



# Global labor and employment law strategic topics

DE&I – Diversity, Equity &  
Inclusion

**July 2021 Edition #2**





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DE&I – Diversity, Equity & Inclusion (July 2021)

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# Editors' letter

Corporate reporting includes Environmental, Social and Governance (ESG) reporting. This trend to measure the health of an organization, not only through financial and economic measures, but also through non-financial indicators, is key to assess a company's value for investors and shareholders today. As with CSR (Corporate Social Responsibility), organizations need to demonstrate sustainability and good corporate citizenship as measured through ESG reporting. The Social aspect of ESG includes inter alia working conditions, health and safety, employee relations, and DE&I: Diversity, Equity & Inclusion.

Together with ESG reporting needs, countries around the world understand that incentives and binding legal measures are needed to achieve gender parity and generally, greater diversity, equity and inclusion in the workplace. For this reason, many countries are passing legislation to ensure non-discrimination laws are in place, and also requiring companies to measure and report on Diversity, Equity & Inclusion. Indeed, as the Head of the European Central Bank, Ms. Christine Lagarde, stated in March 18, 2021 before the French National Assembly, it would take 140 years before parity between men and women is achieved if nothing further is done.

In this edition of EY's Global labor and employment law strategic topics publication, we survey the laws in 31 countries relating to DE&I.



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## Argentina



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### DE&I in the working environment

Same-sex marriage was approved in 2010 in Argentina, making it the first country in Latin America to allow gay couples to wed. Two years later, the Gender Identity Law was one of the most progressive pieces of legislation enacted worldwide.

Interest in diversity has been gaining momentum since then, in line with global events, with initiatives in the corporate and public sectors.

The Argentine Ministry of Women, Genders and Diversity was recently created to implement policies that foster gender equality and nondiscrimination in different spheres, including employment, along with other ministries, such as the Labor, Employment and Social Security Ministry.

#### Labor precedents

The Argentine Constitution amended in 1994 introduces clauses that grant supra-legal status to human rights treaties and conventions, such as the Convention on the Elimination of all Forms of Discrimination Against Women, which establishes gender equality in employment in article 11 (article 8(22), Argentine Constitution).

It also empowers the Argentine Congress to promote measures to ensure equality of opportunity and treatment, and full enjoyment of rights recognized in the Argentine Constitution and international treaties (article 75(23), Argentine Constitution).

Argentine Employment Contract Law No. 20,744 governs employment relationships in the private arena, establishing workers' basic rights.

Section 17, Employment Contract Law, prohibits discrimination between workers on the basis of sex, race, nationality, religion, political opinion, union or age.

Section 172, Employment Contract Law, recognizes women's full capacity to enter into all type of agreements, and equal pay to men and women who perform jobs of equal value.

Moreover, Law No. 26,485 on Comprehensive Protection for Women, enacted in 2009, establishes that the limitation or control of women's earnings as well as the collection of a lower pay for the same job within the same workplace is economic and financial abuse.

#### Reports

The Argentine Bulletin of Labor Statistics, whose set of indicators arises from different sources of information developed by the Argentine Ministry of Labor, Employment and Social Security and the National Institute of Statistics and Census, monitors the distribution of employment per gender in Argentina.

The Permanent Household Survey conducted by INDEC also offers insights on persistent inequalities in the Argentine workplace.

However, there are no mandatory reports to be completed by employers in relation to D&I.

#### Latest reviews

In 2020, a hiring quota for transgender people was set through Presidential Decree No. 721. It aims to ensure that at least 1% of all civil servants are transgender people.

Furthermore, Presidential Decree No. 191/2021 introduces an incentive for companies located in some provinces in northern Argentina that increases the payroll for hiring women or transgender people by reducing employer social security contributions up to 80% during the first 12 months, 55% the following 12 months and 30% the last 12 months.

Though legislation has promoted policies that foster inclusion in the workplace, there are more opportunities to expand on this.

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## Australia



**Andrew Ball**

## Diversity, equity and inclusion

### Gathering information

Laws around the world are requiring that companies do more to achieve diversity, equity and inclusion (DE&I).

One way to overcome inequality is to measure it through formal reporting requirements.

Australia leads the way on gathering data about gender equity and equal pay. Apart from this there are no mandatory reporting requirements.

### Anti-discrimination laws

Australia has comprehensive anti-discrimination laws at both the federal and state/territory level.

An employer must not discriminate against an employee because of, or for reasons including protected grounds such as the employee's race, color, sex, sexual orientation, age, physical or mental disability, marital status, family or caregiver responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

These laws rely on employees making complaints around the hiring process, their experience at work or upon termination of employment.

### Can data on diversity measures be gathered?

Yes, data on gender equality and equal pay is gathered by the Workplace Gender Equality Agency (WGEA). Apart from this, DE&I data is mainly based on a mixture of government inquiries and voluntary participation by employers in DE&I initiatives.

### Specific reporting requirements

The Workplace Gender Equality Agency Act 2021 (Cth) requires private sector employers with 100 or more employees to file an annual report signed by the CEO with the WGEA ([www.wgea.gov.au](http://www.wgea.gov.au))

The report covers gender equality indicators such as internal programs to promote gender equity, the number of women in leadership positions and any gender pay gap.

The reports are publicly available but exclude personal information and remuneration information. However, the WGEA can use pay gap data in aggregated reports including headline figures such as:

- ▶ The current national gender pay gap is around 14% to 19% which is expected to close by 2040.
- ▶ Only 14.1% of board chairs are women, with very little change over the last six years.
- ▶ Women are more likely to hold lower-level line management roles than senior leadership positions.

An employer with 500 or more employees must have a formal policy or strategy in at least one of nine areas such as recruitment, retention or promotions. An employer of 500+ employees must also have a policy or strategy in place for either closing gender pay gaps, supporting caregivers or preventing sexual harassment and discrimination.

The employer must inform employees and shareholders or members that the public report has been lodged.

Non-compliance may result in the WGEA naming the employer in a report to the minister, on its website or in a newspaper. Non-compliance may impact whether the employer can tender for Australian government work.

### Leading practice

Leading practice for Australian employers is to gather data on DE&I matters at the hiring stage and through employee surveys and exit interviews.

The Australian Human Rights Commission launched a Respect@Work report in March 2021. Recommendations include requiring employers to take more responsibility for preventing sexual harassment.

Employers can stay a step ahead of regulators by taking proactive steps now to prevent discrimination and increase DE&I outcomes for employees.

Diversity surveys ensure that data gathering does not stop at mandatory WGEA reporting.

Surveys and exit interviews have the added benefit of potentially alerting the employer to serious issues, enabling it to head off anti-discrimination claims.

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Brazil



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## Collection and maintenance of diversity information

### ESG and diversity

Companies in Brazil have focused more on environmental, social and governance (ESG) issues and, diversity and inclusion are very relevant. During the COVID-19 pandemic, several companies have been planning and studying what the future of work will look like, considering not only the work regime, but also new ways of evaluating performance, measuring productivity, determining more appropriate benefits, etc. Many companies have already determined that it is fundamental for the business to assure there is a diverse team.

However, some companies still struggle with a lack of information necessary to evaluate the current diversity picture, to establish a structured action plan, and to monitor and make sure the actions taken will be effective.

### Legislation regarding diversity information

Brazilian law forbids any type of discrimination for the purpose of access or maintenance of the work relationship due to gender, race, origin, skin color, civil status, family situation, disability and age, among others. Also, the Brazilian Federal Constitution expressly forbids salary differences due to the reason of gender, disability, age, skin color or civil status.

### Reporting and hiring obligations

Currently, most Brazilian companies must report information relating to the workforce to the Government. The report is made through an electronic obligation named eSocial. Companies must report specific personal information about each employee hired under the Brazilian Labor Law.

Therefore, some information must be collected from employees during the selection process; otherwise, companies will not be in compliance with local legislation. Mandatory information includes gender, race, skin color, social name if applicable (transgender) and disabilities (including type of disability - mental, intellectual, physical, hearing or visual).

Additionally, companies with 100 or more employees must meet hiring goals for employees with a disability (from 2% to 5%, according to the headcount). The non-observance of such law may result in penalties.

Even though a report to the Government is mandatory, it is important to be aware that in Brazil, there is a law related to personal data protection. Therefore, companies should implement very robust internal processes and controls around employees' personal information.

### Gender equality

As mentioned, equal pay between males and females is assured by law. However, according to a research recently published by the Statistics and Geography Brazilian Institute, in general, women received 77% of the salary paid to men in 2019.

Even though most Brazilian companies are obligated to report employees' information, as well as to provide detailed payroll information to the Government, there is no significant questioning on salary equality by the authorities.

Aiming to reduce the differences of salaries due to gender, there is a Law Project being analyzed by the Brazilian Congress that establishes the payment of a penalty in the amount corresponding to five times the difference of salary, during the total period of the work relationship (observing the statute of limitations).

### Conclusion

There are several reasons why a company should have a very structured process regarding diversity information: compliance reasons and no less important, to make sure necessary actions will be taken to assure a diverse and inclusive environment.

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## China Mainland



**William WL Zhang**

### Diversity, equity and inclusion

More companies are realizing that employee diversity, equity and inclusion are closely related to enterprise creativity, productivity, customer satisfaction and market competitiveness and thus are trying to build the best compliant global DE&I programs.

#### Rules on diversity data collection and transfer

In recent years, the China Mainland has placed significance on personal data collection and protection. The legislation and standards are becoming more comprehensive and the compliance stricter. In general, collecting diversity data should comply with the principles of legality, legitimacy and necessity and should meet the specific requirements under different laws.

Article 8 of China Mainland Employment Contract Law states that employers should be entitled to, and employees should render, a truthful explanation of basic personal information relating directly to the employment contract. Employees have the right to refuse to provide information that is not directly related to the employment contract.

According to Article 1,035 of China Mainland Civil Code, the processing of an individual's personal information should comply with the principles of legality, legitimacy and necessity, should not be excessive and should meet these requirements:

- ▶ Consent shall be obtained from a natural person or his or her guardian unless otherwise stipulated in laws or administrative regulations.

- ▶ Rules on information processing should be disclosed.
- ▶ The purpose, method and scope of the information processing should be expressly indicated.
- ▶ The law, administrative regulations or agreement between the parties should not be violated.

China Mainland Cybersecurity Law also specifies that key information infrastructure operators should store personal information and important data gathered and produced during operations within the territory of the China Mainland. Where it is necessary to provide such information and data to overseas parties due to business requirements, a security assessment should be conducted in accordance with the measures formulated by the national Cyberspace Administration in concert with the relevant departments under the State Council.

