GLOBAL DEVELOPMENTS IMPACTING WORKPLACE DIVERSITY AND INCLUSION

Managing the Global Workforce Webinar Series

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Introduction

• Geographic Scope
  – United States
  – Europe
  – Latin America

• Overview
  – What is diversity?
  – Reasons for diversity and inclusion

• Recent Issues Overview
  – Hot Topics
OVERVIEW
Overview

- Defining Diversity
- Reasons to Adopt Diversity and Inclusion Initiatives
What Is Diversity Today?

- Sexual orientation
- Age
- Race
- Socioeconomic status
- Gender
- Hobbies
- Values
- Birth order
- Work experience
- Physical abilities/qualities
- Own/Rent
- Ethnicity
- Accent
- Working style
- Work experience
- Birth order
- Values
- Ethnicity
- Accent
- Working style
Benefits of Diversity and Inclusion

• Improves a company’s bottom line
• Creates a better work environment
• A business and moral imperative
• Critical factor in the recruitment and retention of a talented workforce
• May aid in compliance with legal requirements
United States

- Government Scrutiny
  - EEOC Focus on Systemic Litigation Initiative
  - OFCCP’s Pursuit of Compensation Claims
  - Dodd-Frank Wall Street Reform and Consumer Protection Act

- Judicial Review
  - US Supreme Court
EEOC

- EEOC
  - Essence of Strategic Plan
  - Follow the Budget
  - Systemic Litigation
OFCCP

- Traditional Focus
- Recent Actions
- Apparent Course
Dodd-Frank Wall Street Reform and Consumer Protection Act

- Government agencies and financial industry
- Scope
- Impact
The Court

- US Supreme Court
  - *Fisher v. University of Texas* (the candidate pool)
UNITED KINGDOM
UK Overview

- Equal Opportunities Monitoring
- Positive Action
- Gender Diversity on Boards
- Equal Pay
- Gender Pay Gap Reporting
Equal Opportunities Monitoring

• Employers are entitled to monitor the composition of their staff and also candidates

• Equal opportunities monitoring forms should be anonymous and separated from application forms prior to the selection process, so that the information provided by candidates is de-identified and has no bearing on the selection process

• Other practices that are becoming more common include no longer requesting photographs of candidates and also “name blind” application forms for graduate recruitment
Positive Action

• The Equality Act contains controversial provisions concerning lawful positive action

• Designed to apply where persons who share a protected characteristic suffer a disadvantage connected to the characteristic, have particular needs, or are disproportionately under-represented

• Employers can take certain actions to address these problems without opening themselves up to discrimination claims brought by people without the relevant protected characteristic

• Employers are not obliged to take positive action
Gender Diversity on Boards

- Trend going in right direction – women held 26% of board positions in FTSE100 companies in 2015 compared to 12% in 2011.
- Davies Reports – developed a business strategy aimed at increasing representation.
- UK Corporate Governance Code.
- Reporting on gender equality issues.
- Executive Search Firms voluntary code.
- Guidance from EHRC and ICGN.
- 30% club.
- EU initiatives.
- Other countries have taken different approaches.
UK Equal Pay Legislation

- According to recent ONS statistics, on average, a woman earns 80p for every £1 earned by a man
- Doctrine of equal pay: men and women should receive equal pay for equal work
- Equal pay law operates by way of “equality clauses,” which are incorporated into every contract of employment. This gives the woman the benefit of more favorable terms enjoyed by a man in the same employment doing equal work unless the difference is due to a nondiscriminatory “material factor”
- Pay and benefits – look at each pay and benefit term individually when assessing less favorable treatment
- Comparator must be of opposite gender to the claimant, must work in the same employment, and must be an actual rather than a hypothetical comparator
UK Gender Pay Gap Reporting Regulations

Background

• In 2011, voluntary gender pay gap reporting was introduced
• In 2015, the government launched a consultation on proposals for mandatory gender pay gap reporting for all large businesses (250 or more employees)
• Draft Equality Act 2010 (Gender Pay Gap Information) Regulations published on February 12, 2016
• Still awaiting final version of Regulations
• Expected to be in force by April 2017
UK Gender Pay Gap Reporting Regulations
Proposals

• All employers with at least 250 employees must collect and publish information about their gender pay gaps

• Employers must report
  – Mean (average figure) and median (middle figure) pay gaps between men and women
  – Number of men and women in four salary quartiles
  – Mean bonus (e.g., commission, cash value of shares, LTIP) pay gap between men and women
  – The proportion of male and female employees who have received bonuses

