE, that is, on 14 April 2021.

1. Transparency

It establishes the principle of transparency with regard to pay so as to be able to identify discrimination, whether direct or indirect, and it is specified in the instruments established in the regulation: (i) pay records; (ii) pay audit; (iii) the system of evaluation of jobs belonging to a professional category in the company and in the applicable collective agreement and, (iv) the employees' right to information.

2. The equal pay for equal work obligation

Pursuant to article 28.1 of the Workers' Statute (**ET**), one job will have the same value as another when the nature of the functions or tasks actually involved, the educational, professional or training conditions required to perform it, the factors strictly related to doing it and the labour conditions in which such activities are carried out are, in reality, equivalent.

Moreover, factors such as arduousness and difficulty, cramped positions, repetitive movements, dexterity, meticulousness, isolation, responsibility (whether financial or related to the welfare of persons), versatility, social skills,

the skills of attending to and caring for persons, a capacity for dispute resolution or organisation, among others, may also be relevant.

Criteria are established for a proper evaluation of the jobs: suitability (taking into account the related factors that actually exist in the activity, including training), entirety (that no conditions of the job are overlooked or underestimated) and objectivity (clear mechanisms that do not depend on social valuations reflecting gender stereotypes).

3. Pay records

All companies have to keep pay records for all staff, "*including management personnel and senior executives*".

The pay records will include average salary values, salary supplements and non-salary payments for staff broken down by sex. Specifically, the pay records will contain, broken down by sex, the arithmetic mean and the median of what was actually received for each of these items in each professional group, professional category, level, position or any other applicable system of classification. In turn, this information will have to be broken down showing the type of remuneration, including base salary, each of the supplements and each of the non-salary items.

The legal representatives of the employees are entitled to see the entire content of the company's salary records. When there are no employee legal representatives, the employees will be entitled to access the information on the percentage differences existing in the averaged pay of men and women, which will also have to be broken down according to the nature of the pay and the applicable system of classification.

The employee legal representatives will have to be consulted at least ten days before the preparation of the records or whenever the records are modified. In general terms, the period of reference for the pay records will be the calendar year.

The pay records of companies who carry out pay audits (see the following section), will have the following peculiarities:

- ✓ In addition to the above, they will show –broken down by sex– the arithmetic means and medians of the job groupings with the same value in the company, according to the results of the evaluation of jobs, even if belonging to different sections in terms of professional classification.
- ✓ When the arithmetic mean or median of the total remuneration in the company of personnel of one sex is higher than that of the other by at least 25%, it will include justification showing that this difference is due to reasons other than the sex of the employees. Nonetheless, this justification cannot be applied to rule out the existence of signs of discrimination.

4. Pay audit

Companies that draw up an equality plan will have to include a pay audit as part of it, previous to the negotiation involved in such equality plans. The pay audit will have the same validity as the equality plan of which it forms part, unless a shorter term of validity is established.

The pay audit entails the following obligations for the company:

- ✓ Carrying out an assessment of the pay situation in the company. The assessment requires that the jobs be evaluated in the context of the equal pay for equal work principle, in relation to the system of remuneration and the system of promotion. A system of valuation factors is established for each area and each position, and a score is assigned. Other factors affecting differences in pay will be taken into account (e.g.: measures to facilitate a work-life balance).
- ✓ Establishing a plan of action to correct inequalities in pay, including a system of implementation and follow-up.

The application of the above for pay audits will follow the same gradual application stipulated for equality plans (e.g.: as of 7 March 2022, it will apply to all companies with a staff of 50 or more).

The Women's Institute and the Equal Opportunities Institute will prepare a best practice protocol or guidelines for collective bargaining and companies, as well as technical guidelines on carrying out pay audits from a gender perspective.

A procedure for the assessment of jobs will be approved in the form of a ministerial order within 6 months of the entry into force of the Royal Decree on Equal Pay.

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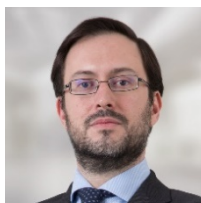
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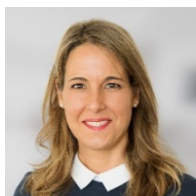
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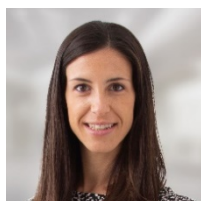
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