#### Requirements on equal pay

Under China Mainland law, employees should enjoy the right to be employed on an equal basis in accordance with the law. Employees should not be subject to any discrimination arising from differences in terms of nationality, race, gender and religious belief. China Mainland Labor Law further clarifies that women should enjoy equal employment rights to men. When companies are recruiting employees, women should not be refused on the grounds of sex, nor should the recruitment standards for women be raised, except in those types of work or positions of work that are unsuitable for women as stipulated by the law. In addition, the employer's recruitment information should not include gender restrictions

(except for the range of work that should not be assigned to female employees or other circumstances as stipulated by the law) or gender preferences, nor should they restrict the employment of women or refuse to employ women on gender grounds; they should not inquire about a female applicant's marital and childbearing status; nor should they include a pregnancy test in the pre-employment physical examination or include restrictions on childbirth as a condition for employment; and they should not increase the recruitment standards for women in a differentiated manner.

Employers that are suspected of gender discrimination should be subject to joint interviews and investigation by the local administrative authorities and be exposed to the public through the media if they refuse to make rectifications. Female employees are entitled to file a case to demand equal employment rights.

#### Conclusion

More companies are pursuing business or social fairness, which emphasizes the need for diversity, equity and inclusion, but they must follow certain procedures when collecting and processing employees' information.

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## Colombia



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### The gender equity track

Enabling diversity is a main principle of guidance for employers as inclusiveness is a way to boost performance of working teams.

Over the past few years, inclusion has become a major issue in corporate responsibility programs. It also has been included in the agenda of governments as they seek to promote it through their legislations, actions and rulings. But how well is the market responding to diverse workforce?

#### Gender equity numbers

According to data compiled by the National Department of Statistics, in Colombia, the average general wage gap between men and women is 12.9% for 2019 in favor of men. However, the direction of the gap changes when calculating the average wage gap per hour of work. In fact, the gender pay gap per hour for 2019 is -2.3% (i.e., per hour, on average women earn 2.3% more than men).

#### Constitutional and legal approach

It is important to note that the Colombian Constitution established as a fundamental right that all citizens are born free and equal before the law, and deserve the same rights, freedoms and opportunities without discrimination based on sex, race, national or family origin, language, religion, and political or philosophical opinion.

This right has been extended to the workplace in principles developed by the Constitutional Court such as “equal work per equal remuneration,” the right to equality and non-racial discrimination in the workplace and employment stability

for those under particular circumstances (e.g., pregnant employees, soon to retire, disabled or sick individuals). Regarding the LGBTIQ+ community, this court established that sexual orientation is a matter circumscribed within the scope of individual autonomy that allows an individual to adopt, without coercion, life projects that are considered pertinent as long as they do not violate legal order and/or other rights.

Law 823 of 2003 was aimed at promoting equal opportunities for women. Thus, the government established the obligation to eliminate sexism and other discriminatory criteria in the processes, contents and methodologies of formal and informal education. It developed actions to promote non-discrimination against women at work and the principle of equal pay for equal work.

In relation to the protection of personal data, Law 1581 of 2012 established the legal framework for its treatment. Furthermore, sensitive data is data that affects the privacy of the holder or whose improper use may generate discrimination, such as racial or ethnic origin; political orientation; religious or philosophical convictions; membership of trade unions, social organizations, human rights organizations or that promote the interests of any political party or that guarantee the rights and guarantees of opposition political parties; as well as data related to health, sexual life and biometric data.

According to article 23 of the aforementioned law, when an employer does not have a data protection policy or authorization to treat personal data from its employees, it could be subject to economic fines by the Superintendency of Industry and Commerce.

#### Practical approach

The constitutional and legal development has generated prohibitions in the workplace that mitigate any opportunity for discrimination in which the following stand out:

- ▶ In a selection process, questions should be geared toward determining whether the candidate has the skills for the position. Therefore, any inquiries related to the intimate sphere of the candidate constitute an indication of discrimination.
- ▶ Requesting information on certain diseases or disabling conditions from candidates or employees constitutes an illegitimate practice that violates, among other things, the rights to non-discrimination and to privacy. These may only be requested if a diagnosis may expose the individual to higher risks (e.g., HIV tests, pregnancy tests, among others).
- ▶ Regarding the COVID-19 pandemic, if symptoms are suspected, the employer must direct the person to an authorized medical center to carry out a diagnostic test. This should not impede the hiring process or the continuation of employment.

#### Conclusion

Any employer must promote diversity and inclusion, not only because it is the ethically correct thing to do, but because diverse teams work better. At a time in history where innovation is an intangible asset, having a diverse and inclusive team ensures that all employees feel free to express ideas that could lead to big changes.

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## Costa Rica



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### Diversity, equity and inclusion

The workplace of the 21st century Companies around the globe are focusing more and more on diversity, equity and inclusion (DE&I) to have a better workplace. A diverse and inclusive workplace leverages from the different perspectives, becomes more innovative and collaborative, and strengthens the employees' capacities to work in a globalized environment. Employees deeply appreciate working for an entity that shows trust and appreciation, and for an employer that values their uniqueness and empowers them to express their diverse points of view in a safe environment.

#### Rules against discriminatory practices

Since 2017, Costa Rica has reinforced its rules against discriminatory practices in all stages of the employment relationship. These rules protect candidates against discrimination in the recruitment process and employees from discriminatory practices when the relationship is already in force or when it comes to an end. Article 404 of the Labor Code prohibits any form of discrimination in the workplace based on age, ethnicity, sex, religion, race, sexual orientation, marital status, political opinion, nationality, social origin, affiliation, health conditions, disability, union membership, economic situation or any other form of discrimination. This ensures that employment decisions will be properly substantiated on an objective reason and not on subjective conditions that are intrinsic to each employee.

Differentiation is not equivalent to discrimination. It is completely valid to differentiate when based on truly objective factors and not on the employees' personal characteristics. Due to the above, filling specific diversity quotas may be a practice for employees, if based solely on the employees' personal traits and not on their experience, competences, etc.

It is best practice and fairness within their internal policies and procedures. To accomplish this, it is key to train all decision-making employees to identify their unconscious bias and focus on the company's business needs and the abilities, experience, talents and skills that each employee has to offer.

#### Diversity monitoring

Is a company permitted to collect sensitive personal data (e.g., race, nationality, sex, age, sexuality, health, military status) in relation to its employees and prospective employees in order to monitor diversity? The answer is yes "under certain circumstances." The Law for the Protection of the Person Against the Processing of their Personal Data (Law No. 8968) defines sensitive data as information related to the intimacy of the person (e.g., racial origin, political opinions, religious or spiritual convictions, socioeconomic status, biomedical or genetic information, life and sexual orientation). Pursuant to article 9 of Law No. 8968, people are not obligated to provide their sensitive data. Even though there are certain exceptions, the law does not carve out as an exception employment-related purposes related to diversity. Therefore, all data collection should be voluntary and anonymized to the extent possible.

Employees must provide written informed consent for the collection of such data.

The informed consent must include information on where the data is being collected, how they may access such data, and how the data is being stored and/or processed. Employees should always be made aware of their right to refuse to provide such information. In addition, legally protected sensitive data may not be used for discriminatory purposes.

Although most practices that seek to incentivize DE&I in the workplace have a good purpose, poor execution of such initiatives or lack of document trails to back up the rationale behind certain decisions may bring discrimination claims against employers.

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## Czech Republic



**Ondřej Havránek**

### Diversity, equity and inclusion

Diversity, equity and inclusion are long-term topics resonating throughout the Czech society as well as governmental programs.

#### Legal background

The equity of people is one of the main principles enshrined in the Czech Charter of Fundamental Rights and Freedoms, followed by the guaranteed fundamental rights and freedoms regardless of gender, race, color of skin, language, belief and religion, political and other opinions, national or social origins, belonging to a national or ethnic minority, property, lineage or other status.

The right to equal treatment and protection against discrimination is further regulated by the Anti-Discrimination Act.

Additionally, the equal treatment of all employees and prohibition of their discrimination is stipulated directly in the Czech Labor Code, including the principle of the same remuneration for the same work or work of the same value.

#### Protected categories

Discrimination grounds under Czech law are race, ethnic origins, nationality, gender (including pregnancy, motherhood, fatherhood, gender identification), sexual orientation, age, disability, religion, and belief or worldview.

### Data on diversity

Overall data on diversity is anonymously gathered, processed and published by the Czech Statistical Office with an emphasis on gender statistics in various areas. This data is gathered regularly and is published approximately every three years. The various areas include demographics, health, education, salary, social security, criminality, representation in public functions and employment in the information and communication technology sector.

Specific data is gathered from the statistical reports made by various official authorities and from a number of databases and information systems.

### Data on equal pay

Data on equal pay between males and females is part of the annual structural salary statistics performed by the Czech Statistical Office. This statistic is based on a sample survey among economic entities randomly selected from the Register of Economic Entities. The selected entity then must provide required data, including number of employees and their salary, to the Czech Statistical Office. If the entity fails to provide the data, it may face a penalty up to CZK100,000 (approximately EUR3,930).

Data on equal pay consistently shows a wide gender pay gap of approximately 20% that represents the third widest gap among the EU member states. This makes the Czech Republic the subject of continuous criticism by the European Union and international organizations, not only regarding the pay gap but also in relation to unequal representation in managerial positions or in public authority bodies.

### Trends

There are clear statutory rules for anti-discrimination and equality, but no legal regulation actively demanding diversity in various functions.

Employers are generally not required to publish data on salaries, making it difficult for employees to be aware of pay gaps and file legal claims. Disputes relating to diversity, equity or discrimination are still rather rare in the Czech environment.

In 2020, the Supreme Court issued an important decision promoting equal pay for employees performing the same work in different regions of the Czech Republic. This decision has brought the equal-pay issue more into the public discussion.

Another labor market issue complicating the position of persons requiring flexibility such as parents is a very low number of part-time positions offered by employers. With the shift to remote work during the last year, this trend now seems to be finally turning. It will be an important task for the new Czech government after the upcoming Parliamentary elections to provide more systematic support of part-time and remote (home office) work, also due to the implementation of the EU Work-Life Balance Directive.

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Finland



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## Diversity, equity and inclusion at workplace

Finnish companies have recognized that a diverse workforce attracts the best talent and helps them outperform competitors. Companies are building their diversity and equity programs and have a need to gather data regarding their employees and jobseekers.

### What kind of data on diversity matters can be gathered?

Companies are entitled to gather and monitor only employee data that is directly necessary with respect to the employment. This data is related to the rights and responsibilities of employees and an employer, and the benefits provided by the employer or the special nature of the employee's duties, but rarely straight on diversity matters.

