

The Ethical Workplace & the Law in Practice

Key Takeaways from our Diversity Monitoring session – delivering an effective equality, diversity and inclusivity strategy (1 December 2020)

Policy: What is HR data and why is it relevant to forming an organisation's equality, diversity and inclusivity agenda and policy?

- When we talk about HR data in the context of diversity, we are referring to data about the race and ethnicity, disability, sexual orientation and age of staff.
- This kind of data is crucial to the development of an effective strategy that drives sustainable change to equality, diversity and inclusion in the workplace – if you don't know where there is under-representation, inequality or other challenges, you won't know where action needs to be targeted.
- Beyond the obvious value to individuals affected by diversity challenges, collecting and analysing diversity data creates real long-term value for businesses. Companies who appear progressive and open regarding diversity, who acknowledge challenges and talk about what they are doing, generate greater trust from employees, investors and the general public – so the benefits are clear.

Law: How can employers collect and use data, taking into account legal obligations that differ greatly across the globe?

- When getting started, the key is to “plan, plan, plan” your diversity data collection strategy.
 1. Determine your underlying aims: what you are trying to achieve? For multi-national employers, make sure you consider this on a country-by-country basis, as well as at a global level.
 2. Understand what data you are (i) required and (ii) permitted to request and/or collect, and the risks associated with doing so
 3. Identify what data you already have, where it's stored and whether you can legally use it for the purpose of developing your diversity & inclusion programme
 4. From here, work out what additional data you need in order to achieve your aims. You should aim to collect as much as you need (with your aims in mind), within the scope permitted by employment and data protection law. For further guidance on this, see our Global Guide to Equality, Diversity & Inclusivity [here](#).

- **Tools:** Data and technology can assist with both collecting and analysing this data in an efficient and cost-effective manner. Proper analysis will help you to develop your diversity and inclusion strategies and target resources effectively.
- **Business needs:** Think about the wider needs of your business. If you have already identified particular concerns or have been alerted to complaints about specific areas (whether from staff or the general public) this is likely to affect your priorities, your approach and the resources you may have available for this process.
- **No one-size-fits-all:** Law, culture and experience with regard to (i) diversity and discrimination, and (ii) the use and protection of data varies hugely by country, internal region and in some cases cities.
 - In China, there are 56 recognised ethnic groups – all of whom would be categorised as in the single race group of 'Asian' in the USA
 - The Australian government doesn't collect data on race – the national census focuses on ancestry instead
 - In Denmark, employers are prohibited from requesting, obtaining, receiving or making use of information about key protected characteristics in connection with or during their employment, in contrast, whereas employers in the UK and Belgium are required to collect gender pay information.

Employers should consider these variations to further identify priorities and potential risks – avoid creating additional areas of risk, particularly for countries with robust data protection legislation.

- **Overstepping the mark – countries with robust data protection regimes:** You will need to carefully consider and execute your data collection and analysis to minimise risk - if you get this wrong, the exposure can be great no matter how admirable your aims
 - *Excessive data:* Without proper planning you risk collecting excessive data, which can be a particular risk in Europe and other jurisdictions with robust data protection legislation.
 - *Less intrusive objective:* In those countries, if there is a less intrusive way to achieve your objective, the courts and national regulators are likely to expect the employer to take it and doing so should lower the risk to the business.
 - *Sensitivity:* The collection and processing of diversity information is strictly regulated under data protection law. Staff diversity data is likely to be sensitive and may be subject to additional risks or requirements in such countries.
- **Employment risks of improper data use:**
 - From an employment perspective, failure to process data correctly may undermine or render unfair any employment process reliant on or involving the data in question (and this could be the basis of a protected disclosure for whistleblowing purposes, an unfair dismissal or other related claim).
 - More generally, misuse of such data could be deemed a breach of the underlying duty of mutual trust and confidence – leaving the employer at risk of a constructive dismissal claim (a particular concern in relation to post-termination restrictions).

Implementation: How do employers lawfully collect data, and how do you go about successfully implementing a diversity programme?

- **As far as possible, collect and use anonymised data.** Under most regimes, including the EU's GDPR, Singapore and so on, the risks are much greater where individuals can be identified for the data in question, so think of ways in which you can collect the data without identifying staff where possible.
- **Implement clear policies and processes, bring these to the attention of staff and implement regular training** – this will help both with managing compliance risks (particularly under the GDPR,

which requires employers to evidence their compliance) and reduce the practical risk of breaches occurring.

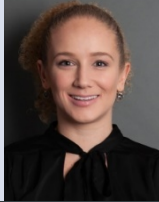
- **Transparency is key** – engage with staff and explain what you are doing and why. The more that you can bring staff with you, the more accurate the data is likely to be and the lower the risk of adverse employee reactions. We can talk about the legal risks but in practice, employee resistance and a breakdown in trust can be the biggest blocker.
- **Only collect the data you need and only use the data for the purpose you originally collect it for, and when you have finished with it, securely delete / destroy it** – the less data you hold, and the more you can directly connect the purpose with the data collected, the lower the risk to your business.
- **Plan, plan, plan.** Allocate resources and time appropriately, be very clear on your aims, limits and responsibilities, and be realistic. Rome wasn't built in a day, and sometimes small adjustments can have a bigger impact.

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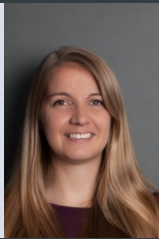
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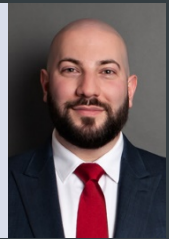
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