• “Pay”:
  – Includes basic pay; paid leave; maternity, parental, and sick pay; area allowances; bonus pay; and other pay such as car allowances
  – Excludes overtime pay, expenses, benefits in kind, redundancy pay, and salary sacrifice values
UK Gender Pay Gap Reporting Regulations
Proposals

• For mean and median pay gaps and salary quartiles, the figures should show a “snapshot” on April 30 each year (starting April 30, 2017)

• For bonus pay, the figures should show bonuses paid over a 12-month period

• Employers must publish the gender pay gap figures on their websites and leave the information online for at least three years. Employers may produce voluntary narratives to explain the context and what steps are being taken to address any pay inequality
UK Gender Pay Gap Reporting Regulations
Proposals

- Employers must upload the figures to a government website that will publish examples of “good practice” and list noncompliant companies.

- A senior employee (such as a director) must provide a statement that the information is accurate.

- Timetable?
  - By April 2017: gender pay gap regulations in force
  - April 30, 2017: employers take their first “snapshots”
  - April 30, 2018: employers must report the gender pay gap figures

- No civil or criminal penalties proposed at this stage.

Morgan Lewis
UK Gender Pay Gap Reporting Regulations
Potential Problems

• It is likely that employers will need to gather more information than is required by the regulations because:
  – It is not clear whether pay should be based on contractual hours or actual hours worked
  – There is no requirement to publish separate gender pay figures for full-time compared to part-time employees
  – There is no requirement to break down figures by age, which is significant given the wider gap that exists from age 40
  – The inclusion of maternity pay means there will be a higher differential during a period of maternity leave

• It is likely that employers will need to provide significant qualitative information with the equal pay reporting

• Risk of discrimination or equal pay claims based on reports
UK Gender Pay Gap Reporting Regulations
Practical Steps

• Before the reporting requirement takes effect, employers should consider conducting an internal review:
  – Decide who will be responsible for verifying the accuracy of the gender pay reporting
  – Consider what changes are required to IT systems and administrative processes to gather information
  – Gather information on current pay practices and rates
  – Consider gender pay gaps that exist on a departmental, geographical, or functional level, and compare these with workforce composition
  – Identify and report on the reasons for such gender pay gaps

• To reduce the risk of the review being discoverable, employers should engage legal counsel and structure the review as being for legal advice so it is privileged
FRANCE
The Principle of Nondiscrimination

- Article L. 1132-1 of the French Labor Code forbids the employer to base his professional decisions on any nonobjective criteria that is not work related.

- No employee or person applying to any position can be discriminated against “due to his origin, sex, customs, sexual identity and orientation, age, familial status or pregnancy, genetic characteristics, specific vulnerability resulting from his economic situation apparent or known from the author, belonging or non-belonging, real or alleged, to an ethnicity, a nation or race, political opinions, unions or mutualist engagements, religious convictions, physical appearance, family name, place of residence or due to his state of health or handicap.”
• Other grounds for discrimination can be raised such as
  – Discrimination relating to sexual harassment
  – Discrimination based on belonging to labor unions
  – Discrimination relating to the right to strike
  – Discrimination in remuneration based on gender

• This list is not exhaustive. The judge rules, on a case-by-case basis, whether a decision taken by an employer was based on a discriminatory criteria
The Principle of Nondiscrimination

• As a consequence, all employees must be treated equally in the workplace.

• Any act taken by the employer infringing this principle will be considered as null and void.

• Discrimination is a sustainable legal basis for a claim of an employee before a Labor Court.

• Since October 2016, discriminations are also a matter on which class action claims can be brought.
How to Implement It: Mandatory Negotiations

- Actions against discriminations must be discussed during the annual mandatory negotiations with the trade-unions representatives.
- The aim of the negotiations is to reach an agreement between the employer and the trade-unions representatives on the measures that could be taken to prevent discriminations. For example, the employer can:
  - Commit, when recruiting, to consider equally the candidacies of men and women.
  - Encourage diversity inside teams.
  - Implement training actions.
How to Implement It: Mandatory Negotiations

• Once agreed upon, those measures are binding on the employer
• Employers and companies must take this obligation extremely seriously given the severe consequences a breach can have
Focus: Religion in the Workplace

- The question of religious signs in the workplace is very sensitive in France.
- The question was first brought before the French Supreme Court in 2013.
- The Supreme Court ruled that private sector companies’ employees could show signs of their faith at work, unless the ban:
  - Could be justified by the nature of the tasks to be performed;
  - Responds to a determining and essential professional requirement; and
  - Is proportionate to the result searched.
The French Supreme Court was presented again in 2015 with a similar issue, and decided to take its position to the ECJ.