Some data, such as competence, suitability and health suitability of an employee, may be regarded as diversity data and it, as well as other employees' personal data, may be gathered only from employees themselves or from other records with the employee's consent. Exceptions are not permitted even on employee's consent and thus, all collection of data shall fulfill the requirements of the Act on Protection of Privacy in Working Life.

### Reporting requirements on diversity

According to the Non-discrimination Act, no one may be discriminated against on the basis of age, origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family relationships, state of health, disability, sexual orientation or other personal characteristics.

Companies employing at least 30 employees must have a plan regarding the measures and how it will promote diversity and prevent discrimination. There are no defined special reporting requirements.

Authorities such as the Non-Discrimination Ombudsman and the National Non-Discrimination and Equality Tribunal as well as occupational health and safety authorities must ensure that companies are not in breach of legal requirements. Should an authority ask for a clarification or a report of a suspected breach on an equity matter, the company must provide this.

### Reporting requirements on equal pay

The Act on Equality between Women and Men provides that as part of a gender equality plan, an employer must provide a written report on the grounds for all salaries paid.

Should there be unlawful differences on the grounds for salaries for men and women, an employee is entitled to claim a compensation currently amounting to at least EUR3,620. The employee may also claim compensation for damages and losses.

The Ombudsman for Equality and the National Non-Discrimination and Equality Tribunal monitor that companies are in line with the liabilities of the law. On an authority's request, the company must provide all necessary reports and show documents to find out whether any discrimination on salary payments has taken place. If the company declines to provide this, a conditional fine may be imposed.

## Conclusion

Diversity, equality and inclusion at workplaces require continuous monitoring and concrete actions, supported by the mandatory plans and reports, from employers. Company policies, culture and adequate processes starting from the evaluation of the company's present situation and identification of the measures needed to promote these topics have an essential role. Everyone in the workplace – leadership, superiors and all employees – have a role in creating a diverse and inclusive workplace.

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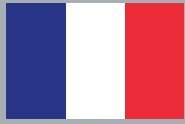
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## France



**Roselyn Sands**

### Diversity, equity and inclusion in France

The terms “diversity, equity and inclusion” are not per se covered by French Labor Law. French law focusses more on anti-discrimination laws and equal pay. However, through recent legislative action, French law is encouraging employers to achieve DE&I by various means, including measurement, transparency, and reporting. This is quite similar to the new ESG non-financial reporting sought by sustainability-minded investors.

#### Legal protections

French labor law prohibits discrimination in employment covering a vast array of categories, 17 in all: national origin; sex; sexual orientation; gender identity; age; marital status; pregnancy; genetic characteristics; belonging or not belonging to an ethnic group, a nation or a race; political opinions; trade union or mutualist activities; exercise of an elective mandate; religious convictions; physical appearance; surname; place of residence; state of health; disability; and ability to express oneself in a language other than French.

In addition to these anti-discrimination laws, specific measures became mandatory to ensure equality and diversity in the workplace.

Employees have 5 years to bring claims before court for violations of these rules in hiring, employment, and equal opportunities for advancement.

In addition, employers have the absolute obligation to safeguard employees’ health and safety at work while ensuring their well-being by preventing sexual and bullying or moral harassment.

#### In order to achieve diversity and inclusion in the workplace, companies

#### need to comply with specific reporting obligations:

- ▶ Companies with at least 50 employees must publish each year indicators (4 to 5 based on the headcount) relating to women-men salary gap and the actions implemented to eliminate them. The 5 indicators are the following, each being credited with a score:
  - ▶ Salary gap between men and women in view of their age and position
  - ▶ Rate level of individual salary increases
  - ▶ Promotion rate gap between women and men
  - ▶ Percentage salary increase in the year following the return from maternity leave
  - ▶ Number of the underrepresented gender’ employees among the 10 highest earnings.
- ▶ The score obtained out of 100 must be published. A score below 75 requires corrective actions within a set period. Failure to meet these requirements may result in financial penalties (an administrative fine of 1% of the total payroll).
- ▶ Obligations to bargain and consult the Social and Economic Committee (CSE - former Works Council) on equal pay between men and women and on quality of life at work or set up a specific action plan.
- ▶ In that frame, the employer shares with the CSE several information such as diagnosis of the comparative situation of women and men in terms of hiring, training, promotion, salary gap, qualification, working conditions, remuneration, professional activity/ personal life balance, proportion of women and men on the board of directors.

In addition to the above reporting obligations, many companies seek to gather data on diversity and inclusion in order to measure progress.

#### Can data on diversity matters collected and gathered?

Unlike the United States, in France, an employer is not permitted to ask an employee about his/her ethnicity, national origin, sexual preference, etc.

For employers, personal employee data may be collected for hiring, salary, monitoring and access control purposes, such as name, personal address, age, phone number, ID photo, social security number, bank account details, family situation, gender or yearly appraisal score. But no data, for example on sexual preference, religion, national origin, ethnicity, political opinion, union membership, health state, judicial record, may be gathered.

Which makes it difficult to assess these data for purposes of measuring progress.

#### Best practices

If a company seeks a more inclusive and diverse work environment, the following actions may be considered:

- ▶ Prepare an action plan to work to achieve a work environment that guarantees the best level of health and safety protection, that prevents discrimination and harassment, and promotes DE&I
- ▶ Include staff representatives in the discussions surrounding DE&I programs and actions
- ▶ Apply for a “diversity label” certification awarded by Association Française de Normalisation (AFNOR) that attests that the company fulfills the DE&I specifications

The ideal would be to avoid a legal obligation to publish an index on diversity knowing that fostering a serene work environment is also a key factor in employee performance and engagement.

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Georgia



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## Diversity, equity and inclusion

The laws of Georgia define and prohibit discrimination in labor relations. In 2020, new major amendments to the Labor Code of Georgia were enacted. As a result, stricter rules related to prohibition of labor discrimination were introduced.

### Gathering data on diversity

The laws of Georgia do not require gathering diversity-related data. However, this information may be collected by different research or other types of organizations within various targeted projects. Participating in such research is voluntary and at the request of the participant, anonymity may be maintained.

### Protection against discrimination

For the purpose of labor relations, discrimination is an intentional or negligent action or exclusion of a person or giving to him/her a preference. The grounds of such action may include race, skin color, ethnic or social affiliation, nationality, age, gender, sexual orientation, disability, health status, religious, public, political or other affiliation, political or other opinions, or any other grounds aiming to deny or breach equal opportunities or treatment. Discrimination in labor relations and pre-contractual relations – including when publishing a vacancy and at a selection stage – and in employment and occupation is prohibited.

### Reporting

There are no specific reporting requirements on diversity or equal pay between males and females in Georgia.

As part of the 2020 amendments, a new norm regarding equal pay appeared in the Labor Code. The new law specifically states that employers must ensure equal remuneration of female and male employees for equal work performed.

The Labor Inspection has the right to review cases related to the violation of labor norms, including the norm related to equal pay, and to impose respective sanctions.

### Sanctions

In the event of a dispute relating to discrimination, the burden of proof rests with the employer.

Furthermore, it is prohibited to terminate an employment agreement with an employee, to treat an employee in a negative manner and/or to attempt to influence them because the employee filed a complaint or has cooperated with an appropriate body on possible discrimination at the workplace.

The violation of the principle of prohibition of discrimination results in a warning or a fine. The amount of the fine depends on the organizational form of the employer and its aggregate amount of VAT-taxable transactions.

Furthermore, any person considering himself/herself to be a victim of discrimination may bring a court action against the employer and may make a claim for moral and/or material damages.

### Conclusion

The laws of Georgia may be deemed to put a heavy burden of proof on employers, who may have acted in discriminatory manner. As a result of the recent amendments, the violation by an employer of the principle of prohibition of discrimination as well as other obligations under the Labor Code may lead to administrative inspection and penalties. Therefore, employers should pay special attention to issues related to discrimination and other labor law requirements as well as examine any decisions that are made in relation to employees.

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Germany



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## Diversity, equity and inclusion in Germany

### The value of diversity

Diversity has become a prominent issue in today's working world. Companies promoting diversity within their organization benefit from greater employee satisfaction, market advantages in the competition for new talents and business partners, and increased success. Gathering data on diversity is particularly relevant for employers when evaluating their existing diversity management or implementing new strategies to promote diversity, equity and inclusion.

### Categories protected against discrimination

Promoting diversity and inclusion as an employer means valuing each employee for his/her individual characteristics and lifestyle and integrating them equally. German law promotes diversity and inclusion by protecting certain categories against discrimination. According to Article 3 of the German Constitution, no person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, religious or political opinions or disability. Regarding the protection against discrimination in work life, Section 1 of the German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz) forbids any discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.

### Gathering data on diversity

In general, there is no mandatory law with regard to data gathering on diversity for employers, even though specific regulations for certain groups have to be followed (e.g., maintaining a register listing employees with disabilities). If an employer gathers data on diversity in order to promote more diversity and inclusion within its workforce, strict data protection laws, such as the German Federal Data Protection Act (Bundesdatenschutz-gesetz) and the General Data Protection Regulation must be followed. According to those regulations, the processing of employees' personal data is only allowed if it is either expressly permitted by law or if the employee has consented to the data processing on an individual case-by-case basis. These strict regulations may hinder the employer in gathering data with regard to diversity, especially if such data relates to personal details of the employee such as his/her ethnic origin or religion.

### Gathering data on equal pay

The German Remuneration Transparency Act (Entgelt-transparenzgesetz) promotes equal pay for women and men for the same work or work of equal value. According to the Remuneration Transparency Act, each employee is entitled to gain information by the employer in order to verify compliance with the equal pay principle. Furthermore, the Act regulates reporting obligations for employers regularly employing more

than 500. Within this, employers must regularly submit a report outlining the measures taken to promote gender equality and the equal pay principle and justify it if no such measures have been taken. Moreover, the report must contain data on the average total number of employees as well as on the average number of full-time and part-time employees by gender. There are no legal penalties for non-compliance with those reporting obligations. Nevertheless, compliance with those laws is encouraged, taking into account the company's reputation.

### Best practice

Gathering data on diversity may be a valuable first step for employers to develop effective and sustainable diversity management. With regard to the implementation of data gathering measurements, employers should comply with data protection laws and communicate thoroughly with their employees to gather data on a consensual basis.

