



European network of legal experts in gender equality and non-discrimination

Country:	France
Title:	New Decree on Gender Pay Gap in France
Date:	11 March 2019
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<u>Context</u>	
Issue at stake:	Indicators to fill in gender wage gap
Grounds of discrimination:	Sex
Source:	Decree
Field of application:	Equal pay; employment
Applicable law:	Decree n°2019-15 of 8 January 2019

Content

Legal development The New Decree on the Gender Pay Gap was adopted to implement the law of 05 September 2018, Chapter IV articles 104-107, which provide that in companies with more than 50 employees, the employer must publish each year indicators relating to the pay gap between women and men and information on the actions implemented to eliminate this gap.¹ The decree also defines the methodology used to establish the indicators (L.1142-8 of the Labor Code).

The general obligation to take into account the goal of eliminating the gender wage gap came into force on 01 January 2019 for companies with more than 250 employees and 01 January 2020 for those between 50 and 250 employees (art. L 1142-7 Labor Code).

The requirement to publish the wage disparity indicators will come into force on 01 September 2019 for companies between 250 employees and 1 000 employees (Art. D. 1142-2. Labour Code) and no later than 1 March 2020 for those between 50 and 250 employees (Art. D. 1142-2-1 of Labour Code).

For companies with more than 250 employees, the indicators required are as follows:

- 1) The gender wage gap between the company's female and male workers, calculated in reference to the average wage of the company's female workers compared to the average wage of male workers, calculated by age cohort and category of equivalent jobs.
- 2) The rate of disparities in individual pay raises that do not reflect promotions between the company's female and male workers.
- 3) The rate of disparities in promotions granted to the company's female and male workers.
- 4) The percentage of employees who benefited from a pay raise during the year of their return from maternity leave if wage increases were granted at the company's level during their leave.
- 5) The number of workers of the underrepresented sex among the ten employees which earn the highest wages in the firm.

¹ See <https://www.legifrance.gouv.fr/eli/loi/2018/9/5/MTRX1808061L/jo/texte> (accessed 07 February 2019).

For companies between 50 and 250 employees, the criteria for companies of more than 250 employees apply except the criterion on the rate of disparities in promotions of male and female workers.

When a works council has been created for several companies constituting an economic and social unit, the indicators will be calculated by the employer within this broader realm and will be monitored accordingly by the works council.

Regarding the methodology of calculation, the indicators can be calculated within a period of reference of 12 consecutive months according to the employer's choice. Companies under 250 employees can opt for a pluri-annual period of reference including two or three previous years. Indicators are calculated on 01 March of every year at the latest. The results of the company in view of the indicators are published each year on the website of the company, or in the absence of such website, the indicators are circulated to employees by any means (Art. D. 1142-4 Labour Code). Works councils are for instance granted access to these indicators.

The method of calculation of the wage disparity indicators and the scale of points awarded are based on a categorisation of equivalent jobs. To calculate the wage disparity, the employees are sorted out by category of equivalent jobs and in four age groups: under 30, 30 to 39, 40-49 and 50 and above. The equivalence of jobs will be determined by the employer after consulting work councils according to the level or the hierarchy (grade) related to the classification in the sector of activity. The rating of jobs will be set after consultation of the works council (Art. D. 1142-5). If the employer does not want to adopt this type of ranking or this methodology does not enable him/her to calculate the indicator, the employees can be sorted out according to the four socio-professional categories: blue collar workers; rank and file employees; technicians and foremen; engineers and managers.² Only groups composed of at least three male workers and at least three female workers will be accounted for. The individual average wage of female and male workers will be calculated according to the equivalent salary for a full-time position for each employee, after which the average wage will be calculated for the group.

In the annex of the decree (Art. D. 1142-3.), charts indicate the number of points to be awarded to companies according to their size and the level of wage disparity. For example for companies over 250 employees, the lower the disparity in wages, the more points are awarded. Equal to 0 % disparity: 40 points awarded; more than 0 % and inferior or equal to 1 % disparity: 38 points; superior to 1 % and inferior or equal to 2 %: 39 points and so on; the more the disparity increases the less points are awarded. For example a wage disparity above 14 % and below or equal to 15 % corresponds to 17 points. The annex also allows, for example, for the groups constituted by socio-professional categories to admit a margin of error of 5 % which means that if there exists a wage disparity, the margin of error is deducted from the wage disparity except if this results in a negative number eliminating the wage disparity altogether. For instance if the wage disparity is 15 %, a 5 % margin of error is deducted (approximation is thus tolerated) and the relevant wage disparity is brought down to 10 %.