The ECJ is expected to rule in the coming months on the issues of whether:
- An employer in the private sector can prevent employees from showing signs of their faith at work, and
- Internal regulation can prohibit employees from showing signs of their faith at work

Until then, those questions remain unsettled.

Employers should be extremely careful when negotiating and implementing measures relating to religious signs in France.

The French administration will soon provide guidance in this matter.
LATIN AMERICA
Latin America Overview

- Discrimination
  - Constitutional rights against discrimination
- Race
- Gender
- Disability
- LGBT
Brazilian Law

- Brazilian Constitution
  - All individuals have equal rights under the law, regardless of gender, age, marital status, sexual orientation, religious beliefs, nationality, or skin color

- Affirmative Action
  - Only lawful if expressly provided by law
  - Need to adapt global policies to Brazilian laws, especially with respect to diversity policies

- Women
  - Protection of pregnant employees
  - 15-minute break before overtime
  - Legal quota on public company boards and public-private companies
  - Potential additional rights under applicable CBAs

- LGBT
  - Resolution of the Brazilian National Council of Justice in force on May 16, 2013 determined that civil notaries could not refuse to register the marriage of same-sex couples
Brazilian Law

• Minors
  – Minor age: 16 years old
  – Minimum age to enter the job market: 14 years old
  – Apprentices (aged from 14 to 24 years old) must make up between 5% and 15% of a company’s workforce

• The Elderly
  – Individuals over 60 years old
  – Individuals over 50 years old cannot roll over holiday entitlement to following year
  – Job security under certain CBAs
  – Bill for quotas of elderly employees in companies and public service
Brazilian Law

• Disabled Employees
  – Progressive Quotas:
    – 100 to 200 employees: 2%
    – 201 to 500 employees: 3%
    – 501 to 1,000 employees: 4%
    – More than 1,000 employees: 5%

• Serious Illnesses
  – Brazilian Labor Supreme Court issued ruling protecting employees with serious illnesses (e.g., cancer and AIDS) from discrimination. Dismissal of such employees may be deemed discriminatory and the employer has the burden to prove that the dismissal was not discriminatory
Mexican Law

- **Mexican Constitution**
  - Every form of discrimination motivated by ethnic or national origin, gender, age, disability, sexual preference, status and any other attempt on human dignity or acts seeking to annul or diminish the rights and liberties of the people are prohibited

- **Mexican Anti-Discrimination Law**
  - Created the National Council to Prevent Discrimination, whose mission is to create and promote public policies for equal opportunity and treatment and to coordinate all actions aimed at preventing and eliminating discrimination
  - Defines discrimination as “every distinction, exclusion or restriction based on ethnic or national origin, sex, age, disability, social or economic status, health, pregnancy, language, religion, opinion, sexual preference, civil status, among others, that hinders recognition or enjoyment of rights and real equality in terms of opportunities for the people”

- **Federal Labor Code**
  - Also provides for the protection of human dignity of the worker by prohibiting discrimination as defined in the Mexican Anti-Discrimination Law
Mexican Law

• Women
  – Right to same treatment as men under Mexican law (e.g., equal salary and benefits)
  – Right to special protections at work during pregnancy (e.g. not to perform activities that require considerable physical force and may endanger the mother’s health, a 6-week rest period before and after giving birth)

• LGBT
  – In June 2015, Mexico’s Supreme Court removed restrictions on same-sex marriage nationwide by declaring that the state laws that defined marriage as only “between a man and a woman” were unconstitutional
Mexican Law

- **Minors**
  - Minor age: under 18 years old
  - Minimum age to enter the job market: 15 years old
  - Minors under 16 years old must obtain authorization from their parents or legal guardian prior to entering the job market
  - Work shift: 6 hours daily divided in periods of 3 hours maximum
  - No overtime or work on Sundays or official holidays is allowed

- **The Elderly**
  - Individuals over 60 years old are eligible for retirement
• Disabilities and Illnesses
  – Temporary disabilities: employees are entitled to a maximum of 52 weeks of leave, which can be extended for another 52 weeks
  – Permanent disabilities: employees are entitled to permanent leave fully paid by the Social Security Institute (IMSS)
  – First 3 days of sick leave certified by the IMSS are paid in full by the employer
  – From the 4th day onward, the IMSS pays either (i) 60% of employee’s salary if leave is due to non-work-related illness, or (ii) 100% of the employee’s salary if leave is due to a work-related illness

• Minorities
  – No quotas for hiring minorities under Mexican law
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THANK YOU