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Greece



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## Diversity and inclusiveness initiatives

Diversity is about differences, such as nationality, language, education, gender and gender identity/expression, sexual orientation, generation, age, socioeconomic background, working and thinking styles, religious background, abilities and disabilities. Inclusiveness is leveraging these differences to create a positive environment. While there are many aspects to a sustainable working environment, Greece has mainly focused on legislation related to the support of employment of people with disabilities (as of the late 90s, Law 2643/1998 requires companies with more than 50 employees to hire to a level of 8% of employees with special needs) as well as provisions related to the equal pay principle between men and women.

Therefore, although the Greek Constitution prohibits any act of unequal treatment, there is room for active measures that directly promote inclusiveness and diversity in the workplace.

### Diversity and inclusiveness regulatory initiatives

The relatively recent Law 4706/2020 on Corporate Governance of Societe Anonymes introduced respective initiatives for societes anonymes with shares or other securities listed in a regulated market in Greece. More specifically, listed companies should have available a Fitness and Propriety Policy for board members that is unambiguous

and sufficiently detailed to respect the principles of transparency and proportionality and to be in accordance with the Operating Regulation and the Corporate Governance Code that the company follows. The Fitness and Propriety Policy should provide for diversity criteria for the election of board members, achieving a variety of opinions and experiences to reach better decisions. A significant innovation of the law is the explicit provision that the election criteria of the board members include at least the sufficient representation per gender in a percentage not lower than 25% of the total number of its members, requesting the participation of more women to the boards of listed companies.

Another initiative is included in the provisions of Law 4604/2019 (which are expected to be further reinforced through the labor law reform approved by Parliament in June 2021) in relation to the Gender Equality certification provided to champion companies. The Secretary General for Family Policy and Gender Equality and the Greek Ministry of Employment reward public and private sector companies that excel in implementing policies of equal treatment and equal opportunities for working women and men by awarding the Gender Equality certification.

The award takes into account, inter alia, equal pay for equal work, balanced participation of women and men in managerial positions or in professional and scientific teams in the company,

equality in professional development, observance of maternity protection legislation, and the implementation of equality plans or other innovative measures to promote effective gender equality. Companies that have been awarded the Gender Equality certification are required to submit an annual report on actions related to the gender equality agenda. The Secretary General monitors and evaluates whether the awarded companies continue to implement policies of equal treatment and equal opportunities for working women and men and, if not, removes the certification. The Secretary General publishes an annual list of companies that hold the certification on its website.

### Best practices

Despite the fact that a D&I legislative agenda of active measures is in an early stage of development, there are extensive examples of Greek companies that incorporate an active agenda of initiatives and internal policies that aim to establish working environments where every voice and idea count.

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## Hong Kong



**Rossana Chu**

### Hong Kong is taking active steps to improve gender diversity in listed companies

#### Boards of Hong Kong listed companies make gains in diversity

Hong Kong listed companies are slowly making improvements in promoting gender diversity. According to an MSCI report issued in November 2020, the percentage of Hong Kong listed companies' board seats held by women increased from 10.6% in 2016 to 12.7% in 2020. Such proportion is comparable with the 13% rate in mainland China but is still far behind that of its peers in other international finance centers (e.g., US (28.2%), United Kingdom (34.3%), Germany (25.2%) and France (43.3%)).

As at end of 2020, around 32.1% of Hong Kong listed companies had no female directors, while around 37.4% had only one female director. This proportion can also be seen in tech companies where boards are dominated by male directors.

We are now seeing increasing positive changes toward gender diversity in Hong Kong where global funds and institutional investors are now prioritizing board diversity in investment decisions.

#### Collection of personal data relating to diversity

Data collection is an essential first step to enhance diversity, equity and inclusion. In Hong Kong, the Personal Data (Privacy) Ordinance (PDPO) regulates the collection, use and handling of personal data, including diversity data such as gender, marital status, nationality, religion and ethnicity of a data subject.

Under the PDPO, personal data should only be collected for a lawful purpose

directly related to a function or activity of the data user. Data collected should be necessary and adequate but not excessive for such purpose.

When collecting personal data from data subjects directly, data users should inform data subjects whether it is obligatory or voluntary to supply the data, the purpose of their data and the classes of persons to whom their data may be transferred. Data users should also inform data subjects of their right and means to request access to and to correct their data.

#### Requirements on new listing applicants

The stock exchange requires applicants looking to list in Hong Kong to include in their listing documents:

- ▶ Specific environmental, social and corporate governance (ESG) disclosures, including the applicants' environmental policies and the processes to identify, evaluate and manage significant ESG risks.
- ▶ Policy on board diversity (including gender). If an applicant has a single-gender board, it should disclose:
  - ▶ How and when gender diversity of the board will be achieved after listing
  - ▶ Its measurable objectives for implementing gender diversity (e.g., specific numerical target for the proportion of the absent gender on its board by a certain year)
  - ▶ Its measures to develop a pipeline of potential successors to the board that could ensure gender diversity of the board

#### Proposed requirements on listed companies' gender diversity

Although newly listed single-gender board companies have committed to appointing at least one female director within two to three years after IPO, there was little improvement in raising the percentage of female directors on the listed companies' boards. Further, gender diversity is a key ESG consideration that is attracting the attention of regulators and investors around the world.

In April 2021, the Hong Kong Stock Exchange issued a consultation paper seeking public comments on proposed amendments to the Corporate Governance Code and Listing Rules of the Stock Exchange. The general objective is to promote good corporate governance practices among Hong Kong listed companies and IPO applicants. To promote gender diversity among listed companies, the Hong Kong Stock Exchange proposes that:

- ▶ Diversity is not considered to be achieved with a single-gender board.
- ▶ Listed issuers with single-gender boards are given a three-year transition period to appoint at least one director of the absent gender.
- ▶ IPO applicants are not expected to have single-gender boards.
- ▶ Listed issuers should set and disclose numerical targets and timelines for achieving gender diversity, both at the board level and across the workforce (including senior management).
- ▶ Listed companies should review the implementation and effectiveness of diversity policies annually.

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India



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## Diversity data in Indian workplaces

The Indian Constitution grants all citizens equality of opportunity in matters of public employment and stipulates that no citizen shall be discriminated against on the grounds of religion, race, caste, sex, descent, place of birth and residence with respect to any employment or office under the state. There are also specific legislations applicable to the private sector that prohibit discrimination at the workplace.

To manage the challenges surrounding diversity and inclusion, there has to be a clear understanding of the composition of work groups and their demographic differences. Therefore, it is vital to gather demographic data for promoting diversity within the workforce.

### Legality of data collection

The Indian personal data protection law is currently governed by the Information Technology Act, 2000 (IT Act) read with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (IT Rules).

Personal information has been defined to mean “any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.” The IT Rules delineate certain classes of personal information as sensitive personal data or information (SPDI). As per the IT Rules, information relating to sexual orientation and physical, physiological and mental health, among others, falls under the category of SPDI. However, information

relating to gender identity, religious beliefs, caste and race may qualify as personal information and not SPDI.

Data that falls into the category of personal information can be collected from employees on a voluntary basis. For collection of SPDI, the employee’s consent regarding purpose of usage must be obtained in writing through letter, fax or email.

D&I data (i.e., data collected by employers constituting either personal information or SPDI) must be collected for a lawful purpose and should be used for that purpose. Employers collecting D&I data should take reasonable steps to ensure that the employees are aware that it is being collected, the purpose of collection, its intended recipients, and the details of the agency that is collecting the information and the agency that will retain the information. Employers should publish a privacy policy and comply with reasonable security practices and procedures. Employees must be given the choice to opt out from providing D&I data. A grievance officer should be designated for redressal of any complaints with respect to D&I data processing.

The Indian Government is seeking an overhaul of the country’s data privacy framework through the Personal Data Protection Bill, 2019 (PDPB). It is presently under the consideration of a Joint Parliament Committee and is not yet in force. PDPB classifies data into personal data and sensitive personal data (SPD). Personal data relating to health, sexual orientation, transgender or intersex status, caste, tribe, and religious or political beliefs or affiliation falls in the SPD category. PDPB permits employers to process personal data (not SPD) necessary for purposes related to employment

without consent. However, an employee’s consent is required for processing SPD. PDPB also stipulates additional conditions for processing of SPD.

### Reporting requirements under gender discrimination laws

Anti-discrimination laws applicable to the private sector prohibit discrimination based on gender or disability. The Equal Remuneration Act, 1976, requires employers to pay equal remuneration to men and women workers for the same or similar work, and prohibits any discrimination against women. This act stipulates that employers maintain an up-to-date register in relation to its workers, specifying the number of male and female workers and the remuneration paid. Failure to maintain such a register is punishable with imprisonment for a term that may extend to one month or with a fine that may extend to INR10,000 (~USD136.15), or with both.

### Conclusion

There is no blanket prohibition on collection of diversity data under Indian law. However, the collection and processing of such data have to comply with the personal data protection framework, as well as the mandatory recording requirement contained in laws prohibiting discrimination.

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Italy



**Stefania Radoccia**

## Areas of intervention

During the last several years, Italy has strengthened actions to incentivize companies to achieve diversity and to reduce the gender gap.

Such actions are notably focused on increasing the presence of the less-represented gender at the management level and prompting large companies to disclose data on diversity and equal pay.

### The collection of data on DE&I matter

Generally speaking, companies are entitled to gather all data necessary for the performance of the employment and for compliance with specific legal obligations.

In this respect, privacy laws say that data related to the employment relationship – including those concerning diversity, equity and inclusion (DE&I) matter such as gender, age, disability – can only be collected within the principles of the General Data Protection Regulation (GDPR) or upon an employee's consent.

Other DE&I information (e.g., sexual orientation or religion) cannot be collected by the employer when not tied to these purposes or tied to the assessment of the employee performance.

### Mandatory reporting requirements on diversity and equal pay

Several laws require that companies report their data on DE&I and equal pay. Notably, public interest entities (such as banks or insurance companies) and large company groups should publish DE&I statistics in financial reporting.

The definition of large companies includes companies employing more than 500 employees and companies that closed their related fiscal year reaching a certain minimum overall income statement or overall net revenue. All companies of the private and public sector employing at least 100 must report on gender equality and pay gap statistics at least every two years.

Noncompliance with reporting obligations may expose the company to variable economic sanctions depending on the breach.

In addition, females are required to comprise at least 40% of the board of directors and of the statutory auditors' composition in listed companies.

The same provisions apply to non-listed publicly controlled companies.

Noncompliance with such requirements may expose the company to sanctions by the Italian exchange supervisory agency.

### Leading practices in Italy

In light of the statutory scenario and the limitation on data collection by the employer, Italian large companies have been incentivized to do more to achieve diversity and gender equality.

