

Client Alert

Global Human Capital and Compliance

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The Future of DEI – the International Perspective

THE BACKLASH AGAINST DEI – WILL THE REST OF THE WORLD FOLLOW THE TRUMP ADMINISTRATION'S LEAD?

In recent alerts, we have outlined the DEI agenda of the second Trump Administration. Though this agenda leaves “DEI” largely undefined, it includes orders eliminating race and gender affirmative action plan obligations for federal contractors, requiring certification from federal contractors that they do not operate programs promoting “illegal discrimination, including DEI”, and directives to federal agencies and departments to investigate “illegal DEI and DEIA preferences, mandates, policies, programs, and activities” in the private sector. A number of household name companies have announced reviews or changes to their DEI policies. While these orders and directives were recently paused by a US court, uncertainty regarding the legal status of DEI programs in the US remains.

But to what extent will US employers look to their operations overseas? And what is the current legal status of DEI in other key locations outside of the US?

NO LEGAL EFFECT OUTSIDE THE US

The starting point is that the US’s recent Executive Orders and Federal and State DEI investigations do not have extra territorial effect. This means that they do not extend to affiliates of US companies outside the US. And although some countries such as France and Germany are also seeing public commentary on DEI overreach, it is generally the case that these countries have not seen swings against affirmative action or DEI efforts near the extent or degree of those in the US.

SPOTLIGHT ON EUROPE UK

In the UK, lawful positive action is limited to promoting opportunity for demonstrably underrepresented groups – for example by encouraging applications and providing targeted training – and only where that action

is justified as being 'proportionate' to the lack of representation. The law has never permitted the setting of quotas or requiring that interview panels include members of certain groups. Additionally, preferring a candidate from an under-represented group is only permitted where the employer can show those candidates are equally qualified (known as the 'tie breaker rule') – which is subjective and involves risk for employers. Well prior to the DEI backlash in the US, employers in the UK were exercising caution. There have been highly publicized cases – largely in the public sector – warning employers of the risks. Police authorities have been found to have discriminated by wrongly setting a 'bar' above which it treated all candidates as equally qualified (which breached the 'tie breaker rule') and by promoting a minority officer without a competitive process. In the private sector, an advertising agency lost a claim by two middle aged male managers terminated in a reduction in force following statements by the agency that it wanted to shed its reputation for "white, British, privileged, straight men".

Although DEI is typically applied cautiously in the UK, and with a focus on remedying socio-economic advantage more than focusing on specific under-represented groups, the government is moving forward with plans for new disclosure requirements based on race and disability pay gap reporting. There is also increasing support for menopause-positive initiatives. Public (and consumer) opinion appears to generally remain in favour of these limited legal initiatives. As such, although some companies with federal contracts in the US or a US HQ may be considering extending DEI changes to the UK, we do not expect major shifts away from the DEI in the UK.

FRANCE/ GERMANY

In France, as in much of Europe, DEI efforts are limited by privacy rules – the processing of data relating to personal characteristics (such as race or sexual orientation) is in most cases not allowed. As a consequence, the use of positive action in favor of certain groups is only permissible when that action is mandated by law. In France and Germany, this includes gender pay transparency and mandatory quotas to employ disabled workers. Larger companies also have an obligation to ensure minimum gender mix at leadership levels beginning in March 2026. Aside from these exceptions, lawful positive action would allow for a requirement that the company consider a diverse slate of candidates but would not allow for hiring quotas. As in the UK, we see more focus on targeted policies (such as adhering to the "L'Autre Cercle" LGBT+ chart) or benefits such as menstrual leave than potentially risky policies promoting or hiring specific groups.

SPOTLIGHT ON AUSTRALIA/ APAC

Across APAC, DEI efforts vary depending on business, value, and cultural norms, with different countries focusing on different measures and areas of interest. At this stage, we expect that DEI efforts and initiatives will continue rather than be dialed back.

In Australia, employers are required by law to positively eliminate discrimination on the basis of sex at work. Larger employers are required to report to a government agency on gender equality indicators within the workforce, and safety laws require employers to examine the diversity and gender balance of the workforce to assist with identifying and eliminating gender-based harassment and similar hazards. The Australian Government is seeking to introduce first-of-its-kind legislation that will require large employers to set gender equality targets, and to show progress against those targets, which may result in non-compliant employers being barred from government procurement. Australian employers are therefore highly likely to continue to introduce policies and strategies that target gender equity in workforce composition, including hiring quotas (subject to state and territory law).

Other countries within APAC are also introducing or improving DEI efforts. For example, Hong Kong's Stock Exchange requires listed companies to have appointed at least one female director to the board of directors by the end of 2024. In Japan, legislation has been recently introduced that will require employers to offer working parents

and caretakers of elderly parents flexible working arrangements, and for eligible employers to publicly report on staff use of parental leave.

EXPECT DEI TO CONTINUE IN EUROPE AND APAC

DEI looks different in Europe and APAC to the US – but our expectation is that for most companies it will continue to be market practice. And provided employers are aware of the legal limits, our view remains that DEI still generally puts employers in a position of strength rather than weakness when facing discrimination claims.

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