Art. L 1142-9 Labour code sets out adequate and relevant measures of correction to be taken by companies in case a pay gap is found. The results are presented by socio-professional categories, levels, or hierarchical pay grades or other rankings according to jobs. If the indicators cannot be calculated, the employer must explain why. Measures foreseen by Art. L 1142-9 of the Labour code include providing information to the works councils and the possibility to engage in negotiations on professional equality. In companies where the results obtained with regard to the indicators are under 75 points, the collective negotiations on equality will focus on adequate and relevant measures to

² <https://www.insee.fr/fr/information/2497952>.

correct the gender wage gap and program annual or pluri-annual financial measures to close it (Art. D. 1142-6). In the event that no agreement on measures is found between the employer and employee representatives, the employer takes its own measures after consultation with the works council. This decision is monitored by public authorities.

An employer can ask the regional director of Labour inspectors (DIRECCTE) to designate one or more contact persons to help companies between 50 and 250 employees to calculate their indicators and define adequate and relevant measures of correction. Public authorities can comment on the measures taken through an agreement or a personal initiative of the employer (Art. D. 1142-7).

Financial sanctions arise after the time limit is reached (L. 1142-10). In companies of at least 50 employees, if the indicators-based score is under 75 points, the company has three years at its disposal to comply by reducing the wage disparities. If the company achieves a score of 75 points before the 3-years-deadline, then a new time limit of three years is awarded to correct the remaining disparities (Art. D. 1142-8).

Finally, the decree foresees sanctions for companies which do not comply within the 3-year-time limit. An agent from the labour inspector corps sends a report to the regional director (Art. D. 1142-9.). The director then informs the company that financial sanctions will be considered within two months following reception of the report. The director can however take into account the justifications put forward by the company to explain noncompliance with its obligations under the Gender Pay Gap Decree (economic hardship, company restructuring or merger, bankruptcy) (Art. D. 1142-11). The director has two choices: either impose a sanction amounting to 1 % of the company's earnings and profits from the past calendar year based on revenues from activities (social security contribution base Art. D. 1142-13) or award extra time to the company to comply within a maximum of one year.

Key points of analysis:

- 1) It is useful to look at the gender wage gap according to age cohorts because it reveals when exactly in their career women benefit from similar wages to men. Only comparing wages on the basis of equivalence of positions would otherwise obscure the fact that it often takes women much longer to reach levels equivalent to their male counterparts. However, the decree gives considerable leeway to employers to determine what constitutes categories of equivalent jobs. After consulting the works council or *Comité Social et Economique* (CSE), the employer can classify workers according to their level, their hierarchical grade linked to job sector classifications or any other agreed method to rate jobs.
- 2) Publishing the rate of disparities in individual pay raises granted to female and male workers does not reveal the amount of wage actually awarded to both categories.
- 3) Equally, publishing the rate of disparities in promotions granted to female and male workers reveals the difference in the amount of promotions distributed but says nothing about the nature of these promotions.
- 4) Article 1225-6 of the Labor Code already required employers to pay raises to employees during the year of their return from maternity leave if wage increases were granted at the company's level during employees' maternity leave. Therefore, on this point, the Decree does not add any new obligation.
- 5) The requirement to publish the number of workers of the underrepresented sex among the ten best paid employees is more of a strong symbol than a key provision to fight gender wage disparities across the board in companies.

It is first regrettable that no indicators are required for smaller companies (under 50 employees) since a majority of the job pool is within this category. It is also problematic that medium size companies (between 50 and 250 employees) are exempted from the obligation to publish the disparity rate in promotions granted to male and female workers as it removes a useful indicator from the monitoring toolbox.

In addition to publication on the company's website, employers can circulate the indicators to employees "by any means" which seems too flexible and can for instance take the form of a simple poster on the work place instead of a formal letter sent to employees or a company bulletin, which would be better suited to fostering wage transparency and raising awareness on wage disparities.

Age cohorts are a useful category to understand the increase of wages over a career but the category over 50 is too broad given that the mandatory retirement age is 70. There is no visibility of wage disparities from 50 to 70 which is a concern for women. In the same vein, limiting the application of measuring indicators to groups of at least three male workers and three female workers reduces the opportunity to see wage disparities in sex segregated job sectors where there is no critical mass of female or male workers and wage transparency rules are all the more crucial.

The calculation of points awarded according to the extent of the wage disparity is useful but this sliding scale downward implicitly still awards points to companies with strong disparities, which seems to indicate that some wage disparities are relative, tolerable. Allowing to take into account a "margin of error" mitigates the level of wage disparity actually accounted for.

The requirement to correct wage disparities when they attain a certain cap through collective bargaining or a personal initiative of the employer is a positive step towards filling the structural gap preventively and constructively before financial sanctions occur.

Internet link source:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id> (accessed 07 February 2019).

<https://www.legifrance.gouv.fr/eli/loi/2018/9/5/MTRX1808061L/jo/texte> (accessed 07 February 2019).