The economic return in terms of branding and human capital related to DE&I achievement seems to push companies to adopt measures in this respect.

More efforts are expected on this matter to promote inclusion.

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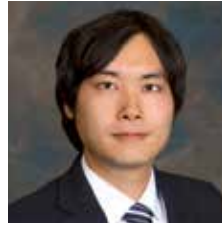
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Japan



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## Collection and disclosure of diversity data

### Categories protected against discrimination

The Labor Standards Act and other employment laws protect employees from employers' discriminatory treatment based on nationality, creed, social status, sex, disabilities, labor union membership, age and contractual status (i.e., different treatment between regular employees and fixed-term and/or part-time employees). The scope of protection varies depending on category. For example, in Japan, it is generally understood that a mandatory retirement-age system is legally valid.

### Collection of personal information

Under the Personal Information Protection Act, an employer must specify and make known to the data subject (i.e., job applicants and employees) the purpose of collecting his or her personal information. An employer cannot use collected personal information for any other purpose the data subject's consent (there are several exceptions). Further, an employer is required to obtain the data subject's consent to collect "special care-required personal information," which includes personal information about a data subject's race, creed, social status, medical history and criminal record, status as a crime victim, or other descriptions that are prescribed by the Cabinet Order. The Employment Security Act imposes special restrictions on collecting information on job applicants during recruitment to prevent discrimination.

The Employment Security Act guidelines issued by the government state that information on job applicants' race, ethnicity, social status, family origin, registered domicile, place of birth, creed and union membership can be collected only if the information is necessary for an occupational reason and the information is collected directly from the job applicants who are informed of the purpose of the collection. Further, the Industrial Safety and Health Act requires an employer to collect information on physical and mental conditions of workers only within the necessary scope to ensure the health of the workers.

### Disclosure of diversity information

The Act on Promotion of Female Participation and Career Advancement in the Workplace requires an employer with 301 (101 from April 2022) or more employees to prepare and disclose to the public an action plan concerning promotion of female participation and career advancement in the workplace. The action plan is required to have certain quantitative targets. A notification to the authority is required when an action plan is formulated. Further, an employer with 301 (101 from April 2022) or more employees is required to publicly disclose certain information on promotion of female participation and career advancement at the workplace, such as the rate of females among managerial employees. The government gives certifications to companies satisfying certain criteria regarding promotion of women's participation in the workplace.

There is no sanction for violating those requirements. The act only provides that a person who fails to submit a report (or makes a false report) ordered by the Minister of Health, Labor and Welfare will be punished by a non-criminal penalty of not more than JPY200,000.

### Leading practice

As discussed, the collection of certain diversity data (such as religion) from job applicants is restricted. Employers should communicate such information only to confirm whether there are any obstacles to the job applicants' ability to perform their duties after being hired.

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Lithuania



**Rūta Žukaitė**

## Equality and non-discrimination at work

### Groups protected against discrimination

The Lithuanian Labour Code establishes that one of the key principles of employment relations is equality of persons. Therefore, the national labor laws as well as the Law on Legal Opportunities require employers to implement the principles of gender equality and non-discrimination on other grounds. Under these principles, direct or indirect discrimination, harassment, sexual harassment or instruction to discriminate on the following grounds is prohibited: gender, race, nationality, language, origin, social status, age, sexual orientation, disability, ethnic affiliation, political affiliation, religion, faith, and convictions or views. There is an exception concerning a professed religion, faith or convictions for those working in religious communities, societies or centers, provided that the requirement for the employee is normal, lawful and justifiable. The following grounds are also included: intention to have children or circumstances unrelated to the employees' professional qualities or on other grounds established by laws. The employer must follow gender equality and non-discrimination principles in all decision-making processes that concern employees, such as setting selection criteria and conditions when hiring employees, creating working conditions and opportunities to improve

qualification, setting work evaluation criteria and criteria for dismissal from work, remuneration for the same work, etc. Moreover, an employer with 50 or more employees must adopt the measures for implementation of the principles for the supervision of the implementation and enforcement of the equal opportunities policies. Such policies must be prepared and adopted in consultation with the work council (if there are more than 20 employees). The information and statistics on equality and non-discrimination at work issues are gathered by various means, such as anonymous surveys, data of the State Social Insurance Fund Board, etc.

### Gender equality

Following the Lithuanian Labour Code, the remuneration system must be prepared in such a way to avoid gender-based or other discrimination in its application. Men and women must receive equal remuneration for the same or equal work. The principles of gender equality and non-discrimination apply not only to the base remuneration of the employee, but also to all additional earnings in cash or in kind that the employee receives either directly or indirectly from the employer for his/her work. Additionally, a new obligation of the employer to publicly disclose information on average remuneration by gender came into force. This obligation applies to employers with at least 8 employees, of whom there are more than 3 women and more than 3 men.

### Liability for the breach of principle of non-discrimination

Following the Code of Administrative Offences, an administrative fine may be imposed for the breach of the Labour Code and/or Law on Equal Opportunities. Moreover, employers may be required to pay the employee a compensation (e.g., the difference in remuneration for the same or equal work, compensation of non-pecuniary damage) for damage caused by the breach of principles of equality and non-discrimination.

Nonetheless, society is paying more attention to equality and non-discrimination issues at workplaces. Therefore, it is important for employers to follow these principles not only de jure, but also de facto. Otherwise, an imposed administrative fine may be minor compared to the damage to the company's image in the eyes of existing and potential employees and business partners.

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## Luxembourg



**Laurence Chatenier**

### Diversity, equity and inclusion

Diversity is part of the landscape in Luxembourg, with 170 different nationalities, around 200,000 daily cross-border workers and three official languages, and with females comprising 41% of workers.

The public authorities are committed to promoting diversity in the day-to-day life of citizens and workers. The Ministry for the Family and the Integration is sponsor of the Diversity Charter Lëtzebuerg, which is a national commitment, open for signature to any organization in Luxembourg wishing to promote diversity through concrete actions that go beyond legal obligations.

This Diversity Charter currently has more than 200 signatories from both public and private sectors (representing 15% of the Luxembourg workforce) and new signatories join each year.

By signing the Diversity Charter, employers commit to fighting all forms of discrimination and to setting up policies in favor of equal opportunities and diversity, focused on the acknowledgement and valuing of individual skills.

#### Gathering on diversity matters

In Luxembourg, public institutes (universities, research institutes, non-governmental organizations) run large surveys and studies on diversity and discrimination.

The Center for Equal Treatment (CET) monitors equal treatment by publishing reports, issuing opinions and recommendations, gathering complaints, and giving advice and orientation to discriminated individuals.

At the company level, each employer with more than 150 employees must provide statistics regarding equality between women and men on hiring, promotions, dismissals, remuneration and trainings.

In addition, quotas regarding employees with disabilities have been implemented and should lead to penalties in cases of non-compliance.

However, it appears that only 18% of the companies in scope meet the quota set by law and that the financial penalties are not frequently applied.

#### Discrimination categories

In Luxembourg, discrimination is ruled by both labor and penal codes.

Any direct or indirect discrimination on the grounds of religion or belief, disability, age, sex, sexual orientation, nationality, or established or supposed membership or non-membership of an ethnic group or a race is prohibited.

In 2016, the scope was extended by providing that "any discrimination based on the change of sex is considered discrimination based on sex."

Any person who considers that he or she is a victim of direct or indirect discrimination can contact CET for advice and information. The Labor Authorities can also act as a mediator before legal action before a court.

### Gender equality

Since 2006, equality between women and men has been embedded in the Luxembourg Constitution and since 2016, the Labor Code has guaranteed equal pay for women and men. If a difference in pay cannot be justified by objective reasons and is based on gender considerations, the employer can be sanctioned by a fine between ERU251 and EUR25,000 (Art. L.225-1 and following of the Luxembourg Labor Code).

According to recent data from the Statistical Office of Luxembourg, the wage gap between women and men is estimated at 5.5%; at the European level, the difference is close to 15%.

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## Netherlands



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### Diversity, equity and inclusion from a Dutch law perspective

As a main principle, discrimination is prohibited in the Netherlands, based on Article 1 of the Dutch Constitution. This is further specified in various Dutch laws. According to the civil code and the Equal Treatment Act, direct discrimination on religion, personal beliefs, political opinion, race, sex, nationality and civil status is prohibited. In addition, Dutch employment law stipulates that discrimination on age, temporary/permanent employment contracts, the amount of working hours, disability and chronic illness are also prohibited. Employers are required to observe the principles of equal treatment in the employment field.

#### Discrimination

Direct discrimination occurs when a person is treated less favorably than another person due to an underlying characteristic, such as race or gender. Indirect discrimination occurs when (within the employment context) there is a practice, policy or rule that applies to all employees in the same way but has a less favorable effect on some employees. In certain circumstances, indirect discrimination may be lawful. When, for example, an employee with a fixed-term employment agreement is

treated differently from an employee with an indefinite employment agreement, this may under circumstances be lawful when it is regarded objectively as necessary to achieve a legitimate aim and is proportionate to the aim. Discrimination may also be lawful if the law specifies exceptions. An example in Dutch employment law is termination of an employment agreement at the state pensionable age. Lastly, discrimination may (under strict circumstances) be lawful in the case of positive discrimination.

#### Enforcement

Any complaint regarding discrimination may be reported to the Netherlands Institute for Human Rights. This institute is responsible for monitoring compliance with the Equal Treatment Regulations in the Netherlands. The complainant can also request an official opinion on the complaint. The Netherlands Institute for Human Rights will assess whether the discrimination complaint is justified and make a ruling. However, these judgments are not legally binding.

#### Equal pay proposal

Despite legislation that prohibits unequal treatment between men and women, women are often still paid less than men for the same work. For this reason, a legislative proposal has been filed that is intended as an additional measure to be incorporated into the existing

Equal Treatment Act. However, it is still unclear whether the proposal will be accepted. With this proposal, unequal pay must be countered by means of several instruments, such as:

1. The burden of proof shifts to the employer to prove that equal pay is observed.
2. Certification is required for companies with more than 250 employees and there is an increased burden of proof if the company does not have such a certificate.
3. For companies with at least 50 employees, several obligations shall be applicable, such as the obligation to provide access to anonymized data on wages and the obligation to inform the works council once a year about differences in pay.
4. The employee may file a complaint toward the company in the event of unexplained differences in payment. If the employer has not dealt with the complaint within two months or has not dealt with it properly in the employee's opinion, the employee may file a complaint with the Dutch Institute for Human Rights.

