

# New obligations for employers? Proposed Equal Pay Directive 1/46/22



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In March 2021 the European Commission passed a **proposal for a new directive** aimed at putting mechanisms in place that will help employers provide equal pay for men and women. According to the draft directive, the pay disparity is still about 14%. Inequality becomes evident when we convert this percentage into days: compared to men, women actually have to work 51 days a year without pay. The main aim of the new rules is to minimise gender inequality in pay. While gender equality is a topic that has been discussed in public at length, statistics do not give us a reason to believe a balance has been achieved on the issue of pay. To achieve this, the European Commission has come up with new solutions that will mean new statutory obligations for employers.

## Determining the value of work for all roles

Employers are required to set up pay structures that allow women and men to receive equal pay for equal work or work of equal value. To measure the value of work, the member states will have to develop mechanisms and methodologies enabling employers to evaluate this aspect.

According to the CJEU, we need to evaluate not only persons working for a particular employer but also, for example, a group of companies, and former employees may also be evaluated.

The value of a job could be characterised by the following objective criteria:

- Education, vocational and training requirements
- Skills, effort and responsibility required to do the job
- Job duties and tasks to be performed

## A more transparent pay system

Employers will have to prepare a description of gender-neutral criteria to be used in determining pay and career growth. Employees will have the right to demand information on pay levels according to the gender aspect and employee categories for equal roles or roles of equal value. Employers will also have to annually remind employees of their right to receive such information.

## A new reporting obligation for large employers

Large companies (with over 250 employees – Latvia has more than 200 registered large employers) will be required to prepare and publish information on the gender pay gap (including any extra pay such as bonuses). If it's 5% or more, the employer will have to conduct a pay assessment and justify the gap. If an objective rationale cannot be prepared, the employer will have to close the gap in cooperation with employees and government agencies.

## Disagreement more likely to be settled in court

Finally, one of the directive's aims is to make it easier for employees to take legal action if any hallmarks of discriminatory pay are identified. The draft directive therefore includes the following provisions:

- The burden of proof on the employer only. This approach is already taken in anti-discrimination lawsuits, yet the current case law<sup>1</sup> implies the need for a prima facie court assessment to identify a party required to carry the burden of proof. The directive provides that the burden of proof will be placed on the employer without a prima facie assessment, meaning by default.
- A longer time limit for bringing an action. The draft envisages a 3-year time limit for bringing an action (the current time limit being three months).<sup>2</sup> The time limit will start to run from the date the discriminatory breach is stopped.
- The employer to pay litigation expenses. The directive provides that if the employer wins the case and the employee's claim is dismissed, the employer has no right to recover litigation expenses unless the action is brought with malicious intent or non-recovery of expenses would be unreasonable, for example the employer is a small company with a deteriorating financial position.

While the directive's final version is being developed in EU corridors, the proposed rules allow us to outline the anticipated employer obligations and labour law trends. The emphasis will be on the aggregation and transparency of pay information and on the reduction of factors limiting litigation, so employers should be ready for challenges the new rules will bring.

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<sup>1</sup>Supreme Court Ruling No. SKC-684/2012 of 6 June 2012 <https://www.at.gov.lv/downloadlawfile/3066>

<sup>2</sup>Section 60(3) of the Labour Code provides that an employee may bring equal pay proceedings within three months of the date they did or should have become aware of a breach of the equal pay rules.