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## New Zealand



**Tori Sullivan**

### Diversity data in New Zealand

Gender is regarded as the most important diversity issue for NZ employers, with well-being and bias the second and third.<sup>1</sup> Although there is a 9.3% gender pay gap,<sup>2</sup> there is no legislation that specifically regulates an organization's gender pay gap. Rather, the current diversity, equity and inclusion (DE&I) employment initiatives focus on pay equity, increased sick leave (increasing from 5 to 10 days per annum) and fair pay, complementing NZ's well-established (but largely untested) Equal Pay Act 1976, as well as NZ's existing anti-discrimination and human rights rules.

The Pay Equity Amendment Act came into force in November 2020 and seeks to address the pay equity gap where an employer predominantly employs one gender and, as a result, wages are lower (e.g., in childcare) by establishing a process to resolve pay equity claims.

Further, the Government has signaled that Fair Pay Agreements (FPAs) will be re-introduced toward the end of 2021, imposing compulsory nationwide agreements that determine the wages, terms and conditions for all workers within particular industries. The FPA-proposed changes do not just apply to a narrow range of low-paid or vulnerable workers as originally signaled. Rather, it's required that more than 1,000 workers, or 10% of the workforce, request an FPA.

### Collecting data

These new legislated DE&I initiatives will require employers of all sizes and in different parts of NZ to form a view of what employees' pay should look like. However, the collection and analysis of data will be an important part of that process, helping inform whether an organization's policies and practices are having their intended DE&I effect.

Diversity data can be gathered in NZ; however, the collection and use of personal information by public and private sector agencies must comply with the 13 Information Privacy Principles (IPP) set out in the Privacy Act 2020. Personal information is broadly defined to include any identifiable information such as details of sex, race and occupation.

Broadly, organizations can collect personal information about employees for valid work purposes only or where directed by the law but must ensure that they protect the privacy of the personal information and must not disclose or use the personal information for any other purpose. Any agents that the organization uses (including cloud storage providers) also need to take reasonable steps to avoid loss or unauthorized access, use, modification or disclosure of personal information.

The Privacy Act recognizes that personal information routinely finds its way outside of NZ. To strengthen accountability, before transferring personal information offshore, organizations may need to ensure that it is protected by comparable data protection law.

When collecting and analyzing employment DE&I data, employers should have strict policies, processes and contractual terms in place to ensure there are appropriate safeguards to reduce an inadvertent breach of the 13 IPP by adequately protecting data.

### Reporting requirements

There are no specific reporting requirements on DE&I statistics.

### Leading practices

Organizations need to consider whether and how to voluntarily communicate their DE&I statistics to employees and other stakeholders. From a transparency perspective, organizations are increasingly reporting their DE&I statistics in their annual sustainability reports.

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1. Workplace Diversity Survey 2020

2. As of 30 June 2019.





Norway



**Helga Aune**

## Employer's activity and reporting obligation

Norwegian employers are subject to the general duty to actively and consciously promote equality (equal opportunities) and prevent discrimination in all HR-areas of the organization per the Norwegian Equality and Discrimination Act. The grounds of protection against discrimination include gender, pregnancy, maternity/paternity or adoption leave, care obligations, ethnicity, religion, philosophy of life (non-religious views), disability, sexual orientation, gender identity, gender expression or any combination of these. Employers must also strive to prevent harassment, sexual harassment and gender-based violence. Age, political position and trade union affiliation are also protected against discrimination in the Working Environment Act but are not included in the employer's general duty.

The activity and reporting duty must encompass the workplace processes when recruiting, in pay and working conditions, in promotion, in development opportunities and in work and family life balance. There is a specific activity obligation for public employers, private employers with more than 50 employees, or if one of the work life parties requires it in companies with 20 -50 employees. The activity duty requires the employer to work in a four-step method, where they need to: at a minimum every second year, investigate whether there are risks of discrimination or other obstacles to equality, including a duty to map pay conditions between men and women (it is also a duty to report on the use of involuntary part-time work every other

year); analyze the causes of any risks identified; implement measures designed to combat discrimination and contribute to improved equality and diversity at the company; and assess the results of the work carried out.

### Reporting obligation

All employers are required to document that they have worked systematically in accordance with legislative requirements. Employers subject to the four-step method are also to fulfill a reporting duty. This requires the company to include a statement in the company's annual report or another public document on the said activities, where they are to work systematically. The board is responsible for securing compliance with the activity and reporting obligations. Breach of the duty to report may lead to a fine imposed by the Norwegian Anti-Discrimination Tribunal. Violation of the equal pay provision may additionally result in compensation or redress.

### Data on diversity matters

Employers are obligated to comply with the activity and reporting obligation. This involves mapping gender balance when it comes to salary, temporary employment, part-time work and parental leave. This data can and must be obtained and stored by the employer to fulfil the obligation. Other discrimination grounds, such as ethnicity, religion, philosophy, disability and form of cohabitation may not be monitored on a regular basis. An applicant's status in in these regards are, under special circumstances, nevertheless permitted if the information is of decisive importance for the performance of the work or profession.

Even though one may not count individuals based on the specific protected grounds, an employer may still count the measures instigated to secure a culture where no discrimination takes place and equal opportunities are promoted. As such, one may produce quantifiable data on the amount of D&I work carried out by an employer.

### D&I on the agenda

The board is responsible for ensuring that the obligation to actively work for equality and the obligation to account for this is fulfilled. Systematic work is required if the board is to succeed in its work. It is necessary to ensure that the company has the tools and the knowledge it needs to work with equality at a systemic level.

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Peru



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## Labor inclusion and equal pay in Peru

The labor market has always faced constant change, but the changes brought on by the COVID-19 pandemic are forcing companies and their employees to adapt to new challenges.

Together with ongoing globalization, this makes it all the more necessary to promote a policy of respect for diversity and labor inclusion in all social spheres, especially within labor relations. The promotion of fair and objective practices has a direct impact on the productivity of a company and helps foster a more competitive business environment.

### Toward inclusion

Article 2 of the Peruvian Constitution established that everyone has the right to equality before the law. No person shall be discriminated against based on origin, race, sex, language, religion, opinion, economic status or any other distinguishing feature.

Some laws have sought to promote equality and include different sectors that have long been marginalized.

One such example is Law No. 29973, General Law of the Person with Disabilities, which dates to 2012 and regulates an employment quota for private entities (not less than 3% of the payroll for companies with more than 50 workers) to reduce the historical lack of labor inclusion of people with disabilities.

Very few companies have complied with the obligation to hire a minimum percentage of people with disabilities. This is due to multiple factors, such as the lack of supervision by the inspection authority, a regulatory framework that is not adapted to the current reality and the fact that people with a disability may decline to be labeled.

Therefore, although a formal law exists that benefits this group, obstacles remain.

### True equality

Another matter recognized and regulated by Law No. 30709, The Equal Salary Law is pay equality. This law prohibits compensation discrimination between men and women.

This law creates two main obligations for the employer: to develop a remuneration policy and to develop an organization chart based on the value of the job.

Although this law was designed to equalize salary gaps between men and women, the fact that it can be applied generally to benefit all kinds of employees makes it stand out. Based on this regulation, any employee can demand compensation according to his/her merits, efforts and abilities, regardless of sex, race, age, religion or any other condition. This represents a significant advance toward a fair and truly competitive labor market.

It is important to highlight that this law

does not seek unjustified pay equity for all, but rather to objectively justify differences in remuneration that exist within companies based on adequate valuation of jobs and, consequently, the value said jobs generate for the organizations. The regulations also require employers to support promotions based on objective criteria, which not only motivates greater production by employees, but also creates a salary and promotion management system based on duly justified merit.

Failure to comply with these obligations can generate fines of up to UIT300 (US\$300,000 on average).

### Conclusion

Adopting a culture of diversity and inclusion encourages innovation, stimulating a healthier work environment and improving worker performance, thereby helping a company become a more competitive presence in the global market.

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Poland



**Zuzanna Zakrzewska**

## Diversity, equity and inclusion in Poland

### Importance of equality in workplace

More and more employers and employees recognize the importance of diversity, equality and inclusion in the workplace. Therefore, it is important to be aware of legal regulations in this regard.

### Anti-discrimination laws

The Polish Constitution plays an essential role in the legal system on gender equality in Poland. It stipulates that all men and women shall have equal rights in family, political, social and economic life, in particular regarding education, employment and promotion. It also stipulates they shall have the right to equal remuneration for work of equal value, to social security, to hold offices, and to receive public honors and decorations.

Moreover Polish Labor Code prohibits "any discrimination" in the field of employment, either direct or indirect, in particular on the grounds of sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnic origin, faith, sexual orientation, and employment for a definite or indefinite term or on a full-time or part-time basis. Polish Labor Code provides that employees should be treated equally in terms of entering into and terminating employment, terms of employment, promotion and access to training to improve professional qualifications. It guarantees equal rights due to the equal performance of the same duties and the same remuneration for the equal work or for work of equal value.

Polish law therefore provides an open catalog of grounds that may result in discrimination against employees.

### Gender pay gap

According to Eurostat, the gender pay gap in Poland, construed as the difference in the average gross hourly wage between men and women, stands at 7.2%, while the average gender pay gap in the European Union is 16.2%.

### Reporting requirements regarding diversity and equal pay

Despite the above-mentioned differences in the earnings between men and women currently, there are no reporting obligations under Polish law in relation to diversity and equal pay between men and women.

At the EU level, work is currently underway to strengthen the general principle of equal pay for men and women within the EU. According to the proposed regulations, employers with 250 or more employees will be obligated to report regularly on pay, in an appropriate and transparent manner (e.g., by including information in their management reports).

### Collection of data on diversity

Due to the fact that data on employee diversity usually constitute sensitive data, the collection thereof is restricted.

As a rule, processing of personal data revealing religious beliefs or sexual orientation of the employees is prohibited in Poland. Nonetheless, it is possible to process such personal data based on the consent of the employee, provided that the transfer of such personal data takes place at the initiative of the employee. Therefore, it is forbidden for employers to ask for such personal data.

### Penalties

The Polish Labor Code guarantees the right to compensation if an employer breaches the principle of equal treatment in employment. In such a case, the employee is entitled to compensation in an amount not lower than the minimum remuneration.

### Best practices

While social awareness of the need for a diverse working environment increases, we expect new regulations in this area. It is already a good business practice to include in the internal regulations and policies, as well as in day-to-day practice, the guarantees of diversity, inclusion and equal pay.

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Romania



Anca Atanasiu

## Diversity, equity and inclusion

Diversity, equity and inclusion are three principles that have been an ongoing topic for Romanian employment relationships during the past several years. More companies are adhering to a corporate culture where these principles are at the forefront.

Nowadays, DE&I is no longer seen as a corporate trend but as a business imperative. Having a diverse workforce is steadily recognized as essential in improving a company's performance. In general, employees and teams perform better and make better decisions when diversity, equity and inclusion are embraced by their organizational culture. This also can translate into an increase in business profits.

EY in Romania, surveys on diversity matters are usually performed voluntarily by private entities, but there are also surveys and statistics on the level of discrimination in Romania performed by the Romanian National Council for Combating Discrimination.

### Romanian business trends

Inspired by the European diversity movement, in 2018, Romania adopted its own Diversity Charter, which seeks to establish a multi-stakeholder platform that addresses problems related to diversity and inclusion. The entities signing the charter publicly commit to support and protect these principles to promote diversity, non-discrimination, inclusion and equal opportunities in the workplace. Multiple major Romanian employers have already publicly signed and adhered to the principles of this charter.

### Legal framework on DE&I

The principle of equal treatment of all employees and employers is at the heart of Romanian employment relations.

Any direct or indirect discrimination against an employee, or discrimination by association, harassment or victimization is strictly prohibited.

The protected criteria are race, citizenship, ethnicity, color, language, religion, social origin, genetic features, sex, sexual orientation, age, disability, chronic non-contagious disease, HIV infection, political choice, family situation or responsibility, membership or union activity, and membership of a disadvantaged category.

The equal work/equal pay principle is also regulated in Romania. Thus, when determining an employee's salary or elements of the remuneration, any form of discrimination based on sex, sexual orientation, genetic features, age, national membership, race, color, ethnicity, religion, political choice, social origin, disability, family situation or responsibility, and membership or trade union activity is strictly prohibited.

Failure to observe these prohibitions and discriminating in any way can result in a sanction by the labor authorities with fines between approximately EUR200 and EUR4,100.

In addition, companies with a breach of the equal work/equal pay principle may also be sanctioned by the National Council for Combating Discrimination with fines between approximately EUR200 and EUR6,100.

### Conclusion

DE&I became one of the focal points in employment matters in Romania. More employers understand the need to develop a healthy corporate culture built on these principles.

The importance of this topic is also reflected in today's workforce trends. Many employees seek inclusive cultures where they can be themselves, have flexibility and engage in purposeful work. In this regard, employees feel safer in an inclusive environment where they have equal opportunities during the entire life cycle of their employment relationship: starting with the hiring process and continuing with the way they are paid, trained, evaluated and promoted.

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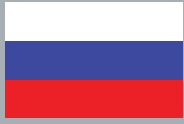
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Russia



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## Diversity, equity and inclusion

### Discrimination legislation

Russia has been a party to and has ratified most major human rights treaties prohibiting discrimination. The prohibition of discrimination is also set forth in the Russian Federation Constitution, which stipulates that all individuals should be equal before the law. The state guarantees the equality of human and civil rights and freedoms regardless of sex, race, nationality, language, origin, material and official status, place of residence, attitude to religion, convictions, membership of public associations, or of other circumstances. All forms of limitations of human rights on social, racial, national, language or religious grounds are prohibited. Men and women enjoy equal rights and freedoms and equal opportunities to exercise them. The Labor Code of the Russian Federation also contains a prohibition of discrimination in the sphere of labor to secure equal opportunities for everybody and ensure that no one suffers discrimination.

### Implementation

Although well laid out as general values, in practice the above principles are not detailed enough to address everyday cases that employees and employers are dealing with and to ensure effective protection against discrimination. For example, there is no specialized body to deal with discrimination issues. To date, it has been the exclusive prerogative of courts to deal with discrimination at work. The available discrimination complaint

mechanisms lack effectiveness. Even if the court rules in favor of the plaintiff, the plaintiff will receive nothing but compensation for moral damage, which is usually not a substantial amount. In reality, claims on equality grounds have not been common in courts. There are no official discrimination statistics.

### Data on diversity matters

Criteria covered by anti-discrimination legislation include gender, race, ethnicity, nationality, language, origin, disability, family status, age, place of residence, religion, political beliefs, or membership or non-membership of voluntary organizations.

Some of the above is mandatory data gathered by an employer at hiring and is updated during the lifetime of employment relation, namely gender, disability, family status, age, place of residence and citizenship. Disability, gender, age and number of foreign employees are criteria with compulsory reporting and communication to a public administration. These criteria are associated with special treatment and/or certain law guarantees, and, therefore, must be collected.

For example, an employer is required to grant an additional (unpaid) leave of up to 14 calendar days upon a senior employee's request. When recruiting pensioners, an employer has the right to conclude a fixed-term employment contract because of the employee's retirement age.

The general labor law principle is that processing of employees' personal data may be carried out exclusively to ensure observation of laws; to assist employees in obtaining employment, training and promotion; to ensure employees' personal

security; and to control the quantity and quality of fulfilled work and safety. Data on political, religious and other convictions, and private life is explicitly prohibited to be gathered by the Russian Labor Code. The employer is also not allowed to obtain and process employees' personal data on membership in public associations or trade union activities, except for the cases envisaged by labor legislation.

### No designated body

There is no specially designated body for the promotion of equal treatment of all individuals without discrimination. Accordingly, there are no specific reporting requirements on diversity issues in employment relations or equal pay between men and women. Human rights ombudsmen theoretically may deal with such issues and there are a few examples when regional human rights ombudsmen have launched projects to monitor discrimination in employment, but these are local initiatives rather than common practice.

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## Singapore



**Evelyn Ang**

### Collection of data for diversity, equity and inclusion programs

Singapore has often been regarded as a society where diversity is encouraged. An increasing number of companies are formulating their diversity, equity and inclusion programs to ensure that employees are accorded dignity and respect, regardless of their race, religion, gender, nationality, sexual orientation or political opinion. These companies will first need to collect data on diversity matters before improvements and best practices can be proposed.

#### Collection, use and disclosure of data on diversity matters

In Singapore, the Personal Data Protection Act 2012 (No. 26 of 2012) (PDPA) defines “personal data” as data, whether true or not, about an individual who can be identified (a) from that data, or (b) from that data and other information to which the organization has or is likely to have access.

If any data on diversity matters that is collected by an organization falls within the definition of “personal data,” the organization will have to comply with the obligations set out under the PDPA in relation to such data.

Under the PDPA, an organization may only collect, use or disclose personal data about an individual under several circumstances: where the individual gives, or is deemed to have given, his consent under the PDPA to the collection, use

or disclosure of the data; or where the collection, use or disclosure of the data without the consent of the individual is required or authorized under the PDPA or any other written law.

Organizations seeking to collect, use or disclose personal data in relation to diversity matters should ideally collect, use or disclose such data with the consent of the employees to whom such data relates. Before obtaining such consent, the employees should be notified of the purposes for which their personal data is collected, used or disclosed. Such purposes should be what a reasonable person would consider appropriate in the circumstances.

Alternatively, organizations may collect, use or disclose personal data in relation to diversity matters without employees’ consent insofar as such collection, use or disclosure is reasonable for the purpose of or in relation to the organization entering into an employment relationship with the individual or appointing the individual to any office, or managing or terminating the employment relationship with or appointment of the individual. However, the organizations must inform employees of the purpose for which the employees’ data is collected, used or disclosed; and upon request by an employee, the business contact information of a person who is able to answer the employee’s questions about such collection, use or disclosure on behalf of the organization.

Additionally, organizations should note that the Tripartite Guidelines on Fair Employment Practices issued by the Tripartite Alliance for Fair & Progressive Employment Practices, state that only questions relevant to assessing an applicant’s suitability for a job should be asked in job application forms and at job interviews. Questions relating to age, race, religion, gender, marital status and family responsibilities, or disability that are irrelevant to suitability should not be included. Employers should conduct fair recruitment and selection based on merit regardless of the above factors to avoid giving rise to misunderstanding and the perception of discrimination.

#### Specific reporting requirements

The Code of Corporate Governance, which applies to all listed companies in Singapore, requires every listed company to have a board diversity policy, including qualitative and measurable quantitative objectives (where appropriate). The board should comprise directors who as a group provide the appropriate balance and mix of skills, knowledge, experience, and other aspects of diversity such as gender and age. The board diversity policy is to be disclosed in the company’s annual report, which may be found on the company’s official website and/or on the Singapore Exchange’s website.

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## South Africa



**Claire Hock**

### Employment equity and affirmative action

The Bill of Rights in the South African constitution recognizes that affirmative action measures can be designed to promote the achievement of equality among persons or categories of persons previously disadvantaged by unfair discrimination.

The Employment Equity Act 55 of 1998 was enacted to give effect to this right. This statute places general and specific obligations on employers. All employers must eliminate unfair discrimination in any employment policy or practice. Larger employers (50 employees or more) are required to implement affirmative action for employees who are members of designated groups.

#### Affirmative action beneficiaries

Designated groups (i.e., the beneficiaries of affirmative action) are defined as black people, women and people with disabilities who are South African citizens by birth or descent or who became South African citizens by naturalization prior to the advent of democracy. Black people are defined as Africans, Coloureds<sup>1</sup> and Indians. People with disabilities are defined as people with a “long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in employment.”

Affirmative action is aimed at ensuring that these beneficiaries are equally represented in the workplace as they are in the economically active population.<sup>2</sup>

### Gathering data on affirmative action beneficiaries

Designated employers are required to develop an employment equity plan to address barriers to the employment and advancement of designated groups; report annually to the Department of Employment and Labour on progress against this plan, using a prescribed template; and report on income differentials between the different designated groups, using a prescribed template signed by the Chief Executive Officer. This template requires reporting of total fixed and variable remuneration per occupational level (there are six occupational levels defined from “unskilled” to “top management”) and number of employees according to race, gender and foreign nationals.

#### Penalties for non-compliance

Enforcement of affirmative action is via the Department of Employment and Labour. An inspector will either secure a written undertaking from the employer to comply or issue a compliance order in the first instance. If compliance does not ensue, a penalty may be ordered by the Labour Court. Maximum penalties for non-compliance without prior contraventions range from ZAR1.5million to 2% of the employer’s turnover, whichever is greater.

Individual cases of alleged unfair discrimination are initially channeled through the Commission for Conciliation, Mediation and Arbitration and then on to the Labour Court.

### Slow progress

Ineffectual enforcement by the Department has resulted in relatively slow affirmative action progress although recent amendments to the Income Differential Statement will allow for improved analysis.

1. In South Africa, this term historically denoted people of mixed race.

2. Defined as those between 15 and 64 who are either employed or actively seeking employment.

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Spain



**Raul Luis Garcia Gonzalez**

## Diversity, equity and inclusion

### Personal data treatment

In Spain, according to the Organic Law on the Protection of Personal Data, any information related to an identified or identifiable natural person (e.g., birth, marriage or religious convictions) may be considered sensitive personal data.

Personal data that includes information regarding racial origin, health, sexual orientation, religion and beliefs may only be collected and processed when a law requires it, based on public interest grounds or with the specific consent of the data subject.

This requirement also applies in the context of employment and must be respected by companies when considering potential candidates in recruitment processes unless this information is relevant to the performance of the position and not indiscriminate information.

### New challenges: diversity and inclusion policies

In this era in which diversity is of vital importance, employers' awareness of gender equality, diversity and inclusion, among others, is becoming more highly valued.

In general terms, diversity must be approached from different standpoints to advance public awareness. Therefore, this requires a change not only in companies, but also in society.

A further step was taken with the publication of two complementary royal decrees:

- ▶ Royal Decree 901/2020, of October 13, 2020, on equality plans, requires companies with 100 or more employees to negotiate an equality plan by March 7, 2021. Companies with 50 or more employees must negotiate an equality plan by March 7, 2022, and companies that already have an equality plan must ensure compliance with the Royal Decree by January 14, 2022.
- ▶ Royal Decree 902/2020, of October 13, 2020, on equal payment for women and men, has led to major changes in the area of equality by requiring companies to keep a remuneration register covering all employees, including executives and senior managers. An explanation must be included for any gender pay gap that is 25% or above.

In addition, the obligation to comply with the principle of equal pay for men and women has been reinforced in recent years, in particular through the following instruments:

- ▶ Remuneration register
- ▶ Workers' right to information and access to their company's pay register
- ▶ Remuneration audit

Failure to comply with this rule, besides possibly having a penalty imposed by the labor inspectors, may be classified as: (i) serious with a fine from EUR626 to EUR6,250; or (ii) very serious with a

fine from EUR6,251 to EUR187,515. In addition, companies could be excluded from public tenders by being legally barred from entering into contracts with the public sector.

All of this is reflected in the obligations regarding non-financial information, which was reinforced in 2018, with the publication of Law 11/2018, which increased the number of companies that are required to present the statement of non-financial information. It has introduced a new significant change regarding the selection of directors in listed companies and the importance of respecting the principle of diversity and promoting the election of female directors in a number that allows for a balance between men and women on the board of directors.

Spain is one of the countries with the most advanced legislation in terms of diversity and equality.

It is expected that in the near future, companies can continue to incorporate different measures that help to ensure the protection of all employees in the workplace so that equal treatment between men women in the workplace becomes a reality.

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Sweden



**Paula Hogéus**

## Diversity, equity and inclusion

In recent years, diversity, equity and inclusion have been a growing focus for many businesses, not only in Sweden but globally. There has been a clear push to prioritize diversity in the workplace, with businesses recognizing the many benefits of a diverse workforce.

At the end of 2020, the Swedish government presented an inquiry on how the enforcement of current discrimination legislation can be more effective. Since the inquiry may result in stricter sanctions for non-compliance, employers will need to be aware of Swedish anti-discrimination regulations.

### The Discrimination Act

The responsibilities of employers in regard to equal treatment in the workplace are governed by the Discrimination Act (2008:567). There are seven grounds of discrimination covered by the Discrimination Act: sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation and age.

The rules prohibit both direct and indirect discrimination at the workplace and apply to all aspects of the business. Further, employers have a responsibility to take “active measures.”

This requires employers to carry out continuous work in four stages: investigating, analyzing, taking measures, and monitoring and evaluating. The work shall be carried out in cooperation with employees and cover the following areas: working conditions, provisions and practices regarding salaries and other terms of employment, recruitment and

promotion, education and professional development, and opportunities for combining work and parenthood.

Employers must also develop, follow up and evaluate guidelines and routines for preventing harassment, sexual harassment and reprisals, and carry out an annual salary survey to identify any gender pay gaps.

### Reporting obligations

The Discrimination Act does not impose any general reporting obligations for employers. However, employers with more than 25 employees are required to document their work with active measures in writing. Employers with fewer than 25 but more than 10 employees are only required to document the salary surveys in writing.

The Equality Ombudsman supervises compliance with the Discrimination Act and may bring a court action on behalf of an individual who consents. If an employer does not fulfill its obligations with regard to active measures, it may be ordered to do so subject to a financial penalty.

### Gathering data and measuring diversity

In their efforts to achieve more diversity in the workforce, many employers are wondering what kind of data they can gather as part of their diversity work.

Legal regulations on the processing of personal data (e.g., the General Data Protection Regulation) prohibit the processing of sensitive personal data unless there is an applicable exception. Further, asking employees for personal details may be seen as inappropriate. Thus, when measuring diversity, it is best practice to focus on general conditions at

the workplace and measures taken by the employer rather than collecting data on employees. No mapping should be done at the individual level, and any investigation must be conducted in such a manner that any sensitive personal data cannot be linked to an individual employee.

In light of the above, employers should consider introducing clear policies and guidelines regarding their DE&I work. Additionally, these policies and guidelines should include information on the processing of personal data to minimize the risks of non-compliance with data protection regulations.

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## Switzerland



**Marc Philipp Gugger**

### Diversity, equity and inclusion

The topic of diversity, equity and inclusion has gained enormous importance, particularly in recent years. Organizations and consulting firms are dedicated to supporting employers to take responsibility in this regard.

#### Equal pay analysis

Equal pay for men and women is a constitutionally protected fundamental right, even if its implementation is not equally strict in every industry and company. In addition, the Federal Gender Equality Act protects against unequal treatment for men and women.

To better enforce equal pay for men and women on the highest political level, an amendment to this act and its associated ordinance came into force on July 2020 for an initial limited period of 12 years.

To achieve the set goal, employers with more than 100 employees are required to carry out an internal anonymized equal pay analysis every four years, to have this audited by an independent external body, and to communicate the results to employees and – if the companies are listed on the stock exchange – to shareholders.

The act does not provide for direct sanctions if an equal pay analysis is not carried out or if the results show gender-specific salary differences. However, besides possible reputation damage to the company, such results may lead to an increase in employee claims since they have a direct information right, including the right to ask detailed questions.

#### Diversity data

Data on gender must be collected to comply with this legal obligation. Gender, civil status and whether an employee has children is already part of an employee's personnel file, as this data is decisive regarding maternity/paternity leave, family allowances, etc. A physical impairment of an employee is often also known (to a limited extent), as employees tend to turn to their employer if their impairment makes adjustments to the workplace or work materials necessary.

Other categories of data that are protected against discrimination (e.g., origin, religion, political interests, sexual preferences, and physical or mental impairments) are usually not gathered, since a specific legal basis to gather such data does not exist.

#### Data gathering

Data gathering and processing without a legal basis and purpose require compliance with further data protection principles such as proportionality and necessity; this does apply to data requiring special protection, which in principle includes data on diversity matters.

Even though a general legal basis for data gathering on diversity matters does not seem to exist on the required level, data protection principles are adhered to in case a respective justification may be found. The general right and obligation of the employer to create and process personality profiles as part of an employee's personnel file may not be seen as such a justification since diversity matters are not required for this purpose.

For this reason, even the explicit consent of the employee would in general not be sufficient to justify the breach of general data protection principles even if certain narrow exceptions may exist. To adhere to these principles and in particular to the principle of proportionality, both the gathering as well as processing of the relevant data on diversity, equity and inclusion must occur anonymously. Only the use of anonymized data exclusively for statistical purposes can be considered a legal justification in this sense.

#### Conclusion

Even though anonymous gathering and processing of diversity data can be challenging, it is best practice for an employer to attach great importance to diversity, equity and inclusion. This is necessary not only to comply with equal pay rules but also because business performance can be improved by developing employees with diverse talents and backgrounds. This topic is often part of a company's social responsibility strategy to remain competitive and attractive as an employer.

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## United Kingdom



**Rob Riley**

### Diversity, equity and inclusion

Recent research found that almost half of the UK's workforce thinks that diversity and inclusion should be more of a priority in the workplace. Promoting and supporting diversity in the workplace is an important aspect of good people management. Section 4 of the Equality Act 2010 covering the nine protected characteristics (e.g., disability, race, religion or gender) sets minimum standards by preventing an employer from discriminating against an employee on account of any of the protected characteristics. However, employers are increasingly recognizing the benefits of having a diverse and inclusive culture that goes way beyond the need to ensure compliance with legal obligations.

#### Gathering diversity data

To promote and support diversity and inclusion in the workplace, employers often carry out diversity monitoring, and there are some specific circumstances in which employers are required to carry out diversity monitoring (such as gender pay gap reporting).

When carrying out diversity monitoring, employers are bound by the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. Under this legislation, employers must process their employees' data in a fair and transparent way and only collect personal data for specific purposes. When gathering data on diversity, this may involve employers processing "special category" data.

Special categories of personal data are those revealing, for example, racial or ethnic origin, religious beliefs or sexual orientation. Under the data protection law in the UK, processing personal data that falls within special categories is prohibited unless the employer can show that it has a lawful basis for collecting and processing the data and that it has fulfilled one of the conditions provided under the data protection law (such as the employee providing the employer with explicit consent to process the data). An employee privacy notice will be required to comply with an employer's transparency obligations under the GDPR, in addition to a data protection impact assessment being carried out before undertaking diversity monitoring. Breaches of an employer's requirements under the data protection law may result in enforcement actions by the UK's Information Commissioner's Office such as enforcement notices, monetary fines or legal prosecution. Breaches of data protection obligations may result in reputational damage and employment law claims.

#### Gender pay gap reporting

Under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (GPG Regulations), some employers have an obligation to publish an annual report containing data on their gender pay gap to show whether there are pay differences between male and female employees. There are growing calls in the UK for the requirement to also extend to ethnicity pay gap reporting.

Gender pay gap reporting applies to employers who have at least 250 employees as of 5 April each year. Public authorities and government departments must also comply with separate (but largely similar) obligations. Gender pay gap reporting does not involve the processing of special category data, but salary information is nevertheless sensitive data.

Failure to publish a gender pay gap report if required may result in the UK's Equality and Human Rights Commission taking enforcement action against employers. There are also reputational risks if an employer is non-compliant.

#### Leading practice

Diversity and inclusion monitoring helps better equip employers to identify issues with various equality obligations and the wider need to ensure a diverse and inclusive culture and workforce. Monitoring helps employers shape better and more effective policies around recruitment, reward and promotions, and helps make the workplace a better and more attractive place for talent.

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